

14 May 2014



The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Level 4, 345 King William Street
Adelaide, South Australia 5000
Telephone 08 8110 2800
Telephone Freecall 1800 010 360
Facsimile 08 8110 2811
Facsimile Freecall 1800 010 370
Website www.nativetitlesa.org

By email: nativetitle@alrc.gov.au

Dear Sir/Madam

***SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION CONCERNING
ISSUES PAPER
REVIEW OF NATIVE TITLE ACT 1993***

South Australian Native Title Services Ltd (SANTS) is the recognised native title service provider for South Australia pursuant to the Native Title Act 1993 (NTA). We have been performing this role since July 2008 and prior to that date these functions were performed by our transitional predecessor the Aboriginal Legal Rights Movement.

SANTS in the course of providing statutory native title services to the Aboriginal community of South Australia represents a large number of native title claimants and native title holders including their prescribed body corporates.

We welcomed the opportunity to provide our comments to your review team on the 29th of April 2014. Whilst we do not wish to provide a further written submission we do note and support the submission of the National Native Title Council and also attach for its relevance our submission on the Deloitte Access Economics Review of the Roles and Functions of Native Title Organisations.

Please do not hesitate to contact us should you require clarification or further information in relation to this submission.

Yours sincerely

Keith Thomas
Chief Executive Officer
South Australian Native Title Services Ltd

11th October 2013



Mr Ric Simes
Attention: Native Title Review Team
Deloitte Access Economics
Grosvenor Place
225 George Street
Sydney NSW 2000

Via Email: native.title@deloitte.com.au

Dear Mr Simes

Review of the Roles and Functions of Native Title Organisations

This submission is made in relation to the *Review of the Roles and Functions of Native Title Organisations* initiated by the Australian Government and undertaken by Deloitte Access Economics (hereafter, the Review).

South Australian Native Title Services (SANTS) is the Native Title Services Provider (NTSP) for South Australia performing all of the functions of a Representative Body pursuant to Section 203FE of the Native Title Act 1993 (Cth) (the NTA).

SANTS commenced operation as the NTSP for South Australia in July 2009. Prior to that, these functions were performed by our predecessor the Native Title Unit of the Aboriginal Legal Rights Movement (ALRM). Given that the Native Title Unit transitioned into SANTS we have provided native title services across South Australia for nearly 20 years.

We welcome the opportunity to make comment on the Review, which we see as an opportunity to improve and strengthen the native system including the role of NTSPs and Native Title Representative Bodies (NTRBs).

By way of general comment, we believe that the native title system provides a positive framework for the recognition and resolution of native title. In South Australia, we have established positive relationships with successive State Governments and other respondent parties to resolve native title through negotiation and consent. With the support of the Federal Court, this has resulted in 16 consent determinations, including 9 in the last 3 years. As is reflected in the *Discussion Paper*, what this has meant, however, is that we have needed to respond to increasing and broadening service delivery demands. While we continue to prepare, lodge and prosecute native title and compensation claims, we are also increasingly involved in delivering post-determination native title services.

We believe we are well placed to provide these services given our existing relationships with native title groups and the expertise of our staff. However, a critical issue for us is that the level of funding we currently receive is insufficient to enable us to meet the service delivery needs of our clients, both in the pre and post determination environment. We believe that a more flexible and better resourced native title system is important in progressing native title resolution in a more efficient manner, and better assisting native title corporations to hold and manage native title and deliver sustainable outcomes for their members.

Please find attached our submission, which is structured around the points outlined in the Review's *Discussion Paper*. We also would like to acknowledge our support for the submission of the National Native Title Council (NNTC).

Thank you for the opportunity to contribute to this Review. Please feel free to contact me should you wish to discuss anything further.

Yours sincerely,

A handwritten signature in black ink that reads "Keith Thomas". The signature is written in a cursive style with a large, prominent initial 'K'.

Keith Thomas
Chief Executive Officer
Phone: 8110 2800
Email: keitht@nativetitlesa.org



Submission

Review of the Roles and Functions of Native Title Organisations

Introduction

This submission of the South Australian Native Title Services (SANTS) is made in relation to the *Review of the Roles and Functions of Native Title Organisations* (hereafter, Review) initiated by the Australian Government and undertaken by Deloitte Access Economics.

We support the previous Government's initiative in commissioning the Review, which we see as an opportunity to improve and strengthen the native system including the role of Native Title Service Providers (NTSPs) and Native Title Representative Bodies (NTRBs). In particular, we support the emphasis on addressing the current shortcomings of the post-determination environment.

The submission and comments made below, are structured around the discussion points outlined in the Review's Discussion Paper.

Discussion Points

1: Roles and functions of native title representative bodies/native title service providers

Discussion Points 1

- **What current activities of each NTRBs/NTSPs respond to statutory obligations under the Act or regulations and what non-statutory work is undertaken?**

SANTS is a company limited by guarantee, established under s203FE(1) of the Native Title Act 1993 (Cth) to carry out all of the functions of a representative body as set out in s203B of the Native Title Act.

Facilitation and Assistance

This is the core function of SANTS which provides funding and legal and administrative assistance to matters including but not limited to; prosecuting applications for native title and compensation,

negotiate ILUAs and other agreements, to negotiate future acts, to research native title claims, to obtain advice, to fund external solicitors, and for litigation.

We also provide a range of services to both native title claimants and holders associated with exercising and protecting native title rights and interests. These include facilitating land management and cultural heritage projects with groups to access and look after sites, record and share knowledge, and build relationships with other land users. These are directly linked to native title rights and interests, such as the right to access, to hunt and gather, to engage in cultural activities, to teach and share knowledge, and to visit and look after areas of significance.

SANTS also provides corporate governance and compliance and community planning and development services, particularly to PBCs but also other Aboriginal Corporations that have been established with respect to a native title claim or ILUAs. These services are also provided under our Facilitation and Assistance functions, in particular S.203BB (1)(b)(v).

Certification

SANTS utilises this function for the certification of native title claims and ILUAs as necessary.

Dispute resolution

This function is utilised to resolve disputes in regard to overlapping claims, intra group disputes, and disputes between groups over shared country and shared rights and interests. This function has been widely used by SANTS and continues to be utilised as necessary.

Notification

SANTS receives future act notices from developers, miners, government etc which are acted upon as necessary. SANTS role is to ensure claimants are fully informed about notices.

Agreement Making

SANTS uses this function as necessary. SANTS has negotiated many exploration and mining agreements pursuant to our alternative right to negotiate legislation and at the time of writing has been involved in most of the 88 registered ILUAs in SA.

Internal Review

From time to time SANTS receives requests for internal review of its decisions. All internal review requests to date have been a result of decisions not to fund a matter. No decisions have been overturned by review. The exercise of review can become quite resource intensive especially where an independent reviewer is sought

Other Functions

SANTS utilises other functions from time to time predominantly in identifying people to country and also in building client and public awareness of native title through media communications.

Besides the statutory obligations set out above SANTS also has a contractual arrangement through its Program Funding Agreement (PFA) with FaHCSIA to provide services to those PBCs attracting

funding through the PBC support program. The PFA also provides the opportunity to gain approval for the allocation of further funding support to PBCs from within the existing funding allocation.

As stated above, SANTS also performs what may be considered non-statutory work for PBCs and claim groups by assisting them to apply for other funding that that helps in the management of their native title rights and interests. SANTS also manages the project activities in partnership with the groups which include planning, allocation of resources, financial management, logistical support, equipment support, and report writing. Programs to date have included a ranger program, management plans for a number of Parks, site protection, and rock-hole projects.

- **What factors impact on the focus of NTRB/NTSP activity? (e.g. state and Commonwealth Government policies and native title holder needs).**

There are several factors that impact on the focus of SANTS' activity and each of them can be significant in their own way; usually resulting in new or extended activity that was not planned for thus reducing SANTS' capacity to support the planned priority activities. For SANTS this can have a huge impact on the services we are able to provide in any given year as SANTS does not have the flexibility within its budget to deal with the impact of influences outside of its control.

Federal Court

The Federal Court has a significant impact on SANTS' activity. It is the Court that manages the native title applications and accordingly sets priorities for the resolution of these applications. The Court works closely with SANTS and the State Government in determining those priorities. Generally this process works well and enables priorities to be set according to resource constraints.

However, from time to time various interlocutory applications or as has happened this financial year a native title trial will be heard which diverts significant resources from agreed priority matters.

State Government

SANTS has a close working relationship with our State Government and in the main have been able to agree with the State on priority activities and successfully negotiate most native title claims to resolution.

However whilst in general our relationship is a good one, in recent times there have been a number of matters which give SANTS and our clients cause for concern about the direction our current Government is taking in relation to Aboriginal Affairs. Recent examples include the passage of retrospective legislation without consultation and the continued submissions of the State in the matter of *Karpany v Dietman* (heard this week in the High Court) in an attempt to extinguish the native title right to fish in South Australia.

Given the broad reach and complexities of native title and links more broadly to Aboriginal Affairs, we also often need to respond to changes in State legislation and policy directions. Over the last 3-5 years, this has included, for example, attending to reviews and amendments to the *Aboriginal Lands Trust Act 1966*, *Aboriginal Heritage Act 1988*, *Petroleum and Geothermal Act 2000*, and *National Parks and Wildlife Act 1972* along with contributing to policy directions on State Strategic Plan,

establishment of Regional Authorities, Natural Resource Management and a myriad of other initiatives.

Commonwealth Government

The Commonwealth Government as a respondent has had little involvement in most SA claims but from time to time has engaged in relation to technical issues that have required SANTS to resolve such matters before the Court. This again causes resources to be re-directed away from other matters.

As with the State Government, SANTS has also contributed to changes in Commonwealth legislative and policy directions. Key examples in recent years include with respect to the Native Title Act, the taxation treatment of native title benefits, carbon farming and caring for our country initiatives, and native title settlement and benefits management. With respect to these initiatives, the National Native Title Council (NNTC) has provided valuable support and leadership in engaging with the Commonwealth on behalf of its members.

Native Title Claimant needs

The needs of native title claimants are far in excess of what SANTS can assist with which of course is why priority activities are identified each year within the SANTS operational plan. Claimants have had to be very patient if their claim is not in the operational plan as it has taken in most cases many years for claims to be resolved

The needs of native title claimants are also diverse, and not just limited to the preparation and prosecution of native title and compensation applications. For example, claimant groups that have negotiated ILUAs and other native title related agreements typically establish and operate corporations to hold and manage the benefits. This comes with corporate responsibilities with regard to governance, compliance and reporting. In many cases, SANTS provides services to these organisations given the overlap with native title rights and interests.

Native Title Holder needs

As outlined in the *Discussion Paper*, the increase in the number and frequency of native title determinations and the negotiation of ILUAs has brought new challenges for NTRBs and NTSPs. For SANTS, meeting the needs of native title holders is a growing concern. The majority of the PBCs in South Australia do not have the capacity to manage their own affairs and require continued assistance from SANTS. SANTS currently obtains PBC funding support for 6 PBCs. This support is essentially just sufficient to keep them compliant with legislative, native title and rulebook obligations. PBCs also have their own aspirations but will need ongoing assistance to develop a working model to manage their own affairs, to access expertise, and to build their own capacity.

While our objective is for PBCs to be independent and meet their aspirations on their terms, we believe that this will take time. It is not an easy transition from struggling to have native title determined to managing native title and maximising outcomes. For SANTS, we see a necessary role in assisting PBCs to build their individual and institutional capacity and put in place the administrative and business systems required to operate effectively and sustainably. Thus, SANTS does allocate resources to working with PBCs through a community development approach.

SANTS Activity – Budget Constraints

As above SANTS operates on a very tight budget and any unplanned activity takes resources away from priority matters. SANTS' funding is at the lower level for NTRBs/NTSPs, so naturally there are greater budget pressures when external factors impact on the activities being undertaken. SANTS does however receive additional funding from the State Government to assist with ILUA negotiations and claim settlement.

Future Acts

Generally most future acts are actioned with agreement by all parties. From time to time there will be disagreement and where this cannot be satisfactorily resolved matters have been resolved in the Courts. SANTS have a successful track record in prosecuting future act matters thus far. Significant resources are usually required to attend to these matters. FaHCSIA may provide some litigation funding assistance if funds are available; otherwise funds must come from the normal allocation depriving priority matters of resources.

Disputes

Disputes between claim groups and internal disputes between claimants are a significant factor in resources being reallocated away from priority activities. Generally matters are now referred to mediation with the Federal Court and if that fails matters are referred to hearing. Mediation can be quite resource intensive bringing negotiators together for multiple meetings and then depending on what is agreed may require a community meeting to authorise/accept any changes

- **What is the relative importance of these activities, and the relative scale of the resources deployed to undertake these activities?**

Statutory Activities

The statutory activities are our 'bread and butter' activities; they are critical to the resolution of native title claims. The resolution of native title claims is SANTS' major activity utilising around 90% of operational resources to implement the operational plan to provide professional services to claimants to assist in achieving the best possible outcomes.

However, included in the statutory activities are a growing number of litigation matters within the Environment, Resources and Development (ERD), Supreme, Federal and High Courts. This is a significant resource drain on SANTS.

Other Activities

The remaining 10% of operational resources is used to support PBCs and to assist native title holders and claimants gain access to other funding sources to assist those groups in the management of their native title rights and interests.

As above SANTS currently receives PBC funding support for six of the PBCs in South Australia which involves quite intense work in managing their Director's meetings and general meetings, general compliance matters and providing support to develop policies and processes for Governance, Financial Management, Planning, and other activities as they arise. These PBCs do not yet have the

capacity at the present time to run their own administration so they rely on SANTS to assist in all facets of their operation.

- **Have these activities been subject to any trends or recent changes?**

As stated above, PBCs are identifying a growing need for services, including in the areas of corporate governance, administration and compliance, corporate policy, community and business planning, economic development, agreement implementation and land and cultural heritage management. These are services which clearly the NTRBs/NTSPs are best placed to deliver, but unfortunately the services are not able to be delivered to the extent required due to already significant budget pressures in assisting claimants to have their native title rights and interests recognised.

- **What are the main areas where the NTRBs/NTSPs are unable to meet current demands for their services? Why?**

Statutory Activities

SANTS is often in a position of not being able to meet the demand for our services. The first stage of this is when the operational plan is prepared and priorities are determined. Unfortunately not all claims or potential claims can be prosecuted as SANTS strives to work within its budgetary limits. The second stage occurs during the implementation of priority activities when unforeseen costs might be incurred such as expenditure higher than estimated for a matter, external factors influencing additional expenditure such as litigation, or Court directions.

PBC Support

SANTS currently receives PBC funding support for 6 PBCs which in the main allows those PBCs to fulfil legislative obligations in terms of being able to hold Directors meetings and hold an AGM. PBCs are keen to do much more but a lack of resources is currently holding them back. Capacity development is urgently needed in various areas such as governance, administration, planning, policy development, financial management, and project management.

Unfortunately we are aware that there is only a very limited funding source for PBC support and these funds have been set aside from the national native title allocation. SANTS believes it to be critical that the Commonwealth Government allocate additional program funding to support PBCs. It is critical that this occur as the growing number of PBCs certainly indicates an increasing capacity problem.

Both State and Commonwealth governments have invested much in the resolution of native title. The recognition of native title also offers the opportunity for significant social, cultural, political and economic change. However, under investment in native title corporations in the post-determination environment will see these opportunities lost. A long term, bi-partisan, inter-government approach needs to be developed to secure the sustainability of PBCs and realise the opportunities created through the recognition of native title. Such an approach should also consider investments made by statutory bodies such as Indigenous Business Australia (IBA) and Indigenous Land Corporation (ILC) along with government programs such as 'Caring for our Country' and 'Jobs Services Australia'.

Other Activities

From time to time PBCs and native title claimants seek assistance from SANTS to write funding applications and for SANTS to be the host organisation in respect of those applications. Once again the demand for these services exceeds the ability of SANTS' to first complete funding submissions in a timely manner, and second where applications are successful to have the capacity to manage projects.

- **What is the potential growth/decline in demand for services in the short to medium term?**

In the short to medium term SANTS does not believe there will be a decline in demand for services. There are currently 22 native title claims on foot in South Australia which based on recent trends may take 7-10 years to process. SANTS estimates another 4-5 new claims may be lodged which will further extend that period. The reality for SANTS is that it simply does not have the capacity to progress claims any quicker.

There is also certainly potential growth in the service needs of PBCs in South Australia. There are currently 11 PBCs with the majority of those not having resources to manage their own affairs. As already mentioned in this submission, the PBCs are new bodies keen to take up their responsibilities yet are restricted and frustrated by the lack of resources to operate without the support of SANTS.

- **How much of NTRB/NTSP resources are taken up by their claims activities versus post-determination activities?**

Claims activity takes up about 90% of SANTS resources with 10% of resources directed toward post-determination activities. SANTS' main focus is assisting claims to determination and as mentioned above is likely to continue for more than the next 10 years. Another reality is that resources are only directed toward post-determination activities where separate funding to do that has been obtained such as the PBC support program funding. SANTS reiterates the need for new funding to assist post-determination activities. To not do so threatens the investment made in gaining the right for PBCs to manage their native title rights and interests.

2: Agreement making

Discussion Points 2

- **What are the current challenges to supporting native title holders in relation to agreements post-determination?**

Currently PBCs are responsible for agreements post-determination. Where requested SANTS has provided assistance to negotiate agreements. Most of the PBCs in South Australia do not have the expertise on the Boards to negotiate agreements and nor do they have the capacity to pay for expert advice in regard to negotiating agreements.

A major concern is the capacity of the PBCs to operate as most of them do not have the ability to engage staff and do not have office facilities from which to operate. SANTS provides administrative support, legal advice, and other services as necessary to assist the PBC to remain compliant, to plan

its future directions, limited capacity development, and to try and access other sources of funding assistance. SANTS thus provides important (though limited) services to PBCs in monitoring and implementing agreements.

- **What are the practical differences between certified and non-certified ILUAs and what are the implications of these differences?**

An ILUA certified by SANTS certifies that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified, and all persons so identified have authorised the making of the agreement. The certification must also include a statement to the effect that SANTS is of the opinion the requirements of the Act have been met and briefly set out the reasons for being of that opinion.

The main practical difference where an application has not been certified is that there is no opportunity to make a formal objection to a ILUAs registration whereas this can be done where SANTS certifies and ILUA.

The obvious implication of this is that it may be preferable depending on the circumstances to not exercise our certification function as it may take significantly longer to have an agreement registered if there are objections. A practical example of this being an issue is where a Government has as a condition precedent of a determination that a settlement ILUA is registered. Potentially objections might flow from community members opposed to an agreement that will slow down and potentially stop a determination from occurring.

- **Should NTRBs/NTSPs have a stronger or broader role in agreement making post-determination?**

In SANTS' experience it is inevitable that the NTRB/NTSP play a role in agreement making post determination particularly for those PBCs that have neither the resources nor capacity to undertake such activities. SANTS is of the view that NTRBs/NTSPs should have a role in agreement making post-determination as they have the requisite expertise and existing relationships with native title holders in many cases. Ideally this position could be strengthened by additional funding to deliver capacity development services to PBCs and meet essential operational costs.

- **Should NTRBs/NTSPs have a stronger or broader role facilitating, or assisting in managing, sustainable use of benefits flowing from agreements and settlement of claims?**

SANTS is of the view that NTRBs/NTSPs have a responsibility to advise native title holders in regard to the management of their native title rights and interests which includes establishing processes for the financial management of their benefits flowing from agreements and the settlement of their claim. It is vitally important that PBCs are assisted by NTRBs/NTSPs to develop sound financial practices and to ensure professional financial advice is provided so as to make best use of their benefits to enable a sustainable future.

- **If so, how could this stronger or broader role be achieved? Should it be subject to any limitations?**

SANTS strongly supports the provision of professional advice that enables the PBCs to make informed decisions about the way their benefits are managed, about their financial management structure, about risk management, and about process. It is vitally important that dialogue occurs between the NTRB/NTSP and the PBC to identify the aspirations of the native title holders so as to be able to provide timely and professional advice to meet their particular needs in building a better and sustainable future.

SANTS is also of the view that native title is not necessarily going to be the means for producing a better and sustainable future for all PBCs. If a PBC is fortunate (or unfortunate) to have mining in its area then it is more likely to have an income stream that greatly assists a PBC to improving their social, economic and cultural circumstances. However there are PBCs with no likelihood of ever having an income stream and have limited benefits from settlement arrangements. What becomes of these PBCs, if there is no wealth sharing system in place and there is no funding program in place?

In terms of strengthening the role of NTRBs/NTSPs in assisting with benefit management, the main issue comes back to resources. The deficiency in resources means that we are not always able to spend sufficient time with clients or spend long enough in working through these important matters. In addition, it also means that we are not always able to employ or engage the specialists required. Thus, further resources or improved access to expertise across the NTRB/NTSP system would assist in strengthening our role in this area.

3: Recognition of NTRBs

Discussion Points 3

- What are the current implications, both positive and negative, of having to seek recognition and being covered by the recognition provisions?

SANTS is a NTSP and as such is not covered by the recognition provisions however from a SANTS perspective the move from an organisation covered by the recognition provisions as we were with ALRM to a NTSP as SANTS has been positive and has not affected the way we do business.

- **Are governance and funding arrangements affected by the recognition provisions?**

In SANTS' experience the move to a Company limited by guarantee has seen no change in funding arrangements but there has been significant change in terms of governance. SANTS was previously an autonomous unit of the Aboriginal Legal Rights Movement. The Board of ALRM consisted of Aboriginal persons who qualified by the region they lived in and may not have had the necessary skills required to be on the Board. SANTS now has a Board specifically dealing with native title and with skill sets identified for members to be selected onto the Board. For example, there must be a Board member qualified as a lawyer and one qualified accountant.

- **What impact does the possibility of de-recognition have on the operation of NTRBs?**

It is the view of SANTS that the possibility of de-recognition has little impact on the operations of NTRBs/NTSPs. The NTRBs/NTSPs are professional service providers and are focussed on servicing

the needs of our clients. SANTS would expect if a de-recognition was to take place that appropriate notice would be given so as to ensure a smooth as possible transition to take place so as to cause the least disadvantage to clients. SANTS reiterates that the current NTRB/NTSP structure is well established, has developed vast knowledge and experience within the native title system, and offers Government certainty in the provision of professional native title services across the country.

4: Rationalisation of NTRBs/NTSPs

Discussion Points 4

- **What anticipated financial and non-financial costs and benefits would be associated with rationalisation?**

The current native title system is well established with NTRBs/NTSPs gaining many years of experience, knowledge, relationship building and general business acumen in their regions. Accordingly, non-financial costs will be significant as you lose the experience and corporate knowledge that comes with long term operations, relationships with clients and other native title stakeholders are broken, and the trust that has been established is no longer there. There is also increased risk for clients in terms of the break-down of compliance with legislation and contracts with third parties.

The financial costs are likely to be significant in any rationalisation. If a NTRB/NTSP is to be shut down then if timed right the costs with that closure can largely be offset from within the funding allocation for that NTRB/NTSP. However significant cost is then incurred in picking up the service delivery in that region particularly if new relationships need to be built within the region native title landscape and to ensure professional services are maintained to clients so as to ensure continuity with the least disruption.

- **Could an NTRB/NTSP operate effectively in more than one state or territory?**

An NTRB/NTSP could operate effectively in more than one State or Territory. However, SANTS suggests it would still require separate offices in each State or Territory to deal with the particular intricacies of each State or Territory and to maintain the benefits of established relationships with all native title stakeholders in that State or Territory.

- **How would barriers associated with political, historical, operational, cultural and institutional factors be overcome to achieve any rationalisation?**

SANTS is of the view that if there is to be rationalisation then this should be made clear where this is to occur. There will always be barriers to rationalisation but it is clearly more difficult to discuss these barriers without a specific action in mind. As stated earlier in this paper the current native title system is now well established and broadly speaking seems to be working well achieving significant outcomes throughout Australia. SANTS supports the current native title structure of NTRBs/NTSPs.

- **In what circumstances is a rationalisation of NTRBs/NTSPs likely to enhance the effectiveness and efficiency of service delivery to native title holders and claimants?**

From a SANTS point of view the only circumstance where rationalisation of NTRBs/NTSPs is likely to enhance the effectiveness and efficiency of service delivery to native title holders and claimants is where a NTRB/NTSP is clearly not performing to agreed standards.

- **What measures might enhance the ability of NTRBs/NTSPs to collaborate on facilitation and assistance for traditional owner groups, for example, across jurisdictions?**

The current system works reasonably well with an MOU negotiated and agreed between NTRBs/NTSPs operating across jurisdictions. SANTS considers that communication between the NTRB/NTSP should be ongoing so each party is fully aware of events taking place especially if there may be budget implications for each party. Over time it is also useful to revisit the MOU as often there are changes of officers within NTRBs/NTSPs and knowledge of the working agreement may be lost.

5: Prescribed bodies corporate and registered native title bodies corporate

- **In what areas do PBCs/RNTBCs need the most support?**

For most of the PBCs in South Australia, the focus is on simply keeping a PBC operational and fulfilling compliance and other legislative obligations. This is not a reflection of the knowledge and skills of Directors and members of PBCs, but a lack of resources and focus on building the institutional and administrative capacity of their corporations. Accordingly most support is required around administration, governance, capacity development, financial management, legal advice and planning. This may sound simple but providing this level of assistance to a growing number of PBCs can be complex, intense and at times frustrating. It is also difficult to manage this level of activity within the PBC support funding allocation.

Unfortunately, a focus on these compliance activities also does not allow much time, if any, to seek out the broader aspirations of the native title holders and in any event there certainly is insufficient funding support to finance such activities. This is particularly frustrating for Directors and members of PBCs as they see few outcomes and progress from native title, and the time and effort that they often volunteer. Thus it is important to not only provide services around administration, governance and compliance, but also on community planning, partnerships, economic development, and land and cultural heritage management.

- **What legislative and administrative changes, if any, might improve the capacity of PBCs/RNTBCs to fulfil their functions and responsibilities?**

SANTS does not necessarily think that any legislative or administration change will improve the capacity of PBCs to fulfil their functions and responsibilities. SANTS believes capacity development of PBCs is a long term process. PBC capacity can be enhanced by, for example, PBCs appointing independent experts or advisors to their Boards and undertaking additional training. However, if the administrative and institutional capacity issues are not addressed, then PBCs will always struggle to get traction and make progress. For example, PBCs desperately need the ability to acquire office space and employ staff. While some native title claimant groups and PBCs have been able to self-fund such initiatives and have reaped the rewards, many groups will remain dependent on external funding, and primarily will look to governments. Thus, building PBC capacity in these important areas (and others) will only be achieved adequately by seeking new program funding for such services and activities. A broadening of ILCs land acquisition program to include purchasing administrative centres may provide such an opportunity. Funding assistance from such programs could also be income tested so as to benefit those PBCs most in need of support.

- **Should incorporation (i.e. creation of an RNTBC) be required for all native title holders?**

SANTS would be prepared to look at other models but currently supports the incorporation process. Incorporation provides a framework for governance and accountability which should not be underestimated. Some of the compliance requirements may seem onerous but it does help in the native title context to keep records of your members, to have rules about who can be members, to have rules about governance, and to have rules about how you operate, and to be open, transparent and accountable. Without this type of framework there is an increased risk of mismanagement and an increased risk of more dominant family groups shanghaiing the operations of the PBC.

6: NTRB/NTSP support for PBCs/RNTBC

- **How do NTRBs/NTSPs currently support pre-determination activities by PBCs in areas such as agreement making and capacity development? Does this support lead to capacity building post-determinations?**

SANTS notes that there are no PBCs pre-determination. However assistance is provided to native title claim groups pre-determination in making agreements and all other activities leading to a determination. In South Australia, many of the claimant groups have established native title management committees or corporations, which the claim groups authorise to manage their native title process. SANTS provides native title services to the claimant groups and their respective management committees, including in the area of agreement making. These negotiation services encompass future acts, sector based ILUAs, settlement agreements, and consent determination.

Following a determination of native title, these management committees generally transition into a PBC. Although claimants gain governance experience during the pre-determination phase, the transition to a PBC is still significant as the organisation's role often completely changes and the same level of support by SANTS pre-determination is not present. At present, SANTS only provides capacity building post-determination for those PBCs approved for funding from the PBC support program.

- **To what extent do NTRBs/NTSPs currently support RNTBCs post-determination and what models does this support follow?**

The support that SANTS provides is fairly basic in terms of providing the administration, legal advice, and capacity development to meet its compliance and other legislative obligations. In addition, land and cultural heritage management projects with PBCs have been facilitated on a more opportunistic basis. As mentioned above this support is currently provided where additional funding through the PBC support program is obtained. SANTS does not have the financial or human resource to provide additional services to other PBCs, though there is significant demand and need for further support.

In terms of models, our approach to the provision of PBC services is through a community development approach. While we are in the process of developing this area of service delivery, it centres on identifying the needs and aspirations of the client group, establishing community plans and strategies, and working alongside the group to build their skills and their level of engagement in bringing about change and delivering positive outcomes.

- **Why do NTRBs/NTSPs provide post-determination support even after an RNTBC exists and has assumed representative responsibilities for native title holders? Is this support sufficient?**

NTRBs/NTSPs provide post-determination support as a RNTBC does not magically acquire the necessary resources and skills to manage their native title rights and interests. Most RNTBCs do not have the capacity to administer their business and establish and run their own office, let alone acquire expert advice and facilitate decision making processes. There has been a significant

investment in assisting claim groups pre-determination to gain recognition of their native title rights and interests. It is in no-one's interest to see these groups 'fall-down' post determination. As stated elsewhere, addressing the service needs of PBCs is a critical area needing immediate attention and investment to ensure sustainable outcomes are realised.

- **Are there non-financial constraints to the support that NTRBs/NTSPs can give to RNTBCs post-determination?**

SANTS is not aware of any non-financial constraints to the support that NTRBs/NTSPs can give PBCs post-determination other than that of seeking approval from FaHCSIA if an NTRB/NTSP wishes to allocate funds from its native title program funding allocation. However, the expertise available within NTRBs/NTSPs is obviously limited by our financial position and priority activities, which thus limits what we may be able to offer by way of in-kind support and assistance to PBCs.

- **What costs would be imposed on NTRBs/NTSPs as a result of increased support for RNTBCs?**

SANTS could not increase support for PBCs without new or increased funding being made available to do this. Within current budget allocations increasing PBC support would significantly slow down the resolution of native title applications and most probably attract the ire of the Court and other native title stakeholders.

- **What other support and relationships do PBCs/RNTBCs draw on and do these represent a viable substitute to NTRBs/NTSPs for some of the services PBCs/RNTBCs may need?**

The PBCs that SANTS does not currently provide support generally have their own funding to engage legal representation and presumably other services as necessary. This occurs where SANTS engaged an external solicitor for a claim and this relationship has continued post-determination. Most PBCs in South Australia are not financially self-sufficient and do not have the capacity to manage their native title rights and interests without assistance from SANTS. Even where a PBC has an income stream and engages external advisors, we would question the sustainability of some of these arrangements. As stated above, building the institutional capacity of PBCs will be critical to their sustainability in ensuring that they have a presence in the region, have a community identify, have an administrative base, and have the capacity to employ staff.

- **Where do bodies established as part of an alternative settlement, or to facilitate the business of a claim group pre-determination, fit in the picture in terms of support?**

As mentioned above in South Australia, SANTS has encouraged the formation of native title management committees to manage the native title process pre-determination. These committees have then transitioned into the PBC. There are no other bodies established that require support.

- **What are the advantages and disadvantages associated with cost recovery by NTRBs/NTSPs?**

SANTS strongly believes that cost recovery can be effective where the PBC has the financial ability to pay for services provided. This process would advantage those PBCs without financial capacity as funds received through fee for service activities can be utilised to provide them with support services.

7: Private agents

Discussion Points 7

- **Are there significant differences in the types of native title services provided by private agents compared to NTRBs/NTSPs?**

Generally speaking in South Australia, the firms that provide services to native title claimants and holders is satisfactory. It must be noted as in many other States that there are some private agents operating that we would not consider of satisfactory services to their clients. In some case it may be that minimal services are provided whereby SANTS are not able to allocate enough money to cover all expenses or a native title client does not have capacity to pay for all of the services it requires.

- **In recent times, are there differences in cost and outcomes of cases and agreements managed without the involvement of NTRBs/NTSPs?**

There is little doubt that there are higher costs for SANTS where native title claimants or holders are represented externally. No claims are currently able to self-fund the prosecution of their applications.

- **Should there be more explicit accountability for the claimant group or its representatives in the Act?**

SANTS in principle would support legislative amendment to achieve greater accountability.

- **Would there be value in greater regulation of private agents, e.g. a registration system, constraints on private agents undertaking particular activity? Should private agents assisting Indigenous parties be made subject to some of the same standards and obligations as set down for NTRBs/NTSPs under the Act?**

SANTS would support the greater regulation of private agents such as those suggested.

- **What costs and benefits would be associated with implementing any legislative or regulatory changes?**

Significant cost benefits would be achieved as the actions of some private agents can result in significant financial costs for SANTS such as responding to various Court applications or reviews of funding decisions.

- **Why do some claim groups choose to pay private lawyers for services they could receive for free from an NTRB/NTSP?**

In many cases in SA those law firms representing claim groups or native title holders have had long standing relationships with their clients. In some cases this has been because there wasn't the capacity within the NTRB or NTSP to assist a group or in other cases the NTSP or NTRB was representing an overlapping claim.