



18 July 2025

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## South Australian Native Title Services – Response to Australian Law Reform Commission Review of the Future Acts Regime, Discussion Paper 88 (May 2025)

### Introductory comments

- (1) South Australian Native Title Services Ltd (SANTS) is the Native Title Service Provider (NTSP) for South Australia as recognised under the *Native Title Act 1993* (Cth) (the NTA). In performing our statutory functions, SANTS provides services to native title claimants and holders to recognise and protect native title rights and interests. The lands and waters over which native title has been recognised represents over 65% of South Australia. The legislative framework, regulation and management of future acts in the State of South Australia is of significant interest to native title claimants and holders and our work as a NTSP. We welcome the opportunity to make this submission and address key areas of interest for SANTS and our native title client groups.
- (2) SANTS obtained an extension to provide our submission until 18 July 2025.
- (3) SANTS supports and advocates for Aboriginal people's right to self-determination manifesting through their right to speak for, and manage their own Country, rights and interests, to govern their own communities, to participate fully in decision-making and to self-determine their own social, cultural and economic development.
- (4) Of the area not subject to native title, 22% of South Australia is covered by Aboriginal freehold.<sup>1</sup> In South Australia there are 25 Registered Native Title Bodies Corporate (RNTBCs) who are either responsible for managing, or who hold, native title rights and interests on behalf of thousands of native title holders.
- (5) Most native title determinations in South Australia were negotiated alongside ILUAs that deal with several native title matters, which are generally referred to as "State Settlement ILUAs". Importantly for this review, the State Settlement ILUAs provide consent to a wide range of Future Acts done before and after the ILUAs were registered and include processes that replace most of the future act regime, except for the right to negotiate. In relation to the right to negotiate we also have an alternative regime for mining and exploration. Therefore, several of the proposals proposed by the ALRC in this review will have only limited application to most PBCs in South Australia. Given this we do not intend to respond to every proposal or question in the Discussion Paper. The structure of our response follows

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<sup>1</sup> Created under various South of Australian legislation, including *Aboriginal Lands Trust Act 2013*, *Anangu Pitjantjatjara Land Rights Act 1981* and *Maralinga Tjarutja Land Rights Act 1984*.

the structure of the discussion paper and is in response to specific issues as they may arise in the South Australian context.

## Submission by the Mabo Centre and National Native Title Council

- (6) We have had the benefit of considering the content of the submission made on behalf of the Mabo Centre and National Native Title Council, and we support those submissions and have made specific references within our submissions below.

## Native Title Management Plans

**Question 6 Should the *Native Title Act 1993* (Cth) be amended to enable Prescribed Bodies Corporate to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?**

- (7) SANTS agrees that the principles behind Native Title Management Plans (NTMP) are consistent with section 3 of the *Native Title Act 1993* and its Preamble. Further, SANTS supports any legislative moves to promote the principles of self-determination, which we consider NTMPs would. Given that in South Australia most future acts are dealt with in State Settlement ILUAs, SANTS' submission considers how NTMPs might operate in conjunction with pre-existing agreements to, for example, provide early notice of Aboriginal heritage matters and cultural obligations that a RNTBC must observe.
- (8) NTMPs would be a step towards native title holders gaining greater control of their traditional lands and waters, which would be at least consistent with the intent of several Articles contained in the United Nations Declaration on the Rights of Indigenous Peoples. However, as SANTS understand the proposal around NTMPs, native title holders would still be unable to veto activities on their country.
- (9) In South Australia, most proponents are generally willing to work with native title holders to protect Aboriginal heritage by being flexible and avoiding certain areas that are important to native title holders. SANTS considers that NTMPs would be a useful mechanism to put governments and proponents on early notice that certain parts of a determination are sensitive, for undisclosed reasons that could include the existence of Aboriginal heritage and should not be developed. In this sense NTMPs would act as an early notice that informs a government or a proponent that it is prudent to start discussing proposed future acts with native title holders in the early stages of planning and ideally before formal applications are made to the relevant authorities.
- (10) It is unclear to SANTS how NTMPs might interact with existing ILUAs and other agreements such as cultural heritage agreements and section 31 deeds. In this context, legislation could make it clear that, for as long as the effect of a NTMP does not contradict extant agreements, they should be registered, subject to any objections and other criteria. In this way, NTMPs could refer to existing agreements and operate to fill in any gaps, noting that older agreements may be deficient when compared to more contemporary agreements.
- (11) In addition to dealing with consents to certain future acts, NTMPs have the potential to give native title holders the opportunity to make a firm declaration about how their cultural protocols require their RNTBC to do business within the system of Federal and State laws imposed on it. SANTS observes that some proponents and governments, particularly some local governments, continue to expect that a single meeting with a board will result in a signed agreement. However, traditional obligations to observe cultural protocols often mean the board of a RNTBC is unable to make a firm decision on agreements as readily as, for example, a local government can. This reality can leave

proponents disappointed and perplexed and serve to create tension between native title parties and non-native title parties.

- (12) In this context, NTMPs have the potential to set out cultural obligations that must be observed before a RNTBC can enter into an agreement of a particular kind. NTMPs could serve to temper proponent's expectations and help to bridge the cultural divide between how Indigenous Australians approach business and how non-Indigenous proponents and governments expect Indigenous Australians to behave. In South Australia, if an existing State Settlement ILUA does not prescribe how certain consultations or transactions are to be conducted, a NTMP could fill such a gap.
- (13) SANTS observes that proponents and State and local governments may struggle to accept the proposal that a NTMP be registered without the chance of becoming a party to it. Therefore, legislation and its supporting material should make it clear that NTMPs have the potential to introduce certainty to the often murky future acts regime and could help promote an understanding of Indigenous cultural obligations that can impact on timeframes.
- (14) In SANTS' view, any draft legislation should clarify that if a NTMP does not deal with future act consents it is not a "native title decision" and would not require compliance with the RNTBC Regulations to be registered. It is presumed that, where NTMPs provide consent to certain future acts, compensation for the impacts of those future acts on native title rights and interests would remain to be settled in accordance with Division 5. Legislation could encourage NTMPs to set out a RNTBC's preferred process or framework for agreement on compensation to be reached.

## Promoting fair and equitable agreements

**Question 7 Should the Native Title Act 1993 (Cth) be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?**

- (15) SANTS supports introducing standards for negotiations and agreement making such as good faith standards into the NTA. However, SANTS considers that conduct standards could go beyond introducing good faith standards that apply to future agreements. For example, ILUAs in South Australia, which have been entered into before determinations have often been negotiated under threat of trial. While these ILUAs have limited review clauses, they effectively operate to bind generations of native title holders in perpetuity by providing native title consents to various classes of future acts.
- (16) In SANTS' view the NTA should be amended to require that any ILUA or other agreement that consents to future acts, including proposed NTMAs, must be subject of a right to negotiate 12 months before its 25-year anniversary of being registered, approximately a generation. Under this proposal, any notice of a right to renegotiate a 25-year-old ILUA would require that good faith standards apply.
- (17) SANTS wholly supports negotiation standards that require disclosure by the State or a proponent of all material matters. The challenge would be to define what all material matters are under certain circumstances. As a starting point land and mining tenures are a necessity that some State and Territories, other than South Australia, have not been forthcoming with.
- (18) Mining negotiations would be assisted if there was a standard list of information that must be disclosed by miners in relation for production forecasts and related deductions. Negotiations are often hampered by a refusal by miners to provide sufficient data to estimate in a meaningful way what a good value settlement package would look like. More often than not what should be a straightforward discovery process ends up being a long and slow extraction that creates mistrust and suspicion between parties.

**Proposal 1 The Native Title Act 1993 (Cth) and Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.**

SANTS agrees with this proposal and considers that it goes hand in hand with the NTMP proposal. Standing instructions could be included in a NTMP. If required, the PBC Regulations should be amended to clarify that a RNTBC can receive standing instructions on native title decisions and that it can include them in a NTMP. Such changes would provide a RNTBC and its native title holders with flexibility in relation to recurring future acts and result in time and cost savings.

**Question 8 Should the Native Title Act 1993 (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?**

- (19) SANTS understands the main reason for regulating native title agreements is the fact that they might contain important matters on consent to future acts that impact on native title rights and interests. Ancillary agreements are usually confined to compensation details and in SANTS' view it would be improper for them to deal with matters that restrict native title rights and interests. However, requiring ancillary agreements to be registered alongside head agreements would be a useful way of recording contractual arrangements for future generations. For the same reason that ancillary agreements should not deal with native title rights and interests, common law contracts should not contain clauses which impact on native title. SANTS is unaware of common law contracts that set out to deal with future acts. However, it would be useful for the NTA to clarify that such agreements have no impact on native title rights and interests and do not bind native title holders.

**Proposal 2 The Native Title Act 1993 (Cth) should be amended to provide that:**

- a. the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and**
- b. when a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate.**

- (20) SANTS wholly supports this proposal. Agreements that predate either a claim or a determination being registered can impinge on the native title rights and interests of a RNTBC. The fact that a RNTBC cannot currently access such agreements as of right is an absurd situation that should be remedied. It is difficult to think of another area of law where a pre-existing agreement or instrument that affects the rights of a person's interest in land are not made available to them. In circumstances other than native title, such an agreement or instrument would be disclosed before an interest in land is granted. In the native title context, such disclosure should be mandatory upon the Court's determination of an interest in land that exists, and has always existed, at least since European settlement. SANTS considers this disclosure is particularly important for native title holders whose deep connection to country has long been previously denied by Australian law.

**Question 9 Should the Native Title Act 1993 (Cth) be amended to provide a mechanism for the assignment of agreements entered into before a positive native title determination is made and which do not contain an express clause relating to succession and assignment?**

- (21) SANTS agree with the proposal generally and suggest that the ALRC should consider section 63R of the *Mining Act 1971* (SA), which deals with the scenario posited by the review in a way that avoids any delays to a determination being made. Subsection 63R(2) allows mining parties two years after a determination of native title to negotiate a

fresh agreement with determined native title holders who are different from the native title party with who an agreement was made before a determination.

(22) Section 63R of the *Mining Act 1971* (SA) is reproduced here:

*63R—Effect of registered agreement*

- (1) *A registered agreement negotiated under this Division is (subject to its terms) binding on, and enforceable by or against the original parties to the agreement and—*
  - (a) *the holders from time to time of native title in the land to which the agreement relates; and*
  - (b) *the holders from time to time of any exploration authority or production tenement under which mining operations to which the agreement relates are carried out.*
- (2) *If a native title declaration establishes that the native title parties with whom an agreement was negotiated are not the holders of native title in the land or are not the only holders of native title in the land, the agreement continues in operation (subject to its terms) until a fresh agreement is negotiated under this Part with the holders of native title in the land, or for 2 years after the date of the declaration (whichever is the lesser).*
- (3) *Either the holders of native title in the land or the tenement holder may initiate negotiations for a fresh agreement by giving notice to the other.*
- (4) *A registered agreement that authorises mining operations to be conducted under a future mineral tenement is contingent on the tenement being granted or registered.*

(23) Section 63R works with section 63G of the *Mining Act 1971* (SA), which suspends the right to mine when there is no native title agreement over a mining tenement and provides the Minister with powers to deal with delays in negotiations caused by a less than diligent mining party.

(24) In South Australia, the determination of *Coulthard v State of South Australia (Adnyamathanha, Ngadjuri and Wilyakali Overlap Claim)* [2018] FCA 1993 resolved a 3-way overlap and parties and the Court agreed to use a novel approach where the consent determination itself operates to novate a raft of native title mining agreements from the former Applicant to the determined RNTBC.<sup>2</sup> The novation took effect on registration of the PBC as a RNTBC.

(25) In SANTS' view, the issues raised by the ALRC review regarding uncertainty about the operation of section 199C of the NTA are resolved by reference to the explanatory memorandum that accompanied the introduction of section 199C.<sup>3</sup> SANTS concludes that the explanatory memorandum expresses a clear and unambiguous intention to place a positive obligation on the Registrar. For example, at 23.6 “**(t)he Registrar is obliged** to remove details of a registered ILUA in certain circumstances”, table 23.1 then sets out “which circumstances require the removal of each type of ILUA.”

(26) With respect, SANTS also consider it is also unclear why Mortimer J introduces a requirement that a “sufficient overlap” of native title holders should mean the Register may not remove an ILUA under section 199C. In contrast to Mortimer J's comments, SANTS' view is that the use of terms in the explanatory memorandum, such as “there **are native title holders** who are not the same as those previously determined to hold native title for the area”, in relation to body corporate ILUAs, and “**(o)ne or more of the native title holders** under that determination did not authorise the agreement”, in relation to area ILUAs, in table 23.1 make the intention of Parliament very clear that notions of sufficient overlap do not affect the circumstances where an ILUA must be removed by the Registrar. SANTS submits that any clarifying amendments to the NTA should be consistent with the intent of Parliament and could borrow

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<sup>2</sup> *Coulthard v State of South Australia (Adnyamathanha, Ngadjuri and Wilyakali Overlap Claim)* [2018] FCA 1993 at Order 17 and Schedules 8 and 9.

<sup>3</sup> Native Title Amendment Bill 1997, Explanatory Memorandum, Chapter 23.

words from the explanatory memorandum to clarify that the Registrar has a positive obligation to remove them from the Register.

- (27) SANTS holds the very strong view that the intention contained in section 199C and expressed in the explanatory memorandum should extend to section 31 Deeds and agreements entered into under alternative procedure agreements. The limitation of section 199C to ILUAs only is not logical when the effects of other types of agreements on native title rights are considered.

**Proposal 3 Section 199C of the Native Title Act 1993 (Cth) should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when:**

- a. the relevant interest in property has expired or been surrendered;**
- b. the agreement has expired or been terminated; or**
- c. the agreement otherwise comes to an end.**

- (28) SANTS agrees with this proposal, which it considers to be generally consistent with common law contract principles. However, there may be exceptions, for example, ILUAs and agreements might have clauses that the agreements must run with the land and parties intended their terms to bind future owners, such as pastoral leaseholders. This is the kind of information that State and Territory governments could note on their records of title.

**Proposal 4 The Native Title Act 1993 (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.**

- (29) SANTS agrees with this proposal and notes that any ILUA that has no work to do should be removed from the Register and that the Register serves as notice that there may be a different regime in operation than to the NTA.

**Question 10 Should the Native Title Act 1993 (Cth) be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again, and if so, what types of amendments should be permissible?**

- (30) SANTS agrees. We may seek to renegotiate some of our older settlement ILUAs to bring them more into line with more modern compensation entitlements. Not having to go through a lengthy registration process would be useful for our clients in obtaining those benefits in a more timely fashion.

**Proposal 5 The Native Title Act 1993 (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.**

- (31) SANTS agrees this could potentially be a useful reform. Most ILUAs include a dispute mechanism that focusses on mediation. The proposal could be a sensible and cost effective option when dispute resolution processes fail to break a dispute.

**Question 11 Should the Native Title Act 1993 (Cth) be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the National Native Title Tribunal's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?**

- (32) SANTS considers this could be a useful option but note that the NNTT would need increased funding to fulfil this role. The NNTT possess the skills and knowledge to be the natural choice for native title dispute resolution, if funding permits.

**Question 12 Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?**

- (33) SANTS agrees and notes that confidentiality does not assist native title holders to understand when they have achieved reasonable outcomes in comparison to other similar situations. However, proponents and State governments may resist agreeing to publish commercial terms that could be considered favourable to native title holders.

**Question 13 What reforms, if any, should be made in respect of agreements entered into before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement?**

- (34) See comments made in relation to section 199C, which apply to the circumstance where determined native title holders are different from those who made an earlier agreement.
- (35) Regarding compensation paid under agreements before a determination is made, SANTS submits the proposal raised by the ALRs that:
- a requirement that all pre-determination agreements that contemplate the payment of compensation or other payments to native title parties include a provision specifying a portion of the payment must be held on trust for the ultimately determined native title holders*
- Would strike a balance between the efforts and evidence required to attain a registered native title claim and the ultimate and “proper” beneficiaries.
- (36) However, any provision that would quarantine funds until after a determination could create complexities where one family who was not included at the time an early agreement is included in a final determination. To deal with this situation any drafting should clarify how funds held in trust are to be distributed after a determination, for example, drafting could clarify that the RNTBC is responsible for dealing with trust money on behalf of the determined group and no members have a better claim to it than others.

## Reshaping the statutory procedures

**Question 14 Should Part 2 Division 3 Subdivisions G–N of the Native Title Act 1993 (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:**

- a. categorises future acts according to the impact of a future act on native title rights and interests;
- b. applies to all renewals, extensions, re-grants, and the re-making of future acts;
- c. requires that multiple future acts relating to a common project be notified as a single project;
- d. provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and
- e. provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?

- (37) Generally, SANTS supports the proposal to replace Part 2 Division 3 Subdivisions G–N. These sections of the NTA are notoriously complex and SANTS has observed they are sometimes misinterpreted by government departments and some lawyers, particularly by some advisors to local governments. Amongst some proponents and governments, the approach to Subdivisions G–N and its complexities appears to be informed by a superficial review, whereas in SANTS’ experience, proper understanding of the complex quagmire of words in Subdivisions G–N requires reference to the relevant explanatory memorandum to properly understand the Parliament’s intention behind the words.
- (38) Recently, when a SANTS lawyer was explaining why a section 24MD future act notice failed to comply with the requirements of the NTA, a lawyer for a local government who issued the notice accused the SANTS lawyer of raising barriers to the matter being settled. In SANTS’ experience, the complexities inherent in Subdivisions G–N create frustration and promote a culture of “rough enough is near enough” amongst some governments and their advisors. SANTS observes that this attitude may indeed be encouraged by the fact that a failure to comply with procedural requirements do not impact on the validity of the right to undertake a future act to which a notice relates.
- (39) SANTS supports any proposal to simplify future act processes so that native title holders receive the correct notices and can respond to them in an informed way. A simplified future acts process should be accompanied by provisions in the NTA that render a failure to properly observe simplified future act requirements would result in invalidity, which would encourage compliance with legislated processes that does not currently occur.
- (40) The model proposed by the ALRC to replace Subdivisions G–N has potential to simplify the future act requirements. However careful drafting will be required to define the key terms. The issues related to the notion of categorising impacts and related matters are canvassed in Part 2.6 of The Mabo Centre & The National Native Title Council’s Submission to the Australian Law Reform Commission and SANTS supports and adopts these submissions.
- (41) In addition, SANTS notes that any right to consultation arising from lower impact, Category A acts, would benefit from a requirement that consultation must satisfy a definition of “Genuine Consultation”. The corresponding definition of “Genuine Consultation” should set out what consultation process must be observed before a future act can be commenced.
- (42) SANTS shares the concerns raised in The Mabo Centre & The National Native Title Council’s Submission about governments being granted a discretion to assess whether a proposed activity is Category A or B. SANTS submits that the ALRC consider the possibility of a provision in the NTA that allows a NTMP to set out categories of acts that constitute Category A and B acts. This power should be accompanied by a right of governments to object to a particular categorisation in an NTMP. SANTS considers that empowering RTBCs to express its views in a NTMP would counter the risks involved with providing responsibility solely to governments. Enshrining categories of acts in a NTMP would provide early certainty to all parties and could include what consultation protocols need to be observed in relation to Category A acts.

**Question 15 If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to:**

- a. infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the Native Title Act 1993 (Cth));**
- b. future acts involving the compulsory acquisition of all or part of any native title rights and interests;**
- c. exclusions that may currently be permitted under ss 26A–26D of the Native Title Act 1993 (Cth); and**
- d. future acts proposed to be done by, or for, native title holders in their determination area?**

- (43) SANTS considers that excluding certain acts from an impact-based model risks undermining the intended benefits of such a model. The aim of the model appears to be to differentiate impacts on native title and apply proportional

rights in response to them. In SANTS view all future acts that affect native title should be assessed under the proposed impact-based framework.

- (44) Any 'tailored provisions' as contemplated by Q15 should operate within the framework of the impact-based model, rather than as complete exclusions from it. In this way, there would be greater and more consistent protection for native title based on actual impacts. The 'public benefit' argument should not justify lesser procedural rights where the impact on native title is significant.
- (45) In response to question 15(b), SANTS notes that compulsory acquisition is obviously one of the highest impacts on native title, if the model's purpose is to align procedural rights with impact, then compulsory acquisitions must logically, and without exception, trigger the strongest procedural right being the right to negotiate (Category B). This would remedy the ALRC's observation in [170]<sup>4</sup> that only some acquisitions attract the right to negotiate. As such, compulsory acquisitions should not be excluded from the model, but should be considered Category B future acts, ensuring a full right to negotiate (reflecting their maximum extinguishing impact on NT).
- (46) Question 15(d): Applying the future acts regime to acts initiated by native title holders themselves is potentially burdensome and counterproductive. However, any proposal to exclude such acts would need to be carefully drafted to ensure the exclusion isn't exploited by other parties seeking to avoid their obligations. Perhaps a solution could be to categorise such acts as Category A acts, but only if they do not create exclusive rights of possession. Again, NTMPs could deal with this situation by setting out minimum consultation standards.

**Question 16 Should the Native Title Act 1993 (Cth) be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?**

- (47) SANTS agree with this proposal but note the difficulty that will arise in assessing and predicting the impacts. The obvious impacts beyond footprints relate to mining activities over many years that impact on riparian and subterranean water quality and quantity, which in turn impacts on a wide range of native title rights and interests relating to rights to live in affected areas and rights to take resources. The NTA should be amended to require associated impacts to be considered in negotiations, but this could require expensive and time-consuming expert reports.

**Question 17 Should the Native Title Act 1993 (Cth) be amended to:**

- a. exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and**
- b. clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?**

- (48) SANTS submits that if a legislative act affects native title, it has an impact. Therefore, it makes sense for legislative acts that affect native title to be assessed under this model. This would also provide greater consistency. Excluding legislative acts from an impact-based model would undermine the purpose of the model and could create a loophole for the State to potentially use legislative acts to bypass the greater procedural rights afforded under the impact-based model framework for other future acts.
- (49) Regarding Question 17(b) SANTS agrees that the NTA should be amended to clarify that planning activities conducted under legislation can constitute future acts where they affect native title. These acts should then fall within the proposed impact-based model, ensuring that appropriate procedural rights are afforded at the planning level, rather than only at the granting level. This would allow for more proactive engagement with RNTBCs, rather than reactive

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<sup>4</sup> ALRC Discussion Paper 88 May 2025.

responses to individual acts. From SANTS' experience, the current system's focus on individual acts constituting future acts means that by the time RNTBCs are engaged, most of the fundamental decisions relating to the act has already been made and consultation with RNTBCs is largely meaningless in influencing the broader plan.

**Proposal 6 The provisions of Part 2 Division 3 Subdivision P of the Native Title Act 1993 (Cth) that comprise the right to negotiate should be amended to create a process which operates as follows:**

- a. As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act.
- b. Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act.
- c. If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18).
- d. If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination.
- e. If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:
  - require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act;
  - at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or
  - if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act.
- f. At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.
- g. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the Native Title Act 1993 (Cth).
- h. If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.

(50) SANTS agrees with this proposal but notes that we have an alternative regime in place for mining and exploration.

**Question 18 What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?**

(51) In SANTS' view a fair and reasonable test would be based on the degree of potential harm that a future act might cause to Aboriginal heritage and/or to native title rights and interests. We support and adopt the views expressed in Parts 2.5.3 and 6.3 of The Mabo Centre & The National Native Title Council's Submission about the problems inherent in the current Future Act Determination Application process.

**Question 19 What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?**

(52) SANTS refers to, and adopts, its response in paragraph 51 above in relation to Question 18.

**Proposal 8 Section 38(2) of the Native Title Act 1993 (Cth) should be repealed or amended to empower the National Native Title Tribunal to impose conditions on the doing of a future act which have the effect that a native title party is entitled to payments calculated by reference to the royalties, profits, or other income generated as a result of the future act.**

(53) SANTS supports and adopts the views expressed in Part 6.3 of The Mabo Centre & The National Native Title Council's Submission regarding the need to reform section 38(2) of the NTA.

**Proposal 9 Section 32 of the Native Title Act 1993 (Cth) should be repealed. 241.**

(54) SANTS agrees with the ALRC proposal as set out in its Discussion Paper 88, May 2025 at [241]-[244].

**Question 20 Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss 43 and 43A of the Native Title Act 1993 (Cth)?**

(55) No. SANTS has been quite outspoken about the issues with our alternative mining regime for nearly two decades.

(56) Part 9B of the Mining Act 1971 (SA) was introduced by the Mining (Native Title) Amendment Act 1995 (SA), an Act enacted on 11 May 1995. The South Australian "right to negotiate" provisions have operated since 17 June 1996. There is and has been significant variance (or inconsistencies) between our State's provisions and subdivision P of the *Native Title Act 1993* (NTA).

(57) It has long been our view that First Nations South Australians should have the same rights as all other Aboriginal people in Australia in relation to mining and exploration. Our State's provisions do not provide for the same rights and those inconsistencies have resulted in severe prejudice to our clients when seeking to protect and enjoy their native title rights and interests.

(58) We remain concerned about the administration of the Mining Act and the level of non-compliance with it from the mining sector. (ie not initiating negotiations when affecting native title, and not providing notices of entry etc).

(59) To fully comprehend the number of inconsistent provisions that have featured in our Act over the years in comparison to the NTA we have set out below a previous summary of them.

(60) Please note that this summary was originally prepared some years ago and so some of these points have now been remedied by amendment such as the timeframe issues. However we consider it prudent to demonstrate that the below summary demonstrates the inconsistencies that can arise when an alternative regime is established.

1. The statutory right to prospect under Mining Act 1971 (SA) s.20 is not a "mining tenement" (as the term is defined in s.6(1)), and therefore a person relying upon it is not a "mining operator", and the person:

- (a) need not give notice under s.58 despite the fact they are authorised to enter on land under s.57;
  - (b) is not subject to the prescriptions upon native title mining agreements that apply to mining operators under s.63K(2) and 63K(5);
  - (c) is not identified as a proponent under s.63L(2).
2. The amendment of the definition of “exploration authority”, to include paragraph (b) concerning the “right to prospect for minerals under section 20”, by the Mining (Exploration Authorities) Act 2012 (SA) was incompatible with the criteria in NTA s.43(2) by reason of its retrospective effect.
  3. The structure of ss.58 and 63F(1)((a) permits an exploration authority holder to “self assess” whether particular mining operations affect native title, which has contributed to extensive non-compliance with the limitation in s.63F(1).
  4. The s.6(1) definition of “registered representative” operates to exclude registered native title claimants under the NTA and so only refers to registered claimants under the Native Title (South Australia) Act 1994 (SA).
  5. The s.6(1) definition of “registered representative” means that registered claimants under the NTA have no clear authority to execute a native title mining agreement, and a proponent’s negotiation with them is not deemed to be a negotiation with their claim group, under the s.63L(1) explanatory note.
  6. Part 9B provides only 2 months (s.63N), after s.63M notification, for a native title claimant to be registered in order to participate in negotiation unlike the 3 and 4 month (for claim and registration) timeframe under NTA s.30.
  7. Time does not flow from a “notification day” (which is the day on which it is reasonable, in a government party’s opinion, to assume that all notices under NTA s.29(2)&(3) will have been received, or come to the attention, of the persons to be notified: NTA s.29(6)) but from fixed time of giving notice under s.63M.
  8. The expedited procedure criteria in s.63O are inconsistent with those in NTA s.237.
  9. No provision of Part 9B precludes the making of a summary determination application, or its determination, before the expiry of the 2 month objection period under s.63O.
  10. The timeframe for expedited procedure objection is 2 months only, unlike the 4 months in NTA s.32(4).
  11. Good faith negotiation is not a condition precedent to a future act determination of the ERD Court under s.63S, unlike NTA s.36(2).
  12. Part 9B contains no clear power for a native title mining agreement to bind a native title claim group (as opposed to determined native title holders), unlike NTA s.41(2).
  13. Good faith negotiations must proceed for 4 months “from when the negotiations were initiated”, where the authorisation of exploration activities is sought, or 6 months otherwise, before an application for a native title mining determination may be made under s.63S unlike the fixed 6 month period in NTA s.36(1).
  14. The ERD Court’s determination of a native title mining determination application must be made within 4 months “from when the negotiations were initiated”, where the authorisation of exploration activities is sought, or 6 months otherwise, “unless there a special reasons why it cannot do so” unlike the fixed 6 month period in NTA s.36(3).
  15. The criteria in s.63T by which the ERD Court decides a future act application differs, in some significant respects, from those in NTA s.39.

**Question 21 Should Part 2 Division 3 Subdivision F of the Native Title Act 1993 (Cth) be amended:**

- a. to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples;

- b. for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response;
- c. for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or
- d. in some other way?

(61) SANTS supports limiting non-claimant applications to being made by, or for the benefit of, Aboriginal or Torres Strait Islander Peoples. The current section 24FA allows non-native title claimants to take advantage of the limited resources available to NTRBs and is an affront to human rights principles and the UNDRIP.

**Proposal 10 The Native Title Act 1993 (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.**

(62) SANTS agrees with the ALRC proposal as set out in its Discussion Paper 88, May 2025, and the rationale provided in paragraph [257]-[259].

**Question 22 If the Native Title Act 1993 (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?**

(63) Yes, SANTS agrees that the NTA should address the consequences and expressly outline options. The discussion paper notes the challenges and costs in obtaining traditional remedies, and the submission of the Mabo Centre and National Native Title Council outlines the current circumstances of a majority of PBCs post determination of native title (let alone in a predetermination environment) and the capacity to pursue remedies. Such options should operate alongside and consistently with traditional remedies.

**Question 23 Should the Native Title Act 1993 (Cth), or the Native Title (Notices) Determination 2024 (Cth), be amended to prescribe in more detail the information that should be included in a future act notice, and if so, what information or what additional information should be prescribed?**

(64) SANTS agrees that future act notices should provide more detail. It is noted that the ALRC discussion paper focusses on the activities to be undertaken pursuant to the licence. SANTS takes the view that the State or other entity granting rights should set out the activities envisioned to be permitted by the permit, authority, licence, dedication, reservation etc (**authority**). In SANTS experience and working with the relevant Crown Lands legislation, the act relevantly provides that an authority may be created in relation to the land for a *purpose* such as "preservation of water supply", or "for any purpose of public safety, convenience, health or enjoyment". The identification of a *purpose* does not necessarily facilitate a comparison to be carried out as between the activities to fulfil a purpose and the exercise of native title rights and interests. Such information may also be relevant to understanding the impact of the future act.

**Proposal 11 All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.**

(65) SANTS agrees that future act notices should be provided to the NNTT and agree with the rationale expressed in paragraph 270, of the discussion paper. A central repository of information that is available to Prescribed Body Corporates would facilitate information being available to native title claimants and native title holders. The

relationship between such a register and that which is provided for in State Settlement ILUAs would require further consideration.

## Resourcing, costs, and implementation

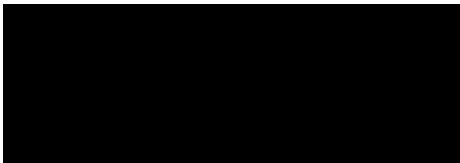
**Proposal 15 Native Title Representative Bodies and Native Title Service Providers should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes.**

(66) SANTS agrees with this proposal and submits that additional resourcing would be required for this purpose. SANTS considers that is not limited to future acts notified pursuant to the NTA, but also in relation to the State Settlement ILUAs in which alternative processes are provided.

(67) Thank you again for the opportunity to provide feedback to the review of the Mining Act 1971 (SA). SANTS looks forward to continuing to engage with the Australian Law Reform Commission in relation to these reforms.

Yours sincerely

South Australian Native Title Services



Mr Keith Thomas  
Chief Executive Officer