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Wayne Beswick
Assistant Secretary, Land Branch
Department of Prime Minister and Cabinet
CANBERRA ACT 2600

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

via Email: nativetitle@pmc.gov.au

Dear Wayne

Submission on PBC Support Strategy - Consultation Paper October 2016

This submission is in relation to the consultation paper released by the Department of Prime Minister and Cabinet entitled '*PBC Support Strategy - Consultation Paper October 2016*' (hereafter 'consultation paper').

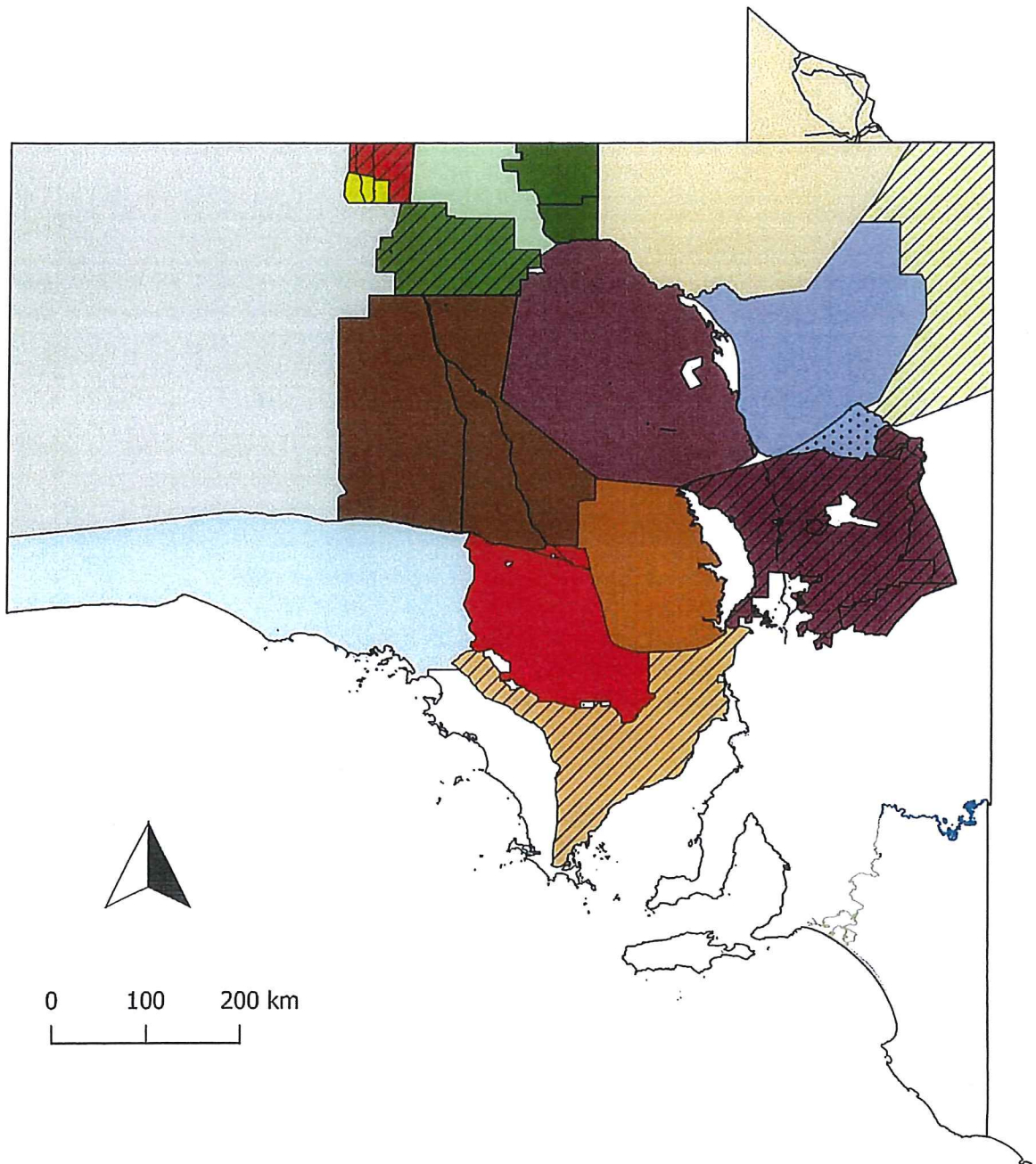
As you are aware, South Australian Native Title Services (SANTS) is the Native Title Services Provider (NTSP) for South Australia performing all of the functions of a Representative Body pursuant to Section 203FE of the *Native Title Act 1993* (Cth) (the NTA). This submission should be considered in conjunction with the comments provided to the Commonwealth during the NTRB/NTSP forum held in Canberra on 7-8 November 2016. We also refer you to our previous submissions on '*Capacity Building for Native Title Corporations Consultation Paper – November 2015*' and '*Native Title Funding: Proposed Transition to Outcomes-Based Funding Model*'.

Prior to addressing the questions outlined in the paper, we first provide an overview of PBCs in South Australia and outline the nature of our services to PBCs. This we feel is important context which underlines our position on the consultation paper.

Native Title Determinations and PBCs in South Australia

There have been 27 positive determinations of native title in South Australia (including one compensation determination), 19 were of which have been made since 2011. The area covered by these determinations is more than 56% of the State or some 560,000 square kilometres. There are currently 15 Prescribed Body Corporates (PBCs) established in relation to these native title determinations (see Figure 1).

The nature of our work has changed as a result of these successes and rapid emergence of the post determination environment. Over the last few years, we have restructured to realign our business with new service demands including establishing a section (Corporate and Community Development) to primarily work with PBCs. While claim work remains significant with 19 current native title applications, a broad range of post determination native title services are now also provided to PBCs.



Legend



















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|--|--|
|  Adnyamathanha (Combined) |  First Peoples of River Murray & Mallee |
|  Antakirinja Matu-Yankunytjatjara |  Gawler Ranges |
|  Arabana People |  Irrwanyere (Combined) |
|  Barngarla |  Kokatha Uwankara |
|  De Rose Hill |  Tjayuwara Unmuru |
|  Dieri |  Wangkangurru/Yarluyandi |
|  Dieri No. 2 |  Yandruwandha/Yawarrawarrka |
|  Eringa |  Yankunytjatjara/Antakirinja |
|  Far West Coast |  Aboriginal Statutory Freehold |

Figure 1: Native Title Determinations in South Australia, June 2016

The services which SANTS provides to PBCs include:

- Ongoing legal representation and advice (native title and broader matters)
- Executive officer and secretariat services
- Community liaison and logistics
- Dispute resolution
- Corporate governance and compliance
- Corporate governance training and development
- Financial management training
- Agreement implementation and compliance
- Management and administration of future acts
- Strategic and operational planning
- Economic development facilitation
- Cultural heritage (inc. clearances) and natural resource management (inc. Ranger program)
- Project development and management
- Advocacy and representation
- Communications
- Grant and submission writing
- Partnerships and stakeholder management
- Consultant/contract management
- Financial services (bookkeeping and accounting)

These services (or subset of) are currently provided to some 8 PBCs, with services tailored to the specific needs/interests and aspirations of the PBC. From time to time, we also provide some of these services to other PBCs (besides the 8 we primarily work with).

Our approach to working with PBCs is very much focussed on supporting them to achieve their aspirations and operate autonomously. This is consistent with our vision of 'Sustainable Aboriginal Nations' and our goal 'to provide services to Aboriginal Nations to enhance their capacity to achieve their aspirations'. Our Strategic Plan 2015-2020 (see attached) outlines a number of strategic priorities to achieve this goal which are also reflected in the services outlined above.

Achieving sustainability or 'establishing capacity' for PBCs is challenging and requires flexible, responsive approaches. It is also a process and most likely ongoing as operating environments, internal governance and leadership, challenges and opportunities rise and fall. Diversity of the PBC landscape is also a challenge, with PBCs in South Australia varying greatly in size, assets, income, complexity and capability. For example:

- five of the PBCs (including related entities) employ staff or have an office and others do not;
- six of the PBCs currently receive Basic Support Funding from the Commonwealth and have little to no assets or income;
- one PBC is over a single pastoral lease while others are responsible for vast tracts of land with a multiplicity of tenure and interests;
- PBC membership ranges from 30-40 people to well over 1000 people.

SANTS works with PBCs across this spectrum. For some PBCs, we are providing a full suite of services and the PBC very much relies on SANTS for all matters including day-to-day business. For others, the

PBCs operate more independently (i.e., they have their own staff and administrative support) and request SANTS assistance on an as needs basis.

In our experience, whether PBCs are small or large, new or 'old', simple or complex, capacity gaps may arise. That is, for PBCs to address their needs and interests, aspirations and goals, and opportunities and challenges, they need (or would benefit from) engagement with a service provider. While we value and respect that PBCs need to determine who they engage and on what basis, we believe that for a number of reasons we are well placed to provide these services. Indeed, the active presence of NTRBs/NTSPs in the post determination 'market' should be viewed as an essential component of the system providing a stable, efficient and sustainable approach to the ongoing protection of native title. That is the case whether a PBC has significant resources or not. However, from recent the policy directions of the Commonwealth, it would seem that this view is not necessarily supported.

While the long list of PBC services is somewhat impressive and clearly illustrates the important role SANTS and NTRBs/NTSPs have in the post determination environment, the demands for these services surpasses current resource availability. In short, we are often stretched to meet basic service needs of PBCs and thus not as often able to provide those services which value-add by building capability and enhancing the position of PBCs to achieve aspirations. We had hoped that the Indigenous Advancement Strategy and, in particular, the PBC Capacity Building Funding would provide opportunities to address this resource short-fall. However, on both counts the door has been shut with NTRBs/NTSPs informed that they are not eligible for funding given the native title statutory support allocations. Thus while non-NTRBs not-for-profit and for-profit companies are eligible, SANTS on behalf of one or more PBCs are not supported in delivering the outcomes the Commonwealth and PBCs seek.

As was consistently reinforced at the Canberra forum, the existing architecture of NTRBs/NTSPs provides the Commonwealth with an established, mature, regionalised framework for channelling post determination investment. That is not to say direct investment in PBCs should not be considered, but that NTRBs/NTSPs be given the opportunity to compete on equal footing for resources and put forward proposals to work with PBCs. Areas where we see that further Commonwealth investment could be made in our work with PBCs include additional funding support for:

- delivery of corporate governance training, including financial management;
- development of strategic plans, including mapping assets and capabilities;
- economic development initiatives, including funding 'business development manager' to work at a statewide/regional level and early stage business scoping and planning;
- repatriation of native title materials and building PBC capability in managing their information (i.e., local databases);
- land management and employment initiatives including working on country programs;
- leadership and succession initiatives;
- access to investment advice and wealth creation initiatives;
- cultural heritage planning and management, including mapping, information management, oral history and cultural maintenance initiatives;
- PBC network, communications and regional forums.

While we are working on many of these initiatives, further investment would allow SANTS to deliver these services with greater impact across all PBCs. We would welcome the opportunity to discuss with the Commonwealth these and other opportunities.

Specific Responses to Questions

In addition to the context and comments outlined above, we provide the following responses to the matters and questions raised in the consultation paper:

Question 1: What is the best way for the Commonwealth to engage with PBCs, now and into the future?

SANTS supports the view put forward on the importance for the Commonwealth to have a meaningful engagement with PBCs. This might involve strengthening understandings as to the role and responsibilities of the Commonwealth and potential areas of mutual interest. In other cases, it may entail a more sophisticated (perhaps contractual) engagement. Given the growing number of PBCs, we believe a strategic approach would be best adopted.

As outlined in the paper, NTRBs/NTSPs have an ongoing role in facilitating engagement between PBCs and the Commonwealth both through information and communications and coordinating direct engagement opportunities. In terms of more direct engagement, we believe that a regional approach would provide greatest efficiency and effectiveness. In South Australia, PBCs (and native title groups) are in the process of establishing a Statewide representative body which would be well positioned to serve this purpose. To date, discussions suggest that this body will have an important role in sharing information and experiences amongst PBCs and building partnerships, including with governments. Engagement at this statewide/regional level with NTRBs/NTSPs and PBC representative bodies/forums, can then lead to more localised direct engagement.

Question 2: Is current PBC funding reaching those PBCs that need support to maximise available opportunities for economic development and partnerships, within the context of the aspirations of the native title holder group? How can more PBCs take advantage of the existing funding opportunities?

SANTS' experience of the PBC Basic Support program is that the funding is primarily utilised to address the basic governance and compliance requirements. In short, it is used to fund the required number of Directors meetings and support an Annual General Meeting. Our work involves both ensuring compliance and working with the PBC to identify and progress their aspirations. This has typically involved strategic planning along with partnership development. However, there is not always a focus on economic development or the reality of the PBC internal and external context (i.e., the assets of the corporation and that of the region) is that economic opportunities are some way off.

In terms of other programs, given what was said at the Canberra forum regarding the PBC Capacity Building Funding, then certainly it would seem that the funding is not hitting the ground to support PBCs maximise economic opportunities. The answer to how this might improve may lay in question 1 regarding Commonwealth engagement with the sector (both NTRBs/NTSPs). For example, it is somewhat bewildering as to why we have not been previously approached by the Commonwealth regarding possible PBC projects and initiatives under this program (besides the release of the program guidelines). In addition, it may reflect how the Commonwealth is developing and communicating grants programs resulting in a mismatch between the needs and aspirations on the ground with those of the Commonwealth.

In short, some improvement might be made in:

- targeted funding programs which match (or provide flexibility to match) on-ground priorities;
- effective communication of programs and direct engagement of Commonwealth officers with the sector;
- flexibility in programs and program delivery to allow a dialogue (between Commonwealth and PBCs or NTRBs/NTSPs) to identify projects of mutual interest.

Question 3: What are your views of these proposed changes to funding arrangements?

As stated above, SANTS support direct engagement between the Commonwealth and PBCs and PBCs exercising choice in engagement of service providers. However, where there is not the capacity for this or where it makes economic or administrative sense, then engagement through a NTRB/NTSP should still be considered preferable. It is important that a PBC is not the loser in a direct funding arrangement through for example the cost of complying with the grant funding agreement being higher than any benefit. For example, we have had PBCs request direct funding rather than through SANTS and they lost money through bookkeeping and reporting costs. We note that the consultation paper also flags 'other provider authorised on their behalf' as the recipient. We have concerns with this and do not support a non-related PBC entity (besides a NTRB/NTSP) receiving PBC funds. Under the PBC Basic Support funding, we would also question the transaction costs (and thus cost/benefit) for the Commonwealth should it go to a direct funding model with the associated increase in contracts being managed. Thus careful consideration needs to be given to direct funding.

On other changes proposed in the consultation paper, our only other comments are:

- removal of the \$50,000 cap is reasonable, so long as basic compliance and governance requirements continues to be fully funded and that any prioritisation of funding for other activities is clearly communicated by the Commonwealth;
- sector-facilitated training and targeted funding of PBCs is supported, however, the role of the NTRB/NTSP as a service provider for initiatives should not be discounted by program guidelines;

Question 4: How do PBCs want to get information about funding related changes in the future?

The emerging statewide PBC/Native Title group is likely to provide an important vehicle for communicating and sharing information amongst PBCs. This might be facilitated through regular newsletters or email bulletins or through regional and sector-based forums. SANTS will also continue to produce its publications including *Aboriginal Way* newspaper and *Aboriginal Message* radio program along with our social media platforms. These, as well as other networks (e.g., AIATSIS PBC network) provide valuable avenues for informing PBC funding changes and opportunities.

Question 5: What are the current support services available to PBCs? How can this be better coordinated?

As outlined above, SANTS provides a range of support services to PBCs in South Australia. We do so often at no cost to the PBC and with a high level of care and professionalism. Besides the relationship

with SANTS, we also encourage and facilitate engagement with other regional stakeholders including government agencies, land holders and the private sector. In terms of government, there is a mixed experience with some very positive local engagement and outcomes to a lack of dialogue altogether. Better coordination is part of the improvement required, but in some areas and sectors there is also a lack of information and direct engagement on the ground. Having whole-of-government conversations with PBCs and NTRBs/NTSPs needs to occur, before moving to program and project based discussions.

Question 6: Are PBCs interested in participating in these kinds of projects?

Any further investment in the sector is supported, and certainly there are opportunities for coordinated sector-based training and more active facilitation of cross-sector partnerships. Again, there is a role of NTRBs/NTSPs in supporting these initiatives.

Question 7: Is there interest in funding for this purpose? How can it be prioritised?

Strategic planning is a core aspect of good governance. From our perspective, all PBCs need to have a strategic plan to set the pathway for the Corporation and its members over the short to longer term. They are important steps in building on the native title determination and transitioning from the claim environment to the post determination environment. SANTS has developed PBC strategic plans and whole-of-country management plans and we have done so without additional resources. We have done so because we have seen the need and we have also been asked to undertake this work. We believe there would be strong support across the PBC sector for more resources to support planning, and again reiterate the important role NTRBs/NTSPs in this space.

Question 8: Would a system of low cost and final dispute resolution between members of the native title group and the PBC lead to earlier consideration and potentially resolution of disputes?

Membership of PBCs and the decisions around accepting/rejecting applicants is a source of much disputation. There is further thought that needs to go into finding the right regulatory framework for PBCs including possible legislative amendments. In the interim, we have:

- advised groups to include in the Rulebook the right for rejected applicants to appeal to members at a general meeting;
- been engaged to mediate disputes between the PBC and members (or applicants).

In our experience, the first of these has strengthened the voice of members over that of Directors and removed some of the potential for 'numbers' to play a role in deciding on membership. The second, has provided a low cost vehicle for dispute resolution. However, where these steps are not successful in resolving a dispute between a PBC and a potential member (or native title holder), then it would be sensible that an alternative dispute resolution process be provided for. Subject to the details, we would support the National Native Title Tribunal (NNTT) taking on such a role.

Question 9: How could the accountability of PBCs to native title holding groups for compliance with the PBC Regulations be improved?

SANTS acknowledges that there is currently an apparent gap in regulatory compliance with the PBC Regulations, particularly in relation to native title decisions. NTRBs/NTSPs have a role in that they are meant to be notified of such decisions and may provide comment. Our understanding is that there have been native title decisions made for which we have not been notified. This might simply be a result of lack of awareness of this requirement and could be addressed through a communication strategy.

In relation to when there are disputes on decisions made and questions over compliance with PBC Regulations, it would be best that these be kept out of the court system. NTRBs/NTSPs may have a role in relation to dispute resolution and in our statutory obligations to protect native title rights and interests. ORIC may also have a role and perhaps do so under existing provisions of *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). While perhaps not being able to hear a dispute between a PBC and non-members/native title holders, Section 453-1 Part 1(b) provides the Registrar with powers to examine the books of a PBC drawing attention to "...an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory, being a contravention that concerns the management or examinable affairs of an Aboriginal and Torres Strait Islander corporation or a related body corporate...". Given the record keeping requirements for native title decisions, it would appear in our view to provide the Registrar with sufficient powers to at least examine procedural compliance with the PBC Regulations.

SANTS would also support strengthening procedural and evidential requirements of native title holder consultations and consent. In particular, Regulation 9 falls short of providing certainty that native title holders have been appropriately consulted. Alongside the requirement for a document to be signed by 5 native title holders, more emphasis should be placed on providing evidence of the process. The certification process under the *Native Title Act 1993* (Cth) involves useful requirements which could be adapted to strengthen PBC compliance with consulting native title holders.

Question 10: Should the PBC Regulations that relate to the transparency and accountability to native title holders about the use of native title monies also apply to native title monies held outside the PBC?

While acknowledging the concerns of the Commonwealth in this regard, the most important matter for SANTS is that the native title claimants or holders authorise the initial decision to apply native title monies for particular purposes. If this decision establishes and transfers funds to a separate entity (such as a trust or commercial entity) then any financial obligations are likely to rest with that entity and not the PBC. Certainly it would be good practice to ensure that there remains some accountability or at least transparency (i.e., reporting) back to the PBC, but ultimately it rests with native title holders making an informed decision.

Question 11: Are current mechanisms for streamlined decision-making processes, such as standing authorisations and alternative decision-making processes, being used by PBCs? How can information about these mechanisms and their usefulness be improved?

In our experience, standing consents have not been taken up by PBCs. One of the limitations, perhaps with some justification, is that they are not able to be utilised in relation to native title decisions or where there is a right to negotiate (RTN). Broadening the scope of standing authorisations may improve decision-making efficiencies, however, protecting the interests of native title holders is paramount. In South Australia, an example where a broadened standing authorisation may apply is in relation to resource exploration agreements pursuant to *Mining Act 1971 (SA)*. Currently such agreements which contain fairly standard provisions require consent of native title holders. A standing authorisation from native title holders could establish the parameters of agreement making from both a process and substantive perspective. To limit the risk, a time limit could be set for standing authorisation which apply to certain native title decisions (i.e., 1 year).

I appreciate the opportunity to put forward our views on the consultation paper and please feel free to contact me should you wish to discuss anything further.

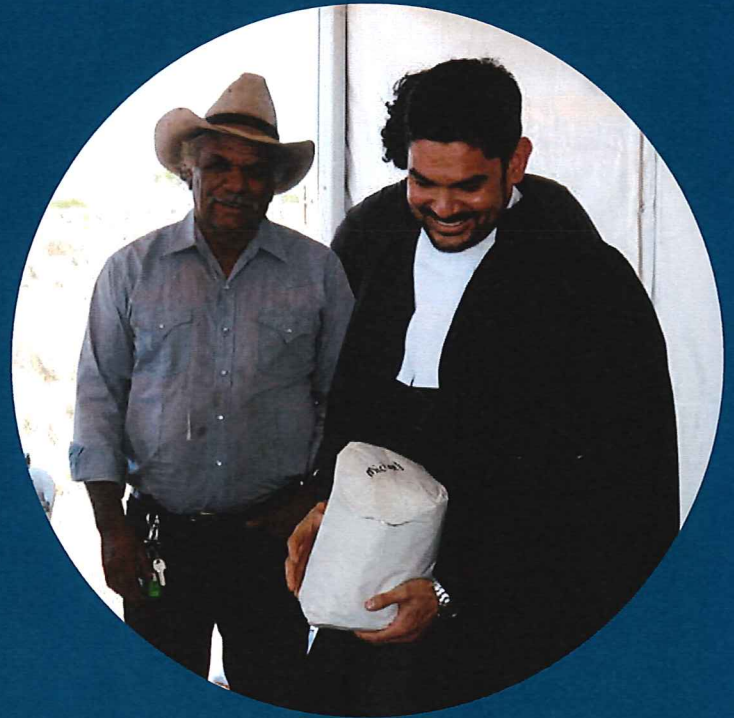
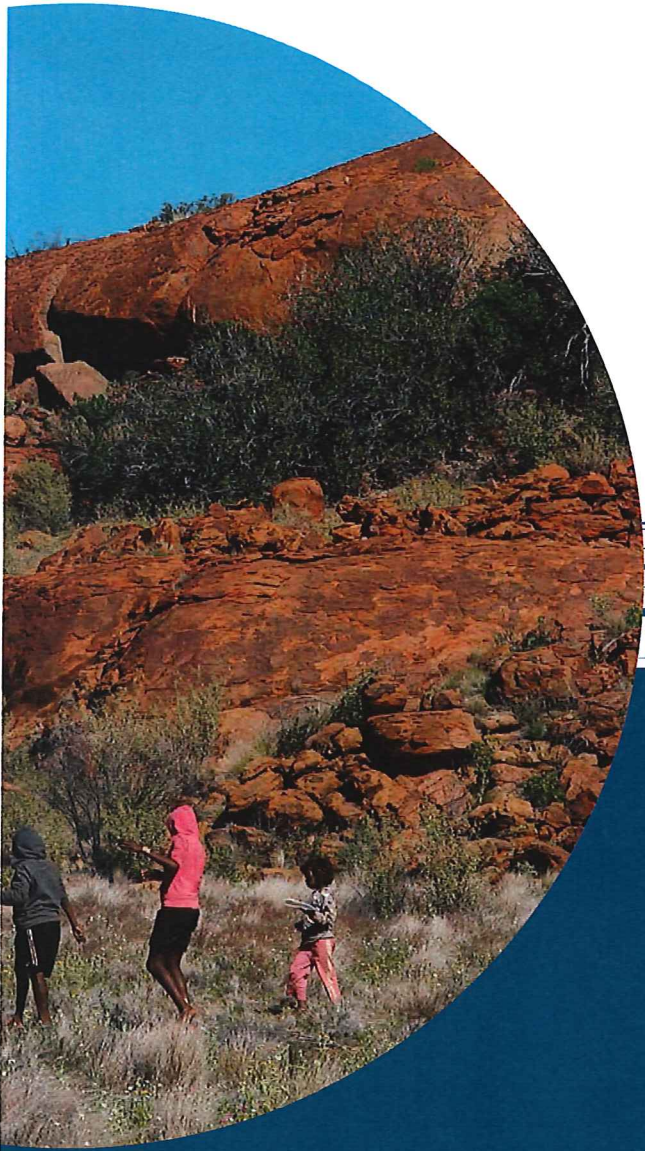
Yours sincerely

A handwritten signature in black ink that reads "Keith Thomas". The signature is written in a cursive, flowing style.

Keith Thomas

Chief Executive Officer

Email: keitht@nativetitlesa.org



South Australian Native Title Services Ltd
Strategic Plan 2015–2020





This plan establishes the strategic direction of South Australian Native Title Services (SANTS) for the next five years.

Native title remains an important foundation for Aboriginal Nations to gain recognition and bring about positive and lasting change. This plan supports the ongoing delivery of services to Aboriginal Nations in South Australia to secure sustainable social, cultural and economic outcomes through the recognition and protection of native title rights and interests.

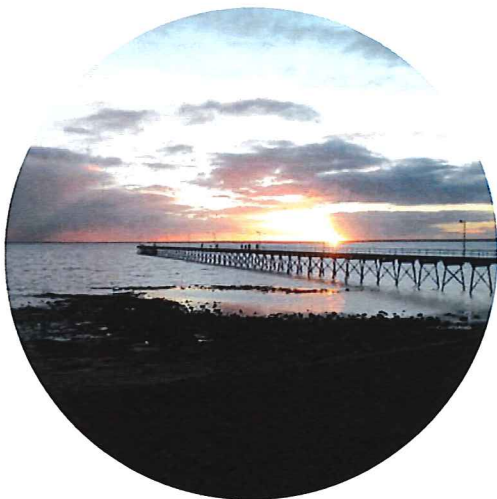
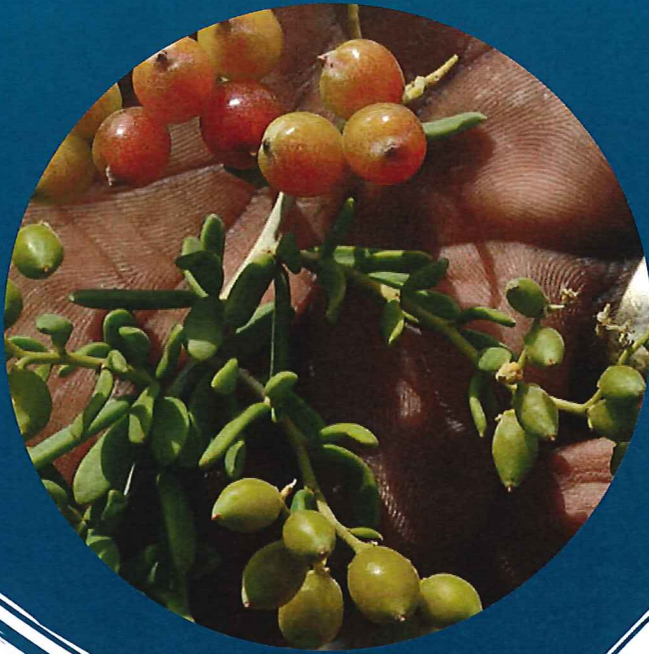
SANTS recognises that the aspirations of Aboriginal Nations are often broader than the recognition of native title. We will strengthen our relationships and work with Aboriginal Nations to respond to these broader interests and aspirations. Collaboration and partnerships are fundamental to our work and we remain committed to achieving negotiated outcomes, building capability and enhancing relationships.

SANTS is a company limited by guarantee and is the Native Title Service Provider for South Australia. We receive funding from the Federal Government under 203FE (1) of the *Native Title Act 1993* (Cth) to carry out all of the functions of a representative body. Those functions as set out in Section 203B of the Act are:

- Facilitation and Assistance
- Certification
- Dispute resolution
- Notification
- Agreement making
- Internal review
- Other functions

SANTS also receives additional funding from the Federal and South Australian Governments to perform these functions and provide related services.





Our Vision

Sustainable Aboriginal Nations.

Our Mission

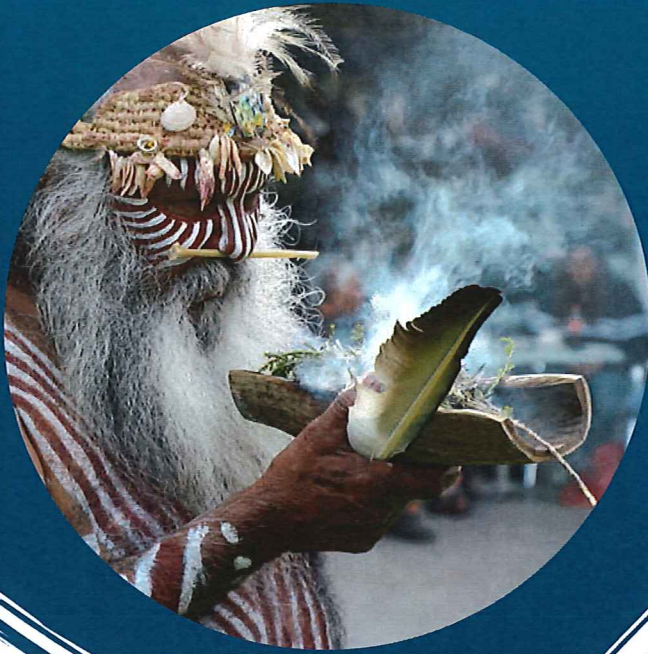
To work with Aboriginal Nations to deliver services to realise their aspirations.

Our Values

Across all our work, we uphold the following values:

- Respect – for people, culture, country, difference and ideas
- Professional – being ethical, accountable and transparent and working with integrity and competence
- Inclusive – encouraging collaboration and participation and listening to and considering the views of others





Our Goals and Strategic Approach

1

Native Title Services

To deliver native title services that provide for the recognition and protection of native title rights and interests.

- 1.1 Prepare, progress and prosecute native title claims
- 1.2 Prepare, progress and prosecute native title compensation claims
- 1.3 Establish and review priority claim matters in collaboration with the State Government (AGD) and Federal Court
- 1.4 Establish and advise Prescribed Body Corporate(s) (PBCs) and other corporate entities
- 1.5 Assist with the resolution of disputes
- 1.6 Negotiate agreements
- 1.7 Perform other functions as required

2

Influence Change

To provide leadership in native title and the development of Aboriginal Nations.

- 2.1 Provide leadership through the contribution of ideas and strategies
- 2.2 Maintain and build strategic relationships and partnerships
- 2.3 Contribute to policy, administrative and legislative reform
- 2.4 Engage in relevant forums, events and initiatives
- 2.5 Share information and engage with Aboriginal Nations and stakeholders to promote change
- 2.6 Participate in Federal and State Government Aboriginal program initiatives



3

Community and Corporate Development

To provide services to Aboriginal Nations to enhance their capacity to achieve their aspirations.

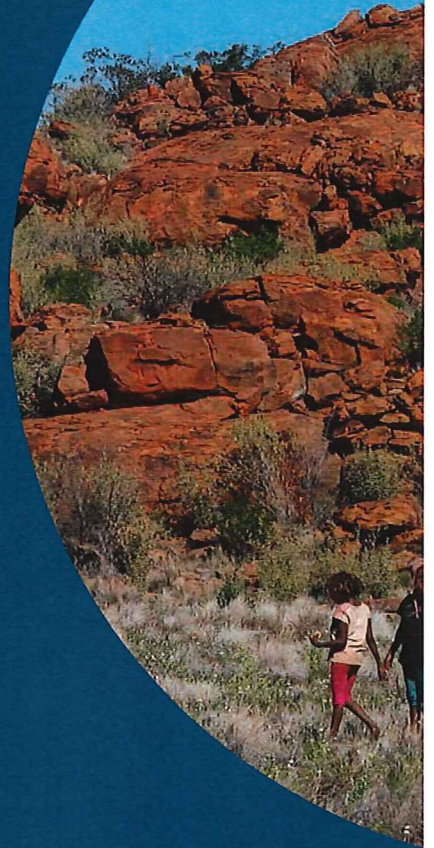
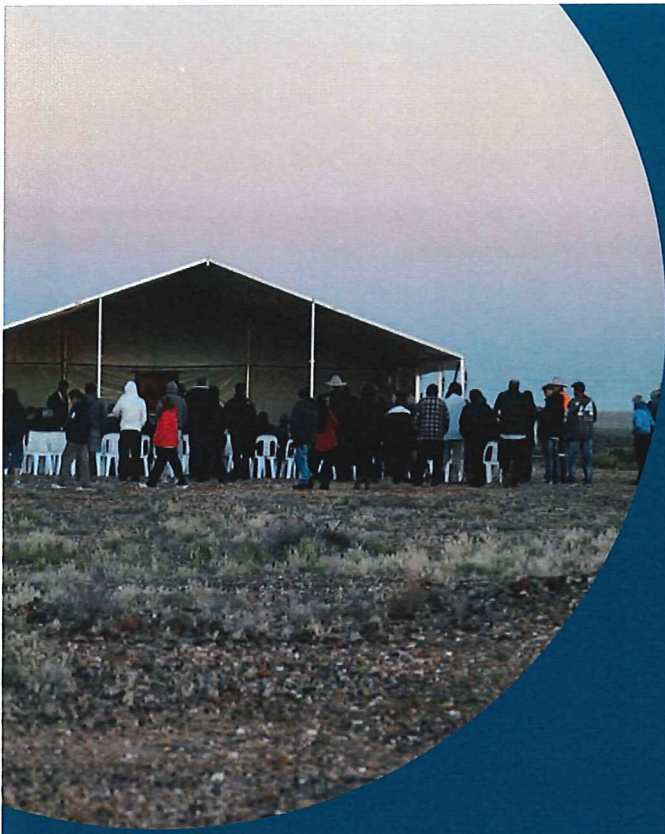
- 3.1 Develop and implement effective communication strategies to maintain and strengthen working relationships with Aboriginal Nations
- 3.2 Identify, develop and deliver community development services and project initiatives with Aboriginal Nations which respect community values, aspirations and ideas and build on existing capabilities and assets
- 3.3 Provide services to support Aboriginal Nations to meet organisational requirements
- 3.4 Maintain and grow professional and community networks and bring opportunities, partnerships and resources to Aboriginal Nations
- 3.5 Provide advice and support services to Aboriginal Nations to increase engagement in natural and cultural resource management
- 3.6 Provide and facilitate access to education, training and professional development opportunities with Aboriginal Nations to build individual and organisational capabilities
- 3.7 Support Aboriginal Nations to access professional economic and business development advice and services
- 3.8 Increase the presence of SANTS in the marketplace for providing a broad range of services to Aboriginal Nations and others

4

Organisational Capability

To improve SANTS' capability through processes, systems and culture that deliver effective business outcomes.

- 4.1 Promote and implement the SANTS Strategic Plan in all aspects of operations
- 4.2 Comply with statutory and contractual obligations for financial and performance reporting
- 4.3 Produce, deliver and continuously improve initiatives in the annual business plan
- 4.4 Provide best practice governance through implementation of the Board Charter
- 4.5 Provide effective leadership and work collaboratively through all levels of the SANTS organisation structure
- 4.6 Maintain a positive and safe workplace environment that promotes health, wellbeing and cultural diversity
- 4.7 Manage risk, people, communications, financials and resources to ensure compliance and to add value
- 4.8 Build capability through managed professional development opportunities to enhance business performance
- 4.9 Build a performance culture that ensures effectiveness across SANTS
- 4.10 Provide effective corporate services across SANTS' operations



South Australian Native Title Services (SANTS)
Level 4, 345 King William Street, Adelaide SA 5000
P (08) 8110 2800 | Freecall 1800 010 370 | F (08) 8110 2811
E info@nativetitlesa.org | W www.nativetitlesa.org