

Opinion of the delegate of the Registrar of Aboriginal and Torres Strait Islander Corporations, issued under section 60AC(2) of the *Native Title Act 1993*, in response to an application received 20 July 2022

Context

1. On Wednesday 20 July 2022 the Registrar of Aboriginal and Torres Strait Islander Corporations (**the Registrar**) received a compliant application requesting an opinion on a fee charged by a registered native title body corporate (**RNTBC**) under section 60AB of the *Native Title Act 1993* (**the Act**).
2. The Registrar's power to issue an opinion about that fee is contained in section 60AC(2) of the Act. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (**the Regulations**), specifically Regulations 20 to 25, specify the procedure for applying for and giving an opinion and related matters.
3. The Office of Registrar of Indigenous Corporations (**ORIC**) has issued Policy Statement 23 'Review of fees charged by RNTBCs for certain native title functions' to provide guidance on how the Registrar deals with such requests.
4. A delegate of the Registrar wrote to the RNTBC requesting further information on 15 August 2022, which was provided on 26 August 2022.

Material considered

5. The following material was considered in relation to this application:
 - a. An application to the Registrar in a letter emailed to this office on 20 July 2022. The applicant appended a letter from the relevant RNTBC, dated 29 June 2022, which contained an invoice and a description of certain fees.
 - b. A letter from a representative of the RNTBC to the delegate of the Registrar providing information on the nature of the fee and how it was calculated, dated 26 August 2022.

The issues

6. The application relates to an invoice received by the applicant relating to '*Legal Costs of the negotiations undertaken in relation to the proposal of the State to grant [relevant grant] and associated administration costs.*'
7. The applicant gave five reasons why they considered the fee was not one that could be charged. The assessment by the delegate of each reason is given below.

Reason 1: The agreement under section 31(1)(b) was not concluded

8. The applicant contends:

[The native title party] *cannot, or cannot yet, establish the Invoice can fairly be said to relate to 'negotiating an agreement under paragraph 31(1)(b)'* [footnote omitted] *as required by section 60AB(1)(a) of the NTA. No such agreement has been signed – if such an agreement had been signed there would be no FADA [future act determination application] on foot before the Tribunal.*

9. There is nothing in the language of section 60AB(1)(a) to suggest that costs incurred negotiating an agreement must only be charged if there is a concluded agreement.
10. Per section 60AB(1)(a), a fee must relate to 'performing' a function. The relevant prescribed function is 'negotiating an agreement under paragraph 31(1)(b)'. 'Performing a function' and 'negotiating an agreement' are descriptions of an activity, which may be a preparatory activity, not a concluded event.
11. Paragraph 31(1)(b) describes a mandatory next step after the issue by a state government of a notice under section 29 of the Act, which is 'the negotiation parties must negotiate in good faith with a view to obtaining the agreement'.
12. 'With a view to obtaining' expresses intention or hope, but not a requirement for a concluded agreement.
13. I consider the reasons given at paragraph [8] are not reasons the relevant fee cannot be charged.

Reason 2. Failure to negotiate in good faith

14. The applicant contends:

Further, in the course of the FADA, [the grantee party] has alleged that [the native title party] failed to negotiate in good faith while negotiating as required by paragraph 31(1)(b). The Tribunal may make a finding to that effect. If so, [the native title party] should not be permitted to request payment of the Negotiation Fee or, alternatively, should not be permitted to request payment of the Negotiation Fee at this time.

15. The National Native Title Tribunal (NNTT) has made a positive finding that the native title party did negotiate in good faith.
16. I consider the reasons given at paragraph [14] are not reasons that the relevant fee cannot be charged.

Reason 3: The negotiation fee is said to be charged 'jointly and severally'

17. The applicant contends:

The Negotiation Fee is said to be charged "jointly and severally." Nothing in section 60AB appears to justify this such an approach. Further, a fee chargeable under that section should be informed by the extent to which discussions held and correspondence exchanged during the period when negotiation parties are required to negotiate 'an agreement under paragraph 31(1)(b)' were, in fact, directed to obtaining such an agreement.

In particular, a fee should have regard to and reflect the dual track nature of negotiations conducted pursuant to that paragraph in [the State]. Under that practice it is usual for a native title party and a grantee party to negotiate and execute an agreement between themselves concerning the grant of the tenement applied for (commonly known as the "Ancillary Agreement"), and to subsequently enter into a further agreement with the State (known as the

"State Deed"), the latter reflecting the agreement under the said paragraph that the act (the grant of the tenement applied for) may be done. Any fee chargeable following the conduct of such negotiations should reflect this dichotomy. This practice is at least partly reflected in subsections 31(1A) and (1B) of the NTA.

18. This is not a matter for which the Registrar is empowered under the Act to provide an opinion. The nature of the inquiry the Registrar is empowered to undertake is to give an opinion under subsection 60AC(2) on 'whether a fee is one that the body corporate may charge under [section 60AB]'. The inquiry is directed at the fee itself and whether it is a fee for costs incurred by the RNTBC in the performance of certain prescribed functions.

Reason 4: Invoice for legal costs is not particularised

19. The applicant contends the invoice for legal costs does not further particularise the costs charged.
20. The invoice does not particularise the costs, however the invoice was appended to a letter to the applicant on 29 June 2022 where the RNTBC outlines that the negotiation fee comprises:

the legal and professional costs incurred by [the native title party] to date over the course of the negotiations including to review materials provided by [the grantee party] the State, prepare correspondence directed towards reaching agreement and participate in NNTT mediation requested by [the grantee party].
21. A RNTBC may, under section 60AB, charge 'a fee for costs the registered native title body corporate incurs' when performing a relevant function. It follows that a RNTBC must identify the costs incurred.
22. It is open to a person charged a fee to seek information from the RNTBC on costs incurred.
23. It should not be a function of the Registrar under the statutory scheme to give an opinion on whether a fee can be charged in the absence of the parties taking reasonable steps to clarify the nature of the services provided and costs incurred.
24. The statutory scheme provides the Registrar the discretion to decline to give an opinion. This is one such circumstance where a discretion to decline to give an opinion might reasonably be justified on the basis that further steps should be taken to clarify the nature of the fee. To do otherwise would only encourage applications for an opinion prior to negotiation parties taking reasonable steps to request and to outline the services to be provided or functions to be performed and the costs likely to be incurred.
25. A refusal or an evinced unwillingness of an RNTBC to supply details might reasonably cause a person charged a fee to seek an opinion from the Registrar about whether, on the information available to them, the fee reflects the costs incurred.
26. Notwithstanding the above, in the current circumstances of this application, this office requested further information from the RNTBC on the nature of the services rendered and the basis of the costs.

27. This was received and has been provided to the applicant. On the basis of this information, I consider the legal costs bear a sufficiently close relationship with performing the function of 'negotiating an agreement under paragraph 31(1)(b)'.

Reason 5: No basis to charge an administration fee

28. The applicant contends there is no basis in section 60AB to justify an administration fee or an element of a fee characterised as such.
29. A fee, whether it is characterised as a 'negotiation fee', an 'administration fee' or a 'processing fee' must bear a relationship with and be reflective of costs incurred.
30. It is not an express requirement of the Act to require in itemised fee. This is not practical for performing a function where the actions taken by an RNTBC might involve, for example, internal personnel taking numerous actions (sending and receiving communications, consolidating information and convening meetings) where these costs are impractical to quantify. Rather, the Act allows the RNTBC to charge a fee that is reflective of those costs. Indeed, this is the function of an administration fee in its relatively widespread usage in a commercial setting, whereby an amount for back-end administrative functions and use of organisational resources is generalised with reasonable reference to the total value of the service.
31. At the same time, the Act requires that a fee cannot be charged without reference to costs incurred. These costs must not, per subsection 60AB(3), 'be such as to amount to taxation'.
32. Policy Statement 23 '*Review of fees charged by RNTBCs for certain native title functions*' at paragraph 6.3 and 6.4 outlines guidance about what will amount to taxation. The fee should be imposed in respect of a service delivered and have a sufficiently close relationship to the cost to the provider of the services. It does not need to be a direct relationship.¹
33. Communication between parties and to the public at large about the nature of administrative costs incurred, and the basis of the calculation of a fee, may be achieved by the publication of a schedule of fees by an RNTBC or may be achieved by the provision of further information in an invoice or other communications, if requested.
34. It is open to a person charged an administration fee to seek further information on the costs incurred, which formed the basis of the fee, especially if there is no schedule of fees to refer to.
35. A refusal or an evinced unwillingness of an RNTBC to supply sufficient details, might cause a person charged to seek an opinion from the Registrar about whether, on all the information available to them, the fee reflects a sufficient relationship with costs incurred.
36. As stated above in my reasons at paragraph [23]-[25], it is not generally desirable, for the effective operation of the statutory scheme, for the Registrar to give an opinion on a fee in the absence of steps taken by the parties to clarify the nature of the services provided and costs incurred.

¹ *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133

37. Notwithstanding the above, in the current circumstances of this application, this office requested further information from the RNTBC on the nature of the services rendered and the basis of determining an administration fee.
38. This was received and has been provided to the applicant. On the basis of this information, I consider the administrative costs bear a sufficiently close relationship to the function of 'negotiating an agreement under paragraph 31(1)(b)'.

Decision

39. Notwithstanding any of the reasons given by the applicant, the discretion granted to the Registrar or their delegate is to consider, in the specific circumstances of the application, whether a fee charged is sufficiently reflective of costs incurred in the performance of a function permitted under section 60AB.
40. I consider the description of the activities performed by the RNTBC in the letter to the applicant dated 29 June 2022 and extracted above at paragraph [20] are activities that were directed at 'negotiating an agreement under paragraph 31(1)(b)'.
41. The itemised information received from the RNTBC on 26 August 2022 confirmed that the amount charged for that function, including the administration fee, bears a sufficient relationship to the costs actually incurred by the RNTBC.
42. I have jurisdiction to give this opinion, granted to me by way of a delegation made by the Registrar of Aboriginal and Torres Strait Islander Corporations on 12 August 2022.



Mr Andrew Huey

Deputy Registrar

Delegate of the Registrar

23 September 2022