

Opinion issued under section 60AC(2) of the *Native Title Act 1993*, in response to a request for reconsideration received 19 July 2022.

Context

1. On 22 May 2022 the Registrar of Aboriginal and Torres Strait Islander Corporations (**the Registrar**) received 22 compliant applications requesting an opinion on 22 fees charged by a registered native title body corporate (**RNTBC**) under section 60AB of the *Native Title Act 1993* (**the Act**).
2. The applications were not responded to in the statutory timeframe (28 days from receipt of the application). This had the effect of becoming decisions of the Registrar not to give an opinion on the 22 fees.
3. On 19 July 2022, the applicant asked the Register to reconsider the decisions not to give an opinion pursuant to regulation 23(1)(b) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999*, (**the Regulations**).
4. The Registrar's power to issue an opinion about a fee is contained in section 60AC(2) of the Act. The Regulations, specifically Regulations 20 to 25, specify the procedure for applying for and giving an opinion and related matters.
5. If, after reconsideration, the Registrar forms an opinion, Regulation 25(1) requires the Registrar to tell the applicant and the body corporate the opinion and reasons for the opinion in writing, within certain timeframes.
6. A delegate of the Registrar wrote to the RNTBC on 15 August 2022 requesting further information by 2 September 2022. A decision to give an opinion is required with 28 days of the due date mentioned in the request.
7. Further information was provided by the RNTBC on 1 September 2022. Further clarification of matters was requested on 16 September 2022, which was provided on 21 September 2022.
8. The Office of the 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.

Material considered

9. The following material was considered in relation to this application:
 - a. twenty-two applications received on 22 May 2022, inclusive of relevant invoices;
 - b. twenty-two requests for reconsideration received 19 July 2022;
 - c. further information supplied by the RNTBC on 1 September 2022, inclusive of attachments; and
 - d. further clarification of information supplied by the RNTBC on 21 September 2022, inclusive of attachments.
10. All materials considered have been copied to the applicant and the RNTBC.

Issues

Exercise of the discretion not to give an opinion

11. In the request for reconsideration, the applicant contends that the construction of section 60AC(2) requires the Registrar or their delegate to give an opinion, which is not discretionary.

12. I consider this view is not supported by the wording of the provision, which provides the Registrar may give an opinion. It follows that the Registrar may reasonably decline to give an opinion.
13. This is supported by Paragraph 4.134 of the Supplementary Explanatory Memorandum for the *Native Title Amendment (Technical Amendments) Bill 2007* which refers to a 'general discretion' and the potential for many possible circumstances where the Registrar could reasonably decline to give an opinion.

Substantive issues common across the 22 applications

14. The table that follows provides my opinion with respect to each of the 22 applications, grouped according to the substantive issues in common across the 22 applications.

Jurisdiction

15. I have jurisdiction to give this opinion, delegated to me by way of an instrument of 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

30 September 2022

Row	Invoice no.	Reasons the applicant considers the fee cannot be charged	Opinion of the delegate of the Registrar and reasons
1	0327	<p>Notification pursuant to section 29</p> <p>The applicant contends a 'notification pursuant to section 29' is not a matter for which a fee can be charged under section 60AB(1) or regulation 20.</p> <p>The [relevant grant] applied for is the subject of the requirement to engage in negotiations provided for in section 31 ('normal negotiation procedure'). Relevantly, section 60AB(1)(a) is concerned with 'negotiating an agreement under paragraph 31(1)(b)'. The invoice (and fee) should not be accepted by the Registrar to be a fee that the body corporate can charge or, alternatively, should not be so accepted without the provision of further particulars of the activity or activities in respect of which it is said to apply to.</p>	<p>1. An invoice for a 'notification pursuant to section 29' will not, on its own, amount to a fee that can be charged under section 60AB(1) of the Act.</p> <p>2. A RNTBC must demonstrate the fee charged is for costs incurred performing a function permissible under section 60AB. It is open to a person charged a fee to seek information from an RNTBC on costs incurred.</p> <p>3. In circumstances such as these, it is reasonable for the Registrar to decline to give an opinion in the absence of reasonable efforts by the parties to clarify the basis upon which a fee is proposed to be charged. To do otherwise would invite applications for opinion prior to parties' clarifying matters amongst themselves.</p> <p>4. Notwithstanding the above, in this instance, the delegate of the Registrar requested further information from the RNTBC about the service provided to which the invoice relates, the amount of fee charged and how it was calculated.</p> <p>5. The information supplied on 1 September 2022, which was copied to the applicant, outlines the activities undertaken by the RNTBC after receiving a notice under section 29 of the Act.</p> <p>6. A notice initiates a requirement to engage in a good faith negotiation procedure (as required by paragraph 31(1)(b) of the Act) about matters related to the effect of a proposed future act on the registered native title rights and interests of the relevant native title parties. This procedure must be fulfilled before any grant may be made.</p> <p>7. With respect to the invoice identified in this Row 1, I consider the activities described by the RNTBC in their 1 September 2022 correspondence – communicating with effected parties, seeking information, considering and consolidating advice – are activities performed in connection with fulfilling this negotiation procedure. None of the activities can be described as unnecessary or unreasonable. The activities result in the RNTBC incurring costs, for the time spent by personnel undertaking the activities. The amount of the fee charged bears a sufficient relationship with the costs incurred.</p> <p>8. I consider the fee charged in the invoice identified in this Row 1 is a fee that may be charged under section 60AB(1).</p>

Row	Invoice no.	Reasons the applicant considers the fee cannot be charged	Opinion of the delegate of the Registrar and reasons
2	0310-0311 0314-0321 0324-0326 0328-0332	<p>Expedited procedure</p> <p>The applicant indicates that the notifications pursuant to section 29 to which these invoices relate include a statement that the government party considers the relevant act attracts the expedited procedure.</p>	<ol style="list-style-type: none"> 1. If a notice under section 29 of the Act includes a statement that the government party considers the relevant act attracts the expedited procedure, the normal right to negotiate process under paragraph 31(1)(b) expressly does not apply. 2. To the extent that the invoices identified in this Row 2 relate to notices under section 29 which attract the expedited procedure, I consider the fees are not fees that may be charged, because the activities performed will not be for negotiating an agreement under paragraph 31(1)(b). 3. If despite the opinion in paragraph 2 (immediately above) the expedited procedure does not apply to any of the invoices identified in this Row 2, then the above opinion in Row 1 applies to the invoices in this Row 2.
3	0333	<p>Notification of an infrastructure facility associated with mining under section 24MD(6B)(e)</p> <p>The description in the invoice does nothing more than state the body has been given a notice. There is nothing in the nature of 'a fee for costs it [incurred] when performing ... [particular] functions'.</p> <p>The activities in respect of which a fee is entitled to be pursuant to this regulation include 'activities related to consultations under ... paragraph 24MD(6B)(e)'.</p> <p>Because the invoice does not specify any such activities the Registrar should not accept it as a fee that the body corporate may charge, or should not do so without first requiring further particulars and permitting the applicant to make submissions to the Registrar on the same.</p> <p>The body corporate has until 15 June 2022 to provide comment in accordance with paragraph 24MD(6B)(e). Such comment would be expected to be made following the carrying out of the consultations referred to previously. As at the date of this letter the Department has not receive any such comment from the body corporate.</p>	<ol style="list-style-type: none"> 1. Under regulation 20(1)(c) a RNTBC is entitled to charge 'a fee for costs it incurs' in performing 'activities related to consultations ... under section 24MD(6B)(e)'. 2. Section 24MD(6B)(c) requires that notice is to be issued to native title claimants and bodies corporate in relation to construction of an infrastructure facility associated with mining. Once received, section 24MD(6B)(d) allows a claimant or a body corporate to lodge an objection. 3. The obligation to consult under 24MD(6B)(e) only relates to parties who object. Section 24MD(6B)(e) relevantly states that the person who applied for the doing of the act: '<i>must consult any claimants, and bodies corporate, who object, [emphasis added] about ways of minimising the act's impact on registered native title rights and interests in relation to the land or waters, and, if relevant, any access to the land or waters or the way in which any thing authorised by the act might be done.</i>' 4. To the extent the fee charged in Row 3 relates to activities undertaken in response to a notification under 24MD(6B)(c), that are activities undertaken <i>prior to</i> lodging an objection, which I understand to be the case in this instance, I consider the fee cannot be charged. 5. Only activities undertaken as part of consultation with persons who object are activities for which a fee may be charged. 6. I further note that, as expressly provided for by section 24MD(6B)(e)(ii), the consultation is to be conducted by the person who applied for the doing of the act, being the grantee party, not the applicant.

Row	Invoice no.	Reasons the applicant considers the fee cannot be charged	Opinion of the delegate of the Registrar and reasons
4	0323 0334	<p>Notification under section 24HA(7) (management of water)</p> <p>The description of invoice 0334 states 'Notification pursuant to section 24HA. The description of invoice 0323 states 'Notification pursuant to section 24H (7)'. That description does nothing more than state the body corporate has been given a notice. There is nothing in the nature of 'a fee for costs it [incurred] when performing ... [particular] functions.' There is no section 24H(7) although there is a section 24HA(7).</p> <p>Regulation 20(a) permits a body corporate to charge a fee for 'activities related to providing comments on proposed future acts under... (iv) section 24HA(7)'. The Registrar should not accept the fee set out in the Invoice as one which the body corporate is entitled to charge or, alternatively, the Registrar should not do so without first seeking further particulars from the body corporate and permitting the applicant to make submissions on the same.</p> <p>The [state party] has received no comment in relation to any matter identified in these invoices.</p>	<ol style="list-style-type: none"> 1. Despite apparent errors in the invoice identifying the relevant section of the Act, the invoices appear to relate to steps taken by an RNTBC in response to receipt of a 'notice under section 24HA(7)(b)'. This relates to giving persons notified a period of time for the 'opportunity for comment'. 2. Regulation 20(1)(a)(iv), made under section 60AB(2) of the Act entitles the RNTBC to charge a fee for costs it incurs for 'activities related to providing comments on proposed future acts ... under section 24HA(7)(b)'. 3. During the period where the RNTBC has the opportunity for comment, activities undertaken which are directed at considering whether to take up the opportunity of providing a comment are activities for which a fee may be charged. 4. This is regardless of whether a comment is given, although a failure to comment might cause a person charged to seek clarification on the costs incurred. 5. A fee charged must bear a sufficient relationship with the costs actually incurred and it is open to a person charged to seek further information if none is available. 6. In circumstances such as these, it is reasonable for the Registrar to decline to give an opinion on a fee in the absence of reasonable efforts by the parties to clarify the basis upon which a fee is proposed to be charged, including to correct errors. 7. To do otherwise would only encourage applications for an opinion prior to 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. 8. Notwithstanding the above, in this instance, the delegate of the Registrar requested further information from the RNTBC. Information supplied to the Registrar and applicant on 1 September 2022 outlines the activities that are performed in responding to future act notices, including notices under section 24HA(7)(b). These activities are sufficiently related to providing comments. 9. The activities result in costs incurred by the RNTBC. The amount of fee charged bears a sufficiently close relationship with the costs incurred. 10. I consider the fee charged in the invoices identified in Row 4 is a fee that may be charged under Regulation 20(1)(a)(iv), namely for activities related to providing comments on proposed future acts under section 24HA(7)(b)'.