



Australian Government

Office of the Registrar of Indigenous Corporations



## POLICY STATEMENT 23

# Review of fees charged by RNTBCs for certain native title functions

<b>Policy</b>	PS-23: Review of fees charged by RNTBCs for certain native title services
<b>Relevant legislative provisions</b>	<i>Native Title Act 1993</i> sections 60AB and 60AC  Native Title (Prescribed Bodies Corporate) Regulations 1999, Part 4, regulations 19 to 26
<b>Last updated</b>	11 February 2013
<b>Other relevant policies</b>	

## **PS-23: Review of fees charged by RNTBCs for certain native title functions**

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## **PS-23: Review of fees charged by RNTBCs for certain native title functions**

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### **1 Purpose**

- 1.1 This policy statement provides guidance on how the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) deals with requests for an opinion as to whether a fee charged by a registered native title body corporate (RNTBC) to a third party for certain native title functions is one that can be charged.
- 1.2 References to sections in this policy statement are references to sections of the *Native Title Act 1993* (NTA) unless otherwise specified. References to corporations in this policy statement are references to Aboriginal and Torres Strait Islander corporations unless otherwise specified. In addition, references in this policy statement to the Registrar are also references to a delegate who is lawfully exercising the powers of the Registrar.

### **2 Introduction**

- 2.1 Amendments to the NTA, made in 2007 by the *Native Title Technical Amendments Act 2007*, gave the Registrar the power to issue an opinion as to whether a fee charged by an RNTBC to a third party for certain native title functions is one that can be charged. The ability of an RNTBC to charge a fee is found in section 60AB. The Registrar's power to issue an opinion about that fee is contained in section 60AC. These statutory provisions commenced on 1 July 2008.
- 2.2 The Native Title (Prescribed Bodies Corporate) Regulations 1999 were amended by the Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 (No. 1). They expand the native title functions for which an RNTBC may charge a fee and specify the procedure for resolution of disputes between RNTBCs and third parties about the proposed fee by way of opinion from the Registrar.

### **3 Functions that fees can be charged for**

- 3.1 The functions for which RNTBCs may charge fees for are:
  - negotiating a 'right to negotiate' agreement under section 31(1)(b) of the NTA—section 60AB(1)(a)
  - negotiating an agreement under alternative state or territory provisions which replace the right to negotiate—section 60AB(1)(b)
  - negotiating Indigenous land use agreements (ILUAs)—section 60AB(1)(c).

- 3.2 Regulations may be made that provide for an RNTBC to charge a fee for costs the RNTBC incurs when performing functions specified in the regulations—section 60AB(2).
- 3.3 The regulations prescribe the following functions for which RNTBCs may also charge fees for costs incurred:
- activities related to providing comments on proposed future acts under sections 24GB(9)(d), 24GD(6)(b), 24GE(1)(f)(ii), 24HA(7)(b), 24ID(3)(b), 24JB(6)(b) and 24JB(7)(b) of the NTA—regulation 20(a)
  - activities related to the exercise of procedural rights under sections 24KA(7), 24MD(6A), and 24NA(8) of the NTA—regulation 20(b)
  - activities related to consultations under sections 24JAA and 24MD(6B)(e) of the NTA—regulation 20(c)
  - activities related to the exercise of procedural rights for acts or provisions mentioned in a determination under sections 26A, 26B and 43A of the NTA—regulation 20(d)
  - activities related to making submissions under section 26C(5)(b) of the NTA—regulation 20(e).
- 3.4 An example of activities for regulations 20(a) and (e) is contacting affected common-law holders. Examples of activities for regulation 20(c) are arranging meetings or travel, or obtaining legal advice.

## **4 Types of fees that cannot be charged**

- 4.1 RNTBCs cannot charge fees for costs incurred as a party to proceedings or inquiries used to break a deadlock in negotiations mentioned in section 60AB(1)—section 60AB(5)(a).
- 4.2 This would primarily cover inquiries by the National Native Title Tribunal (NNTT) following an application for an arbitral body determination under section 35 (which may result in a determination about whether an act can be done, or done subject to conditions—see section 38(1)). It would also cover inquiries where the NNTT is not the arbitral body, or where determinations about whether an act can be done, or done subject to conditions, are made under alternative state or territory provisions.
- 4.3 RNTBCs cannot charge fees for participating in any court proceedings (whether or not the proceedings are contemplated by the NTA)—section 60AB(5)(b).

## **5 Persons who cannot be charged a fee**

- 5.1 An RNTBC cannot charge the following persons a fee:
- the common-law holders for whom the RNTBC holds native title rights and interests in trust—section 60AB(4)(a)

- the common-law holders for whom the RNTBC is an agent prescribed body corporate—section 60AB(4)(b)
- another RNTBC—section 60AB(4)(c)
- a representative body—section 60AB(4)(d)
- a registered native title claimant or other person who claims to hold native title in relation to the land or waters in an area affected by an act to which negotiations mentioned in section 60AB(1) relate, or in an area proposed to be covered by an ILUA—section 60AB(4)(e).

## 6 Fees that can be charged

6.1 RNTBCs may only charge fees for costs incurred—section 60AB(1).

6.2 Further a fee imposed by an RNTBC must not be such as to amount to taxation—section 60AB(3).

6.3 The explanatory memorandum to the Native Title Amendment (Technical Amendments) Bill 2007 states that:

3.1 Proposed subsection 60AB(3) provides that fees charged by RNTBCs must not be such as to amount to taxation (as this would be unconstitutional). A fee will not amount to a tax if it is imposed in respect of a service delivered to the persons required to pay the fee.

6.4 The following broad principles regarding what amounts to taxation can be discerned from *Airservices Australia v. Canadian Airlines International Ltd* (1999) 202 CLR 133:

- if a charge has a close relationship to the cost to the provider of providing the service, or granting a valuable right or privilege, or supplying some such other thing, it is indicative that it is not a tax. It does not need to be a direct relationship
- if a charge has a discernible relationship to the value of a service or grant of a right or privilege to the person who is charged, it is indicative that it is not a tax.

## 7 Request for the Registrar's opinion

7.1 If an RNTBC charges a person a fee in reliance on section 60AB, the person may, in writing, request the Registrar to give an opinion on whether the fee is one that the body corporate may charge—section 60AC(1).

7.2 The request must comply with all of the following requirements:

- it must be made within 21 days after the person is charged the fee—regulation 21(2)(a)
- it must be in writing—regulation 21(2)(b)
- it must be signed—regulation 21(2)(c) and (d).

- 7.3 If the request is made on behalf of a body, it must be signed by a director or secretary or some other authorised person of the body. Otherwise the request must be signed by the individual lodging the request, with their name printed next to their signature.
- 7.4 The request must include the following:
- the name and address of the applicant—regulation 21(2)(e)(i)
  - the address, corporation name and Indigenous Corporation Number of the RNTBC that charged the fee—regulation 21(2)(e)(ii)
  - any document provided by the RNTBC that mentions the functions for which the fee has been charged—regulation 21(2)(e)(iii)
  - any document provided by the RNTBC explaining the charge and its calculation—regulation 21(2)(e)(iv)
  - a description of the services provided, or claimed to be provided, by the body corporate—regulation 21(2)(e)(v)
  - a statement about why the applicant considers that the fee charged is not one that the body corporate may charge the applicant—regulation 21(2)(e)(vi).
- 7.5 There is no prescribed form for a request for an opinion of the Registrar. The request must be in writing but can be in the form of a letter or email.
- 7.6 The applicant must give a copy of the written request and supporting material to the RNTBC that charged the fee, within seven days of lodging the request with the Registrar—regulation 21(3).
- 7.7 The request may be withdrawn in writing at any time before the Registrar gives an opinion about the fee—regulation 21(4).
- 7.8 The Registrar may ask the applicant, in writing, to provide more information within a specified period—regulation 21(5)(a). If the applicant does not comply with the Registrar’s request for more information, within the period or any extended period, the Registrar is entitled to treat the application as being withdrawn, and notify the applicant in writing accordingly—regulation 21(5)(d).
- 7.9 The Registrar may ask the RNTBC that charged the fee, in writing, to provide information or documents about the service provided, the amount of the fee and how it was calculated, within a specified period—regulation 21(5)(b).
- 7.10 The Registrar may extend the period for the receipt of information requested from the applicant or the RNTBC that charged the fee—regulation 21(5)(c).

## **8 The Registrar’s opinion**

- 8.1 If the Registrar provides an opinion on whether a fee is one that the RNTBC may charge, the opinion and reasons for the opinion must generally be

provided in writing within 28 days after the day the Registrar received the request for the opinion—regulation 22(1)(a)(i).

- 8.2 If the Registrar asks for further information from the applicant or the RNTBC under regulation 21, the time period for giving the opinion is extended from the day that the request for further information was made to the day on which the requested information is received—regulations 22(1)(a)(ii) and (iii).
- 8.3 The opinion and reasons for the opinion must be provided to the:
- applicant
  - RNTBC that charged the fee
  - Secretary of the Department with responsibility for administering the NTA—regulations 22(1)(b), (c) and (2).

## **9 Publication of the Registrar’s opinions**

- 9.1 Except in exceptional circumstances the Registrar will publish opinions on the Registrar’s website.
- 9.2 Requests and related documents lodged with the Registrar under sections 60AB and 60AC of the NTA and the proposed regulations are not currently listed in schedule 2 of the Corporations (Aboriginal and Torres Strait Islander) Regulations 2007 (CATSI Regulations) and would not form part of the Register of Aboriginal and Torres Strait Islander Corporations.

## **10 Review of the Registrar’s decision**

- 10.1 Internal reconsideration of the Registrar’s opinion or a decision not to give an opinion, and external merits review in the Administrative Appeals Tribunal of an internal reconsideration are available.
- 10.2 If an opinion is requested, the applicant or the RNTBC may ask the Registrar to reconsider the opinion, or the decision not to give an opinion—regulation 23(1).
- 10.3 A request for reconsideration of the Registrar’s opinion or decision not to give an opinion must be made in writing. Unless a longer period is allowed by the Registrar, the request for reconsideration must be given to the Registrar within 28 days after:
- the person is notified in writing of the Registrar’s opinion, or
  - the period in regulation 22(1) has ended—regulation 23(2).
- 10.4 The notice of request must set out the reasons for the request—regulation 23(3).
- 10.5 The Registrar is also empowered to reconsider an opinion or a decision not to give an opinion on his or her own initiative—regulation 23(4).

- 10.6 If reconsideration is sought, the Registrar may ask the applicant or RNTBC in writing for information or documents relating to the fee in dispute—regulation 24(2) and (3).
- 10.7 Any request for further information and documents must be made within 28 days after:
- the receipt of the request for reconsideration, or
  - the Registrar decided, on his own initiative, to reconsider the matter—regulation 24(3).
- 10.8 The Registrar must specify the period when the requested information or documents are required to be provided to the Registrar—regulation 24(3)(c). The Registrar may extend the period when the requested information or document is required—regulation 24(4).
- 10.9 If the person who sought the reconsideration does not provide information or documents requested by the Registrar, the Registrar may treat the request for reconsideration as withdrawn and inform the applicant—regulations 24(5) and (7).

## **11 Registrar’s opinion following reconsideration**

- 11.1 If on reconsidering a matter the Registrar forms an opinion under regulation 23(1)(a) or (b), the Registrar is required to tell the applicant and RNTBC of the opinion and reasons for the opinion in writing—regulation 25(1).
- 11.2 This must be done within 28 days after:
- receiving the request for reconsideration or deciding to reconsider on the Registrar’s own initiative, or
  - where requests for further information or documents by the Registrar have extended the reconsideration period, the end of the extended reconsideration period—regulation 25(1).
- 11.3 The Registrar must also give a copy of this decision to the Secretary of the Department with responsibility for administering the NTA in the same period—regulation 25(2).
- 11.4 If, on reconsideration, the Registrar does not give an opinion within the period required, the Registrar is taken to have affirmed the opinion given or the decision not to give an opinion—regulation 25(3).
- 11.5 A person may apply to the Administrative Appeals Tribunal for a review of the Registrar’s opinion or decision not to give an opinion, following reconsideration—regulation 25(4).

## **12 Time for payment of fee**

- 12.1 The requirement for the payment of a fee is suspended (with no interest payable) while the request for an opinion or reconsideration is current and until such time as the matter is resolved—regulation 26(1).
- 12.2 If the Registrar is of the opinion that a proposed fee is consistent with Division 7 of the NTA, the fee must be paid by the end of whichever of the following periods ends the latest:
- if no request for reconsideration was made—28 days after the time for making a request has passed
  - if a request for reconsideration was made, or the Registrar decided to reconsider on his or her own motion, 28 days after the time for making an application to the Administrative Appeals Tribunal has ended
  - the period that the RNTBC that charged the fee specifies in writing to the applicant—regulation 26(2).
- 12.3 Should the Registrar be of the opinion that a fee is inconsistent with Division 7 of the NTA or does not relate to the services to be provided, any obligation to pay them is removed when the Registrar has given the relevant opinion. The RNTBC is then required to withdraw the fees—section 60AC(3).

## **END OF POLICY STATEMENT**