

MPS LAW

Charging fees for service under the *Native Title Act* 1993 (Cth)

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Introduction

Section 60AB is a helpful provision of the Native Title Act 1993 (Cth) (NTA) which entitles registered native title bodies corporate (or RNTBCs) to charge a fee for the costs that are incurred when performing certain future act functions.

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What functions is an RNTBC entitled to charge for?

The functions that a fee can be charged for are set out in section 6oAB of the NTA and regulation 2o of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (PBC Regulations). Those functions include:

1. Negotiating agreements under the 'right to negotiate' process in the NTA (such as an exploration or mining agreement);^[1]
2. Negotiating an agreement under an alternative approved State or Territory regime (such as a 'native title mining agreement' (NTMA) under Part 9B of South Australia's Mining Act 1971); ^[2]
3. Negotiating an Indigenous Land Use Agreement (ILUA);^[3]
4. Providing comments on certain future act notifications;^[4] and
5. Exercising procedural rights in response to certain future act notifications.^[5]

Examples of activities or services that fees can be charged are:

- participating in negotiation meetings for an exploration agreement, including costs of legal representation
- legal costs associated with reviewing or negotiating an agreement; and
- commenting on a future act notification, such as a section 24HA notification.

What can't an RNTBC charge for?

RNTBCs are not permitted to charge a fee for service for costs incurred in relation to:

- Future Act Determination proceedings in the National Native Title Tribunal;^[6] or
- Court proceedings.^[7]

The PBC Regulations may also prescribe further functions that an RNTBC is not permitted to charge for (although there are none prescribed at present).

^[1] NTA s 6oAB(1) (a).

^[2] NTA s 6oAB(1) (b).

^[3] NTA s 6oAB(1) (c).

^[4] PBC Regulations, reg 2o(a).

^[5] PBC Regulations, reg 2o(b)-(e).

^[6] NTA, s 6oAB(5) (a).

^[7] NTA, s 6oAB(5) (a).

Who can't an RNTBC charge?

An RNTBC may not charge any of the following persons a fee for service:

- the native title holders for whom the RNTBC holds native title or is their agent prescribed body corporate;^[8]
- another RNTBC;^[9]
- a representative body;^[10] or
- a native title claimant claiming to have native title over an area covered by future act negotiations or an ILUA being negotiated.^[11]

How should fees be calculated?

An RNTBC should ensure there is a close connection between the costs it incurs in performing its function and the fee for service that it charges. A fee charged under section 60AB must not amount to 'taxation'.^[12]

The Explanatory Memorandum to the Native Title Amendment (Technical Amendments) Bill 2007 explains that:

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.^[13]

For the fee to not amount to 'taxation', there must be a connection between the fee being charged and the service being provided. The fee must relate to the costs that the RNTBC incurs in performing its functions. This could include:

- the time of staff and directors in considering the future act and consulting with native title holders about the future act
- arranging meetings or travelling to negotiations
- time taken to write comments or submissions
- seeking legal advice on the future act

^[8] NTA, s 60AB(4)(a)-(b).

^[9] NTA, s 60AB(4)(c).

^[10] NTA, s 60AB(4)(d).

^[11] NTA, s 60AB(4)(e).

^[12] NTA, s 60AB(3).

^[13] Page 78.

How can an RNTBC begin charging?

Funding agreements

For negotiating future act agreements including ILUAs, it is common practice that a funding agreement is entered into which will set out that the proponent will meet the RNTBC's costs for participating in the negotiations.

A funding agreement isn't necessary but it can give certainty to both parties and reduce the risk of disagreements later on about invoicing.

Fee schedules

For exercising procedural rights or performing other functions that might be more regular or 'standard', such as providing comments on certain future acts, many RNTBCs utilise a standard fee schedule, based on the time spent and costs generally incurred in responding to such notices. The RNTBC must still ensure there is a proper basis for the standard fee and how it was calculated.

This approach can be helpful for RNTBCs navigating a large volume of future act notifications. Consideration should however be given to how notifications that require work beyond the 'standard' fees are dealt with.

Be sure to keep records

It is essential that there is a record of all services performed and the details surrounding the service, including how the fee was calculated. This will be essential to be able to maintain the fee if it is challenged by a proponent (see further below).

What happens if there is a disagreement with the proponent about payment?

Under section 6oAC of the NTA, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) can be asked to give an opinion on whether the fee is one that RNTBC may charge.

If the Registrar's opinion is that the fee may not be charged under section 6oAB, the RNTBC must withdraw the charge.^[14]

In forming its opinion, the Registrar can ask the RNTBC to provide information about the fee, including:

- the function performed or service provided to which the fee relates
- the amount of the fee
- time taken to write comments or submissions
- how the amount of the fee was calculated

Fee opinions published by the Registrar are available via the ORIC website: <https://www.oric.gov.au/for-corporations/native-title-and-rntbcs/native-title-fee-opinions>

[14] NTA, s 6oAC(3).

Relevance to ‘good faith’ negotiation standards

There has been some commentary from the National Native Title Tribunal (NNTT) about whether a proponent’s refusal to meet a native title party’s costs demonstrates an absence of good faith in the context of ‘right to negotiate’ negotiations.

In a 2018 determination, the NNTT stated that failure to negotiate negotiation costs “cannot, alone, be a basis for a finding of lack of good faith.”^[15] However, the NNTT elaborated that such a failure may “be a relevant circumstance in considering whether the relevant party has otherwise established absence of good faith.”^[16]

The NNTT has since considered the above position in light of the effects of section 6oAB and the developing ‘post-determination landscape’.

In *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC and Another* [2022] NNTTA 40, the NNTT observed at [165] that:

“In this post-determination landscape, and with s 6oAB of the NTA available to PBCs ... a new light is cast on the principle that the obligation to negotiate in good faith does not extend to providing financial assistance to a native title party to conduct negotiations.”

In that matter, the NNTT ultimately determined that the Grantee Party had taken a ‘rigid and inflexible approach’^[17] by failing to engage constructively in the overall context of the matter and found that the Grantee Party had not negotiated in good faith.^[18]

It appears that failure to meet reasonable negotiation costs is, at the very least, a relevant matter in any consideration by the NNTT about whether a Grantee Party has negotiated in good faith.

As the number of native title determinations across Australia increases, we may see the role of section 6oAB be the subject of further consideration by the NNTT with respect to questions of good faith.

^[15] *Rusa Resources (Australia) Pty Ltd v Sharon Crowe and Others on behalf of Gnulli* [2018] NNTTA 81 [100].

^[16] *Rusa Resources (Australia) Pty Ltd v Sharon Crowe and Others on behalf of Gnulli* [2018] NNTTA 81 [100].

^[17] *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC and Another* [2022] NNTTA 40, [166].

^[18] *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC and Another* [2022] NNTTA 40, [167].

Key takeaways

- Section 6oAB of the NTA is an important provision confirming that RNTBCs are entitled to charge a fee for various future act functions performed.
- Section 6oAB does not prevent RNTBCs from charging for other services where this is agreed by proponents, provided they are not prohibited by the NTA or PBC Regulations from charging the fee.
- When relying on section 6oAB RNTBCs should ensure they carefully document the services the fee relates to and make sure there is a proper basis for how the fee has been calculated.

Disclaimer:

This document is intended as a general guide only and does not constitute legal advice. There may be additional and important considerations that should be taken into account in your specific circumstances. If you or your organisation has a legal issue, you should obtain professional advice from a legal practitioner.