

**Opinion issued under section 60AC(2) of the *Native Title Act 1993*, in response to a request for reconsideration received on 28 October 2022**

**Context**

1. On 8 August 2022 the Registrar of Aboriginal and Torres Strait Islander Corporations (**the Registrar**) received a compliant application for an opinion on 34 invoices charged by a registered native title body corporate (**RNTBC**) under section 60AB of the *Native Title Act 1993* (**the Act**).
2. On 30 September 2022 a delegate of the Registrar issued an opinion in response to that application (**the Opinion**). During the process of considering the Opinion the RNTBC party withdrew four invoices.
3. On 28 October 2022 the applicant requested a reconsideration of the Opinion.
4. On 25 November 2022 a delegate of the Registrar wrote to the RNTBC requesting further information, due by 9 December 2022. Further information was provided to the delegate on 6 December 2022.

**Material considered in this opinion**

5. The following materials were considered in relation to this reconsidered opinion:
  - a. the request for reconsideration received on 28 October 2022;
  - b. further information in a letter emailed to the delegate by the RNTBC on 6 December 2022;
  - c. the Opinion and associated materials considered in relation to the Opinion and listed at paragraph [5] of the Opinion; and
  - d. a separate opinion issued by the delegate to the applicant and the RNTBC in relation to a request for reconsideration received on 19 July 2022 (**the Second Opinion**).
6. All materials considered have been copied to the applicant and the RNTBC.

**Non-substantive issues**

7. After considering the materials listed at paragraph [5] above, I have determined:
  - a. a transposition error occurred in Row 2 of the Opinion. Any reference to invoice 0412 in the Opinion was intended as a reference to invoice 0421; and
  - b. the Opinion made a specific finding in relation to factual issues raised with respect to invoices 0361, 0362, 0414 and 0421 (although the latter was erroneously referred to as '0412' in the Opinion, as above). The Opinion should have clearly stated that the specific opinion issued with respect to those four invoices in Row 2 was intended to prevail over the general opinion expressed on the majority of remaining invoices, which was the opinion expressed in Row 1.

8. As to the factual matters raised about invoices 0361, 0362, 0414 and 0421, no further submissions were made by the RNTBC in its submissions of 6 December 2022 to address those factual matters. Accordingly, as there is no additional information to consider and neither party has requested nor given reasons for seeking reconsideration of the substantive conclusion, I do not find there is sufficient reason to reconsider the conclusion expressed in Row 2 of the Opinion on invoices 0361, 0362, 0414 and 0421, except insofar as I clarify the matters in paragraph [7] above.

#### **Substantive issues**

9. In the 28 October 2022 request for reconsideration the applicant has indicated that the expedited procedure applied to the notices that were the subject of Row 1 of the Opinion.
10. The applicant, in the application for opinion of 8 August 2022, did not inform the Registrar that it considered the expedited procedure applied to the section 29 notices that were the subject of the relevant fees.
11. Therefore, the question of whether the expedited procedure applied to relevant notices was not considered by the delegate in issuing the Opinion.
12. The relevance of the expedited procedure was considered in the Second Opinion, issued by the delegate to the applicant and the RNTBC in relation to a request for reconsideration received on 19 July 2022.
13. Relevantly the **Second Opinion** concluded, at Row 2, if a notice under section 29 of the Act included a statement that the government party considers the relevant act attracts the expedited procedure, the normal right to negotiate process under section 31(1)(b) expressly does not apply. In such a circumstance, the fees could not be charged, because the activities performed in response to a section 29 notice will not be for negotiating an agreement under section 31(1)(b), as is required by section 60AB(1)(a) of the Act.
14. In summary the Second Opinion provided:
  - a. in Row 1, that if the expedited procedure **did not** apply to the section 29 notices, then the fees **could** be charged; and
  - b. in Row 2, that if the expedited procedure **did** apply then the fees **could not** be charged by the RNTBC.
15. ORIC is not aware that any party has sought review of the Second Opinion although review by the Administrative Appeals Tribunal (AAT) was available.
16. However, in its correspondence of 6 December 2022 the RNTBC has implied that, as a factual question, the expedited procedure did apply to some, if not all, of the invoices to which the 8 August 2022 application for an opinion relates.
17. Furthermore, the RNTBC has made submissions in its letter of 6 December 2022 requesting reconsideration of the conclusion expressed in the Second Opinion with respect to the relevance

of the expedited procedure referred to in paragraphs [13] and [14] above. I consider those submissions in detail below.

18. As neither the RNTBC nor the applicant has given further reasons or requested reconsideration of the substantive conclusions expressed in Row 1 of the Opinion, I do not find there is a sufficient reason to reconsider those conclusions except insofar as to clarify that the conclusions in Row 1 were only intended to relate, as a question of fact, to invoices for activities in response to section 29 notices where the expedited procedure **did not** apply.
19. If the expedited procedure did apply to any invoice listed in Row 1, as a question of fact, I consider that this would change the substantive conclusion and the fees **could not** be charged. This conclusion is consistent with the Second Opinion as restated above.
20. In coming to this conclusion, I have considered the submissions of the RNTBC referred to above and which I include an excerpt as follows:

*NTA s60AB permits registered native title bodies corporate (RNTBCs) to charge for costs incurred in, inter alia, negotiating an agreement under NTA s31(1)(b) (s31(1)(b) agreement), and negotiating indigenous land use agreements (ILUA). It is not required that such an agreement actually be signed. If this were the case, RNTBCs would not be able to charge for their costs incurred in negotiations because the other parties withdrew from the negotiations at the last minute, or because, despite good faith negotiations on all sides, the parties were unable to finalise an agreement. All that is required is that the work was for a negotiation towards either a s31(1)(b) agreement, or an ILUA.*

*The right to negotiate is a process where the native title party, the government party, and the grantee party must negotiate in good faith to reach an agreement about the doing of the act, or the doing of the act subject to particular conditions. The right to negotiate process starts with a s29 notice (right to negotiate notice). The right to negotiate process completes with a s31(1)(b) agreement, or an arbitral determination made under NTA s38.*

*The expedited procedure is a sub-process of the right to negotiate, which may apply where the government party attaches an "expedited procedure statement" to the right to negotiate notice. The native title party may object to the inclusion of the expedited procedure statement. If the native title party makes such an objection (and the objection is not withdrawn) the National Native Title Tribunal (NNTT) must consider the objection and uphold or dismiss the objection.*

*If the objection to the inclusion of the expedited procedure statement is upheld, the full right to negotiate applies in relation to the grant of the tenure, including the requirement to negotiate a s31(1)(b) agreement (NTA s32(5)). The government party may also voluntarily withdraw the expedited procedure statement from a particular notice, which also results in the full right to negotiate process applying to the notice (NTA s32(7)). In each of these cases, the inclusion by the government of the expedited procedure statement in a right to negotiate notice does not prevent the negotiation of a s31(1)(b) agreement.*

*In the process of resolving an objection to an expedited procedure objection, the native title party, the grantee party and the government party will frequently negotiate an agreement in relation to the grant of the relevant tenure. Where the expedited*

*procedure is found to not apply, either due to the NNTT upholding the objection, or because the State withdraws the expedited procedure statement from the notice, these negotiations will often form the basis of a s31(1)(b) agreement. Where the negotiations result in a satisfactory agreement before the objection process is complete, the native title party will generally withdraw their objection on the basis of that agreement. While in this second case, no s31(1)(b) agreement is formed, the negotiations that produced that agreement, can still be considered negotiations for a s31(1)(b) agreement, as if no agreement was reached before the objection was considered, the objection would have been maintained, and may have been upheld by the NNTT.*

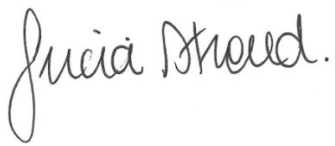
*[The RNTBC party] agrees that 60AB does not permit RNTBCs to charge for costs incurred in objecting to the inclusion of the expedited procedure statement. However, 60AB does permit RNTBCs to charge for work for negotiations that are aimed at a s31(1)(b) agreement. [The RNTBC party] contends that the negotiations conducted alongside the expedited procedure objection process, are negotiations towards a s31(1)(b) agreements; s60AB permits RNTBCs to charge for costs incurred in relation to those negotiations.*

*[The RNTBC party] issued invoices for the cost of reviewing the notices and the proposed tenements. These activities are essential requirements of negotiations between the parties, and are thus costs relating to negotiations towards s31(1)(b) agreements. S60AB provides that [the RNTBC party] may charge for these costs.*

21. My reasons for affirming that the substantive conclusion of the Second Opinion, restated at paragraph [13] and [14] above, are set out as follows:

- a. Section 29 of the Act relates to certain future acts done by the Commonwealth, a State or a Territory. It provides that before a relevant act is done, the Government party intending to perform the act must give notice of the act to the other relevant parties.
- b. A notice given under section 29 may include a statement that the Government party considers the act is an act attracting the expedited procedure. If the section 29 notice does not include such a statement, then under section 31(1)(b), the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the parties to the doing of the act.
- c. Section 31(1)(b) explicitly only applies unless the notice includes a statement that the Government party considers the act attracts the expedited procedure.
- d. It follows that an RNTBC cannot rely on section 60AB to charge fees for activities it undertakes in response to receiving a section 29 notice in circumstances where that notice states that the act it relates to attracts the expedited procedure. This is because no negotiations under section 31(1)(b) have taken place in such a circumstance, meaning the fees cannot have been incurred in performing the function of negotiating an agreement under section 31(1)(b) (per section 60AB(1)(a)).
- e. While I note on this occasion that the relevant RNTBC takes a different view in its submissions above, namely that its activities upon receiving the section 29 notice were still ultimately for the purposes of a section 31(1)(b) negotiation, this is not my view.

- f. In my view, the relevant question under section 60AB(1)(a) is whether the costs were incurred when performing the function of negotiating the agreement. At the point at which a RNTBC receives a section 29 notice stating that the Government party considers the expedited procedure applies, such activities are most accurately described as being for the purpose of determining whether to object to that statement (or for the purpose of preparing an objection to that statement), rather than falling within the scope of the RNTBC's function of taking part in section 31(1)(b) negotiations.
  
- g. In conclusion, where a section 29 notice states that the act the notice relates to attracts the expedited procedure, the normal right to negotiate process under section 31(1)(b) does not apply and the relevant RNTBC cannot charge the associated fees under section 60AB.



Tricia Stroud

Registrar

6 January 2023