

Prescribed Bodies Corporate: Charging fees for services

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I have made a number of presentations over the last 12 months to groups of NTRBs and PBCs about charging fees for their services. A PowerPoint presentation is now available on the NTRU website (see <http://www.aiatsis.gov.au/ntru/pbc.html>) that supplements the following brief outline of the issues. Some of these issues may also apply to claim groups, although the legal framework of the *Native Title Act 1993* (Cth) (NTA) and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC regulations) is specific to PBCs who are Registered Native Title Bodies Corporate (RNTBCs).

There is no doubt that native title holders should be compensated for the costs of engaging with those who want to access their native title lands. This currently occurs in a few ways: funding may be agreed in some circumstances as part of the settlement of the original claim or in future compensation claims; payments may be negotiated as part of an ILUA or future act agreement package; or costs may be agreed as part of negotiation protocol.

However, there were technical legal issues that made it unclear whether PBCs could charge fees for their services, in the same way that NTRBs/NTSPs do, when they are fulfilling one of their functions under the NTA. The *Native Title Amendments (Technical Amendments) Act 2007* added Division 7 (sections 60AB and AC) into Part 2 of the NTA to make it clear that PBCs could charge fees for services that they provide. A set of regulations concerning PBC fees were drafted in 2010 to introduce some further definitions and checks and balances. These regulations are not yet finalised but are expected to come in to effect this year.

At the PBC national meeting held in 2007, PBCs talked about the strain of volunteering time and energy for free to administer the PBC and attend meetings. The changes to the law are an important clarification, as many PBCs lack funds to meet basic administrative requirements.

What 'services' are provided by PBCs?

Before determining what fees a PBC may charge, we need to consider what business the PBCs are engaged in. This is not referring to any commercial or profit making activities that are occurring, but the 'business of being a PBC'. The business of the PBC is set out in their rule book or constitution. PBC rule books generally refer to the functions of PBCs under the NTA and PBC regulations as well as other activities such as cultural activities. It may be that for many PBCs their primary business is 'being consulted'. Section 60AB of the NTA refers to activities such as:

- negotiating an agreement;
- negotiating an ILUA or compulsory acquisition;
- commenting or making submissions on future acts;
- consultation on future acts; and/or
- exercising procedural rights.

These activities may require:

- consulting with individual native title holders (in person or by phone);
- arranging community meetings;
- participating in meetings organised by others; and/or
- facilitating access to land for inspection.

What can a PBC charge?

Once a PBC has determined what services it provides in meeting obligations under the NTA, it is then necessary to determine whether it is reasonable to charge for those services. PBCs can set their own fees but they must be related to 'costs incurred' in performing one of the functions (section 60AB(3)). The important threshold in the NTA is that the fee cannot amount to a tax. Case law

suggests that whether a fee amounts to a tax will depend on whether or not:

- there is a specific identifiable service;
- the fee is payable by the person who receives the service; and
- the fee is proportionate to the cost of the service (*Matthews v Chicory Market Board* (1938)).

The case law also distinguishes 'arbitrary exactions' that have the character of a revenue-raising exercise intended to offset administrative costs without regard to proportionality (*Air Caledonie In'l v Cth* (1998)). In essence, PBCs must be able to justify their 'pricing structure' based on either data of the cost of the services over time, or perhaps industry standard. It is imperative that RNTBCs not be treated any differently to other businesses and that a realistic approach is taken to what constitutes incidental costs and overheads.

It is relatively simple to charge for costs that can be tracked on a case by case basis, such as:

- phone calls;
- travel;
- meeting costs;
- staff time;
- professional advice; or
- advertising.

However, it is more difficult to determine what is a reasonable allocation of 'overheads' or indirect costs to a particular case. PBCs need to cover the costs of running the PBC, for example:

- office rent;
- computers and phones;
- stationery;
- insurance;
- administrative staff;
- book keeping and accounting or audit fees; and
- governing committee meetings and AGMs.

A fee structure could be developed by looking in more detail at the annual budget of the organisations. In some cases, however, it may be simpler to apply an 'administration charge' on top of

the direct costs. In most industries, 15-20 percent is considered reasonable.

The person/organisation being charged by the body corporate can request a review by the Registrar of Indigenous Corporations (ORIC) (section 60AC). In this instance the PBC may be asked to provide information, including:

- the function performed or the service provided;
- the amount of the fee; and
- how the amount, including the profit was determined.

The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2010 set out a specific time period to apply for the review, which can take up to five months before payment is finally made, regardless of whether the PBC has in good faith incurred costs (for further information see proposed regulation 21).

PBCs can take a proactive approach to this, by making their pricing structure available on request or on a website if they have one, as well as providing quotes upfront before any work is done. It would be useful to also give ORIC power to impose penalties or interest on proponents if appropriate, for example if the review is seen as vexatious.

Who PBCs cannot charge and what they cannot charge for

There are specific services and people you cannot charge fees. You cannot charge:

- native title holders, claimants, PBCs or NTRBs for your services (subsection 60AB(4)); or
- for participating in proceedings for a determination and court proceedings (subsection 60AB(5)).

There may be issues where native title holders are acting in a different capacity, such as wanting to negotiate a lease with their PBC. The issue of whether the capacity in which the person acts, makes a difference to whether they can be charged has not been clarified.

What are the implications of charging fees for services?

The reasonableness of the fee may hinge to some extent on the quality of the service provided. This may be reflected by accessibility, for example having someone available to answer the phone, providing documentation and meeting deadlines promptly. It may be useful for PBCs to give some thought to the level of services that it can offer, even for example developing a service charter that sets out what standard the PBC will set for itself, or what standard procedures it will adopt for commonly provided services.

Going down this track also requires PBCs to think more like a small business in terms of the kinds of obligations that might arise out of recouping fees, especially if the PBC begins to regularly receive income. If this is the case, PBCs may incur various statutory obligations in relation to income tax, GST and insurance for the corporation; as well as PAYG tax, super and workers compensation for employees.

By failing to provide adequate public funding to PBCs, governments have made it necessary for bodies corporate to be self sufficient. The regulations challenge current expectations, of governments in particular, who have been 'consulting' with Indigenous people for so long without recompense, to instead accept that these are 'services' that should be paid for.

Upcoming RNTBC State and Regional Meetings in 2011

By Tran Tran, PBC Project Officer, Native Title Research Unit, AIATSIS.

Registered native title bodies corporate (also known as prescribed bodies corporate or PBCs) are a key element of the native title system. There are currently 77 registered PBCs throughout Australia.¹ The primary functions of PBCs are to: protect and manage determined native title land and water in accordance with the laws and customs of the native title holders, as reflected in the objectives of their PBC; and to provide certainty for government and other parties wanting to access and use native title land and waters by providing a legal entity to manage native title.²

PBC experiences and aspirations are diverse and uniquely shaped by: the geographical location and size of the determination area, the nature of native title rights recognised, the level of future acts or development interests, the size and composition of the native title holding group; intersecting State and Territory legislation; the geographic dispersal of the native title holders; and the aims and aspirations of the group. Many PBC functions involve land and water management, engagement with government around service delivery, traditional and contemporary land use as well as development opportunities and enterprises. This work occurs within a common context where many PBCs have limited funding, support and capacity to carry out these functions.

¹ A PBC is a native title holding corporation and becomes a Registered Native Title Body Corporate (RNTBC) once it is established, approved by the court and entered into the National Native Title register. While PBC and RNTBC is used interchangeably here, the *Native Title Act 1993* (Cth) deals with them separately.

² Under the *Native Title Act 1993* (Cth) (NTA) PBCs must be established for each determination in order to hold in trust or manage native title rights and interests on behalf of native title holders. PBCs are currently regulated by the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations*, and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).