

**Submission to the Senate Finance and Public Administration Legislation Committee  
Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment (Economic  
Empowerment) Bill 2021**

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4 November 2021

**Introduction and disclosures**

Thank you for the invitation to provide a submission to this important inquiry that I received Monday 25 October 2021. It would be disingenuous if I did not disclose at the outset that as a member of ‘concerned Australians’ I advocated strongly for this Inquiry believing that the significance of the reforms proposed in the Economic Empowerment Bill justified a higher degree of parliamentary and public scrutiny than appeared likely when the Bill was tabled in the House of Representatives and read a second time. The Senate Selection of Bills Committee has canvassed the range of issues that need to be addressed comprehensively.

By way of background, I note that I am an economist and anthropologist and have undertaken research in the Northern Territory since 1979. Of direct relevance to this Inquiry, I chaired a review of the Aboriginals Benefit Trust Account (now Aboriginals Benefit Account or ABA) in 1984, commissioned by then Minister Clyde Holding; and I was involved in its re-review in 1989. Over the years I have been engaged as a consultant by several parties with direct interest in this Inquiry including the Northern Land Council, the Central Land Council, royalty associations, traditional owner groups and the NT Government.

I am currently a director of Karrkad-Kanjddji Limited and Trust that supports ranger groups in the Top End; and a director of Original Power, that informs traditional owner groups about their free, prior, and informed consent rights in relation to the use of their land. I am the chair of the research committee of The Australia Institute that undertakes research in the NT. I make these disclosures to emphasise that the views expressed in this submission are mine alone and should not be associated with any other entity.

This submission supersedes an earlier document ‘The Aboriginal Land Rights (Northern Territory) Amendment (economic Empowerment) Bill 2021: A brief critical assessment’ that I had prepared that is in the public domain.

**Preamble**

Minister Wyatt announced proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) on 12 June 2021 with the headline ‘Generational Reform to Empower Aboriginal Territorians’. He noted ‘The Morrison-McCormack Government has co-designed with the Northern Territory Land Councils a package of generational reforms to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) to activate the potential of Indigenous land in the NT’.

In a subsequent media release on 25 August 2021 ‘Land Rights Reforms Empower Aboriginal Territorians’ the Minister notes that ‘the Morrison Government has today introduced to

Parliament the most comprehensive set of reforms to the *Aboriginal Land Rights (Northern Territory) Act 1976* since its enactment, with the Economic Empowerment Bill' (my emphasis).

In August 1998, John Reeves QC released the final report of his comprehensive review of the Land Rights Act *Building on Land Rights for the Next Generation*. The review made such far-reaching recommendations for change that the Howard government that commissioned it quickly tasked the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, chaired by Lou Lieberman, to inquire into the Reeves Review.

In August 1999, the Committee released its final report *Unlocking the Future* based on prolonged deliberation and extensive community-based consultations. The Lieberman Report rejected almost all the proposals in the Reeves Review. Its first recommendation was:

The *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act') not be amended without:

- Traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group give their consent; and
- any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.

I provide this brief preamble to highlight the extent to which that principled approach articulated some 22 years ago has been largely forsaken in 2021. Today, with the support of the ALP Opposition despite noting that it has had the limited time of just one week to 'examine the sweeping changes this bill will make to Aboriginal land rights in the Northern Territory' (M Dreyfus, Second Reading Speech 2 September 2021), this Bill was to be passed into law with minimal parliamentary or public scrutiny. On 21 October 2021 the Senate Selection of Bills Committee referred this Bill to a brief inquiry to be completed by 25 November 2021. I advocated for such an Inquiry and I am pleased to be able to provide a submission as invited on 25 October 2021. I do note though that in terms of process such a rapid-fire Inquiry, while better than nothing, is unlikely to solicit sufficient input from traditional landowners in the NT. The process is a far cry from the care taken in the past to ensure there is widespread consideration of significant proposed changes to land rights law.

### **Concerns with the Economic Empowerment Bill**

In what follows, I want to outline some broader policy concerns with the Economic Empowerment Bill. These concerns are based on nearly 40 years of research in the NT much on the operations of the Land Rights Act; as well as the chairing of a review of the Aboriginals Benefit Trust Account (and Related Financial Matters) in 1984 for the Commonwealth Minister for Aboriginal Affairs. My views have been further galvanised in discussions with several colleagues in the group 'concerned Australians' of which I am a member. I have also discussed the proposed amendments with several others, including the Acting CEO of the Northern Land Council and the Senior Legal Officer of the Central Land Council.

The material on hand about the Bill and its development is quite limited: two media releases from the Minister, three Fact Sheets prepared by the National Indigenous Australians Agency (NIAA), second reading speeches in the House of Representatives recorded in Hansard, the Bill and Explanatory Memorandum as tabled. I have also referred to a few published sources especially annual reports of the four land councils, the Office of the Executive Director of Township Leasing and the ABA. I have on-hand a spreadsheet summarising 43 year of ABA financial history compiled as one element of my ongoing research into its operations. The Parliamentary Library has just published a detailed and very helpful *Bills Digest No. 28. 2021–22* focused on the Economic Empowerment Bill.

The Economic Empowerment Bill is divided into four schedules of proposed amendments to the Land Rights Act that I will briefly examine, focusing primarily on Schedule 1 as this encompasses the most significant proposals for change. In each case I will provide a brief background on the perceived problem to be addressed in the reform proposal, what is motivating the amendments. I will then look to highlight some of the silences in the problem representations; proposed solutions that in my view need further scrutiny and some of the potential unintended consequences that will likely arise from them. My approach is influenced by a framework ‘What’s the Problem Represented to be’ developed by Professor Emerita Carol Bacchi as a tool to facilitate critical interrogation of policy proposals. I will conclude with some brief commentary on the difficulty of undertaking comprehensive consultation as per the Lieberman Report recommendation outlined above and end with recommendations.

### **Schedule 1: Establishing the Northern Territory Aboriginal Investment Corporation (NTAIC)**

The most significant changes to the Land Rights Act that the Minister refers to are mainly contained in Schedule 1 (pages 4–46 of the Economic Empowerment Bill) that outlines the framework for establishing a new statutory authority, NTAIC. This new body will fundamentally alter the financial framework of the Land Rights Act through the establishment of a new investment and granting facility under a majority Aboriginal board appointed by the four Aboriginal land councils in the NT. This new facility will partially supersede existing arrangements that saw the Minister make decisions about ABA grants to or for the benefit of Aboriginal people in the NT mainly advised by a larger all-Aboriginal ABA Advisory Committee.

By way of synoptic background, the Land Rights Act established a complex financial framework that has been in operation now for some 43 years since 1978/79. To simplify considerably, the equivalents of mining royalties paid for mineral extraction on Aboriginal-owned land are paid to the ABA. For the 43 years for which data are available the ABA has received \$4.0 billion from consolidated revenue and has earned about \$350 million mainly in interest having a total income of just on \$4.4 billion.

Payments out of the ABA are paid firstly (within six months of receipt) to incorporated traditional owner groups from whose lands minerals and hydrocarbons have been extracted. These payments are fixed at 30 per cent of the ABA’s mining royalty equivalent income minus a mining withholding tax (MWT) currently levied at 4 per cent (more on this tax impost later). To date since 1978/79, just on \$1.2 billion has been paid to areas affected.

Secondly, the administrative costs of the four land councils are paid from the ABA, subject to ministerial approval of budgets. To date \$1 billion (minus MWT) has been paid to land councils. Up until 2006, 40 per cent of the ABA's income and up until 2003/4 sometimes more from supplementary funding (\$64 (7)) was provided to land councils. Since amendments to the Land Rights Act in 2006, the method of payment has changed: rather than being linked to a proportion of MREs, payments are made in response to applications made to, and approved by, the Minister.

Third, payments from the ABA are paid in grants to, or for, the benefit of Aboriginal people in the NT. These payments are subject to ministerial approval based either on proposals recommended by the ABA Aboriginal Advisory Committee or initiated by the Minister or his department/agency. It was always intended that these payments be available to all Aboriginal Territorians not just traditional landowners. To date, \$622 million have been made in such grants, often from ABA investment income that does not attract the MWT. This granting function will be subsumed into the functions of the proposed NTAIC.

The other main expenditure from the ABA since 2006/7 only (after amendments to the Land Rights Act in 2006) is for the payment of township leases and operations of the Office of the Executive Director of Township Leasing (\$58 million).

The balance of the ABA's income of \$4.4 billion minus expenditure of \$3 billion is a net equity (or reserve) currently of about \$1.379 billion.

The proposal for establishing an Aboriginal controlled statutory authority was first canvassed in 1984 in the *Report on The Review of the Aboriginals Benefit Trust Account (and Related Financial Matters) in the Northern Territory Land Rights Legislation* that I chaired and authored. It was recommended that a statutory body like the NTAIC be established in 1988/89 after a period from 1985 when authority for making grants would be incrementally shifted from the Minister to an all-Aboriginal board. This proposal sat in abeyance for 30 years despite occasional calls for reform by the NT land councils. It is now apparent that the proposal was revisited from 2018 in accord with unpublished reform principles developed by the land councils. NIAA in a Fact Sheet notes: 'the Government, the four NT Land Councils and the ABA Advisory Committee have met eight times since 2018 through an extensive co-design process to develop the new Corporation'.

What is proposed in a nutshell is the establishment of NTAIC as a statutory authority with two broad purposes: (a) to promote the self-management and economic self-sufficiency of Aboriginal people living in the Northern Territory; and (b) to promote social and cultural wellbeing of Aboriginal people living in the Northern Territory (\$65BA). It will achieve these purposes by making grants, making investments and providing financial assistance on commercial or other basis (\$65BB). NTAIC will be governed by 12 directors with its own bureaucracy. The directors will include two each from the four NT land councils (the Northern (NLC), Central (CLC), Tiwi (TLC) and Anindilyakwa (ALC)), one director nominated by the Minister for Indigenous Australians and one by the Minister for Finance, and two independent experts in finance and investment nominated by the Board. The Minister refers to this as 'an Aboriginal-controlled Commonwealth corporate entity' with 'an Aboriginal-led Board'. The NTAIC will receive an initial allocation from the ABA of \$500 million and then

\$60 million per annum for three years and then an unspecified amount of ongoing funding at ministerial discretion. On establishment, the NTAIC will receive almost as much as the ABA has allocated in grants in 43 years to 30 June 2021. The NTAIC's investment and granting activities will be guided by a published Strategic Investment Plan that it will be required to develop in consultation with Aboriginal people and Aboriginal organisations in the NT; and a small Investment Committee (minimum four members) that will advise the Board on the investment of NTAIC's money and on its Strategic Investment Plan.

Given the long-held aspirations of the land councils to control the residual income of the ABA and take over its granting functions under S64(4), the establishment of NTAIC is understandably warmly welcomed by them as made clear in a media release from the NLC dated 25 August 2021. Nevertheless, I am concerned that little analysis of the proposed institution has been undertaken by all stakeholders, especially Aboriginal Territorians. All too often negotiated or imposed amendments to the Land Rights Act have resulted in suboptimal or unworkable law that then requires further amendment (or abolition) that is both expensive and requires further protracted political negotiations to address.

I raise the following priority issues that I believe require further exploration and/or ministerial clarification:

- 1 *NTAIC purposes and functions:* The purposes of NTAIC include economic self-sufficiency and socio-cultural goals to be underwritten by grants, loans, and investments. This mix of purposes and functions is likely to be extraordinarily challenging to manage as the Australian government has found since 1978. This is especially the case as the S64(4) granting function of the Land Rights Act will now intermingled with an investment instrument that is being accorded priority in the naming of the Corporation as well as in all the media and fact sheet releases about its formation. The NIAA notes '... these reforms establish a new, Aboriginal-controlled body called the Northern Territory Aboriginal Investment Corporation (NTAIC) to invest money from the Aboriginals Benefit Account (ABA) to maximise the economic future of Aboriginal families and communities in the Northern Territory for generations to come' (my underlining). This government statement looks to prioritise investment over grant-making. There is little reference to the social and cultural aspirations of Aboriginal Territorians.
- 2 *The new NTAIC and the current ABA Advisory Committee:* Transitional arrangements will see the abolition of the existing ABA Advisory Committee. Simultaneously as the Economic Empowerment Bill was tabled, the ABA sought application for grants of up to \$120 million over the next two financial years to 30 June 2024 to support enterprises; communities; culture, language, and leadership; and land, sea and waters management and use—a very worthwhile set of objectives. It is unclear why these two initiatives are being undertaken simultaneously and whether this duality augurs well for a seamless transition to the new NTAIC. Again, I note that the economic is only one of several application categories listed here for grant making.
- 3 *Ministerial control:* While the Bill commits to pay \$680 million to NTAIC it is unspecified what will happen to the residual equity (currently more than 50%) in the ABA or if there are any projections on how this equity might grow or decline into the future, especially after the cessation of manganese mining on Groote Eylandt that

has generated more than half of the ABA's income in the last three years. It is also unspecified in the statute on what basis additional allocations to NTAIC will be made after the final legislated tranche of \$60 million is made. If the ABA's income from mining grows quickly, ministerial discretion on the expenditure of ABA income and equity will similarly grow. If it declines it is possible that the NTAIC will receive no or low future transfers from the ABA.

- 4 *NTAIC governance:* It is unclear why the current representation on the ABA Advisory Committee that is roughly population proportional (one member from each of the TLC and ALC, seven from the NLC, five from the CLC and a ministerially nominated chair) is now replaced by two members from each land council and four other members. The TLC and ALC representing an estimated 2500 and 1500 Aboriginal people respectively are overrepresented. On the other hand, those Aboriginal people in the NT who are unrepresented by the statutory land councils as they are not traditional owners of land under the Land Rights Act are allocated no mandated representation on the NTAIC Board even though S64(4) grants are supposedly allocated to or for the benefit of all Aboriginal people residing in the NT. Indeed, in the original Land Rights Act these grants were intended in part to be redistributive and address the disadvantage of Aboriginal Territorians who have not been granted land ownership rights. There is a danger that majority of directors elected by the land councils will face real or perceived conflict of interest in making decisions in relation to investments on Aboriginal land. It would be preferable if the majority Aboriginal directors of the NTAIC were appointed based on their expertise that aligns with community aspirations for diverse forms of development and social and cultural aspirations. Such a model would better reflect emerging trends to prioritise community-based forms of self-determination as articulated in the National Agreement to Close the Gap.
- 5 *Strategic Investment Plan:* This Plan required under S65C is a very powerful instrument that will shape the activities of NTAIC for periods of 3–5 years. In developing the Plan, the NTAIC Board must consult with Aboriginal people living in the Northern Territory; and Aboriginal organisations based in the Northern Territory; and have regard to any advice provided by the Investment Committee referred to in S65FA in relation to the Plan. This Plan is likely to be very complicated replicating the financial (what is to be spent/invested?), expenditure (on what?) and investment (in what?) policy challenges of the past four decades. The requirement for widespread consultation will be challenging and costly and will take a long time, if undertaken properly. The lack of widespread consultation over the Economic Empowerment Bill does not augur well for the statutory consultation process required for the Strategic investment Plan. It is imperative that in the development of the Plan it is required that the potential to complement rather than duplicate the activities of other statutory bodies like the Indigenous Land and Sea Corporation and Indigenous Business Australia is considered. It is also important that the Plan does not substitute for the legitimate expenditure by governments on Indigenous people in the NT as Australian citizens.
- 6 *Investment Committee:* This committee established by S65FA had several advisory functions including in the development of the Strategic Investment Plan. The committee can have as few as four members with one being the delegate of the Minister of Finance and one an independent member appointed by the Board. This

committee's functions focus as its name suggests on investment, but no distinction is made between active investment in enterprises and passive investment of NTAIC reserves/equity to earn additional income. Nor is it clear to what extent this committee will advocate for the NTAIC to prioritise investment (in both senses of the word) over granting functions. The power of this committee is evident in the requirements that the NTAIC Board must have regard to the advice of the Investment Committee regarding a Strategic Investment Plan (S65C(6)(b)) (emphasis added)

- 7 *Administrative issues:* The NTAIC administration is to be headed by a CEO only appointable with ministerial approval (S65GB). This will be a pivotal appointment as the CEO may, on behalf of the NTAIC, employ such persons as are necessary for the performance of the NTAIC's functions and the exercise of its powers (S65H). It is unclear why the appointment of the CEO should require the written agreement of the Minister (S65GB) rather than just the Board. It is noteworthy that there are no statutory limits placed on the administrative costs of the NTAIC.
- 8 *Review of NTAIC:* Given that the NTAIC is a new institution with significant resources and power, there is statutory requirement for it to be reviewed after seven years (S65JD). In my view this should occur far sooner (after two to three years) and the review should be stipulated as independent and by an eminent person. The Economic Empowerment Bill does not outline any pathway for the NTAIC to gain greater control of the ABA's equity. On one hand the parliamentary checks and balances as required by the Public Governance, Performance and Accountability Act would be essential as NTAIC is established and beds down; on the other hand, the notion of 'Aboriginal-control' would require far greater divestment of authority over time. Certainly, in the 1984 review of the ABA there were recommendations to allow the entire ABA to become a completely autonomous statutory authority.
- 9 *Beneficiaries of reforms:* The Minister has looked to promote the Economic Empowerment Bill by highlighting its benefit to the Northern Territory, not to Aboriginal Territorians. Hence in his media release of 25 August 2021 there is reference to NTAIC investments boosting the Gross Regional Product of the NT by an estimated \$60 million every year to 2029–30; while in his second reading speech the flow on benefit to the NT economy is differently estimated as 'by \$484 million out to 2029–30'. No basis is given for these estimates. In the foreseeable future the net additional benefit to the NT economy might be zero beyond the immediate spend of NTAIC grants and investments. Even were his estimates correct, it represents a low return on expenditure that could total as much as \$680 million (depending on the Strategic Investment Plan). And there is no guarantee that this return will be to Aboriginal Territorians; consequently, the activity of NTAIC could widen, not narrow, the significant socioeconomic gap between Indigenous and other Territorians. Just how the NTAIC and its Strategic Investment Plan will be accountable to Aboriginal people and organisations in the NT remains far from clear.
- 10 *Comparative institutions:* While boosting the economic development potential of the NTAIC, there is no apparent consideration of the investment performance of existing institutions. These institutions include several development corporations linked to the land councils like CentreCorp and the Aboriginal Investment Group. Similarly, the North Australia Infrastructure Facility has struggled to find viable investment projects in north Australia especially ones of benefit to Indigenous Australians. This is despite

recommendations made by the Indigenous Reference Group to the Ministerial Forum on Northern Development. There has also been no evident regard (stated publicly) for the activities of the Indigenous Land and Sea Corporation and Indigenous Business Australia that could dovetail closely with the current objects of the ABA or the proposed purposes of NTAIC. Development in remote Australia and on Aboriginal freehold land is risky; the NTAIC is being encouraged to embrace this risk deploying a significant share of financial resources raised on Aboriginal land and earmarked to or for the benefit of Aboriginal people residing in the NT. It is far from clear what risk assessment has been undertaken, arguably these might emerge from the Strategic Investment Plan.

## **Schedule 2: Streamlining the exploration and mining provisions of the Land Rights Act**

The amendments proposed in Schedule 2 are fundamentally different from those in Schedule 1 and are covered at pages 47–60 of the Economic Empowerment Bill. These amendments respond, eight years, on to recommendations made by Justice John Mansfield, Aboriginal Land Commissioner in his *Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976* dated 28 March 2013. This report was mandated by a provision in a Land Rights Amendment Act passed in 2006 that committed to a review five years after implementation. This schedule is instructive in demonstrating the time it takes, in this case 15 years, between the passage of amendments and their review and modification.

I do not seek to engage here with the extremely detailed 257-page Mansfield Review that canvassed the views of land councils, NT and Commonwealth governments and key mining and petroleum and gas industry groups. I note, however, that the Mansfield Review for some reason did not attract submissions from any independent policy analysts or academics or from traditional owner groups beyond land councils. The problem that was perceived to exist when the 2006 amendments were passed was that the Land Rights Act was not streamlined enough to ensure that exploration licence applications were dealt with expeditiously. The amendments aim to address most the recommendations from that review.

It is worth reiterating that the Land Rights Act requires that land councils can only act on the advice and with the consent of the traditional owners so that primary control over Aboriginal land lies with its traditional owners. At face value these right of consent provisions are maintained. Hence in the media release announcing ‘Generational Reform to Empower Aboriginal Territorians’ it is highlighted that the amendments aim to ‘Activate the potential of Aboriginal land by streamlining arrangements for exploration and mining licenses, whilst maintaining strong controls for traditional owners’; and ‘these generational reforms were key to the traditional owners having the right to free, prior and informed consent to land use and development proposals’ (my emphases).

Three proposed amendments are introduced that might potentially dilute the decision-making powers of traditional owners that need urgent clarification:

- 1 More discretion is given to land councils under S42 (4) to convene meetings with traditional owners to consider exploration licence applications as land councils deem



appropriate. This discretion to provide land councils with greater flexibility might result in more or fewer meetings, but the power to convene such meetings seems to lie entirely with land councils, not traditional owners.

- 2 A new S42 (4C) makes greater provision for a representative of the applicant for an exploration licence to attend meetings between a land council and traditional owners of the land affected. This amendment looks to provide opportunity for the applicant to directly provide information about the substantive content of a proposed exploration program and terms and conditions for an exploration agreement. While traditional owners maintain a right to exclude the applicant's representative from meetings, the onus is on them to seek exclusion via the land council. It would be more appropriate for traditional owners to be afforded the right to invite a representative of the applicant to a meeting.
- 3 A new S42 (4D) allows the Minister to authorise a specified person to attend a meeting between a land council and traditional owners in relation to an exploration application. It is far from clear why the Minister should have such right of oversight or regulation in a meeting; it is counter to notions of self-determination.

These amendments are purported to streamline the processes for traditional owners to either consent to, or reject, exploration applications on their land. But there is a possibility that their rights will be diluted. If traditional owners do not want exploration (and mining) on their lands, do these proposed amendments streamline their means to say no? And, in the absence of property rights in minerals, the streamlining of processes could commercially weaken the de facto collective property rights that traditional owners can exercise with right of consent provisions. This is because the potential of protracted negotiations is the most effective commercial levers that traditional owners can exercise in their dealings with applicants/developers. In the name of streamlining, traditional owners and communities affected by exploration and mining might be less, rather than more, economically empowered.

An ongoing silence of policy import is that while the traditional owners of about 50 per cent of the terrestrial NT that is held under the Land Rights Act have free prior and informed consent rights over land use and development proposals on their land, those who hold native title non-exclusive determinations (340,835 sq kms or an additional 25% of the NT) have no such rights. The existence of these two tiers of rights has the potential to be problematic, especially for any form of extraction that might cross lands held under differing legal regimes.

### **Schedule 3: Improving and clarifying the land administration provisions of the Land Rights Act**

Schedule 3 covers a wide range of land administration issues at pages 61–75 of the Economic Empowerment Bill. The NIAA Fact Sheet refers to these amendments as 'Strengthening land administration and local control'. The amendments look to strengthen community entity township leasing arrangements created by S19A amendments to the Land Rights Act in 2006; remove the (unused) powers to delegate Land Council functions that were introduced by Ministers Brough and Scullion in 2006 and 2015 respectively; improve the workability of the permit system on Aboriginal land; improve leasing certainty for

people living or investing in the mining towns (stranded assets) of Jabiru and Nhulunbuy; and accelerate the ability for land councils to enter contracts.

Overall, the problems that is represented to require these amendments are the inadequate operations of S19A to make them more streamlined; and to consolidate the powers of land councils both in terms of their administrative scale and ability to enter large contracts (with the proposed threshold expanded from \$1 million to \$5 million) without ministerial approval. The improvements and clarifications relate to strengthening 99-year community entity leases over Aboriginal townships that the NIAA Fact Sheet claims are 'increasingly favoured by NT Aboriginal people as an important way to enhance local decision making' and to 'make clear that community entity township leasing is the preferred model for local control'. These are highly contentious comments given that in the 15 years since S19A 99-year leasing was established as a tenure option by the Howard government, only nine townships with a total population of less than 5,000 have taken up this option, with seven of these leases held by the Australian government's Office of Township Leasing (on the Tiwi Islands and the Groote Eylandt archipelago) and only two by Indigenous corporations Gundjeihmi Aboriginal Corporation Jabiru Town (GACJT) and Ngarrariyal Corporation for Gunyangara near Nhulunbuy.

I will not address every land administration amendment proposed, but will rather focus on what appear at face value to be the most significant:

- 1 The Australian government is pressing ahead with streamlining the means to promote more S19A 99-year leases, with the problem of attracting investment to remote Aboriginal towns being perceived as the main problem. But this is occurring without any transparent review of the efficacy of the 2006 amendments to the Land Rights Act that established this new land tenure possibility, in marked contrast to the Mansfield 'seven-years on' review outlined above. A cursory glance at the income and expenditure of the ABA since 2007–08 shows that payments in relation to township leasing cost nearly \$58 million to 2020/21 but returned just over \$20 million in lease rents. This represents a transfer of ABA income to cover the imposed administrative costs of the Office of the Executive Director of Township Leasing (\$3.0 million in 2020–21) and upfront payments to the traditional owners of townships. Were such arrangements to continue without any cap, they could constitute a significant drain on the ABA with an opportunity cost to other interests that needs to be properly considered. The administrative costs of the Office of the Executive Director of Township Leasing might also be indicative of the costs of running the NTAIC administration.
- 2 In Schedule 3, 3AA an approved entity to hold a S19A township lease can have membership of 'Aboriginal people who live in the area of land known by that name' rather than being limited to the traditional Aboriginal owners of land. This raises the possibility that a corporation that is made up of non-traditional owners and possibly Aboriginal people who are recent arrivals in the NT could be the legally recognised landlord of a 99-year lease over Aboriginal freehold land. This possibility needs careful re-evaluation and amendment.
- 3 The Senate Scrutiny of Bills Committee raised concerns about the non-invalidity clauses in relation to agreements made to provide business certainty in a climate

where a mining lease will come to an end (S12D (7)). This provision seems to mainly target Nhulunbuy on the Gove Peninsula where some certainty is required post mine closure. Such a clause seems additionally problematic in this case because there are processes currently underway that are seeking to resolve a native title compensation determination and disputed land ownership in this region.

- 4 The proposed repeal of S28A to S28F (reversing the possible delegation of land council powers to an Aboriginal corporation) and of Section 74AA (reversing the sole right of a traditional owner who has issued a permit to revoke a permit) aim to consolidate and strengthen land management and land administration powers with land councils. Interestingly, this shift in approach runs counter to the preferences of previous ministers Brough and Scullion who oversaw the amendment of the Land Rights Act to dilute the powers of land councils against their wishes. (To be transparent I should note that I strongly opposed these moves that I saw as attempts to institutionally weaken land councils that I believe are of integral importance to the success to date of the land Rights Act.) Now according to the current Minister and Economic Empowerment Bill it is land councils who are apparently best placed in terms of resourcing capacity and institutional knowledge to exercise land administration functions. In combination with amendments proposed in Schedule 1 and Schedule 2 the governmental roles of land councils will be greatly enhanced with an inevitable dilution in the self-determining rights of traditional owners and local communities. This shift is occurring as land councils have become more wedded to the Australian government's developmental ideology for north Australia, a land councils' position likely influenced by budgetary and other controls exercised over them by the Minister.

#### **Schedule 4: Technical amendments relating to the ABA**

Schedule 4 looks to address a straightforward technical issue to ensure that debits from the ABA comply in all circumstances with the Australian Constitution (pages 76–78). To simplify considerably, royalty equivalents are paid to the ABA from consolidated revenue based on unaudited estimates of royalties paid to the NT and Commonwealth governments by mining companies. There is a possibility that under S64 (3) Aboriginal corporations in areas affected by mining might be overpaid under the current workings of the Land Rights Act. This uncontentious amendment ensures that any over or under-payment is adjusted.

The Economic Empowerment Bill does not address two issues that require urgent attention:

- 1 Just as land councils have advocated for full control of the ABA, a call now inadequately addressed by Schedule 1, they have similarly called since 1984 for the abolition of the Mining Withholding Tax (MWT) levied on the expenditure of the ABA's royalty equivalent income. The MWT was introduced in 1979 by then Treasurer John Howard because it was assumed that traditional owners as individuals would not comply with their obligations to submit tax declarations and pay their share of tax from compensatory royalty equivalent payments. But the MWT of 4 per cent (20% of the lowest income tax rate) is levied on payments made to statutory authorities (land councils) and Aboriginal incorporated organisations, not to individuals. There have been calls for the abolition of this tax by a diversity of stakeholders including in the Reeves review of 1998 and the Lieberman Report of 1999. In the last decade alone over \$75

million in MWT has been returned by the ABA to the Commonwealth Treasury. This is an unjustified tax that should never have been introduced and should now be abolished. At S65BN it is stated that 'The NTAI Corporation is not subject to taxation under a law of a State or Territory if the Commonwealth is not subject to the taxation'. It should be clarified that this tax exemption is inclusive of the MWT.

- 2 In the 1984 review of the ABA concern was raised that the investment returns on the ABA's equity were over-restricted by the then Audit Act. It was recommended then that the range of investments permissible should be greatly expanded to ensure a better return on reserves. Today, the equity of the ABA is managed under the Public Governance, Performance and Accountability (PGPA) Act 2013. In the last decade as the ABA's equity has increased from \$412 million to nearly \$1.4 billion its annual investment return has declined from about 6 per cent to less than 1 per cent in the 2020/21 financial year. This can be contrasted with returns to the Future Fund in this period with a ten-year performance of 10.1 per cent. The Australian government should establish the ABA as a future fund under management of the future fund Board of Guardians as a matter of urgency. In 2018 the former Aboriginal and Torres Strait Islander Land Account was established as the Aboriginal and Torres Strait Islander Future Fund earning a return nearly 10 times that of the ABA's reserve in 2019–20—\$117 million in the last financial year alone. Such an arrangement might also clarify the distinction between the equity held by the ABA and the proposed NTAIC. It beggars belief that the poorest Australians are gaining such a low rate of return on their sovereign wealth fund that is purported to deliver 'Generational reform to empower Aboriginal Territorians' (Ministerial media release 12 June 2021).

### **The complex challenges of consultation and co-design**

Minister Wyatt suggests the Economic Empowerment Bill is the most significant change to the Land Rights Act since 1976. This statement is debatable; there have been several significant amendments to the Act that have seen it expand from a document of 45 pages in 1976 to its current 395 pages. Nevertheless, the Economic Empowerment Bill will, as outlined above, deliver significant changes to the Land Rights Act and add many more pages to the statute that will result in it being 10 times longer and far more complicated than when initially passed. This means that meeting the Lieberman Report's aspirational recommendation that changes to the Act should be subject to the free prior and informed consent of traditional owners affected is becoming increasingly difficult if not impossible as comprehending the nuanced complexity of Land Rights law expands.

The first many (including myself) heard of these amendments was on their announcement on 12 June 2021 alongside the release of three Fact Sheets by NIAA. Subsequently, the Minister has been at pains to emphasise that these amendments have been 'co-designed' with the land councils. But there is no record in the public domain about what has been agreed in the co-design process or if this is documented in some written agreement? In his second reading speech the Minister notes 'At all stages of the process, the land councils have consulted around 220 elected landowners from whose land the ABA moneys are generated, agreeing to principles and providing input to the design of the reforms'. This observation is erroneous. While there are about 230 elected members of the four land councils, mines that generate royalties are only located at a handful of sites. Elsewhere in the Explanatory Memorandum it is noted: (at paragraph 6) that 'This Bill is informed by an

extensive co-design process with Aboriginal Territorians through their Land Councils. In particular, the ABA Reform Working Group, including representatives from the Commonwealth, Land Councils and the ABAAC [ABA Advisory Committee] has been meeting since 2018 to design ways to increase Aboriginal decision-making over the ABA for the benefit of Aboriginal peoples in the NT, and to co-design the NTAI Corporation and administration of Aboriginal land. These reforms have been requested by Aboriginal Territorians, through their Land Councils'. And elsewhere 'Government, the four NT Land Councils and the ABA Advisory Committee have met eight times since 2018 through an extensive co-design process to develop the new Corporation based on ABA reform principles developed by the NT Land Councils. People have been calling for these reforms since 1984'. It is far from clear when the land councils received the exposure drafts of the Economic Empowerment Bill? There is no evidence that Aboriginal Territorians and traditional owners have been provided adequate explanatory material in consultation meetings with land council or NIAA staff beyond web-based 'Fact Sheets'. It is unclear if traditional owners and other Aboriginal Territorians have provided input on the proposed reforms to the land councils negotiation team?

Given the complexity of the Economic Empowerment Bill, the extent to which Traditional Owners and Custodians and other interested parties are aware of the extent and legal effects of the proposed legislation can be questioned. This is especially given the exceptional COVID-19 circumstances since early 2020 whereby with biosecurity laws and lockdowns in place there have limited possibility for face-to-face community engagement on the reform package. Even the full membership of the land councils would have found it difficult to meet as a group during the period when these reforms were being finalised.

Returning to the Lieberman Report's recommendation referred to above, it appears that the views of the land councils who represent traditional owners on certain matters are being conflated with the free, prior, and informed consent of all traditional landowners. However, a co-design process dealing with institutional mechanisms that potentially affect the balance of powers/responsibilities between land councils and traditional owners that is only undertaken with one side of the equation is arguably a flawed co-design process. An apparent concession to widespread consultation is contained in S65C (6) which requires that the NTAIC Board in setting its Strategic Investment Strategy 'must consult with Aboriginal people living in the NT and Aboriginal organisations in the NT'. Of concern is that such consultation could again be limited to the members of the land councils: the statute could be more precise on which Aboriginal people and which organisations over what time frame. The sheer scale of the Economic Empowerment Bill makes it unlikely that it has been widely considered and that traditional owners have given their informed consent: this strengthens the case for prolonged parliamentary scrutiny of the Bill beyond the time afforded by this Inquiry; and for early independent review of its new provisions being legally guaranteed if it is passed.

### **Conclusion and recommendations**

The Economic Empowerment Bill has thus far escaped proper academic, policy, media, and wider Indigenous attention: it is important that it is subject to some Senate scrutiny even if this Inquiry is very time limited. The Bill and the processes for its development contain two currently popular terms 'Economic Empowerment' and 'co-design' that in the zeitgeist of

the present with its focus on the National Agreement to Close the Gap many, including the Opposition, seem reluctant to challenge. The continual reference to these terms in the proposed amendments has proven to be an effective political strategy to divert attention from a detailed policy analysis of the Economic Empowerment Bill. There are two main arguments that need to be emphasised. First, if the Economic Empowerment Bill is so faultless then why has the Morrison government sought to rush its enactment and avoid the widest possible consultations. And second, even the best intended law reform will always benefit from further transparent scrutiny and amendment to ensure its workability as intended. It is imperative that this Bill is not the first major reform package to be passed since 1976 without proper assessment that is now partially provided this Senate Inquiry.

My analysis raises questions about the limited 'co-design' and consultation processes evident in the development of the Economic Empowerment Bill as well as about the substance of the Bill. I end with two sets of recommendations:

**On process**, I recommend that the rush to pass this complex omnibus Bill is carefully reconsidered so that proper consultation can be undertaken with a wide range of stakeholders including traditional landowners, Aboriginal Territorians, and others. Rushing this Bill through the parliament is unnecessary, arguably unconscionable, and likely to raise questions about its legitimacy if passed without proper scrutiny and widespread support. **The Bill should be withdrawn; and the forms of widespread consultation statutorily proposed for its Strategic Investment Plan should be undertaken for the entire Economic Empowerment Bill prior to its passage.**

**On substance**, if my recommendation for deferral is ignored and the Bill proceeds to be passed into law in late 2021, then it imperative that a number of qualifying amendments are added. Below I list some priority amendments from my perspective:

1. Ensure that NTAIC is independently reviewed by an eminent person two to three years after its establishment, possibly as part of an over-arching review of the Land Rights Act post the successful land claims process.
2. Address the apparent bias in the proposed NTAIC board membership in favour of the four land councils who have negotiated this reform package with the Australian government; this bias could impact negatively on the interests of other Aboriginal Territorians.
3. Provide a guarantee that all ABA reserves and annual net income is transferred to the NTAIC if it is assessed as a success after independent review; and ensure an associated plan for greater devolution of authority.
4. Clarify in the law the expected trade-off between S64 (4) grants and NTAIC investments, and whether there is any government expectation that NTAIC retains any equity.
5. Provide a clearer statutory framework that defines how NT-wide consultations for the proposed Strategic Investment Plan are undertaken and how the Plan will mesh with initiatives by other Indigenous statutory authorities in the NT. This is especially important given the limited consultations over the Economic Empowerment Bill.
6. Exclude those amendments for streamlining exploration and mining applications that will potentially empower land councils, exploration applicants and the Minister and

simultaneously dilute the negotiation powers of traditional landowners and so disempower.

7. Streamline provisions for traditional owners to say 'no' to exploration and mining as well as to say 'yes'
8. Make a statutory commitment to an independent review of S19A 99-year leasing arrangements first introduced as a government initiative in 2006 that were excluded from the Mansfield Review.
9. Ensure that any corporation that holds a township lease has majority traditional owner membership so as not to transfer rights from traditional owners to corporations thus reducing the property rights of landowners.
10. Ensure that limits are placed on drawdowns from ABA reserves for S19A leasing arrangements; Aboriginal people in the NT are subsidising this experiment that has delivered very limited results in the past 15 years.
11. Abolish the unjustified, arguably racist, MTW, a call that has been made on numerous occasions since 1984 that remains unaddressed; and
12. Legislate for an ABA Futures Fund to ensure that the poorest Australians are provided the best possible return on their sovereign wealth fund.

These proposed amendments are limited to some priorities that are immediately apparent to me. Ultimately, the most comprehensive reforms of the Land Rights Act since 1976 deserve the most comprehensive scrutiny possible. Hopefully this Senate Inquiry will provide one means for the robustness, equity, and potential productivity of the Economic Empowerment Bill to be properly assessed by a fuller range of stakeholders than just its architects.

If this Senate Finance and Public Administration Legislation Committee Inquiry holds public hearings, I would be happy to appear and further discuss any of the issues raised in my submission.