Finance and Public Administration Legislation Committee

Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021

Submission from Greg Marks BA (UNSW); Dip Ed (Sydney Uni); M. Int Law (ANU)

Personal information relevant to this Inquiry

My first degree majors in Economics. I have been closely involved with economic policy issues throughout my career. My International Law speciality is Indigenous Rights (several publications). I am experienced in international development assistance on behalf of AUSAID – UN agencies, the World Bank, the Asian Development Bank.

Relevant experience, including in the Northern Territory - Department of Aboriginal Affairs (DAA) Alice Springs; DAA Land Rights Branch Canberra; Land Rights and Native Title Branch ATSIC. Responsible for ATSIC's management of the 1998 Reeves Report into the operation of the Land Rights Act. A member of ATSIC's team dealing with the Coalition's 10 Point Plan to revise the Native Title Act 1993. Attended Geneva for the inquiry by the UN Committee on the Elimination of Racial Discrimination (CERD) into the Australian Government's 1998 amendments to the Native Title Act 1993, and for drafting session re the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

These qualifications and experience have given me a close working familiarity with the Northern Territory Land Rights legislation, both as a field officer and as a policy officer.

This Submission covers a number of aspects of the Bill but is not meant to be a comprehensive response. It deals with aspects of the procedural handling of the Bill, adequacy of consultation, compliance with international human rights standards, and provisions that marginalise the role of Traditional Owners. It also notes the criticism of the Bill by the Standing Committee for the Scrutiny of Bills. A number of Recommendations for the handling of the legislation are made.

Introduction

The Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill ('the Bill'), amending the *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act'), potentially breaches Australia's obligations under International Law and practice.

The Bill is complex and lengthy, comprising four separate Schedules. There is limited connectivity or cross over between the Schedules. By combining them into one omnibus piece of legislation the difficulties of comprehending the legislation, holding meaningful consultations with Aboriginal and other stakeholders, and having informed public consideration of the Bill are compounded, in my view unnecessarily. The most significant part of the legislative package is Schedule 1 establishing a new Investment facility - the Northern Territory Aboriginal Investment Corporation (NTAIC). There is no reason why this major reform could not be presented in its own stand-alone Bill.

Recommendation 1:

The Bill be disaggregated into separate pieces of legislation.

Undue haste

The Bill purports to be about Aboriginal empowerment. It will, however, result in Aboriginal disempowerment, accentuating a trend of displacement of Traditional Owners in the architecture of the ALRA which began with amendments in 2006.

The proposed changes to the Act are of major import. The Minister in a media release of 25 August 2021 stated:

> 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.

Yet the legislation has only recently appeared in the public arena and is proceeding though Parliament quite quickly. This is undue haste. There is no apparent urgency. The Bill needs to have time for public consideration and discussion, particularly in the Northern Territory and particularly by Aboriginal people and organisations there other than the Land Councils. This appears not to have occurred to date.

There are major concerns with the extent of any consultation with Aboriginal Territorians (see below). It is desirable that an adequate period of time be provided for wide ranging consultations in the Northern Territory on such a major piece of legislation.

Recommendation 2:

The passage of the Bill be delayed to allow for further consultation and consideration

Consultation

There are two issues in regard to consultation and this Bill. The first is the adequacy of consultation in the development of the Bill. The second is the consultation provisions *within* the Bill, especially regarding the activities of the NTAIC.

Absolutely central to the operation of the Act is the informed consent of the Traditional Owners. No decisions can be made in respect of ALRA land without the informed consent of the traditional owners - this is the crux of the Act, reflecting the finding of the Woodward Commission that Traditional Owners lie at the centre of decision making over land. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) in their Report of August 1999, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Land Rights (Northern Territory) Act 1976,* made it clear that the informed consent requirement covered changes to the Act itself, viz:

> Recommendation 1
>
> The *Aboriginal Land Rights (Northern Territory) Act 1976* not be amended without:
>
> - Traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
> - Any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views

The relationship between consent and changes to the Act is central to the problem of the adequacy of consultations over this Bill to date. It should be noted that the HORSCATSIA formulation is consistent with international law and practice.

The Government has emphasised that the Bill has been ‘co-designed’ with Aboriginal Territorians. The Minister said in his 2nd Reading speech (25 August 2021) that:

> Importantly, Aboriginal people in the Northern Territory have asked for these reforms and they have been extensively co-designed with traditional owners in the Northern Territory and their land councils over the last 3½ years.

He also said that:

> Aboriginal stakeholders in the Northern Territory have strong voices through their land councils and this government has committed to only amend the land rights act with their support.
>
> 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.

Similarly, the Explanatory Memorandum (EM) to the Bill states:

> This Bill is informed by an extensive co-design process with Aboriginal Territorians *through their Land Councils*, and
>
> These reforms have been requested by Aboriginal Territorians, *through their Land Councils* (emphases added).

The Land Councils it appears are the gate keepers when it comes to consultation. This gatekeeper role is also evident in the Minister's statement that the land councils had consulted with 220 elected landowners. The 220 elected landowners are the elected members of the Land Councils.

This is not the way that consultation works for Aboriginal Traditional Owners. Consultation cannot be mediated through third parties, even elected representative parties. As is well known, a fundamental of Aboriginal law and custom is that Aboriginal people cannot speak for or make decisions about land for which they are not directly responsible according to that Aboriginal law and custom. The Government cannot delegate its responsibilities for consultation to Land Councils, who in turn are consulting indirectly through elected land council members. Now, there may be difficulties in consulting all Traditional Owners, especially in a time of travel limitations because of COVID 19, but a *bona fide* attempt has to be made by Government to consult widely and to obtain a cross-section at least of the views of Traditional Owners, and other affected Aboriginal communities or groups, before proceeding with legislation of such moment. This is not to displace the role of Land Councils, which is critically important, but to ensure that the appropriate consultation processes are followed.

With border restrictions being eased, and with the use of technologies such as ZOOM, which are used by Aboriginal communities, it would be possible to consult more widely and directly. This is a reason to delay the passage of the legislation i.e., to allow a consultation process to be put in place. If the Government is confident of its legislation this should not be a problem.

<u>The Section 64(4) problem</u>.

There is a particular urgency with direct consultation arising from the operation of s64(4) of the Act. As well as payments of royalty equivalent monies to areas affected by mining and payments to support the costs of land councils, payments from the Aboriginals Benefit Account (ABA) are paid under s64(4) in grants to, or for the benefit of, Aboriginal people in the Northern Territory. These beneficial grants can go to communities wider than the

communities living on ALRA land e.g., to communities on excision blocks from pastoral leases (Community Living Areas – these are a significant part of the Aboriginal population in the Northern Territory), communities within National Parks etc. Under this Bill the s.64(4) payments are to be rolled into the funds to be held by the NTAIC, which can make decisions to invest, loan or make grants. The grant function will no longer be quarantined. As over $600 million has to date been paid in such grants, and as these grants, some small, some larger, are very important to Aboriginal communities across the Territory in meeting a range of social, cultural and economic needs, the subsuming of the granting function into the functions of the NTAIC is a matter of potential significance to these communities. However, from the information provided they have not been consulted. This appears to be a serious flaw in the consultation process, and in terms of subsuming this function perhaps in the design of the Bill itself.

The EM includes a Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. It is claimed in the EM that:

> This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

With respect, I feel that this is at best arguable, and in my view in error. The Minister and the EM make much of the co-design of the Bill with the Land Councils. This co-design with the Land Councils is of course very important. However, to conflate co-design with consultation in respect of informed consent is incorrect. The established international norms in respect of free prior and informed consent for Indigenous peoples set a high bar. The provisions and jurisprudence of international conventions to which Australia is a party, such as the International Convention on the Elimination of All Forms or Racism (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), plus the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Australia supports, make it clear that some form of indirect consultation will not be adequate to meet Australia's international obligations in this regard.

This Bill, in my view, places Australia in jeopardy of being non-compliant with our international obligations. The negative findings of the CERD Committee in 1999 in respect of the amendments made to the Native Title Act 1993 caused Australia considerable international embarrassment. One of CERD's concerns was the lack of effective of consultation with affected communities.[1]

Recommendation 3:

> Further consultation with affected Aboriginal people and communities be undertaken to ensure compliance with Australia's international obligations.

Consultation provisions within the Bill

[1] See CERD Decision 2 (54) on Australia 18/03/1999 at paragraph 9.

The second concern with consultation arises in respect of decisions to be taken by the proposed NTAIC. The NTAIC will be a powerful financial investment institution with a large degree of autonomy, in some ways akin to a development bank. It will be 'a new player on the block' when it comes to Aboriginal Land, and likely to be a major player.

NTAIC will be Aboriginal controlled in that 8 members of the 12 person Board will be appointed by the Territory's 4 land councils. The EM states that:

> The Bill provides for strong governance mechanisms that support culturally informed, best practice governance; and
>
> The NTAI Corporation delivers on the Government's commitment to Shared Decision Making under the National Agreement on Closing the Gap and will contribute to Targets 4 8 and 15 by empowering strong economic participation and supporting Aboriginal Territorians' relationship with their land and waters.

This proposition relies almost entirely on the Land Councils' majority representation on the Board. There appears to be no place here for the direct consultation and informed consent provided for by the Act. The only place in the scheme of the Bill where there is some direct, as opposed to indirect, Aboriginal voice is in regard to the Strategic Investment Plan setting out NTAIC's funding and investment priorities for the forward 3 to 5 years. In developing the Plan, the Board must consult with Aboriginal people living in the Territory and with Aboriginal organisations based in the Territory.

This minimal and vaguely defined requirement for Aboriginal consultation occurs once every 3 to 5 years. There is no mention of Traditional Owners. Whether investments and other financial actions taken by the Board will need to be assessed in terms of informed consent by the Traditional owners, and other affected communities or groups being given adequate opportunity to express their views, is not clear on this reading of the Bill. If this is not the case, and the NTIAC is to be a relatively free-wheeling autonomous investment vehicle there is the danger of further alienation of Aboriginal Traditional Owners and communities. This would be the opposite effect of the claimed 'supporting Aboriginal Territorians relationship with their land and waters'.

Recommendation 4:

> Clarification be made as to the application of the Act's informed consent requirements in respect of any proposed activity by the NTIAC. If the Bill (a) does not require informed consent in respect of the activities of the NTAIC, or (b) it is not clear that it does, the requirement for informed consent either be so included or be clarified in the Bill.

Note: if changes designed to empower Aboriginal Territorians were in fact to further alienate them from the control and management of their land and waters this would, of course, be a travesty amounting to a form of dispossession. Without the ability for Traditional Owners to exercise informed consent, and for other affected Aboriginal communities or groups to be consulted and express their views, Traditional Owners and affected communities would become bystanders in their own land.

Approved entities

Schedule 3 of the Bill, Land Administration, notes that two Aboriginal organisations incorporated under the *Aboriginal and Torres Strait Islander Act 2006 (Cth)*) (CATSI) have been approved by the Minister as 'approved entities' – this is in relation to Traditional Owners leasing township areas on ALRA land to an Aboriginal entity. Under s19A such township leases, usually for 99 years with provision for rollover, are normally leased to a Commonwealth Statutory Office holder, the Executive Director of Township Leasing. However, because of concerns with an outsider having control over Aboriginal land an alternative model has been developed in a very limited number of situations whereby an Aboriginal organisation, an approved entity, can hold such a lease.

The EM notes that:

> Given the growing interest in community-controlled township leasing, also known as community entity township leasing, there is a need to standardise and clarify the processes around, and the operation of, these entities in the Land Rights Act.

I note that the evidence of growing interest in community-controlled township leasing itself is scant. In fact, the innovation of township leasing has been widely resisted in the Territory and few have been taken up, despite significant financial incentives to do so.

In respect of the Bill's provisions concerning 'community entities' the Bill may not sufficiently protect the interest of Traditional Owners. The Bill requires that in respect of such entities:

> a majority of members of the corporation must either be the traditional owners of land that constitutes, or forms part of, the area of land known by that name or they must be Aboriginal people who live in the area of the land known by that name.

This formulation leaves open the possibility of a community entity having a majority of members who are neither Traditional Owners nor *bona fide* community members, but rather Aboriginal people, residing in a community, who may not be from that community, or even from the Northern Territory. This may seem unlikely, but it is certainly feasible and, given the length of leases and the considerable power that the leaseholder wields (noting that once a lease is settled Traditional Owners have no further legal right to exercise informed consent over that area) this provision needs to be tightened.

Nominating an entity

In nominating a CATSI entity as the approved entity, the Land Council must set out a description of any consultation by the Land Council with Traditional Owners and others. However, there appears to be *no requirement for informed consent* involved in a Land Council nominating such an entity.

Overall, the position of Traditional Owners in this section of the Bill does not appear to be adequately protected. Taken with other sections of the Bill that potentially weaken the situation of Traditional Owners, this is a matter of concern.

Recommendation 5:

> Schedule 3 in respect of approved entities be reviewed with a view to strengthening safeguards for Traditional Owners.

Conclusion

The Bill is complex, and problematic. I have dealt with some areas of concern, but there are others including in Schedule 2 Mining. The Standing Committee for the Scrutiny of Bills has requested of the Minister further information, and suggested amendments, on matters of crucial concern. These concerns appear to be germane to the workability, security and parliamentary oversight of the proposed legislation. It appears that the matters raised by that Committee should be resolved before further Parliamentary consideration of the Bill, if we are to have confidence in the efficacy, equity, transparency, accountability and durability of the legislation.

Recommendation 6:

The Bill as presently drafted be delayed (or withdrawn):

- To allow for a process of consultation with Traditional Owners, Aboriginal organisations and other affected or interested parties, particularly in the Northern Territory;

- for matters raised by the Standing Committee for the Scrutiny of Bills Committee to be addressed and resolved; and

- for submissions made to this Inquiry to be duly considered.

Greg Marks
Canberra
1 November 2021