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

Personal Background

This submission is made in my capacity as a private citizen with a longstanding interest in Indigenous policy issues, both as a practitioner and as a researcher. I worked for Aboriginal communities in the East Kimberley in the late 1970s, for the Central Land Council in Alice Springs in the early 1980s, and subsequently as a senior public servant with both the Northern Territory and Commonwealth Governments. Among other things, I worked as a senior member of the teams which designed and drafted the ATSIC legislation including the forerunner to Indigenous Business Australia in 1990, the Native Title Act in 1993, and the original Land Fund and Indigenous Land Corporation legislation in 1995. I was also CEO of the Indigenous Land Corporation for two years from 2013.

Introduction

This submission focusses primarily on the policy design of the Northern Territory Aboriginal Investment Corporation (NTAIC) proposed by the Bill as presented. In particular, it identifies a series of design flaws within the NTAIC, as well as serious policy risks arising from the interaction of the proposed NTAIC and the existing policy architecture of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).

The Scrutiny of Bills Committee report

I note the report of the Scrutiny of Bills Committee in relation to the Bill. While I don't propose to comment on it further, I do wish to say that its analysis is supported and provide important protections for Aboriginal stakeholders going forward. In my view, the Committee's recommendations should be addressed by amendments to the Bill.

Review and accountability

The Bill proposes a review of the NTAIC provisions of the Act after seven years (clause 65JD). This provision is in my view inadequate in a number of respects: it is limited to the NTAIC whereas the NTAIC proposals have the potential to affect the operations of land councils, land trusts, royalty corporations, and other elements of the legislation (and indeed the operation of entities such as PBCs established under the Native Title Act 1993). Any review should be of the operation of the whole Act. It should also be unequivocally independent. Given the role of ministers in oversighting the legislation, and in setting parameters for the operation of land councils and NTAIC, a review should be undertaken by a person or persons of unquestionable independence. In my view, the legislation should require it be undertaken by a barrister with land rights law experience of ten years standing or a person appointed from a short list provided by the Auditor General and the Chair of the Productivity Commission. I make a recommendation for a much more comprehensive review below.

The fact sheets released some months ago indicated that there would initially be stronger accountability provisions applicable to the NTAIC without identifying the details. Presumably these will be laid down in the Rules which have not been made public. Given the significance of the Bill, and the interaction between the Rules and the Bill's provisions, further consideration of the Bill by Parliament should be deferred pending publication of the Rules.

The tendentious codesign justification

To begin, I wish to very briefly address a process issue, namely the significance and accuracy of the assertion that the Bill has been codesigned with Aboriginal Territorians through their land councils (EM para 5). Representation is a complex and multi-faceted issue, highly context specific, and open to differing interpretations. For example, it is ironic that the Bill includes provisions removing the potential for land council functions to be delegated to local communities. This was a provision included in the legislation in response to claims that the larger land councils did not adequately represent all groups of traditional owners (TOs) within their jurisdictions. These claims were advanced by some Aboriginal groups, and importantly for our purposes, by the then LNP Australian Government.

At its core, this Bill impacts on the one hand the balance of power between land councils and a wide array of amorphous and dynamically evolving groups of traditional owners, and on the other hand, between the land councils and their constituent TOs who own and manage land under Aboriginal tenure and a wider group of potential financial beneficiaries resident in the NT but who may have lost their land rights over the course of white colonisation and settlement, and thus have less engagement with land councils. **The result has been to shift the balance of power** in the legislation away from TOs **to the land councils**, and away from the wider group of potential beneficiaries **to the land councils** and their constituent TOs. Even just stating these facts demonstrates the complexities involved. The result has been a Bill that favours land councils over TOs, and that favours land councils and TOs over the wider group of potential beneficiaries. **Yet the codesign process was undertaken only with the land councils.** Yes, land councils have a proud history of representing TOs, and Aboriginal people generally across the NT; but in the context of designing a complex piece of legislation impacting different elements of the diverse Aboriginal population differently, it is patently inadequate to negotiate and codesign (effectively in secret[1]) with just one of those elements. The bottom line is that the codesign process was deeply flawed. The Government itself asserts that the Bill represents 'the most comprehensive set of reforms to the *Aboriginal Land Rights (Northern Territory) Act 1976* since its enactment'[2]. A flawed codesign process undertaken in secret does not provide anywhere near an adequate justification for the policy design that is being proposed. The Bill should be assessed and considered on its merits.

[1] I am not aware that there was any reporting of the codesign process prior to the Minister's June announcement on either the government's or the land councils' web sites.
[2] https://ministers.pmc.gov.au/wyatt/2021/land-rights-reforms-empower-aboriginal-territorians

Northern Territory Aboriginal Investment Corporation (NTAIC)

Contrary to the assertion in EM paragraph 10, the proposed **NTAIC will not be Aboriginal controlled**. Its status as a Commonwealth Corporation and the regulatory framework for Commonwealth owned corporations to which it will be subject means it will be controlled by the Commonwealth. Moreover, the Ministerial controls laid out in EM paras 13 /14 further reinforce this fundamental point. While there will be Aboriginal management of the corporation, it will be within parameters and guidelines laid down by the Government, and able to be tightened as necessary by the Government. In particular, clause 65D of the Bill provides the Minister with enormous capacity to control and shape the operations of the NTAIC through the mechanism of approving estimates of expenditure for running costs and capital expenditure. Moreover, the Aboriginal management of the NTAIC will be chosen by the NT land councils who are themselves entirely dependent on decisions of the Minister for their funding. The CEO must be approved by the Minister. There are no safeguards against ministerial influence being exercised over those appointments to NTAIC that are not elected either in terms of pushing or vetoing particular candidates.

One further issue related to the extent of Aboriginal influence within the NTAIC is that the composition of the Board (see clause 65EA) provides for equal representation of the four land councils. Yet on a pro rata population basis it is extraordinarily skewed in favour of the Tiwi and Anindilyakwa land councils. There are three points to draw from this design feature. The first is that the degree of Aboriginal influence (it is not control) on NTAIC is extraordinarily unequal within the Aboriginal population of the NT. The second, and for our purposes most salient point, is that **this gives the lie to any claim that the land council presence on the NTAIC Board is representative of all Aboriginal Territorians**. The NTAIC has been deliberately designed **to ensure the land councils**, and not the general population of Aboriginal Territorians, **have most influence** on NTAIC decisions. The third point to ponder is what might we expect the consequence of this unequal representation/land council dominance will be in terms of NTAIC's long term focus and activities, and in terms of the risks and vulnerabilities embedded in this Bill discussed below?

A key design parameter that has not been adequately discussed in the NT nor beyond is the potential change in focus of the ABA from a scheme designed to benefit all Aboriginal Territorians (whether or not they benefit directly from land rights) to one that potentially privileges those who do benefit from land rights. While this is a policy choice, it is a choice that properly should have been the subject of informed discussion with those affected positively and negatively as part of the codesign of the amendment bill, not just those who stand to benefit.

The change in focus arises from the shift from the ABA Advisory Committee recommending, and the Minister determining, ABA payments to or for the benefit of Aboriginal people living in the NT to **the NTAIC making investments/payments in accordance with an investment strategy yet to be devised**. The risk here is that the ABA will be transformed into a financial institution even more focussed on land council priorities whereas those Aboriginal

Territorians who do not have the benefit of having successfully reclaimed their traditional land (because it was alienated for pastoral or other reasons) will progressively find it more difficult to access these funds.

To put it another way, the original conceptual scheme of the ABA was to split the available funds in three main ways: (i) amounts for land council funding; (ii) amounts to communities affected by mining; and (iii) amounts to Aboriginal Territorians generally including those Aboriginal Territorians who do not benefit from land rights. These amendments leave categories (i) and (ii) untouched, but potentially strengthen the trend to allocate the majority of category (iii) funding towards land council priorities and away from beneficial payments. **They thus have the potential to effectively further shift the balance of that conceptual split away from compensation of those who do not benefit from land rights and towards those who have the benefit of land rights**. Hence the focus on the rhetoric of 'activating Aboriginal land' (EM para 9).

The response to this critique will be to point to the proposed provisions in clause 65BB (a) stipulating a (discretionary) function for NTAIC 'to make payments to or for the benefit of Aboriginal people living in the Northern Territory;' and in clause 65C (6) for NTAIC **to consult** with Aboriginal people living in the Northern Territory in developing its strategic investment plan. But this is the point: consultation is not decision-making, and a discretionary function does not ensure that the function is prioritised. Were the Government serious about maintaining a focus on general grants, the obvious way to address it would be to provide for say at least a third of the general members of the NTAIC Board to come from non-land council backgrounds.

The above discussion leads into the issue of **the coherence of the policy design for the NTAIC**. The proposed statutory corporation has three conceptually distinct functions: to make general grants from its available cash reserves; to invest in commercial businesses within the Northern Territory; and to invest its available cash reserves so as to sustain and build them for future use bearing in mind that the importance of mining on Aboriginal land, and thus the revenue flow to the ABA, may well decline into the medium term.

Each of these functions requires different sets of specific expertise. More importantly, **the functions will inevitably come into conflict with each other**: beneficial payments will not return a revenue stream and are likely to be minimised once the NTAIC builds a portfolio of business investments.

Business investments are inherently risky, and any bad investments are likely to create an excessive drain on resources before they are halted and written off. Significant financial losses cannot be ruled out. Such outcomes have concomitant opportunity costs for the funds involved, and inevitably create financial distress for any partners/joint venturers/employees. Business investments require high levels of due diligence, which in turn require high quality internal governance. **Sustaining good quality governance over the medium term** will be essential to accruing commercial gains, but this is exactly the areas that will be difficult in a domain where Indigenous (small p) politics are ubiquitous. This reality is exacerbated by the requirement for the elections of NTAIC Board members by land

councils to be carried out in a manner determined by the land council. The members of the land council executive committees have an incentive and the opportunity to shape these processes in their own interest.

The third area of building a capital base that will expand future opportunities is obviously in tension with the beneficial grant function and the ongoing pressures to invest in commercial opportunities. Moreover, if a decision were to be taken to pursue such an objective, the skills required to optimise investment returns are expensive to obtain and consistent returns are never guaranteed. Moreover, scale matters, and it would appear that more than 50 percent of the ABA's financial resources will be managed going forward under the antediluvian investment constraints currently in place.[3] This in turn will reduce the funds available for transfer to the NTAIC in the future. If there is a case for loosening investment constraints on NTAIC funds, why continue with the status quo for the untransferred balance of the ABA's funds?

The paragraphs above can be summarised as saying that the implementation of the *de facto* investment strategy pursued by the NTAIC (as opposed to the high level strategic investment plan required by clause 65C) will be inherently challenging and involve substantial risks at multiple points. Consequently, contrary to the assertions in the EM, **there is no guarantee that the NTAIC will 'empower Aboriginal peoples in the NT to activate the economic potential of their land for generations to come'** (EM para 1).

It is worth noting in this context that while the funds involved appear considerable ($680m for the first three years, drawn from existing appropriations – i.e. it does not involve new funding), when placed against the scale of the economic and social infrastructure requirements on Aboriginal land, the NTAIC will be unlikely to have the capability to make a substantial difference unless it can build its capital base over the coming two or three decades. In other words, **even if successful, the NTAIC is likely to have a marginal impact in raising the economic status of Aboriginal Territorians**. Yet its establishment gives the appearance of action, based on the reallocation of existing and future funds already appropriated for Aboriginal benefit, and may well diminish the capacity of Aboriginal interests to argue for greater social and infrastructure investment by governments on their communities and country. The overall outcome of these proposals may not be a net benefit, it may not even be net zero. **Conceivably the net impact could be negative** for Aboriginal interests in the NT.

Structural conflicts of interest

The **most serious design flaws** in the current NTAIC proposal emanate from the interaction of the current Bill with the ongoing and well established role of the land councils in empowering traditional owners (TOs) to consider proposals from third parties for access to

[3] The Australian Government's Future Fund has maintained a ten year return on investment of 10.5%, well above the returns to the ABA over the last decade constrained as it has been to investments in government bonds or approved bank deposits. See https://www.futurefund.gov.au/investment/investment-performance.html

their lands. The framework of the ALRA and the role it gives to land councils to mediate third party requests for land access by ensuring that proposals are considered carefully and that responses are developed based on a statutory requirement for land councils to act on the advice of TOs have been extraordinarily successful over the past 45 years. The legal framework has proved to be an innovative means of ensuring TOs were insulated from approaches by developers prepared to take inappropriate advantages and that they were able to make informed decisions on highly technical and complex issues. Yet the success of this framework is built on **the implicit assumption that Land Councils will act independently** and indeed in effect as a fiduciary. **The NTAIC proposal has the potential to undermine that assumption**.

As outlined above, the NTAIC has been designed to be dominated by land council interests, and will likely be dominated by the members of the various land council executive committees. Members of the land council executive committees inevitably establish close relationships with the staff of their respective land councils.

Clause 65ED provides for **the NTAIC Board to appoint the two 'independent' Board members**. Despite the provisions of this clause, it is clear to me that it does not ensure that the two independent board members will in fact operate independently. The Board will have an interest in ensuring that the appointed Directors will not rock the boat. The 12 month limitation on appointment of former land council staff is no guarantee of real independence; a period of five years would be more realistic. The reality is that given the risks that the NTAIC will need to address and overcome, and the importance of high quality governance discussed above, the potential for **poor quality independent directors represents a further serious vulnerability**. The designers of the Bill ought to have given this issue greater thought and consideration. To be clear, I strongly support the use of independent directors, but they must be truly independent to fulfill their potential contribution.

The likely focus of the NTAIC on investing in commercial opportunities on Aboriginal land will mean that there will be a risk that proposals will be made and presented to TOs from NTAIC for particular developments and that in relation to such proposals the land councils' role as an independent adviser to the TOs and facilitator of good process regarding land use will be compromised. There are **two obvious ways in which conflicts of interest are likely to emerge**.

First, the likely crossover in membership of key personnel in the land council and the NTAIC will make it extremely difficult for the land council to independently assess NTAIC proposals involving use of TOs' land and to provide neutral and objective advice to TOs.

The second way in which decision-making processes may be subverted is that the NTAIC Directors are likely to know TOs and indeed may well have personal relationships within TO groups. While it can be expected that most land council and NTAIC directors would act ethically, it would be naïve and foolish to assume that all will do so in all circumstances. While the Bill includes various provisions that are directed to disclosure of the interests of Board members (clause 65EI) these may not be adequate in highlighting personal conflicts

of interest. For example, the disclosures are to be made to the 'responsible entity' for the Director, (i.e. the land council that they represent). The problem is that this relates to existing interests, and will likely be dealt with as if it is a proforma matter (i.e. 'just government business'). Determined individuals will find ways to avoid scrutiny, direct involvement etc. The losers from any degradation in ethical practice will be the TOs who should have had the benefit of independent and high quality advice.

The policy design of NTAIC opens to door to **an even more serious and insidious possibility**, namely, **the potential for corporations and/or governments to seek to influence** land council decisions and advisory processes by encouraging the NTAIC to invest in or engage in particular commercial projects, **thus weakening the regulatory oversight role** of the land councils, and/or establishing commercial cash flows to TOs that effectively bypass the land councils' fiduciary oversight role. While context specific, these sorts of strategies may well be legal. However they rely on the effective dismantling of the robust culture of independent oversight of third party land use proposals that has been one of ALRA's strengths for almost five decades, and in turn this could open the door to potentially illegal activities to emerge.

To add some texture to the arguments outlined above regarding the NTAIC policy design flaws, it is worth highlighting **a major deficiency in the NTAIC's architecture** that will contribute to poor governance and potentially open a pathway for inappropriate influence to be exercised. The absence of constraints on subsidiary remuneration provide an avenue for transmitting significant financial benefits to NTAIC Directors over and above their land council and NTAIC remuneration. While legal, the prospect of such benefits has the potential to incentivise key players within NTAIC and thus the land councils to support the relevant commercial activity based on expected access to fees rather than the merits of the proposals. The Bill provides that the NTAIC has the power to establish subsidiaries and enter into joint ventures and partnerships (clause 65BD). It provides for set processes to determine remuneration in relation to the Board, but not for subsidiaries and joint ventures which can provide remuneration well above the rates set by the Remuneration Tribunal. The potential for inappropriate influence clearly exists and it is far from clear that there is any watertight mechanism to either ensure remedial action is taken or to bring any such arrangements into the public domain where sunlight might operate as a disinfectant. To sceptics who might respond, this could never happen within the tight regulatory framework of the Commonwealth, I merely point to the serious and still unaddressed governance problems at the Indigenous Land and Sea Corporation (ILSC) over the past two years.[4] These arose at least in part from proposals by the ILSC Chair to effect a restructure which would have removed some Directors from subsidiary Board positions paying fees above those set by the Remuneration Tribunal for attendance at the Board.

The original policy design of ALRA was implicitly based on protecting TOs from inappropriate pressure from corporations and unethical individuals – a risk that has, by and large, been successfully mitigated over the past 45 years. Looking forward, it is apparent that **the risk of**

[4] See this blog post, and the associated material on the ILSC FOI Disclosure log for the details: https://refragabledelusions.blogspot.com/2021/02/ilsc-governance-issues-broader.html

co-option and inappropriate pressure on TOs and land councils by governments is also real. Where governments attach high political value to facilitating particular commercial developments (e.g. the Ranger uranium mine in the 1970s; the Beetaloo Basin today[5]) the temptation to tilt the playing field may be hard to resist.

The policy design established for NTAIC provides future governments with significant mechanisms to incentivise NTAIC, and thus the land councils, to support particular projects should they decide to use them. The approval – or more insidiously the threat of non-approval – of **future fund transfers** from the ABA to NTAIC (involving substantial discretion over their use for key NTAIC decisionmakers) is **entirely subject to Ministerial discretion**. Other less formal mechanisms are available such as making specific grants from non-ABA sources to encourage NTAIC to invest in particular projects. These government processes are increasingly done with minimal transparency. The fact that the Minister allocated $100m from the ABA to the Land Councils (over two years) as part of a stimulus package[6] at the very time he was negotiating with the land councils over this legislation, but without disclosing that he was involved in this process, provides a salient example of how a co-optive process might operate in the future. Importantly, there is no apparent process for monitoring the allocation of these funds, and the performance of the undisclosed recipients, by the land councils.

There are **two general points to be made about co-option**. First, it is insidious and difficult to observe, let alone establish. The widely acknowledged degradation in transparency standards across the public sector in Australia, and the fact that the Indigenous Australians portfolio is not immune from this trend, serves to increase the risk of inappropriate co-optation going forward. Second, the existence of co-option obviously harms those directly affected, but it also undermines governance standards more generally within affected organisations (in this case, the NTAIC and the land councils) with concomitant negative impacts on the quality of outcomes more generally. Co-option exists in a grey zone between appropriate advocacy and influence and illegal behaviours; however the risk is that if it is allowed to occur in secret without governments being required to justify their actions, then it will inexorably shift towards the zone of soft corruption. **The current Bill** does nothing to prevent such a shift, and indeed **opens multiple avenues that increase the likelihood of soft corruption occurring**. For these reasons, the Bill, and in particular the flawed proposals for NTAIC, are deeply regressive and will ultimately harm the institutional framework that has underpinned extraordinary increases (off a zero base) in Aboriginal political and policy influence in the Northern Territory over the past 45 years.

One of the lessons of the last five decades of Indigenous policy is that when high profile policy failures occur, it is Indigenous people who are blamed. Yet in my experience, such failures can most often be traced back to a failure of policymakers and governments to take seriously their responsibilities for regulatory oversight. This Bill takes this experience a step

[5] See https://www.industry.gov.au/data-and-publications/unlocking-the-beetaloo-the-beetaloo-strategic-basin-plan/the-beetaloo-sub-basin
[6] https://ministers.pmc.gov.au/wyatt/2020/100-million-stimulus-indigenous-businesses-and-jobs-nt

further by embedding lax regulation and perverse incentives into the legislation itself. The Bill should be withdrawn and reconsidered.

Recommendations

1. **The committee should recommend that the Bill be withdrawn and the elements relating to the NTAIC reconsidered and redeveloped. There is a strong case, based around both the moral case for compensation and the policy case for self-determination, for Aboriginal people to control the ABA and its ongoing funding, but the current proposal when subjected to close analysis is not consistent with that vision.**
2. **The committee should recommend that the Minister address the issues raised by the Scrutiny of Bills committee report. In the (likely) event that the Bill is enacted, the committee should recommend that the Government introduce new amendments within six months to address the Scrutiny of Bills committee recommendations.**
3. **The committee should recommend that any redevelopment of the NTAIC proposal should be subject to an open and transparent codesign process, ideally independently facilitated, with a broad representation of all relevant stakeholders, and then be given a comprehensive public consideration through the release of draft legislation followed by a detailed Parliamentary committee process.**
4. **The committee should recommend that an immediate, comprehensive and fully independent review be undertaken of the whole of the ALRA with terms of reference designed to draw out a coherent and optimal framework for the transfer of responsibility for the ABA to Aboriginal control as well as the best structure for maximising Aboriginal involvement in commercial activities on their lands should they desire such activities. Such a review would provide the optimal foundation for implementing comprehensive reforms. Accordingly, in an ideal process, it would occur in advance of the process suggested in rec.3 above. In any case, it is well past the point where the ALRA is in need of a comprehensive and overarching review to map out a roadmap forward.**

M C Dillon

30 October 2021