

Some comments on supportive submissions to the Senate Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021

There are now over 60 submissions lodged with the Senate Finance and Public Administration Committee in its Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021. This is quite a remarkable number given the short two-weeks window to make submissions. From my reading of the submissions there are just five that support the Bill (from NIAA no 14, from the Minerals Council of Australia no.27, from the NT Aboriginal land councils no. 48, from APONT (that includes the NLC and CLC as members) no. 49 and from the ministerially appointed chair of the Aboriginals Benefit Account no. 53. The nearly 60 submissions that take issue with the Bill (at 17.11.21) mainly focus on the view that the consultation process was inappropriate, questioning its adequacy and whether the proposed changes are understood by those on whom they will impact; and issues of substance, aspects of the Bill that need amendment/deletion or addition.

I am not going to comment on the submissions that oppose the passage of the Bill as it stands, but instead look to highlight some shortcomings and errors in the submissions that support the Bill, focusing especially on the financial workings of ALRA that I have researched since 1982. I will divide these five submissions into three groups: the co-designers of the Economic Empowerment Bill (13, 48 and 49) who use some similar language suggesting a degree of collusion or perhaps shared viewpoint and some pushback to critical submissions already in the public domain; submission 27 from the Minerals Council of Australia; and a somewhat unusual submission from the ministerially appointed chair of the ABA Advisory Committee.

Submissions 13, 48 and 49

These are the only three submissions that refer to the 12 principles that were central to the NT Aboriginal land councils' position on reform of the ABA; NIAA refer to the principles, the land councils and APONT make them publicly available for the first time (to my knowledge). There is also reference in submission 48 at p9 to a study commissioned by Minister Wyatt requested by the land councils about governance arrangements for comparative institutions to the proposed NTAIC including Indigenous Business Australia, the Indigenous Land and Sea Corporation and the Torres Strait Regional Authority. This study has not been made publicly available; like the 12 principles it should be. Presumably the study was commissioned by NIAA with public funds. There could be a case for obtaining this report under FOI from NIAA (land councils are immune from FOI).

These three submissions belatedly reveal a lot about the behind-the-scenes negotiations since 2016 that have resulted in the Economic Empowerment Omnibus Bill.

All three submissions make considerable reference to consultations. But it is far from clear if these consultations comply with principle 2 of the *Principles Agreed by the Northern Territory Land Councils to Guide Reform of ABA Grant Processes* namely that 'consistent with Australia's international and human rights obligations, traditional owners must provide their informed consent regarding any changes to the ABA' (my underlining). It is assumed that traditional owners by electing members of the land councils have delegated them authority to provide informed consent on their behalf without consultation. This seems to be a key

issue that is informing widespread calls for more consultations in almost all submissions to the Senate Inquiry.

There appears to be a high degree of common understanding between NIAA and the land councils and APONT on the financial relationship between the ABA and NIAA (that is also referred to as the ABA Corporation by APONT). What is deeply concerning is that this shared understanding is not reflected in the Economic Empowerment Bill and one wonders if this interpretation of financial relations has been retrofitted after the Bill was drafted and in response to some criticisms of the Bill. Two issues stand out for me as having potentially serious consequences.

First, all three submissions refer to the \$500M to be transferred to NTAIC 30 days after a Strategic Investment Plan is tabled with the Australian parliament as an 'endowment'. This is not language that is used in the Bill. An endowment is generally understood as a pool of financial investments that indefinitely generates an income stream: they can be restricted or unrestricted; term or quasi, but these variations are unexplored. It might be argued that the Strategic Investment Plan will clarify how the \$500M will be expended, but then why use that language of 'endowment' in submissions? This is especially as principle 11 states that 'The ABA should not be treated as an 'accumulation' fund (only spending interest)'.

Second, all three submissions refer to \$60 million be available annually for grants, but again this is not stated in either the Bill or Explanatory Memorandum. Coincidentally, the current funding round (for the next two financial years) allocates \$60M to grants, a higher annual level than generally allocated in the past. There is also no reference to inflation-proofing this amount; and a suggestion that such practice will continue after the third allocation of \$60 million is made in 4–5 years' time (depending on when/whether the Bill is passed unchanged and when the NTAIC becomes operational). Such an amount appears quite arbitrary and is unrelated to either ABA income or equity. Interestingly in the original Justice Woodward recommendation in 1974 a formula based on proportions rather than absolute amounts was proposed. It is bewildering that such detail can be left out of the Bill and yet indications are that there is a shared understanding between the land councils and government about what is intended.

A shortcoming of the Bill is that additional payments that will be made to cover the administrative and capital costs of NTAIC and for granting purposes (as well as administering S19A township leases) remain entirely at the discretion of the minister. This means that after the third payment of \$60m it is possible that no further payments will be made; likewise, the administrative cost of NTAIC which will be paid by the ABA (currently provided in-kind by NIAA) will be at ministerial discretion. It is unclear how these arrangements accord with the notion that these amendments somehow empower Aboriginal Territorians to control the ABA.

It is erroneously noted in the APONT submission that the ABA has never been able to invest in large projects. This is wrong, as S64 (4) grants were strategically deployed in the 1980s to purchase several pastoral stations that were subsequently converted to Aboriginal freehold title after land claim; the land councils have also participated in some big projects with ABA funds including \$40M to outstations housing and \$100M over two years for post-COVID economic development projects approved in December 2020.

In relation to governance there are also several commonalities and inconsistencies in these three submissions. Perhaps in response to criticism that there is no requirement for board membership that is representative of wider NT Aboriginal interests, the NIAA submission notes that there is provision for 'two directors appointed by the Board, who must be independent from the Land Councils and Government. These directors must have land, water, or environmental management expertise and/or financial or business expertise and could also represent community interests (my underlining as this is not in the Bill). The NIAA submission also notes that 'The NTAIC will put decision making about beneficial payments in Aboriginal hands ...' but four of the 12 directors of NIAA may not be Aboriginal as the mandated skills for these appointments is land, water, or environmental management expertise and/or financial or business expertise not Aboriginality. The process for electing NTAIC Board members by land councils at S65EB of the Bill is most unclear: to be appointed a person must be a member of a land council and could even be the chair or deputy chair of the land council but presumably they still need to be elected under S65EB(4). APONT suggest that 'Land Councils may choose to elect their Chair or Deputy Chair or another council member as they wish'. If this is the case, there will be no possibility that those elected to be 'other Aboriginal people living in the NT' for at least four of the eight directors from two of the four land councils (Tiwi and Anindilyakwa whose members are all traditional owners). APONT notes at p16 that 'membership of land councils is open to all Aboriginal men and women who live in the Territory'. I am not sure that this is the case: It is my understanding that TLC and ALC have clan-based quota membership; and that NLC and CLC have community-based nominations with the NLC co-opting some women onto the council because of under-representation. At its website the NLC notes 'The NLC's constituency is a representation of the Traditional Owners within its jurisdiction'.

All three submission looks to emphasise that NTAIC will represent all Aboriginal Territorians, whereas the Bill emphasises elected land council members to the board likely representing traditional landowner interests, and board and ministerially appointed expert members. This could have significance especially if such representation is conflated with all Aboriginal Territorians in the development of the statutorily required Strategic investment Plan for NTAIC that will trigger the first transfer of funds (\$500 million) from the ABA.

Submission 27

The short submission from the Minerals Council of Australia is predictably supportive of the Bill, especially of the exploration and mining provisions (Part2) that it was consulted over and co-designed. It is interesting that this submission notes the correlation between payments made to the ABA and mining on Aboriginal-owned land, although it is the equivalents of royalties paid by mining companies (or in the case of uranium royalties near equivalents) that are sourced from consolidated revenue. The submission shows an apparent lack of understanding of the ABA suggesting that it is its equity that comes from minerals development on Aboriginal lands whereas in fact it is its income of about \$4 billion since 1978 that comes from mining royalty equivalents.

Given that the MCA is an industry lobby group it is not surprising that it emphasises both the value of mining to the NT economy and to Aboriginal interests. It notes that the centrepiece of the Bill is the establishment of the Northern Territory Investment Corporation [sic], 'an Aboriginal-led corporation to strategically invest and support locally-led projects that deliver jobs, business and wealth creation for Aboriginal people and communities'. It erroneously (like APONT) suggests that the new corporation will receive \$500 million followed by \$60

million for its first three years to support its activities, the absence of per annum might just be an oversight.

Submission 53

This brief submission is by Leeanne Caton appointed as chair of the ABA Advisory Committee in late 2020; while she writes her submission on behalf of the Advisory Committee it is unclear in what sense the submission is representative of the views of the other 14 land council nominated members.

The submission makes some inexplicable assertions. For example, with respect to the board of NTAIC she suggests its composition 'will place all decision making and financial delegations back in the hands of Territorians'. This statement suggests that they were once in the hands of Territorians; and overlooks the likelihood that some members of the board, especially ministerial nominations, are unlikely to be Territorians. It is also suggested that NTAIC granting processes will be better resourced and speedier than those currently provided by NIAA although this will depend on the administrative capacity of NTAIC (to be determined by the Minister) and the processes put in place for grant making under the Strategic Investment Plan. Interestingly, it is noted that new ABA guidelines were launched on 30 August 2021 just after the Bill was tabled in parliament. This submission seems to conflate NTAIC grant-making with investments; assume that NTAIC processes will be more streamlined than current processes; and that NTAIC investments will be successful. On that basis it is recommended that the Bill, that will abolish the ABA Advisory Committee, be passed.

Commonalities

All five submissions that favour the Bill assume that NTAIC investments will be beneficial: in delivering jobs, business and wealth creation (submission 27); in the Government's willingness to acknowledge 'the strengths, success and dedication that we as Aboriginal people have in relation to ensuring the economic future of our people through large and long term investments and self-determination' (submission 53); it [NTAIC] enables large and long-term investments in Aboriginal businesses and communities that will generate a return on investment so more projects can be supported (submission 49); and [the \$500 million endowment] 'puts it [NTAIC] in a strong position to invest in Aboriginal enterprise and financial markets to grow the wealth and wellbeing of Aboriginal Territorians' (submission 13). Nowhere is there any reference to the issue of risk nor is there mention of the financial difficulties experienced by Aboriginal corporations that have made tourism investments in the Ayers Rock Resort and in hotels in Kakadu.

As noted above, NIAA, the land councils and APONT all make a distinction that is not in the Bill between what NIAA refers to as 'investment funding' (utilising the initial \$500 million endowment) and 'beneficial payment funding' (\$60 million per annum for three years to support NTAIC's beneficial payment program under S64(4) of the Act). This clear-cut distinction is absent from the Bill. While the Bill contains provision at S65JD for review of NTAIC after seven years, it is only NIAA (submission 13) that anticipates that this review will 'reflect on NTAIC's achievements, ensure that its functions are fit for purpose and further consider the strategic direction of remaining ABA funding'. In the meantime, after guaranteed payment allocations are made, NTAIC will need to annually petition the Minister for additional beneficial payment funding.

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