

Land Rights at Risk, again? Evaluation of the Economic Empowerment Bill

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- 1 I acknowledge the Wurundjeri Traditional Owners here in Naarm/Melbourne; and all those 1000s of Traditional Owners in the NT, many of whom either do not know that ALRA is about to be amended or who may not understand the complexity of what is proposed; I would also like to thank Sabine Kacha for the invitation to speak on the proposed 'codesigned' comprehensive amendments to the iconic Land Rights Act, the high water mark in Australian land rights law passed in 1976, arguably the only land rights law that complies with UNDRIP in Australia.
- 2 I need to make a few disclosures: as will become apparent as a Concerned Australian I believe that these amendments in what is called the Economic Empowerment Bill 2021 need a great deal more discussion and scrutiny and much amendment; I do need to acknowledge though that some of the current proposals arise from recommendations I made in 1984 when reviewing the ABA for the then Minister for Aboriginal Affairs; I also want to note that even though an academic I have worked as a consultant or expert witness for NLC, CLC, NTG and the Commonwealth and a number of Indigenous organisations over the years. I am a director of OP and the KK trust, two not-for-profits that work in the NT and I am the chair of the research committee of TAI that also undertakes research in the NT. I say all this to make it clear that what I am saying this evening, much of which will go into my submission to a Senate inquiry into this amendment bill and is already in the public domain, is my opinion alone.
- 3 The title of this talk links back to an earlier episode in 1998 and 1999 when the Howard government commissioned the Reeves review of the Land Rights Act that recommended a fundamental restructure of the Act; an edited volume *Land Rights at Risk: Evaluations of The Reeves Review* (1999) assisted land councils and Traditional Owners in the NT defeat these proposals seen to undermine Indigenous established rights.
- 4 As a long-time observer of policy in the NT, I was rather surprised in June this year when a significant omnibus amendment to the Land Rights Act, the Economic Empowerment Bill (EE Bill), was announced. Maybe I, like much of Australia, had been in deep COVID slumber? Or maybe there was a lack of openness and public discussion and debate in the codesign of the

Bill by the Australian government and the four Aboriginal land councils in the NT?

- 5 The headlines in Minister Wyatt's media releases sounded great: 'Generational reform to empower Aboriginal Territorians' made on 12 June this year at the famous the Barunga Festival in the NT near Katherine: it stated 'the Morrison -McCormack Government has co-designed with the NT Land Councils a package of generational reforms ... to activate the potential of Indigenous land in the NT' 'The centrepiece of the reform is a new Aboriginal controlled corporate Commonwealth entity ... to decide on and administer grants and investments in the NT'.
- 6 Simultaneously three Fact Sheets were released by NIAA the Minister's agency.
- 7 The first, was about a New Northern Territory Aboriginal Investment Corporation (NTAIC), a new Aboriginal controlled statutory body. The government, it said, is unlocking the \$1.3 billion in the Aboriginals Benefit Account to pave the way for Aboriginal landowners to activate the potential of their land (no mention is made of why these moneys were locked away in the first place?)
- 8 The second, refers to the Streamlining of exploration and mining on Aboriginal land – responding to an earlier review in 2013 by Justice Mansfield. 'These amendments will reduce the time and cost of processing licence applications on Aboriginal land to increase clarity, certainty and confidence for all stakeholders' it said. Really? All stakeholders? Including Traditional Aboriginal Landowners? Streamlining for whom?
- 9 The third, was about Strengthening land administration and local control. Apparently, 'NT traditional owners, through their land councils, asked for these reforms to modernise and support contemporary Aboriginal economic, cultural and social aspirations'. Have controls been weak? And has local control been lacking? If the bill is about such diverse aspirations, why is it called Economic Empowerment Bill and not the Economic, Social and Cultural Empowerment Bill?
- 10 Subsequently, there was silence for two months, one suspects the bill was being drafted. And then the Bill was tabled on 25 August with the media headline from the minister 'Land rights reforms empower Aboriginal Territorians' – identified as the most comprehensive set of reforms of the Land Rights Act 1976 since its enactment – in 45 years.

- 11 And from the Northern Land Council (NLC) one of the four land councils involved in co-design 'The NLC welcomes historic reforms to the Land Rights Act': 'this historic Bill represents years of effort by the NT Land Councils working WITH the Commonwealth government on the most significant set of reforms since the Land Rights Act came into effect in' and from the Chairman Mr Samuel Bush-Blanasi 'the creation of the NTAIC is the centrepiece of the reforms. This will create opportunities for investment and joint ventures in Aboriginal business and enterprises and large scale strategic investments that have never been possible before'.
- 12 And from Shadow Attorney-General Mark Dreyfus (on 2 September) in his second reading speech assurances that Labor will always back effective measures to support the economic empowerment of Indigenous Australians; and slightly hesitant conviction that the government has consulted on the design of the Bill with First Nations people who will be effected by the measures; in particular (and perhaps only??? my words) with the four land councils of the NT.
- 13 The problem with these massive omnibus amendment Bills (this one runs to 82 pps almost twice the length of the original act in 1976) is that the devil is in the detail; and that detail is extremely hard to follow as it is tacked onto an Act that is already **395 pages long**.
- 14 I have tried to understand what is proposed and that is what I will share with you all this evening, the parliamentary library is also making such an attempt in a Bills Digest yet to be released, others have focused here and there on bits of the act, but it is all very hard especially when there is such opacity on what has occurred in the negotiations between the government and the land councils and what trade-offs/deals have been done to create this new 'economically empowering policy'.
- 15 What has been surprising is that a Bill that will fundamentally alter the Land Rights Act has been promoted very unusually by a coalition of land councils and a Coalition government that as a default position has always looking to dilute land rights and lands councils at least since 1996 and the John Howard inspired turn in Indigenous policy away from self-determination. This extraordinary rapprochement just makes me (and 'concerned Australians') want to explore things in a little more detail. Surprisingly, the ALP is right behind the Bill as made very clear in the second reading debate on 18 October and has been very resistant to any Senate Inquiry.

- 16 Indeed, after concerted representations, ‘concerned Australians’ were assured that the Bill would not go to a Senate inquiry; in parliament in the second reading debate Adam Bandt was derided for raising concerns about the Bill; but the Greens and especially Senator Lidia Thorpe have persisted and just a few days ago on 21 October the Senate Selection of Bills Committee magically recommended the Bill for inquiry with the reasons for referral (as per Hansard) including:
- 17 • **Insufficient consultation** on the proposed bill with affected First Nations communities and Traditional Owners • **Potential weakening** of First Nations land rights • **Potential weakening** of consultation with Traditional Owners, particularly in relation to mining and exploration processes • **Strengthening** of Land Council powers • **Implications of changes to the ABA and establishments of the NTAIC.**
- 18 These reasons for referral seem to be very serious indeed and include both **process** issues—the extent of consultation (especially during 2020 and 2021 when for periods all remote parts of the NT were inaccessible biosecurity zones)—and issues of **substance**, will the amendments actually economically empower Aboriginal Territorians; or will they mainly economically empower others as has so often been the case in the past?
- 19 The Economic Empowerment Bill 2021 has now been referred to the Finance and Public Administration Legislation Committee for inquiry and report by 25 November 2021, 4 weeks from today with submissions due next Friday 5 November 2021—hardly providing time for Traditional Owners to respond. Then Parliament sits again on 29 November with an eye I am sure to enact the Bill into law.
- 20 I would encourage anyone listening this evening who is concerned by the Bill’s **substance**, that I will look to unravel shortly, to make a submission; but I also note somewhat pessimistically that from my experience such rapid fire inquiries rarely see any amendment to the proposed law.
- 21 The **substance** of the EE Bill is contained in four parts, with Part IV being largely inconsequential and procedural: it is about making sure that people affected by mining are not overpaid mining royalty equivalents out of consolidated revenue because in 2021 it has become apparent that overpayment is unconstitutional, but one suspects underpayment is not.
- 22 My main focus tonight in looking to unpack the complex legalities of the Bill will be on Part 1 because this is where the most significant changes will be made, changes that will fundamentally alter the financial workings

- of Land Rights that have already been undermined to a degree in the last 15 years since imposed amendments in 2006.
- 23 But before I do this let me just say a few brief things about the political economy of the NT because this jurisdiction is unusual in the Australian, even global, contexts; and it is heavily impacted by the Land Rights Act, the high-water mark of land rights in Australia fought for by an unusual alliance of the north and south symbolised in the formation of the tent embassy in Canberra in 1972. So just for a very brief, historically compacted, backgrounder on the NT:
- 24 **The NT population** is 246,500 (1% of Australia, 18% of the continent)
- 25 **The Aboriginal population** of about 80,000 is 30% of the total and about 10% of national Indigenous population.
- 26 **Historically**, the NT was among the last part of the continent colonised. From 1825-1863 it was part of NSW; from 1863-1911 part of SA; and in 1911 it was purchased by the Commonwealth from SA and administered by Canberra to 1978 when the NT became self-governing
- 27 **Land:** covers 1.42 million sq kms; **50% today is Aboriginal owned under inalienable freehold title**, 340,000 sq kms is covered by non-exclusive NT determination, 14,000 sq kms by NT exclusive possession, in total > 70% of the NT is under some form of Aboriginal title.
- 28 **The Governance of the NT is extraordinarily complex:** under s122 of the constitution the territory not state; so it only has 2 House of Representatives seats, 2 Senators (with 3 year terms); a unicameral NT Legislative Assembly, with 25 members, 5 or 20% currently Indigenous (still under-represented!); 9 regional councils; 63 local authorities; 72 remote communities (serviced); 560 outstations/homelands mainly serviced by numerous incorporated Aboriginal organisations; and four land councils that have statutory roles in managing Aboriginal owned lands.
- 29 **The economy** is highly dependent on the rest of Australia, 1% of the national population gets about 5% of the nation's GST revenue; and it is highly concentrated made up mainly of mining, public services, defence and tourism. Most of the mining by value currently occurs on Aboriginal-owned land, but as some mines close, there is a big push to open up Aboriginal lands to more extraction, like the shale gas fracking in the Beetaloo basin; and most of the tourism is to iconic destinations like Uluru and Kakadu, Aboriginal-owned places.

- 30 **Given my main current interest in the north is conservation** I also note that there are currently 15 Indigenous Protected Areas in the NT covering 260,000 sq kms which alongside Kakadu and Uluru means that 20% of the Australian National Reserve System is made up of Aboriginal owned land in the NT. Landowners are Caring for their Country!
- 31 **The NT economy and society are deeply divided spatially and socioeconomically:** most Indigenous people live on remote Aboriginal land, most non-Indigenous people live in Darwin and Alice Springs. More than half Aboriginal people in remote and very remote parts of the NT live under the poverty line and are hugely dependent on welfare support. In terms of Closing the Gap, the latest figures from Dashboard set up to monitor disparities under the recent National Agreement, indicates an employment disparity of just on 50% (85% of non-Indigenous adults are employed compared to 35% of Indigenous adults) in the NT. There are many reasons for such disparities, but Aboriginal people in the NT are truly land-rich and yet very poor. This is part of what is driving the quest for 'economic empowerment'.
- 32 **Unfortunately, and this has to be said,** the same political party that is driving this reform agenda is also the party that gave Aboriginal people in the NT the very disempowering NTER Intervention in 2007; and gave Aboriginal jobless in remote communities the Community Development program, draconian work for the dole that has levied 750,000 no show no pay penalties on the poorest Indigenous Australians, most living in the NT.
- 33 **Now back to the Economic Empowerment Bill after that short interlude.**
- 34 ALRA is unusually powerful law that has seen 50% of the NT, about 700,000 sq kms returned as inalienable communal freehold title to land trusts managed by land councils on instruction of TOs.
- 35 It is the only land rights law in Australia that provides landowners a right of veto, Free Prior and Informed Consent (FPIC) rights, at least at the exploration stage (since 1987).
- 36 It was also law established with an unusual financial architecture that is complicated and poorly understood. To simplify considerably to in part accommodate historical precedent, all royalties raised on Aboriginal land were to be returned to Aboriginal interests and divided according to a formula recommended by Justice Woodward in the Aboriginal Land Rights Commission in 1974: a split 30/40/30: 30% to areas affected by mining, 40% to run land councils (relatively independent of government) and 30%

to provide grants to or for the benefit of Aboriginal people in the NT, those who may not have land rights or may not be 'blessed' with an income generating mine on their land. Traditional Owners could also negotiate more payments in agreements, but that is another complication. These royalties were paid in part as compensation because Justice Woodward did not recommend that Aboriginal landowners be granted mineral rights, instead these were bequeathed to the new NT government in 1978. So, since then it is the equivalents of these royalties that have been paid to a new institution called the Aboriginals Benefit Account or ABA.

37 Since 1978 just on \$4 billion of mining royalty equivalents have been paid to the ABA and it has earned another \$400 million in interest and other income. And payments of \$1.2 billion have been made to areas affected as compensation, \$1 billion to land councils to administer the Act and Land Trusts, and \$600 million as beneficial payments with the balance about \$1.4 billion being retained as a reserve. I should say that at present the ABA is receiving about \$400m per annum in mining royalty equivalents which is 50 times what it received in 1984 when I reviewed it or 7 times in real terms discounting for inflation.

38 **Part 1** of the Economic Empowerment Bill is looking to set up a new Aboriginal development corporation NTAIC with half the accumulated equity in the ABA; this is a huge shift in the unusual financial workings of ALRA and reflects in part a desire by everyone to see Aboriginal landowners benefit more from their vast land holdings; they truly are land rich, but dirt poor for very many reasons – this is a real big ticket item for the four LCs, \$680 million, very understandably a golden prize sought on and off for nearly 40 years as land councils have watched a number of ministers who have controlled the ABA at times use what are regarded by Aboriginal Territorians as Aboriginal moneys for their **pet** projects; or else **veto** projects recommended by the ABA Advisory Committee, established to provide the minister guidance on grant making; or just **not** spend and so have funds accumulate in a reserve that earns very little, a fraction of what can be earned in a future fund.

39 All these resources could have been used far more productively to improve the dire socioeconomic circumstances of most Aboriginal people in the NT.

40 So, one might ask what is the problem with what is being proposed?

- 41 From my perspective, and I might be wrong, there are many potential pitfalls in the proposed arrangement to set up an Investment Corporation in a risky environment; with mixed objectives, at once commercial and cultural; with \$680 million transferred, but no clarity on the balance of the equity or future ABA earnings to still be controlled by the minister; with a governance structure that at once only empowers land councils, but also provides an oversighting role for the minister; and lots of structures to ensure **business investment** which may economically empower or may bankrupt? The appointment of the CEO of NTAIC will require ministerial approval; and it is far from clear if it is the NT or Aboriginal Territorians who will benefit; and there is no apparent regard to other Indigenous institutions and their travails, as well as their roles in similar 'development' activities.
- 42 It might all work out really well, but there is no provision for early independent review nor a pathway for Indigenous Territorians to get full control of the ABA: in the short term NTAIC is a move, but in the longer term does it go far enough?
- 43 **Part 2** is about implementing recommendations from a review of Part IV of the Act completed in 2013 and left to languish; there are no fundamental changes here because the FPIC rights of Traditional Owners (TOs) stay in place, but exploration and mining becomes easier for land councils to administer and for developers seeking exploration licences; making things easier just dilutes the leverage, if not the underlying rights, of TOs.
- 44 **And Part 3** is a grab bag of amendments, solidifying S19A 99-year township leasing imposed in 2006 against the wishes of Land Councils (LCs), at once strengthening the powers of LCS over permits and by reducing the capacity for delegations of their powers very contentiously brought in by Nigel Scullion in 2015 to weaken them; but simultaneously delegating to Aboriginal incorporated groups that might not even be land owners the right to hold a 99-year lease over Aboriginal land.
- 45 In raising these concerns about The EE Bill I might be called a **naysayer** unwilling to trust the land councils to look after the interests of what are their constituents; or I might be labelled **too sceptical** about conservative governments that have wanted to dilute land rights for decades now looking to co-design apparently empowering change; or I might just be **sensibly precautionary**?

- 46 If there was greater transparency in the negotiations and deal making between the government and land councils I might be less concerned. If I knew what the logic of the trade-offs that have been negotiated might be: I can certainly see the LCs becoming more powerful, I can see them sharing a vision to **'develop the north'** with the government, but such past projects mainly based on extraction from Aboriginal land have rarely benefitted Traditional Owners as the statistics on economic disparity and poverty I have presented show.
- 47 I would be more comfortable if I did not feel that the rights and interests of landowners might be diminishing at once to suit developers looking to access Aboriginal-owned land and to weaken leverage in negotiations provided by the right to veto and delay development.
- 48 I would be a lot more comfortable if I did not see Aboriginal townships potentially controlled by people who are not TOs to suit the agenda of a government that has believed for decades that townships need to be privatised for development purposes and to deliver privately funded and owned housing that so far have not eventuated, despite expenditure of tens of millions from the ABA.
- 49 I want to see the unjustified and arguably racist mining withholding tax (MWT) levied on mining royalty equivalents and costing Aboriginal people millions and millions since 1979 when introduced by then Treasurer John Howard abolished; and I want to see the ABA's equity better invested in a Future fund, in 2020/21 it earned just \$10 million on equity of over a billion!
- 50 Having observed operations of the Land Rights Act in the NT for over 40 years now, I am concerned that these amendments have not been thought through enough, they seem very risky, maybe even reckless. In looking for due process and a Senate inquiry I had hoped that the EE Bill might get thorough scrutiny, but I cannot see how this will happen with such a rapid Inquiry that almost seems symbolic: surely the most comprehensive set of reforms of Land Rights since 1976 deserve the most comprehensive scrutiny, especially by Aboriginal people in the NT, especially by Traditional Landowners.
- 51 I have a dozen recommendations that I will make to the Senate Inquiry, I could make many more. I actually think that as the Land Rights Act has almost ended its wonderfully successful land claims process, it needs some form of independent review by an eminent person as was the case

with the original act 7 Years On (by Justice John Toohey) and as were the 2006 amendments five years on (by Justice John Mansfield). Why are LCs as statutory authorities funded from MREs? Are land councils getting too close to government? Is it mere coincidence that as this codesign process was underway, Minister Wyatt was rapidly increasing Land Council budgets (out of the ABA). How can we be assured that LCs remain accountable to TOs especially over the massive jurisdictions overseen by the NLC and CLC; What is the future income stream of ABA? There are so many unanswered questions!

- 52 Let me conclude with my emerging recommendations that I will submit to the Senate Inquiry next week:
- 53 Ensure that NTAIC is independently reviewed by an eminent person three years after its establishment; indeed, I wonder if the whole of ALRA post the claims process needs review especially its financial provisions
- 54 Address the apparent bias in proposed NTAIC board membership in favour of the four land councils who have negotiated this reform package with the Australian government
- 55 Provide a guarantee of future transfers of all ABA reserves and a share of ABA income to NTAIC if it is assessed as success after review, and associated greater devolution of authority
- 56 Statutorily clarify the expected trade-off between s 64 (4) grants and NTAIC investments, and whether there is any expectation that NTAIC retains any equity
- 57 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
- 58 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
- 59 Streamline provisions for Traditional Owners to say 'no' to exploration and mining as well as to say 'yes'
- 60 Make a statutory commitment to an independent review of s 19A 99-year leasing arrangements first introduced as an imposed government initiative in 2006 and 2007 when the Howard government had a rare Senate majority
- 61 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 that may have majority non-TO membership

- 62 Ensure that limits are placed on drawdowns from ABA reserves for s19A leasing arrangements, Aboriginal people in the NT are subsidising this experiment
- 63 Finally abolish the unjustified arguably racist MTW; and
- 64 Legislate for an ABA Futures Fund to ensure that the poorest Australians are provided the best possible return on their sovereign wealth fund: in 2020/21 earned < 1% on equity because of Public Governance, Performance and Accountability (PGPA) Act limitations.

Thank you.