The Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021: A brief critical assessment

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Preamble

Minister Wyatt announced proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) on 12 June 2021 (the Saturday of a long weekend) 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 ALRA 'Building on Land Rights for the Next Generation'. This review made such far-reaching recommendations 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 extensive community-based consultations. The Lieberman Report's first recommendation was:

> The *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act') not be amended without:
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> - 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 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 could pass into law with minimal parliamentary or public scrutiny. Such sweeping changes would under normal circumstances be referred to a Senate inquiry for closer scrutiny. It is my understanding that this will not occur unless the government itself initiates an Inquiry as it did with the Reeves recommendations in 1998.

Senate Standing Committee for the Scrutiny of Bill

The only parliamentary scrutiny of the Bill that I have seen to date is by the Senate Standing Committee for the Scrutiny of Bills in its Digest 15 of 2021 (pps 1–6) dated 15 September 2021 (https://www.aph.gov.au/senate_scrutiny_digest).

The Committee notes that the bill seeks to amend the Land Rights Act in four broad ways to:

1. establish the NT Aboriginal Investment Corporation (Schedule 1)
2. streamline the exploration and mining provisions of the Land Rights Act (Schedule 2)
3. improve and clarify the land administration provisions of the Land Rights Act (mainly in relation to s19A township leasing) (Schedule 3); and
4. align the Aboriginals Benefit Account (ABA) with the Commonwealth's financial framework (Schedule 4).

The Committee raises four broad matters with questions to the relevant Minister Ken Wyatt as follows:

1. why there are no-invalidity clauses in relation to excess expenditures by the NTAI Corporation and an invalid consent to a proposed agreement by a land council without proper traditional owner consent?
2. why key details about the operations of the NTAI Corporation are left to delegated legislation rather than being in primary legislation?
3. why a proposed strategic investment plan that will define the activities of the NTAI Corporation is not a legislative instrument?; and
4. why the processes for ministerial approval of an entity to hold a township lease are left to delegated legislation rather than being in primary legislation?

As I draft this note a response from the Minister has not yet been published.

The Scrutiny of Bills Committee seeks important amendments to the Economic Empowerment Bill to address its concerns, particularly in relation to the NTAI Corporation that will be a major new investment and granting facility. The Committee is correct that these amendments require appropriate ongoing parliamentary scrutiny, otherwise there is a danger of too much ministerial discretion. As the Bill stands, there is a real danger that a minister might effectively undermine the integrity of the amendments by expansive use of his/her powers to issue administrative instruments without proper parliamentary scrutiny**.**

My broader policy concerns

While strongly endorsing the Scrutiny of Bills Committee concerns, I note that it has been a very focused inquiry on parliamentary procedures. 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 then 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. Concerned Australians have written to Minister Wyatt seeking a Senate Inquiry into the Economic Empowerment Bill and have made some preliminary proposals for issues that might be included in its terms of reference. I have also discussed the proposed amendments with several others.

The material on hand about the Bill and its development are quite limited: two media releases from the minister, three fact sheets prepared by NIAA, second reading speeches by the Minister and Mark Dreyfus, the Bill and Explanatory Memorandum (EM) tabled. I have also referred to a few published sources especially annual reports of land councils, the Office of the Executive Director of township Leasing (OEDTL) and the ABA. The only commentary that I am aware of to date is an early critical engagement with the proposed amendments by Michael Dillon posted on 14 June 2021 http://refragabledelusions.blogspot.com/2021/06/proposed-changes-to-nt-land-rights.html. I have also recently compiled a spreadsheet summarising 42 year of ABA financial history as one element of ongoing research.

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; those proposed solutions that need further scrutiny and some of the potential unintended consequences that will likely arise from the proposed solutions. I will conclude with some brief commentary on the difficulty of proper consultation as per the Lieberman Report recommendation and end with some proposals for amendments to improve the Bill were it to proceed in its current deeply flawed form.

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 supersede existing arrangements that saw the Minister make decisions about ABA grants mainly advised by a larger ABA Advisory Committee of Aboriginal members from the NT.

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 42 years for which data are available (2020/21 audited statements are not yet published) the ABA has received $3.6 billion from consolidated revenue and has earned about $366 million mainly in interest having a total income of just on $4 billion.

Payments out of the ABA are paid firstly 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 impost later). To date since 1978/79, just over $1 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 $969 million (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 was provided to land councils.

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. It was always intended that these payments be available to all Aboriginal Territorians not just traditional landowners. To date, $606 million have been made in such grants, often from ABA investment income that does not attract the MWT. <u>This granting function will be subsumed into the functions of the proposed NTAIC.</u>

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 ($50 million).

The balance of the ABA's income of $4 billion minus expenditure of $2.7 billion is a net equity (or reserve) currently of about $1.3 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 such a statutory body similar to 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 reported by the government that the proposal was revisited from 2018 in accord with 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 the 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 (S65BA). It will achieve these purposes by making grants, making investments and providing financial assistance on commercial or other basis (S65BB). 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, Central, Tiwi and Anindilyakwa), 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. In one year, the NTAIC will receive as income almost equal to the amount the ABA has allocated in grants in 42 years to 2019–20. 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 s 64(4), the establishment of NTAIC is understandably welcomed by them as made clear in a media release from the NLC dated 25 August 2021. Nevertheless, I am concerned that next to no, or very thin, analysis of the proposed institution has been undertaken especially by the Opposition but also by other stakeholders, <u>especially other Aboriginal Territorians</u>. All too often negotiated amendments to the Land Rights Act with trade-offs 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; there are likely to be others.

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 s 64(4) granting function of the Land Rights Act is now intermingled with an investment instrument that is being accorded priority in the naming of the Corporation and 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.' This government statement looks to prioritise investment over grant-making.

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 the transition to the new NTAIC.

3 *Ministerial control*: While the Bill commits to pay $680 million to NTAIC it is far from clear what will happen to the residual equity 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 two-third 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.

4 *NTAIC governance*: It is unclear why the 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 less than 2500 and 2000 Aboriginal people respectively are overrepresented. On the other hand, many Aboriginal people in the NT who are largely unrepresented by the statutory land council as they are not traditional owners under the Land Rights Act are allocated no mandated representation on the NTAIC Board even though s 64(4) grants are to be allocated to or for the benefit of Aboriginal people residing in the NT. Indeed, in the original Land Rights Act these grants were intended in part to address the disadvantage of Aboriginal Territorians who have not been granted land ownership rights. There is a danger that directors nominated by land councils will face real or perceived conflict of interest in making decisions in relation to investments on Aboriginal freehold 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. The model would reflect emerging trends to prioritise community-based forms of self-determination.

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 section 65FA 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. The requirement for consultation externally as well as internally will be challenging, will be costly and will take a long time, if undertaken properly. It is important that in development the Plan it is required that the potential to complement rather than duplicate the activities of other statutory bodies like the ILSC and IBA is considered.

6 *Investment Committee:* This committee established by S65FA had several advisory functions including in the development of the Strategic Investment Plan. This committee can have as few as four members with one being the Minister of Finance delegate 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 NTAI Corporation, employ such persons as are necessary for the performance of the NTAI Corporation'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 be to reviewed after seven year (S65JD). In my view this should occur sooner (after three years) and the review should be stipulated as independent. 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 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 over time.

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 theoretically total $680 million. 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*: There seems to be no consideration of the investment performance of existing institutions while bolstering the economic development potential of the NTAIC. These existing 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 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 financial resources raised on Aboriginal land and earmarked to or for the benefit of Aboriginal people residing in the NT.

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 in 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 seven years on. 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 downgrade or constrain the decision-making powers of traditional owners that need urgent clarification:

1. More discretion is given to land councils under Subsection 42 (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 Subsection 42 (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 Subsection 42 (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 interference or regulation in a meeting.

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 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.

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 respectively in 2006 and 2015; 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 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 rather 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 seem to me 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 $50 million to 2019/20 but returned just over $17 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 ($3.4 million in 2019–20) 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 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 Sections 28A to 28F (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. This shift in approach runs counter to the recommended approach in the Reeves report in 1998 and to the preferred approach of previous ministers Brough and Scullion who oversaw the amendment of the Land Rights Act in 2006 and 2015 to dilute the powers of land councils. Now 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 a concomitant dilution in the self-determining rights of traditional owners and local communities. This shift is occurring as land councils have become less critical of the government's developmental ideology for north Australia, a land councils' position likely influenced by budgetary and other controls exercised over them by the Australian government.

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 s 64 (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. That is what the problem is and how it is to be addressed.

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

1 Just as land councils have advocated for control of the ABA, a call now partially 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 1978 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 $75 million in MWT has been returned by the ABA to the Treasury according to its published annual reports. This is an unjustified tax that should never have been introduced and should now be abolished. At Section 65BN 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 back 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 $1.238 billion its annual investment return has declined from about 6 per cent to about 2 per cent. 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—and $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' (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 as 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 another 82 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 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. 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 transparent 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 222 elected members of the four land councils, mines that generate royalties are only located at a handful of sites. Elsewhere in the EM for the Bill 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 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 what expert input the land councils have received in negotiating these proposed reforms; or when exactly they were provided with the exposure drafts of the Economic Empowerment Bill? Nor is it clear how 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 members 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 Subsection 65C (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. The sheer scale of the Economic Empowerment Bill makes it unlikely that it has been widely assessed: this strengthens the case for greater scrutiny of the Bill and for early independent review of its new provisions being guaranteed if it is passed.

Conclusion and recommendations

The Economic Empowerment Bill has thus far escaped proper academic, policy, media, and wider Indigenous attention. 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 dominant political interests are reluctant to challenge. The continual reference to these terms in the proposed amendments is an effective political strategy to divert attention from a detailed 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 the Morrison government should welcome a Senate Inquiry to ensure 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 can only be guaranteed by a well-publicised an open Senate Inquiry.

My analysis raises a number of questions about the Economic Empowerment Bill; I am sure that there are many others. If the Bill proceeds in the immediate term in late 2021 to a third reading, then it imperative that numerous qualifying amendments are added before it is passed. While I have raised many questions above, below I list some priority amendments required from my perspective beyond those recommended by the Senate Standing Committee for the Scrutiny of Bills. These include amendments to:

- ensure that NTAIC is independently reviewed three years after its establishment
- 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
- provide a guarantee of future transfers of all ABA reserves to NTAIC if it is assessed as success after review, and associated greater devolution of authority
- 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
- 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
- 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
- streamline provisions for traditional owners to say 'no' to exploration and mining as well as to say 'yes'
- make a statutory commitment to an independent review of s 19A 99-year leasing arrangements first introduced as a government initiative in 2006
- 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
- ensure that limits are placed on drawdowns from ABA reserves for s19A leasing arrangements
- finally abolish the unjustified MTW; and
- 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 recommended amendments are limited to some priorities that are immediately apparent to me. It is only via a broader and more considered Senate Inquiry into the most significant reforms of the Land Rights Act since 1976 that the robustness of the Economic Empowerment Bill can be properly assessed.