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The political economy of the Aboriginals Benefit Account: Relevance of the 1985 Altman review 30 years on

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Introduction

This paper examines the 1985 Altman review of the Aboriginals Benefit Trust Account (ABTA) and evaluates the relevance of key recommendations and findings 30 years on.¹ It focuses on three key issues raised in the review:

- Are Aboriginals Benefit Account (ABA) payments public moneys or Aboriginal private moneys?²
- Should Mining Withholding Tax (MWT) be levied on ABA payments?
- Should the ABA be an autonomous statutory body?

1 In 1999 the Aboriginals Benefit Trust Account (ABTA) was renamed the Aboriginals Benefit Account (ABA).

2 The Act specified 'payments' from the ABA. Many authors use different terms such as 'ABA moneys' and 'ABA grants' when referring to the variety of types of payments that originate from the account.

I will argue that these questions are as relevant today as they were in 1985, noting that the current ABA has many ambiguous and problematic policy legacies but also the potential to be an important player in Northern Territory Aboriginal development. While the policy of self-management is now passed, the concept of converting the current ABA to a statutory authority is worthy of fresh consideration in the context of more recent policy developments, significant increases in ABA income, and other changing circumstances.

Background

The idea of paying royalties to Aboriginal people affected by mining has a long history in the Northern Territory. In the 1950s, the then Minister for Territories, Paul Hasluck, oversaw the drafting of an ordinance to permit mining on Aboriginal reserves with royalties being paid into an Aborigines Benefits Trust Fund (ABTF) (see Altman (1983) for an analysis of this regime).

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) established the ABTA to replace the ABTF and continued the practice of directing mining royalties from Aboriginal land to Aboriginal people and their institutions, although the method of payment was somewhat different. Instead of miners paying royalties direct to the ABTA, the royalties were directed to the Commonwealth and Northern Territory governments. Uranium royalties were paid to the Commonwealth while all other types of mineral royalties were paid to the new Northern Territory Government established in 1978. The Commonwealth would then calculate the total payments to both governments and pay an equivalent amount into the ABTA. Thus was created the notion of 'mining royalty equivalents' (MREs).

Through this arrangement the Commonwealth was maintaining the practice of paying mining royalties from Aboriginal land to Aboriginal people and also giving the fledging self-governing Northern Territory a source of revenue from mining similar to that in the states. The cost of the arrangement was born entirely by the Commonwealth, with payments to the ABTA coming from the Consolidated Revenue Fund (CRF). This arrangement was maintained in 1997 when the Aborigines Benefit Trust Account was renamed the Aborigines Benefit Reserve

and in 1999 when it became the ABA. The regime continues to the current day despite changes by various governments to broader financial management aspects of policy.

The ALRA financial framework and the 1985 Altman review

Jon Altman was engaged by the Department of Aboriginal Affairs (DAA) in 1984 to undertake a review of the then ABTA and related financial matters under ALRA.³ The review was undertaken with the assistance of a working party which consisted of representatives from the Central and Northern Land Councils, the DAA, and the ABTA Advisory Committee (Altman 1985: xi). The ALRA financial framework under review had three key institutions, the Land Councils, Royalty Associations and the ABTA, plus a corresponding 40/30/30 formula for disbursement of MREs.

The Northern and Central Land Councils were established in 1973. In 1976 under ALRA they were given statutory responsibilities to represent and consult with Aboriginal traditional owners on land claims, land management and all related land matters. Under subsection 64(1) of ALRA, the Land Councils were to receive 40 per cent of MREs for the administration of these statutory responsibilities. The possibility of supplementary payments of MREs to Land Councils was contemplated under subsection 64(7) and ultimate approval of Land Council budgets lay with the Commonwealth Minister under section 34. In 1978, the Tiwi Land Council was established, creating a third entity of this type by the time of the Altman review.

The second type of key institution was Aboriginal bodies known as Royalty Associations, comprising traditional owners and residents of areas affected by mining. These organisations would receive 30 per cent of MREs pursuant to subsection 63(3) as some indeterminate form of compensation or recompense for mining occurring on Aboriginal land in their geographic vicinity.

3 The context of the ABTA review was a recommendation from Justice Toohey's *Seven Years On* report of the ALRA in 1983. Toohey recommended a special review of the financial aspects of the ALRA be established. The review commenced in 1984 and the recommendations were published in 1985.

The third institution of the ALRA financial framework was the ABTA and the associated ABTA Advisory Committee established under section 65. While all MREs would pass through the ABTA on their way to the Land Councils and Royalty Associations, it was the final 30 per cent of MREs over which this Committee had an advisory role to the Minister for Aboriginal Affairs. Under subsection 64(4) this last 30 per cent could be spent on grants for the 'benefit of Aboriginal people living in the Northern Territory', but it could also be applied to supplement the budgets of Land Councils, to meet the running costs of the ABTA, or be invested. The Advisory Committee at the time of the Altman review consisted of seven Aboriginal Territorians. There was a ministerially appointed Chairperson, three members nominated by the Northern Land Council, two by the Central Land Council, and one by the Tiwi Land Council.

The primary task of the 1985 Altman review was to report against two broad terms of reference:

1. Conduct a general review of the role, structure, functions and operations of the ABTA and the Trust Advisory Committee.
2. Examine the nature and extent of the benefits derived by Aboriginal groups and communities from subsection 64(4) payments to date.

There were 14 sub-points for consideration under the first term of reference. These included the status of the ABTA under the Audit Act, policies and guidelines for payments (grants) from the ABTA under subsection 64(4) and their relationship to payments from other grant providers, the role and composition of the Advisory Committee, and the administrative structure of the ABA. One term of reference specifically asked whether the ALRA should be amended to guarantee that 'no less than 30 per cent' of MREs was used for payments under subsection 64(4) (Altman 1985: v–vi).

The Altman review made over 70 recommendations and other findings in response to these terms of reference. Over 40 per cent of the recommendations were implemented or partly implemented, in the years following the review. Examples of recommendations implemented included:

- an increase in size of the ABTA Committee;
- committee representation based on population;

- development of ABTA procedures and management documentation;
- improved investment management;
- a separate annual report for the ABTA;
- annual reports for the Land Councils; and
- changes to the administration and staffing of the ABTA.

The rest of this paper focuses on recommendations which were not implemented and still have relevance today. These relate to whether MREs are 'public' or 'Aboriginal moneys', the related issue of levying a withholding tax on MREs, and the proposal for an autonomous ABTA.

Public or Aboriginal moneys?

In the first chapter of the review report, Altman raised the important issue of whether MREs are public or Aboriginal moneys. This is a fundamental issue for administration and accountability regimes. If the MREs are Aboriginal moneys, then a case can be made for Aboriginal organisations to administer their disbursement. If they are public moneys, then they should be controlled by officers of the Australian Public Service and have accountability measures in line with other mainstream Commonwealth grants (Altman 1985: 11).

Altman (1985: 8) noted that the one important principle that divided the working party during the review was the nature of the MRE payments to the ABTA. All representatives of Aboriginal organisations held the view that MREs were Aboriginal moneys. The bureaucratic view expressed by DAA members was that MREs are public moneys.

Altman (1985: 9) explains the Aboriginal moneys position:

In the letters patent that established the Aboriginal Land Rights Commission in 1973, the Federal Government instructed Justice Woodward to vest full land and mineral rights to the Aboriginal inhabitants of the NT. However, Woodward recommended that ownership of minerals and petroleum on Aboriginal lands should remain the property of the Crown. Woodward did recommend that Aboriginal interests should have full rights to royalties on Aboriginal land. This compromise has been widely interpreted by Aboriginal organisations and individuals in the NT to mean that while the minerals do not belong to Aboriginal interests, the royalties do. Prior to the granting of land rights, royalties raised on Aboriginal reserves

were transferred to Aboriginal interests, yet the land was Crown land. After the granting of land rights, it is not surprising that Aboriginal control of these moneys was assumed to have increased—after all, they are now levied on Aboriginal land.

On the other hand, DAA officers in the working party pointed to the fact that the ABTA has its origins in the CRF (Altman 1985: 11). As such the moneys are public, despite the fact that they are raised on Aboriginal land. Further, the division and payment of these MREs is at the discretion of the Minister and as public monies it is a requirement that these be controlled by officers of the Australian Public Service.

In his review, Altman (1985: 11) noted the variable accountability regimes applying to the Land Councils and Royalty Associations from the ABTA payments. Land Council moneys were treated as public moneys, while Royalty Association were effectively treated as private moneys. Payments under subsection 64(4) seemed to be treated somewhere in the middle, with lots of accountability requirements during the application process, but somewhat relaxed acquittal procedures after grants had been made (Altman 1985: 12, 164). The Altman review (1985: 29, 187) was strongly of the view that the ALRA should be amended to guarantee that ‘at least 30 per cent’ of MREs are paid out as subsection 64(4) grants and that supplementary funding for Land Councils, if needed, come from outside the ABTA.

The 1985 Altman review acknowledges that in law ABTA moneys are public, but also demonstrates how some elements of disbursements have lesser accountability requirements acknowledging some moral and practical concessions towards these being private Aboriginal moneys. In later writings (e.g. Altman & Pollack 1998, 1999; Altman 1999), Altman remains equivocal on these issues and hence open to the view that ABTA moneys are less than fully public.

Mining Withholding Tax critique

The Review working party was unanimous in its belief that the levying of MWT on MREs was iniquitous (Altman 1985: 229).

Altman (1985: 229) recounts amendment of the *Income Tax Assessment Act 1936* (Cwlth) (ITA Act) in 1979 ‘to include special provisions for taxation of payments made in respect of mining operations on

Aboriginal land'. The rate of taxation was specified in the *Income Tax (Mining Withholding Tax) Act 1979* (Cwlth) passed at the same time.⁴ Section 23AE of the ITA Act provided that the assessable income of Aboriginal people and Aboriginal organisations shall not include amounts received as mining payments as these payments would be taxed under the MWT. In short, the MWT is levied at source and is considered a final tax.

Altman (1985: 229–34) described the MWT as confused and unclear and as having inequities in its application:

- ABTA moneys are subject to tax but ABTF moneys are not;
- MREs are subject to MWT but negotiated royalties are not;
- grants from the ABTA are taxed but grants made by government agencies are not;
- Land Councils are taxed but other Commonwealth statutory authorities are not;
- uranium royalties paid to Aboriginal interests are taxed while uranium payments to the Northern Territory government are not.

Altman (1985: 233) noted that the withholding tax on MREs fuelled the debate about 'whether these moneys are public or Aboriginal'. It seemed that for 'financial accountability purposes', these moneys were 'regarded by the Commonwealth as public'; 'but for taxation purposes they are regarded as Aboriginal'. He also noted that there was 'limited scope' for MREs to 'be paid to individuals', as this could occur primarily from the 30 per cent directed through Royalty Associations to people in areas directly affected by mining (Altman 1985: 231). He concluded that this limited amount of MREs 'paid to individuals' should attract income tax and that 'wider Aboriginal interests' were 'paying an enormous price' for the assumption that these individual recipients of MREs might not lodge tax returns (Altman 1985: 233).

Subsequent reviews of and commentaries on this tax regime have also been critical. Crough (1989) regarded it as discriminatory and an unnecessary and inequitable impost. Reeves (1998: 364) advocated

⁴ In 1978 the then treasurer John Howard introduced a Mining Withholding Tax (MWT) of 6 per cent on all payments out of the ABA by amending the *Income Tax Assessment Act 1936* (Cwlth). Over time the rate has been reduced to 4 per cent.

removal of any possibility of individual payments from MREs, which would mean that the justification for the withholding tax would then disappear.

Martin and Tran-Nam (2012) saw the MWT as inequitable and demonstrated that some Aboriginal people or organisations receiving MREs may be subject to double taxing. They regarded the MWT as simple but as imposing many inequities. Further, they argued that the MWT is potentially inconsistent with more recent income tax principles and other income tax laws.

An autonomous ABA?

Altman (1985: xii) distinguished between the 'clearing house' functions of the ABTA in which money was handed on to Land Councils and Royalty Associations and the discretionary 'granting operations' under subsection 64(4). Focusing on the latter, the Altman review envisaged the possibility of a new autonomous ABTA established as a statutory authority. Altman stated that 'there was general agreement among the working party that the ABTA should become autonomous from the DAA and that as a longer term objective, complete Aboriginal control of the ABTA is essential' (Altman 1985: xi). However, the 1985 Altman review also acknowledged 'current realities' which made it 'less than fair to suddenly pass all responsibilities to ... an all-Aboriginal committee' (Altman 1985: xi).

In 1998 the Reeves Review also picked up on the idea of an autonomous ABTA but did so in the context of a proposal to break up the Central and Northern Land Councils and create 18 regional land councils. Reeves proposed a Northern Territory Aboriginal Council (NTAC) which would fund the regional councils. The role of the ABTA was to be absorbed into the NTAC including its grant functions. The NTAC would also absorb the Indigenous programs run in the Territory by the Commonwealth and Northern Territory governments, and NTAC would be the only Native Title Representative Body in the Territory. Altman (1999) was critical of this model, as too were others and a subsequent parliamentary committee (Altman & Pollack 1999: 11). None of these proposals were taken up by the Commonwealth.

While the Reeves Review was the last major review of the ALRA, and the last to propose an autonomous body, the idea of an autonomous self-managing ABA has continually been the aspiration of current and past ABA Advisory Committees.

Changes since the 1985 review

There have been many changes over the last 30 years that have impacted or potentially impacted on ABA policy and operations. These include a change from policies of Indigenous self-management and self-determination to the more recent neoliberal and neopaternal policy approach. Despite these significant shifts in policy orientation, there has been little change to ABA policy and operations.

Some significant amendments to the ALRA were made in 2006 and 2007, which had some impact on the ABA financial framework: one was the repeal of subsection 64(1), meaning that Land Councils would no longer be allocated 40 per cent of MREs. Instead, the allocation was to be based on ministerial discretion, thus ending the original 40/30/30 regime for MREs. Another amendment was the introduction of a new leasing regime and the Executive Director of Township Leasing. This leasing scheme was designed to be self-financing, with costs paid from the ABA (including acquisition and administration costs) (Terrill 2010a, 2010b).

These amendments demonstrate the position of more recent governments on the ABA, reaffirming the official legal position that MREs are public moneys. Rather than moving towards the ABA being a more autonomous entity managing Aboriginal moneys within the ALRA framework, the Commonwealth is in fact exercising more control over the purse strings and functions of the ABA in the Northern Territory.

Conclusion

The payment of mining royalties and their equivalents to Aboriginal people and their institutions in the Northern Territory has a long history and has proved to be a resilient policy. Despite new directions in Indigenous Affairs, the MRE regime has been sustained for almost 40 years with only incremental change.

The relevance of the Altman review's recommendations after 30 years is clear. Ambiguities and shortcomings identified in the 1985 review remain today:

- the issue of whether ABA moneys are public or Aboriginal remains unresolved; and
- the Mining Withholding Tax remains an inequitable tax but continues to be levied on MREs.

As Altman and Pollack (1999: 18) note, these issues have bedevilled policymakers and reviewers since the enactment of the ALRA in 1976. A review of the current ABA would only re-emphasise the findings of the Altman review 30 years ago and raise questions as to why there has not been change to these policy shortcomings.

There is considerable merit in re-examining the proposal for an autonomous statutory ABA. The size of the ABA reserve was \$402,129,000 at 30 June 2013.⁵ This means that a self-managing, self-funded Aboriginal institution based on the reserve could be an important player in Aboriginal development in the Northern Territory. Should such an autonomous body be established, the existing ALRA legislation could be used to clarify the intent of the application of MREs and ensure that they are clearly directed to benefits for Aboriginal Territorians.

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⁵ In 2011–12 the account had an investment portfolio of \$418,994,000.

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