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Lily O'Neill

Kathryn Thorburn

Bradley Riley

Ganur Maynard

Esme Shirlow

See next page for additional authors

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Authors
Lily O'Neill, Kathryn Thorburn, Bradley Riley, Ganur Maynard, Esme Shirlow, and Janet Hunt

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Renewable energy development on the Indigenous Estate: Free, prior and informed consent and best practice in agreement-making in Australia

Submission to Energy Research and Social Sciences

Keywords: renewable energy, 'free, prior and informed consent', Indigenous Estate, Indigenous land ownership, agreement making.

1. Introduction

Technological innovation and the urgent global imperative to reduce greenhouse gas emissions have prompted a global shift from high emission to low- and zero-emission economies. It is necessary, as part of such a transition, for governments to ensure that already marginalised communities are not further disadvantaged. This article addresses a specific concern around the benefits and risks presented by large-scale renewable energy projects being developed on lands over which First Nations people[1] hold rights and interests. Focussing in particular on such projects in Australia, the article considers how to ensure appropriate distribution of the socio-economic and environmental costs associated with these developments, as well as the fair sharing of the significant opportunities created by them. The objective of this article is to explore the conditions under which First Nations people with native title rights and interests in Australia and other settler-states are likely to derive benefit from large-scale renewable energy projects. The paper recognises – and considers what practices might be required to redress – the historic inequality in legal rights and continuing inequities in socio-economy, health and wellbeing that have put First Nations at greater risk across multiple dimensions of energy justice, including for example access to improvements in income, education and life expectancy[1].

The article consists of five substantive sections. Sections 2 to 4 provide the background and context for the discussion in Section 5 to 6. Section 2 outlines the methodology underpinning the article, and Section 3 introduces the concept of the 'Indigenous Estate', which refers to all land that is held communally by Aboriginal and Torres Strait Islander people through diverse forms of land title.[2] The Indigenous Estate is often in remote areas with few competing commercial interests. These areas host significant solar and wind energy resources making them attractive for large-scale generation facilities. Section 4 outlines the global literature considering intersections between renewable energy projects and Indigenous peoples. Land held by Indigenous peoples is increasingly used or sought for renewable energy developments, including in Canada[2,3], New Zealand [4,5], the United States[6], and Central and South American countries including Chile [7] and Mexico [8]. Such projects sit at the intersection of two key goals for the twenty-first century: achieving a rapid transition to renewable sources of energy in order to reduce emissions and avoid the worst impacts of climate change, and realising equitable outcomes for Indigenous peoples [9–11]. While some

scholars have argued that low-emission energy sources will be 'more equitable, egalitarian, and just than their fossil-fuelled or carbon-intensive counterparts' [12], the transition to low- and zero-emission technologies also has 'the potential to distribute its costs and benefits just as unequally as historical fossil-based transitions without governance mindful of distributional justice' [9,13–15]. Indeed, the inclusion of First Nations people in the economic and other benefits of the transition to renewable sources of energy is in no way guaranteed.

Section 5 examines 'free, prior and informed consent' (FPIC), a widely-recognised international human rights standard that sets out an information, consultation and consent framework for proposed developments on First Nations peoples' land. In calling for the First Nations people to play a central role in the control, benefit and risk mitigation of large projects, we propose that 'free, prior and informed consent' serves as a suitable standard for developments on the Indigenous Estate [16]. Importantly, traditional owners of the Indigenous Estate likely have the legal right to say no to large-scale renewable energy projects on those lands, a situation that provides further impetus for proponents and governments to make commitments to genuine FPIC processes to prioritise the informed inclusion of traditional owners in large-scale developments.

In Section 6, we look at what happens in Australia if a given project on the Indigenous Estate goes ahead, which is that the First Nations land holders and the proponent company will have to reach a legally-binding agreement, except in certain circumstances which we discuss. In settler-countries including Australia, Canada and Aotearoa/New Zealand, this process is known as 'agreement making'. This describes the process of reaching an agreement concerning land access and benefit sharing between a company proposing a development and the traditional owners of the land on which that development will take place. In Australia, First Nations peoples have predominantly had experience in negotiating these agreements with the resource extraction industry, but such agreements have also been negotiated for pastoral and infrastructure developments. We argue that renewable energy agreements will be more effective for First Nations communities and companies alike if they utilise the best practices identified in this paper as a minimum threshold. Heeding the call for research that is actionable [12] we deliberately include a level of detail of both best (and worst) practice in agreement making for the purpose of informing First Nations peoples and their representative institutions, as well as corporate and community interests.

2. Methodology and Early Fieldwork

This paper builds upon cross-disciplinary research by the authors, five non-Indigenous researchers and one Indigenous lawyer, who come from positions within academia and industry. With backgrounds in law, energy policy and organisational and community development, we also have experience in working closely, now and in the past, with Aboriginal organisations and representative bodies in the regions described. Based on principles of social justice, our research methodology is informed by the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) Code of Ethics for Aboriginal and Torres Strait Islander Research [17] which requires that research be committed to the principles of First Nations self-determination and leadership, as well as impact, value, sustainability and accountability.

This paper reports upon research that draws from two main methodologies. First, a review of relevant primary documents and secondary sources, and second, engagement with relevant stakeholders through individual and small group conversations and participant observation in north-west Western Australia and online.

We first undertook desktop research, including to review the rich academic literature related to Indigenous people and renewable energy, and the energy transition globally. We also examined relevant research related to Indigenous people and agreement making, specifically to examine the experience of negotiated agreements between First Nations and the extractive industry in settler countries including Australia, Canada and Aotearoa/New Zealand. In order to understand the energy industry and its future, we also engaged with renewable energy stakeholder groups including from within state government departments, regional development authorities, clean energy sector peak bodies as well as renewable energy companies and investors in Australia. Engaging with these groups allowed us to identify and draw from resources publicly available in energy news media, the National Native Title Tribunal Register and related materials and communications from state and federal governments and energy sector participants.

Having engaged in this review of relevant primary and secondary sources, we undertook two week-long periods of in-person fieldwork during September 2019 and February 2020. This

allowed us to consult with First Nations prescribed body corporates (PBC) and landholder representative organisations in north-west Western Australia, a region where a number of large-scale renewable energy developments are currently proposed and in various stages of planning and approval. At the invitation of land councils and PBCs we conducted in-person individual or small group conversations, 'yarning' and participant observation [18] to identify what Aboriginal landowners and organisational staff saw as the priority energy issues in these regions. We heard a range of diverse perspectives related to the opportunities for Aboriginal people to benefit from a transition to renewable energy, including the potential for benefit not only through negotiated land access agreements in relation to large-scale projects, but also to achieve individual, community and regional development aims.

In-person consultations were curtailed by border closures and ongoing restrictions on interstate travel due to the COVID-19 crisis, so consultations continued online in 2021. Travel restrictions have enabled a period of synthesis and analysis by the research team, to interrogate assumptions and consider the trajectories and implications of our research. Part of this process led us to question the concept of 'social licence to operate', which was the original theoretical framework that this research was based on. A dynamic concept, 'social licence to operate' refers to the social approval and acceptance of, or alternatively the rejection and opposition to, the continued operation of a development. This 'licence' may take the form of explicit, informal or tacit agreement by the relevant community to a development taking place, including express conditions for the use of and access to community land [19]. For companies, it can result in cooperative relationships with local communities [20], and act as a bulwark against political pressure from local communities, civil society and governments against a project [21]. It is a concept, however, that is company and development-centric, focusing on how a company can maintain community goodwill. We realised that we were more persuaded by the view that companies may only go beyond what is required of them by law, to obtain 'social licence to operate', when they believe it is necessary to avoid future trouble [22]. The literature clearly highlights that companies' purely voluntary commitments may not be followed where they clash with commercial requirements [22, at 4], and that a 'social licence to operate' is one method by which a company can achieve 'largely unquestioned freedom' in its operations [22, at 84]. We have instead turned to 'free, prior and informed consent' for our theoretical frame, which, as we

explain in Section 5, is an international human rights law norm that imposes obligations on governments and developers rather than relying on their goodwill, and thus has more potential for shifting existing power dynamics between First Nations communities and companies in settler-countries, potentially avoiding some of the problems associated with 'low-carbon colonialism' (discussed in Section 4).

While the larger research project is ongoing, this paper brings together some of our early findings for the purpose of contributing to the fast-developing knowledge base related to the drivers for securing First Nations benefit from large-scale renewable energy developments.

3. The Indigenous Estate

From 1788, the British Crown violently dispossessed Aboriginal and Torres Strait Islander peoples from the lands on which they had lived for more than 60,000 years. At the time of this dispossession – and today – Aboriginal law and culture is extremely diverse at local levels, in terms of languages spoken (estimated at more than 360 at the time of colonisation), ontologies, knowledges and practices. At the same time, a pan-national Aboriginal identity has grown in strength and potency in Australia since the nation federated in 1901 [25–27] A core value of Aboriginal people continues to relate to custodianship of Country, a concept which because of its holistic sense is not easily translated into English. The connections between a group of people, their language and their country are indeterminable, and reciprocal: the people and the country are one, and the responsibilities associated with belonging to places, or areas, are binding. Aboriginal law has its origins in a range of origin and creation myths referred to in English as 'The Dreaming' – these ideas are found universally amongst Aboriginal groups across Australia. The Dreaming sets out moral codes for living, as well as rules for interacting with the natural world. The Dreaming has been described as occurring in the 'everywhen', that is, simultaneously past, present and future [28].

Australia's common law and legislative framework have changed over time, impacting the capacity for Aboriginal and Torres Strait Islander peoples to claim land rights under Australian law. From the 1960s onwards, legal and moral recognition of the rights of Aboriginal and Torres Strait Islander peoples gained increasing traction across Australian states and territories. In 1976, the Commonwealth government enacted land rights legislation

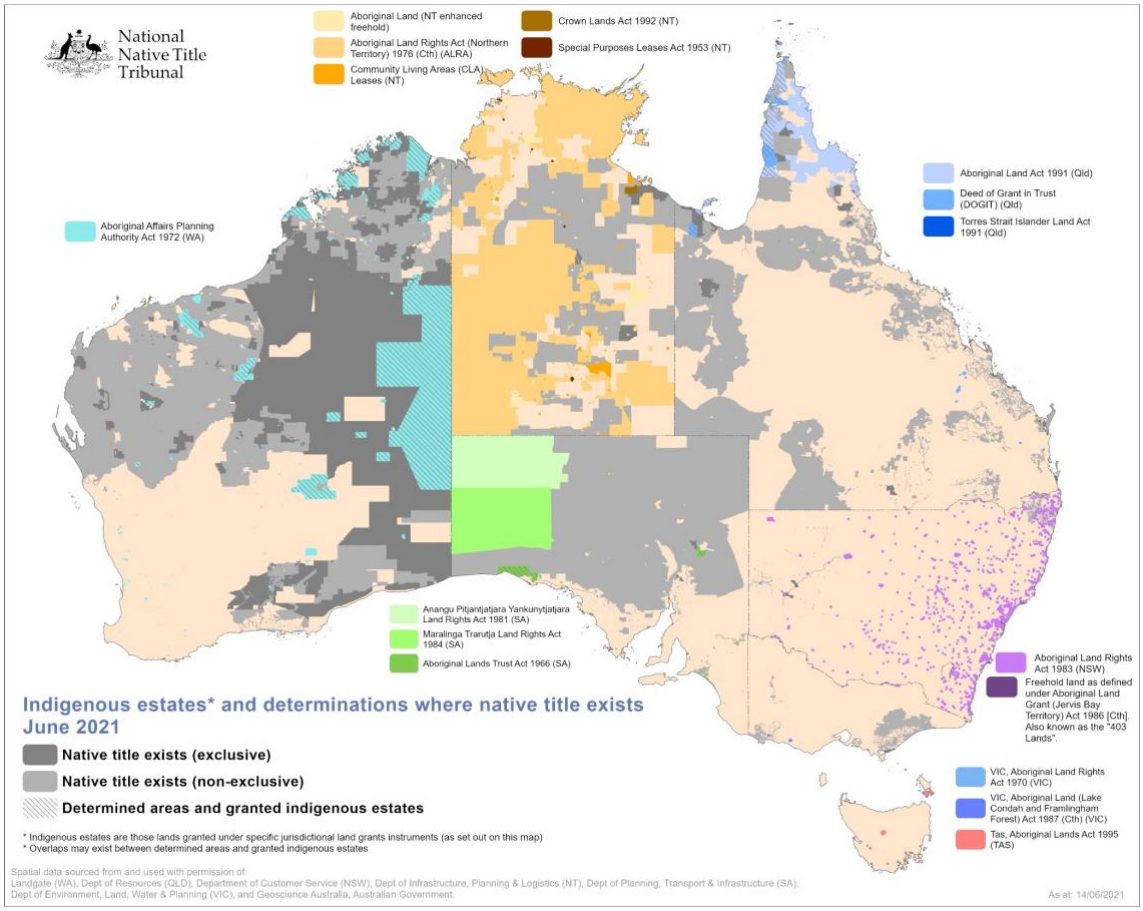
recognising the traditional ownership by First Nations peoples of significant parts of the Northern Territory. Subsequently, several states also enacted their own land rights legislation. While no Treaty has yet been negotiated with First Nations in Australia, treaty processes are underway in several Australian states and territories, including Victoria, Queensland and the Northern Territory.[3]

A significant turning point occurred in 1992, when the High Court of Australia in *Mabo v Queensland (No. 2*) [29] recognised that under Australian common law Indigenous rights and interests in land and waters could continue despite colonisation through a concept the Court termed 'native title'. This judicial decision was subsequently codified in the *Native Title Act 1993* (Cth) (hereafter referred to as 'the Act', or 'Native Title Act'). Subsequent cases found that native title rights exist along a continuum, from weak rights like the right to fish and camp, which co-exist alongside other non-native title rights (for example, a pastoral lease), to the strongest right of exclusive possession of land.[4] The dominant land title on the Indigenous Estate (see Figure 1) is native title held pursuant to the Australia-wide *Native Title Act*.[5] The Indigenous Estate currently encompasses 49% of the Australian continent, and over 60% of northern Australia.[6]

In Australia, the resource extraction industry mounted a ferocious media campaign opposing the passage of Native Title legislation [30]. This opposition – and the spectre of the potential loss of resource extraction rights – significantly impacted upon the drafting of the Native Title Act [26]. While over the next two decades many resource companies changed their public rhetoric to acknowledge the need for good relationships with Indigenous landowners [31], from the beginning, one premise of the Native Title Act has been that native title holders cannot prevent most developments on native title land. The Native Title Act was written to allow development – particularly mineral extraction – to occur [32].[7] The Act sets out a complicated regime regulating how development may be undertaken. This includes a voluntary process whereby agreements, known as 'Indigenous Land Use Agreements' (ILUAs), can be negotiated over almost any topic.

While many consider this process an improvement on the previous *status quo* [33], others are highly critical of the procedural, rather than substantive, nature of these rights. Langton et al describe the agreement making process as often entailing elements of 'duress' [34, at

13]. Negotiated agreements are invariably considered 'commercial-in-confidence' [35], with scholars only able to secure some knowledge of their contents on agreed terms. No legal requirements constrain how agreement benefits are calculated, although if land is compulsorily acquired without agreement, relevant compulsory acquisition principles apply.[8]



In Australia, most mineral resource extraction projects occur in remote areas where other types of development are limited and where First Nations communities are less likely to have been completely dispossessed of land and hence can demonstrate an ongoing occupation and connection with land (both of which are necessary prerequisites for the recognition of native title). These areas are also now attracting attention because they host solar and wind resources which are becoming more commercially profitable and accessible due to advances in transmission technology and the emergence of markets for 'green fuels' (such as hydrogen and low emissions derivatives). A number of gigawatt scale projects are currently in various

stages of planning, approval and financing on land encompassed by the Indigenous Estate,[9] for which we believe that land access agreements are being negotiated with traditional owners and their representative bodies.

The Native Title Act received royal assent in December 1993 and commenced from 1 January 1994, before the advent of wind and solar projects at the large scales currently proposed could have been envisioned. Approvals for these projects are therefore not specifically considered by the Act, and there is currently no judicial ruling on whether they can be validated by the Act without an agreement with native title holders. One view is that they could be valid, without an agreement, pursuant to s24KA, which deals with infrastructure operated to provide facilities for services to the general public. That provision specifies that, for particular facilities, native title holders only have the procedural rights that they would have under Commonwealth and applicable State legislation if they were the holders of ordinary, freehold title (or, in the case of native title partially extinguished by an agricultural or pastoral lease, the holders of such a lease). This means that native title holders do not have a special right to negotiate or object to such activities under s24KA. Amongst the list of covered facilities, s24KA refers expressly only to 'an electricity transmission or distribution facility' (rather than an electricity generation facility). However, it also includes a catch-all, being 'any other thing that is similar to any one or more of the things mentioned in the paragraphs above'. It is arguable that wind turbines and associated infrastructure that have a similar footprint as electricity transmission lines could fall within this 'catch-all', being similar to the facilities listed in s24KA. If this is correct, it would mean that developers do not legally have to reach an agreement with native title holders prior to undertaking such developments. This would put such developments in a similar position to mineral extraction projects.

The more persuasive view, however, is that a developer cannot obtain tenure for an electricity generation facility on native title land without an ILUA, or compulsory acquisition by government.[10] This is supported by the explanatory memorandum related to the provision that became s24KA in the Native Title Amendment Bill 1997. The explanatory memorandum states that: 'Large scale works (e.g. an airport) are not intended to be included among the facilities covered by Subdivision K. Large scale works are either likely to require exclusive possession or significantly impede access by native title holders'. On this reasoning, it is

arguable that wind turbines are of a different nature and scale to transmission lines. Developers will generally require a lease (that confers a right of exclusive possession) for security and certainty of tenure where such infrastructure is located. This interpretation of s24KA is also consistent with the Queensland government's native title policy (contained in the Native Title Works Procedures), which excludes any electricity generation facility from the application of s24KA. This would mean that renewable energy developers, unlike mineral extraction proponents, likely require native title holders to consent to the grant of any interests required for any renewables development – unless a government moves to compulsorily acquire the land. This may increase the leverage of traditional owners in agreement making processes.

It is difficult to assess which interpretation of s24KA is guiding agreement making in practice. The National Native Title Tribunal's register of Indigenous Land Use Agreements (ILUAs) contains only the basic details of ILUAs (usually only detailing the parties to the agreement and the geographical area that the agreements covers) and so we are unable to ascertain with certainty how many relate to renewable energy. However, only 7 out of a total of 1369 ILUAs are currently listed as containing the key words 'solar', 'wind', 'renewable', and 'clean'.[11]

4. Renewable Energy Projects and First Nations Globally

There is a wealth of recent literature on First Nations people and renewable energy. Much of this literature concerns renewable energy developments in geographical contexts outside of Australia, but nonetheless highlights three trends relevant to the Australian context. First, the literature highlights the role of the state, and the impact that government policy has on whether impacts of renewable energy projects on First Nations communities are positive or negative. Second, the literature emphasises that the scale of a renewable energy project may impact the extent to which First Nations peoples benefit from it. Third, the literature emphasises the necessity of ensuring that energy transition results in equitable outcomes for Indigenous peoples, but cautions that this outcome is not guaranteed, and that 'low-carbon colonialism' and a 'business-as-usual' approach may result in the further marginalisation of First Nations peoples.

The role of the state

In Canada and New Zealand in particular, the state has played a key role in supporting the capacity for Indigenous peoples to benefit from renewable energy projects. The 'Canadian Pact for A Green New Deal', for example, developed partly out of Canada's Truth and Reconciliation Commission process and resulting "Calls to Action" [36–38]. The Pact links the energy transition to the goal of achieving reconciliation with Indigenous peoples [36]. Consistent with this, pro-active government policies at the provincial level and market conditions have created a 'demand-pull' for Indigenous ownership in renewable energy developments [39]. The existence of 'supporting regulatory and fiscal policy that were negotiated and adapted to Indigenous sustainability visions' has proved crucial to the success of a range of such projects across Canadian provinces [39, at 3; 40]. Government policies have encouraged Indigenous ownership through feed-in-tariffs, 'price adders' which offer above market, fixed price contracts, and beneficial procurement policies including for power purchase agreements [36]. This government and market buy-in has resulted in significant Indigenous employment and income benefits. A recent survey of Indigenous leaders in Canada reported an abiding view that renewable energy developments could '… materially support holistic community economic and social health'[31, at 6]. New Zealand also presents a range of similar case studies [15,41].

However, the literature also emphasises that there is plenty of room for improvement in terms of the support provided by states to Indigenous peoples engaging with renewable energy projects. One key area for potential improvement relates to the scale of Indigenous ownership of renewable energy projects in each country. For example, Hoicka et al in their analysis of Indigenous ownership of community energy projects in Canada, write that while Indigenous ownership of renewable energy projects is increasing, more than half (60 out of 114) 'have no indications of Indigenous ownership' [15, at 10]. Furthermore, there are indications that Indigenous ownership is patchy, and absent in many communities that might benefit most. Hoicka et al found, for instance, that almost all community ownership is in grid-connected communities, most in provinces (British Columbia, Ontario and Quebec) where ownership has been aided by proximity to large population centres and supporting policies.[12] They advocate for specific policy-supports for those communities who are off-grid, predominately Métis and Inuit peoples[15, at 12]. The South and Central American literature

further highlights the role of the state in perpetuating an approach in which large renewable projects are forced through on Indigenous land. A study by Finley-Brook and Thomas of large-scale hydro-electric dams in Nicaragua, Costa Rica, Panama and the Dominican Republic by foreign-owned firms highlights how these projects further marginalised Indigenous communities. The authors highlight the role of the state in these instances as a form of 'green authoritarianism and carbon colonialism', where the state and companies worked in tandem to the detriment of local communities [37, at 869]. They attribute this to continued racialised stereotyping of Indigenous communities by these governments, as well as, in the case of Panama, a 'hollowing out of the state' in favour of companies in terms of development oversight[37, at 865]. In Mexico, Zárate-Toledo et al outline more than a decade of wind energy planning in the Isthmus of Tehuantepec region, one of the windiest areas in the world [43]. By 2012, Indigenous opposition to these projects had grown significantly, and in response the government mandated, but failed to effectively implement or regulate what was framed as a process of obtaining communities' 'free, prior and informed consent'[38, at 8].

Scale and type of renewable energy projects

As noted above, the literature shows a broad trend of Indigenous people in Canada achieving significant benefits from community-scale projects, many of which they own, whereas Indigenous people in Central and South America are being exposed to 'low-carbon colonialism' vis-à-vis large-scale hydro-electric dams and wind farms. These studies do not assert a link between the scale of the project and its capacity to secure fair impact and benefits. Rather, this literature indicates that the governments in the cases studied appear more likely to support Indigenous aspirations of ownership (or co-ownership) where projects are at community-scale.

Several studies also point to factors that inhibit Indigenous people taking the lead in the development of large-scale projects. For example, Hunt et al examine three scales of development projects in remote Australia: community owned off-grid systems on the many small and widely dispersed remote First Nations communities in Australia; remote and regional utility-owned networks; and large-scale developments. They found that while the first two scales showed promise for First Nations benefit, the barriers to First Nations peoples'

ability to access finance is one reason why First Nations are less likely to be driving large-scales projects. Barriers to finance include limited collateral and credit history (which may result in higher rates of interest where loans are made) [43], and limited ownership of land that can be mortgaged (which results from the fact that much of the Indigenous Estate is non-fungible) [45]. Similarly, Krupa has found that high upfront costs are a significant barrier to even community scale projects [10, at 86].

Energy justice and low-carbon colonialism

While there is some optimism about the ability for the energy transition to aid Indigenous self-determination, there are also concerns that the low emission transition will not automatically be a net good for social equity. For example, in meta-analysis of 332 peer-reviewed case studies from the last twenty years, Sovacool examines and categorises the dominant ways in which the low-emission transition can create, further entrench, or exacerbate social inequality. Cataloguing a range of human rights abuses including murder, prostitution and slavery, he identifies the multiple ways in which climate mitigation projects have displaced or further marginalised Indigenous peoples and ethnic communities world-wide [12]. Sovacool stresses the role of 'proactive governance' to avoid low-emission injustices, without which the transition 'could be more antagonistic, exclusionary, violent, and destructive' [12, at 14].

Illustrating some of these potential risks, for example, Baker's study of the acquisition of Indigenous land for wind farms in Oaxaca province in Mexico found that the developer entered into long-term leases with payments to farmers 'said to be ten to twenty times less than amounts offered to American farmers for similar uses' [43, at 286]. She describes the contracts as deceptive, complex, not in native languages, and with copies not given to farmers [43, at 286-287]. Promises of employment and community development proved 'empty', with many workers brought in from elsewhere [43, at 289-290]. Zárate-Toledo et al similarly observe that Indigenous communities may support efforts to counter climate change, but may nonetheless resist renewable energy projects on their lands 'because they are asked to sacrifice their lands in the name of impersonal global investors and developers'[38, at 10].

5. Free, Prior and Informed Consent

This Section addresses the potential role of the principle of FPIC as a means of addressing the problems that some First Nations peoples have faced in accessing the benefits associated with renewable energy projects. In essence, FPIC requires that the free consent of Indigenous peoples is obtained before an action affecting them is taken [42, at 111]. It applies to decisions that affect Indigenous lands, livelihoods, culture, or resources. The elements of freedom, priority, and information are interrelated and together set the conditions for Indigenous peoples' consent [43, at 76]. The requirement that such consent is 'free' means that the Indigenous people in question must be able to give consent voluntarily and without coercion, intimidation or manipulation [43]. To be 'informed', consent must be based on accurate, timely and sufficient information provided in a way that the Indigenous people consider to be valid [50,51].

The concept of FPIC in the context of development on the Indigenous Estate has been most clearly articulated in international law, particularly in the articles of the United Nations Declaration of the Rights of Indigenous Peoples (2007) ('UNDRIP'). In UNDRIP, FPIC is operationalised in several articles. Relevantly for present purposes, Article 10 states that Indigenous peoples shall not be forcibly relocated from their lands or territories without their free, prior and informed consent, agreement on just and fair compensation, and, where possible, the option of return. Article 32(2) stipulates that:

> [s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of **any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources [emphasis added].

Naturally, FPIC requires that consent can be withheld, with the effect that a development will not go ahead. Thus, if implemented properly, FPIC endows Indigenous peoples with a great deal of power vis-à-vis the State and its industrial partners. As a consequence, the circumstances in which FPIC applies and the extent to which all of its requirements must be fulfilled has been a topic of fierce debate.[13] To date, a 2007 decision of the Inter-American Court of Human Rights has provided the most compelling attempt to resolve this in a manner

that remains true to the principles of self-determination and Indigenous rights in UNDRIP. In *Suriname v Saramaka*, the Inter-American Court considered Article 32(2) of UNDRIP (among other material) in order to determine when a state may legitimately restrict the constitutionally-protected property rights of Indigenous peoples. It held that states must always consult with Indigenous peoples before authorising or undertaking interferences with their territory, and that FPIC must further be obtained if the proposed interference threatens to affect the Indigenous people concerned in a 'major' or 'profound' way[51, at 133-134, and 137].

This contextual, impact-based approach is weakened by a number of obvious limitations. Firstly, an impact-based approach might allow for developers to improperly claim that particular types of projects have minor impacts and therefore do not trigger a consent requirement, undermining the protection that FPIC is supposed to offer [46, at 157]. If not carefully applied, the *Saramaka* test might become preoccupied by project size, with the consequence of allowing smaller developments that could severely damage Indigenous communities' connection to land, despite their smaller footprint [47, at 90-91]. Another limitation is that ambiguity endures in relation to the circumstances in which FPIC obligations can be 'overridden'. According to Article 46(2) of UNDRIP, FPIC requirements can be ignored when this is strictly necessary for the protection of others' rights and the just and compelling requirements of a democratic society. Article 46(1) also ensures the territorial integrity and political sovereignty of independent states. The Inter-American Court of Human Rights has commented that the constitutionally-protected property rights that form the basis of the Saramaka decision could be restricted by laws that are necessary and proportional to attaining a legitimate goal in a democratic society, noting that this goal must be so important that it clearly prevails over the necessity of the full enjoyment of the right to property [54, at 155; 55, at 127; 56, at 96;57, at 144-145, 51 at 127]. However, neither it nor any other court has provided a definitive example of the circumstances that justify overriding FPIC requirements, nor have these circumstances been judicially considered in any significant length.

Nevertheless, FPIC provides the best framework for regulating large-scale development on the Indigenous Estate because it imposes relatively precise obligations on governments and developers. This distinguishes it from principles like 'social licence', which rely on the goodwill

of governments and developers and are also less precisely defined. As one recent Canadian study of Indigenous renewable energy projects has acknowledged, obtaining FPIC is 'critical for energy democracy' [31, at 6]. However, to date, the requirements of FPIC have been 'practised thinly' [15, at 19]. In Australia, FPIC requirements are yet to be implemented in enforceable domestic laws to govern development on native title lands and waters, nor are they explicitly required for most types of developments on land held by First Nations peoples under statutory land rights regimes.

6. What is Agreement Making Best Practice?

The literature on agreements emphasises that traditional owners are almost always at a legal, economic, informational and political disadvantage compared to the companies they negotiate with [33,34,59]. The legislative agreement making framework provides them with a 'seat at the table but no guarantee of success' [60]. Research shows that a significant risk in agreement making is that traditional owners can receive less than they might through alternative approaches, including political action or legal means such as litigation invoking environmental and cultural heritage laws (although these avenues are often limited to those groups with significant political power) [59–61]. This power imbalance means that both the final agreement and the conduct of a negotiation (particularly how well traditional owners are resourced to negotiate and which party dictates the negotiation timing and agenda) are also likely to be skewed to favour the company [62–64].

The literature is clear on which factors result in land access and benefit sharing agreements which are favorable to Indigenous people. The state plays a key role in agreement making, although this role is often overlooked[53, at 201]. The state regulates all legal aspects of a project's approvals, including relevant titles and environmental and cultural heritage permissions, receives rents for resources where applicable, and has the authority to compulsorily acquire land [54, at 30]. Studies have found that the state almost always acts to promote the interests of mineral extraction over First Nations interests [53, at 201][21, at 35] [55, at 558] [54, at 39][68]. When the state does act to promote First Nations interests, as was seen in a major ILUA negotiation in north-west Australia, this can have a positive impact for First Nations leverage, enabling a stronger agreement for traditional owners [54, at 39].

Aside from the influence of the state, it is those traditional owners with political power, combined with strong organisational capacity and financing, who are best able to insist that companies exceed the minimum requirements of relevant laws (including environmental and cultural heritage laws) [48, at 7],[55, at 557]. For example, in an in-depth empirical study of negotiations in Australia and Canada between traditional owners and the same company, O'Faircheallaigh identified four main reasons for differences in agreement outcomes:

1. The company itself, and how committed to corporate social responsibility principles it is;
2. The prevailing legislative regime and whether it favors Indigenous interests;
3. The economics of the project being proposed; and
4. The political capacity, particularly organisational capacity, of traditional owners to insist that companies meet their claims and obligations [59].

Similar findings have been made in the detailed studies of Trebeck [55, at 555], Doohan [31], Altman [69] and O'Neill [52, 213-215].

The relational aspects of agreement making are also relevant. Not only is the relationship (positive or otherwise) that develops between the parties during the negotiation period important, but so is their relationship during agreement implementation [70,71]. This can be captured in implementation clauses (see Table **6.1**) but also depends on personnel and personal rapport. As Bergmann, a senior Kimberley traditional owner, commented, if workable relationships are not in place, agreements "don't deliver half of what they should" [52, at 169].

The question of what impact a 'best practice' land access and benefit sharing agreement can have on the relevant community into the future is extremely important: agreement making is only successful if it results in the creation of substantive beneficial outcomes for First Nations peoples [60, at 306]. Yet, several important studies suggest that the impacts of large developments are often mixed. A recent study examined the impact of the mining boom on the well-being of Aboriginal people in the Pilbara, Western Australia between 2001 and 2016, a region considered an economic powerhouse for national wealth through iron ore and liquefied natural gas industries. It found that the boom resulted in higher employment, more

housing, literacy and numeracy improvements and decreased mortality rates. However, this period in which a huge amount of money had been received by the region, including by First Nations communities, also saw poverty rates increase, income inequality increase, less than half of the potential working population employed and high incarceration rates continue [73]. The study observed that the economic benefits of the mining boom were unevenly distributed within First Nations communities, and that those First Nations people excluded from the benefits of resource development went backward across a number of indicators.

There is strong evidence on what good agreements contain. The confidential nature of most Indigenous land access agreements, and their highly context-specific nature, means that assessing the strength of agreements at a general level inevitably involves value judgments. Nevertheless, O'Faircheallaigh has provided baseline criteria against which agreements can be measured [72]. These are summarised in Table 6.1. O'Faircheallaigh observes that it may be intuitive to think that some groups are making trade-offs between these criteria. However, his findings are that when an agreement is strong or weak, it is usually so across all criteria [62]. The following are best practice principles have developed over two decades of experience of agreement making, particularly in Australia and Canada.

Best practice is:

- Adhering to a robust interpretation of 'free, prior and informed consent' when seeking to access and use land on the Indigenous estate [49].
- Paying attention to the priorities of the local community [62, at 7].
- Ensuring that the land holding group are resourced to obtain qualified independent legal, scientific, business, accounting and other advice for the negotiation[63, at 10].
- Having all parties develop the agenda, nature and timelines of the negotiation, rather than these being determined by a company alone [52, at 214].
- Negotiating in a respectful manner and in good faith, while recognising the need for a robust negotiation [52,64, at 168-172].
- Quantifying benefits based on a 'sharing the benefit' methodology for the proposed activity [49].

- Ensuring a whole-of-company and whole-of-lifecycle commitment to these principles, including by future owners of the project should company structure or ownership change, and that arrangements for eventual land rehabilitation are made [19, at 331].

- Considering paying benefits to more First Nations people than just the traditional owners, including, for example, neighbouring traditional owners or other First Nations peoples in the region.[14]

- Adhering to the agreement fully at the implementation stage, and regularly monitoring, evaluating and reviewing whether the agreement is being fully adhered to [19, at 331].

- Recognising that First Nations people retain sovereignty over all land in Australia, whether they have legal rights or not.

- Recognising that a company must obtain a 'social licence to operate' that may be well above what is legally required [65, at 600].

- Recognising that a social licence to operate, particularly for multi-generational projects, may need to allow for review and renegotiation of certain clauses from time to time [31].

As large-scale renewable energy developments progress, it will undoubtedly become clearer how the differences between renewable and extractive industry will translate into agreement making practice. At this stage, we merely note some of the most significant differences between the extractive and renewable industries. These are captured in Table 6.1, which is adapted from O'Faircheallaigh's assessment criteria for land access and benefit sharing agreements [64, at 309].

Table 6.1

Strong and Weak Provisions in Land Access and Benefit Sharing Agreements

	Strong Provisions	**Weak Provisions**	**Possible modification in light of differences between renewable**

			energy and extractive industries
Environmental Protection	Indigenous land holders are in a position where they can ensure that the environment is protected, including by unilaterally stopping certain activities from occurring if the environment is in imminent danger. For rehabilitation of the project site, see below, 'Project Finalisation'.	The agreement limits the general law rights Indigenous land holders may have and leaves them worse off, for example if in an agreement prohibits their right to sue for environmental damage.	The environmental impacts of the extractive industry are fairly well understood, the environmental impacts of renewable projects less so. An agreement could include clauses to help ameliorate this uncertainty (for example, regular review clauses, or a rehabilitation trust).
Cultural Heritage	A high level of protection would stipulate that the company has to avoid all damage to cultural sites without exception, and that Indigenous land holders be funded to do cultural heritage protection work, can choose which technical staff work on cultural	Very weak clauses may simply comply with weak cultural heritage laws that allow cultural sites to be destroyed and may prohibit Indigenous land holders from objecting to cultural heritage matters under relevant legislation.	Given the very long life of developments, agreements could consider guaranteeing traditional owner access to sites to practice culture, particularly given that it is legally possible for native title rights to be lost if peoples' connection to country is lost.

	heritage issues, and conduct cultural awareness training for the company.		The design of development sites should reflect these considerations
Financial Payments	A good result would be a significant income stream commensurate with the scale and likely revenue stream of the project, including offering equity in the project in recognition of the value of land access.	A poor result would be a financial payment that is equal to or less than Indigenous land holders would receive if no agreement were made (i.e., if the land was compulsorily acquired).	For renewable energy agreements, particularly in Canada, Indigenous equity in a project is becoming the new normal [78].
Employment and Training	Best practice sees concrete employment targets set for local Indigenous people, including career pathways to ensure that workers are not limited to entry level work and provided with opportunities, mentoring and training to develop. Accountability for these targets should be assigned to senior company HR personnel; pathways to	A very weak clause could include a vague commitment to employing Indigenous people.	Jobs in renewable energy developments occur primarily in the construction phase, with far fewer in the operational phase. Parties should consider whether this means that traditional owners and/or other Indigenous peoples should be prioritised for jobs in both phases, particularly given that jobs in operational phases would mean that traditional owners could continue working on country.

	employment created; measures put in place to make the workplace conducive to recruitment and retention of Indigenous workers. These measures might include cross-cultural awareness training for non-Aboriginal employees and supervisors; adjustment to rosters or rotation schedules to acknowledge cultural obligations; and initiatives to maintain contact between trainees and their families and home communities.		
Business Development	Best practice clauses could lend business expertise to Indigenous companies; help with the sourcing of financing for Indigenous companies; provide procurement preference clauses for	Weak clauses would make a vague commitment to helping Indigenous business development.	Renewable energy agreements could provide low or no cost renewable energy to support business development.

	Indigenous businesses; fund business management training; provide secure, long-term, 'bankable' contracts for Indigenous companies.		
Implementation of the Agreement and Ongoing Indigenous Land Holder Monitoring of the Development	A best practice clause might set aside personnel and significant financing specifically for the task of implementing the agreement; ensure structures, processes and financing are set up for the purpose of implementation for both the company and the Indigenous landholding group; contain explicit clauses about who is to do what post agreement; require senior decision makers in the company and Indigenous land holders to focus on implementation and regular review of progress, including in	An agreement weak on implementation would not make any mention or make only general comments about how it would be implemented. Confidentiality requirements, whereby Indigenous land holders face legal consequences if they speak out about perceived failings of the development, are also indicators of an agreement that is weak on implementation.	Energy justice demands that agreements create long-term positive benefits for the Indigenous communities who host these developments. Agreements should carefully consider how to monitor development impacts on local Indigenous peoples, and possibly include flexibility if certain approaches prove to be not beneficial.

	relation to environment protection and cultural heritage; and contain incentives for company personnel to implement the agreement fully.		
Project Finalisation	A best practice clause would make it clear that the company is responsible for the full rehabilitation of the site at project finalisation, including removal of all infrastructure that is no longer of value to local Indigenous land holders. This would include money for rehabilitation being set aside in a trust.	An agreement weak on project finalisation would make no mention of rehabilitation of the area at the end of the project life.	

7. Conclusion – Towards Best Practice Agreement Making for Renewable Energy Projects

We are among the many who believe that the current environmental crisis demands an urgent transition of the energy sector away from costly and polluting fossil fuels toward zero-emission energy resources. In Australia, as facilities for the generation of renewable energy and the production of 'green' fuels expand in both number and scale, they will require increasing access to land. This likely presents both risks and opportunities for those First Nations who have hard-won rights and interests in the 'Indigenous Estate'. As the Central and South American literature in particular shows, low and zero-emission development can represent a continuation of colonial practices.

The example of large-scale wind developments in Mexico highlights a missed opportunity for positive social change and community benefit, whereby the government mandated but subsequently failed to implement or regulate a consultation process adhering to 'free, prior and informed consent'. We are mindful that Australian governments have failed to legislate 'free, prior and informed consent' into domestic law. As internationally, governments and companies should be doing much more to uphold and protect the rights of First Nations peoples in Australia, including those to be impacted by clean energy projects that look set to 'scale-up' in size and number over coming years. Expanding the legal requirements (federal and state) to insist developers obtain the free, prior and informed consent of traditional owners, to reflect best-practice would be a powerful next step, either as a legal requirement or as policy standard communicated to all relevant parties.[15]

As our discussion of agreement making shows, the industry should regard best practice agreement making, as outlined in Table 6.1, as a minimum threshold. Whether or not these agreements improve the socio-economic and cultural lives of First Nations communities should be the topic of research into the future.

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[1] A note on terminology: this paper uses several terms which are correct in context to discuss First Nations people, including Indigenous people (the term often used to describe First Nations people world-wide, including in the United Nations Declaration on the Rights of Indigenous peoples), Aboriginal and Torres Strait Islander Australians (used widely in Australia), traditional owners (an umbrella term used to denote those First Nations people who hold communal title to land according to their traditional laws and customs, whether under the Australian Native Title Act or state or territory land rights legislation) and native title holders (the term used in the Native Title Act).

[2] Including the *Native Title Act 1993* (Cth) and various land rights regimes, including, for example, the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth).

[3] For example, the State of Victoria is currently engaged in Treaty making, see Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic); the Northern Territory has established a Treaty Commission https://treatynt.com.au/) and Queensland has established a Tracks to Treaty process (https://www.datsip.qld.gov.au/programs-initiatives/tracks-treaty/path-treaty).

[4] This jurisprudence is highly controversial for the negative impact it has had on the strength of native title rights: see particularly [79].

[5] Other land title forms include those under the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth), which generally provides stronger rights to traditional owners than native title but is limited to the Northern Territory.

[6] These figures are correct as of 20 October 2020, as per the National Native Title Tribunal, personal communication. Included in these figures are parcels of land that have both strong and weak native title rights.

[7] In contrast, the Northern Territory's land rights regime initially gave traditional owners a veto over the granting of exploration licences and mining interests, subject to a 'national interest' override. Since amendments in 1987, however, the ability to veto is only in relation to exploration licences, s 40 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

[8] For example, the relevant principles for Commonwealth expropriations are expounded in the case of *Griffiths v Northern Territory* [2019] HCA 7 ('the Timber Creek case').

[9] These include plans for a proposed 5GW combined solar and wind farm to produce 'green' hydrogen in the Murchison region of Western Australia, a proposed 10GW Australia Singapore Power Link (ASPL) project in the Northern Territory and a proposed 16GW renewable energy and hydrogen project in the remote Pilbara region of Western Australia.

[10] This anomaly in the Native Title Act brings it closer to the rights accorded traditional owners for similar developments by the stronger land rights legislation in Northern Territory.

[11] National Native Title Tribunal Register of Indigenous Land Use Agreements, http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx (accessed 4 May 2021).

[12] They note that supporting policies in Ontario ended in 2018, [15, at 9].

[13] For a discussion of these debates, see [47, at 44-59].

[14] This was the approach of the Browse LNG agreements, see [52, at 278-279].

[15] We note that in Canada the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent on 21 June 2021. It sets out a process whereby Indigenous peoples and the Canadian government are to work together to implement UNDRIP.