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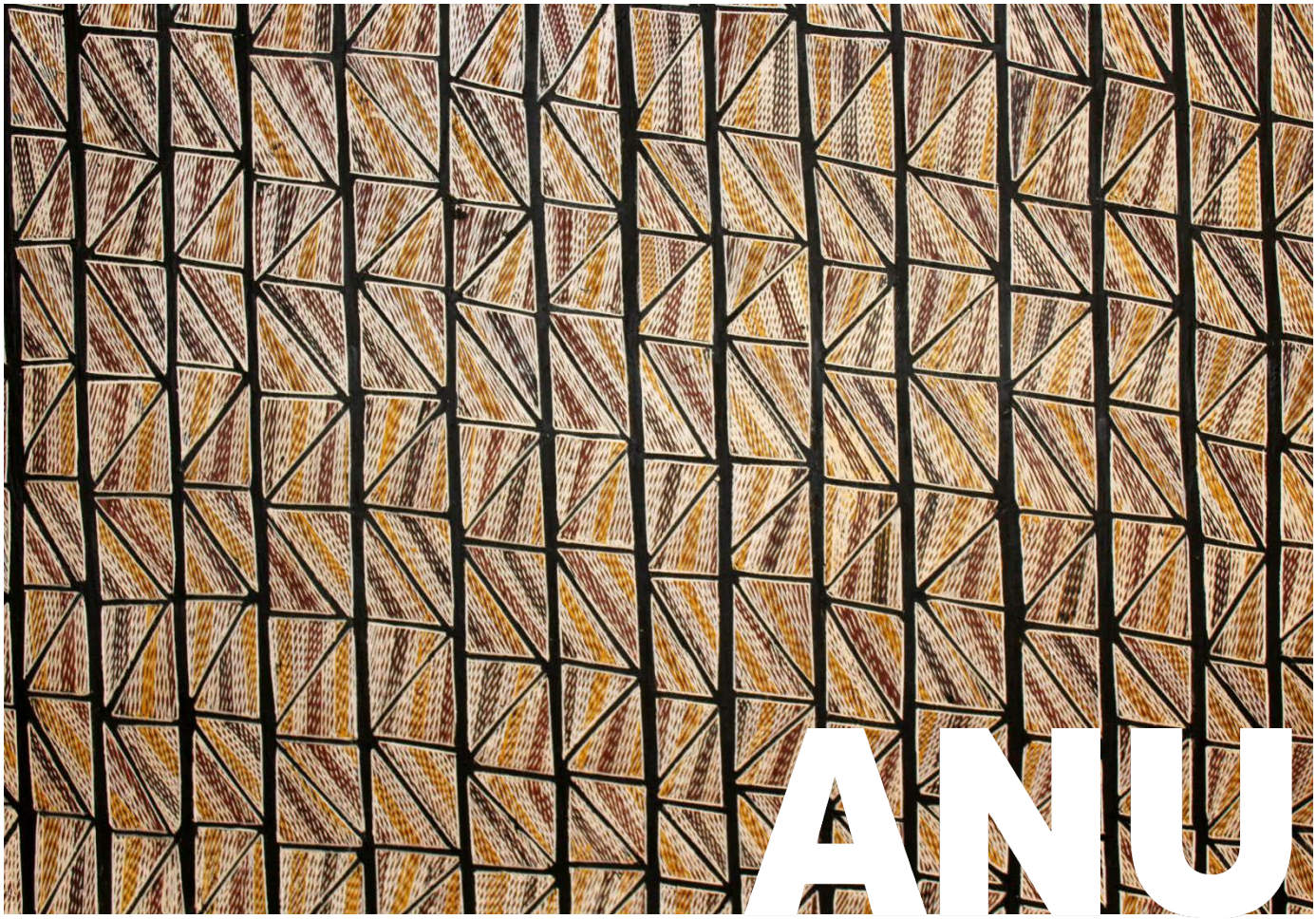

ENSURING INDIGENOUS BENEFIT FROM LARGE-SCALE RENEWABLE ENERGY PROJECTS: DRAWING ON EXPERIENCE FROM EXTRACTIVE INDUSTRY AGREEMENT MAKING

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Ensuring Indigenous benefit from large-scale renewable energy projects: Drawing on experience from extractive industry agreement making

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Abstract

In the coming decades Australia is set to see a dramatic expansion in renewable energy projects. It is likely that many of these will occur on land subject to Indigenous rights and interests. This paper looks to extractive industry experience in negotiating access and benefit sharing agreements with traditional owners to identify best practice to date.

The paper concludes that while the guiding principles and the content of access and benefit sharing agreements may be quite similar between the extractive and renewable industries, there are a number of critical differences between these industries that may impact agreement content. These are that renewable energy developments use a completely renewable resource; are usually not limited to specific geographic areas (although certain areas are more conducive to both wind and solar projects); generally require a much greater land area; have physical impacts that are almost completely reversible; affect visual amenity over greater distances (in the case of wind); are potentially in place for more than one generation; and may allow traditional owners continued land access. Additionally, the use of native title land for renewable energy projects will raise different issues for native title holders and companies than the renewable energy industry's experience to date with neighbouring communities in high population areas.

Keywords: native title; land access and benefit sharing agreements; renewable energy; social licence to operate; corporate social responsibility.

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Acronyms

ANU	Australian National University
ARENA	Australian Renewable Energy Agency
CAEPR	Centre for Aboriginal Economic Policy Research
CEO	Chief Executive Officer
FPIC	free, prior and informed consent
FTSE	Financial Times Stock Exchange
ICMM	International Council on Mining and Metals
ILO	International Labour Organization
ILUA	Indigenous Land Use Agreement
LPG	liquified petroleum gas
MW	megawatt
NGO	non-government organisation
NIMBY	not in my backyard
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993* (Cth)
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPRI	United Nations Principles for Responsible Investment
US	United States

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1 Introduction

There has been a proliferation of renewable energy developments across Australia in the last decade, but very few of a large-scale and even fewer on Indigenous lands.[1] To date, Indigenous people's involvement with the green economy has been largely via carbon sequestration projects (including fire regime management and tree planting) which are generally funded by government or industry to act as an offset for polluting activities elsewhere. The other common experience for Australian Indigenous people, particularly those living in remote areas away from large electricity grids, has been the development of small-scale energy generation projects – mostly solar – to provide for the electricity needs of small groups of households.

In this paper, we contend that Australia may soon witness a dramatic increase in the number of larger scale renewable energy projects. Areas of land without intense competing interests or uses – and with strong sunshine or wind or both – will prove very attractive to investors. The efficiency of energy transfer/transport technology is rapidly improving, and this means that it is increasingly financially viable for renewable energy developments to be constructed far from their target markets.

In Western Australia, there are a number of corporate interests working to explore the possibly of exporting energy offshore, either via undersea cable or via hydrogen, to South-East Asia. One of these projects – the Asian Renewable Energy Hub – is well advanced[2] and is proposing to construct a wind and solar facility across 7,000 square kilometres of land in the East Pilbara. An Indigenous Land Use Agreement (ILUA) is being negotiated with the traditional owners of that country, the Nyangumarta people. If this development proceeds, it will be the first of its kind nationally and will set a precedent for those that follow. Singapore and Indonesia are the target export markets for this power, as well as large industrial energy users in the Pilbara. The Asian Renewable Energy Hub will generate 9,000 megawatts (MW) of electricity, or enough to power 7 million Indonesian homes. It will also offset 1.5 billion tonnes of carbon dioxide over its 60-year life span.

Internationally, the concept of exporting energy generated from renewable sources across national borders is not new.[3] For countries with a high population density but low renewable energy generation potential – such as Japan and South Korea[4] – renewable energy importation might become a necessity. The Australian Renewable Energy Agency (ARENA) has identified the export of renewable energy as one of its four priorities.

If this renewable energy industry is to develop on Indigenous lands, renewable energy companies will have to enter into partnership arrangements with Indigenous peoples. The term 'Indigenous lands' is used to denote rights and interests in land held by Australian Aboriginal and Torres Strait Islander people communally and in accordance with their traditional laws and customs. The rights and interests in these lands are recognised by both native title and land rights legislation. This paper focuses on Indigenous rights and interests in land recognised by the *Native Title Act 1993* (NTA) (Cth), which applies throughout Australia. Australia also has enacted land rights legislation (predominately in the Northern Territory, New South Wales and parts of South Australia) but these will not be a focus of this paper because they do not apply throughout the country. It is noteworthy, however, that agreements made pursuant to land rights legislation are often considered stronger, in

[1] For the sake of brevity we are primarily considering agreement making on land subject to *Native Title Act 1993* applications and determinations, although we acknowledge that strong agreements are also made pursuant to state and territory land rights regimes, particularly the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which applies throughout the Northern Territory.
[2] https://asianrehub.com/.
[3] See for example the Economic Community of West African States which has developed, across 15 countries, a''West African Power Pool' to support the regional governance of trade in energy http://www.ecowas.int/ecowas-launches-energy-governance-programme-for-west-africa/.
[4] If South Korea, with a population density of 517 people per square kilometre, tried to meet all its energy needs with wind power, it would have to cover its entire land area with wind farms https://www.japantimes.co.jp/opinion/2016/09/26/commentary/world-commentary/who-has-the-space-for-more-renewables/#.W3oaya17E6g 14 August 2018).

part because land rights legislation often gives traditional owners stronger legal rights in relation to agreement making (O'Faircheallaigh 2015:91).

This paper draws on the considerable literature relating to agreement making with Indigenous people in Australia to identify best practice standards in agreement making, the ways in which these standards have been encouraged, enhanced or hindered by government policy, as well as trends in international ethical investment standards.

To date, this literature has largely referred to extractive industries. While the impact of long term renewable energy projects is not yet clear, it is likely that they will permanently impact far less on land than the extractive industry, and can clearly make strong claims to improving the long term sustainability of the planet. Nevertheless, a renewable energy project on Indigenous lands is a commercial, profit-making venture that should seek, at the very least, to 'share the benefits' of the project with traditional owners. These projects will also have an impact on traditional owners being able to exercise their rights and interests over the affected land, the level of impact depending on the infrastructure involved. We therefore believe that while these industries are clearly different, the existing literature holds important lessons for the renewable energy industry.

This paper will be followed by a second, which will draw on the substantial international literature documenting Canadian First Nations' involvement in renewable energy developments on traditional lands, and extrapolate these experiences to consider risks and opportunities that might arise from this industry for Australian Indigenous people. It will explore policy and industry settings that have enabled First Nations to benefit from the burgeoning green economy elsewhere in the world. This second paper will also look at the key question of whether and how Indigenous peoples can ensure that renewable energy agreements have a positive impact on their community.

2 Changing relationship: legal and policy drivers

World wide, Indigenous people have long suffered the social, cultural, economic and physical impacts of colonisation and dispossession of their lands (UNDRIP 2007). In recent decades, the continuing impacts have been most visible in interactions between Indigenous peoples and those seeking to develop their traditional lands, particularly the resource extraction industry (Langton et al. 2004, Langton et al. 2006). This is because resource extraction occurs most commonly in remote or so-called 'undeveloped' areas where Indigenous communities are less likely to have been completely dispossessed of land. These interactions have evolved from Indigenous peoples asserting rights to their land and fighting to prevent resource extraction from the second half of the 20th Century, to, in more recent times, the recognition of land rights and the development of legal and policy initiatives enabling agreements between Indigenous peoples and developers on fairer terms (Langton 2006). These legal and policy initiatives include legal procedural rights as well as policy developments at a global level that came about as a result of ideas such as self-determination, particularly the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (O'Faircheallaigh 2013).

The history of interactions between Indigenous Australians and the resource extraction industry has followed this global pattern. Many key moments in the fight for Aboriginal land rights originated from disputes about mining undertaken on land without regard for its Aboriginal owners. Until the landmark Australian High Court decision of *Mabo v Queensland (No. 2*) 175 CLR1 (henceforth 'Mabo No. 2') which recognised that Aboriginal and Torres Strait Islander rights and interests in land continued despite British sovereignty, efforts by most Australian Indigenous people to exert control over what occurred on their traditional lands were defeated by lack of legal title to land, and indifference or outright hostility from resource companies and governments (O'Faircheallaigh 2006).

(a) Legal drivers: recognising Indigenous peoples‘ rights to land

Internationally, recognition of Indigenous peoples’ rights to their traditional land has grown throughout the 20th Century. Of particular note is the International Labour Organization (ILO) Convention Number 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO) 169) and the UNDRIP of 2007. UNDRIP is signed by Australia, but it has not been incorporated into domestic law, while ILO 169 has not been signed by Australia. In other countries, particularly in Latin America, ILO 169 has been incorporated into domestic law and so has legal effect (Barrera-Hernandez 2016:76). Both ILO 169 and UNDRIP are persuasive on what best practice in Australia should be, if not legally binding. Of particular relevance to agreement making is that these treaties advocate that Indigenous people should have to give their ‘free, prior and informed consent’ (FPIC) for developments affecting their land (Article 32 UNDRIP; Article 15 ILO 169). While free, prior and informed consent is often said by Indigenous peoples to mean that they can veto developments on their land, the position at international law is that consent is a procedural goal rather than a substantive right. This means that while FPIC prioritises obtaining Indigenous consent (consent that should come about after prior consultation in which information on the development is freely available), it does not mandate it (Barrera-Hernandez 2016:76–77).

UNDRIP requires countries to provide for ‘just and fair redress’ when development occurs (Article 32(3)) while ILO 169 says that Indigenous peoples should ‘participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities’ (Article 15(2)). This has led commentators to describe best practice land access agreements as ‘sharing the benefits’ of resource activity (Barrera-Hernandez et al. 2016:1–9).

In Australia, Indigenous peoples’ rights to their traditional land were first recognised by South Australia and in the Northern Territory with the enactment of land rights legislation in the 1960s and 1970s. Land rights were subsequently granted through the NSW Land Council system in New South Wales in the 1980s. Then, in 1992, the Australian High Court handed down the landmark case of Mabo No. 2. This ruling followed similar cases elsewhere in the common law world that also recognised, in different ways, that Indigenous ownership of land could survive colonial annexation.

Mabo No. 2 held that Aboriginal and Torres Strait Islander property rights (termed ‘native title’) survived the acquisition of sovereignty by the British Crown, and, where no non-Indigenous interests in land conflicted with that native title, it could be recognised by the Australian common law. Native title jurisprudence has found that native title rights exist along a continuum, from weak native title 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 native title right of exclusive possession of land, which is akin to freehold.[5] The ‘Indigenous estate’[6] which encompasses statutory land rights and recognised native title has now been recognised as existing over 70% of the Australian continent.[7]

(b) Corporate social responsibility

Mechanisms such as the UNDRIP and ILO 169 act as significant benchmarks for corporate social responsibility in the context of negotiating land access with Indigenous peoples. They are underpinned by a suite of principles, including FPIC, gender equality, rights to practice culture, to speak language and to access country. Adherence to these may be considered essential to best practice. Corporate social responsibility is a concept that says that

[5] This jurisprudence is highly controversial for the negative impact it has had on the strength of native title rights: see particularly Strelein 2009.
[6] The term ‘Indigenous estate’ refers to all land that is communally held by Aboriginal and Torres Strait Islander people. The Indigenous estate is recognised by Australian law pursuant to a variety of statutes, including the NTA and various land rights regimes.
[7] Native title agreements can be made in relation to land subject to any level of native title. If there are other right or interest holders in relation to the land, the proponent of any development may also have to negotiate with, or accommodate, those other right or interest holders.

companies should be held to account for their social and environmental impacts by civil society and their shareholders. The advent of corporate social responsibility poses many relevant questions for agreement making and Indigenous peoples, including of accountability for their actions and policies, as well as whether and how corporate social responsibility can affect how benefits and impacts are distributed between companies and Indigenous peoples (O'Faircheallaigh & Ali 2008). What is clear is that there are a great range of initiatives and agreements that can be referred to as 'corporate social responsibility', and that these initiatives do not exist in a vacuum but rather are impacted by a network of policies, pressures and dynamics – from the local to the international – which influence the extent of the redistribution of benefits and costs from resource developments on indigenous lands (Langton 2006 O'Faircheallaigh & Ali 2008: 6, Altman & Martin 2009).

As discussed above, UNDRIP is particularly relevant in this context. Article 32 is of especially relevant to this discussion, and is quoted below in full:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States 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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (Art 32, UNDRIP).

While Article 32 most clearly outlines state obligations with regard to Indigenous peoples, the principles can equally be applied to corporations seeking to access traditional lands

The agreement making standards dictated under native title law, described below, do not represent best practice, but rather signify a bare minimum in terms of negotiation practice, and are silent on agreement content. These are left, as it were, to the 'free market' – to be negotiated via commercial-in-confidence processes between the traditional owners and commercial interests.

Rather than being guided by minimum legal requirements as to best practice minimums in the contexts of these agreements, companies negotiating with Indigenous people in Australia can refer to a range of corporate social responsibility standards and/or indices as guiding their best practice. Some of these are industry specific, such as the International Council on Mining and Metals (ICMM) 'Community Development Toolkit' and 'Good Practice Guide: Indigenous Peoples and Mining', and refer to the international principles described above, including UNDRIP. This approach is in line with a de-regulated approach to corporate ethics in Australia, and more generally across the globe. Traditional owners may also refer to these when negotiating land access agreements and ask that corporations demonstrate their adherence to them. For example, this occurred in the negotiations to build a liquefied natural gas (LNG) plant on the Kimberley coast (O'Neill 2016:136).

The extent to which corporate social responsibility principles are adhered to is influenced by three types of stakeholders, according to Trebeck (2007:544). These are:

1. Those possessing formal leverage (such as shareholders, managers and directors)
2. Those using economic influence (such as customers, creditors/investors and employees)
3. Those using political influence that will affect the social and political operating environment of the company (such as non-government organisations (NGOs), activists, lobbyists, communities and governments).

All three, she notes, '…interact and reinforce each other.' Clearly, Australian traditional owners have the capacity to influence stakeholders in all three categories. However traditional owner groups require certain capabilities to wield this influence, and a crucial means is through Indigenous representative organisations, which are usually inadequately funded by the State and Commonwealth governments (Trebeck 2007:545).[8]

Companies seeking to demonstrate adherence to corporate social responsibility principles are able to sign up to a multitude of international standards, principles and indices, all of which purport to indicate ethical corporate behaviour. The literature relating to corporate social responsibility, both Australian and international, is vast and there is a range of views as to the extent to which these principles are delivering real outcomes in terms of benefits for colonised groups (Scholtens & Dam 2007, Trebeck 2008, Larsen, Österlin & Guia 2018).

O'Faircheallaigh advocate applying a critical lens to what these commitments mean in practice, noting that '…in some cases (corporate social responsibility commitments) consist of little more than exercises in public relations' O'Faircheallaigh 2008: 1). Trebeck observes however that where appropriate accountability mechanisms are in place, these kinds of corporate commitment can translate into real benefits for Indigenous peoples, for example, where then Rio Tinto company Chief Executive Officer (CEO) Leon Davis 'spearheaded' changes to corporate culture to better recognise community demands (Trebeck 2008:17). These cultural changes resulted in the landmark Argyle Diamond Mine agreement with traditional owners in the Kimberley, among other initiatives.

(c) The impact of ethical investment

What is increasingly noteworthy in the second decade of the 21st Century, however, is that it is neither government regulation, international human rights bodies nor NGOs that hold large international corporations to account for their social and environmental performance. Rather, account-seeking is coming from Trebeck's second group of stakeholders, both international finance institutions, and more generally, from investors. This account seeking has resulted in a range of international indices and mechanisms which seek to demonstrate the performance of large corporations across non-financial indicators, most commonly focusing on social, environmental and governance indicators.

The International Finance Corporation (IFC) 'Performance Standards on Environmental and Social Sustainability' are an example. The IFC is the private sector arm of the World Bank Group and is the largest multilateral provider of financing for private enterprise in developing countries worldwide. They seek to measure the performance of companies according to these standards, which gives them an indication of investment risk. In particular, Performance Standard No. 7 relates to Indigenous people and begins by acknowledging that:

> …Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development than non-Indigenous communities. This vulnerability may include loss of identity, culture, and natural resource-based livelihoods…(IFC 2012).

This standard also specifically refers to FPIC and makes a distinction between projects which might impact on non-Indigenous communities where 'informed consultation' is deemed sufficient, versus those where the

[8] While strong political influence of traditional owners can be used to raise the expectations of what is a reasonable minimum of corporate social responsibility, this political sophistication has also been identified by a number of scholars as a prerequisite for robust and sustainable agreements (particularly O'Faircheallaigh 2004), because it enables Indigenous parties to more effectively participate in the negotiation and implementation of agreements (see also Limerick et al. 2012).

affected communities fall within the IFC's specific definition of what constitutes an 'Indigenous community', and therefore require informed consent[9] (IFC 2012: 48).

The United Nations Principles for Responsible Investment (UNPRI) is a similar scheme with over 1700 corporate signatories. Because of its scale and prominence, the UNPRI are described as '...the most important global responsible investment initiative in existence today' (Majoch et al. 2016). Finance industry-led standards, such as the Equator Principles[10] and the Global Reporting Initiative,[11] also provide tools for companies to report on their social and environmental sustainability performance.

All of these mechanisms are useful indicators of ethical corporate *intent* to investors, who are, after all, their key stakeholders. When understood in this context, they indicate a burgeoning awareness that the absence of such ethics in corporate practice signifies investment risk. They are not however robust measures of corporate performance, because they do not independently assess such performance, nor demand such assessment from their signatories. Rather these frameworks are voluntary and aspirational. One of their primary aims is to encourage investor confidence. The evidence is unclear on whether becoming a signatory to these sets of principles or standards universally impacts on standards of corporate behaviour. It seems that larger companies, that might be more likely to receive wide-scale public scrutiny and can therefore afford less reputational risk, seek to adopt such principles as part of their own risk management, even where there might be a financial cost associated with such adoption (Mackenzie 2013).

Of a similar ilk are the various indices on stock exchanges around the world which also report on social, environmental and governance indicators. Examples include the London-based FTSE 4 Good Index[12] and the Dow Jones Sustainability Index,[13] both of which measure corporate performance on these indicators.

Similar to the range of international principles mentioned above, the development of these indices indicates a growing awareness amongst investors that social, environmental and governance indicators factors are risks for project performance and therefore important for investor reputation and project profitability. These indices also acknowledge that these factors are important contributors to financial performance, and allow investors to track corporate performance across measures beyond share price.

(d) Reputational benefits of corporate social responsibility

There is renewed pressure on international finance institutions, and other investors, to use company reporting against social, environmental and governance indicators to gauge their performance. This is because such developments – particularly those involving Indigenous peoples' lands – are increasingly open to scrutiny, not by governments as such, but by the public, and by large international NGOs that can have significant networks and impact. The potential for 'bad press' to impact on future investors – as well as future access to nations or to development sites – is a significant risk for company profitability into the future (Mirvis 2000). Reputation and branding can build on the 'sustainability ratings' offered by various indices and are now considered crucial to investor confidence.

[9] See IFC (2012:14) for complete definition of 'Informed consultation and participation' and Performance Standard 7: Indigenous peoples (IFC 2012:47–52).
[10] http://equator-principles.com
[11] https://www.globalreporting.org/standards
[12] http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp; FTSE is the abbreviation for Financial Times Stock Exchange.
[13] http://www.sustainability-index.com/

(e) Less-than ethical investors?

Non-western sources of investment may be less concerned with conforming to the international standards of corporate social responsibility described above. The power of protest, including social-media shaming, might be more limited in countries where there is not access to a free and open media. The complexity of investment sources for the Adani company's coal mine development in Queensland, including the withdrawal of Queensland and Commonwealth offers to contribute to its financing, demonstrates the complexity of interactions between the state and corporate interests in Australia (Krien 2017). Adani also demonstrates the power of NGOs and social media to effect shifts in how Australian governments may respond to pressure in relation to corporate compliance with international and national standards of corporate social responsibility.

(f) Social licence to operate

Worldwide, there is a growing expectation that resource companies should contribute positively to the long-term development of impacted communities, known as obtaining a 'social licence to operate' (Owen & Kemp 2011: 29). 'Social licence to operate' is commonly taken to mean an agreement by the relevant community to a development taking place, including setting out the conditions for the use and access of community land (Langton & Mazel 2008:43). It is a concept that is directed towards the impacted community, unlike corporate social responsibility which focuses more broadly on company operations. The need for a 'social licence' is often seen as a pragmatic response from companies wanting cooperative relationships with local communities, and because of political pressure brought both by local communities and more broadly by civil society (O'Faircheallaigh 2000:4).

In Australia, Howitt (1997:5) observed that it is a combination of opportunities and threats that leads companies to value an agreement with Indigenous landowners. Opportunities include being known as a good partner to Aboriginal or Torres Strait Islander communities and securing employment agreements for local labour. Threats include community unrest close to mine sites which can hinder access to resources (Howitt 1997:5). The cynical view is that resource companies only go beyond what is required of them by law when they believe it is necessary to avoid future trouble (Ritter 2010 30–31). However, the literature clearly highlights that companies' purely voluntary commitments may not be followed where they clash with commercial requirements (Trigger et al. 2014:4). It is also arguable that a 'social licence to operate' is one method by which a company can become a 'legitimate organisation', giving it 'largely unquestioned freedom' in its operations (Parsons, Lacey & Moffat 2014:84). There is also scepticism about the gap between a company's rhetoric and actions (Whyte 2011).

(g) Social licence to operate for the renewable energy industry: a brief, and urban-skewed history in Australia

The developments described above mean that Indigenous peoples' rights, as well as the rights of communities more broadly, are far better recognised than several decades ago. To date, the vast majority of renewable energy developments in Australia have been adjacent to towns and cities, largely because these are the energy markets that these developments seek to access. The industry therefore has a significant history already in Australia of negotiating access to land with a range of interest groups, and also of negotiating a social licence to operate which takes account of neighbouring communities and groups beyond immediate landowners. This experience sets the renewable energy industry apart from the extractive industries, which for the most part, have sought access to land in areas remote from cities and towns where most Australians live. This issue of proximity to residential areas (or to semi-rural areas which are themselves proximate to residential areas) has meant that the renewable energy industry has faced a number of challenges relating to social acceptability which many other out-of-sight developments have not had to contend with. The reality, however, is that

generally in such areas, because of a longer history of colonisation, native title rights are weaker, and Indigenous interests become only one of many to be considered.

The challenges that the renewable energy industry has faced include 'not in my backyard' or 'NIMBY-style resistance' (Paddock and Greenblum 2016:156–158, 169, Rønne 2016:176) along with complaints of a vague health condition known as 'wind turbine sickness', for which there is significant and credible evidence that reported symptoms are due to anxiety about wind farms (Crichton 2013. This has led to some comments that the industry would prefer sites with few local residents or where communities are used to development (Hall et al. 2015:306). Positive community attitudes are closely associated with host communities receiving significant economic benefit: Rønne cites European case studies that show public attitudes are far more positive to wind farms than in Australia, New Zealand and the United States (US) where the industry is less developed (Rønne 2016:190).

While gaining a social licence to operate in a region such as rural Victoria (see Lane & Hicks 2017) presents a range of challenges to renewable energy developers, these challenges are likely different to those that might occur on native title land which – particularly in northern Australia – is typically sparsely populated, and with few competing land uses and owners. How this industry, which will likely operate at a different scale, and have different cultural and environmental impacts, will interact with native title agreement making is yet to be seen.

3 Legal instruments and their limits

(a) Agreement making and the Australian Native Title Act

The NTA was enacted in 1993 following the 1992 Mabo No. 2 decision. The resource extraction industry mounted significant opposition to native title legislation, concerned that they would be adversely affected by it. One of the industry's most infamous arguments came from Hugh Morgan, of Western Mining Corporation, who said that the decision would not only threaten resource extraction but would also put peoples' backyards at threat (Rowse 1993). This opposition – and the spectre of the loss of resource extraction – significantly impacted the drafting of the NTA (Langton & Webster 2012).

Yet, over the next two decades, resource companies significantly changed their public rhetoric. Companies now acknowledge the need for a good relationship with Indigenous landowners, and some do far more than that. The turning point in the Australian industry's attitude is often said to be a speech by Leon Davis, then chief executive officer of Rio Tinto, in which he said that his company would actively embrace engagement with the Aboriginal landowners of its projects (Doohan 2006:50). Rio Tinto had just come out of a bruising experience with its copper mine in Bougainville, in which negative community responses to a project imposed on them escalated into a civil war, and the company could see the benefits of positive community and public relations (Harvey 2004). Negotiating an agreement with traditional owners is now often seen as just another 'approval' required by a proponent.

(i) Native title agreement making and resource extraction

The NTA does not allow traditional owners to refuse access to companies or developers seeking to build, mine or access their land. These activities are called 'future acts' in the legislation, being any development (for example a mine, a telecommunications tower, or a wind farm) that interferes with native title rights. Rather, the NTA sets out the 'future act' regime that regulates how future acts may validly be undertaken.

For 'future acts' that were seen to have the biggest impact on land (principally resource extraction and acts of compulsory acquisition), the Act stipulates that proponents (those proposing to do the 'future act') must follow

the 'right to negotiate' regime. This regime states that companies must negotiate with traditional owners over a minimum six month period with a view to reaching an agreement over access to land, although an agreement does not have to be reached. Native title agreements must also comply with other relevant laws, most usually related to the environment and cultural heritage. While many point out that the 'right to negotiate' regime is an improvement on the lack of rights many Indigenous Australians had when it came to proposed developments on their land (Langton et al. 2006), others are highly critical on the procedural, rather than substantive, nature of NTA rights (Pearson 2010:39).[14]

Aside from the 'right to negotiate' processes, the NTA also sets up a voluntary process whereby agreements, known as 'Indigenous Land Use Agreements' (ILUAs) can be negotiated over almost any topic.

The NTA is silent on how the quantum of agreement benefits – if any – should be calculated and how negotiations should be conducted. If no agreement is reached, either party (but in practice, almost always the resource company) can apply to the National Native Title Tribunal (NNTT) to rule on whether the 'future act' can take place. Yet, as the NNTT has pointed out many times, the Act was written to allow 'future acts' to occur. This has heavily influenced NNTT decision making: as of August 2018, when the NNTT has been asked to rule on whether a future act can proceed on native title land without an agreement with traditional owners, they have refused just three times, and acquiesced to company demands 111 times (48 of which had conditions attached – for example, environmental or cultural heritage protections) (NNTT 2018). Ritter says that this NNTT case law means that traditional owners know they have almost no chance of success there (Ritter 2009:34). Langton et al. (2004:13) have described the agreement making process as often amounting to 'duress'..

Where a 'future act' takes place without an agreement with traditional owners, the NTA says that they are entitled to compensation. How this compensation is quantified has only recently become clearer with the first litigated decision on this issue (*Griffith v Northern Territory* (2017), 'the Timber Creek case'). It looked at compensation due to the Ngaliwurri and Nungali Peoples for the discriminatory loss of native title rights (that is, land that had been assigned after the enactment of the Racial Discrimination Act in 1975). The land in question was found to have non-exclusive native title rights at the time of the discriminatory transfer, because of 1882 pastoral leases to the Musgrave Range and Northern Territory Pastoral Land Co Ltd that validly extinguished exclusive possession native title. The Full Federal Court found that the Ngaliwurri and Nungali Peoples non-exclusive native title rights should be compensated at 65% of the value of the freehold title. The Court emphasised that compensation should be worked out on a case-by-case basis. The economic value of the land could not, the court said, take into account the economic value to the Northern Territory of the land – rather, it was the economic value of the loss of native title rights that is to be compensated. The court also endorsed a payment of 'solatium', akin to a pain and suffering payment, which was assessed at three times the value of freehold (in comparison, solatium in Victorian legislation is set at 10% of the value of the freehold land). The court said that this amount for solatium was in recognition of 'the unique nature of the spiritual link between the people and the land and the need to place a monetary value on the disruption to that connection' (*Griffith v Northern Territory (2017)*: 42). However, this case is currently on appeal to the High Court, which is likely to hear the matter in late 2018.

In practice, it is clear that a strong agreement can result in compensation far above what might be paid for the compulsory acquisition of the same land. For example, the Kimberley Browse LNG agreements contained $1.5 billion of benefits, for land that had been valued at $30 million for compulsory acquisition purposes (O'Neill 2016:106). However, agreements have also been found to contain provisions weaker than traditional owners

[14] 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).

would be entitled to under legislation (for example, in relation to environmental protection) (O'Faircheallaigh 2015:69). These discrepancies are discussed in more detail below.

(ii) Native title land and renewable energy

The NTA also sets out the rights of traditional owners where the proposed development relates to renewable energy. It is important to note that renewable energy projects do not fall under the 'right to negotiate' regime, except where compulsory acquisition is required. This is because for proposed developments on native title land that are considered to have less of an impact on land than resource extraction, including the building of renewable energy projects, the NTA sets out weaker procedural rights. These include the opportunity to comment, the right to be consulted, the right to be notified, and the right to object. These procedural rights mean that while traditional owners must be informed of developments, and, in certain circumstances, must have their concerns heard about the development, they do not have the legal power to stop or alter a project. Renewable energy projects appear to be predominately negotiated pursuant to s24KA (Kater, Kneebone & Gerrard 2018), to which the 'right to be notified' applies. Given the scale and potential impact of some of the large-scale renewable energy projects currently envisaged for native title land, it seems like a historical legislative anomaly that native title right and interest holders are not accorded the highest procedural protection of the NTA. If an agreement over a renewable energy project was not concluded with traditional owners, compensation explained or referenced that would be payable on the terms set out in the Timber Creek case.

There is no available literature analysing Australian native title agreements made with the renewable energy industry.

4 The role of the state in agreement making

Australian political discourse and policy development focused on supporting the renewable energy industry has been increasing in intensity over the last five years. Most States and Territories have renewable energy targets, though they vary in ambition and commitment. Nevertheless, the issue of renewable energy, particularly setting minimum targets for its use, remains a hugely divisive and contested issue (Krien 2017).

As with extractive industries, the state (that is, various governments and their instruments including laws, and policies) can have a considerable impact on the nature of the relationship between a burgeoning renewable energy industry, and Australia's Indigenous peoples. First and foremost, the state sets the minimum thresholds for negotiations through its enactment of legislation, particularly the NTA. The state resources the Native Title Representative Bodies that are usually the organisation negotiating agreements on behalf of traditional owners, although notably only for certain functions and not at all in relation to agreement making. The state also, through its public and private stance, strongly indicates to industry how it expects them to treat traditional owners (O'Neill 2015). Unlike the extractive industry however, the state does not collect royalties for renewable energy projects and so has less of a direct financial stake in these projects than in resource extraction. There are a number of compelling reasons why it is in the Australian public interest for governments of all persuasions to develop policies that explicitly encourage mutually beneficial agreement making between the renewables industry and Indigenous peoples. The most obvious of these is Australia's commitments, under the Paris Agreement, to reduce its carbon emissions by 2030 to between 26% and 28% of the 2005 levels (Department of the Environment and Energy 2015).

Less obvious but equally compelling is the example provided by numerous Canadian provinces which have legislated for 20–51% First Nations equity in renewable energy developments on traditional lands. In that country, a combination of pro-active government policies at the provincial level and market conditions have created a 'demand-pull' for First Nation participation in, and part ownership of, renewable energy developments

(Henderson & Sanders 2017). This buy-in has resulted in significant First Nations employment, and income, as well as signifying the transition away from diesel-reliant generators. A recent survey of First Nations leaders in Canada reported that the abiding view of renewable energy developments was that they can '…materially support holistic community economic and social health' (Henderson & Sanders 2017:6).

New Zealand also presents a range of case studies, and a policy and industry development history, to which Australian renewable energy policy developers might usefully refer (Hiocka & MacArthur 2018). The opportunities and risks for Australia's Indigenous people in renewable energy developments – drawing on lessons learned by Indigenous peoples internationally – will be canvassed in the second (forthcoming) Working Paper.

5 Agreement making in practice

(a) How do traditional owners maximise agreement outcomes?

A significant majority of literature on land access and benefit sharing agreement making is concerned with extractive industries. This literature emphasises that traditional owners are almost always at a legal, economic, informational and political disadvantage to the companies they are negotiating with (Langton et al. 2004, Langton et al. 2006, O'Faircheallaigh 2006). As outlined above, the NTA has given traditional owners the opportunity to negotiate an agreement with those seeking to access their land, but with few significant legal levers with which to ensure a favourable agreement is reached. It is a 'seat at the table but no guarantee of success' (O'Faircheallaigh 2007: 1). Research has shown that a significant danger in agreement making is that traditional owners (and other Indigenous people world-wide) can receive less than if they took an alternative approach, including political action and legal means, including litigation over issues such as environmental and cultural heritage laws (O'Faircheallaigh 2004b, 2006, 2007). This power imbalance means that both the final agreement and the way the negotiation is conducted (particularly how well the traditional owners have been resourced to negotiate and which party dictates the negotiation timing and agenda) are likely to be skewed in favour of the company (O'Faircheallaigh 2013, O'Neill 2016).

The literature is very clear on which factors result in traditional owners negotiating strong land access and benefit sharing agreements. Foremost, it is those traditional owners with political influence, combined with strong organisational capacity and financing, who are best able to insist companies go above the minimum requirements of the NTA and other laws. How that political power is exercised depends on the specific circumstances of each negotiation. For example, in a broad-ranging empirical study of three negotiations in Australia and Canada between traditional owners and the same company, Ciaran O'Faircheallaigh identified four main reasons for differences in agreement outcomes. These are the company itself, and how committed to corporate social responsibility principles it is (which he partially explains by reference to prevailing norms derived from UNDRIP and corporate social responsibility principles); the prevailing legislative regime and whether it favours Indigenous interests; the economics of the project being proposed; and the political capacity of traditional owners to insist that companies meet their obligations (O'Faircheallaigh 2006). He found the agreement most beneficial for traditional owners was the one in which the Indigenous group was most politically influential (O'Faircheallaigh 2006:7).

O'Faircheallaigh argues that the most effective way in which groups may level the playing field is through political strategies that are local (often associated with a strong native title representative body and a unified Indigenous group); regional, involving the sharing of information and common strategies; and national, including through alliances with other stakeholders (e.g. environmentalists, unions and churches). On this latter point, however, he highlights potential difficulties stemming from competing agendas, particularly if the Indigenous

people in question do not want to halt development but rather ensure it occurs with their consent and on acceptable terms (O'Faircheallaigh 2006:19). Agreements are more beneficial to traditional owners in northern Australia where native title rights are generally stronger, the region has robust organisations with experience in agreement making and colonial impact was often less than in southern Australia (O'Faircheallaigh 2015:93). Renewable energy projects will potentially become more desirable to the wider Australian public and thus make it more difficult for traditional owner groups to form alliances with those they have traditionally sought out when dealing with the extractive industry and seeking a better share of benefits, or opposing a renewable energy development on their land.

Katherine Trebeck's research into traditional owner power focuses on company acquiescence to Indigenous people demands in two case study sites: Century Mine in Queensland, and Jabiluka in the Northern Territory. Despite being 'relatively powerless' in comparison to mining companies, she argues that groups can nevertheless exert leverage over these companies where they can impact on company profit through threatening damage to company reputation (Trebeck 2007:544). The power to harm corporate reputation comes from an increasing awareness of Indigenous rights by the Australian public, as well as increased monitoring of corporate activities by national and international civil society, she says (Trebeck 2007:555). It can occur by direct action (including shareholder activism), mobilisation of supporters, alliances, delay tactics, and through legislation (Trebeck 2007:545). She observes that the Mirarr people of Kakadu used these tactics to prevent uranium mining occurring at Jabiluka in the Northern Territory without traditional owner consent (Trebeck 2007:554). Trebeck endorses O'Faircheallaigh's finding that the political capacity of groups and organisations is key to understanding why companies pay differently (Trebeck 2007:577).

Kim Doohan's examination of the renegotiation of the Good Neighbour Agreement at Argyle Diamond Mine in the Kimberley found that it took place despite not being legally required because of demographic factors and changing attitudes (Doohan 2006). The mine's sizeable neighbouring Aboriginal community was demanding better relationships with the mine, as well as a greater share of the mine's wealth. In addition, the mine was operated by a subsidiary of Rio Tinto, which was leading a shift in corporate attitudes to the communities in which their mines were situated, and whose upper management were sympathetic to community demands (Doohan 2006:50).

Jon Altman, looking at the power of traditional owners in opposition to resource projects, compares the campaign against the Ranger Uranium Mine with that of proposed uranium mining in Jabiluka, both in the Kakadu World Heritage National Park (Altman 2012:46). The first never stood a chance, he said, because traditional owners had little power. Ranger occurred before the enactment of the land rights legislation meaning traditional ownership was unrecognised by Australian law. The mine also had strong Commonwealth government support. He compares this with the later, successful, campaign by traditional owners against the Jabiluka mine, in which the Mirarr people had legal title to the land,[15] were allied with international NGOs, and were able to successfully lobby the UNESCO World Heritage Committee and company shareholders (Altman 2012:57–60).

Similarly, Lily O'Neill compared the Browse LNG land access agreement in northern Western Australia that resulted in $1.5 billion in benefits for traditional owners, and the Curtis Island LNG agreement in central Queensland that resulted in $10 million in benefits for traditional owners. She found the reasons for these differences were the respective political power of traditional owners (particularly the strength of their organisations), the history of colonial impact on each Aboriginal community (with its corresponding impact on strength of native title rights), and the attitude of the respective State governments. On this latter point, O'Neill found that the State of Western Australia insisted that traditional owners receive a significant benefit from any

[15] It is worth noting that the Mirarr people hold title to their land pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which is generally accepted to contain stronger rights for traditional owners than the NTA but is not subject to detailed examination in this paper.

development, while Queensland allowed companies to do the bare minimum required by the NTA (O'Neill 2016:213–215).

(b) The personal aspects of agreement making

The literature also emphasises the personal aspects of agreement making. The process of coming to an agreement is often emotional given the background of dispossession and a myriad of other injustices that continue to impact communities (Guest 2009). Agius, Jarvis & Williams (2003) write of the post-negotiation disappointment of unfulfilled expectations that 'native title might allow…people who had been homeless to be housed...people who had been removed to be returned' (Agius, Jarvis & Williams 2003:5). Traditional owners negotiating these agreements come from many different backgrounds and have highly variable experience relevant to the agreement making process. In some regions, for example, the Kimberley in north-west Australia, groups have negotiated many significant agreements and individual people have a good understanding of how to ensure maximum benefit (Bergmann 2010, Doohan 2006). For other groups, those negotiating the agreements might not have relevant experience and may lack the financial and legal skills to adequately assess the impact and consequences of what they are agreeing to (O'Neill 2016:180).

The agreement making process can also result in splits in the traditional owner group, as different people may want different outcomes, including not wanting the proposed development to proceed. Differences of opinion can be driven by the knowledge that traditional owners cannot legally prevent the development from occurring (O'Neill 2016:130). Additionally, division within a group can also be exacerbated by outsiders, including the company wanting to access land (Cleary 2017).

In recent years the literature has also noted divisions between Indigenous groups and environmental organisations in situations where Indigenous groups have accepted that a development should go ahead, subject to conditions (Neale 2011, O'Faircheallaigh 2011, Pearson 2010 Ritter 2014). This is far less likely to be an issue in the development of renewable projects given environmental groups are usually strongly in favour of the industry.

(c) Best practice: from negotiation to implementation

We have compiled the following list of best practice guidelines from the literature on both the extractive and renewable industries. These are discussed more fully below.

For companies and governments, best practice in agreement making is:

- Recognising that a company must obtain a 'social licence to operate' that will often be well above what is legally required. This should be actively promoted by governments
- Recognising that a social licence to operate, particularly for multi-generational projects, will need to be re-negotiated on a regular basis
- Adhering to the standard of 'free, prior and informed consent' when seeking to access and use Indigenous-owned land
- Ensuring that the land owning group are resourced to obtain good independent legal, scientific, business, accounting and other advice for the negotiation
- Agreeing that the agenda, nature and timelines of the negotiation are to be developed in consultation with the land owning group
- Negotiating with land owners in a respectful manner and in good faith, while recognising the need for a robust negotiation
- Quantifying agreement benefits based on a 'sharing the benefit' methodology for the proposed activity

- Ensuring that there is a whole-of-company commitment to these principles, and
- Adhering to the agreement fully at the implementation stage.

There is significant recognition in the literature that a strong agreement will almost always be preceded by a fair and robust negotiation. For example, Owen and Brereton says that 'successful agreements' are preceeded by a fair and equitable process of negotiation in which communities are provided financial and logistical assistance; and where all parties have committed to affirming the obligations in the agreement in implementation (Owen and Brereton 2011). Similarly, O'Faircheallaigh writes that a community should have access to resources, including independent commercial, legal, environmental and industry experts — an area in which Aboriginal communities are usually at a disadvantage (O'Faircheallaigh 1995:10). A robust negotiation is one in which Indigenous people are not only properly resourced to negotiate, but are also able to exercise a level of control over the negotiation agenda and the negotiation timelines (O'Neill 2016:214). Howitt et al argue that a fair process is also one in which native title holders feel listened to and respected in native title negotiations, as well as substantive outcomes (Agius et al. 2003:2–3).

When entering a negotiation, O'Faircheallaigh says that the community should first establish its goals for the negotiation, a process that necessitates knowing the likely impacts of the project (O'Faircheallaigh 1995:3). Kimberley Aboriginal leader Wayne Bergmann also emphasises the value of individual and organisational experience when negotiating agreements (Bergmann 2010:187).

There is also strong evidence on the breadth of matters that good agreements contain, including financial remuneration, employment and training provisions and environmental and cultural heritage protection, among other things. Given both the confidential nature of most Aboriginal land access agreements, and that any evaluation of them depends heavily on the context of the agreement (for example, whether the resource project is financially sound), assessing the strength of agreements inevitably involves value judgments. Nevertheless, an assessment framework has been developed by Ciaran O'Faircheallaigh to provide baseline criteria against which traditional owners can gauge negotiation offers (O'Faircheallaigh 2004a). His eight criteria relate to environmental management (scores between 0 and 6); cultural heritage protection (scores between 1 and 5); rights and interests in land (scores between –5 and 5); financial payments (as a percentage of expected project output); employment and training (minimum to substantive); business development (scores between 0 and 5); Indigeenous consent and support (scores between 1 and 7); and implementation (the extent to which resources and planning have been allocated to implementation). These criteria are alternatively on a scale, cumulative, or absolute (in relation to financial payments) (O'Faircheallaigh 2004a:303–328).

O'Faircheallaigh studied 45 agreements from Australia and Canada to come up with the following examples of good and bad practice agreement making (O'Faircheallaigh 2015:69–89). His findings have been summarised in Table 1.

Table 1 Strong and Weak Provisions in Agreement Making (O'Faircheallaigh 2004a)

	Strong Provisions	Weak Provisions
Environmental Protection	Traditional owners 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.	The agreement limits the general law rights traditional owners may have and leaves them worse off, for example, if an agreement curtails their right to sue for environmental damage.
Cultural Heritage	A high level of protection would stipulate that the company has to avoid all damage to cultural sites without exception, and that traditional owners be funded to do cultural heritage protection work, can choose which technical staff work on cultural heritage issues, and conduct cultural awareness training for the company.	Very weak clauses allow cultural sites to be destroyed by a company without recourse to traditional owners.
Recognising Rights and Interests in Land	A strong clause would result in native title being recognised, or a transfer of land to traditional owners	Very weak clause would result in extinguishment of all native title rights and interests.
Financial Payments	A very good result would be a royalty of 2–3%	A poor result would be a financial payment that is less than traditional owners would receive if no agreement were made (i.e., if the land was compulsorily acquired).
Employment and Training	Best practice sees concrete employment targets set; local traditional owners explicitly favoured for jobs; measures put in place to make the workplace conducive to recruitment and retention of Aboriginal workers. These 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.	A very weak clause could include a vague commitment to employing Aboriginal people.
Business Development	Best practice clauses could lend business expertise to Aboriginal companies; help with the sourcing of financing for Aboriginal companies; provide preference clauses for Aboriginal businesses; fund business management training; provide secure, long-term, 'bankable' contracts for Aboriginal companies.	Weak clauses would make a vague commitment to helping Aboriginal business development.

	Strong Provisions	Weak Provisions
Implementation of the Agreement	A best practice clause might set aside personnel and significant financing specifically for the task of implementing the agreement; where traditional owners and the company personnel have a good and trusting ongoing relationship; structures are set up solely for the purpose of implementation; explicit clauses about who (traditional owners and company) is to do what post agreement; senior decision makers in the company and traditional owners are required by the agreement to focus on implementation; and incentives for company personnel to implement the agreement fully.	An agreement weak on implementation would not make any mention of how it would be implemented.

Source: O'Faircheallaigh 2004a.

O'Faircheallaigh observes that while it may be intuitive to think that some groups are making trade-offs between these provisions, his findings are that when an agreement is strong or weak, it is usually so across all categories (O'Faircheallaigh 2015:69–89). Of course, these criteria are based on the status quo of extractive industry agreements: it would be in keeping with the ethos of the renewable energy industry for 'best practice' to represent a higher bar than the extractive industry, as has happened in other countries (this will be discussed in more detail in our second (forthcoming) Working Paper).

Good working relationships between the company and community are also very important for the implementation period. For example, one State government official with extensive experience in this area said that a good relationship could 'add 50 per cent to the value of the agreement' because it aided the implementation of an agreement, which in turn could attract other government and company funding. Wayne Bergmann mirrored this sentiment, saying that where parties do not have a good relationship, agreements 'don't deliver half of what they should' (quoted in O'Neill 2016:169).

(d) Agreement making and the renewable energy industry

For renewable energy projects, the literature is predominately concerned with agreements made with local communities, rather than agreements made with the actual landholders, known as 'hosts'. This is an important distinction because the majority of the comparable literature on resource extraction agreement making is concerned with the traditional landowners. Nevertheless, there are several themes in the literature that highlight important trends in these agreements that are likely to translate to Indigenous communities. These include minimum requirements in relation to equity offered to local communities (for example, in Denmark companies must offer local communities the ability to acquire a minimum 20% stake in the production facilities and transparent registers for community benefits (Rønne 2016:184)). In some regions, the quantum of community benefits has been set by the government. For example, in the US State of Maine, there is a legislative minimum standard of $4,000 per turbine per year for 20 years. This minimum saw the actual value of agreements increase above the required minimum (Paddock & Greenblum 2016:165). Also in Maine, one wind farm agreement saw one-off payments given to residents for installation of fossil fuel reduction technology to their homes and cash payments to off-set electricity payments (Paddock & Greenblum 2016:166).

Lane and Hicks write of new requirements in Victoria that renewable energy companies must provide evidence of both community engagement and benefit sharing (Lane & Hicks 2017:6). They say that best practice in the renewable energy industry involves: early community engagement; tailoring the project to local identity and landscape values; undertaking a social feasibility analysis; community participation in decision making and design; 'sharing the benefits' with the community in line with the size of the project; ongoing and regular engagement; setting up a robust complaints procedure; ensuring a process is set up for legacy issues (Lane & Hicks 2017:7). They say that social acceptance of renewable energy projects and a social risk analysis are as important as technical and economic considerations (Lane & Hicks 2017:11).

One important distinction between renewable energy projects and extractives for traditional owner groups is that the resources are, to a much greater degree, universally distributed. There may be limiting factors such as proximity to electricity markets, or industrial centres, or avenues for energy export. But nonetheless, neighbouring traditional owner groups are likely to have similar renewable resources at their disposal. This reality potentially sets up a competitive marketplace where traditional owner groups will be vying against each other to sell their energy resources. While renewable energy companies might benefit from this competition, traditional owner groups desperate for resource developments of any kind – and for access to affordable energy – might not.

One potential method to combat such a strategy from companies would be for traditional owners to form regional alliances of Native Title Representative Bodies and Prescribed Bodies Corporate (the corporate body that holds the native title on behalf of traditional owners). This approach was taken by Kimberley traditional owners prior to the search for a site to build a LNG processing plant on the Kimberley coast: traditional owners believed, with considerable justification, that presenting a unified front to LNG companies would ensure a strong negotiating position for whichever group would eventually host the site. This regional approach also saw these groups agree that benefits should be paid to the region as a whole, not just to the specific traditional owner group as is usual practice (O'Neill 2016:137). Such an approach also avoids the inequalities of only certain traditional owners benefiting from a development in a region.

6 Conclusion

This paper has clearly shown that strong agreements are negotiated by a politically influential traditional owner group with significant resourcing and experience of agreement making; with a company with good adherence to corporate social responsibility principles; over a financially viable development. Like the extractive industry, the NTA clearly puts the renewable energy industry in a better legal position than traditional owners.

While renewables and extractives both seek to obtain profit from developing native title land, renewable energy projects raise different issues for agreement making, including of economics, impact, as well as potential allies for traditional owners should they want to prevent or alter the terms of such a development. However, traditional owners should continue to insist that agreements follow the extractive industry best practice, including attempting to strongly mitigate the impacts of developments and the payment of benefits using a 'sharing the benefit' methodology. Renewable energy companies would be well advised to heed the changing attitudes and experience of the extractive industry over the past two decades in relation to best practice.

Native title land is likely to become more attractive to renewable energy companies as technology develops and allows proponents to move further away from high population areas. However, unlike resource extraction, renewable energy is not restricted to certain geographic areas in the same way, raising the possibility that companies may be able to pick and choose whose land they will attempt to develop. The use of native title land for renewable energy projects will raise different issues for native title holders and companies than their experience to date with neighbouring communities in high population areas.

These conclusions raise several important areas for further research. These include:

- How does the role of the state differ in renewable energy compared to extractive industry projects, and what role ought the state be playing? In the absence of a pro-active state, what role might there for be for the renewable energy industry at regional levels in providing information, drawing together investment opportunities, working with Native Title Representative Bodies and so forth?
- What are the key differences between renewable energy projects and the extractive industry in terms of impacts and potential benefits, and how do these differences impact on agreement making?
- What alternative models are there, beyond (or in addition to) native title agreements, for traditional owners to take the initiative, and wholly or partly own these kinds of developments? Are the models that are working in Canada and New Zealand transferrable to Australia? What policy settings are required?
- What knowledge do traditional owner groups require to be able to participate in the coming energy revolution? Is this knowledge/expertise readily available to them? What role could Indigenous organisations be playing in facilitating traditional owner benefits, ownership and energy justice into the future?

This first Working Paper will be followed by a second, which will begin to answer some of these questions. It will look to First Nations experience in Canada and New Zealand – where there is already a significant history – to explore the role of the state in facilitating Indigenous benefit, and part-ownership, of renewable energy resources in those countries. Potential benefits include elements of ‘energy justice’, of ensuring that First Nations people have the same, or better, access to renewable energy resources as the rest of the community, and that the economic future of First Nations people is built upon renewables. For these to happen, it is likely that Australian governments will need to develop a specific focus on building the policy architecture – via a range of mechanisms – or risk Indigenous Australians being left behind in the coming renewables revolution.

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