

Trending Up:

How clean energy agreement-making in Australia is raising the bar on benefit and co-ownership arrangements for Australian Traditional Owners

March 2025

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**MCF
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The Mabo Centre is a transformational joint initiative of the National Native Title Council (NNTC) and the University of Melbourne. The First Nations-led Mabo Centre will support Traditional Owner groups and organisations to enable better economic outcomes through leveraging land and sea rights. It aims to maximise the economic, social, and cultural benefits of these rights by building leadership skills and knowledge for successful agreement-making.

Led by Traditional Owners and their communities, The Mabo Centre will ensure that the benefits of land and sea rights are fully realised by providing a network of First Nations-led leaders to share knowledge and expertise. Over time, this will ensure better support of community aspirations and provide opportunities for economic development and entrepreneurship on Country. With the Mabo family generously gifting The Mabo Centre name, the Centre will honour the legacy of Dr Eddie Koiki Mabo as a campaigner for land and sea rights and economic development and the forefather of native title. The ongoing work of the Mabo Centre will be based at the University of Melbourne Parkville Campus in Naarm (Melbourne) on the lands of the Wurundjeri Woi Wurrung people.



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Preface

We are pleased to present this discussion paper on native title agreements relating to renewable energy. Informing native title holders, traditional owners and other parties is critical to improving outcomes for all.

In 1998, Indigenous Land Use Agreements (ILUAs) were introduced into the Native Title Act 1993 (Cth) (NTA) by amendment requiring Aboriginal and Torres Strait Islander people with native title interests to negotiate the terms of Future Act proposals.

The common thread in mining, oil and gas agreement-making is that native title holders cannot veto this extraction of resources on their Country and are forced to negotiate only the terms of the resource extraction projects under very strict deadlines. More than 500 agreements have been settled on this very unequal playing field.

As this paper demonstrates, the playing field for agreements on renewable energy projects is far more equal than for mining and resource extraction. While it is too early to say what long-term outcomes these agreements may provide for Australia's Traditional Owners, it is already clear that many renewable energy projects are being led, owned and controlled by these communities of native holders and traditional owners. This is a very positive start.

ILUAs are binding agreements registered with the National Native Title Tribunal. Other types of agreements have also been settled. More than 500 agreements have been settled related to mining, oil and gas since the commencement of the ILUA provisions in 1998. A further 312 agreements relating to pastoral activities have been concluded. In total there are approximately 1,500 agreements settled under the NTA. Of these, 13 native title agreements have been finalised for different types of renewable energy and this figure is expected to increase considerably.

This innovative solution of settling potential conflicts through agreement-making has been the subject of comprehensive research, identification and review since

2002 when the Agreements, Treaties and Negotiated Settlements (ATNS) project was established. The ATNS project has long been supported by the National Native Title Council (NNTC) as the peak body for Australia's native title and other Traditional Owner organisations.

Building on this long-standing relationship, the NNTC and the University of Melbourne have come together as partners in the creation of the Mabo Centre. The key purpose of the Mabo Centre is to support Australia's Traditional Owners in translating their land and sea rights into tangible economic, social and cultural outcomes for the benefit of their communities and broader regional Australia.

The ATNS project will become a signature project of the new Mabo Centre, informed by the needs of both Traditional Owners and industry research, such as this paper. Training will also form an important plank of the work of the Mabo Centre.

The potential for good practice in improving the outcomes for Indigenous Australians is significant, if the terms provide for Indigenous economic development and the protection of cultural and environmental heritage.

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Trending Up: How clean energy agreement-making in Australia is raising the bar on benefit and co-ownership arrangements for Australian Traditional Owners

Introduction

The clean energy industry is the most significant to impact the Indigenous Estate since the mining boom that began early in the 2000s.¹ During the mining boom, it was estimated that 60 per cent of minerals in Australia were extracted from, or next to, Traditional Owner communities.² The clean energy transition likewise will occur on vast tracts of Traditional Owners' Country.³ Mining, oil and gas companies are increasingly active in the clean energy space to decarbonise their operations, but there are also major new international clean energy companies investing in Australian projects. These clean energy projects often have a huge land footprint and will produce equally enormous amounts of power.

However, the clean energy industry is faced with a different legal and policy framework to the mining, oil and gas industries. It is also being established in an environment that presents different economic and political pressures and opportunities. This paper explores how these differences are impacting the way that Traditional Owners are negotiating or developing clean energy projects on their Country.

Traditional Owners can say no to clean energy projects

Unlike for mining, oil and gas, Traditional Owners with native title rights and interests in their Country can legally veto clean energy developments. This is because the only approval pathway in the Native Title Act 1993 (Cth) for clean energy developments is by using an Indigenous Land Use Agreement (ILUA). These agreements are voluntary.

This legal veto is hugely important. It makes Traditional Owner consent more valuable to clean energy

developers because, unlike in a mining, oil or gas context, clean energy developers cannot apply to the National Native Title Tribunal to overrule Traditional Owners' wishes. This means that where groups welcome development and the corresponding financial benefits, they can stipulate binding and extensive cultural heritage and environmental protections, both issues that are very important to Traditional Owners.

Like all similar legal vetoes, it is subject to governments' ability to compulsorily acquire land. To our knowledge, the use of compulsory acquisition has not yet been proposed to acquire Traditional Owners' rights and interests in land for a clean energy project.

Easier to protect cultural heritage

Renewable energy projects allow Traditional Owners to exert greater control over cultural heritage protection than for mining, oil and gas projects. This is due to two key factors. Firstly, Traditional Owners must consent to clean energy projects and can therefore require that projects avoid cultural heritage sites. Secondly, clean energy projects can be flexible as to where infrastructure, including wind turbines and solar arrays, are placed. This is because the ability to generate wind and solar energy is often similar across a region and so wind turbines and solar panels can be shifted fairly easily to accommodate cultural heritage sites. In contrast, mining, oil and gas projects have far less flexibility because they must be placed close to the non-renewable resource they are extracting.

There are other pertinent differences between mining, oil and gas, and clean energy industries. These include employment patterns and proximity to customers. These are shown in the Figure 1.⁴

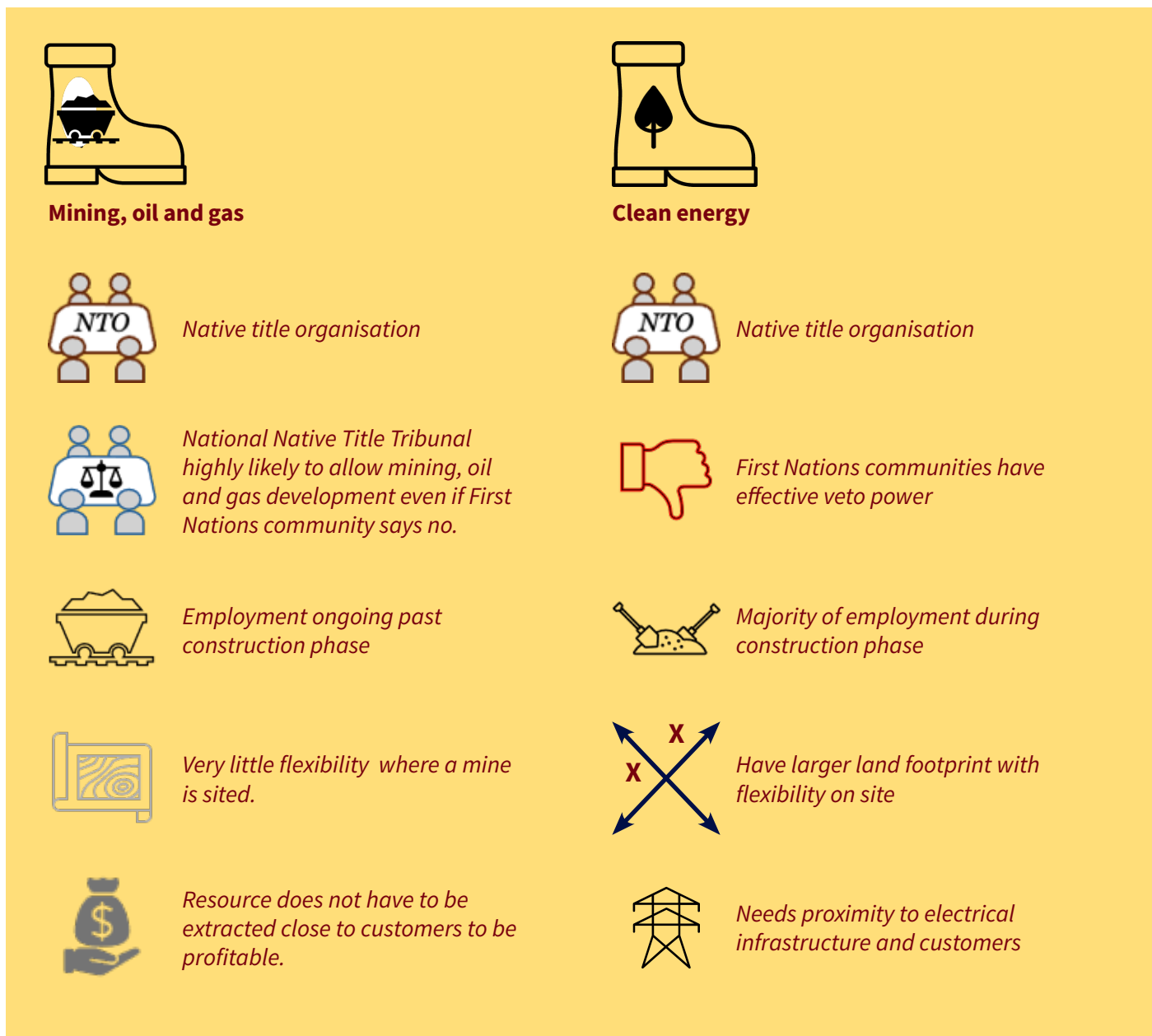


Figure 1: Mining, oil and gas developments versus clean energy developments

Success factors for Traditional Owners

In Australia, there are now many examples of Traditional Owners developing clean energy projects in partnership with clean energy developers and companies.⁵ Three significant examples are discussed here. From these examples, and others uncovered in our research, there appear to be five critical success factors behind Traditional Owners participating in clean energy on their own terms.

These are:

1. Undertake renewable energy resource mapping for your Country
2. Carefully choose your development partner
3. Be creative to obtain finance
4. Gain access to expert advice and information
5. Understand power purchase agreements

The Yindjibarndi-ACEN partnership will see Yindjibarndi people of the Pilbara region in Western Australia take a 25 to 50 per cent stake in an initial 750-megawatt wind, solar and battery project developed on their Country, with Filipino clean energy giant ACEN Corporation taking the remainder.⁶ Yindjibarndi undertook the wind and solar resource mapping themselves. ACEN was chosen by Yindjibarndi after sounding out other companies, primarily due to their positive reputation partnering with Traditional Owners.⁷ This partnership has also signed a Memorandum of Understanding with mining giant Rio Tinto, presumably for the provision of clean energy to Rio Tinto's nearby mines.⁸ ACEN will do the construction work themselves, rather than the common practice of obtaining the approvals and on-selling the project. Yindjibarndi were also able to negotiate with ACEN a hugely important financing arrangement whereby they are guaranteed a shareholder loan from ACEN for their equity contribution to the project.⁹



The **Nari Nari Tribal Council** have 89,500 hectares of freehold land on the Murrumbidgee flood plain in New South Wales. The initial mapping of the wind and solar resource was undertaken by the New South Wales government; Nari Nari land is close to a Renewable Energy Zone interconnector. Nari Nari chose Kilara Energy after establishing a relationship of trust with the company. Nari Nari negotiated a deal that includes milestone payments during the pre-development phase and, depending on the success of financial fundraising, a minimum five per cent equity share at financial close. Nari Nari will finance their equity stake by ‘leveraging their knowledge and cultural services broadly including cultural heritage, liaison and other cultural services’.¹⁰ Nari Nari are also to receive an additional \$40,000 annually per wind turbine, of which there are 74 planned.¹¹

The **Barngarla** people, Traditional Owners on the Eyre Peninsula region in South Australia, are also key players in clean energy, including solar, hydrogen hubs, battery projects, and powerlines¹² after successfully fighting a nuclear dump on their Country.¹³ These deals will be worth \$50 to \$80 million in revenue each year once they are active.¹⁴ One of these projects is the Yoorndoo Ilga Solar Project, a 300-megawatt solar and 250 to 500-megawatt per hour battery storage project, located on 665 hectares of freehold land owned by the Barngarla Determination Aboriginal Corporation. This land was purchased freehold by the Barngarla from the state of South Australia after creating an extremely strategic set of circumstances that had resulted in a deadlock for clean energy development.¹⁵ Barngarala then entered into an Agreement for Lease with a renewable energy company, a legal arrangement that is markedly simpler and easier to enforce than an ILUA.

Faster approvals with Traditional Owners

Our research finds that where Traditional Owners are proactive (and supported to be proactive through access to adequate resourcing) in clean energy mapping and development planning, it is likely that approvals will be faster and more streamlined. This is clearly a significant advantage.

It is noteworthy that two of the best examples of Traditional Owners partnering on clean energy projects are for freehold land, rather than native title land. Freehold title may make it easier to obtain finance. Freehold title is also simpler and more flexible to deal with than native title and means that there is no need to obtain native title approvals. Governments should therefore consider granting freehold title to Traditional Owners where possible.

The price is not the price

The clean energy industry is a new industry and there is still considerable need for Traditional Owners to be able to obtain good, independent information on the financial outlook of clean energy projects.

It is not clear the exact amounts that are being paid in clean energy project agreements, however several people commented that the payments they were seeing were significant. What is clear is that the amount and form that financial benefits will take often depends on the negotiation, with clear evidence of low-ball initial offers being made by clean energy developers. New benchmarks on appropriate royalty rates are clearly being developed, although again these figures are confidential.

The role of the clean energy industry and Power Purchase Agreements

Clean energy companies can play a vital role in enabling Traditional Owners to benefit, including by entering genuine business partnerships with host communities. The examples discussed above are good illustrations of these. Likewise, customers who enter into Power Purchase Agreements (PPAs) for power produced on Traditional Owners' Country can also play a key enabling role.

For example, one type of Power Purchase Agreement (PPA) being considered for a clean energy project is on a cost-plus basis. A cost-plus model of PPA means that the purchaser of the electricity agrees to pay the clean energy developer (which includes Traditional Owners) the actual costs involved in the development, plus an agreed profit margin. This includes payment of costs incurred where the developer is delayed in achieving commercial operations. In comparison, a fixed-cost PPA guarantees the amount that the purchaser will pay, meaning that if the project goes over budget or is delayed, the extra costs must be found by those building the project.

Such an approach helps to de-risk the project for the clean energy developers, including helping them obtain finance because of this greater financial certainty. For the purchaser of the electricity, such an approach helps to ensure the project will proceed (which also benefits the developer and Traditional Owner group) and is also likely to result in significant social license benefits.

Where Traditional Owners may not benefit

Capacity and resources are essential for Traditional Owners to benefit

While many Traditional Owners have the organisational capacity to source independent experts and resources to understand the scale and nature of this opportunity, there are also many groups who do not. For these latter groups to benefit, proper resourcing is urgently required.

Avoiding native title land

There is evidence that, in a few instances, developers are avoiding native title land, both because a particular Traditional Owner group may be viewed as obstructive, or because the developer may want to avoid native title approvals entirely in the interests of speed. This echoes recent findings from the United States where it was observed that American Indian '...reservation lands are 46 per cent less likely to host wind farms and 110 per cent less likely to host solar than comparable adjacent lands', despite being well positioned for both and taking into account land use, transmissions lines and other infrastructure.¹⁶

Regulatory complexity was identified as a key barrier behind this trend: in relation to new transmission lines, as well as the complicated jurisdictional, regulatory and land tenure arrangements that apply to American Indian reservations, arrangements the authors describe as 'bureaucratic obstacles'.¹⁷ The solution to these obstacles, the authors argue, is '[v]esting regulatory authority with one entity – the tribe'.¹⁸ This is a suggestion worthy of further investigation in the Australian context.

Using existing Indigenous Land Use Agreements to build clean energy facilities

There is also evidence that some developers are using existing land access agreements with Traditional Owners – that may relate to mining, for example – to build a nearby clean energy facility without the need for consent of, or compensation to, the Traditional Owners. The legality of this depends on the terms of each individual agreement, with older agreements more likely to be wide enough to allow this kind of further development without additional consent.



Conclusion

The clean energy transition has the potential to be very beneficial for Australian Traditional Owners on whose Country much of it will occur. However, the transition also brings significant risks. We have identified five factors that are critical to success for Traditional Owners. These are:

1. Undertake renewable energy resource mapping for your Country
2. Carefully choose your development partner
3. Be creative to obtain finance
4. Gain access to expert advice and information
5. Understand power purchase agreements

Each of these requires resourcing and expertise. However, there is currently no clear pathway for Traditional Owners to access funds to undertake these actions. This means that those groups who already have independent financial resources to pay for this advice are therefore at a significant advantage, compared to those groups who must rely on developers to provide funds to them for this purpose.

This Discussion Paper is a summary of qualitative research conducted in 2023 and 2024. It was designed with the National Native Title Council and the First Nations Clean Energy Network. It received ethics clearance from the Office of Research Ethics and Integrity, University of Melbourne, project ID number 25722. This research was funded by Melbourne Climate Futures and Boundless Earth. The views expressed in this publication are those of the authors and do not reflect any official position on the part of these funders. Any mistakes are likewise those of the authors alone. The full research findings can be found in Lily O'Neill and Kathryn Thorburn, 'First Nations at the Forefront: The Changing Landscape of Clean Energy Agreements in Australia' (forthcoming). The research is based primarily on 15 anonymised interviews with people who have significant practical expertise and experience in clean energy agreement making, predominately lawyers and financial professionals. These people are both Indigenous and non-Indigenous and represent both community and industry. While this is not a large number of interviews, the pool of people with relevant expertise in Australia is small. These experts tend to be extremely wary of providing any information given confidentiality requirements and other ethical obligations, including legal professional privilege. Additionally, the researchers have had many off-the-record conversations with a similar pool of people that while not part of these findings, has informed the thinking behind them.

Endnotes

- 1 The 'Indigenous Estate' refers to the almost 60 per cent of the Australian continent that is subject to Traditional Owners rights and interests in land (commonly referred to as 'Country'), held communally, and in accordance with their traditional laws and customs. A note on terminology: throughout this paper, rather than use specific legal terms like 'native title party', we instead use the term 'Traditional Owner' to refer to Aboriginal and Torres Strait Islander people who hold rights and interests in their traditionally-owned Country, whether under Australian law or traditional law and custom, or both.
- 2 See Minerals Council of Australia, Minerals Industry: Indigenous Economic Development Strategy (2011), 4.
- 3 Net Zero Australia estimates that up to 43 per cent of new energy systems will be on land subject to some level of Indigenous ownership or management, including native title or land rights, by 2060, see Andrew Pascale et al, *Downscaling – Net-Zero Transitions, Australian Communities, the Land and Sea* (2023) 8.
- 4 This graphic was produced by Amanda Belton, with a grant from the Melbourne Centre for Law and the Environment, Melbourne Law School, University of Melbourne.
- 5 See the [First Nations Clean Energy Network project tracker](#).
- 6 ['Yindjibarndi people partner with ACEN to bring clean energy to Western Australia'](#).
- 7 Interview with Interviewee I, online, 5 October 2023.
- 8 ['Rio Tinto and Yindjibarndi Energy Sign Pilbara Renewables MOU'](#).
- 9 Interview with Interviewee I, online, 5 October 2023.
- 10 Interview with Interviewee F, online, 19 and 27 September 2023.
- 11 Aston Brown, ["Destiny in Our Hands": The Indigenous Australians Joining the Renewable Energy Transition](#), *The Guardian* (online, 20 July 2024).
- 12 Paul Starick, ['\\$1bn Empire: Aboriginal Corp Breaks Wealth Record in Land Deals'](#), ABC online (online, 23 February 2024).
- 13 Tory Shepherd, ['Traditional Owners Win Court Case to Stop Nuclear Waste Dump in South Australia'](#), *The Guardian* (online, 18 July 2023).
- 14 Paul Starick (n xi).
- 15 Ibid.
- 16 Dominic P Parker et al, 'Economic Potential of Wind and Solar in American Indian Communities' [2024] *Nature Energy* 1.
- 17 Dominic P Parker et al, 'Economic Potential of Wind and Solar in American Indian Communities' [2024] *Nature Energy* 1, 5.
- 18 Ibid.



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