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First Nations at the forefront: The changing landscape of clean energy agreements in Australia☆

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ABSTRACT

The clean energy transition has the potential to be very beneficial for the Australian First Nations people on whose Country much of it will occur. This paper documents results of interviews with legal and financial experts who have very particular insight into the contents of benefits agreements currently being negotiated with First Nations groups for large scale clean energy developments – agreements which are conventionally confidential. The results of our analysis give reason for cautious optimism in this space, confirming that First Nations people in Australia have the legal ability to veto clean energy projects on Country. We note the wider impacts of this emergent power of veto, which makes consent more valuable to developers, but also might encourage developers to avoid First Nations Country altogether. We further observe that as First Nations groups become key stakeholders, or co-owners, in these kinds of development, they also can become exposed to significant financial risk. The need to access excellent advice for First Nations groups in Australia who are navigating these projects – as developers, co-owners, shareholders, board members and contractors – is more urgent than ever.

1. Introduction

The clean energy transition underway in Australia is the most significant new industry 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 % of minerals in Australia were extracted from, or next to, First Nations' peoples' land. [1] The clean energy transition likewise will occur on vast tracts of this land.[2] Many of the people who acted for both First Nations' people and the mining industry during the mining boom are now negotiating the ways in which the clean energy industry manages the impacts, shares benefits and shores up a social licence to operate. Mining, oil and gas companies are increasingly active in the clean energy space, [3] but there are also some major new international clean energy companies now investing in Australian projects. [4] These emerging clean energy projects, many of which have only been proposed in the last few years, are of a scale not witnessed before by Australian First Nations' peoples.

There are significant differences between the two industries.

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[1] The 'Indigenous Estate' refers to the almost 60 % of the Australian continent that is subject to First Nations peoples' rights and interests in land held communally, and in accordance with their traditional laws and customs. This paper uses several terms which are correct in context to discuss Australian First Nations people, including 'native title holders' (the term used in the Commonwealth Native Title Act 1993 (Cth) (NTA)), 'Indigenous people' (the term often used to describe First Nations people world-wide, including in the Nations Declaration on the Rights of Indigenous Peoples), and 'Traditional Owners' (a widely-used term for First Nations people who hold communal title to their traditional Country, whether under the NTA or state or territory land rights legislation. Most of the discussion of projects in this paper relates to Country subject to native title rights, unless noted otherwise.

[2] Net Zero Australia estimates that up to 43 % 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 [2,p. 8]

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Industrial-scale clean energy projects have a significantly bigger land footprint than mines and oil or gas projects,[3] and project durations are likely to be much longer (because mines are extracting a non-renewable resource) with many clean energy developments promoting project life to last for at least 30 years. [5] Clean energy projects are also markedly different to mining in terms of their visual impact. As one of our interviewees said: '*The wind turbines being built these days have a 160-metre-high hub height, with blade that extend another 80-90m. The tallest building in Perth is 263 metres high*'.[4]

In the last few years, a major theme from the literature on the clean energy transition and Indigenous peoples has been the risk that Indigenous people world-wide may not benefit from clean energy development on their land. [3] Also discussed in the literature are the opportunities that clean energy development can bring to Indigenous communities, if policy, legal and financial levers are in place. [6–8]

Australia does not yet have the same level of enabling government policy as, for example, Canada.[5] But this has not prevented First Nations Australians developing significant clean energy projects on their Country.

This research asks, what are the factors behind successful Australian First Nations participation in clean energy projects? What are the barriers to success? What is going into land access and benefit sharing agreements? In seeking even general answers to these questions, we aimed to address a complete lack of transparency in agreement making which has characterised the process since the advent of the *Native Title Act 1993* (Cth) (NTA).[6]

While there are several different definitions of 'industrial-scale clean energy projects' that relate to size (usually more than 100 kW), we define these projects as those that produce electricity in quantities large enough to power large regions or industrial facilities, like a nearby mine. It is at these larger scales that significant benefits can be negotiated for First Nations groups, and where standards are being set for the wider industry in Australia. In Australian policy, these are referred to as 'large-scale'.

This paper is comprised of seven sections. The **first** section introduces the context these developments are taking place in. The **second** section outlines the literature on the history of agreement making between First Nations people and those seeking to access their land, particularly in Australia. It also describes how the renewable energy sector is markedly different from mining, oil and gas, particularly that First Nations peoples with rights and interests in land have a veto right over clean energy projects, as well as other key differences.

The **third** section outlines the methodology and justification for the qualitative survey design and describes the early, unsuccessful attempt at obtaining the full text of land access and benefit sharing agreements. The **fourth** section sets out how the three case studies – clean energy projects on the Country of the Yindjibarndi, Nari Nari and Barngarla – were chosen.

The **fifth** section details the findings of the research project, principally that First Nations people are able to consent to, and are exerting significant control over, clean energy projects on their Country. This section also outlines how payments are being calculated, and cultural heritage and the environment protected.

The **sixth** section discusses the success factors for First Nations people in clean energy developments. A key finding of this section is that accessible funding to obtain independent expert advice is crucial for groups to be able to take this kind of proactive control.[7]

Finally, the **seventh** section provides concluding remarks, particularly around the need to bolster the organisational capacity of First Nations groups who currently do not have adequate resourcing to best engage with the clean energy transition.

This paper's contribution to the literature is to provide detailed information about how the almost always confidential costs and benefits of the clean energy transition are currently being shared in Australia between First Nations landowners and clean energy developers. In 'Success Factors' it sets out exactly how some First Nations groups have negotiated strong agreements for clean energy on their Country. It finds that First Nations people have the right to veto clean energy projects on their land and can control the development to protect cultural heritage and the environment. It also provides a methodological approach for finding out information about these confidential arrangements.

While some of these lessons will be confined to Australia, many will be useful for similar agreements in countries including Canada, New Zealand and the United States where confidentiality likewise dominates.

2. Agreement making in Australia: From mining to clean energy

Australian First Nations people have lived in Australia for the last 65,000 years. [9] They have been subject to British colonisation since 1788, manifesting in land dispossession, massive population displacement, dehumanisation, denigration of cultural and language practices, and the removal of children. [10] Nevertheless, many First Nations people maintain strong cultural, legal and spiritual connections to land – commonly referred to as 'Country'. [11]

First Nations peoples' rights and interests in Country have only been claimable under Australian law since the mid 1970s. [12] The basis of such claims tends to be a groups'demonstrable connection to Country, via knowledge of relevant language, kin connections, knowledge of songlines and so forth – precisely elements of cultural knowledge and expression that were severely discouraged, or in fact outlawed, by colonial administrations. [13] The strongest areas of First Nations land rights therefore on the Australian continent tend to be those areas that were colonised later or deemed uneconomic or undesirable for settlement until much later in the nation's history.

The *Native Title Act* 1993 (Cth) (NTA) codified this system for claiming back land. Under the NTA, First Nations people may be found by courts to have exclusive possession to their Country, or they may have lesser rights to Country, for example when sharing rights with pastoral lease holders. [12]

Since 1998, the Native Title Act has set out a process through which First Nations landholders can come to a legally binding agreement with those seeking to access their Country. This process is known as 'agreement making'. [14] The agreements that are reached are commonly called 'Indigenous Land Use Agreements' but also, less commonly, s31 agreements.[8] More generically, this type of agreement is often referred to globally as a 'land access and benefit sharing agreement'.

One of the most important factors that explain the land access and benefit sharing agreements that result from mining, oil and gas agreement making is that native title holders in Australia – those First Nations people who hold rights and interest in their Country pursuant to the NTA – cannot legally veto these developments. This is due to the nature of

[3] They are "land hungry", according to Interviewee B: Interview with Interviewee B, online, 1 May 2023.

[4] Interview with Interviewee I, online, 5 October 2023.

[5] See First Nations Clean Energy Network for useful summaries of each Australian jurisdiction's policy opportunities and barriers: https://www.firstnationscleanenergy.org.au/policy_opportunities_and_barriers

[6] As of June 2025, there were almost 1519 Indigenous Land Use Agreements and 295 s31 agreements registered with the National Native Title Tribunal.

[7] In December 2024, the Australian Government released its First Nations Clean Energy Strategy (https://www.energy.gov.au/sites/default/files/2024-12/First%20Nations%20Clean%20Energy%20Strategy.pdf) which also clearly articulated a need for funding of a range of avenues for First Nations groups to access advice and resources. The authors of this paper made a submission to the Strategy: https://app.converlens.com/climate-au/first-nations-clean-energy-strategy-consultation-paper/download/fil2d0f5fb954e7b29e01b46

[8] Both these types of agreements, and their regulatory requirements, are set out in the Native Title Act.

mining and oil and gas extraction rights, which are legal rights that can be enforced against all landholders, including those with freehold title. It is also because the Native Title Act ensures that Traditional Owners can only say no to mining, oil or gas in exceptional circumstances. [6,p. 3] Indeed, native title holders have only been able to prevent mining, oil or gas via legal avenues three times: once in 2009 and twice in 2011. In comparison, resource companies have been successful in gaining legal permission at the arbitral body, the National Native Title Tribunal (NNTT), despite a "no" from Traditional Owners on 153 occasions, of which 60 had conditions attached. [15] Such low odds no doubt discourage Traditional Owners from pursuing arbitration via the NNTT. [16,p. 34]

It is not just First Nations people who are not able to legally veto mining, oil and gas. In general, Australian property owners cannot veto the taking of these resources from their land, where the relevant authority has granted rights or licences to do so. The basic legal rule is that Australian State, Territory and Federal governments own all resources contained in the ground, including gold, silver, coal, aluminium, oil and gas.

The inability to veto mining, oil or gas is further enforced because of a willingness on the part of governments to compulsorily acquire land on behalf of mining, oil or gas companies. [17,p. 244], [18] The significance of this lack of veto cannot be overstated. It means that even when Traditional Owners are inclined to allow a development on their land, they have been doing so, as one Traditional Owner put it, with a 'gun to the head'. [18,p. 36] In other words, historically in Australia, the experience of Traditional Owners involved in negotiations over land access has not reflected the internationally recognised best practice principle of free, prior and informed consent (FPIC) because a lack of an alternative has meant that consent has not been freely given. [19] At the risk of stating the obvious, consent, to be freely given, must also include allowing Traditional Owners the right to withhold consent.[9]

In contrast, there are no equivalent legal rights in relation to wind or solar development and so clean energy developers need the permission of the landholders to proceed. It means that native title holders (First Nations people who have rights and interests in land pursuant to the NTA) can say "no" to clean energy agreements.[10] This is because the NTA does not have an approvals pathway under the 'future acts' regime designed for clean energy projects, so agreements that deal with native title consents must take the form of an Indigenous Land Use Agreement (ILUA). ILUAs are entirely voluntary. This means that a developer cannot obtain native title legal approvals without the consent of native title holders (except if governments use compulsory acquisition, which to date has not yet occurred). A number of interviewees, including lawyers, noted that this gap in the NTA is effectively a "veto".[11]

There are other pertinent differences between mining, oil and gas, and clean energy industries. These include in employment patterns, proximity to customers and the flexibility of where infrastructure can be sited. These are shown in the Fig. 1. (See Table 1

Research investigating agreement making in Australian mining, oil and gas has identified four key factors behind strong land access and benefit sharing agreements. Not enough research has been undertaken to understand whether these factors are similarly influential in clean

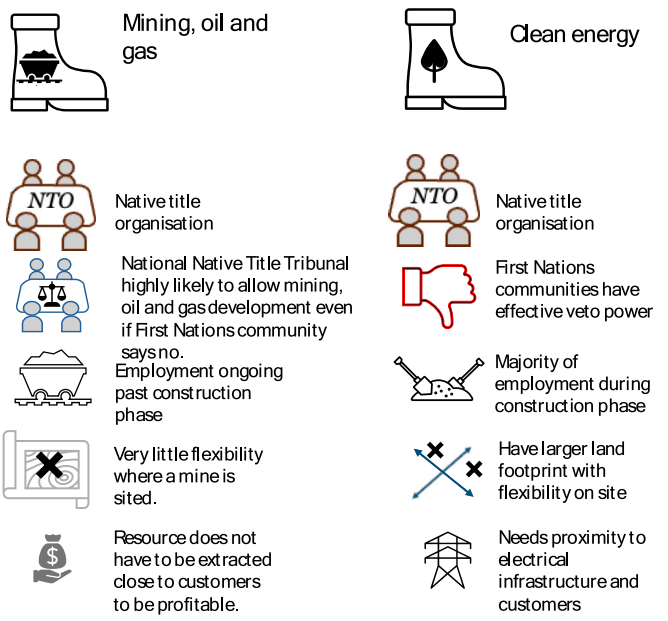

Fig. 1. Mining, oil and gas developments versus clean energy developments. This graphic was produced by Amanda Belton, with a grant from the Melbourne Centre for Law and the Environment, Melbourne Law School, University of Melbourne.

energy agreement making, however the research we are reporting on here suggests that they are.

These factors are:

1. The **political/strategic power of First Nations communities**, particularly their organisational capacity. This is the most influential factor.
2. The **ethos of the proponents** seeking to develop the resource, and how committed they are to principles of corporate social responsibility in relation to First Nations people. The ethos of company leadership is particularly important in this regard.
3. The legislative framework and **legal rights in which the development occurs**, including land access regimes, environmental and cultural heritage regimes and whether these laws favour First Nations interests.
4. The **economics of the project being proposed**, that is, how risky or how profitable a project is for the companies involved. [20]

As stated previously, the contents of land access and benefit sharing agreements are almost always confidential. There are only a few exceptions to this lack of transparency. They include:

- a very small number of Indigenous Land Use Agreements (ILUAs) where the State of Western Australia is a party, including the agreements for a liquefied natural gas processing hub on the Kimberley coast (a development which ultimately did not go ahead)[12];
- academic research where the researcher was given access to full-text agreements[13]; and

[9] 'Free, prior and informed consent' is an internationally recognised standard that essentially means that the free consent of Indigenous peoples should obtained before an action affecting them is made – for a more detailed discussion of FPIC, see [6,p. 6]

[10] We note that this legal interpretation has not yet been tested in any court. The discussion of this section is accordance with the interpretation of the relevant provisions in the Native Title Act by one of the authors (who is a lawyer) and in keeping with discussions the author has had with other lawyers.

[11] Interview with Interviewee D, online, 15 July 2023; Interview with Interviewee L, Melbourne, 19 September 2023; Interview with Interviewee M, online, 6 April 2023.

[12] Including ILUAs relating to the Browse LNG precinct in the Kimberley, the Southwest Native Title Settlement and the Murchison Radio-astronomy observatory.

[13] The most noteworthy of these is the research laid out in the research of Professor Ciaran O'Faircheallaigh, see [21,pp. 303–328].

Table 1
Success factors behind Australian First Nations participation in clean energy projects.

Category	Key actions	Direct quotation
Undertake renewable energy mapping for Country	Some First Nations groups are proactively undertaking clean energy project development for their Country, from mapping the potential wind and solar resources, to sourcing development partners and developing plans to co-own and co-operate clean energy projects. This is a clear departure from mining, oil or gas projects which saw very little in the way of Traditional Owners directing projects on their Country. The key reason behind this welcome trend is that clean energy project planning is comparatively less complicated, and wind and solar resources are easily identified. The cost of a First Nations group doing this preliminary project planning was put at between $AUD500,000 to $1,000,000.[lix] There were pointed comments from interviewees identifying an acute need for funding to enable Traditional Owners to undertake this mapping work themselves as an act of self-determination.[lx]	Interviewee A said: *Its working out where the project will go – having early access to land and data, doing some initial weather monitoring, working out where you are comfortable having development culturally and environmentally, engaging with state governments around land tenure.*[lviii]
Carefully choose your development partner	The ethos, experience and credibility of the company proposing to develop or partner on a clean energy project was spoken about by many people as being extremely important. Many interviewees said that their experience of the clean energy industry was that it is generally respectful of First Nations communities (with some exceptions – see quotations) particularly those companies who place a value on corporate reputation.[lxi] Interviewees speaking about both Yindjibarndi and Nari Nari clean energy projects emphasised that they needed to trust their development partner.[lxiii]	Interviewee I speaking of Yindjibarndi clean energy: *ACEN brings a huge amount of credibility to the project because they're building stuff. They've got engineers in-house, they've got access to markets, they've got capital, they've got strong relationships with the project finance industry because they've already got loans.*[lxii] Interviewee G: *You've got to have a company that's making a lot of money and a business that's going to be around for 50 years. You don't want anybody who's going to come and go broke. You don't want the fly-by-nighters. Or people who are well-intentioned but don't have the resources to make it happen … because one of these major projects is billions of dollars.*[lxiv] Interviewee F: *For Nari Nari all of their engagement is done on the basis of relationship and respect. If its not there, they will just walk away, as they have no interest in having the aggravation of a bad experience.*[lxv] Interviewee N: *Some companies are very respectful. Others begin by saying that, during the feasibility phase, there will be no compensation, no community meetings. I have had a small company just send the licence to Traditional Owners, just saying, 'sign here'.*[lxvi]
Be creative to obtain finance	Obtaining finance is difficult for First Nations groups whose Country is not able to be mortgaged because it cannot be bought or sold. Therefore, groups have to be creative to raise the capital they need if they are seeking an equity share, for example. Yindjibarndi were able to negotiate with their partner ACEN a landmark financing arrangement whereby ACEN guaranteed they would lend Yindjibarndi their share of the equity contribution with very favourable repayment conditions. Nari Nari will finance their equity stake by "leveraging their knowledge and cultural services broadly including cultural heritage, liaison and other cultural services."[s]	*We have a guaranteed shareholder loan from ACEN for our equity contribution to the project. So it's not free equity. It's a loan. But that loan comes pretty much with no capital behind it from Yindjibarndi's perspective. Guaranteed minimum equity of 25 % throughout the life of [the] project. Yindjibarndi can take up to 50 % of the equity if we can fund it separately. Any loan will be paid out of the cash flows of the project. And we don't have to take the ACEN loan. We can go seek an alternative loan from the debt markets.*[lxvii]
Gain access to expert advice and information	Almost all people interviewed spoke about the ability for groups to receive expert advice as the most important factor in whether or not First Nations people would benefit, particularly for groups who had not experienced industrial development on their Country before. Several interviewees expressed a fear that the clean energy transition would be just "another wave of dispossession, industrial development" if it was not done with care and good governance.[lxviii] Several people spoke about how shocked they were at the draft terms of particular agreements for major clean energy projects.[lxix] Interviewees also praised peak organisations like the First Nations Clean Energy	Interviewee N said: *Hydrogen proponents are pitching projects for Country whose Traditional Owners have never had any money. This is because where hydrogen works best, it's all on the coastline [with good access to Asia] and those are areas where there is usually no iron ore, no gold, it's all pastoral leases. These groups have not had any negotiation experience, they have not made money from mining like other groups. And proponents are still at the 'let's have a crack' stage, they are just seeking 2-to-3-year [feasibility] licences.*[lxx] Interviewee E said:

(*continued on next page*)

Table 1 (*continued*)

Category	Key actions	Direct quotation
	Network for providing quality guides, and stressed the need for that to continue.[lxxi]	
	Interviewee K said that, at a minimum, groups should ask for all relevant documents to inform their decisions, access to the agreements including those with third parties, and request evidence of the investors' contribution as well as the financial modelling and budgets.[lxxii]	*I did another one [where] 10 % [equity] is $300 million. And free equity was only up to FID [Financial Investment Decision], after which it is contributory. And I said look they're not going to be able to find anything meaningful out of the $300 million. So effectively they'll be wound back to 1 % if they're lucky. My concern with is that five years later, the young people say we've got all these wind turbines on our land and we're not getting anything from it.* *Interviewee K said:* *What was hard to fathom was the lack of accountability and transparency and the very bad and neglectful advice being given - just to get a poor deal across the line. Often the TO group was required to decide what they were going to do about … billion-dollar projects proposed through looking at semi completed projects on mud maps that lack design around project lay out (both upstream and downstream) or what this looked like on Country. Neither was there any financial modelling provided …* *Our people went through many years of misery to get our land back. These two second rulings of 'just sign and we will worry about that later', do not cut up against the trauma, suffering, the heartache, the loss and grief out people experienced over the many generations.*
Understand power purchase agreements	A Power Purchasing Agreement (PPA) is a binding, and usually long-term (up to 25 years, for example), contract between a producer and consumer of power, that sets out the terms of the provision and payment for that power.	A PPA can also be used by a customer to ensure that the First Nations landholder is being fairly dealt with. For example, Interviewee M said that:
	A model of PPA known as 'cost-plus' means that the purchaser of the electricity agrees to pay the First Nations clean energy developer 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. The purchaser will receive access to the developer's costs on an open-book basis. The purchaser will also directly fund decommissioning and rehabilitation costs through periodic payments into a separate account over the life of the PPA.	*An electricity [purchaser] might insist, as part of the contractual arrangements … that they be able to review … agreement so that they could say that best practice was applied in relation to the traditional owners, in relation to ultimately the electrons that they are buying.*[lxxiii]
	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.[lxxiv] 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. It is a model often used in public-private infrastructure partnerships. The purchaser of the electricity is effectively helping the First Nations group develop the project to a greater extent than under a traditional, fixed price PPA. 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 licence benefits.[lxxv]	Interviewee O spoke of an existing model of PPA that has been negotiated on a cost-plus basis. We see this as having great potential to be highly beneficial for First Nations power producers.

[lviii] Interview with Interviewee A, online, 16 March 2023.

[lix] Interview with Interviewee B, online, 1 May 2023; Interview with Interviewee I, online, 5 October 2023. European companies and larger companies were most often spoken about as being better in this regard.

[lx] Interview with Interviewee K, online 16 November 2023; Interview with Interviewee L, Melbourne, 19 September 2023.

[lxi] Interview with Interviewee M, online, 6 April 2023; Interview with Interviewee H, online, 1 February 2024; Interview with Interviewee E, online, 28 August 2023; Interview with Interviewee A, online, 16 March 2023.

[lxii] Ibid.

[lxiii] Interview with Interviewee F, online, 19 and 27 September 2023 and Interview with Interviewee I, online, 5 October 2023.

[lxiv] Interview with Interviewee G, online, 30 May 2023.

[lxv] Ibid.

[lxvi] Interview with Interviewee N, online, 9 September 2024.

[lxvii] Interview with Interviewee I, online, 5 October 2023.

[lxviii] Interview with Interviewee B, online, 1 May 2023; Interview with Interviewee K, online 16 November.

[lxix] Interview with Interviewee L, online 9 September 2024; Interview with Interviewee K, online 16 November 2023; Interview with Interviewee E, online, 28 August 2023.

[lxx] Interview with Interviewee N, online, 9 September 2024.

[lxxi] Eg, Interview with Interviewee{Citation}e N, online, 9 September 2024.

[lxxii] Ibid.

[lxxiii] Interview with Interviewee M, online, 6 April 2023.

[lxxiv] Interview with Interviewee O, online, 24 September 2024.

[lxxv] Interview with Interviewee O, online, 24 September 2024.

[s] Interview with Person F, 19 and 27 September 2023, online.

- academic research where the researcher was not given access to the primary agreements but was told significant details about what they contained by people with knowledge of them.[14]

This research joins the last category of inquiry, acknowledging that it provides, at best, only generalised insights.

While the specific content of agreements remains confidential, there are often individuals in industry, law firms and large First Nations organisations who know in broad terms the trends and payments in these agreements. [22,p. 118] This information access disparity keeps knowledge in the hands of 'expert advisors' and disempowers First Nations groups who are forced to pay for such advice. This paper seeks to help fill that information gap.

While there are some good reasons for agreements remaining confidential, including that some First Nations groups would rather not publicly disclose payments, [23] there are also many compelling reasons for greater transparency.

These include:

- The use of good agreements as templates for future agreements, reducing transaction costs and increasing knowledge of best practice;
- Greater analysis across agreements, particularly whether agreement making is achieving its often-stated aim of improving the lives of host First Nations communities;
- Increasing the accountability of industry to pay fair rates for land use and behave in a socially responsible manner[15]; and
- Increasing the accountability of those receiving payments to fairly distribute these payments (in many cases, the amounts received are confidential even to the wider First Nation group on whose behalf they are paid). [23]

There have been many announcements in recent years of Australian clean energy projects that appear to have significant First Nations financial involvement.[16] Likewise, recent academic publications have addressed general issues relating to barriers and opportunities of industrial-scale clean energy projects on Indigenous-owned land globally, and particularly in North America, often focusing on the importance of 'free, prior and informed consent'. [6,8,25–27] What has not been documented, however, is significant detail on exactly how the impacts and benefits of the clean energy transition are being managed and shared.

3. Method

We first attempted to gain access to full-text land access and benefit sharing agreements, of which there were only a few at the time. This attempt was not successful, primarily due to confidentiality fears, but also because many people involved in early negotiations feared research scrutiny at a time when it was very unclear how such agreements should be structured.

We then co-designed a qualitative survey approach with the National Native Title Council and the First Nations Clean Energy Network to undertake detailed interviews with those with the most knowledge of the content and context of clean energy land access and benefit sharing agreements for the Indigenous Estate. This project received ethics clearance from the Office of Research Ethics and Integrity, University of Melbourne, project ID number 25722, approval date February 2023.

We obtained our data both through interviews, and through desktop research, primarily of media reports, industry publications and project-specific material that was publicly available. We interviewed 15 people chosen because of their significant expertise and/or experience in clean energy agreement making, predominantly lawyers and financial professionals. This cohort is representative of the only people currently in Australia who hold knowledge of what is being negotiated for these agreements, the contents of which are all confidential, even to government regulators and often the wider First Nations community who are parties to the agreement.

All interviews were conducted on the proviso that interviewees would remain anonymous – this was an important consideration for many people approached for an interview. Interviewees were both Indigenous and non-Indigenous and represented both community and industry. While this is not a large number of interviewees, the pool of people with relevant expertise in Australia is small. They tend to be extremely wary of providing any information given confidentiality requirements and other ethical obligations, including legal professional privilege. All people interviewed, for example, made significant edits to the summaries of their interviews, including deleting information that could be interpreted as confidential. Additionally, the researchers have had many off-the-record conversations with a similar pool of people which while not part of these findings, has informed the thinking behind them.

A similar number of people were approached who declined to participate in an interview, most often citing confidentiality concerns, although it was noteworthy that many of these same people were still keen to find out what was occurring in other parts of Australia. A draft of the research results was circulated to all interviewees, with seven responding with comments and minor corrections.

We asked semi-structured questions across five broad areas:

1. How cultural heritage and the environment are being protected beyond the statutory requirements of Australian law;
2. What is being paid to First Nations communities, and how are those amounts calculated;
3. The legal or policy changes needed to ensure that First Nations communities benefit from clean energy projects;
4. What do equity stakes for First Nations landholders mean in practice financially?
5. What are the most important factors groups need to succeed in this area?

The interview and other data – predominantly media reports and other grey literature – was analysed using NVivo coding software. Through the interviews and desktop research, we obtained good information on three projects that show a high degree of First Nations control, as well as being well-progressed. These projects are the Yindjibarndi/ACEN partnership, the Nari Nari clean energy project, and clean energy projects on Barngarla Country.

4. Case studies: Background information

The Yindjibarndi/ACEN partnership will see Yindjibarndi people of the Pilbara region in Western Australia take a 25 to 50 % stake in an

[14] E.g., see the Gladstone LNG ILUAs case study, as outlined in [22,pp. 115–119]

[15] On this point, it is worth observing the large disconnect between the public rhetoric and private behaviour of Rio Tinto uncovered by the parliamentary inquiry into the detonation of age-old rock shelters at Juukan Gorge in 2020. See discussion in [24,p. 151]

[16] For example, Bella Peacock, 'Three major, Indigenous-led solar and storage projects announced for the NT in $1 billion investment plan', pv magazine Australia (Web Page, 30 August 2023) <https://www.pv-magazine-australia.com/2023/08/30/three-major-indigenous-led-solar-and-storage-projects-announced-for-the-nt-in-1-billion-investment-plan/>.; Giovanni Torre, 'Bailai, Gurang, Gooreng Gooreng and Taribelang Bunda peoples strike clean energy deal with H2U', National Indigenous Times (Web Page, 1 June 2023) https://nit.com.au/01-06-2023/6196/hydrogen-mou; Ciaran O'Mahony, 'New Indigenous partnership for Upper Burdekin Wind Farm - Energy Magazine', Energy Magazine (Web Page, 14 July 2022) <https://www.energymagazine.com.au/new-indigenous-partnership-for-upper-burdekin-wind-farm/>. See also the First Nations Clean Energy Network's Clean Energy Project Tracker - https://www.firstnationscleanenergy.org.au/energy-projects

initial 750-MW wind, solar and battery project developed on their Country, with Filipino clean energy giant ACEN Corporation taking the remainder. [28] The process of negotiating this partnership took 13 months, with ACEN being chosen by Yindjibarndi because of their good reputation in dealing with First Nations people.[17] 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. [29].

The Nari Nari Tribunal Council in southern New South Wales is another interesting example of a First Nations' group controlling clean energy development on their Country. Unlike most examples of clean energy projects on First Nations' peoples' Country, the Nari Nari were dispossessed of their land in the early nineteenth century, and so their significant landholdings, including 89,500 ha on the Murrumbidgee flood plain, have been purchased through canny buybacks, including in partnership with the Indigenous Land and Sea Corporation and conservation organisations. The initial mapping of the wind and solar resource was by the New South Wales government, and with Nari Nari land "about 10km from the [renewable energy zone] interconnector … we were stampeded by wind energy people" said Interviewee G.[18]

The Barngarla people, Traditional Owners of the Eyre Peninsula region in South Australia, are also key players in clean energy, including solar, hydrogen hubs, battery projects, and powerlines [30] after successfully fighting a nuclear dump on their Country. [31] These deals will be worth $50 to $80 million in revenue each year once they are active. [30].

One of the projects the Barngarla are partners in is the Yoorndoo Ilga Solar Project, a 300 MW solar and 250 MW/500 MWh battery storage project, located on 665 ha of freehold land owned by the Barngarla Determination Aboriginal Corporation. This land was purchased as freehold by the Barngarla from the State of South Australia for $855,000, pursuant to South Australian legislation that allowed for the purchase of Crown Land in unique circumstances.[19] It is worth noting that Bargnarla had only persuaded the State to sell them this land after creating an extremely strategic set of circumstances that had resulted in a deadlock for clean energy development.[20] 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.

5. Findings

5.1. Consent and control

Our research findings point very clearly to First Nations people being able to consent – or not – to industrial-scale clean energy projects on their land. As discussed above, this is the consensus view of the legal position set out in the Native Title Act. Further, the Queensland and Western Australian governments explicitly require an ILUA for renewable development in most circumstances, while South Australia is proposing this requirement in draft legislation. [32] This is clearly a sharp divergence from mining, oil and gas.

This consent applies not only to native title approvals. Interviewee G mentioned that in relation to any type of large development:

> *The EPA [Western Australia] now acts as a regulator for community engagement. They will not allow large scale developments if the traditional owners don't support it … the EPA's process has provided an unofficial veto, since Juukan.*[21]

First Nations peoples' consent results in regulatory and financial approvals being obtained much faster, many interviewees said, helping to 'de-risk' these projects.[22] This value appears to be well understood in parts of the industry.[23] In the limited circumstances where groups have land subject to freehold title – as the Barngarla people do – their land is even more of an attractive proposition because it does away with the need to obtain native title approvals at all.[24]

There were also broader reasons than the law given for the need for consent. The destruction of caves with significant evidence of 46,000 years of human activity at Juukan Gorge in the Pilbara by Rio Tinto in 2021, together with the response from First Nations groups, investor groups and governments to this destruction, was also a dominant reason given by those interviewed. The scandal resulted in far greater scrutiny of company behaviour on First Nations land, particularly around cultural heritage. [33] It also exposed practices that, while legal, did not meet shareholder expectations of corporate behaviour. [34] From the interviews, there appears to be general nervousness across industries about legislative gaps on cultural heritage protection that have not yet been resolved. Industry appears to be taking matters into its own hands in terms of raising the bar on minimum standards of heritage protection.[25]

There has also been strong advocacy by First Nations organisations, particularly the First Nations Clean Energy Network, established in 2021. [35]

The drive towards implementing the principle of FPIC in major resource development projects of all kinds appears to be trending, even while industry actors in this space are waiting for legislative and policy frameworks to catch up. Legal firms that regularly publish generalised advice for practitioners note that project proponents need to be aware of the difficulty in getting a major project approved without the support of Traditional Owners, irrespective of whether there is a legal requirement to do so.[26]

The issue of consent is not just a one-off decision. Rather, it appears that land access agreements increasingly include the need for multiple consents throughout the life of a project, particularly around where infrastructure like wind turbines or solar arrays will be built.[27] This was described by Interviewee M as looking remarkably like "free, prior and informed consent" because "it's about agreeing what the proponent can do and where they can do it".[28]

Our findings also point to First Nations people being able to exert ongoing control over aspects of the development of clean energy projects, including their physical footprint. This power over the design of

[17] Interview with Interviewee I, online, 5 October 2023.
[18] Interview with Interviewee F, online, 19 and 27 September 2023
[19] Interview with Interviewee J, online, 20 March 2023.
[20] Ibid.
[21] Interview with Interviewee G, online, 30 May 2023. 'Juukan' refers to Rio Tinto's blasting of priceless ancient sites at Juukan Gorge, discussed below in 5. Findings>Consent and control.
[22] Interview with Interviewee D, online, 15 July 2023; Interview with Interviewee G, online, 30 May 2023; Interview with Interviewee I, online, 5 October 2023; Interview with Interviewee L, Melbourne, 19 September 2023.
[23] Interview with Interviewee D, online, 15 July 2023.
[24] Interview with Interviewee J, online, 20 March 2023.
[25] Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee B, online, 1 May 2023; Interview with Interviewee C, online, 15 May 2023; Interview with Interviewee G, online, 30 May 2023; Interview with Interviewee J, online, 20 March 2023; Interview with Interviewee M, online, 6 April 2023.
[26] See for example FPIC continues to dominate the discourse(https://www.ashurst.com/en/insights/fpic-continues-to-dominate-the-discourse/) (Ashhurst Group), and FPIC in the Australian context: now and into the future - Corrs Chambers Westgarth (https://www.corrs.com.au/insights/fpic-in-the-australian-context-now-and-into-the-future).
[27] Interview with Interviewee M, online, 6 April 2023; Interview with Interviewee D, online, 15 July 2023.
[28] Interview with Interviewee M, online, 6 April 2023.

the footprint of a development is primarily being used to ensure cultural sites are not impacted, and the environment is protected.[29] Interviewee A said of this: [36].

> *Because you can put infrastructure pretty much anywhere, it will be less complicated than for a mining pit to be placed around culturally important features in the landscape.*[30]

Interviewee D likewise talked about the ability to more easily protect cultural heritage, saying that:

> *We had one where it immediately became apparent that their first draft had six wind turbines proposed on a known massacre site.*[31]

Rather than agreements being static contracts, flexibility is increasingly being built into them. For example, in some agreements should the footprint of where the solar panels or wind turbines are built change after the agreement has been reached, the parties have to meet again and potentially negotiate further payments.[32]

Several interviewees felt that clean energy presented greater ability to protect cultural heritage and the environment than for mining, oil or gas. Said Interview F:

> *I think as long as the renewable energy heavy lifting that's being done in areas where indigenous land ownership is significant, it doesn't trash those values, then the downside is controllable. And the upside is skills, education, jobs and money, so long as the community is driving it.*[33]

However, this flexibility also may mean it is possible that if a certain group or region is seen as difficult to negotiate with, clean energy developers may be able to move their project elsewhere where they believe native title consents may be easier to obtain – or where native title has been extinguished.[34]

A potential move away from native title land was not just because of a First Nations group being viewed as not amenable. Other reasons were also given. The first is that there may be a preference on the part of developers to own the freehold land on which they build, which automatically excludes any areas subject to native title rights and interests since the two cannot co-exist.[35] Secondly, several people talked about the complexity of approvals for any kind of development in Australia today, with native title approvals being one that may be able to be avoided. Said Interviewee G:

> *Approvals are also a political battle now. An EPA approval [extends] from 12 months, to 24 months. But now, even a pretty small activity that you would never heard of, there'll be a queue of 100 or more, public consultation reviews, an overloaded regulator. The lead time for those now is nearly 10 years. And 10 years is the time at which you don't even bother.*[36]

It was also pointed out that speed is of the essence in clean energy projects, given the electricity grid has limited capacity to include new developments unless upgraded, and therefore first movers often have a significant advantage over their competitors. Unless this situation is resolved by governments, it could "push companies onto fully extinguished land, where native title holders will not benefit", said Interviewee J.[37]

This echoes recent findings from the United States where it was observed that American Indian 'reservation lands are 46% less likely to host wind farms and 110% 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. Regulatory complexity was identified as a key barrier behind this trend: 'Despite no formal prohibitions against renewable energy on reservation lands, the results imply that projects have been almost as difficult to launch as if they were forbidden'. [37,p. 4] The solution to these obstacles, the authors argue, is '[v]esting regulatory authority with one entity—the tribe'. [37,p. 4].

It is not known how significant the trend of avoiding native title land is. It is important to note that where First Nations peoples' land is in a strategically important location, that is, sited near or in a renewable energy zone, a mine, close to a substation, or transmission lines, it will inherently be more valuable as a site for a clean energy project. Said Interviewee J:

> *Two properties might be of equal value for growing cows, but they are not equal value for a renewable energy project because powerlines are about $1 million per kilometre.*[38]

5.1.1. Exceptions

Several exceptions to the ability to consent to, and control, clean energy projects also emerged. The first exception is in relation to compulsory acquisition: the governments of all Australian states and territories, and the Commonwealth, have the legal ability to compulsorily acquire private rights and interests in land without the consent of those right and interest holders. While this sounds like a significant exception, it is worth stressing that there are not yet any known instances of governments compulsorily acquiring native title rights for clean energy projects (although Interviewee D expressed a fear that this could occur in a Renewable Energy Zone).[39]

Another potential exception to consent appears to exist for existing mine sites. Resource companies with existing mines and established agreements with native title holders could use their existing agreements to build clean energy projects solely to power their mines,[40] with major mining companies needing to decarbonise their operations as part of Australia's Net Zero by 2050 aims and related legislation.[41] It is possible that such an approach may not require the consent of native title holders. This is because mining legislation and existing ILUAs might allow for further infrastructure, like a solar array, to be built without further consent from native title holders, if the solar array is used solely to power the mine, and not provided to any third parties.[42] As stated previously, it is impossible to determine this without having access to these confidential mining, oil or gas ILUAs.

Legal advice is being given to some miners is that this practice is

[29] Interview with Interviewee I, online, 5 October 2023; Interview with Interviewee F, online, 19 and 27 September 2023; Interview with Interviewee D, online, 15 July 2023.
[30] Interview with Interviewee A, online, 16 March 2023.
[31] Interview with Interviewee D, online, 15 July 2023.
[32] Interview with Interviewee M, online, 6 April 2023.
[33] Interview with Interviewee F, online, 19 and 27 September 2023
[34] Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee C, online, 15 May 2023; Interview with Interviewee G, online, 30 May 2023; Interview with Interviewee J, online, 20 March 2023.
[35] Interview with Interviewee J, online, 20 March 2023.
[36] Interview with Interviewee G, online, 30 May 2023.
[37] Interview with Interviewee J, online, 20 March 2023.
[38] Interview with Interviewee J, online, 20 March 2023.
[39] Interview with Interviewee D, online, 15 July 2023. Renewable Energy Zones in Australia are clusters of large-scale renewable energy projects that will be developed using economies of scale, supported by network infrastructure and backed by government investment.
[40] Interview with Interviewee A, online, 16 March 2023.
[41] Primarily through the *National Greenhouse and Energy Reporting Act 2007* (Cth)
[42] Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee B, online, 1 May 2023; Interview with Interviewee C, online, 15 May 2023; Interview with Interviewee G, online, 30 May 2023; Interview with Interviewee I, online, 5 October 2023.

permissible, where the clean energy development is 'ancillary' to the mining infrastructure, particularly where the new development is replacing an existing gas-fired or diesel generator.[43] One interviewee expressed disquiet that such developments could outlive the mine they were built for, without the need for any further Traditional Owner consent.[44] This practice was described as a "huge risk" by an interviewee, however, "it's questionable in my view whether they would follow that through and force a project on a group where they didn't consent."[45]

5.2. Financial benefits

5.2.1. Amount of payment

It is not clear the exact amounts that are being paid in clean energy project agreements. However, people interviewed did make many useful observations about general payment principles. Several people commented that the payments they were seeing were significant, particularly in Western Australia.[46] Many people also commented that they were seeing a variety of payments, with one person saying that of all the negotiations they had participated in during the last four years:

> *[T]he average between first and last offer, has been on average one tenth. They are coming up about ten times. Government assume that the price is homogenous, the price is the price. But we are talking about a level of divergence that is significant.*[47]

We were able to uncover some project-specific payment information. The Nari Nari people negotiated a deal that includes milestone payments during the pre-development phase, and, depending on the success of financial fundraising, a minimum 5 % equity share at financial close. Nari Nari can invest more in the project in the development phase if they choose.[48] According to media reports, Nari Nari are also to receive an additional $40,000 annually per wind turbine, of which there are 74. [38]

It was a common theme in interviews that formulas for payments were being worked out from a combination of different factors including:

- The value of the land for renewable energy (for example, its proximity to a substation), although also sometimes the value of the land for another commodity is being offered (for example, the growing of wheat[49]);
- The type of land tenure involved, including where First Nations people own land with freehold title. For native title land, exclusive possession native title will likely receive higher payments than non-exclusive, for reasons including that there are no other interest holders to pay;
- The expertise, resourcing and organisational ability of the First Nations group – where groups are better able to understand the clean energy development, they are likely to negotiate a better financial return;
- A company involved in developing a single project may pay more than companies with multiple possible development sites. This is because the latter company has alternatives if one site does not go ahead;
- The long-term price projections of the electricity to be generated, including the costs associated with transmission; and
- Benchmarks for payments are being developed on a per kilowatt basis or installed capacity basis, although these appear to be used to work out minimum payments rather than maximum payments.

5.2.2. Types of payment

Payments are being paid in a variety of ways, including as defined benefit payments, royalties, area-based payments, as an equity share, or a combination of these. Defined benefit payments, or lump sums, are being linked to milestone events such as agreement signature, financial investment decision to proceed (FID) and to some measure of energy capacity. Area-based payments are also common and while they are often referred to as 'land rental payments', and the word 'rent' is commonly associated with leases, they do not necessarily have a lease in place.

Royalty payments appear to be increasingly common. These payments are tied to electricity production, and thus more variable than defined benefit payments. Land access and benefit sharing agreements also include minimum and maximum royalty rates which have the effect of reducing the volatility of payments Traditional Owners receive. While it is not known how widespread they are, Interviewee M said "I don't think I've ever seen a renewables agreement that … wasn't linked to productivity."[50]

5.2.3. Co-ownership and equity arrangements

Equity and co-ownership of projects is also clearly an emerging trend. It is clear from the interviews that the prospect of co-ownership of clean energy projects introduces a range of new opportunities for Traditional Owners as well as new levels of financial, legal and governance complexity. It also has the potential to expose First Nations investors to new degrees of financial risk – and potentially deliver new levels of financial benefit, said several interviewees.[51]

Many interviewees discussed equity as important symbolically, as well as for influence over the early stages of the project,[52] and potentially financially during the operational stage. But they also warned that taking an equity share has significant risk and should only be taken with appropriate financial advice.[53]

More specifically, the value of an equity stake initially relates to the influence it may provide over early decision making (the siting of the project, which subcontractors win contracts etc.), but once the project is at the commissioning and operational stage (it is being built and then producing energy), the importance of 'influence' diminishes, and the equity share then becomes important for its capacity to deliver financial returns.

Some groups are receiving a 'free-carried interest' – whereby the developer pays for the First Nations share – in the development phase. In the commissioning and operational stage, it is far more likely that First Nations people will be required to contribute financially.

It is unclear from the interviews whether there are broad trends in relation to benefit sharing where clean energy projects are proposed for land with co-existing native title and pastoral lease interests. It has long

[43] Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee C, online, 15 May 2023; Interview with Interviewee G, online, 30 May 2023.
[44] Interview with Interviewee I, online, 5 October 2023.
[45] Interview with Interviewee B, online, 1 May 2023; with Interviewee G expressed something similar: Interview with Interviewee G, online, 30 May 2023.
[46] Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee E, online, 28 August 2023; Interview with Interviewee F, online, 19 and 27 September 2023; Interview with Interviewee J, online, 20 March 2023.
[47] Interview with Interviewee J, online, 20 March 2023.
[48] Interview with Interviewee F, 19 and 27 September 2023, online
[49] Interview with Interviewee K, online 16 November 2023
[50] Interview with Interviewee M, 6 April 2023, online.
[51] Interview with Interviewee H, 1 February 2024, online; Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee L, 19 September 2023, online.
[52] Interview with Interviewee E, 28 August 2023, online; Interview with Interviewee F, 19 and 27 September 2023, online; Interview with Interviewee H, Interview with Interviewee L.
[53] Interview with Interviewee B, online, 1 May 2023; Interview with Interviewee E, 28 August 2023, online. Interview with Interviewee H, 1 February 2024, online; Interview with Interviewee L, 19 September 2023, online.

been observed that where native title rights co-exist with pastoral leases, native title holders have been illegally excluded from exercising their rights by pastoral lessees. [39] The latter have better "access controls", observed Interviewee E, that is, lockable gates and fences.[54]

While some interviewees observed that First Nations groups would likely be receiving more or the same in benefits from clean energy developments than pastoral lease holders,[55] others believed that it was pastoralists who are receiving more.[56] Where the First Nations group have control over the development, this clash of rights can be avoided – for example, the Yindjibarndi have chosen to focus their project on areas in which no co-existing pastoral rights are present.[57]

6. Discussion – what are the factors behind successful Australian First Nations participation in clean energy projects?

For the sake of brevity, we have summarised the critical success factors as relayed to us in the interviews and identifiable in the case studies – with specific examples that were provided in interviews. We identified five success factors which we believe are the critical actions that underpin successful participation of First Nations groups on their own terms.

They are not listed in order of significance:

1. Undertake renewable energy mapping for 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 *barrier* to all of these being actualised – which was our second stated research question – is having resources to access or acquire expertise. *All* these actions require targeted, coordinated, and accessible sources of funding to pay for the expertise, to ensure that First Nations groups are fully informed of options; of the energy and investment landscape within which they are making decisions; and of ways in which they can control the development process to protect cultural heritage and Country and to generate wealth for future generations.

7. Conclusion

The clean energy transition has the potential to be very beneficial for Australian First Nations people on whose Country much of it will occur, despite a lack of enabling policies. Several important factors are behind this. One of the most significant is that First Nations people have the legal ability to veto clean energy projects on their Country. This gives them far more potential control over these developments, including for cultural heritage and environmental protection purposes, as well as makes their consent more valuable to developers – unlike mining, oil or gas, developers cannot rely on the National Native Title Tribunal to overrule First Nations peoples' wishes.

Another significant factor is the extent to which First Nations people are becoming key players in clean energy projects: as developers, co-owners, shareholders, board members and contractors. This clearly brings opportunities for significant benefits to flow, and this research shows that well-resourced and well-organised groups will likely benefit well from the clean energy transition.

However, the transition also brings significant risks. The need for groups to be able to obtain good advice is vital to mitigate these risks, particularly where they are dealing with companies that may not be committed to ensuring their project benefits First Nations communities.

Every single one of our five listed critical actions requires resourcing and expertise, and currently in Australia, there is no clear pathway for First Nations groups to access funds to enable payment of such experts. 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.

Greater transparency in how different groups are undertaking these projects, and receiving benefits, is urgently needed as many groups are currently under significant pressure from clean energy developers. Regulatory complexity is likewise a barrier. The suggestion by Parker et al. (2024) to vest regulatory authority in First Nations communities is one that is worthy of further investigation.

Research from mineral extraction land access and benefit agreements highlighted four key factors in strong land access and benefit sharing agreements. These are: the political/strategic power of First Nations communities; the ethos of the proponents; legal rights in which the development occurs; and the economics of the project being proposed. This paper has found strong evidence that these four factors continue to be highly influential in clean energy agreement making. The key difference between mining, oil or gas and clean energy agreement making is that the legal rights that apply to clean energy developments have the potential to greatly empower First Nations communities. However, it appears that the political and strategic power of First Nations communities together with their ability to access independent expert advice, continues to be a highly influential factor determining the extent to which they will benefit.

CRediT authorship contribution statement

Lily O'Neill: Writing – review & editing, Writing – original draft, Software, Methodology, Investigation, Formal analysis, Data curation, Conceptualization. **Kathryn Thorburn:** Writing – review & editing, Writing – original draft, Conceptualization, Formal analysis.

Declaration of competing interest

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Data availability

The data that has been used is confidential.

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[55] Interview with Interviewee A, online, 16 March 2023; Interview with Interviewee D, online, 15 July 2023.
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