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CLEAN ENERGY AGREEMENT MAKING ON FIRST NATIONS LAND: WHAT DO STRONG AGREEMENTS CONTAIN?

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DOI **10.25911/VHH3-F498**

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Suggested citation:
O'Neill, L., Riley, B., Hunt, J., & Maynard, G. (2021). *Clean energy agreement making on First Nations land: What do strong agreements contain?*, Centre for Aboriginal Economic Policy Research, Australian National University. **https://doi.org/10.25911/VHH3-F498**

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Abstract

This Guide outlines best practice guidelines for how clean energy companies could approach agreement making with the First Nations land holders of their potential development site, drawing upon Professor Ciaran O'Faircheallaigh's assessment criteria for land access and benefit sharing agreements. It is produced for the 'Zero-Carbon Energy for the Asia-Pacific' ANU Grand Challenge Project.

Acknowledgments

The authors gratefully acknowledge the assistance of Professor Tony Dreise, Ms Karalyn Keys, Ms Karrina Nolan, Dr Francis Markham, Dr Kaely Woods, Dr Emma Aisbett, Dr Esmé Shirlow, Dr Kathryn Thorburn, Professor Kenneth Baldwin, Mr Luke Blackbourn, Mr Justin Coburn, Ms Anna Freeman, Professor Asmi Wood and Dr William Fogarty.

This work is funded by the Australian National University through the 'Zero-Carbon Energy for the Asia-Pacific' Grand Challenge Project. It is based on O'Neill, L., Thorburn, K., Riley, B., Maynard, G., Shirlow, E, Hunt, J. (2021), Renewable energy development on the Indigenous Estate: Free, prior and informed consent and best practice in agreement-making in Australia, *Energy Research & Social Science*, Volume 81. Please email Lily.O'Neill@anu.edu.au if you would like a copy.

Acronyms

ANU	Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
CEO	Chief Executive Officer
FPIC	free, prior and informed consent
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
PBC	Prescribed Body Corporate
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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Preface

We are in the midst of the world's fastest energy transition. The need to reduce our emissions to avoid the worst effects of climate change requires our economy to switch to low- and zero-carbon resources. This transition represents one of the biggest economic opportunities to occur in this country for decades. Renewable energy is revolutionising the generation and ownership of energy across all scales, from world-beating uptake of solar photovoltaic panels on rooftops; to community level energy plans, batteries and micro-grids; to industrial-scale wind and solar farms capable of generating gigawatts of power and of exporting electricity and 'green' fuels to the world.

First Nations people can and should be at the forefront of this revolution. Aboriginal and Torres Strait Islander peoples were Australia's first users of renewable energy on Country. We have thousands of years of experience in environmental practices. For First Nations, the generation of renewable energy on their lands can contribute to individual and communal prosperity and wellbeing, while continuing tens of thousands of years of use and enjoyment of Country, in a renewable way.

Renewable energy companies seeking to do business on First Nations land are presented with a unique opportunity: access to world-class renewable energy resources, and the ability to be world-leading in building sustainable relationships with First Nations. *Clean energy agreement making on First Nations land: What do strong agreements contain?* explains the basic building blocks of how to develop an enduring relationship with Australian First Nations people through 'sharing the benefits'.

In publishing this Guide, we invite renewable energy companies to embrace the opportunity of having strong, equitable, respectful and durable relationships with Australian First Nations people.

Professor Tony Dreise
Director, Centre for Aboriginal Economic Policy Research
Australian National University

Foreword

At Original Power, our mission is to back First Nations communities to take the lead in determining what happens on our Country. We believe we must treat the crisis of climate change as an opportunity for our people to be part of the economic transition to clean and sustainable energies. The opportunity of renewable energy should and can be available to all. But we know for many of our communities affordable secure and clean power isn't yet a reality. We need to ensure our people are part of the renewable energy revolution from household solar through to incubation of community-owned projects and equitable arrangements for large scale renewable projects. This will require investment and a supportive government policy framework, commitment from industry and investors to apply best practice principles. And from our communities raising our expectations about what's possible, including First Nations ownership of renewable energy projects.

Our people are critical to sustaining country and know best how to manage lands that could host renewable energy resources. Many of our communities want to engage with renewable energy as it's cleaner and more sustainable than other development, yet our level of participation, let alone ownership, in the industry so far has been limited.

When it comes to large-scale projects we can't assume these would inherently benefit communities. There must be principles to ensure First Nations people and our communities are central in the development, design, and implementation. And there must be policy change to facilitate genuine benefit to local economies through employment and an increase in energy security, which we know is connected to overall quality of living. As *Clean energy agreement making on First Nations land: What do strong agreements contain?* makes clear, many First Nations communities will develop clean energy projects themselves for community development, energy security and business development.

We want to ensure that clean energy is done the right way and driven by our communities and developed in a way that sustains Country for generations to come. These guidelines set out the ways in which we can work together to achieve on that journey.

Ms Karrina Nolan
Executive Director, Original Power
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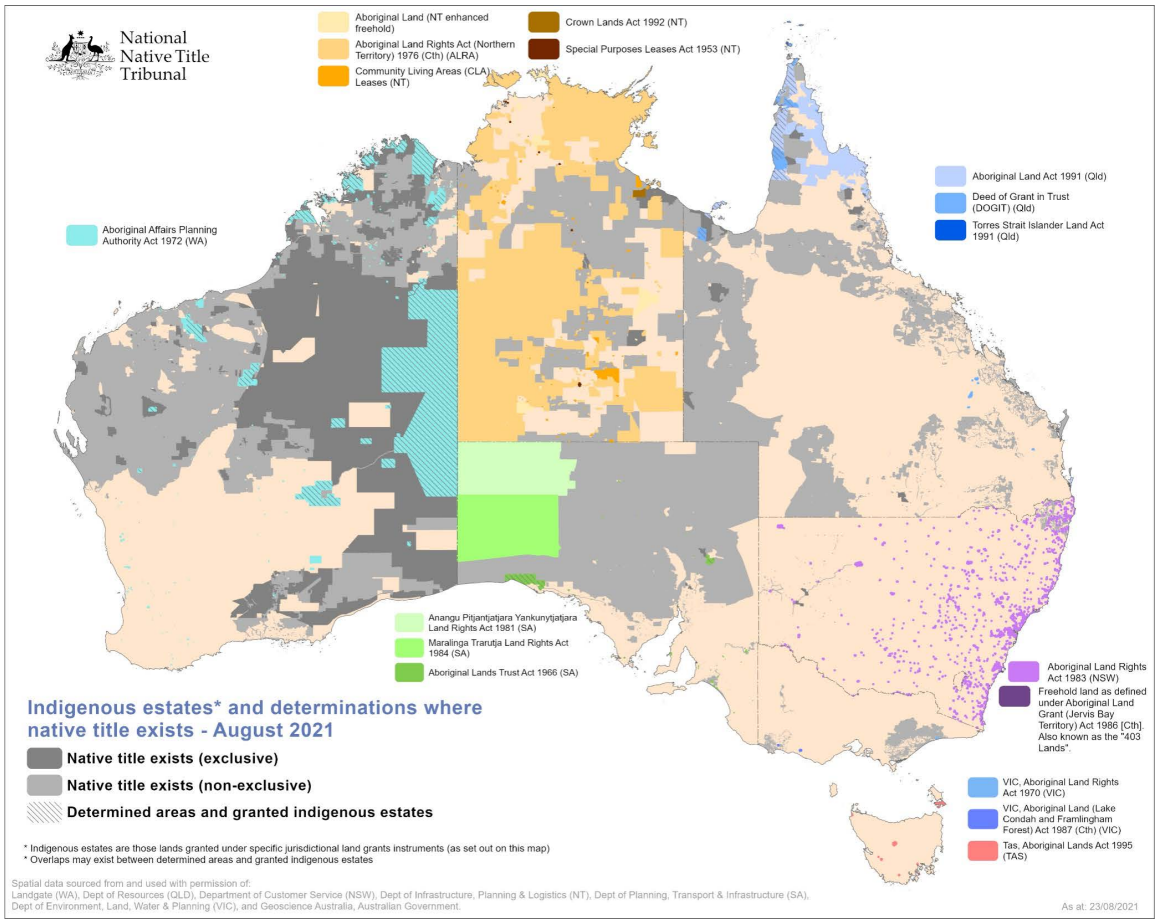
Introduction

This Guide is written for clean energy companies seeking to develop larger-scale clean energy projects on First Nations land, known as 'the Indigenous Estate'. It explains some of the key concepts and obligations, as well as setting out best practice guidelines for negotiating land access agreements with First Nations land holders. It provides examples of the contents of both strong and weak land access and benefit sharing agreements. These guidelines have been developed out of experience primarily with the mineral extraction industry.

'The Indigenous Estate' refers to Aboriginal and Torres Strait Islander peoples' communal property rights and interests held according to their traditional laws and customs under land rights and native title legislation, or some other forms of tenure.

Failure to follow best practice can have serious consequences for companies. For example, in 2020 Rio Tinto destroyed 46 000-year-old rock shelters in Juukan Gorge, the Pilbara, resulting in significant reputational damage to the company. This destruction was reportedly due to land access and benefit sharing agreement clauses prohibiting traditional owners from objecting to any actions by the company, poor communication between traditional owners and the company, and the 'community relations' unit being sidelined within the company. While this destruction was legal under heritage legislation, the destruction of Juukan Gorge led to a Federal Parliamentary Inquiry and the resignation of Rio Tinto's Chief Executive Officer (CEO) and other executives.

Fig. 1 The Indigenous Estate, Australia, August 2021



Source: National Native Title Tribunal, 2021.

The Indigenous Estate

First Nations people arrived in Australia from southeast Asia more than 60 000 years ago, making them the oldest living culture in the world. Land is central to that culture. 'First Nations Australians', also known as Indigenous Australians, are Aboriginal and Torres Strait Islander people who belong to many different groups, cultures and language groups.

From 1788, European colonisation resulted in Australian Aboriginal and Torres Strait Islander people being dispossessed of their land. From the 1960s and 1970s, First Nations people became increasingly successful in the fight to take back their land. The Commonwealth Government enacted land rights legislation in 1976 (the *Aboriginal Land Rights Act (Northern Territory) Act 1976* (Cth) returning significant parts of the Northern Territory to its traditional owners. Other states have also enacted land rights legislation.

In 1992, the Australian High Court in the case of *Mabo v Queensland (No. 2)* recognised that Aboriginal and Torres Strait Islander people owned the continent prior to European colonisation, and that these rights and interests in land (which the court called 'native title') continued, but only where no other property rights conflicted with that native title. Subsequent legislation (the *Native Title Act 1993* (Cth)) enables Aboriginal and Torres Strait Islander people to claim native title rights over land and waters, and large areas have been claimed.

As well as land rights land and native title, the Indigenous Estate also contains numerous other forms of land tenure, including land purchased under various schemes from the Aboriginal Land Fund to the Indigenous Land and Sea Corporation.

Further reading

Langton, M. (2018). *Welcome to country: A travel guide to Indigenous Australia*. Hardie Grant.

Agreement making on First Nations land

The opportunities for Aboriginal leadership, participation and benefit are diverse and likely span a range of applications and scales. Some projects may be developed unilaterally by land holders and communities for aims of community development, energy security and enterprise. Some larger projects are perhaps more likely to be undertaken in alliance with private sector developers or the state and progressed through agreement making processes.

Companies proposing clean energy projects on the Indigenous Estate will likely need to reach an agreement with the First Nations people who have property rights and interests in that land. Agreement making is an opportunity for companies and First Nations people to positively negotiate the parameters of their ongoing relationship. Given the perpetual nature of renewable energy resources, this relationship may span generations. Companies should therefore be aware that the agreement may need to contain triggers for certain aspects of the agreement to be reviewed over the life of the project.

Comprehensive agreements can take several years to negotiate: this time should be factored into the early planning for project development. This is because the land is held communally by people who may live large distances away from one another, travel is often difficult and costly, and because decisions among First Nations traditional owner groups often must be made collectively according to customary processes. Companies should consider engaging experts in Aboriginal community consultation and decision making to advise them on negotiating such agreements.

Agreements will likely cover a wide range of subject areas, including financial payments, employment and training opportunities as well as cultural heritage and environmental protection provisions. ‘Cultural heritage’ protection refers to a range of laws that protect places or objects of cultural value to First Nations people. Companies will likely also need to negotiate a separate cultural heritage management plan.

The Native Title Act and relevant state or territory land rights legislation set out ways in which companies can come to agreements with First Nations people. To date, the predominant experience of First Nations people engaged in agreement making has been with the extractive industries.

Best practice is:

While relevant legislation sets out minimum standards that have to be met, it is accepted that 'best practice' agreement making should go above these. The following non-exhaustive list summarises best practice in relation to extractive industry projects on First Nations land.

- recognising that sovereignty was never ceded and that First Nations people retain sovereignty over all land in Australia, whether this is recognised by Australian law or not
- ensuring that First Nations people are resourced to obtain qualified independent legal, scientific, business, accounting and other advice for the negotiation
- agreeing that the agenda, nature and timelines of the access and benefit sharing agreement negotiation are to be developed with the relevant First Nations group, not determined by a company alone
- negotiating 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. Agreement benefits can include ownership, equity, royalty streams and other aspects of control of the development for the relevant First Nations group.
- ensuring that there is a whole-of-company (particularly company leadership) and whole-of-lifecycle commitment to these principles, including engaging with First Nations groups early in the planning stage, and ensuring future owners of the project also adhere to these principles should company ownership change
- adhering to the agreement fully at the implementation stage, as well as regular monitoring, evaluation and review to ensure that the agreement is being fully adhered to and understanding that consent must be maintained over time
- adhering to the standard of 'free, prior and informed consent' when seeking to access and use First Nations land.
- recognising that a company must obtain a 'social licence to operate' that may be well above what is legally required
- recognising that a social licence to operate, particularly for multi-generational projects, may need to include agreement clauses which allow certain aspects of the agreement to be reviewed from time to time
- paying attention to the priorities of the local community
- developing a Reconciliation Action Plan with Reconciliation Australia – a strategic plan that includes practical actions for how companies can ensure they have meaningful relationship with, and opportunities for, First Nation peoples.

Examples of strong and weak agreement provisions in the extractive industries across the usual agreement categories are provided in Table 1. It includes possible modification of these agreement clauses in light of differences between the clean energy and extractive industries.

It may be prudent for companies and First Nations traditional owners to obtain an independent assessment of how a draft agreement compares to these provisions. This would enable all parties to signal to investors, community and other stakeholders that the agreement is best practice while maintaining confidentiality of the overall agreement (if confidentiality is required, although best practice may increasingly require transparency).

O'Faircheallaigh (2015) observes that it may be intuitive to think that some groups may make trade-offs between these criteria. However, his findings are that when an agreement is strong or weak, it is usually so across all criteria.

Further reading

O'Faircheallaigh, C. (2015). *Negotiations in the Indigenous world: Aboriginal peoples and the extractive industry in Australia and Canada*. Routledge.

Clean Energy Council (2018). *Best Practice Charter for Renewable Energy Developments*. https://assets.cleanenergycouncil.org.au/documents/advocacy-initiatives/community-engagement/best-practice-charter.pdf

Indigenous Carbon Industry Network (2020). *Seeking free, prior and informed consent from First Nations communities for carbon projects: A best practice guide for carbon project developers*. https://www.icin.org.au/resources

Table 1: Strong and weak provisions in land access and benefit sharing agreements

Provision	Strong provisions	Weak provisions	Possible modification in light of differences between clean energy and extractive industries
Environmental protection	First Nations land holders are in a position where they can ensure that the environment is protected, including by unilaterally stopping certain activities from occurring if the environment is in imminent danger (e.g. the First Nations group could have a community representative on the development's environmental protection committee, with the power to veto certain development activities if necessary). For rehabilitation of the project site, see below, 'Project finalisation'.	The agreement limits the general law rights First Nations land holders may have and leaves them worse off – e.g. if an agreement prohibits their right to sue for environmental damage.	The environmental impacts of the extractive industry are fairly well understood, the environmental impacts of clean energy projects, and their potential downstream uses and products, less so. An agreement could include clauses to help ameliorate this uncertainty (e.g. regular review clauses, or a rehabilitation trust).
Cultural heritage	A high level of protection would stipulate that the company has to avoid all damage to cultural sites without exception, and that First Nations land holders be funded to do cultural heritage protection work, can choose which technical staff work on cultural heritage issues, and ensure ongoing cultural competency training for company personnel. This could be embedded in the agreement by way of a power of veto in certain circumstances.	Very weak clauses may simply comply with weak cultural heritage laws that allow cultural sites to be destroyed and may prohibit First Nations land holders from objecting to cultural heritage matters under relevant legislation.	Given the very long life of developments, agreements could consider guaranteeing traditional owner access to sites to practice culture, particularly given that it is legally possible for native title rights to be lost if peoples' connection to country is lost. The design of development sites should also bear this in mind.
Financial payments	A good result would be a significant income stream commensurate with the scale and likely revenue stream of the project, including offering ownership, equity or royalty-type payment in the project in recognition of the value of land access.	A poor result would be a financial payment that is equal to or less than First Nations land holders would receive if no agreement were made (i.e., if the land was compulsorily acquired).	

Provision	Strong provisions	Weak provisions	Possible modification in light of differences between clean energy and extractive industries
Employment and training	Best practice sees concrete employment targets set for local First Nations people, including career pathways to ensure that workers are not limited to entry-level work and provided with opportunities, mentoring and training to develop. Accountability for these targets should be assigned to senior company HR personnel; pathways to employment created; measures put in place to make the workplace conducive to recruitment and retention of First Nations workers. These measures might include cross-cultural awareness training for non-Aboriginal employees and supervisors; adjustment to rosters or rotation schedules to acknowledge cultural obligations; and initiatives to maintain contact between trainees and their families and home communities.	A very weak clause could include a vague commitment to employing First Nations people.	Jobs in clean energy developments occur primarily in the construction phase, with far fewer in the operational phase. Parties should consider whether this means that traditional owners and/or other First Nations peoples should be prioritised for jobs in both phases, particularly given that jobs in operational phases would mean that traditional owners could continue working on Country.
Business development	Best practice clauses could lend business expertise to First Nations companies; help with the sourcing of financing for First Nations companies; provide procurement preference clauses for First Nations businesses; fund business management training; provide secure, long-term, 'bankable' contracts for First Nations companies.	Weak clauses would make a vague commitment to helping First Nations business development.	Clean energy agreements could provide low-cost clean energy to support business development.

Provision	Strong provisions	Weak provisions	Possible modification in light of differences between clean energy and extractive industries
Implementation of the agreement and ongoing First Nations land holder monitoring of the development	A best practice clause might set aside personnel and significant financing specifically for the task of implementing the agreement; ensure structures, processes and financing are set up for the purpose of implementation for both the company and the First Nations landholding group; contain explicit clauses about who is to do what post-agreement; require senior decision makers in the company and First Nations group to focus on implementation and regular review of progress, including in relation to environment protection and cultural heritage; and contain incentives for company personnel to implement the agreement fully.	An agreement weak on implementation would not make any mention or make only general comments about how it would be implemented. Confidentiality requirements, whereby First Nations land holders face legal consequences if they speak out about perceived failings of the development, are also indicators of an agreement that is weak on implementation.	Agreements should create long-term positive benefits for the First Nations communities who host these developments. Agreements should carefully consider how to monitor development impacts on local First Nations peoples, with the flexibility to change course should certain approaches not bring the anticipated benefits.
Project finalisation	A best practice clause would make it clear that the company is responsible for the full rehabilitation of the site at project finalisation, including removal of all infrastructure that is no longer of value to local First Nations land holders. This would include money for rehabilitation being set aside in a trust.	An agreement weak on project finalisation would make no mention of rehabilitation of the area at the end of the project life.	The perpetual nature of the resource provides an opportunity for very long-term (multi-generational) planning. Project sites may be repowered rather than decommissioned presenting opportunities for new agreements based on new possibilities and future conditions.

Source: This table is drawn directly from Professor Ciaran O'Faircheallaigh's assessment criteria for land access and benefit sharing agreements. See O'Faircheallaigh, C. (2004). Evaluating agreements between Indigenous people and resource developers'. In M. Langton, M. Tehan, L. Palmer & K. Shain (Eds.), *Honour among nations*. Melbourne University Press, p. 309.

The United Nations Declaration on the Rights of Indigenous Peoples

Australia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007). Although not legally binding in Australia, UNDRIP is an important framework for the rights of Australian First Nations people. This Declaration states that all actions affecting First Nations owned land should only be done with the 'free, prior and informed consent' (FPIC) of its owners.

This means that consent should come about after prior consultation in which information on the development is freely available and clearly understood by the First Nations land holders. There are also other international treaties that are relevant to protecting First Nations land and human rights, including the International Covenant on Civil and Political Rights.

Further reading

United Nations (2007). *United Nations Declaration on the Rights of Indigenous Peoples.* http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

United Nations (2012). U*nited Nations Guiding Principles on Business and Human Rights.* https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

United Nations (2003). *UNESCO Convention for the Safeguarding of the Intangible Heritage.* https://ich.unesco.org/en/convention

What is the difference between native title and land rights land?

Land rights land is land granted to First Nations people by legislation, in response to calls from First Nations people for land justice from the 1960s onwards. The regimes differ across the Australian states and territories. In the Northern Territory, for example, in order to claim land under land rights legislation Aboriginal people need to show that they are the owners of that land under traditional law and custom. In comparison, in New South Wales, a traditional connection to the land does not need to be shown. Land claims are made by Local Aboriginal Land Councils whose members are Aboriginal people who reside within their geographical boundaries.

Land rights land is generally (but not always) held as inalienable freehold, a communal title which, in most cases, cannot be sold, bought or mortgaged. New South Wales land rights legislation is a key exception to this rule, allowing land to be bought, sold and mortgaged.

The rights that First Nations land holders have in relation to their land rights land differs according to which regime they hold it under, i.e., the legislation (Commonwealth) that applies in the Northern Territory has stronger protections than Queensland land rights legislation. For example, the legislation that applies in the Northern Territory allows traditional owners to say no to proposed developments in most cases.

Native title is the name given by Australian law to the continuing rights and interests in land that Aboriginal and Torres Strait Islander people have held since time immemorial. It was first recognised by Australian courts in 1992, in the case of *Mabo v Queensland (No 2)*. Subsequently the Native Title Act was passed which provides the mechanism under which First Nations people can claim their native title rights over lands and waters.

In order to claim native title, First Nations communities or societies have to show that their traditional law and custom in relation to land has continued uninterrupted since colonisation, and that this 'native title' has not been extinguished by the grant of another property right (a grant of freehold, for example, completely extinguishes native title).

Native title consists of what courts have termed a 'bundle of rights'. These rights exist along a continuum, from weaker rights like the right to conduct ceremonies and to hunt and fish, to the strongest native title right, that of exclusive possession of land. The right to 'exclusive possession' native title is only possible in areas where no other proprietary interests have been legally granted (usually only on Crown land). Native title rights cannot be bought or sold or mortgaged.

Making a claim of native title requires groups to assemble large amounts of information about their traditional law and custom. These claims take many years to finalise and are often an arduous and emotional process. In many instances, key elders have passed away before the native title claim has been finalised. Some groups have found that once they have 'won' their native title claim, their rights to Country are disappointingly weak in practice.

Where a development is proposed for native title land, the Native Title Act governs how that development can proceed. Companies will need to obtain legal advice as to what legal rights apply to their proposed development. Agreements reached between native title holders and proponent companies often take the form of an 'Indigenous Land Use Agreement', although other types of agreements may also permissible in certain circumstances.

Further reading

Riley, M. (2002). 'Winning' native title: The experience of the Nharnuwangga, Wajarri and Ngarla people (NTRU Issues Paper no. 19). Australian Institute of Aboriginal and Torres Strait Islander Studies. http://www.austlii.edu.au/au/journals/LRightsLaws/2002/7.pdf#page=2

Who represents First Nations land holders?

A range of different organisations represent First Nations people in land access negotiations. The following is a non-exhaustive list. Most of these organisations receive limited and specifically-tied government funding and are not funded to enter into land access or project development negotiations. Proponents seeking to negotiate with them should recognise this limitation and pay no-strings-attached funding to ensure the relevant First Nations people have independent advice to enter into negotiations.

Land councils: land councils are organisations that were set up from the 1970s onwards as part of First Nation's people's struggle to obtain land rights. Some were initially set up as grass roots organisations, and now often hold statutory functions under both land rights legislation and the *Native Title Act 1993* (Cth). They often represent groups in land access negotiations; however they normally do not receive any government funding to do the work of negotiating agreements.

For example, in the Northern Territory, land councils have certain functions and powers in relation to Aboriginal inalienable freehold land. In New South Wales, Local Aboriginal Land Councils hold, acquire, and manage land rights land on behalf of Aboriginal people in New South Wales under the *Aboriginal Land Rights Act 1983* (NSW).

Native Title Representative Bodies (NTRBs)/ Native Title Service Providers (NTSPs): these are organisations (which are often, but not always, land councils) that have statutory functions under the Native Title Act to assist First Nations people in a certain region with their native title claims.

Registered native title applicant group: native title claims are made through the Federal Court and the National Native Title Tribunal. In the past, claims have often taken 10 to 20 years to reach a final determination. Prior to determination, native title claimants have certain procedural rights over the land they are claiming, including the ability to negotiate land access agreements with developers. The applicant group is usually represented in land access negotiations by NTRBs (which may include land councils) or private lawyers.

Registered native title applicant(s): are the person or people from within the claimant group who are chosen to represent the registered native title applicant group.

Registered Native Title Body Corporate: commonly known as a Prescribed Body Corporate (PBC) is the legal entity that holds the native title on behalf of the native title group after a native title claim has been determined. All legal dealings over land subject to native title have to be made through the PBC. PBCs receive very limited government funding, and do not generally receive funding to negotiate land access agreements.

Aboriginal Land Trusts: also known as 'Land Trusts' and 'Lands Trusts' depending on the state or territory; they are the legal entity that holds land on behalf of local Aboriginal land holders pursuant to land rights legislation.

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ANU CRICOS Provider Number: 00120C