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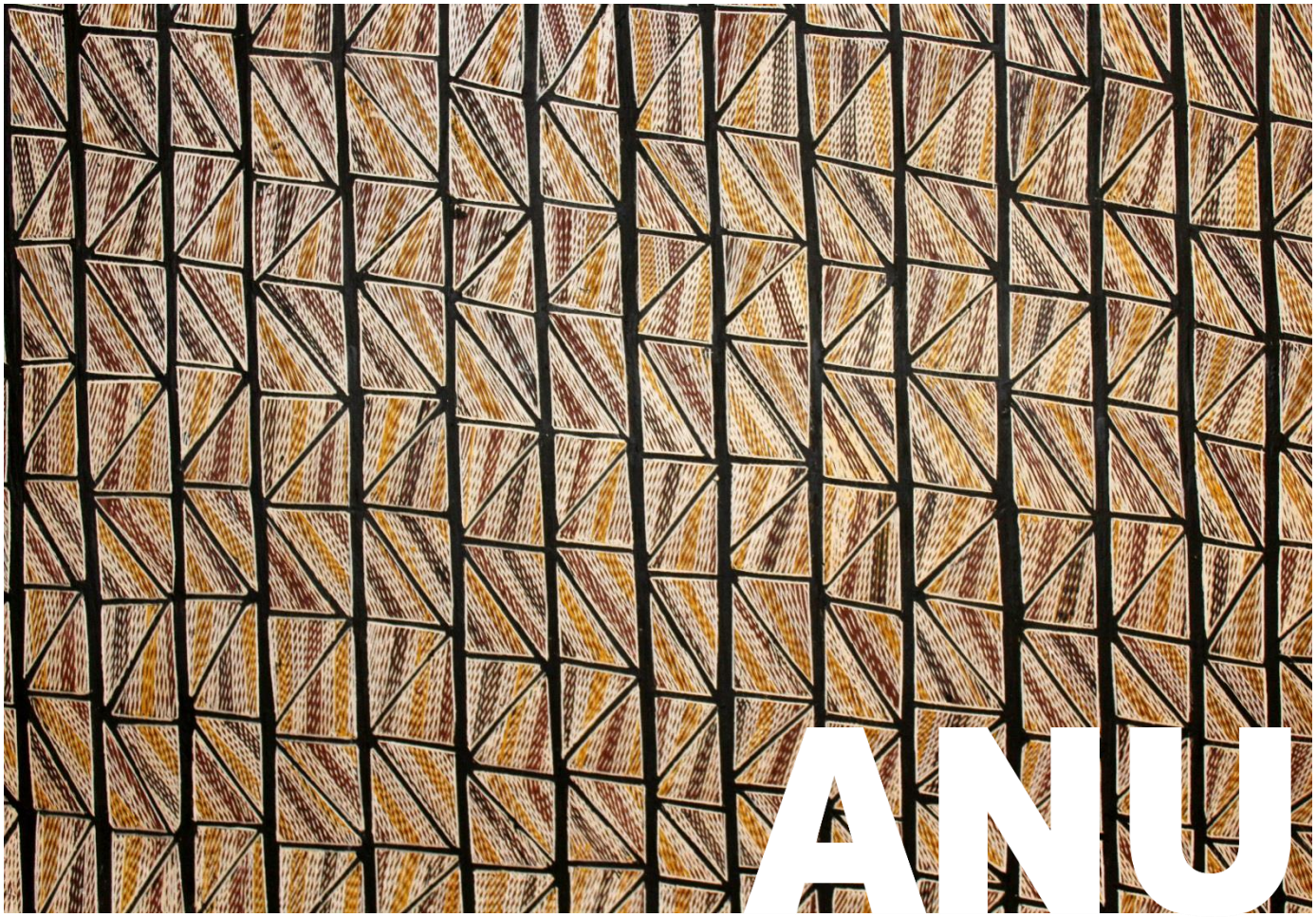

RENEWABLE ENERGY DEVELOPMENT AND THE *NATIVE TITLE ACT 1993* (CWLTH): THE FAIRNESS OF VALIDATING FUTURE ACTS ASSOCIATED WITH RENEWABLE ENERGY PROJECTS

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Renewable energy development and the *Native Title Act 1993* (Cwlth): The fairness of validating future acts associated with renewable energy projects

G. Maynard

Abstract

Increasing demand, innovations in technology, and extensions to electricity grid infrastructure are likely to lead to a growth in renewable energy development on native title land and water. The likelihood that native title holders and claimants will benefit from this development will depend in part upon the legal regime that governs native title. The prevailing legal regime governing renewable energy development on native title land and water involves two principal alternatives to permitting development: voluntary land use agreements and compulsory government acquisition of native title. While the procedures associated with these alternatives afford native title holders and claimants more procedural protection than some commentators have suggested, they fail to attain the standard of 'free, prior, and informed consent' prescribed by international best practice and the philosophical and moral arguments that underpin that standard. To remedy this failure, the *Native Title Act 1993* (Cwlth) should be amended to place less weight on economic and similar considerations when authorising the compulsory acquisition of native title for renewable energy development, or prohibit the compulsory acquisition of native title generally, except for in certain exceptional circumstances. While this paper focuses on renewable energy in particular, a number of its conclusions could apply to issues that attenuate native title generally.

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Acronyms

ACHPR	African Commission on Human and Peoples' Rights
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
ANU	Australian National University
ATSISJC	Aboriginal and Torres Strait Islander Social Justice Commissioner
CAEPR	Centre for Aboriginal Economic Policy Research
CERD	Committee on the Elimination of Racial Discrimination (United Nations)
COAG	Council of Australian Governments
Cwlth	Commonwealth (of Australia)
FPIC	Free, prior and informed consent
HREOC	Human Rights and Equal Opportunity Commission
ILUA	Indigenous Land Use Agreement
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NSW	New South Wales
NTA	*Native Title Act 1993* (Cwlth)
PJCNTATSILF	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund
PM&C	Australian Government Department of Prime Minister & Cabinet
RNTBC	Registered Native Title Body Corporate
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Contents

Introduction

The prospective development of large-scale renewable energy generation facilities in remote and regional Australia is an opportunity for the holders of Aboriginal and Torres Strait Islander land rights to benefit socially and economically (see, e.g., Thorburn et al., 2019). However, this opportunity is not guaranteed to be realised. Aboriginal and Torres Strait Islander peoples' experiences with resource extraction have demonstrated that economic and social benefits do not automatically accrue to the holders of Indigenous rights in the land on which large-scale projects are located (see Langton & Mazel, 2008). Rather, the likelihood that rights holders will benefit from a project on their lands or waters depends on a number of factors, including the nature of the legal regime that will govern renewable energy development (O'Faircheallaigh, 2007, p. 7). A legal regime that treats Indigenous rights and interests fairly is more likely to result in Indigenous economic and social benefits from development than a legal regime that does not.

One area of discussion in the burgeoning literature regarding renewable energy development and Indigenous land rights[1] has been whether the laws regulating Indigenous land rights are strong enough when dealing with renewable energy developers. In the Australian context, it has been queried whether the *Native Title Act 1993* (Cwlth) (NTA) should be amended to offer greater procedural rights to holders and claimants of native title rights and interests in the context of renewable energy development on their lands (O'Neill et al., 2019, p. 18).

'Native title' refers to rights and interests in relation to land or water that are derived from Aboriginal and Torres Strait Islander peoples' traditional laws and customs and continued connection to country (NTA s. 223(1)). The courts' interpretation of the tests for traditional laws and customs and connection to country has made it nigh impossible to prove native title in urban areas (*Risk v Northern Territory* (2007) 240 ALR 75; *Bodney v Bennell* (2008) 167 FCR 84; Strelein, 2006). Moreover, legislative extinguishment of native title in all residential and commercial areas and many agricultural and pastoral areas further diminished the Indigenous estate (NTA Pt. 2 Div. 2B). As a result, native title is most often only legally recognisable in remote and less commercially valuable land (Altman & Markham, 2015, pp. 136–138). However, some of this land is well-suited for renewable energy development.

The rules currently governing suspension or extinguishment of native title for the establishment of renewable energy generation facilities provide some protection against non-consensual interference with native title rights and interests. In most cases, the proponent of a renewable energy project must negotiate an Indigenous Land Use Agreement or 'ILUA' with the authorised native title representatives in order to procure a licence or lease in relation to native title lands or waters. However, if a government entity is convinced to exercise its powers of compulsory acquisition to enable the development of a project, which could happen with respect to a sufficiently lucrative or otherwise attractive project, native title is afforded little protection. In these circumstances, native title holders and claimants have a right to be consulted with respect to the acquisition. The consultation will regard the minimisation of the generation facility's impacts on native title rights and interests. If the native title parties are not satisfied with the consultation, they can apply to have the decision made by an independent person (most likely, the National Native Title Tribunal (NNTT)). The independent person's decision must be complied with unless the government consults with the Minister for Indigenous Affairs and determines that it is 'in the interests of the Commonwealth, State or Territory [including the economic interests] not to comply with the determination' (NTA s. 24MD(6B)(f),(g)). This protection is weaker than that which is provided with respect to mining on native title land, where there is often a 6-month period during which the proponents of the mine must negotiate with native title parties about the project in good faith (a 'right to negotiate'). Given that native title parties' objections to mining or other developments on their lands rarely succeed in preventing these developments, it seems likely that the absence of the admittedly scant protections of the right to negotiate will

[1] See, e.g., Arriaga et al., 2013; Bargh, 2012; Byrnes et al., 2016; Henderson, 2013; Hunt et al., 2021; Karanasios & Parker, 2018; Krupa, 2012; MacArthur & Matthewman, 2018; O'Neill et al., 2019; Thorburn et al., 2019.

leave native title parties even more vulnerable to the non-consensual acquisition of their lands or waters for renewable energy development. This provokes a question as to whether the current state of affairs is fair.

To answer this question, this paper first measures the fairness of the NTA in relation to its facilitation of Indigenous peoples' right to self-determination. The standard of 'free, prior and informed consent' (FPIC) is used because of its conformity with the right to self-determination and its acceptance and familiarity in international law. This exploration of the philosophical and legal issues aims to contextualise and clarify the policy arguments for potential reform. Second, this paper analyses the extent to which the prevailing legislative regime conforms to FPIC requirements, before offering some suggestions for reform in its third and final section. This discussion leads the conclusion that, although the procedures regulating the compulsory acquisition of native title in relation to a renewable energy development are less accommodating of developers than might be feared, they still operate to the detriment of native title holders.

There are a number of normative justifications for making these procedures more onerous, and options for law reform depend on the justification adopted. Ultimately, this paper recommends either placing less weight on the commercial interests of developers and the state when determining the desirability of a compulsory acquisition of native title, or prohibiting compulsory acquisition of native title except in certain exceptional circumstances. While this discussion focuses on renewable energy in particular, a number of its conclusions could apply to issues that attenuate native title generally.

The scope of the paper excludes detailed consideration of the interaction between statutory land rights and renewable energy development, as well as the role played by other laws governing renewable energy development on native title land (such as heritage, planning and environmental laws, as well as the laws and rules governing the transmission and sale of electricity). This paper is also limited in its discussion of renewable energy sources: only large-scale (i.e., at least 5 megawatts of generation capacity) solar photovoltaic and wind farm developments are considered. Statutory land rights, the effect of other laws, and the application of the NTA to other types of renewable energy would all be valid and important areas for further research, and it is likely that many of the observations and recommendations made in this paper would apply in these areas as well.

Self-determination as a standard of fairness

In order to judge whether the NTA treats native title rights fairly, we must be clear about what we mean by 'fair'. The history of contested meanings of fairness in native title demonstrates that this is no easy task (Bartlett 2020, ch. 36; Neate, 2009; Strelein, 2006). Sometimes, fairness has meant 'equality', so that native title is treated as if it were similar to an analogous non-Indigenous property right (e.g., exclusive native title is treated as if it were freehold title – see *Mabo v Queensland [No 1]* (1988) 166 CLR 186; *Mabo [No 2]*; *Native Title Act Case*; *Wik*; *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209 ('*Akiba*'); *Western Australia v Brown* (2014) 253 CLR 507; *Timber Creek Case*). Other times, the meaning of 'fairness' has been determined by those who feel threatened by native title. The political compromises designed to protect settlers' certainty of land title and opportunities for the commercial exploitation of land are products of this approach (Bartlett, 1995; Keon-Cohen, 2017; Nettheim, 1999; Strelein, 2001; *Ward*; *Yorta Yorta*). In yet other cases, native title is afforded special protection in recognition of its unique nature and significance – however, the extent of this protection can be narrow and subject to exceptions, as occurs with respect to the right to negotiate in cases of compulsory acquisition. Aboriginal and Torres Strait Islander peoples' group and collective rights to make decisions about their political participation, economic development, and use of their traditional lands surface intermittently in discussions about the fairness of native title (Sanders, 2002, pp. 1–3), but – as will be shown in the following analysis – they have not been effectively implemented in the NTA. The result of the constant compromises and changes of direction has been an unwieldly and expensive legal regime, and the need for a principled reform of the NTA has been clear for many years (see ALRC, 2015a).

This section identifies the principles of self-determination as a desirable point of reference for assessing the fairness of the NTA. It does so on account of the concept's normative, empirical and pragmatic advantages. The section then marks out the obligations pertaining to FPIC in the United Nations' 2007 Declaration on the Rights of Indigenous Peoples (UNDRIP) as a useful, although imperfect, form in which self-determination could be implemented in the context of native title. This requires a discussion of whether FPIC obligations should bestow a right to veto developments on Indigenous lands and waters. Finally, the section comments broadly on the application of basic FPIC principles to renewable energy development on native title land, in order to identify the most relevant points of focus for the reform of the NTA. The section concludes with a framework for assessing fairness in the NTA, which will be necessary in the following section.

Advantages of self-determination as a principled basis of law reform

Essentially, a people's right to self-determination grants them the freedom to choose how they will live their lives (Webb, 2012, p. 90). It is a collective right that is held by all peoples, regardless of whether they are constituted as independent states (Hofbauer, 2016, p. 62). In the context of Indigenous peoples' rights, UNDRIP articulates the key import of self-determination. By virtue of their right to self-determination, Indigenous peoples have the rights to freely determine their political status, freely pursue their economic, social, and cultural development, and self-govern in matters relating to their internal and local affairs (which might require means for financing this self-government) (UNDRIP arts. 3–4).

This right provides a compelling normative framework for native title law. Indeed, it has formed the basis of a number of calls for reform over the years (Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC, 2002; ATSISJC, 2013; ATSISJC, 2016). There are three reasons why this is so. First, it is a logical extension of basic human rights to Indigenous peoples. A people's right to self-determination is a long-standing principle of international law. It is enshrined in the first articles of both the *International covenant on civil and political rights* and the *International covenant on social, economic and cultural rights*, and has formed the basis of the organisation of politics since the end of the First World War. The colonisation of peoples' lands involved the denial of this basic right on the grounds of cultural superiority, racial discrimination, and proselytism that are no longer accepted as legitimate. Recognising that Indigenous peoples are entitled to their autonomy as a result of their historical connections to land and cultural specificity is a crucial, if belated, correction of a historic wrong.

Some, however, challenge the normative value of self-determination where it fails to recognise the sovereignty of Indigenous peoples or provide reparations for the damages wrought by colonisation (e.g., Dombrowski, 2010; Moreton-Robinson, 2011; Young, 2019). This failure was the product of compromises made at international law, where the concept of 'self-determination' for Indigenous peoples was developed through dialogues between international organisations, Indigenous representatives and nation states. Nation states' anxieties about territorial integrity inspired forceful, and successful, arguments against Indigenous collective rights that amounted to, or even resembled, sovereignty (Davis, 2008). The concession is held out by some as a fatal flaw of self-determination and used to portray the policy as the mere legitimisation of settler states' ill-gotten gains (e.g., Dombrowski, 2010, pp. 136–137; Moreton-Robinson, 2011; Young, 2019). Others emphasise that the conceptualisation of the rights of 'Indigenous peoples' to 'self-determination' is the enactment of an international legal order that emanates from a Western, liberal hegemony (e.g., Watson, 2017; Young, 2020). On this analysis, an assertion of rights of self-determination recognises the authority of the hegemony. This approach risks overlooking the value of self-determination within the existing framework of the settler state. Aboriginal and Torres Strait Islander peoples' aspirations for increased autonomy often focus on rights to not be discriminated against, rights to practise culture, rights of economic self-sufficiency, and rights of self-government within Indigenous communities (Anaya, 2004, p. 129; Behrendt, 2001). Such a conception of self-determination involves an acknowledgement of the normative force of affording Indigenous peoples basic rights of self-

determination, without necessarily requiring (nor prohibiting) the abolition of the colonial state in which those peoples presently live.

Second, the principle of self-determination has the capacity to improve the economic and social conditions of Indigenous peoples. The evidence for the proposition is strong, particularly when policies of Indigenous self-determination are compared to policies that adopt an assimilatory or top-down approach (Cornell, 2006; Dockery, 2010). The results of a 20-year study in the United States showed that the likelihood of economic growth and social strength is higher where Indigenous peoples have the power to make decisions regarding project funding and development strategy (Cornell 2002, pp. 7–8). These conclusions might surprise an Australian reader, given the strident criticism that policies of self-determination have faced for their alleged failure to improve the lives of Aboriginal and Torres Strait Islander peoples. Some have argued that certain features of Indigenous cultures are inherently incompatible with core standards of liberal democracy, and the extent of this incompatibility circumscribes the degree to which self-determination can be implemented (e.g., Kowal, 2008; Sutton, 2009). This argument feeds into a neo-liberal criticism of self-determination for its perceived inefficiency in 'closing the gap' between Indigenous and non-Indigenous peoples (see Altman, 2009).

However, self-determination's prospects for improving economic and social outcomes depends on the manner in which it is implemented and the context in which it operates. Some Australian policies have proclaimed to support self-determination, but were in truth an abdication of government responsibility to provide services in Indigenous communities (see Hunt 2008, p. 35; Royal Commission into Aboriginal Deaths in Custody, 1991, p. 39). Moreover, the institutions responsible for self-government in Indigenous communities have been hamstrung by short-term, limited and inequitable budgets, limited institutional capacity, and heavy compliance requirements, which together resulted in inefficient service delivery and strict government control (Human Rights and Equal Opportunity Commission (HREOC), 2002, p. 10). The bodies responsible for self-government in Indigenous communities must have adequate resources, strong training, and political and cultural authority from the communities they represent (Cornell, 2002, pp. 7–8; Cowlishaw, 2003, pp. 5–7). Once these conditions are met, the evidence that self-determination will result in better outcomes for Indigenous peoples is compelling.

The third reason why self-determination should be adopted as a standard for law reform is its widespread endorsement by states, Indigenous peoples, and other actors (Dodson, 1996; Xanthaki, 2009, pp. 131–195).[2] The concept is well-known in Australia and has been pursued to varying extents since the 1970s (Lino, 2018, pp. 214–215; Rowse, 2012; Webb, 2012, pp. 93–96;). Despite an initial rejection of UNDRIP and a lingering governmental ambivalence toward self-determination for Indigenous peoples, especially among conservatives (see Cronin, 2019), the Australian federal government – the entity primarily responsible for the enactment and administration of the NTA – has officially endorsed the concept by supporting its articulation in UNDRIP (Mendelsohn & Mansour, 2012, p. 300). Crucially, the right to self-determination is also still invoked by contemporary Indigenous policy campaigns, including those for constitutional reform and treaty (Hobbs & Williams, 2018, pp. 4–7; Morris, 2015). Arguably, Indigenous Australians have called for self-determination, as that concept is understood today, for almost 100 years (see Maynard, 2007, pp. 53–54). This endorsement by government and Indigenous peoples alike provides a pragmatic basis for a consensus on self-determination as a useful guiding principle for law reform.

In short, the normative, substantive, and pragmatic qualities of self-determination mark the concept out as a preferable basis for assessing the fairness of Australia's native title system. We must next identify a means by which Indigenous peoples' rights to choose their system of government and organisation can be implemented in

[2] For a discussion of how norms of corporate social responsibility has influenced multinational mining companies to engage with discussions of Indigenous self-determination when operating in Australia, see Trebeck (2009) and O'Neill et al. (2019, pp. 3–5).

the context of renewable energy development on native title land. The concept of FPIC provides a good option for such implementation.

Using FPIC to implement self-determination

At its most essential, FPIC means engagement and decision making in which the free and informed consent of an Indigenous people is obtained before an action is taken (Szablowski, 2010, p. 111). It is invoked in decisions that affect Indigenous land, livelihoods, culture, or resources. In UNDRIP, FPIC is operationalised in several articles. The most relevant articles to our discussion regarding renewable energy development on native title land are Articles 10, 29(2) and 32(2). Article 10 states that Indigenous peoples shall not be forcibly relocated from their lands or territories without their free, prior and informed consent, agreement on just and fair compensation, and, where possible, the option of return. To the extent that the development of renewable energy might involve the storage or disposal of hazardous materials in the lands or territories of Indigenous peoples, Article 29(2) requires that those peoples' FPIC must be obtained. Article 32(2) applies beyond the forcible relocation of Indigenous peoples and storage or disposal of hazardous materials. It stipulates that:

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

Some aspects of these articles have the advantage of being relatively clear in meaning. Where a development involves the forcible relocation of an Indigenous people or the storage or disposal of hazardous waste on their land, FPIC must be obtained. The elements of freedom, priority, and information are interrelated and together qualify and set the conditions for Indigenous peoples' consent (Berrera-Herndández, 2016, p. 76). Essentially, the obligation to obtain prior consent requires that, in respect of development on lands in which Indigenous peoples enjoy Indigenous property rights, the consent of those peoples is procured before any development can begin (Barelli, 2018, p. 250). The requirement that such consent be 'free' means that the Indigenous people in question must be able to give consent voluntarily and without coercion, intimidation or manipulation (Barelli, 2018, p. 250). The 'informed' criterion requires that the consent is based on accurate, timely and sufficient information provided in a way that the Indigenous people consider to be valid (Australian Human Rights Commission (AHRC), 2011, app. 4; Food and Agriculture Organization, 2016).

FPIC, especially in the form found in UNDRIP, also enjoys the advantages of relatively widespread support and a clear link to the right to self-determination. While UNDRIP creates no binding rights or obligations in Australia (Davis, 2012), it nevertheless has been endorsed by Australia on the international stage (Mendelsohn & Mansour, 2012, p. 300), and it represents the most recent and most widely accepted iteration of FPIC in international law (Allen & Xanthi, 2011; Barelli, 2016; Hartley, 2016, p. 31). The concept generally conforms with, and can operationalise, the core principles of self-determination (Hanna & Vanclay, 2013).

Recently, governmental and independent reviews of Australian heritage laws have advocated for the implementation of FPIC to protect Aboriginal cultural heritage (see, e.g., Heritage Chairs of Australia and New Zealand, 2020, p. 32; Joint Standing Committee on Northern Australia, 2021, p. 194; Samuel, 2020, p. 63). Critics have questioned whether the incorporation of Indigenous rights within the legal order of the settler state through the rubric of FPIC subjugates Indigenous communities to the state at the same time as it empowers them to assert their rights (see, e.g., Merino, 2017; Young, 2020). This analysis challenges whether FPIC can ever truly allow Indigenous peoples to decide how to self-govern or self-organise.

Like the challenges to self-determination discussed above, this critique risks foregoing the opportunity to leverage the coercive power of the state in service of an ideal that is not necessarily inconsistent with broader changes to Indigenous self-government in the long run. However, this perspective draws focus onto the extent to which FPIC is a true implementation of self-determination. Even under the version of FPIC articulated in UNDRIP, where a project will affect an Indigenous people's lands or territories and other resources but not necessarily require their relocation or the disposal or storage of hazardous waste on their lands, the FPIC obligation is less clear. The debate concerning the meaning of FPIC in Article 32(2) is the subject of the next section.

Circumstances in which FPIC need not be obtained

The final wording of Article 32 reflected a decades-long struggle between Indigenous representatives and state plenipotentiaries during the drafting of UNDRIP. According to Hartley (2016, pp. 44–59), an obligation to consult and cooperate in good faith to obtain FPIC was the product of a compromise thought necessary to assuage state fears about an absolute right of veto vested in Indigenous peoples, while simultaneously avoiding a weak obligation merely to 'seek' consent (see also Errico, 2015, pp. 427–432, 436) As a result of this compromise, the text of Article 32(2) is ambiguous as to whether a state must positively obtain FPIC before conducting or permitting an interference with Indigenous peoples' traditional lands, or merely consult with a view to obtaining this consent (International Law Association, 2012, pp. 510–511). As a consequence of this ambiguity, a spectrum of interpretations has emerged between the alternatives of consent and consultation.

Some have argued that the wording of Article 32(2) does in fact grant an autonomous right of veto to Indigenous peoples (e.g., Fredericks, 2016; Leydet, 2019). Others maintain that the text requires only an attempt to obtain consent in good faith (e.g., Newman, 2017, pp. 13–14). Yet another approach asserts that UNDRIP recognises only the forcible relocation of Indigenous peoples and the storage or disposal of hazardous waste on their lands as situations in which the state is under an obligation to obtain the consent of the Indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations (e.g., Anaya 2009, [47]).

However, such a restrictive interpretation of UNDRIP FPIC obligations is misplaced for two reasons. First, Article 32(2) is the result of a compromise that abandoned an obligation to seek Indigenous peoples' consent – this suggests that the Article imposes a more stringent obligation on states that is not satisfied by merely attempting to obtain consent. Second, Article 32(2) should be read in the context of the rest of the Declaration, which includes recognition of Indigenous peoples' right to self-determination, and their rights to and regarding traditional lands (UNDRIP arts. 3, 25–30). Barelli (2018, p. 254) concludes that 'while FPIC [in Article 32(2)] should not be read as conferring an overreaching right to veto on Indigenous peoples, it should nevertheless be interpreted in such a way that guarantees the effective protection of Indigenous peoples' fundamental rights… [T]his may mean that, on occasion, Indigenous peoples should be able to say 'no' to proposed measures or projects, or that, similarly, States will have to provide alternative solutions which would mitigate the negative effects of their proposed plans'.

To date, the most compelling attempt to resolve this ambiguity in a principled manner is found in a 2007 decision of the Inter-American Court of Human Rights. In *Suriname v Saramaka*, the Inter-American Court considered Article 32(2) of UNDRIP (among other material) in order to determine when a state may legitimately restrict the constitutionally-protected property rights of an Indigenous people. It held that states must always consult with Indigenous peoples before authorising or undertaking interferences with their territory, and that they must further obtain FPIC if the proposed interference threatens to affect the Indigenous people concerned in a 'major' or 'profound' way (*Case of the Saramaka People v Suriname (Preliminary Objections, Merits,*

Reparations, and Costs) (Inter-American Court of Human Rights, Series C, No 172, 28 November 2007) ('*Saramaka*') at [133]–[134], [137]).

The *Saramaka* decision's contextual, impact-based model for Indigenous participation in decision making affecting their lands has proven to be popular. Legal commentators and other courts have directly referred to the *Saramaka* model to construe Article 32(2) (*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Merits)* (African Commission on Human and Peoples' Rights, Comm 276/2003, 46th Ordinary Session, 11–25 November 2009) at [291]; *Sarstoon Temash Institute for Indigenous Management v Attorney General of Belize* [2014] BZSC 15 at 30–8; African Commission on Human and Peoples' Rights (ACHPR), 2012; Pentassuglia, 2011, p. 187), while United Nations (UN) bodies have employed a similar impact-based approach to FPIC in the wake of the *Saramaka* decision (Human Rights Committee, 2009, [7.6]; 2012, [27]; Anaya 2009, [47]; 2013, [27]). Furthermore, domestic courts in other jurisdictions have adopted an impact-based approach to FPIC requirements in national laws that is redolent of the *Saramaka* model (*Delgamuukw v British Columbia* ('*Delgamuukw*') [1997] 3 SCR 1010 at 1112–1113 per Lamer CJ; *Haida Nation v British Columbia* [2004] 3 SCR 511 at 532, 534–535 per McLachlin CJ; *Ruling T-769/09* (Unreported, Constitutional Court of Colombia, 29 October 2009) at [133]–[134]; *Constitutional Judgement 2003/2010-R* (Unreported, Constitutional Court of Bolovia, Jinés J, 25 October 2010); *Tsilhqot'in Nation v British Columbia ('Tsilhqot'in')* [2014] 2 SCR 257 at 297–298 per McLachlin CJ). The *Saramaka* approach could therefore provide a basis for the operationalisation of FPIC in the context of renewable energy development on native title land in Australia.

However, the model is not without criticism, some of which must be addressed before the model can be implemented effectively. One crucial limitation of the *Saramaka* model's approach to FPIC concerns the indeterminacy of the criteria for assessing impact on Indigenous peoples. An impact-based approach might leave room for vested interests to improperly claim that particular types of projects have minor impacts and therefore do not trigger a consent requirement, undermining the protection that FPIC is supposed to offer (Doyle, 2015, p. 157). If not carefully applied, the *Saramaka* test might become preoccupied by project size, with the consequence of allowing smaller developments that could severely damage Indigenous communities' connection to land, despite their smaller footprint (Pasqualucci, 2009, pp. 90–91).

An approach that could help protect Indigenous peoples from vested interests and significant impacts from physically less extensive projects is to ask what a reasonable member of the Indigenous people concerned would consider to be an impact of the type necessitating FPIC to be obtained. Similar tests are found in Australian consumer protection and racial discrimination laws (see *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207; *Eatock v Bolt* (2011) 197 FCR 261; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389). The adoption of the perspective of the group of people impacted by the project is important to ensure that cultural differences regarding the value of matters impacted are respected (Akeemana & Jones 1995, p. 129). However, to date, a definitive criterion for assessing the degree of impact that requires the positive obtainment of consent remains to be determined by a court or commentator.[3]

Another limitation of the current approach to UNDRIP FPIC obligations is the lack of clarity regarding the circumstances in which FPIC obligations can be 'overridden'. According to Article 46(2) of UNDRIP, the

[3] For some suggestions on future directions for the *Saramaka* model, including accounting for the cumulative effect of a given impact and a shift to an approach grounded in rights to dignity (as opposed to a right to property), see *Saramaka v Suriname* (*(Interpretation of the Judgment on Preliminary Objections)* (Inter-American Court of Human Rights, August 12, 2008) at [41]), Antkowiak (2013, pp. 172–87) and Hartley (2016, pp. 308–313).

circumstances are limited to those in which overriding FPIC requirements is strictly necessary for the protection of others' rights and the 'just and compelling requirements of a democratic society':

> *In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society (UNDRIP Article 46(2)).*

Article 46(1) also ensures the territorial integrity and political sovereignty of independent states[4]:

> *Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States (UNDRIP Article 46(1)).*

The Inter-American Court of Human Rights has commented that the constitutionally-protected property rights that form the basis of the *Saramaka* decision could be restricted by laws that are necessary and proportional to attaining a legitimate goal in a democratic society, noting that this goal must be so important that it clearly prevails over the necessity of the full enjoyment of the right to property (*Ivcher Bronstein v Peru (Judgment)* (Inter-American Court of Human Rights, Series C No 74, 6 February 2001) at [155]; *Herrera Ullloa v Costa Rica (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 107, 2 July 2004) at [127]; *Ricardo Canese v Paraguay (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 111, 31 August 2004) at [96]; *Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 125, 17 June 2005) at [144]–[145]; *Saramaka* at [127]). However, neither it nor any other court has provided a definitive example of the circumstances that justify overriding FPIC requirements, nor have these circumstances been judicially considered at any significant length.

There have, however, been comments by courts and other experts on what circumstances do not by themselves justify overriding UNDRIP FPIC obligations. Overriding UNDRIP FPIC obligations has been considered unjustified where a state government has merely appealed to an amorphous 'public interest' (Doyle, 2015, pp. 170–171). It would also be unjustifiable to override UNDRIP FPIC obligations just because a substantial commercial benefit could be wrought (Anaya, 2013, [35]). Under international law, large development projects do not necessarily justify overriding human rights (Errico, 2015, pp. 437–438). Generally, it appears that maximising the utility of the majority would not justify overriding FPIC obligations under Article 46(2) (Leydet, 2019, p. 399). Ultimately, a state must legislatively define the concept of public interest in a participatory way, encompassing worldviews and interests of groups living in its territory – rather than rely on a nebulous concept to override the rights of Indigenous peoples.

Broad application of FPIC to renewable energy and native title

Despite these issues with FPIC in the abstract, two comments can be made in relation to UNDRIP FPIC obligations in the specific context of renewable energy development on native title land. First, it is clear that renewable energy projects have the potential to significantly impact native title parties' connection to and use of their traditional lands. As Shalanda Baker (2010, pp. 285–287, 2016, pp. 381–383) has recently demonstrated, the commercial imperatives of project finance and renewable energy development can unjustly infringe

[4] For a critique of this provision, see Scheinin and Åhrén (2015, pp. 70–73).

Indigenous property rights if those rights are not well protected. A lack of engagement with Indigenous communities can disempower and frustrate people, result in unfair compensation packages, and leave people with limited land access that is insufficient to observe their customs. In the isthmus region of Oaxaca, Mexico, the construction of a large-scale wind farm on Indigenous land restricted the community's subsistence farming practices, ultimately making it less resilient to the effects of climate change (Baker, 2010, pp. 285–287, 2016, pp. 381–383). In Alberta, Canada, a wind farm jointly owned by the Batchewana First Nation left some community members ambivalent because of its effects on the ecological and spiritual values of Bow Wind Lake and its native flora and fauna (Smith & Scott, 2021). Any application of UNDRIP FPIC obligations to renewable energy development on native title land in Australia must ascertain the physical, psychological, spiritual, and economic impacts of the project concerned to the native title holders and their successors.

Second, the circumstances surrounding the potential construction of a large-scale renewable energy generation facility on native title land are unlikely to justify overriding FPIC requirements in most cases. Although renewable energy's role in supplying electricity to a community and reducing greenhouse gas emissions is undeniably important, it seems unlikely that any single renewable energy project on native title land will be necessary to uphold important human rights and satisfy the just and compelling requirements of a democratic society. Neither a broad appeal to the public interest associated with renewable energy nor the commercial value of a specific renewable energy development would suffice to justify overriding UNDRIP.

Summary of the suitability of self-determination and UNDRIP FPIC obligations

On the basis of its normative, substantive, and pragmatic value, the right to self-determination should be the norm by which the fairness of Australia's native title legislation is judged. Although they have functioned poorly when improperly implemented, UNDRIP FPIC obligations are the best available operationalisation of self-determination in the context of native title rights and interests because of their conformity with self-determination and their jurisprudential pedigree in international law. It remains unclear how an impact-based approach to mandatory FPIC obligations should be implemented and in what circumstances FPIC obligations can be overridden by appealing to Article 46(1) and (2) of UNDRIP. However, because large-scale renewable energy involves significant changes to the land and the exclusion of people from large areas, a broad application of UNDRIP to renewable energy development on native title land should require native title holders' FPIC in most circumstances. It is unlikely that this requirement could be overridden, especially when a large-scale renewable energy project is designed for exporting energy for commercial gain, not for the energy requirements of the Australian state. In the following section, this paper takes these standards and compares them to the current state of affairs under the NTA.

Assessment of the NTA's fairness

Now that we have determined what would broadly constitute a fair treatment of native title rights and interests in the context of renewable energy development, we can assess the fairness of the NTA's current processes. There are two primary alternatives by which a developer could obtain the right to build a renewable energy project on native title land: by entering into a type of agreement with native title representatives known as an Indigenous Land Use Agreement or 'ILUA'; or by government compulsory acquisition. This section compares the characteristics of ILUAs and the compulsory acquisition of native title rights and interests against the FPIC obligations imposed by UNDRIP. The analysis commences with ILUAs, paying attention to how pressures brought to bear on native title parties can undermine how consensual an agreement is. One of the biggest pressures is generated by the threat of a non-consensual alternative to ILUAs, which, in the context of renewable energy development on native title land, is posed by government powers of compulsory acquisition.

Overview of the NTA

At the most basic level, 'native title' is a concept in settler-colonial law that describes rights and interests in relation to land or water held by a defined group of Aboriginal or Torres Strait Islander people and recognised by Australian law. These rights and interests are rooted in traditional laws and customs, and can include the right to exclude people from land ('exclusive possession') if that right has not been extinguished by a valid grant of a right of entry to a person or persons outside the native title group.[5] The NTA is the chief instrument that governs how this recognition is granted, and how native title rights and interests are protected once they are recognised, or while an application for their recognition is afoot. Under this protection, any future dealing that purports to create rights and interests that are inconsistent with native title is invalid to the extent of that inconsistency, unless certain procedures are followed. The framework for 'validating' future dealings that are inconsistent with native title is known as the 'future acts regime'.[6] Under the future acts regime, there are two principal alternatives for renewable energy developers to obtain the tenure necessary to finance and build a solar and wind farm on land or water in respect of which native title is held or claimed: ILUAs and the compulsory acquisition by government of the land or water in question.

Indigenous Land Use Agreements

Theoretically, ILUAs can satisfy the FPIC standard.[7] Indeed, international financial institutions and Australian governments tend to accept the existence of an ILUA as conclusive evidence that the native title group's FPIC has been obtained (Storey, 2018, [282,850]). In some respects, ILUAs are deeply compatible with FPIC. For example, because the native title group's consent is sought before the commencement of the future act, and interests granted without observance of the NTA's procedures are invalid, the criterion of priority is clearly satisfied (NTA ss. 24OA, 25(4), 28; *Warrie (Yindjibarndi People) v Western Australia* [2017] FCA 803 at [211]–[216] per Rares J).

A more complicated issue with ILUAs' compliance with FPIC relates to whether 'informed' consent is obtained, in light of the minimum requirements of authorisation for ILUAs. The requirements for authorisation of decision-making in agreement-making have been described as crucial because of the potential impacts of development and because of the often-contentious questions around benefits under the agreement (Duff, 2017, p. 161). As a matter of basic principle, the proponents of a future act must obtain the authorisation of the native title holders for an ILUA (NTA s. 251A).[8] Australian courts are sensitive to the importance of this requirement, and have ruled decisions invalid when they were made in the course of negotiations without effectively informing the native title group (e.g., *Bolton v Western Australia* [2004] FCA 760 at [45]–[46] per French J; *TJ (on behalf of the Yindjibarndi People) v Western Australia* (2015) 242 FCR 283 ('*TJ v Western Australia*') at 301–302 per Rares J; *Collins (Wonghumara People) v Harris (Palpamudramudra Yandrawandra People)* [2016] FCA 527 at [32]–[34] per Jagot J).

[5] The distinction between 'exclusive' native title and 'non-exclusive' native title is not emphasised in this paper, because the papers observations and recommendations regarding FPIC apply equally to exclusive and non-exclusive native title.
[6] The future acts regime applies to actions or developments done after 1 January 1994 (the date of the commencement of the NTA). Different regimes apply to acts done before that date, and certain acts done by governments between January 1, 1994 and December 23, 1996. These regimes are not discussed in this paper.
[7] Note that this paper only considers ILUAs as in those agreements which are negotiated pursuant to NTA Pt 2 Div 3 Subdivs B, C and D. This section of the paper does not consider other native title agreements, such as an agreement negotiated under the NTA s. 29 right to negotiate process.
[8] This also requires the proponents to accurately identify the native title holders. For an illustrative example of the importance of identifying the correct native title holders in the context of a proposed future act, see *Manado (Bindabur Native Title Claim Group) v Western Australia* [2017] FCA 1367; [2018] FCAFC 238, in which the Federal Court determined that the true holders of native title in relation to James Price Point – the site for a proposed natural gas development – were the Jabirr Jabirr People, and not the members of the Goolarabooloo family with whom environmentalists opposed to the development had allied. O'Neill (2019) describes the heuristic errors and biases that led the opponents of the processing hub for Woodside Energy's Browse Basin Project to misidentify the proper native title holders in relation to James Price Point.

Despite this, persistent tensions in agreement-making under the NTA exist in relation to pragmatic considerations of certainty and the decision-making processes of native title holders. For example, the Commonwealth Parliament's decision to pass a law overturning the Federal Court's determination that all registered native title claimants must sign an Area Agreement showed government's concern for the workability of ILUAs where claimants are dispersed (and possibly deceased) (*McGlade v Registrar Native Title Tribunal* (2017) 251 FCR 172 at 214–15, 248–9 per North and Barker JJ, at 276–277 per Mortimer J; *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cwlth)).[9] However, as Young (2017, p. 26) has noted, the easing of ILUA registration requirements can undermine traditional decision-making processes, especially with regard to minority groups who oppose the surrender of or other dealing in native title.

Another controversial element of FPIC in relation to ILUAs is the criterion of freedom. The essence of the criterion has been expressed as the absence of coercion or improper influence (Permanent Forum on Indigenous Issues, 2005, p. 12). Conceptually, agreements between native title holders and future act proponents have been facilitated by provisions of the NTA since its enactment, and supported by the state, territory and federal governments as the basis for 'a lasting and workable resolution to native title, land use and co-existence issues', because they represent the voluntary agreement of native title parties (Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJCNTATSILF), 1997a, [7], 1997b, [2.7]). As in the case of the 'informed' criterion, Australian courts have sought to uphold requirements of freedom in negotiating consent. For example, in *TJ v Western Australia* (at 296, 308), Rares J ruled that land access negotiations were invalid where meetings were arranged or interfered with by the future act proponent.

However, practical imbalances in negotiating power often result in the coercion of native title parties and inequitable agreement-making, undermining the agreement's claim to voluntariness (Altman, 2012, pp. 57–60; Doohan, 2006, p. 50; O'Neill, 2016, pp. 213–215; Trebeck, 2007). Generally, to be in a position to provide consent freely, native title holders and their representatives must be adequately funded, politically and strategically sophisticated, and internally stable (O'Faircheallaigh, 2004, 2006, 2007, 2016, p. 207). Funding has proven to be a particularly controversial issue in the context of ILUAs generally. As native title proponents have consistently argued for decades, a lack of resourcing can force the entities which hold native title, Registered Native Title Bodies Corporate (RNTBCs), to curtail engagement, consent to projects they otherwise might not agree to, and rely on future act proponents for funding (Council of Australian Governments (COAG), 2015, p. 59; O'Faircheallaigh, 2006, p. 5, 2016, p. 212; O'Neill, 2014, p. 32; PJCNTATSILF, 2006, pp. 29–55). Despite recent increases in funding and charging processes (COAG, 2015, pp. 63–68; Australian Government Department of Prime Minister & Cabinet (PM&C), 2018), RNTBCs remain under-resourced (National Native Title Council (NNTC), 2019).

Another crucial factor in the voluntariness of ILUAs is the availability of alternative mechanisms to validate the future act. This is important in two respects. First, if the alternative procedure for validation does not satisfy the FPIC standard, the availability of the procedure means that the FPIC standard can be effectively circumvented. The likelihood of such a course of action depends on the ease by which the alternative procedure can be accessed and the existence of external factors that might encourage the future act proponent to prefer obtaining FPIC, regardless of the availability of the alternative procedure (such as public relations pressure or requirements imposed by financiers). Second, the prospect of less consensual alternative mechanisms can exert a pressure on native title parties to reach a purportedly 'voluntary agreement' to which they would not consent in usual circumstances. In particular, for the development of renewable energy generation facilities, the availability of compulsory acquisition processes could undermine native title parties' negotiating position. This risk was illustrated in the negotiations for the acquisition of native title in relation to the gas hub facility at James Price Point. During negotiations, the Western Australian government became frustrated by native title parties'

[9] See further Australian Government Attorney-General's Department (2017); ALRC (2015); COAG (2015).

protracted negotiating tactics, warned that it would exercise its powers of compulsory acquisition unless an agreement was reached soon, and eventually carried out that threat (O'Neill, 2019, p. 601).[10] Therefore, it is necessary to consider whether the procedures for compulsorily acquiring native title satisfy UNDRIP FPIC standards.

Compulsory acquisition

The procedure for the compulsory acquisition of native title to facilitate the development of an infrastructure facility is set out under s. 24MD(6A) and (6B) of the NTA. In the context of an acquisition for the development of a renewable energy generation facility, s. 24MD(6A) requires that native title holders have the same procedural rights as ordinary title holders. Depending on the state or territory in which their native title exists, native title holders might thereby have a right of review of the decision before a court or tribunal. In addition to these rights, s. 24MD(6B) requires that the government authority to which the acquisition is attributable must notify the proposal to the relevant native title parties, who can object to the acquisition. Following objection, the relevant government authority must consult with the objectors about ways to minimise the impact of the acquisition on registered native title rights and interests, about access, or about the way in which the renewable energy development authorised by the acquisition might be carried out (NTA s. 24MD(6B)(e)). At the objector's request, the matter can be heard by an independent person or body, whose determination must be complied with unless the Minister for Indigenous Affairs is consulted, their views considered, and it is in the interests of the Commonwealth, state or territory not to comply with the determination (NTA s. 24MD(6B)(f), (g)). In sum, there are detailed procedural protections in place with respect to the compulsory acquisition of native title.

However, the procedure does not comply with UNDRIP FPIC obligations in three respects. First, it appears that a government authority need only 'consult' about ways in which significant impacts to native title holders' and claimants' interests can be minimised. If the government authority conducts a consultation about minimising the impacts of the renewable energy development but ultimately fails to minimise those impacts or obtain the relevant native title parties' consent to them, the impacts could nonetheless be permitted to occur, regardless of their significance. This interpretation concurs with the comment of the Full Court of the Federal Court in *Harris v Marine Park Authority* ((2000) 98 FCR 60 at 71–72 per Heerey, Drummond and Emmett JJ) that s. 24MD(6B) bestows no right of veto in favour of the native title parties who must be notified under it. By comparison, the standard of FPIC prescribed by UNDRIP as interpreted in *Saramaka* requires the positive consent of an Indigenous people whose rights and interests are significantly impacted by a development.

Second, even if a native title party is able to convince the independent person to make a determination prohibiting the acquisition or requiring the minimisation of impacts associated with the renewable energy development, that determination can be overridden on grounds that are not justified under UNDRIP. The 'interests' that can justify overriding the independent person's determination include the economic benefit of the project to the Commonwealth, state, territory, or relevant region or locality (NTA s. 24MD(6C)). However, as noted above, an economic or commercial benefit has been described as insufficient to justify overriding an obligation to obtain FPIC (Anaya, 2013, [35]).

Third, a failure to comply with the procedural requirements in s. 24MD(6A) and (6B) does not invalidate the acquisition of the native title rights and interests (or the grant of the Crown lease for the land on which the wind or solar farm will be built). The Full Court of the Federal Court recently clarified that the validity of a future act passing the freehold test is only dependent on the right to negotiate (*BHP Billiton Nickel West v KN (Deceased)*

[10] In September 2010, the Western Australian government issued notices to acquire land. These notices were ruled to be invalid because their description of the land was inadequate (*McKenzie v Minister for Lands* (2011) 45 WAR 1 at [111] per Martin CJ). A second notice to acquire land was issued in December 2012 (*Augustine v Western Australia* [2013] FCA 338 at [73] per Gilmour J), and the land was eventually acquired in 2014. However, by that time, commercial interest in the hub had been abandoned. For a summary of the James Price Point disputes, see Mills, 2018; O'Neill, 2014, 2016.

(2018) 258 FCR 521 at 526–534 per the Court).[11] Where native title parties are not notified of a future act under s. 24MD(6A) or (6B), it appears that their remedies will be limited to seeking compensation from the government authority to which the act was attributable. Monetary compensation might be insufficient to ensure the native title parties' ability to access traditional resources, practise culture, or perform other activities or enjoy connections necessary to satisfy the 'survival test' prescribed in the *Saramaka* model.

Summary of the NTA's fairness

The NTA's approach to renewable energy development on native title land does not attain the standard prescribed by UNDRIP's FPIC provisions. While ILUAs might appear to satisfy the FPIC provisions at first glance, the extent to which a native title party's consent to an ILUA is 'informed' can depend on how the ILUA is authorised, and the 'freedom' with which that consent is given can be undermined by the financial pressures to which native title parties are subject. Further, where a government authority is willing to acquire native title rights and interests compulsorily to facilitate renewable energy development, a native title party might be forced into entering an ILUA to which it would otherwise not agree. In connection with this, it is important to note that the procedures imposed for the compulsory acquisition of native title rights and interests in connection with renewable energy development fail to achieve the standard set in UNDRIP. There are a number of options for reform that would bring the NTA's approach to renewable energy development closer to the best practice standard of FPIC. Each of these options and the arguments for and against them are discussed in the following section.

Options for reform

This section considers four options for reforming the NTA's regulation of renewable energy development on native title land and waters. Each of these options would more closely reflect the standard of fairness articulated in UNDRIP's FPIC provisions than the NTA's current approach. Some options are closer to UNDRIP's FPIC provisions than others, but options that fall short of full UNDRIP FPIC attainment have been included nonetheless on the basis that a less-than-perfect but politically viable reform proposal can be more beneficial than a more ideal but politically untenable reform proposal. Beginning with the weakest option for reform, this part discusses each option in ascending order of the protection afforded to native title holders and claimants. The final section of this part discusses a strong right to veto renewable energy development on native title land and waters that would most closely attain UNDRIP's FPIC standards.

Public use requirement

The most limited proposal for reform is a requirement that compulsory acquisition for the provision of a renewable energy generation facility must be done for a public purpose. Government powers of compulsory acquisition are normatively justified by the expectation that it is appropriate for government to encroach upon private rights in order to provide goods and services in the public interest (ALRC, 2015b, pp. 489, 490, 538). In the context of the electricity industry, the United Nations Food and Agriculture Organization has recognised that private land may be legitimately compulsorily acquired in order to support private electricity companies to construct and operate the infrastructure needed to provide electricity to their customers (Keith et al., 2008, p. 11). This justification might apply to the compulsory acquisition of land for the provision of renewable energy generation facilities that will supply electricity within their state or territory of origin, or at least to an Australian market.

[11] See also *Lardil Peoples v Queensland* (2001) 108 FCR 453 at 473 per French J, at 477 per Merkel J, at 486–487 per Dowsett J; *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1; *Daniel v Western Australia* (2004) 212 ALR 51.

However, it is questionable whether the same justification could be relied upon in the case of a renewable energy development for the generation of electricity destined for export. Where electricity generated by renewable energy is proposed to be converted into hydrogen or ammonia for export, it is possible that no electricity would be provided as a public utility in Australia and therefore have little 'public purpose' in Australia. While some Australian government authorities are required by legislation to exercise their powers of compulsory acquisition for a 'public purpose' only (*Lands Acquisition Act 1989* (Cwlth) ss. 40(1), 41(2)(b); *Lands Acquisition Act 1994* (ACT) ss. 3, 19; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ss. 4(1), 21; *Land Acquisition Act 1993* (Tas) ss. 3(1), 4(3)), there is presently no statutory requirement that all compulsory acquisition of native title rights and interests be done in the public interest. There is also no such requirement at common law, nor have Australian courts been willing to infer a public purpose requirement in state or territory compulsory acquisition legislation without clear legislative intent. For example, in the 2008 case of *Griffiths*, the High Court of Australia held that a Northern Territory legislative provision empowering the Northern Territory government to compulsorily acquire property, including native title, 'for any purpose whatsoever', allowed the government to expropriate land to deliver it into private hands for the pursuit of private profit.

Further, in the specific context of infrastructure development, there is no requirement under the NTA that the 'infrastructure facility' that enables the weaker procedure under s. 24MD(6B) be dedicated to public use. The Full Court of the Federal Court of Australia has interpreted the relevant legislative intent to be 'to exclude the right to negotiate where the acquisition is to provide a facility for the economic benefit of the nation or a region of the nation' (*Slipper* at 277 per Branson J). That approach is similar to the position taken in American courts, which have interpreted concepts similar to that of 'economic benefit of the nation' broadly, so that the compulsory acquisition of property to provide land to a private company pursuing private gain has been considered lawful (*Kelo v City of New London*, 545 US 469 (2005); Olejarski, 2018). Therefore, without explicit statutory provision to the contrary, Australian courts will not construe powers of compulsory acquisition in such a way as to prevent compulsory acquisition of native title land for private benefit (Brennan, 2008, 2010, pp. 244–246; compare Basten, 2010, pp. 265–266). By permitting compulsory acquisition of native title land for the benefit of private and non-utility renewable energy generation facilities, the current NTA regime conflicts with the normative standards of compulsory acquisition.

A suggestion for reform would be to redefine the concept of an infrastructure facility to specify that it must be for the public's use. Interestingly, this was the position taken in the original draft of the Native Title Amendment Bill in 1996, before it was amended to delete any reference to the 'public' (Bartlett, 2020, p. 66). Alternatively, state and territory governments could enact legislation or adopt policies prohibiting the exercise of compulsory acquisition powers except where this is done for a public purpose. However, such a reform proposal might be of little practical effect. First, Australian courts have recognised that this requirement imposes some limitations on government power, such as that the notice of intention to acquire land must identify a public purpose and the public purpose must be lawful (*Jones v Commonwealth [No 1]* (1963) 109 CLR 475; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 198–199 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). However, the High Court has held that a government declaration that land was required for a public purpose was conclusive evidence of the existence of that purpose and that courts would not go behind a declaration to determine whether there was another purpose (*W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 519 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ). Therefore, a government assertion that the renewable energy development facilitated by a compulsory acquisition of native title serves a public purpose will not be challenged by a court. Second, even if a court could challenge whether a renewable energy development serves a public purpose, it might be arguable that all renewable energy development is done for a public purpose so long as it generates income for people and the government authorities entitled to receive taxation payments in connection with the development. The deployment of low-carbon technology might also serve a public purpose in mitigating climate change, generally. Therefore, any

protection afforded by a public purpose requirement is unlikely to provide fair protection of native title rights and interests according to UNDRIP's FPIC standards.

Extension of right to negotiate

A stronger proposal for reform to the NTA is one that would ensure that native title parties enjoy the right to negotiate with respect to a compulsory acquisition of their rights and interests for the provision of an energy generation facility. This measure has been suggested by O'Neill et al. (2019, p. 10) as a way to improve the bargaining position of native title parties in the context of future renewable energy development. It would represent a return to the position that existed before the implementation of the Ten Point Plan in 1998.

The exclusion of the right to negotiate with respect to compulsory acquisition for the provision of infrastructure was inserted by the *Native Title Amendment Act 1998* (Cwlth) as part of the Howard Government's plan to amend the NTA in order to 'ensure its workability' after the *Wik* decision. The Ten Point Plan was decried by Indigenous, non-Indigenous, and international commentators for its racially discriminatory extinguishment of native title and diminishment of the right to negotiate (Committee on the Elimination of Racial Discrimination (CERD), 1999; Triggs, 1999). The exclusion of the right to negotiate in relation to infrastructure facilities received less attention than other aspects of the Ten Point Plan, but it was still identified as an unfair provision by commentators (e.g., Bartlett, 1997, pp. 60–61; Brennan, 1999, p. 70). Winding the legislation back to its pre-Howard position would represent a return to the status quo ante.

There are two counter-arguments against the provision of the right to negotiate to compulsory acquisition for the provision of infrastructure. First, in the specific case of compulsory acquisition of native title rights and interests for the provision of a renewable energy generation facility, the absence of a right to negotiate for native title parties does not result in 'blatant discrimination' against those parties as it does in other cases (see Bartlett, 2020, p. 603; Keith, 1997). The requirements of formal equality in the conduct of compulsory acquisition mean that other title holders are at least as vulnerable to compulsory acquisition for the provision of renewable energy generation facilities by a non-government party as native title parties are. Indeed, the procedure in NTA s. 24MD(6A) and (6B) affords a right to consultation and appeal to an independent body that other title holders do not have. This counter-argument might appear persuasive at first, but only if one forgets the normative standards imposed by UNDRIP and FPIC, which do not require a mere abolition of discrimination but rather encompass positive protection of Indigenous rights in recognition of their special nature (see above).

The second counter-argument is that the abolition of the infrastructure exclusion would fetter the government's ability to facilitate development of important infrastructure, including the renewable generation facilities that are required to support Australia's transition to a low-carbon economy. However, the requirements of the right to negotiate are not so onerous as to pose a significant threat to the development of important infrastructure. On the contrary, the right to negotiate is overwhelmingly permissive of the extinguishment or impairment of native title rights and interests, as is clear by the statistical likelihood that a failed negotiation will result in the approval of the future act at arbitration (Corbett & O'Faircheallaigh, 2006; Sumner & Wright, 2009). It merely grants certain procedural rights to native title parties that are not afforded under the s. 24MD(6A) and (6B) procedure, namely that the requirement that government negotiate in good faith with native title parties for at least six months in order to obtain the parties' agreement.

Strengthening right to negotiate requirements

For the very reason that the right to negotiate does not currently impose especially onerous requirements on government, it does not attain the standard required by FPIC. The right to negotiate mandates that parties negotiate in good faith for at least six months before a mandatory arbitral determination is sought. The tribunal

vested with the jurisdiction to make a determination, the NNTT, must consider certain criteria in reaching its determination. These criteria include any public interest in the compulsory acquisition, the economic or other significance of the compulsory acquisition to Australia, the state or territory concerned, the area in which the land or waters concerned are located, and the effect of the compulsory acquisition on the native title holders and their rights and interests (NTA s. 39(1)). The latter criterion includes a question as to whether the native title holders consent to the compulsory acquisition (NTA s. 39(1)(b)).

This means that the native title party's non-consent to the compulsory acquisition can be relevant to the determination. For example, in *Western Desert Lands* (*Western Desert Lands v Western Australia* (2009) 232 FLR 169 at 227 per Sumner DP), the NNTT ruled that the native title party's non-consent to a future act outweighed the potential economic benefit or public interest in the project and therefore refused to permit the future act. In *Weld Range Metals* (*Weld Range Metals Limited and Western Australia v Wajarri Yamatji* (2011) 258 FLR 9 at 108 per Sumner DP) a determination refusing to validate the future act was reached on a similar basis.

However, those cases were exceptional. Both cases involved a very important traditional site and a lack of significant benefits to the native title holders. Only on three occasions in its entire history has the NNTT determined that a future act must not be done; by comparison, it has approved the doing of a future act 135 times (as at February 13, 2022). Ultimately, unlike the FPIC standard, the right to negotiate is not intended to grant native title parties veto powers in any circumstances (Keating, 1993, p. 2877), and the NNTT has also held that it will not make a determination solely on the basis that an agreement satisfactory to the native title had not been reached and that this adversely affected their aspirations to self-determination (*Australian Manganese v State of Western Australia* (2008) 218 FLR 387 at 408–409 per Sumner DP). Rather, the NNTT has considered that it must weigh up a range of different effects and interests associated with a future act, including its economic benefit, without affording any one type of effect or interest greater weight than any other (*Re Koara People* (1996) 132 FLR 73 at 81 per Seaman DP, Smith and McDaniel; *Western Australia v Thomas* (1996) 133 FLR 124 at 165–166 per O'Neil and Neate). Therefore, the strength of the native title parties' position will depend on a range of circumstances, especially the socioeconomic benefits associated with the renewable energy development, the importance of any site it might interfere with and the extent of any benefits the native title holders will receive in the course of the development.

Other jurisdictions afford the self-determination of Indigenous groups more weight when considering whether to permit an encroachment on their property. For example, in Canada, the requirements of meaningful reconciliation arising from the constitution incorporation of treaty rights under s. 35 of the Canadian Constitution require the Crown to justify incursions on Aboriginal title lands by demonstrating both a compelling and substantial government objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group (*Tsilhqot'in* at 295–298 per McLaughlin CJ). The Crown's fiduciary duty incorporates a requirement to consult, which can be satisfied by obtaining the consent of the interested Aboriginal group. The adoption of a similar position in Australia would give native title holders a much stronger position from which to bargain, and ameliorate some of the pressure exerted by the unlikelihood of a favourable NNTT determination.

However, even in Canada, the infringement of Aboriginal title without consent for the development of electric power generation facilities might still be approved by the courts (*Delgamuukw* at 1111 per Lamer CJ). Therefore, while a stronger proportionality requirement would improve native title holders' position, it still would not satisfy the strictest requirement of FPIC. To conform with UNDRIP FPIC standards, the NNTT must not be able to permit a future act against the wishes of a native title party merely because of potential economic benefits.

A strong right to veto compulsory acquisition

The final proposal for reform would be to grant native title holders a right to veto compulsory acquisition, or exclude native title from the purview of compulsory acquisition laws, even when that acquisition is being exercised in the public interest. In line with UNDRIP and the *Saramaka* principles, this right would operate with respect to developments that would result in forcible relocation, the storage or disposal of hazardous waste, or a major or profound impact on native title holders.

Some have argued in favour of such a reform. For example, MacKay argues that FPIC's status as an internationally-recognised human right suggests that states should not be able to act inconsistently with it. According to MacKay (2004, p. 53), the power of compulsory acquisition should be subject to limits imposed by human rights as much as any other prerogative of the state and therefore should not be granted any special status to justify denial of the right to FPIC. This position has been well recognised at international law, even before the advent of UNDRIP. In 1993, the World Conference on Human Rights declared that a right to development cannot be invoked to abridge internationally recognised human rights (*Vienna Declaration*, [5]).

A second argument in favour of a strong veto focuses on the theoretical basis of compulsory acquisition. As Doyle (2015, p. 181) notes, the concepts of eminent domain and resumption from which powers of compulsory acquisition are theoretically derived are inextricably linked with questions of sovereignty. In common law countries, powers of compulsory acquisition are premised on the assumption that the state transferred to, or granted, private individual's ownership of its property, retaining a right of resumption of that property (Doyle, 2015, p. 182). This assumption is false when applied to Indigenous peoples who were incorporated into states without consent or conquest, and whose rights to land are not derived from the state but owe their origins to traditional laws and customs, such as in Australia (*Mabo [No 2]* at 55–58 per Brennan J, at 82–83 per Deane and Gaudron JJ; *Yorta Yorta* at 441 per Gleeson CJ, Gummow and Hayne JJ). Therefore, the normative justification for the compulsory acquisition does not apply, or is at least seriously undermined, when dealing with native title land. Taken together, these two arguments suggest that native title should not be able to be acquired compulsorily.

There are three likely impediments to such an approach. First, one might wonder whether the Commonwealth Parliament has the constitutional power to make a law preventing the exercise of state and territory powers of compulsory acquisition to acquire native title. A law to protect native title from compulsory acquisition is likely to fall within the Commonwealth's power to make special laws deemed necessary for the people of any race (*Australian Constitution* s. 51(xxvi); *Native Title Act Case*). However, the Australian states might argue that such a law would impermissibly control their exercise of legislative power or impair their ability to function as states contrary to implied constitutional immunity of state power (see *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31). The High Court has previously determined that a Commonwealth law intended to operate with respect to the protection of native title exclusively of state and territory law does not represent an intention to invalidate state law (*Native Title Act Case*). The Court also held that the Commonwealth's power to make laws for the benefit of Aboriginal people cannot be limited by an implication that exempts the states from the application of such a law. However, these findings of the High Court were made in relation to the NTA's requirement that states (and territories) pay just terms compensation for the acquisition of native title, which might be distinguishable in a case challenging the validity of Commonwealth laws prohibiting the exercise of state and territory compulsory acquisition power itself. For that reason, a proposed Commonwealth law to restrict state and territory powers of compulsory acquisition requires careful thought as regards its constitutionality. These considerations would not apply to a suite of state and territory laws to restrict each government's own power of compulsory acquisition.

Second, and perhaps even more significantly, one might doubt that the Commonwealth Parliament (or state and territory parliaments) has the political will necessary to implement a restriction on Commonwealth, state and territory powers of compulsory acquisition. It is beyond the scope of this paper to speculate on the likely outcome of political battles, but some general observations can be made. For one thing, while the prohibition of native title's compulsory acquisition would be extraordinary, it would not be without analogous precedent. Land held by the Northern Territory's Aboriginal Land Trusts cannot be compulsorily acquired by any law of the Northern Territory (*Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) s. 67). In New South Wales (NSW), land held by the Aboriginal Land Council cannot be acquired except by an Act of Parliament (*Aboriginal Land Rights Act 1983* (NSW) s. 42B). Queensland's land rights legislation originally contained provisions to a similar effect (*Aboriginal Land Act 1991* (Qld) ss. 3.13, 5.15 (as enacted)), although the legislation has since been amended to allow the compulsory acquisition of native title under the *Acquisition of Land Act 1967* (Qld). It must be conceded that the restrictions on land rights' compulsory acquisition have never been absolute – the Commonwealth remains able to acquire Northern Territory Aboriginal Land Trust land compulsorily, and the NSW and Queensland parliaments each retained an exceptional power to make laws permitting their respective jurisdictions' Aboriginal land rights to be compulsorily acquired.

Third, governmental powers of compulsory acquisition are always in tension with core human rights to security of person and property. Very few human rights (if any) are protected in absolute terms and it is difficult to justify limits being imposed on compulsory acquisition from a human rights conception of FPIC when compulsory acquisition is inevitably at odds with certain human rights. Moreover, in the Australian context there is no strong human rights tradition in which the powers of government, which is the vessel of representative authority, are limited by the ambit of individual or group rights. These two counter-arguments were implicit in the Australian Government's 2018 reiteration of its reluctance to adopt FPIC as a standard requiring consent, especially 'where there is a compelling social need that requires State action' (Australian Government, n.d., p. 2). Nevertheless, this line of argument is challenged by the observations of MacKay, the *Vienna Declaration* and Doyle, each discussed above.

In any event, a hard restriction on the compulsory acquisition of native title faces serious political and constitutional challenges, but none of these challenges appear to be insurmountable. Reform of this sort would require the constitutional, political and philosophical arguments outlined in this section to be articulated and debated in full. However, on the basis of this brief discussion, a strong restriction on compulsory acquisition of native title seems consistent with the principles established in UNDRIP – the norms of Indigenous rights with which Australia has agreed. In the particular context of renewable energy development, strong protections against non-consensual development on native title land has the prospect of improving the likelihood that Indigenous peoples benefit more substantially and fairly than what has so far occurred in Australia. For these reasons this paper recommends a strong restriction on compulsory acquisition of native title land as the preferred reform to the NTA.

Conclusion

The NTA's current approach to renewable energy development is problematic. As a matter of principle, native title holders' free and prior informed consent to the development of renewable energy generation facilities on their land should be obtained. This is so because renewable energy developers will require tenure to land that will be likely to impair or extinguish any native title that might conflict with development. While the NTA renders the grant of this tenure invalid as against the native title holders unless the developer and (as applicable) the government complies with its requirements, the practical effect of the requirements do not attain the FPIC standard.

In the case of ostensibly voluntary agreements, inequalities in bargaining power and weak processes can undermine the degree to which consent elicited is free and informed. The situation could be improved by increasing financial support for native title representative bodies' capacity to negotiate with developers. But another crucial factor in securing FPIC is ensuring that the alternative to a negotiated outcome retains respect for native title holders' consent. The NTA's process for the compulsory acquisition of native title rights for the provision of renewable energy development, while not altogether unfair, it is still unbalanced. Because renewable energy generation facilities fall within the NTA's definition of 'infrastructure', native title holders have fewer procedural guarantees when faced with the compulsory acquisition of their rights. Native title holders do not enjoy the right to negotiate and the concomitant guarantee of a six-month good-faith negotiation for agreement with respect to a renewable energy development.

Several options for reform are available to achieve better compliance with the FPIC standard. On one end of the spectrum, a requirement that renewable energy generation facilities be established for public use would mitigate the reliance on weaker procedures to secure compulsory acquisition of native title rights for the development of ultra-large renewable energy export hubs and remain faithful to the public interest exception to FPIC. Moderate proposals for reform are to return the NTA's compulsory acquisition provisions to their pre-Ten Point Plan status by extending the right to negotiate to native title holders, or to place greater weight on native title holders' wishes when determining whether a renewable energy development should be validated. The most radical proposal for reform is to confer on native title holders a right to veto developments. Indeed, as this paper's discussion of the alternative reform options has revealed, the most ambitious reform proposal is the option that is most consistent with the right of self-determination and its operationalisation in the standard of free and prior informed consent. The constitutional and political challenges to such a reform are significant but not insurmountable and, in sum, it is hoped that this outline of policy proposals maps the way for future research in this area at the legislative, constitutional and other levels.

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