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Agreements with Indigenous Communities

The Native Title Act in Australia

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I. Introduction: The rise of agreement-making

Across the world, indigenous peoples are asserting their rights to be involved in decisions about energy and resource projects that impact on their traditional lands and waters. Agreement-making has emerged as a significant mechanism for negotiating the impacts of energy and resource projects, and for securing benefit flows to indigenous communities. This chapter provides an initial overview of international law principles, before turning to detail two case studies of agreement-making with indigenous communities, governed by the Australian Native Title Act 1993 (Cth). The Act has provisions for native title claims and for agreements around future 'acts' (activities) such as mining, energy, and infrastructure development. The Act sets procedures that give indigenous communities a 'right to negotiate' with those seeking access to land, and provides the platform for benefit sharing—typically a 'commercial' negotiation between native title claimants/holders, governments, and industry groups. Mining and energy companies are frequently parties to an agreement.

The Native Title Act adopted human rights' models promoting equality and anti-discrimination, but whether other international law principles such as free, prior, and informed consent are incorporated is uncertain. The analysis of two liquefied natural gas (LNG) project agreements with Aboriginal communities contrasts the relative bargaining positions and benefits achieved through negotiations. The chapter explores the power dimensions implicit to these agreements, premised, in part, upon the particular function identified for the Native Title Act. The extent to which Aboriginal communities are successfully integrated into decision-making about the sharing of impacts and benefits reflects the rights recognized within the governing frameworks, as well as extra-legal factors, such as the political power and social cohesion of indigenous communities.

II. Participation of indigenous communities

Calls by indigenous peoples to be involved in energy and resource projects on their lands and waters have been given momentum by their growing profile within international law. In turn, this has been reinforced by various forms of legal and constitutional recognition of the rights of indigenous communities in national laws.[1] The extent to which law and policy measures can equitably 'share' the costs and benefits of resource and energy activity will turn on the adoption of measures to include indigenous communities, not simply as communities to be consulted, but as active participants in decision-making governing those activities. Agreement-making has become a major legal mechanism for negotiating the impacts of projects, and for securing benefits for indigenous communities when energy and resource projects are developed.[2]

International law has articulated principles for strengthening the participation of indigenous communities; with varying levels of uptake in national laws. Concurrently, the energy and resources industry, and other private sector actors, have developed guidelines to facilitate constructive relationships with indigenous communities.[3] Examination of a national model can gauge the effectiveness of agreement-making in achieving more robust participation by indigenous communities; and explore the degree to which 'sharing' of impacts and benefits is practically and politically achievable. Research suggests that fully equitable sharing of benefits from resource and energy activities on indigenous lands is rare.[4]

The Native Title Act was introduced in 1993, partly in response to international developments, but primarily driven by judicial recognition of native title in *Mabo v Queensland [No 2]*.[5] It governs Aboriginal and Torres Strait Islander peoples' claims to their traditional land and waters within Australia. It is invested with the aspirations of many Aboriginal and Torres Strait Islander peoples as a means of also securing long-term economic, social, and cultural sustainability for relevant communities.[6] In addition to a claims' process, the statute provides for agreement-making in relation to 'future acts', such as energy and resource projects by

[1] M. Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Aust ILJ 17.
[2] M. Tehan et al., 'Sharing Land and Resources: Modern Agreements and Treaties with Indigenous People in Settler States' in M. Langton et al. (eds), *Settling with Indigenous People* (M. Langton et al., eds, 2006) 1 at 3.
[3] International Council on Mining and Metals, *Good Practice Guide: Indigenous Peoples and Mining* (2010) available at <https://www.icmm.com/document/1221>.
[4] D. Campbell and J. Hunt, 'Achieving broader benefits from Indigenous land use agreements: Community development in central Australia' (2013) 48 Community Development Journal 197 at 197.
[5] (1992) 175 CLR 1.
[6] D. Harrison, 'Call to Link Native Title to Aboriginal Economy' *The Sydney Morning Herald*, 28 June 2012.

governments or third parties that may 'affect' native title.[7] The framework also allows for financial and other benefits to Aboriginal and Torres Strait Islander communities.

A. International law, indigenous communities

The Native Title Act was enacted against the backdrop of human rights and anti-discrimination treaties incorporated into Australian law.[8] Since then, international law has progressively articulated more tangible human rights for indigenous peoples. James Anaya, then United Nations Special Rapporteur on Indigenous Peoples, noted:

> [t]his evolutionary international law and policy has provided virtual ground for a new and still developing regime of international standards and institutional activities specifically concerning the rights of indigenous peoples.[9]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations in 2007, is the culmination of these trends.[10] As a Declaration, it is technically non-binding on nation-state parties, but its significance transcends its formal legal status.[11] The Declaration acknowledges the distinctive status of indigenous peoples and addresses a wide range of matters relating to indigenous communities,[12] including the capacity to freely decide issues of group identity. The Articles concerned with consultative norms for third parties in their dealings with indigenous peoples are of growing significance.[13] Several Articles pertain to indigenous rights to traditional lands and resources, with two of particular relevance for resource and energy developments. Article 27 seeks to establish culturally appropriate procedural guarantees for indigenous participation:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[14]

Article 32 contains the 'free, prior, and informed consent principle'. More broadly, it provides:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

[7] Native Title Act 1993 (Cth), s 227 ('Native Title Act').
[8] Native Title Act, Preamble.
[9] S. J. Anaya, *International Human Rights and Indigenous Peoples* (2009) 1.
[10] Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295, 13 September 2007 ('UNDRIP').
[11] M. Davis, 'Adding a New Dimension: Native Title and the UN Declaration on the Rights of Indigenous Peoples' [2009] Australian Law Reform Commission Reform Journal 17.
[12] UNDRIP, Arts 3, 4. [13] ibid Art 33. [14] ibid Art 27.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[15]

The translation of these Articles into enforceable legal rights and normative standards at a national level is variable and often highly contested. For some, the Declaration:

> . . . provides a blueprint for Indigenous peoples and governments around the world, based on the principles of self-determination and participation, to respect the rights and roles of Indigenous peoples within society.[16]

The degree of acceptance of the Declaration typically reflects divergent levels of formal legal recognition of the sovereignty of indigenous peoples.[17] Such 'recognition' may range from 'sovereignty', constitutional status, to various forms of political, economic, and social inclusion within the nation state or transnational legal framework. The status of indigenous communities within a nation is an important determinant of whether the law will mandate their involvement in decisions around resource and energy developments. Indigenous peoples typically also strongly assert rights of self-determination in respect of dealing with their lands and waters.[18]

B. Indigenous communities within Australia

In this context, the concept of an indigenous community has many possible interpretations. Typically, it is taken to refer to 'local' groups with cultural affiliation to the lands and waters in which they live. However, impressions of indigenous communities, framed only by reference to 'localized' relationships with land and waters, need to be tempered. Many indigenous communities exist in networks of extended relationships that transcend local places. When impacted by, or engaged in, resource and energy projects, indigenous communities participate in a globalized economy with local, national, and transnational effects.[19] Nonetheless, third parties still define communities by cultural parameters despite '. . . the long reach of relationships relevant to project planning and benefit sharing'.[20] Relationships also may extend into obligations to care for lands which have future, intergenerational

15 ibid Art 32.

16 M. Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission quoted on Community Guide to the UN Declaration on the Rights of Indigenous Peoples, available at <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/community-guide-un>.

17 R. Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (2012) 2.

18 H. Minde et al. (eds), *Indigenous Peoples: Self-determination, Knowledge, Indigeneity* (2008).

19 M. Forte (ed), *Indigenous Cosmopolitans: Transnational and Transcultural Indigeneity in the Twenty-First Century* (2010); see also Barton and Goldsmith this book.

20 J. Chernelaa and L. Zanottib, 'Limits to Knowledge: Indigenous Peoples, NGOs, and the Moral Economy in the Eastern Amazon of Brazil' (2014) 12 Conservation and Society 306 at 307.

requirements.[21] Many indigenous peoples challenge the view of their community as caught in a 'time warp', especially where it serves to exclude them from participation in the benefits of resource and energy activity.

Within Australia, the term 'indigenous community' is a generic one. Most Aboriginal and Torres Strait Islanders prefer 'peoples' to better reflect the collective or group dimension to their lives, rather than purely individual aspects.[22] There are several different definitions of indigenous peoples for the purposes of specific legislation;[23] which at times causes confusion and conflict. While Aboriginal and Torres Strait Islander peoples comprise a relatively small percentage of the overall population, the communities are concentrated in the northern and western parts of the country—the areas where much resource and energy activity takes place. This distribution results from the historical spread of European settlement and its displacement of Aboriginal peoples.

Many Aboriginal communities have been strongly impacted by the mining and energy boom in Australia over the last decade.[24] The Minerals Council of Australia estimates that 60 per cent of mining operations in Australia neighbour indigenous communities.[25] The increase in mining and energy activity has seen substantial benefit flows to some Aboriginal communities—but the patterns are highly variable across Australia.[26] These disparities are evident in the two case studies discussed here—the proposed James Price Point (Browse Basin) LNG project in Western Australia, and the Gladstone/Port Curtis LNG project in Queensland.

III. Models for managing impacts and benefits in Australia

A. Energy and resources: a point of conflict

Competing interests over land and resources has characterized the relationship between Aboriginal peoples and European settlers since colonization.[27] Today, Australia remains highly dependent upon mining, resource extraction, and energy

21 M. Langton, 'The Estate as Duration: "Being in Place" and Aboriginal Property Relations in Areas of Cape York Peninsula in North Australia' in *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (L. Godden and M. Tehan, eds, 2010) 75 at 87.

22 Australian Human Rights Commission, *Community Guide to the Declaration on the Rights of Indigenous Peoples*, available at <http://declaration.humanrights.gov.au/get-it>.

23 'Community' does not appear in the Native Title Act, but it is implicit to the identification of native title holders.

24 M. Langton and O. Mazel, 'The Resource Curse Compared: Australian Aboriginal Participation in the Resource Extraction Industry and Distribution of Impacts' in *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (M. Langton and J. Longbottom, eds, 2012) 23 at 26.

25 Minerals Council of Australia, *2011–2012 Pre-Budget Submission*, 15 February 2011, at 64, available at <http://www.minerals.org.au/news/2011_2012_pre_budget_submission>.

26 J. Altman and F. Markham, 'Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities' in *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (S. Brennan et al., eds, 2015) 126 at 136–7.

27 M. Tehan and L. Godden, 'Legal Forms and their Implications for Long-Term Relationships and Economic, Cultural and Social Empowerment: Structuring Agreements in Australia' in Langton and

projects to support its economy. Historically, conflicts over resources had profound impacts upon Aboriginal communities, as colonization resulted in dispossession, deaths, and removals of Aboriginal peoples[28]—a pattern evident in other 'settler' countries. Aboriginal peoples initially were excluded from many social and economic spheres, and not granted citizenship until 1967. Many Aboriginal communities bore the costs of energy and resource projects on their lands, largely without compensation, until relatively recently.[29] The advent of the Native Title Act, which not only recognized indigenous rights to traditional lands and waters, but also provided a framework for compensation to affected communities, marked a very significant shift in Australia's legal, political, and economic structures. It was highly controversial when enacted, and remains a divisive issue in Australian society.

Despite the recognition by the Australian High Court of Aboriginal and Torres Strait Islanders' rights to traditional lands and waters in 1992, there is still no treaty with indigenous peoples and the issue of indigenous sovereignty is strongly contested. Constitutional recognition has proved elusive. Inclusion of Aboriginal and Torres Strait Islander peoples within the nation state, therefore, is largely premised upon creating economically and socially viable 'communities'.[30] Consequently, most recent 'agreements' with Aboriginal communities revolve primarily around economic 'benefits', while Aboriginal communities still continue to experience disadvantage as gauged by economic, education, and health indicators.

B. 'Sharing' impacts and benefits: pre-Native Title Act

Largely, it has only been since the 1970s that negotiations have occurred with Aboriginal peoples about access to their traditional land and resources for energy and resource project development. Two legal frameworks then governed negotiations. First was legislation for the protection of Aboriginal cultural heritage sites, such as rock art, but which did not *require* negotiation for access and use of lands. Secondly, regional land rights legislation, which created process frameworks for obtaining Aboriginal consent for exploration or resource development.[31] Neither industry nor governments, at that time, saw the need for dealing broadly with traditional owners' concerns about mining and energy developments.[32]

Throughout the 1980s, in the Northern Territory and South Australia where Aboriginal land rights' legislation existed, Aboriginal communities began more

Longbottom, above n 24, 113. M. Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 MULR 523 at 531.

[28] As mining and energy projects most directly impact Aboriginal communities, the chapter uses Aboriginal peoples while acknowledging impacts upon both groups.

[29] Above n 27 at 536.

[30] S. Brennan, B. Gunn, and G. Williams, 'Sovereignty and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 Syd LR 307.

[31] Tehan and Godden, above n 27. M. Tehan and L. Godden, 'Legal Forms and their Implications for Long-Term Relationships and Economic, Cultural and Social Empowerment: Structuring Agreements in Australia' in *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (M. Langton and J. Longbottom, eds, 2012) 111 at 113.

[32] ibid.

extensive negotiating over land access and project development. Community benefits at that time were primarily monetary, and largely relied on trust models to manage benefits.[33] In recent years, Aboriginal peoples, resource companies, and governments have worked more constructively in negotiations around the impacts of resource and energy developments, the legal forms and terms of agreements, and the mechanisms for managing benefits. Many agreements now comprise a range of benefits, such as employment and training, social facilities, and community health packages, as well as provision for ongoing relationships, such as cultural awareness training.[34] Agreements have 'become the key tool for engagement ...'.[35] The Native Title Act has been a central driver for this change.

C. The Native Title Act

The Native Title Act was enacted after protracted negotiations between the national government, state and territory governments, and indigenous and industry representatives.[36] It altered earlier assumptions about whether the impacts of mining and energy resource developments on traditional land and waters should be compensated, and the consequent obligations of governments, and energy and resource companies.[37] Broadly, the Act did four things. First it validated previous land grants and resource legislation, given concerns these may have been invalid due to the recognition of native title. Secondly, it created a 'future acts regime', that is explained below. Thirdly, it gave power to determine native title claims to the Federal Court. Finally, it provided for compensation where native title was extinguished in identified circumstances.

The Act has been in operation for more than twenty years, with early case law setting the pattern for its interpretation and implementation.[38] Subsequent tightening of the interpretation of the requirements to successfully establish native title in cases decided by the Australian High Court from 2002 saw many Aboriginal claimants turn away from pursuing a claim through litigation towards agreement-making, within the Act, and along a regional settlements' model.[39]

The Native Title Act, as national legislation, operates within Australia's federal system with, at times, overlapping spheres of legislative powers and executive

[33] For a discussion of a trust for managing benefits, see Tehan and Godden above n 27.

[34] Above n 2 at 2.

[35] D. Llewellyn and M. Tehan, ' "Treaties", "Agreements", "Contracts", and "Commitments"—What's in a Name? The Legal Force and Meaning of Different Forms of Agreement Making' (2004) 7 Balayi: Culture Law and Colonialism 1 at 1.

[36] The mining and energy industry associations played a major role.

[37] T. Bauman and L. Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (2012) chs 7–11.

[38] Above n 27 at 45.

[39] Marcia Langton and Alistair Webster, 'The "Right to Negotiate", the Resources Industry, Agreements and the Native Title Act' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years on* (AIATSIS Research Publications, 2012), 269. C. O'Faircheallaigh, 'Implementing Agreements between Indigenous Peoples and Resource Developers in Australia and Canada' (2003) Aboriginal Politics and Public Sector Management Research Paper No 13, Centre for Australian Public Sector Management, Griffith University, available at <https://www.griffith.edu.au/business-government/griffith-business-school/pdf/research-paper-2003-implementing-agreements.pdf>.

responsibilities between the Commonwealth and state and territory governments.[40] Power to grant interests in land, resource tenures, and exploration permits rests with state government and territory governments.[41] In conjunction, state and territory governments have land management, environmental protection, infrastructure provision, land use planning, and other responsibilities that interface with native title rights and interests.[42] The Commonwealth government has responsibilities (including international obligations) for indigenous peoples in areas such as welfare and human rights. The Commonwealth funds the organizations bringing native title claims on behalf of Aboriginal claimants—as well as the Federal Court and tribunal system. These complex interests and responsibilities create intergovernmental and inter-party tensions that can manifest in entrenched positions within the native title system and which influence the stance that parties take to agreement-making.

D. The native title system

Despite significant tensions around its operation, the Native Title Act has achieved an increasing rate of resolution of native title claims. There is a complex legal test for native title to be recognized. Claimants must demonstrate that they have continued to acknowledge their traditional laws and observe traditional customs since prior to the assertion of British sovereignty (over 200 years ago), thereby establishing 'connection' to the land and waters that are claimed.[43] Claims over traditional land and waters are made by a native title claimant (communal) group. As this is a communal claim, there have to be representatives nominated by the group to bring the claim, known as registered applicants. Once a claim has been finalized and native title rights and interests have been determined, the native title rights are held communally on behalf of all the traditional owners by a 'Registered Native Title Bodies Corporate'.[44] As of 3 September 2015, there had been 324 native title determinations (i.e. claims finalized and native title recognized): 248 were made by consent of the parties, 40 were litigated, and 36 were unopposed.[45] The growing number of claims resolved by consent is evidence of the turn to agreement-making under the Act. There have been 255 determinations that native title exists in the entire claim area, or part of it, and, 63 determinations that native title does not exist in the area.[46] To put this in context, it is estimated that more than 30 per cent of the Australian continent is now subject to some form of indigenous land 'tenure' or non-exclusive native title rights.[47] A large number of native title claims are still pending resolution. This rate of native title claim resolution has been matched

[40] R. Bartlett, *Native Title in Australia* (2nd edn, 2014) 88.
[41] See, generally, *Walker v State of South Australia (No 2)* [2013] FCA 700.
[42] See, generally, L. Strelein, *Dialogue About Land Justice: Papers from the National Native Title Conference* (2010).
[43] Native Title Act, ss 223, 225. [44] Native Title Act, ss 56–7.
[45] 'Consent' means all parties agreed and 'unopposed' means the claim was not challenged. National Native Title Tribunal, Statistics, available at <http://www.nntt.gov.au/Pages/Statistics.aspx> (as at 3 September 2015).
[46] ibid. [47] Above n 26 at 126.

by an escalating number of agreements, especially with mining and energy companies.[48]

IV. Agreements governing impacts and benefits

A. Native title agreement-making

Most agreements around resource and energy projects are now subject to Native Title Act provisions and individually negotiated for each specific claim. Native title agreement-making has profoundly reshaped how to account for the future impacts of projects, and the extent of benefits for Aboriginal groups. Significantly, the Act initially extended the right to negotiate an agreement to a much larger group of Aboriginal participants than previously. The Act was substantially amended in 1998, following *Wik Peoples v Queensland*.[49] The amendments included abridged requirements to notify, consult, or negotiate with Aboriginal claimants, and set more strict requirements for lodging a native title claim via a registration test for all claims. Significantly, the 1998 changes heralded a more comprehensive agreement-making scheme, including the introduction of 'Indigenous Land Use Agreements' (ILUAs), which are voluntary but legally binding agreements with traditional owners over land access. The agreements occur in the context of future acts, such as the development of an energy project. Agreement-making under the Act continued apace.

The Native Title Act makes clear that the purpose of the 'future act' regime is to enable—not prevent—development. Negotiations must be undertaken 'with a view to reaching an agreement about the act (activity)'.[50] It sets out minimum standards that must be undertaken before the doing of a 'future act', depending on what kind of 'future act' is proposed. For 'future acts' that relate to the exploration, exploitation, or extraction of minerals, oil, or gas, the Act provides traditional owners who have registered native title claims or already determined (i.e. claim resolved) native title rights with its highest procedural protection. The legislative framework—known as the 'right to negotiate'—requires resource companies to negotiate with traditional owners with native title interests in that land.[51]

B. The right to negotiate

Where the right to negotiate operates over land or waters subject to a registered native title claim, the registration test requires claimants to satisfy criteria, including that at least one group member has a 'traditional physical connection' with the

[48] See Agreements, Treaties and Negotiated Settlements Project, available at <http://www.atns.net.au/>.
[49] L. Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (2nd edn, 2009) 6–7. *Wik Peoples v Queensland* [1996] 187 CLR 1. This controversial case extended native title claims to areas covered by pastoral leases, which occupy a significant proportion of Australia.
[50] Native Title Act, s 25. [51] Native Title Act, ss 24–44.

area claimed.[52] No right to negotiate applies when 'low impact' exploration is involved,[53] although legislation that protects Aboriginal cultural heritage remains relevant. The process is instigated by the relevant Minister giving notice to native title parties (and the public) that various licences are to be issued,[54] such as conferral of mining rights or compulsory acquisition of native title rights. The parties (native title claimants, project proponents, and relevant governments) are required to negotiate, in good faith, with a view to reaching an agreement about the 'doing of the act' or the 'conditions upon which the act may be done'.[55]

The parties effectively have six months to negotiate. Time limits may be varied by the parties, and often are, but it is not uncommon for the parties, particularly non-native title parties, to proceed to arbitration.[56] If no agreement is reached after six months, any party may apply to the National Native Title Tribunal (NNTT) for a determination.[57] Good faith requires parties to act with subjective honesty of intention, and in accordance with objective indicia, including reasonableness. A lack of good faith can be assessed as including: unreasonable delays in communications; failing to make proposals; stalling negotiations; refusing to compromise on trivial matters; adopting a non-negotiable position; and failing to make counter offers.[58] Notwithstanding, negotiating in good faith does not require parties to deviate from their commercial interest, and can encompass 'hard line' negotiations.[59] It does not require that reasonable offers or concessions are made, although these may influence the overall assessment of a party's negotiating behaviour.[60] At one level the agreement-making is designed to provide for benefits for traditional owners, but it retains a 'hard-edged' commercial character of arm's-length bargaining, leading Ritter to refer to the process as a 'native title market'.[61]

The agreement reached is usually an ILUA,[62] and possibly ancillary agreements. For ILUAs, the Act sets extensive authorization and registration requirements for the native title group.[63]

If the process reaches the NNTT and good faith is demonstrated, the Tribunal may only determine whether the act can be done, and whether any condition should be imposed;[64] (i.e. it cannot 'investigate good faith'). Traditional owners do not have great odds of succeeding at the NNTT stage.[65] As of 3 September 2015, the NNTT has refused to allow just three 'future act' applications, while allowing forty-six 'future acts' without any attached conditions, and a further thirty-nine future acts with certain conditions imposed.[66]

[52] Native Title Act, s 190B. [53] Native Title Act, s 26A. [54] Native Title Act, s 29.
[55] Native Title Act, s 31. [56] Native Title Act, s 38. [57] Native Title Act, s 35.
[58] *Western Australia v Taylor* (1996) 134 FLR 211.
[59] *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at 93–4, (Deputy President Sumner).
[60] ibid. [61] D. Ritter, *The Native Title Market* (2009).
[62] The three different ILUAs are: body corporate, area, and alternative procedure agreements.
[63] Native Title Act, s 24AA – 24EC. [64] Native Title Act, s 38.
[65] R. Bartlett, *Native Title in Australia* (2000) 476.
[66] National Native Title Tribunal, Search Register of Indigenous Land Use Agreements, available at <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx>.

The right to negotiate, while an effective procedural tool under the Native Title Act, clearly stops short of a 'veto right' for Aboriginal communities faced with resource and energy development on their lands. While many in the resources and energy sector speak of a 'social licence to operate' beyond the Act, the exact elements of that 'licence' are unclear. Overall, there is a working presumption that resource and energy projects will proceed.

V. The case studies: A tale of two LNG projects

The Native Title Act's 'right to negotiate' regime was the predominant regulatory framework for two native title negotiations over major LNG development in Australia. The first project, Browse LNG, sought to pipe offshore gas to a processing plant on the Kimberley coast of north-western Australia.[67] The second, Curtis Island LNG, will have multiple LNG processing plants built to treat and export coal seam gas as part of the bigger Gladstone LNG onshore project in central Queensland, Australia.[68] The resulting Browse and Curtis Island native title agreements were negotiated at similar times, and both relate to land subject to registered native title claims. As the negotiations occurred in different Australian states, Queensland and Western Australian environmental protection, cultural heritage, and compulsory acquisition laws applied; although with little practical difference between the respective state laws. The key difference was that of size—in the production phase, it is estimated that Curtis Island LNG will produce about twice as much LNG as the projected output for Browse LNG.[69]

A. Research methods

The two negotiations form the subject of empirical research,[70] using a qualitative, multi-site explanatory case study research design. Browse LNG and Curtis Island LNG were chosen because they resulted in disparate agreement outcomes, despite the similarities in the LNG developments. This methodology is known as 'purposive sampling', in which case studies are selected based on their ability to illuminate the research questions being asked.[71] The research resulted in forty-nine interviews

[67] The Browse LNG proposal was abandoned in April 2013, with the proponent resource company Woodside citing cost blowouts, and a large 'anti-gas' opposition claiming a victory: Australian Stock Exchange Announcement, Woodside Energy, 'Woodside to Review Alternative Browse Development Concepts', 12 April 2013.
[68] The four projects were joint ventures, known as QCLNG (lead BG Group), Arrow LNG (Shell and PetroChina), APLNG (Origin Energy), and GLNG (Santos). The processing plants on Curtis Island, and the agreements referred to as 'Curtis Island LNG', are distinguished from the broader Gladstone LNG projects.
[69] Interview with Don Voelte, former CEO, Woodside Energy, Sydney, 5 June 2014.
[70] L. O'Neill, *A Tale of Two Agreements; Negotiating Indigenous Land Access Agreements in Australia's Natural Gas Industry* (PhD Thesis, University of Melbourne, 2016).
[71] R. Yin, *Case Study Research: Design and Methods* (1984).

with forty-one people involved in the negotiations. Interviewees were sourced from traditional owners from the respective claim groups, resource company representatives, state public servants and senior state politicians, Kimberley Land Council (KLC) staff, and those in opposition to the developments. Interviewees were either direct participants in the negotiations, or otherwise heavily involved, and all spoke purely in a personal capacity.[72]

B. The negotiated agreements

The Browse LNG Agreements were negotiated by the Goolarabooloo Jabirr Jabirr registered native title applicants, the KLC, the State of Western Australia, and Woodside Energy in June 2011.[73] The Browse LNG development, had it gone ahead, would have been the first significant industrial development on the Kimberley coast; a relatively pristine area known for its high environmental attributes. It was designed to process LNG from the offshore Browse LNG deposit. Quite unusually, the agreements are publicly available.[74] The agreements contained: significant monetary and land compensation packages (estimated at up to $1.5 billion, including $552.4 million of guaranteed financial payments from Woodside and the State of Western Australia); extensive business opportunities for traditional owners; traditional owner control over significant cultural and environmental aspects of the project, and the guarantee that LNG would not be processed anywhere else on the Kimberley coast. They have been described as 'much more positive' than those typically achieved in negotiations between extractive industries and Aboriginal people.[75] The LNG Precinct was to be controlled and managed by the state, while Woodside, the holder of the Browse deposit retention leases, was the foundation proponent of up to four potential users of the site.[76]

The Curtis Island LNG ILUAs are confidential, with scant publicly available information on what they contain. The registered native title claimants are known as the 'Port Curtis Coral Coast Claim' (PCCC group), an amalgam of four groups: the Gooreng Gooreng, Gurang, Bailai, and Bunda peoples. Information obtained from traditional owners in terms of the financial payments indicated relatively small

[72] Interviews were semi-structured; lasting 1–3 hours. Interviews were transcribed, and sent to interviewees for approval, in line with university ethics' requirements. Interviews were analysed for thematic content.

[73] The registered native title claimants at the time of the agreement were the 'Goolarabooloo/Jabirr Jabirr Peoples'; however, this claim group has since split.

[74] Government of Western Australia, Department of State Development, Browse LNG—Environment, available at <http://www.dsd.wa.gov.au/state-development-projects/lng-precincts/browse-kimberley/native-title-heritage>. The agreements were intended to include an ILUA; however, due to conflicts within the claim group, it was difficult to meet registration requirements.

[75] C. O'Faircheallaigh, 'Extractive Industries and Indigenous Peoples: A changing dynamic?' (2013) 30 Journal of Rural Studies 28.

[76] Woodside's joint venture partners are Shell Developments Australia Pty Ltd, BP Developments Australia, Chevron Australia Pty Ltd, and BHP Billiton Petroleum (North West Shelf) Pty Ltd.

amounts,[77] in unspecified agreements.[78] PCCC traditional owner Tony Johnson stated, 'It's obscene. I couldn't honestly say that we got the best of a bad lot.'[79]

Information from energy company representatives, while not specific, indicated that most companies paid what they referred to as 'an industry standard'.[80] When asked whether the Browse LNG and Curtis Island LNG agreements were comparable, all three Queensland industry representatives indicated that they were vastly different: 'in a different universe, different stratosphere', was a comment made.[81] Kezia Smith, a PCCC traditional owner who had previously worked for a mining company in Western Australia and the Northern Territory observed:

> Coming from the west, and the Northern Territory where I have spent most of my career in the mines, this royalty is toilet paper compared to what they pay their TOs [traditional owners] over there. And I know because I have seen the payments, and I know the people . . . They are going to earn billions, and to pay us a . . . shut up deal is just sickening.[82]

C. Accounting for differences

A number of factors influenced the outcomes of these agreements including: the political strength of the respective Aboriginal groups and organizations; state and federal government practice; company policy; and different levels of colonial impact in each area. A key difference is the strength of the native title rights likely to be found to exist in the eventual native title determinations. The type of native title rights that are determined can vary from claim to claim. The relevant claims in the two LNG case study areas had not been finalized at the time of writing. However, almost certainly, the native title eventually recognized will involve more substantial rights (potentially areas of exclusive possession native title) in the Kimberley than in central Queensland. Curtis Island is in a heavily industrialized area from which traditional owners were forcibly removed early in Queensland's colonial history.[83] The result of this dislocation will mean that the native title rights, if recognized, are unlikely to allow for exclusive possession native title, and are more likely to include non-exclusive rights of access to, and protection of culturally significant areas. Former Deputy Premier of Queensland Andrew Fraser noted, 'Gladstone has been developed for a long time. That might explain, in part, why the TOs [traditional owners] don't have a big part to play, the earth was scorched a long time ago.'[84]

However, the quantum of the Browse package was clearly not determined solely by the value of the land for the purposes of compulsory acquisition—it was valued

[77] Interview with Kerry Blackman, Gladstone, 10 September 2013.

[78] Interview with Kezia Smith, Gladstone, 11 September 2013 and Neola Savage, Rockhampton, 11 September 2013.

[79] Interview with Tony Johnson, via telephone, 30 August 2013.

[80] Interview with Anonymous 1, Brisbane, 16 September 2013 and interview with Anonymous 2, Brisbane, 17 September 2013.

[81] Anonymous (above n 80).

[82] Smith (above n 78).

[83] J. Hogan, *The Gladstone Colony: The Unwritten Chapter of Australian History* (1898) 71–2; R. Evans et al., *Race Relations in Colonial Queensland* (2nd edn, 1988).

[84] Interview with Andrew Fraser, Brisbane, 5 November 2013.

by the Western Australian Valuer General at $30 million.[85] Clearly, other factors are at play—significantly, these relate to the way the Native Title Act was interpreted in each negotiation. Indeed, the political, historical, and governmental context of each case study site led to the national legislation being viewed, used, and applied differently in each impact and benefit negotiation.

VI. The role of the Native Title Act

Negotiation participants across both case study sites were almost unanimous that, when strictly interpreted, the Native Title Act provides traditional owners with little more than 'a seat at the table' with resource companies, as well as some ability to delay approvals for a short period. Nevertheless, significant differences emerged in the role of the legislation. First, traditional owners involved in the Browse LNG negotiations were more likely to attribute symbolic power to the Act. Secondly, a discursive trend discernible in the Kimberley was that negotiations should not be limited by the minimum standards contained in the *Native Title Act*. A similar demand by Curtis Island traditional owners failed to gain traction. Finally, negotiation participants in the Kimberley observed that the Act was impacted by what might be termed a continuing Aboriginal jurisdiction—that is, that Aboriginal law and custom enlivened the interpretation of the Act and its function by the negotiating parties, and that Aboriginal law retained its authority in the area.

A. Browse LNG, Western Australia

Many Browse LNG negotiation participants talked about the power of the Act to confer legal status. Traditional owner, Mary Tarran said, 'The Act means that we are the native title party—just that label has power. Labeling has power. We were not taken lightly.'[86] Similarly, former Western Australian Premier Geoff Gallop commented, 'you can't underestimate the power of the law'; the right to be consulted is a 'powerful idea', as Aboriginal people now have access to 'lots of lawyers who are able to fight the good fight'.[87] A senior Western Australian government official though observed of negotiations that, '[t]oo often people try and be lawyers and use how the Act is written and interpreted ... as opposed to standing back and saying what's its fundamental message [of recognition of Aboriginal land tenure]'.[88]

A KLC staff member highlighted the Act's existence as important—while the Act may not accord strong rights, those seeking to do future acts have to pay heed to traditional owners.[89] They suggested that the KLC was good at insisting that companies adhere to standards beyond what is required by the Native Title Act:

[85] J. Addis, 'James Price Point Land Acquisition Likely' *WA Today*, 1 May 2013. <http://www.watoday.com.au/business/mining-and-resources/james-price-point-land-acquisition-likely-20130501-2isew.html>.
[86] Interview with Mary Tarran, Broome, 27 June 2012.
[87] Interview with Geoff Gallop, Sydney, 18 July 2013.
[88] Interview with anonymous, Perth, 5 December 2012.
[89] Interview with anonymous, Broome, 13 June 2013.

> It comes straight from cultural feelings, a sense of ownership ... the fact that isn't recognised by Australian law isn't really an issue, people still carry that sense into the negotiation room ... if you were to negotiate on the terms of the Native Title Act you would just end up with a meagre amount.[90]

Former KLC CEO, Wayne Bergmann also argued that:

> [D]espite what the law says, we are determined to make our own decisions, such as the principle 'no means no'. That means to us that a company won't destroy a cultural site unless we agree to it ... [the resource company] agreed to this.[91]

The KLC say that their authority to represent Kimberley Aboriginal interests in the negotiations derived not only from the Native Title Act, but also from extensive consultations and consents received from Kimberley traditional owners, in line with traditional law and custom, particularly the 'wunan', a Kimberley-wide 'foundational practice of local and regional Indigenous governance ... a blueprint for living'.[92]

The idea that traditional owners had authority in the negotiations, which was derived directly from traditional law and custom, appeared to have been understood and accepted to some extent, by those negotiating with them. Don Voelte, CEO of Woodside during negotiations, acknowledged the right of Western Australia to compulsorily acquire land for the LNG hub but said:

> I told the Woodside management team that I am not sure that I wanted us to be the beneficiary of compulsory acquisition ... I thought that compulsory acquisition was the wrong way ... again it was taking land, taking culture away from people ... Although I recognised that legally there was every right to do that, under white man's law.[93]

Niegel Grazia, also of Woodside, said that:

> ... I kind of had this academic approach, of course I respect the Yawuru people, and I respect the environment, and I respect the law, and that's where I got it wrong ... they are not traditional constructs, they are white man's constructs. And if the whole basis for approaching respect is around meeting your legal obligations, then you are falling well short of the expectations of traditional leaders ...[94]

This stance was not fully accepted, however, by either Western Australia or Woodside. The then Western Australian Premier Colin Barnett, referring to the land designated for development: 'Now, this land, and I respect the traditional ownership, but this land legally is vacant Crown land and that's its legal status.'[95]

[90] ibid.
[91] W. Bergmann, 'Native Title, Agreements and the Future of Kimberley Aboriginal People' in *Dialogue About Land Justice: Papers from the National Native Title Conference* (L. Strelein, ed, 2010) 183 at 189.
[92] C. O'Faircheallaigh and J. Twomey, 'Kimberley LNG Precinct Strategic Assessment: Indigenous Impacts Report Volume 2' (Kimberley Land Council, 3 September 2010), at 26–7.
[93] Interview with Don Voelte, Sydney, 5 June 2014.
[94] Interview with Niegel Grazia, Perth, 26 June 2014. The Yawuru are the traditional owners of the area around Broome, Western Australia.
[95] Colin Barnett, 'Q&A' *ABC TV*, 5 November 2012.

Traditional owner, Wayne Barker suggested traditional owners' statements sometimes might be seen as 'bluster':

> The Kimberley Land Council, badabada, we represent the Traditional Owners. What does that mean, particularly when its Crown land and [Premier] Barnett turns around and says 'that's all very fine Mr Barker, but it's our land and we can take it. You don't govern the country, we do'.[96]

B. Curtis Island LNG, Queensland

In contrast, in central Queensland, when traditional owners spoke of the symbolic value of the Native Title Act, it was that it had failed to live up to its original promise. The minimum standards of the Act were regarded as a prescriptive framework that must be adopted. A manager in a Gladstone LNG industry observed that traditional owners, '... are often frustrated with the legislation, they think it fails them or doesn't suit their purpose'.[97] Alternatively, for companies:

> I think that the [right to negotiate] is a very good process. As long as you meet the provision for good faith, which is fairly practical and reasonable, you will essentially be granted the tenure. It does provide a process there ... It can be a mutually beneficial process, we get our security of tenure and the group is compensated for their loss of native title.[98]

On issues of the leverage of traditional owners he said, '[l]egal-wise, unless they want to be very technical and get us on a formality, or a clause or trigger, not much'.[99] By contrast, the position of the company was related to the Act:

> It's not about leverage; it's just following the statute. It's pretty black and white. You have to go through the statutory process, and that's it. You get to six months, and if you don't have an agreement, you go to the Tribunal.[100]

The threshold for good faith was seen as operating differently in Queensland:

> ... the good faith threshold was met because they funded meetings. That alone meets the criteria. Obviously the groups have a different idea of what good faith means. They seem to think that unless we agree to do all these other things, if we don't give them everything they want, then we are not in good faith.[101]

Asked whether his company ever went beyond the statute, he replied:

> There is no need to. The statute provides a process and a budget for what we consider to be reasonable compensation if it does end up being monetary compensation. We are advised internally legally and we work through it.[102]

He added that extending the timeframe beyond six months 'would serve no purpose'.[103] Similarly a negotiator for a resource company, stated, '[i]t's a five step

96 Interview with Wayne Barker, Broome, 18 June 2013.
97 Anonymous 2 (above n 80). 98 ibid. 99 ibid. 100 ibid. 101 ibid.
102 ibid. Note: the Native Title Act does not set a budget for negotiations or compensation.
103 ibid. Note: the Native Title Act does not prescribe a certain number of meetings.

process, and I tell them at the start that the first meeting will be about this, the second that, and at the fifth one we are going to sign'.[104]

PCCC traditional owners were not so sanguine. Traditional owner Kerry Blackman said, 'Native title is theft of our land. We just see it as a politically expedient thing to thieve Aboriginal land.'[105] Traditional owner Tony Johnson felt there was no alternative but to accept the minimum standards of the Act. Traditional owners argued for more time and resources to negotiate but:

> [t]here weren't really any viable alternatives, because they were going to build the plant, and the Native Title Act was the framework we could work within, stay at the table, and have some sort of participation in the process at least.[106]

This view was echoed by a manager in the Gladstone LNG industry:

> Native title gave traditional owners more leverage when the Act was first implemented because the companies were scared of what it would mean. It is now a tick the box exercise [with] some semblance of recognition, the fact that they can negotiate.[107]

The law, he felt, was on the company's side, aligned to the State of Queensland's ability to compulsorily acquire land.[108]

Traditional owner, Nat Minniecon, comparing the agreement reached by his group with that of Browse LNG, explained the difference in striking terms:

> There are two different laws—that is, there is one Native Title Act but each State then puts their own spin to it.[109]

The concept of two different laws revolving around one statutory framework for a right to negotiate for benefits from energy projects highlights the importance of the different values accorded to what is ostensibly national legislation for managing the impacts of energy and resource activity upon native title. The interviews reveal that while much of the bargaining around resource extraction benefits and impacts occurs with reference to the statutory framework, it is also strongly influenced by external factors. Thus, the outcomes of agreements for Aboriginal communities can be radically different depending upon the specific circumstances surrounding agreements. The parties to an agreement, including governments, still largely view the negotiation as a commercial 'exchange process', even though it operates under the Native Title Act. The 'letter of the law' that comprises prescriptive statutory processes and even good faith formulas may not always produce the 'equitable' outcomes that agreement-making appears to promise for indigenous communities from energy and resource development.

104 Interview with Craig Jones, Brisbane, 17 September 2013.
105 Interview with Kerry Blackman, Gladstone, 10 September 2013.
106 Interview with Tony Johnson, via telephone, 30 August 2013.
107 Anonymous 1 (above n 80). 108 ibid.
109 Interview with Nat Minniecon, Gladstone, 10 September 2013.

C. Lessons learned

The analysis of the interviews from the case studies suggests pertinent questions for the Native Title Act framework—and, indeed, other models for impact and benefit-sharing arrangements with indigenous communities affected by resource and energy projects. A preliminary list might include: should the right to negotiate framework allow for more collaborative processes—for example, should the 'good faith' requirement accord more closely with indigenous cultural understanding? Are there 'best practice' models for agreements that should be imposed by statute and, if so, what mechanisms should be used to require compliance? There are questions also about how Aboriginal communities may be involved in the future governance and management of lands once resource and energy projects are in place.[110]

In the Native Title Act, the 'right to negotiate' provisions are a procedural right of negotiation accorded to indigenous peoples impacted by resource and energy projects, not a veto on development. Ultimately, the legal position is that if resource and energy projects are approved there will be impacts upon Aboriginal communities, but also potential benefits. Thus the question of, when and how, 'no means no' is a finely nuanced issue that is formally outside the statute, but which nonetheless may strongly inform negotiations under the Act. Similarly, while the consent aspect is stressed in terms like social licence and free, prior, and informed consent, generally speaking, neither is regarded as a right of veto for communities. In this context, Aboriginal People remain in a position of vulnerability in terms of 'sharing' impacts and benefits, emphasizing the significance of international standards comprised within UNDRIP, and the need for further articulation of principles such as free, prior, and informed consent.

VII. Conclusion: Sharing impacts and benefits as a basis for inclusion

The findings from the two native title negotiations accord with other literature which points to the highly variable outcomes for Aboriginal communities from energy and resource developments that have been achieved under the Native Title Act. The native title statutory framework has come to be dominated by negotiation and agreement-making. However, the process of negotiation and agreement-making between indigenous peoples and prospective energy and resource users, including government entities, is part of a broader relationship between the parties, realized at the immediate level through legal processes and statutory instruments, but referencing the wider political power and social capital of the negotiating parties in order to agree a benefits package in respect of the energy and resource activity.

[110] J. Edgar, 'Indigenous Land Use Agreement—Building Relationships Between Karajarri Traditional Owners, the Bidyadanga Aboriginal Community La Grange Inc. and the Government of Western Australia' (2011) Australian Aboriginal Studies 50.

Analysis of the Native Title Act's right to negotiate provisions suggest that law, both the broader legal system in which the Act is embedded, and the specific legal provisions governing the agreement, provide a necessary, although by no means sufficient, basis for the flow of benefits from energy and resource developments to indigenous parties. Procedural 'rights' in the statute constitute a significant, but minimal, threshold from which Aboriginal communities can negotiate.

International law, such as the UNDRIP principle, 'free, prior, and informed consent', while an important 'background' set of conditions, typically as yet does not directly inform the statutory procedures for negotiation and agreement-making. This is clearly indicated by the two LNG projects within Australia explored in this chapter. Concepts such as a social licence to operate, while gaining increasing currency, are more likely to have an impact in situations where the native title rights and interests are already relatively robust, and the Aboriginal community has other leverage, particularly political influence. Similarly, while consent is stressed neither concept is regarded as a right of veto for communities. Over time, the significance of the international standards comprised within UNDRIP may more strongly influence national law.

Thus, the outcomes of agreements for Aboriginal communities must be regarded as being influenced by a complex of factors; the provisions of the Act, the political strength of relevant indigenous communities; and by reference to the continuing presence of Aboriginal law and custom. In this manner, Aboriginal communities and traditional owner negotiators reference a 'moral economy' where agreements operate in circumstances only understandable in terms of the previous lack of compensation for resource and energy development impacts, the relative disadvantage of many communities, as well as the aspirations of indigenous communities to build a more secure future from the benefits pursued in negotiations.[111] Agreement-making with Aboriginal communities about energy and resource projects under the Native Title Act has transformed many aspects of the relationships between Aboriginal peoples and the wider Australian community. The 'exchange process' embedded in negotiations about access to traditional land and resources for those seeking to 'do' future acts has the potential to be an important leverage point for economic and social inclusion of Aboriginal communities. Ritter's description of a series of contractual relations operating within a native title 'market' is apt at one level,[112] but is too limiting in terms of the range of benefits that Aboriginal communities are seeking from their engagement with energy and resource developments governed by the Native Title Act.

[111] J. Chernelaa and L. Zanottib, 'Limits to Knowledge: Indigenous Peoples, NGOs, and the Moral Economy in the Eastern Amazon of Brazil' (2014) 12 Conservation and Society 306.
[112] D. Ritter, *The Native Title Market* (2009) 2–3.