Non-technical summary of GCP01-18: Ensuring Indigenous benefits from large-scale renewable energy projects

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Renewable energy, especially solar and wind, is expanding rapidly across Australia and increasingly in areas distant from main population centres which are also, in many cases, places where indigenous communities live. Northern Australia has very high rates of Indigenous land tenure which is held by Aboriginal communities under various land rights regimes, as well as the Native Title Act of 1993 (NTA).

Project owners are obliged to deal with such communities and their rights. They usually do so with superior resources of organisation, and skills in such areas as finance, law and political negotiation, compared with their Aboriginal community counterparts. As well as these disadvantages, Indigenous communities carry the burden of a history of colonisation, violence and dispossession. There is growing awareness in the non-indigenous community of this background and of the need for better relationships. There are important issues not only for project proponents but also for the federal, state and territory governments and for civil society. The issues have local, national and international dimensions. Indigenous rights in relation to resource projects on their land have been evolving towards more just solutions than occurred in the past.

The Asian Renewable Energy Hub (AREH) project in the East Pilbara region brings these issues into sharp focus. The project area is 7,000 square kilometres of land largely held as exclusive possession native title by the Nyangumarta people, subject to the NTA. This legislation identifies native title rights to certain lands at different levels depending upon factors including historical occupation and land-use. The Act recognises that traditional Aboriginal land rights and interests continue despite British colonisation and the emergence of the Australian nation. Prior to the enactment of this measure in 1993, Aboriginal efforts to control what happened on their traditional lands were defeated by lack of legal title and indifferent and often hostile attitudes of companies and governments.
The AREH project is of national and regional significance with its objective of generating 11,000 MW of electricity; 6,000 MW for export to Jakarta and 5,000 MW for use within Pilbara. The project is innovative and potentially transformative in its impact on the Australian economy and nation in that it can contribute to securing Australia’s pre-eminence as a resource exporter, and a global energy ‘super power’ by generating and exporting (‘renewable’) electricity while coal is phased out. This will increasingly attract attention globally and treatment of indigenous communities will be of critical importance both to the project and to Australia’s reputation. An Indigenous Land Use Agreement (a voluntary process under the NTA) is under negotiation.

It is pertinent to consider what standards should be applied having in mind the historical background, indigenous community needs, the legislative framework and international norms and practices, recognising also that the global trend is toward greater recognition of indigenous rights and needs. Since the enactment of the NTA, Indigenous land access agreements have been negotiated in the main in relation to extractive industry projects. These differ from renewable energy projects in several respects including the absence of (State and Territory) royalty payments in the latter, and the longer time frames; the AREH project has an estimated life of 60 years.

The business and political environments for resource projects on Indigenous lands have been evolving with the emergence of Environmental and Social Responsibility (ESR) and Corporate Social Responsibility (CSR) principles in the global corporate sector, and codification of international standards. Under CSR principles, companies are held to account by their shareholders and the community for their actions and omissions. This can include issues around fair division of benefits between the company and indigenous communities with which they interact. However, CSR does not operate within a vacuum.

Two important international measures are the International Labour Organisation (ILO) Convention Number 169 of 1989 (ILO 169) and the UN Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP). Australia has signed UNDRIP but not incorporated it into Australian law. It has not signed ILO 169 but these instruments can be regarded as persuasive guidance for Australian policy-makers and project owners. Provisions of these instruments include the principle that indigenous communities should give their ‘free, prior and informed consent’ (FPIC) for developments on their land but stop short of mandating such consent. UNDRIP requires countries to provide ‘just and fair redress’ when development occurs. Other principles are gender equality, rights to practise culture, speak language and access country. These principles underpin CSR and need to be reflected in agreements with companies.

Stakeholders in negotiations include firstly, company shareholders, managers and investors, secondly customers, creditors/investors and employees, and thirdly political influencers such as NGOs, activists, lobbyists, communities and government. Trebeck¹ notes: ‘What is increasingly noteworthy … is that it is neither government regulation, international human rights bodies nor NGOs that hold large international corporations to account for their social
and environmental performance. Rather account-seeking is coming from ... international finance institutions and, more generally, from investors.’ However for Indigenous communities to be effective in securing rights and benefits they need adequate resourcing (their representative organisations are usually inadequately funded), and access to legal, financial and technical advice.

Global standards have been formulated by the International Finance Corporation (IFC), the World Bank’s commercial lender: IFC Performance Standards on Environmental and Social Responsibility (ESG) which specifically addresses indigenous issues, and the UN Principles for Responsible Investment, an important although voluntary and aspirational guide designed to encourage investor confidence. Failure to live up to these standards can be regarded as a risk factor in an investment. There is increasing pressure on international financial institutions to adopt company reporting against ESG principles and a growing expectation that resource companies will contribute positively to the long-term development of communities. Agreements are also now expected to include a ‘social licence to operate’ setting out conditions for community acceptance of the development and focusing on the community concerned.

If no agreement is reached between the Indigenous land holders and the company, either party can apply to the National Native Title Tribunal (NNTT) to rule on whether the project (‘future act’) may proceed. However decisions of the Tribunal have overwhelmingly come down on the side of companies. The NTA provides an entitlement to compensation but is silent on how it should be determined or how much it should be. Outcomes vary widely, for example a Western Australian LNG project agreement resulted in benefits to traditional owners of $1.5 billion whereas a not dissimilar LNG project agreement in Queensland yielded only $10 million of benefits. Different State government policy settings influenced these results. The Federal court recently has found that compensation should be based on the value of the loss of native title rights to the land not the value of the land itself but it also ordered a ‘solatium’ payment, akin to recompense for pain and suffering.

Both opportunities and threats influence companies to value agreements with indigenous communities. Opportunities can include being seen as ‘good partners’ of the indigenous community and securing agreements for local labour. Threats can include community unrest that can hinder access to resources including the site. Positive outcomes of agreements are highly associated with economic benefits to the community. Good outcomes for communities come from well-resourced - including with independent commercial, legal, environmental and industry experts - and politically influential community negotiators who have some control over the process and timing of negotiations, working with companies adhering to CSR principles.