First Nations, risks and opportunities, and Australia's energy transition

Jonathan Kneebone FIRST NATIONS CLEAN ENERGY NETWORK

Introduction

There is a massive global and domestic energy transition underway that is driving generational shifts in energy systems. As we transition away from fossil fuels and the environmental and climatic impacts caused by their extraction, combustion and use, the shift to renewable energy technologies presents new risks, opportunities and challenges for First Nations' rights, interests, and responsibilities.

Many First Nations communities are at the forefront of these impacts and are simultaneously struggling with unreliable and expensive power.

Across Australia, First Nations hold substantial rights, interests and responsibilities to land and waters and resources — through both traditional systems of law, justice and culture, and also through the rights and interests recognised by Australia's legal system (eg native title, statutory land rights, cultural heritage).

Australia's transition to electricity generation from renewable sources will require access to large areas of land and waters and seas, including for thousands of kilometres of new transmission infrastructure. Interaction between the renewable energy sector and First Nations rights, interests and responsibilities — whether legally recognised or not — is inevitable.

Enabling and empowering First Nations to play a key and central role in Australia's renewable energy transition goes beyond just social licence issues. By including and embedding First Nations as partners in the energy system transition, and the right to free, prior and informed consent (FPIC) in policy, legislative, project approval and financing systems and processes, we can ensure the transition is fair and just for First Nations, can occur at the pace necessary, will avoid unnecessary legal contestation, and will deliver ongoing mutual cultural, social, economic and environmental benefits to people and country.

With a focus on the access to the property rights that renewable energy infrastructure will require, this article presents a perspective on some of the emerging points of tension between a sector that outwardly appears progressive in its intent to ensure First Nations involvement and partnerships, and the new regulatory and policy schemes being established by governments that create pathways for how projects will access land and waters for renewable energy infrastructure.

This article highlights that when it comes to land and waters and the tenure required to support renewable energy infrastructure, challenges abound to establish a policy and regulatory framework that doesn't perpetuate the legal fiction of terra nullius ("land belonging to no one").

If governments continue to perpetuate the fiction of terra nullius, Australia will miss opportunities for the development of a renewable energy sector that best ensures First Nations as active participants and supporters.

Setting the scene and unravelling the fiction

In any society, the concept of property (and property rights) plays a critical role in the regulation of access to and use of natural resources. Accordingly, the manner in which the rights, duties and obligations of property are arranged and distributed has much to do with the allocation of wealth and power in society.[1] In Australia, the denial of First Nations' property rights has been premised on the legal (and actual) fiction of terra nullius.[2] This is despite, in world terms, that European law (including the common law) was equipped with the ability to recognise and protect First Nations' rights to land, waters and resources as far back as 1537.[3] Writing in 1997, Emeritus Professor Garth Nettheim AO remarked that to deal with "a meta-legal phenomenon [such] as invasion" the law turns to the "invention or deployment of legal fictions".[4] Expanding on this line of analysis, Nettheim contrasted the invasion of England by the Normans in 1066, and that of Australia by the English in 1788.

In the invasion of England in 1066, Nettheim noted that England was not treated as terra nullius; and "the land rights of the existing inhabitants were largely respected."[5]

In the latter — the invasion of Australia by the English — the opposite occurred and Australia was characterised by the legal fiction that the lands were terra nullius. On this assumption, the consequent application of the English doctrine of tenure in Australia precluded recognition of rights in land which were not derived from Crown grant.[6] This situation — that all land holdings had to be the direct consequence of some grant from the Crown — existed up until the Mabo[7] case in 1992, which cleared away some of the old legal fictions, but only in part.[8]

For as Nettheim observes, the legal fiction of terra nullius remains as far as the acquisition of sovereignty over Australia is concerned which applies to non Indigenous land holdings (which are derived from Crown grant),[9]but to acknowledge the existence of native title, the High Court in Mabo agreed that the common law, as it had been previously understood, should be changed to recognise native title rights — being rights which do not derive from a Crown grant.[10]

When it comes to access to land and waters, this is the complex legal, historical and cultural reality into which the renewable energy sector now wades.

And layered upon the historical foundations of the legal fiction of terra nullius, when it comes to First Nations rights, interests and responsibilities, Australia's existing policy and regulatory systems for access to land, waters and resources for economic activities tend to reproduce Australia's past colonial arrangements in terms of the non-recognition of First Nations rights, interests and responsibilities.[11]

For Australia's transition to renewable energy, existing systems for property rights and land access typically presuppose First Nations opposition, invite legal contestation, entrench disempowerment, which has the potential to generate unnecessary conflict leading to additional

project delay and risk for proponents. For example, despite the increasing recognition of the concept of free prior and informed consent (FPIC) in an international context[12] and as a project precondition, FPIC is not part of Australia's domestic law (which includes of course, the Native Title Act 1993 (Cth)). As noted by Maynard, in a paper considering renewable energy development, the Native Title Act ultimately provides little protection for native title parties.[13] The legal destruction of the 46,000 year-old caves at Juukan Gorge by mining company Rio Tinto is a stark reminder of the power imbalance and consequent risk for a legal and policy system that fails to adequately balance First Nations rights and interests (through standards based on FPIC).

Systems that do not appropriately incorporate FPIC and recognise First Nations rights, interests and responsibilities always have been problematic, and particularly so now, given the scale and pace of the energy transition that is now underway.

In this author's opinion, perpetuating these systems is counterproductive, particularly in an age where ESG metrics are increasingly important and where the finance sector is deeply interested in ensuring capital flows to projects with positive impacts on host communities, and particularly First Nations. Accordingly, in the emerging post-fossil era, it is incumbent on governments to establish policy and regulatory systems that accurately reflect the expectations of all stakeholders (particularly the finance sector, investors, project proponents and civil society) by ensuring First Nations partnership is genuinely embedded.

The remainder of this article describes two ways that jurisdictions are creating new interests in land and waters to facilitate renewable energy projects, and how, in both cases, this is being done in a manner that unnecessarily hides behind the legal fiction of terra nullius and accordingly misses opportunities to establish a policy and regulatory framework for renewable energy that treats First Nations as partners in the transition.

An opportunity missed — diversification leases in Western Australia

Released for just 2 weeks of public consultation in October 2021, the Western Australian Government's Land and Public Works Legislation Amendment Bill 2022 introduced "diversification leases" as a new form of tenure on Crown land under the Land Administration Act 1997 (WA). Royal Assent was given on 24 March 2023 but the substantive provisions have not yet commenced as at the time of writing. The concept of a diversification lease was proposed by the WA Government to allow proponents to carry out activities beyond pastoral activities, and specifically to "provide an opportunity . . . to get involved in the growing renewables market."[14]

Covering close to 40% of Australia, the pastoral lease in Australia as a legal instrument has done much damage to the property rights of First Nations.[15] Indeed, follow ing Mabo, it was thought that pastoral leases would completely extinguish native title, however, in Wik Peoples v State of Queensland,[16] by a bare 4–3 majority, the High Court held that pastoral leases did not necessarily extinguish native title; rather native title and pastoral interests could co-exist.[17]

As discussed in Wik, a pastoral lease is characterised not as a lease at common law but as a grant of statutory rights, short of exclusive possession, necessary to under take pastoral activities.[18] In Western Australia, a pastoral lease can only be used for pastoral purposes, which

includes the commercial grazing of stock, and any supplementary and ancillary purpose to facilitate that.

While on the one hand it might be viewed as sound policy to create a new form of tenure to allow for "a

more diverse range of land uses"[19] on land the subject of pastoral leases (which can otherwise only be used for pastoral purposes as outlined above), and specifically for renewable energy infrastructure developments, an alter native view is that diversification leases perpetuate the legal fiction of terra nullius.

Pastoral leases have been a tool of colonial legal dispossession of native title rights and interests — often denying native title holders the full enjoyment of their native title and the economic and cultural benefits that would then flow, and if pastoral leases are no longer the primary or sole purpose of tenure, than rather than creating another form of tenure the previous pastoral tenure should be terminated.

Approaching the need to facilitate alternative uses of the pastoral estate for renewable energy infrastructure more creatively, and with First Nations justice and economic empowerment[20] in mind, the WA Government could instead have achieved its desire to facilitate "a more diverse range of land uses on the crown land estate"[21] and also simplified the complex arrangements for ownership of the pastoral estate by making native title holders the lessor.[22]

This approach (proposed by a former CEO of the National Native Title Council in 2019[23]) aims to simplify the complex arrangements for ownership — presently the Government is the regulator, the Government is the lessor, there is the pastoralist as the lessee, and then there are also native title holders. By transferring the role of lessor to the native title holders, this arrangement is both simplified, and the Government retains its role as regulator.

There are a range of other missed opportunities to build in genuine co-design, partnership and engagement with First Nations in the WA Government's amendments to its Land Administration Act 1997. These are set out in the First Nations Clean Energy Network's submission on the Land and Public Works Legislation Amendment Bill 2022.[24]

Licensing of offshore wind projects and the silencing of First Nations interests

In 1995 academic Sue Jackson published a paper titled "The water is not empty: cross-cultural issues in conceptualising sea space".[25]

That phrase — the water is not empty — was taken from evidence by a Traditional Owner given over a decade earlier in 1982:

> *. . . the earth and the sea, the water is not empty. It's not like a man building a house, leaving a house without furniture . . . That is the reason why we Aboriginal people are closing the seas . . . because the earth contains things that you don't understand or Europeans don't understand. The reason we are closing the seas — we got something in it, we always have it and we'll be having it all the time . . . The land and the sea are not empty sheds that man has built. There's something in it.*[26]

Evidence from across Australia establishes that for First Nations, Sea Country[27] is inseparable from terrestrial Country.[28] That is, First Nations people make no proprietary distinction between estates that are land and those which are sea — rights in both estates (sea and land) include ownership, use, exclusion of others and management of rights.

Rodney Dillon, a Palawa Elder, has noted that the failure to understand First Nations' relationships with Sea Country had resulted in this relationship being deemed "invisible" with the settler state's proprietary interests rendered both dominant and visible. Dillon makes the point that this invisibility "has been a matter of great convenience to governments and industry groups who, by ignoring Aboriginal interests in marine environments, have been able to exploit the resources".[29]

Offshore wind is poised to play a critical role in Australia's energy transition up and down the Victorian coast from Portland to Gippsland.

Just over 40 years ago in Portland, Alcoa of Australia (Alcoa), following a major deal with the Victorian Government, was required to build an aluminium smelter on land at Portland. The smelter land contained relics of Aboriginal occupation with workshops, stone tools and manufacturing debris. Seeking to protect the destruction of their cultural heritage, the case Onus v Alcoa[30] saw two Gunditjmara leaders, Sandra Onus and Christine Frankland, take on the multinational Alcoa.

To demonstrate standing, Onus and Frankland had to prove that they had a "special interest" in their own Country. It seems somewhat astonishing today that Australia's systems of law and policy require First Nations — who have been here for millennia — to prove a special interest in their own Country to have a voice.

However, this "onus of proof" requirement is replicated 40 years on in the Commonwealth's Offshore Electricity Act 2021.

The assertion of rights, interests and responsibilities to Sea Country by First Nations is anything but new. There have been a range of significant cases involving the sea and the assertion of rights and interests by First Nations — e.g Croker Island,[31] Blue Mud Bay,[32] the Torres Strait Sea Claim[33] (where the Torres Strait Regional Sea Claim has recently been finalised recognising native title rights over seas by the Kemer Kemer Meriam, Kulkalgal, Ankamuthi, Gudang Yadhaykenu and Kaurareg Peoples)[34] and recently in South-Eastern Australia, a claim by the South Coast People of NSW.[35]

That there will be further claims offshore and an ongoing assertion of rights and interests in Sea Country is incontrovertible.

However, rather than incorporating First Nations rights and interests in Sea Country, the Offshore Electricity Infrastructure Act maintains the invisibility of First Nations' rights, interests and responsibilities in the sea by relegating native title rights and interests as an afterthought and condones interference with native title rights and interests.

This is reflected in sections 77 and 78 of the Act (and which are expressed in similar terms), which in the Act's only mention of native title, provide that interference with the exercise of

native title rights and interests is permissible, if the interference is "necessary for the reasonable exercise of the person's rights under this Act or the licence".[36] (emphasis added)

Again, alternative approaches are available to avoid this invisibility of First Nations. The Carbon Credits (Carbon Farming Initiative) Act 2011 in Pt 3 Div 8 provides an example of how native title holders can be built into schemes where access to tenure is required (including to provide native title holders with a right of veto).[37]

Conclusion and a way forward

With new regulatory and policy systems being designed by governments across Australia to facilitate a rapid transition to renewable energy, access to and engagement with First Nations Country and Sea Country for renewable energy infrastructure will be essential and inevitable. The Jukaan Gorge tragedy has demonstrated to us all that these sorts of standards — whereby the law passively permits destruction, or leaves protection of cultural heritage and native title rights and interests to corporate social responsibility policies — as ineffective and wholly inappropriate.[38]

Across the globe, First Nations are moving beyond minimal corporate social responsibility and tokenistic approaches to demand a new realism. In this new reality, First Nations are no longer just the passive hosts of projects or mere regulatory hurdles to clear. The finance sector too is increasingly engaging with this new realism,[39] and the foundations on which the myth of terra nullius was established are rapidly eroding.[40]

The two examples highlighted in this paper demonstrate recent Government failure to fully engage with this new reality.

Stalled progress on projects attests to the growing urgency of including rights of free, prior and informed consent, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples in legislation, and to design processes to fully include First Nations in the early planning, design, execution and management of projects.

Despite the increasing recognition of the need for FPIC in an international context, our current legislative and policy systems that set the rules for engagement with First Nations do not contain this principle or standard — formed as they were either in an atmosphere of concocted hysteria following Mabo and Wik and the 10-point plan, or in a bygone era when First Nations' proud culture and accompanying, rights, interests and responsibilities were conveniently made invisible and so rendered silent by the myth of terra nullius.

If we perpetuate historical approaches to the development of projects that require access to land based on a dispossession that has always been unjust we will invite legal contestation and delay. Alternatively, by engaging with First Nations as partners in the design of systems, laws and policies, we will decrease uncertainty and project risk, resulting in a range of additional cultural, economic, environmental, social and political benefits to all parties.

Footnotes

1. L Godden & M Tehan, “Introduction: A sustainable future for communal lands, resources and communities” in L Godden & M Tehan (eds), Comparative Perspectives on Communal Lands and Individual Ownership, Routledge, Oxon, 2010, p 3.

2. See also N Winfield “Vatican official repudiates Discovery Doctrine at request of Indigenous peoples”, National Observer, accessed online on 16 May 23 at www.nationalobserver.com/ 2023/03/30/news/vatican-officially-repudiates-discovery-doctrine request-indigenous-peoples?utm_source=piano-esp&utm_ medium=push&utm_campaign=24577.

3. G Koppenol “Recent Developments in Native Title in Australia with International Perspectives”, speech to the Europe-Asia Legal Conference, July 2002, accessed online on 16 May 23 at https://archive.sclqld.org.au/judgepub/2002/koppenol300 602.pdf. As noted in the transcript at [2]:

One of the earliest statements of recognition was made by Pope Paul III in 1537, who said: “[T]he said Indians and all people who may later be discovered by Christians are by no means to be deprived of their liberty or the possession of their property.” (Papal bull Sublimis Deus).

4. G Nettheim “Wik: On Invasions, Legal Fictions, Myths and Rational Responses” (1997) 20(2) UNSWLJ 495.

5. Above.

6. U Secher “The doctrine of tenure in Australia post-Mabo: Replacing the ‘feudal fiction’ with the ‘mere radical title fiction’ — Part 2” (2006) 13 Australian Property Law Journal 140, 141.

7. Mabo v Queensland (No 2) (1992) 175 CLR 1; 107 ALR 1; [1992] HCA 23; BC9202681.

8. Above n 4.

9. Above.

10. U Secher “The doctrine of tenure in Australia post-Mabo: Replacing the ‘feudal fiction’ with the ‘mere radical title fiction’ — Part 2” (2006) 13 Australian Property Law Journal 140.

11. P Velasco-Heerjon, T Bauwens, M Friant, Challenging dominant sustainability worldviews on the energy transition: Les sons from Indigenous communities in Mexico and a plea for pluriversal technologies, World Development 150 (2022). And also, eg, the destruction of Juukan Gorge — a sacred rock shelter in the Pilbara region of Western Australia — which was legally blasted and destroyed by Rio Tinto, destroying intangible and tangible aspects of a whole body of cultural practices, resources and knowledge systems dating back 46,000 years.

12. FPIC is a specific right that pertains to Indigenous peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Properly recognised, FPIC provides Indigenous people with the right to give or withhold consent to a project that may affect them or their territories.

13. G Maynard “Renewable energy development and the Native Title Act 1993 (Cwlth): The fairness of validating future acts associated with renewable energy projects”, CAEPR Working Paper 143/2022, Australian National University, Canberra, accessed online at https://caepr.cass.anu.edu.au/sites/default/ files/docs/2022/5/WP_143_Maynard.pdf.

14. Land and Public Works Legislation Bill 2022 (WA) available <www.wa.gov.au/government/document-collections/land-and public-works-legislation-amendment-bill-2022#frequently-asked questions>.

15. R H Bartlett, Native Title in Australia, Butterworths, Sydney, 2000, p 273.

16. Wik Peoples v State of Queensland (1996) 187 CLR 1; 141 ALR 129; [1996] HCA 40; BC9606282, (Wik)

17. Wik Peoples v State of Queensland (1996) 187 CLR 1 at 132. 18. M Storey “Unspoiling the Broth: simplifying ownership of the pastoral estate to facilitate development” (2019) 13(2) Native Title News 18.

19. Second reading speech, Mr J N Carey (Minister for Lands), 23 November 2022, Land and Public Works Legislation Amendment Bill 2022, available, www.parliament.wa.gov.au/ Hansard/hansard.nsf/0/6E023B9555496076482589080022675 5/ $FILE/A41%20S1%2020221123%20p5770b-5771a.pdf.

20. See, eg the WA Government's "Aboriginal Empowerment Strategy" which talks of genuine partnerships and engagement with Aboriginal stakeholders, available www.wa.gov.au/ organisation/department-of-the-premier-and-cabinet/aboriginal empowerment-strategy-western-australia-2021-2029.

21. Second reading speech, Mr J N Carey (Minister for Lands), 23 November 2022, Land and Public Works Legislation Amendment Bill 2022, available, www.parliament.wa.gov.au/ Hansard/hansard.nsf/0/6E023B9555496076482589080022675 5/ $FILE/A41%20S1%2020221123%20p5770b-5771a.pdf.

22. Above n 18.

23. Above n 18.

24. Submission on the Land and Public Works Legislation Amendment Bill 2022, available https://assets.nationbuilder.com/fncen/ pages/164/attachments/original/1676439311/Western_Australia_-_ Lands_and_Public_Works_legislation_Amendment_Bill_2022_-_ Submission_-_First_Nations_Clean_Energy_Network_%289% 29_%282%29.pdf?1676439311.

25. S Jackson "The water is not empty: cross-cultural issues in conceptualising sea space" (1995) 26(1) Australian Geographer 87–96, accessed online at www.tandfonline.com/doi/abs/ 10.1080/00049189508703133.

26. M Dreyfus and M Dhulumburrk, Submission to Aboriginal Land Commissioner regarding control of entry onto seas adjoining Aboriginal land in the Milingimbi, Crocodile Islands and Glyde River area, 1982, p 75. See https://catalogue.nla.gov.au/ Record/1738235/Details.

27. To appropriately reflect the intricate and powerful connection First Nations people have with the land and sea, the words "Country" and "Sea Country" have been capitalised throughout this article.

28. Sea Country — an Indigenous perspective — the South-east Regional Marine Plan Assessment Reports, National Oceans Office 2002, at p 16:

Before British control in Australia, marine areas were owned and cared for by Indigenous people through a system of strict, complex community rights and responsibilities built up over generations. Land and the sea were not viewed as separate entities but as one customary 'country' . . . which is bound spiritually, culturally and historically to specific communities.

29. R Dillon "Aboriginal Peoples and oceans policy in Australia — an Indigenous perspective" (2004) 3 The Journal of Indigenous Policy 141.

30. (1981) 149 CLR 27; 36 ALR 425; [1981] HCA 50; BC8100104. 31. Commonwealth of Australia v Yarmirr (2001) 208 CLR 1; 184 ALR 113; [2001] HCA 56; BC200106150.

32. Northern Territory of Australia v Arnhem Land Aboriginal Land Trust (2008) 236 CLR 24; 248 ALR 195; [2008] HCA 29; BC200806836.

33. Akibaobh of Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) 250 CLR 209; 300 ALR 1; [2013] HCA 33; BC201311628.

34. See www.nntt.gov.au/Pages/Torres-Strait-Regional-Sea-Claim. aspx#:~:text=The%20 original%20 Torres%20street%20 Regional,finalisation%20of%20the%20original%20claim.

35. See www.abc.net.au/news/2022-06-04/indigenous-traditional owners-push-for-sea-rights-native-title-/101123930 and details from the National Native Title Tribunal's Register of Native Title Claims: www.nntt.gov.au/searchRegApps/NativeTitle Registers/Pages/RNTC_details.aspx?NNTT_Fileno=NC2017/ 003.

36. Offshore Electricity Act 2021, s 77(1)(d).

37. See Carbon Credits (Carbon Farming Initiative) Act 2011 s 45A.

38. See, eg Joint Standing Committee on Northern Australia (2021), "A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge", available <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application% 2Fpdf>.

39. N Hussain & S Jessop (2022), "AXIS to stop insuring energy, other projects without community support", available <www. reuters.com/article/axis-capital-policy-esg-idCAL1N31 E1ST>.

40. N Winfield (2023) "Vatican official repudiates Discovery Doctrine at request of Indigenous peoples", National Observer, available <www.nationalobserver.com/2023/03/30/news/vatican officially-repudiates-discovery-doctrine-request-indigenous peoples?utm_source=piano-esp&utm_medium=push&utm_ campaign=24577.