

Submission in response to:
Department for Energy and Mining
South Australia's Green Paper on the energy transition

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Introduction

Thank you for the opportunity to provide a submission in response to the Department for Energy and Mining's (DEM) Green Paper on the energy transition (**Green Paper**) dated June 2023.

We are an interdisciplinary research team from the Australian National University (ANU), whose research focuses on energy insecurity and disparities of access to the energy transition in Australia. Our submission responds to three (3) questions presented in the Green Paper as follows:

1. What are the key risks (short, medium and long-term) you consider the Government of South Australia should be mindful of and how can these be addressed as part of this work? To what extent are such risks quantifiable and is there any supporting evidence?
2. How can access to rooftop solar PV and/or its benefits be made more equitable across energy users?
3. What reforms would help address the equity issue affecting renters and people in premises unsuited to solar PV systems?

We address these matters below.

What are the key risks (short, medium and long-term) you consider the Government of South Australia should be mindful of and how can these be addressed as part of this work? To what extent are such risks quantifiable and is there any supporting evidence?

General submissions

Our first overarching submission is that there are two sides of the energy inequity issue which must be considered by government: on one side, barriers to accessing cost and carbon saving technologies and, on the other, the impacts of such lack of access. Key emergent risks are thus energy bill cost differentials between those with rooftop solar and those without, and greater carbon emissions from customers without rooftop solar.

Addressing the risk of bill cost differentials while also considering environmental impacts requires a focus on making grid power cheaper in ways that also support developing a cleaner grid – and doing so in ways that share cost benefits and environmental contributions beyond those who are able to install solar on their own roofs. This could, for example, be done by making electricity cheaper during sunshine hours. This tariff approach can, provided it is carefully designed, reduce disparities in access to benefits of energy transition by decreasing the cost disadvantage for customers without solar while increasing demand during sunshine hours. Shifting demand to these hours helps alleviate the system security issues of low demand and reverse power flows, bolsters the investment case for further utility solar farms, and reduces the carbon emissions of this demand.

We emphasise the benefits of this type of demand side initiative, while also noting that there are significant risks for customers in the absence of careful policy design. Depending on their design, time-of-use (TOU) rates can disadvantage vulnerable customers; one TOU pilot was found to disproportionately increase bills for households with elderly and disabled occupants, and predict worse health outcomes for households with disabled and ethnic minority occupants than those for non-vulnerable counterparts¹. When implementing rates that allow customers to access electricity more cheaply during sunshine hours, it is important to ensure that the ‘non-sunshine hours’ (the on-peak hours in most TOU programs) are not priced at a rate that penalises those vulnerable customers who are nonetheless unable to shift loads away from these times.

For smart meter households in SA, the time of use tariff is prescribed under the National Energy Retail Law (Local Provisions) Regulations 2013 s 6A(2)(a), with the result that many customers are unable to switch to a flat rate and face higher bills for consumption during peak times if they are unable, through behavioural changes, to take advantage of lower off-peak rates. This is likely to impact vulnerable and low-income households, for whom household characteristics such as constant reliance on energy for medical needs or out-of-home work commitments mean patterns of energy use are less flexible. To address this risk, demand side initiatives should not be mandatory in any way and vulnerable groups should be considered separately in TOU tariff designs to avoid exacerbating existing energy injustices or creating new ones¹. This also applies to any time-varying designs that include lower costs for sunshine hours, especially if the non-sunshine hours would be priced more highly than a standard flat rate offered to customers in the same location.

Overall, we note that demand side participation makes up a substantial part of grid balancing in renewable energy transitions. However, it is currently under-emphasised in the Green Paper

regarding potential risks. Given that demand side decarbonisation transition can only be made through investments/interventions in customers' properties, it also requires investment and support, particularly for customers who may face financial or other disadvantages. The supply side of the transition can be progressed on the utility scale i.e., through solar and wind farms. However, energy efficiency in rentals remains a challenging area and is unlikely to progress without measures to (a) increase visibility of property energy efficiency (such as the mandatory disclosures to renters in the ACT); and (b) to create a minimum standard for rental homes that were constructed before NatHERS in 2003 established national minimums of energy efficiency.

Priority communities at risk of exclusion in energy transition

Additionally, our research highlights a risk that some groups will be excluded from participating in the energy transition, and that this exclusion will be systematic. Specifically, low-income households, renters, those in remote and off-grid communities, and households using prepayment meters are likely to be systematically excluded from the benefits of energy transition, for differing reasons.

In the case of low-income households, upfront costs of installing rooftop solar are prohibitive to accessing solar in the absence of supportive policies². Generally, landlords across Australia have been unwilling to install solar PV systems, with Australian Bureau of Statistics (**ABS**) survey data showing that as of 2017-18, only 3-4% of rental properties in Australia had solar PV systems compared to 25% of owner-occupied properties³. Research at the ANU has indicated that while landlords do see upfront costs as a barrier, interest free loans may be insufficient to change installation preferences for many of the investors who own rental properties³.

For off-grid communities and remote First Nations households using mandatory prepay in South Australia, there are additional barriers to participating in the energy transition due to prohibitive conditions under the Remote Area Energy Supply (**RAES**) scheme. Prepay customers in South Australia do not have clarity in their contracts with distributors regarding the process, if any, for connecting rooftop solar. In other states, prepay customers attempting to install rooftop solar have run into extensive barriers, including lack of retailer and distributor institutional knowledge on how to connect². Remote-living prepay customers in government-owned housing may also face compounding barriers, including doubts about roof structural integrity and responsibility for removing the panels if they move house². Prior research shows that prepay households face significant risks of disconnection from essential energy services, that the risks increase with temperature extremes which are exacerbating with climate change, and that access to solar can ameliorate the risks of disconnection.

That is, current South Australian government policies both increase the risk of energy insecurity for priority remote First Nations households while precluding those same households from access to the benefits of energy transition through rooftop solar. This exclusion and injustices are already occurring and must be urgently addressed through remedial policy action aligned with Closing the Gap targets.

Regulatory reform

There are several aspects of South Australia's energy regulation that could be amended to reduce the risks highlighted. They include:

- Electricity Act 1996 (SA), s 36AE

This provision of the Act excludes the right to connect residential solar PV systems from applying in networks of under 10,000 domestic customers. The result is that off-grid households do not have equivalent access to solar compared to on-grid customers in South Australia.

- Electricity Act 1996 (SA), ss 36AC and 36AD

These provisions of the Act exclude the minimum feed-in payment to exporting household requirements from applying in networks of under 10,000 domestic customers. The result is that off-grid households do not have equivalent access to the financial incentives for solar, compared to on-grid customers in South Australia.

- [RAES Connecting Customer Owned Solar PV Systems](#) (February 2020)

This State Government policy prohibits household solar connections in the RAES grid without prior written approval from the Department for Energy and Mining (**DEM**) and prohibits exports along with feed-in tariffs that are available to grid-connected customers in the state. To connect solar, customers must either completely disconnect from the RAES grid or demonstrate that their proposed solar PV system “will not impact on the stability of the existing grid or the security of electricity supply to all customers”. This is an extremely high bar which places administrative and evidentiary burdens on the customer, effectively making it impossible for remote households to negotiate the regulatory barriers and access the benefits of energy transition in their homes.

- [Distributed Generation Requirements for Connecting to the Coober Pedy Grid](#) (10 January 2023)

This policy which operates in Coober Pedy is less restrictive than the DEM policy which applies in other RAES locations. It specifies the system requirements and other conditions for approval of solar connections by the District Council of Coober Pedy in its capacity as a licensed distributor and retailer of a small, isolated network in the state. However, limits on export are imposed and no feed-in tariffs for exporting households are available.

- Cowell Electric’s Service and Technical Installation Rules (5 April 2014) for exempt electricity services in Iron Knob and Pimba

Cowell Electric as licensed distributor, and exempt retailer, in the interconnected locations of Iron Knob and Pimba permits household solar PV connections of a maximum system size of 10 kW but does not offer a feed-in tariff; rather, exports reduce the customer’s consumption by the amount exported to the grid.

- [Municipal Council of Roxby Downs Electricity Supply Guideline and Conditions for Solar Installers](#)

The Municipal Council of Roxby Downs as licensed distributor, and exempt retailer, in the interconnected location of Roxby Downs permits household solar PV connections but limits exports to the grid of 5 kW (per phase) while the solar feed-in tariff is set at 16.3c/kWh and credits are not payable until they exceed \$100.

We encourage the South Australian Government to scrutinise the disparities of access that apply across the groups we have identified and address existing inequities through regulatory and policy change.

How can access to rooftop solar PV and/or its benefits be made more equitable across energy users?

Our submission is that access to rooftop solar and its benefits can be made more equitable by recognising the South Australian households that experience barriers to participating in the benefits of solar and removing those barriers through targeted regulatory change and policy incentives. From an equity perspective it is also concerning that those groups most likely to be excluded from solar access are the groups that are most likely to need additional support (such as financial) and may be most likely to benefit from solar access (off-grid customers able to reduce reliance on heavily polluting and expensive diesel fuel for generators). Our research identifies renters, off-grid customers and First Nations and low-income households as those most likely to be underserved in the energy transition in South Australia²⁻⁴, whilst also being those with the most to gain from solar access through reduced energy costs and increased household energy security^{2,5}. Notably, off-grid prepayment customers in the Northern Territory (**NT**) found substantial reductions in their experience of energy insecurity following rooftop solar installation, including a complete attenuation of 'self-disconnection' events following solar install, and more comfort in the home². To ensure these benefits are available to the South Australian households that need them most, legislative changes are needed.

As stated in the Green Paper, South Australia has abundant solar resources and is a policy leader in the energy transition nationally, reflected in the rate of household renewable energy adoption with "more than one in three households having rooftop solar PV systems in South Australia (and increasing)" (p. 33). Yet this achievement occurs predominantly in interconnected and affluent parts of the state and overlooks the disparities of access that exist for low-income households, renters, and communities outside of the major interconnected regions. Financial and structural barriers to solar access are commonly faced amongst these groups. In South Australia, off-grid households and remote First Nations communities face significant additional barriers to connecting solar due restrictive regulatory conditions which have long limited their ability to participate equally in the benefits of energy transition.²

Some of these regulatory barriers are identified in our recent case study of one of the first public housing residents to install and grid-connect a rooftop solar PV system to prepay metering in Tennant Creek, NT². This region of the NT is similarly host to world class renewable energy generation potential, yet the absence of a regulatory framework and supportive policy for solar connections and feed-in tariffs in remote communities where prepay is prevalent and levels of energy insecurity high has limited the opportunities for households to benefit from solar uptake. In this case, our co-authors conducted a cooperative trial with the Territory-owned distributor Power and Water Corporation (**PWC**) and retailer Jacana Energy for the purpose of integrating rooftop solar and prepay. To install solar, new paperwork facilitating connection and export arrangements applicable to prepay needed to be drawn up by PWC and Jacana Energy. Further, approvals and indemnities were required by the NT Government in its capacity as landlord of the public housing property. The

upfront costs of the solar PV system were met by funds sourced by Aboriginal-led charity Original Power.

These different obstacles to connection are non-trivial and are likely to be amongst those faced by First Nations households in remote communities of South Australia where prepay is mandatory, public housing prevalent and solar connections not permitted without the express permission and prior written approval from the Department for Energy and Mining.¹

Nonetheless the benefits of access to solar for these households are equally significant: our analysis of household energy data before and after solar PV installation in the NT case study demonstrates that in addition to reduced electricity expenditures, rooftop solar PV mitigates experiences of energy insecurity for prepay households by reducing the frequency and duration of involuntary 'self-disconnection' due to inability to pay².

We recognise the different conditions that need to be navigated to achieve solar connections in small, isolated networks. However, we submit that this should not exclude off-grid and remote First Nations households sharing in the benefits of solar access through technologies such as rooftop solar with storage and community solar.

Our observation is that the benefits of the energy transition in remote South Australia have, so far, been biased towards the private utilities and government through supply-side efficiencies. The case study in the Green Paper of renewables integration at the central powerhouse in Umuwa on the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands (p. 30) demonstrates benefits which primarily accrue on the supply side in reduced costs of remote energy production. These benefits do not flow to remote households in reduced energy costs, other than indirectly through long-standing government commitments to tariff parity for on and off-grid customers. In fact, households in the APY Lands, Yalata and Oak Valley have only recently been shifted to a user pays system based on mandatory prepay metering with attendant risks of energy insecurity and lack of household access to the benefits of solar PV. Emphasising the financial disadvantages that these households currently experience, the Essential Services Commission of South Australia (ESCOSA) has stated that:

“[t]he majority of prescribed (mandatory prepay) customers are low wage individuals on income support, who are more likely than average to suffer financial hardship”.²

Considering all these factors, we urge the South Australian Government to (a) codify basic requirements for solar connections in off-grid networks to support customer certainty and promote equity of solar uptake; (b) recognise that appropriate regulation can reduce systemic barriers to solar uptake for prepay and remote customers in the state; and (c) provide targeted policies so that low-income households, remote First Nations communities and renters can access solar or solar benefits.

¹ Government of South Australia, 2020, Remote Area Energy Supply (RAES) Connecting Customer Owned Solar PV Systems, available at < https://www.energymining.sa.gov.au/data/assets/pdf_file/0008/670391/13-Fact_Sheet-Connecting_customer_owned_PV_to_RAES_grid.pdf>.

² ESCOSA, Cowell Electric Supply Pty Ltd licence amendment: Prepayment by default consumer protections. Final decision – June 2022, available at: < <https://www.escosa.sa.gov.au/ArticleDocuments/21889/20220620-Electricity-CowellElectricLicenceAmendment-PrepaymentDefault-FinalDecision.pdf.aspx?Embed=Y>>.

What reforms would help address the equity issue affecting renters and people in premises unsuited to solar PV systems?

Renters are currently largely excluded from access to rooftop solar; only 3-4% of rental properties have solar panels installed. Rooftop solar can help reduce exposure to high costs of grid electricity, particularly for households that are able to self-consume a lot of the rooftop generation – that is, using electricity while the sun is shining. However, renters are dependent on landlords to provide rentals that have solar installed. Recent work looking at landlords’ motivations found that the two biggest reasons they hesitate to install solar on their properties are 1) upfront costs, and 2) perception that renters wouldn’t pay more for a home with solar.³ A follow-up analysis within the study found that when offered a hypothetical interest-free loan, less than two thirds of the landlords valued this in making their hypothetical installation decisions. That is, to encourage landlords to install solar on rental properties, more than loans will be needed. It is also notable that renters are in fact willing to pay more for properties with solar,⁶⁻⁸ which many landlords currently seem unaware of when making investment decisions.

Recommendations³ beyond loans include:

- Investing resources into educating property managers about the benefits of rooftop solar. Property managers could then include such features in home advertisements and talk about these benefits in discussions with landlords and prospective tenants;
- Making the benefits of solar more visible to both property investors and tenants – such as through a resource that describes expected savings. This could help landlords see solar as a better investment;
- Considering requirements for minimum rental standards. This could include overall requirements for minimum energy costs, which could be met in practice through a combination of solar installation and energy efficiency upgrades;
- Streamlining processes for solar installation in multi-family housing, such as mandated processes for Strata to follow to approve solar requests. Many landlords see Strata as a potential barrier to installing solar for apartments that they own.

Additional collateral materials at Appendix 1

In addition to our comments and recommendations above we submit the following collateral materials representing the views of the First Nations Clean Energy Network as being relevant to Question 1:

1. What are the key risks (short, medium and long-term) you consider the Government of South Australia should be mindful of and how can these be addressed as part of this work? To what extent are such risks quantifiable and is there any supporting evidence?

³ Also discussed here: <https://theconversation.com/electricity-prices-are-rising-again-heres-how-to-ensure-renters-can-cash-in-on-rooftop-solar-205928>

- a. FNCEN (2023) Submission in response: Hydrogen and Renewable Energy Act – Draft Bill
- b. Kneebone, J (2023) Pretending the water is empty may hurt offshore wind investors.

Thank you for the opportunity to make a submission in response to the Green Paper. We would welcome the opportunity to discuss any aspects of the submission further.

References

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Appendix 1:

Submission: Hydrogen and Renewable Energy Act – Issues paper responses

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Introduction and about the First Nations Clean Energy Network

The [First Nations Clean Energy Network \(FNCEN\)](#) welcomes the opportunity to make a submission on the South Australian Government's Hydrogen and Renewable Energy Act Issues Paper.

The FNCEN is made up of First Nations people, groups, community organisations, land councils, unions, academics, industry groups, technical advisors, legal experts, renewables companies and others - working in partnership to ensure that First Nations share in the benefits of Australia's clean energy transition.

The FNCEN is led by a Steering Group of First Nations leaders.

Australia's rapid transition to renewable energy will require access to vast areas of land and waters, including for thousands of kilometres of new transmission infrastructure. Enabling and empowering First Nations to play a key and central role in Australia's renewable energy transition goes beyond just social licence issues - it presents a unique opportunity for Australia to design a system that is fair and just and which can also positively impact and result in other social and economic benefits for First Nations.

As a national, First Nations-led coalition, the FNCEN aims to enable and empower First Nations to participate in, benefit from, respond to, and shape renewable energy projects that impact their communities, land, waters and Sea Country.

The FNCEN's approach is built on three pillars:

- **Community** The FNCEN supports First Nations communities to shape the design, development and implementation of clean energy projects at every scale
- **Industry partnerships** The FNCEN acts as an innovation hub, promoting best practice standards and principles that companies should adopt and investors should require before committing capital to a clean energy project
- **Policy reform** The FNCEN advocates to lift significant federal and state regulatory barriers and stoke government investment, removing regulatory barriers to energy security and clean energy generation

Designing a renewable energy system that is inclusive of First Nations rights, interests and responsibilities

There is a massive global and domestic renewables energy transition underway that is driving generational shifts in energy systems. First Nations people can, and should benefit from this revolution, whether from small community-based projects, to large scale, export-focused initiatives.

With many First Nations communities at the forefront of the devastating impacts of climate change and struggling with unreliable and expensive power, coupled with the substantial rights, interests and responsibilities (through traditional ownership, cultural heritage, native title and land rights

schemes) held by First Nations across Australia's land and seas, now is the time to position First Nations as co-designers and drivers of systems, policy, legislation, and projects needed to facilitate the transition.

Put simply, by including and embedding First Nations as partners in the transition, and the right to free, prior and informed consent in systems, policy, legislation and projects, the transition can be fair and just, occur at the pace necessary (and avoid legal contestation), and will deliver mutual cultural, social, economic and environmental benefits to people and country.

With the Federal Government committing to enshrine a First Nations voice to Parliament (and with South Australia taking a leading role in this movement through the introduction to the South Australian Parliament of the First Nations Voice Bill 2023), now more than ever is the right time to ensure First Nations play a central role in, and benefit from the opportunities that the transition will establish. Through the First Nations Clean Energy Network, we're excited to bring together First Nations people, industry and government leaders to help chart this way forward.

We also appreciate that there are real challenges to getting this right.

While there is broadly goodwill from the renewable energy industry, we must translate this into action, working in a respectful partnership. Engaging early, and in a genuine manner, will be critical - we don't want Traditional Owners hearing about projects for the first time through the media or on schematic diagrams on government websites. Companies and the industry could do well to listen to and learn from traditional knowledge and culture about proposed renewables sites - we need to consider what the benefits look like over generations.

We also need to make sure that First Nations are properly resourced and equipped to engage with the industry and the pace and scale of the transition.

Best Practice Principles to inform renewable energy developments

The First Nations Clean Energy Network advocates for the development of a renewable energy sector which supports the aspirations and objectives of First Nations people across Australia, and an active network of Traditional Owners and First Nations representative entities, businesses, organisations and groups engaged in the renewable energy sector.

To assist in the shaping of such a sector, the First Nations Clean Energy Network has developed and launched on 30 November 2022 a set of Best Practice Principles for Clean Energy Projects ("Principles").¹ These Principles place First Nations people and their communities at the centre of the development, design, implementation and opportunities for economic benefit from renewable energy projects.

The First Nations Clean Energy Network has developed the Principles anticipating they will aid governments with the design of policy and regulatory frameworks and also assist industry in its efforts to engage and partner with First Nations in the development of renewable energy projects.

¹ See https://www.firstnationscleanenergy.org.au/mr_launch_guides and https://www.firstnationscleanenergy.org.au/tool_kit.

Opportunities to develop systems for renewable energy projects that respect First Nations' rights to self-determination and which implement principles of free, prior and informed consent

Systems that presently exist in Australia and which regulate access to land, waters and resources for activities like mining, oil and gas, pastoral, infrastructure etc. typically establish by design an adversarial relationship with First Nations and First Nations rights and interests.

The tone set by these existing (Commonwealth, State and Territory) policy and legislative systems presupposes First Nations opposition, invites legal contestation, and ultimately generates additional and unnecessary project risk for proponents. This is counterproductive, particularly in an age where ESG metrics are increasingly important and where markets and the finance sector wants to understand the impacts of projects and capital on host communities, and particularly First Nations.

For renewable energy projects too, designing an inclusive system that respects First Nations' rights makes additional sense, given the opportunity to attract First Nations as active participants and supporters.

Accordingly, rather than the present system which is adversarial by design, we have the opportunity now to design policy and legislative systems that enable and empower First Nations to participate in, make real decisions about, and benefit from activities that will impact on First Nations' land, sea, waters, rights, interests and responsibilities.

Our comments in response to the questions in South Australian Government's Hydrogen and Renewable Energy Issues Paper, set out in **Attachment A**, are designed to aid in the design by South Australia of such a system.

A vision of the future

Lessons from Canada, where First Nations have been engaged with the renewable energy sector for the past 20 years, help to highlight some of the wins from an approach based on principles of inclusion and partnership.

In the last decade alone, First Nations-led initiatives have fostered 200 medium to large renewable energy projects, which have helped to generate \$1.5 billion in Indigenous and employment contracts. These outcomes were achieved through actions by Governments acting with foresight, including mandating project ownership targets for the First Nations on whose lands the projects were proposed.

In the words of our sister organisation from Canada, the Indigenous Clean Energy Network (and clearly highlighting the significant mutual benefits from policy and legislative systems founded on inclusion and engagement):

Indigenous communities are the second largest clean energy asset owners and partners in Canada with thousands of small to large scale projects underway and ongoing. These projects have led to community training and job creation, reduction in greenhouse gas emissions, advanced gender equity, materially improved economic stability, cultural

revitalization and much more. Globally more action needs to be taken to amplify Indigenous voices in dialogues on the development of clean energy resources and climate leadership.

First Nations have the capacity, skills and resources needed to help drive the clean energy revolution. By working in partnership with governments and industry, these sort of outcomes (and better) can similarly be achieved in South Australia.

The proposed Hydrogen and Renewable Energy Act

The First Nations Clean Energy Network welcomes the opportunity to provide a submission to the Issues Paper on the proposed Hydrogen and Renewable Energy Act (HREA).

This submission builds on our previous policy work and the First Nations Clean Energy Network acknowledges the work of all our members, supporters, and allies in developing this body of work. We would welcome any queries the South Australian Government has to develop the issues, recommendations and concerns raised by this submission further

Issues relevant to native title owners

For Native title rights and interests to be appropriately dealt with under the proposed legislative regime, it is crucial that the regulatory frameworks are clearly understood.

FNCEN notes that the South Australian government acknowledges that Aboriginal people, particularly those with Native title rights and interests are co-existing landholders in the process of proposing new leasehold interests and that the issue of a form of HREA tenure that provides the requisite certainty of tenure to proponents will affect Native title rights.

FNCEN is of the view that for the HREA tenure to apply to pastoral tenure, the previous pastoral tenure should be terminated by agreement, as the purpose of the pastoral lease will no longer be the primary or sole purpose of the tenure.

At that point, any suspension of the native title rights and interests by the pastoral lease should be removed,² and the native title rights are to be given their fullest expression (or “spring up” as the judgments describe this process). This will include all rights recognisable, apart from the right to exclude others. It is unclear why Native title holders cannot at that point negotiate a different form of access than currently reflected in pastoral leases.

FNCEN notes that managing the balancing act between competing public interest outcomes will be difficult and that there is considerable risk that renewable energy proponent’s outcomes will be prioritised through the ‘one window’ approach.

FNCEN notes that the approach taken in the HREA paper with respect to the rights of freehold owners is a good guide for South Australia when considering what rights Native Title holders should have in the proposed HREA tenure process. FNCEN notes that the Issues paper allows freehold owners to determine their own process when working with renewable energy proponents and the State does not intend to interfere.

² See section 36(1)(b)(ii), *Native Title Act 1993* (Cth)

But for the issue of the pastoral lease, native title holders would have been in a similar circumstance.

While the history of the pastoral lease cannot be unwound, the impact on native title rights and interests can be minimised.

The following specific feedback in **Attachment A** responds to questions in the Issues Paper.

Attachment A: First Nations Clean Energy Network – Responses to the Issues Paper

Issue	Questions	First Nations Clean Energy Network response
<p>Issue 1: Objects of the Act</p> <p>The objects will explain the purpose of the Hydrogen and Renewable Energy Act and provide the context for reading the provisions of the Act.</p> <p>The proposed objects are to:</p> <ul style="list-style-type: none"> • create an effective, efficient and flexible licensing and regulatory framework for the feasibility, construction and maintenance of large scale renewable energy infrastructure • create an effective, efficient and flexible licensing and regulatory framework for the construction, operation and maintenance of facilities for generating hydrogen • encourage and maintain an appropriate level of competition for access to pastoral lands and state waters for renewable energy and hydrogen development • partner with Aboriginal people to ensure the regulatory framework delivers net economic, environmental and social benefits to communities and minimises cultural, spiritual and heritage impacts • facilitate a net environmental benefit from activities licenced under the Act, including promoting, as appropriate, practices to eliminate waste and restore biodiversity 	<p><i>Are the proposed objects considered suitable for the proposed regulatory and licencing framework under the Hydrogen and Renewable Energy Act?</i></p> <p><i>Are there any important matters that have not yet been addressed in the proposed objects?</i></p>	<p>The FNCEN considers that the following are important matters that should be clearly addressed and included in the proposed objects:</p> <ul style="list-style-type: none"> • facilitate decision-making and the free, prior and informed consent by Traditional Owners about large scale renewable energy infrastructure and facilities for generating hydrogen on their lands and waters • provide priority opportunities and pathways for Traditional Owners to engage in and benefit from large scale renewable energy infrastructure and facilities for generating hydrogen, including as project owners and developers and through genuine partnership and engagement with project proponents • facilitate engagement and participation by Aboriginal people in and benefit from large scale renewable energy infrastructure developments and facilities for generating hydrogen • create employment, supply chain and business opportunities for Traditional Owners and Aboriginal people in large scale renewable energy infrastructure developments and facilities for generating hydrogen. <p>The FNCEN also considers that the following change should be made to the current proposed drafting and to help clarify the intent of the legislation:</p>

Issue	Questions	First Nations Clean Energy Network response
<ul style="list-style-type: none"> • establish appropriate consultative processes involving all relevant government agencies and ministers in the establishment of suitable renewable energy areas and the licensing processes • establish appropriate processes and mechanisms to facilitate multiple and sequential land use outcomes (eg. Native Title, agriculture, mining and mineral exploration, tourism, fisheries, forestry etc). • protect the public from risks inherent in the regulated activities under the Act • support the achievement of: <ul style="list-style-type: none"> • the targets in Part 2 of the Climate Change and Greenhouse Emissions Reduction Act 2007 (SA) • competitively priced and reliable renewable energy supply for South Australia • local employment and supply chain development through the South Australian Industry Participation Policy • economic development of a green hydrogen sector for South Australia, including exports • economic development of other strategically important net zero industries for South Australia. 		<ul style="list-style-type: none"> • partner with Aboriginal people to ensure the regulatory framework delivers net economic, environmental and social benefits to Aboriginal communities and minimises cultural, spiritual and heritage impacts
<p>Issue 2: Renewable energy definition</p> <p>The proposed definition of renewable energy is: “energy derived from a source that is not depleted when used.”</p>	<p><i>Does the proposed definition adequately define renewable energy?</i></p>	
<p>Issue 3: Renewable Energy Priority Areas (REPAs)</p> <p>For the purpose of competitive tender licensing provisions in the proposed Act, REPAs are proposed to be jointly determined by:</p> <ul style="list-style-type: none"> • the Minister administering the Act 	<p><i>Is the concept of utilising REPAs to identify and prioritise the locations for competitive land access</i></p>	<p><u>Prior to the identification of REPAs</u></p> <p>For Traditional Owners to engage in genuine and informed discussions and negotiations about REPAs, and certainly well before areas are identified as REPAs by governments and</p>

Issue	Questions	First Nations Clean Energy Network response
<ul style="list-style-type: none"> the Minister administering the Pastoral Land Management and Conservation Act with a co-decision making role for the native titleholder. <p>REPAs would relate to government-owned land, focusing on pastoral land and state waters.</p> <p>Factors for consideration in identifying these areas will include:</p> <ul style="list-style-type: none"> Native Title & Aboriginal heritage current government policies and priorities pertaining to both existing land use over which the REPA is to be applied and also renewable energy and hydrogen economy aspirations wind and solar resource data existing and required infrastructure including electricity and gas transmission, roads, port, water and other relevant infrastructure conservation land uses and threatened species management current economic land uses and rights to use land (including pastoral, mining, petroleum, agriculture, forestry, fisheries, maritime, tourism). 	<p><i>tendering process for the granting of relevant renewable energy licences considered suitable?</i></p> <p><i>What other factors should be considered in the identification of REPAs?</i></p> <p><i>Who should be consulted during the REPA identification process and at what points?</i></p>	<p>industry, Traditional Owners and their representative institutions must be properly resourced and equipped (in terms of skills, capability and capacity) to be able to make decisions about REPAs.</p> <p>The FNCEN considers that a critical part of this resourcing and capability/capacity development of Traditional Owners and their representative institutions must be support for each Traditional Owner group in South Australia to develop and implement a Renewable Energy Country Plan Roadmap.</p> <p>A Renewable Energy Country Plan Roadmap and associated consultation processes within each Traditional Owner group should be discussed and completed prior to identification or discussion about REPAs.</p> <p>The FNCEN envisages that a Renewable Energy Country Plan Roadmap would establish a plan and framework for how each Traditional Owner group would take advantage of feasible and valuable opportunities for renewable energy on their lands and water. The FNCEN envisages this country planning exercise would include:</p> <ul style="list-style-type: none"> recognition of rights and responsibilities of Traditional Owners and other Aboriginal people to land, waters and cultural heritage assessment and identification of areas within that Traditional Owner group's country that have potential for generating and exporting renewable energy realising opportunities and identifying potential pathways and opportunities for Traditional Owners to invest in own or co-own renewable energy infrastructure developments and facilities for generating hydrogen

Issue	Questions	First Nations Clean Energy Network response
		<ul style="list-style-type: none"> ● building on the aspirations and future priorities of Traditional Owners: <ul style="list-style-type: none"> ○ identification of opportunities for the provision of goods and services by the Traditional Owners to potential large scale renewable energy infrastructure developments and facilities for generating hydrogen ○ identification of job opportunities (and required skills development requirements to access job opportunities) likely to be available in large scale renewable energy infrastructure developments and facilities for generating hydrogen ● identification of pathways for members of the relevant Traditional Owner group to have greater access to affordable, clean energy generated from their lands and waters ● development of investment and economic development policies and tools to guide investment decisions and to support that Traditional Owner group achieve its long-term aspirations ● identification of opportunities and pathways for renewable energy infrastructure developments and facilities for generating hydrogen as a means for achieving other outcomes for Traditional Owners, including energy security and energy access, environmental stewardship and cultural heritage protection. <p><u><i>Decision-making about the declaration of REPAs</i></u></p>

Issue	Questions	First Nations Clean Energy Network response
		<p>In relation to the determination of REPAs and the joint decision-making of native title holders, the FNCEN considers that the Act:</p> <ul style="list-style-type: none"> ● must be clear as to the process for engagement and consultation with native title holder and other Aboriginal people, including timeframes, for declaration of REPAs ● must ensure that native title holders and their representative institutions are properly resourced and equipped to make free, prior and informed decisions about REPAs ● must be clear as to the role and status of native title holders as co-decision makers, more specifically: <ul style="list-style-type: none"> ○ establish that native title holders be afforded genuine free, prior and informed consent about the declaration of REPAs ○ provide that if consent is withheld by native title holders, that the Minister administering the Act and the Minister administering the Pastoral Land Management and Conservation Act are not able to override or otherwise the decision of native title holders to withhold consent. <p><i>Factors for consideration in identifying REPAs</i></p> <p>The FNCEN considers that the following factors should also be considered when identifying REPAs:</p> <ul style="list-style-type: none"> ● the ability of the REPA (and of renewable energy infrastructure developments and facilities for generating hydrogen) to support the aspirations of the Traditional Owners as set out in their Renewable Energy Country Plan.

Issue	Questions	First Nations Clean Energy Network response
		<p><u>Native title and REFAs</u></p> <p>The FNCEN understands that the declaration of a REFA to essentially be a land planning and management tool.</p> <p>Accordingly, it is the FNCEN’s view that the free, prior and informed consent of Traditional Owners (and the negotiation of Indigenous Land Use Agreements (ILUA) and other processes relating to future acts under the <i>Native Title Act</i>) would still be required for licences to be granted to proponents (see further our responses under Issue 8, below).</p>
<p>Issue 4: Renewable energy projects</p> <p>Renewable energy projects intended to be covered in the proposed Act will include energy generated from:</p> <ul style="list-style-type: none"> ● wind ● solar ● wave energy ● biomass ● microalgae ● energy storage technologies ● all activities incidental to renewable energy generation, such as battery storage, associated facilities and infrastructure, other than those exempted as stipulated in the following section in this paper ● any other activity that generates renewable energy as defined by this Act. 	<p><i>What other forms of renewable energy should be covered in this Act</i></p>	
<p>Issue 5: What is not covered</p> <p>The Hydrogen and Renewable Energy Act will not cover:</p>	<p><i>What other renewable energy activities or resources should not be covered in this Act?</i></p>	<p>The FNCEN considers that the ability for the Minister to exempt projects on a case by case basis is a discretionary power that must be carefully defined and restricted to very discrete circumstances.</p>

Issue	Questions	First Nations Clean Energy Network response
<ul style="list-style-type: none"> • electricity generation licensing regime under the Electricity Act, which is administered by the Essential Services Commission of South Australia • renewable energy generation projects that may be exempted by the Minister administering the Act on a case by case basis. The Hydrogen and Renewable Energy Act is not intended to regulate smaller scale, localised renewable energy projects. • power transmission lines associated with the national and local electricity grids • power stations • transmission pipelines (already licenced under the Petroleum and Geothermal Energy Act), vehicle or any other form of transportation of hydrogen (including maritime vessels) • renewable energy from geothermal sources • underground geological storage of hydrogen – this will be licenced under the Petroleum and Geothermal Energy Act 	<p><i>Should a minimum threshold be applied to electricity generated for renewable energy projects that would require licensing under the proposed Hydrogen and Renewable Energy Act? If so, what nameplate capacity in mega-watts electric (MWe) is appropriate?</i></p> <p><i>Should any exemption for licensing under the Hydrogen and Renewable Energy Act be solely left to the discretion of the Minister administering the Act? If so, what should the Minister take into consideration when exercising such discretion?</i></p>	<p>For example, the FNCEN would consider it a perverse outcome if renewable energy infrastructure developments solely associated with or ancillary to mining activities were able to somehow be exempted from the Act (and the mutually beneficial regime and planning processes the FNCEN is proposing for Traditional Owners and the State).</p> <p>FNCEN is concerned that the proposed Ministerial discretion and exemptions will encourage proponents to avoid the Act, and pressure the Minister to approve alternate processes. There should be a Ministerial obligation to ensure the environmental, and human rights benchmarks are applied to any exemption.</p> <p>More detail about the case-by-case exemptions that are being considered is necessary to fully respond on this point.</p>
<p>Issue 6: Hydrogen generation</p> <p>The following definition is proposed:</p> <p>‘...generating hydrogen includes any operation or process by which hydrogen is generated, such as—</p>	<p><i>Is this definition for hydrogen generation fit for purpose?</i></p>	

Issue	Questions	First Nations Clean Energy Network response
<p>a. Electrolysis; or b. Steam methane reformation; but does not include— c. Operations for the recovery of hydrogen from the ground, licenced under the Petroleum and Geothermal Energy Act 2000; or d. Operations or a process of a kind excluded from the ambit of this definition by the regulations to be established under the Hydrogen and Renewable Energy Act.</p> <p>Incidental activities</p> <p>Furthermore, a reference to a regulated activity for the generation of hydrogen includes all operations and activities reasonably necessary for, or incidental to, that activity such as (for example)—</p> <p>a. constructing, operating, maintaining, modifying or decommissioning a facility b. surface storage c. water treatment and disposal d. processing and converting of hydrogen into any form for the explicit purpose of transportation and/or distribution (such as ammonia or liquid organic hydrogen carriers such as methylcyclohexane).</p>		
<p>Issue 7: Hydrogen generation activities excluded from Act</p> <p>It is proposed that the Act only include hydrogen generated for a prescribed commercial purpose and not hydrogen generated at the domestic level or as part of research or pilot testing equipment or new technologies.</p> <p>The following definition of a “prescribed commercial purpose” is proposed:</p> <p>Generating hydrogen for a prescribed commercial purpose means generating hydrogen—</p>	<p><i>Is this inclusion and exclusion from the ambit of the proposed Act for hydrogen generation still fit for purpose?</i></p>	

Issue	Questions	First Nations Clean Energy Network response
<p>a. for the purposes of export; or b. for use in manufacturing; or c. for wholesale distribution; or d. as part of a process of generating electricity for sale or supply to customers; or e. for any other purpose prescribed by the regulations for the purposes of this definition, but does not include— f. generating hydrogen for the purpose of research or pilot testing; or g. generating hydrogen for a purpose excluded from the ambit of this definition by the regulations</p>		
<p>Issue 8: Renewable Energy Feasibility Licence</p> <p>The primary purpose of a REFL is to provide access to relevant land to undertake approved testing and evaluation programs to establish an understanding of the relevant renewable energy resource.</p> <p>A REFL will be granted:</p> <ul style="list-style-type: none"> ● through a competitive acreage release process for REPAs ● for a term determined by the Minister administering the Act, aimed to prevent land banking and ensure projects progress to the next stage ● with a defined size of licence area ● on the basis of work program and against published criteria: <ul style="list-style-type: none"> ○ maximising understanding of one or more renewable energy resource ○ technical and financial capacity of applicant, including operational capability ○ business model or plan of applicant and how it serves the state’s renewable energy objectives 	<p><i>Should such a licensing process only apply to Renewable Energy Priority Areas (REPAs), or should there be a provision to allow for such licences to be granted elsewhere outside REPAs?</i></p> <p><i>Should the Hydrogen and Renewable Energy Act be more specific regarding the maximum size of REFL areas?</i></p> <p><i>Should a specific minimum or maximum term for REFLs be specified in the Hydrogen and Renewable Energy Act, and if so how long?</i></p>	<p><u>Developing a licencing regime in the Act for renewable energy infrastructure developments and facilities for generating hydrogen that incorporates principles of free, prior and informed consent</u></p> <p>As noted above in our response to Issue 3, the FNCEN considers that prior to the declaration of a REPA (and decision-making about whether that particular area is suitable as a REPA):</p> <ul style="list-style-type: none"> ● Traditional Owners and their representative institutions must be properly resourced and equipped (in terms of skills, capability and capacity) to be able to make decisions about REPAs, and ● Traditional Owners must be supported to develop and implement a Renewable Energy Country Plan Roadmap. <p>In relation to the grant of licences within REFL for development activities, the FNCEN considers that the following principles must inform and underpin licencing scheme design in the Act:</p>

Issue	Questions	First Nations Clean Energy Network response
<ul style="list-style-type: none"> o Native Title, Aboriginal heritage and environmental matters o local economic benefit and Aboriginal procurement through an Industry Participation Plan o power supply agreements and offtake criteria, as applicable <p>After a fixed period (nominally 5 years) a portion of REFL area will need to be surrendered and made available for re-release REFL can be extended or cancelled at the discretion of the Minister.</p>	<p><i>Should such a term be subject to automatic renewal and/or extension and How should the licensee amend the conditions of the license based on technology and/or area?</i></p> <p><i>Are the proposed selection criteria sufficient for the purpose of ensuring a competitive allocation of REFLs is achieved?</i></p> <p><i>Are the above provisions for renewing and cancelling the REFLs appropriate for the purpose of ensuring that the natural renewable energy resource(s) within a relevant REPA will be effectively and efficiently developed?</i></p> <p><i>Is there support for a fit for purpose financial assurance requirement at the licensing stage?</i></p>	<ol style="list-style-type: none"> 1. Traditional Owners must be afforded the right to participate in decision-making for the grant of any licence under the Act 2. Licences under the Act must not be granted unless Traditional Owners have given their free, prior and informed consent to the grant of that licence. 3. Traditional Owners must be given a first right of refusal to apply for a licence under the Act before any other proponent <p>The FNCEN considers that these principles could be made operational in the Act in the following manner:</p> <ol style="list-style-type: none"> 1. The Act must recognise Traditional Owners as a party who must give their free, prior and informed consent for the Minister to grant a proponent a licence 2. The Act must require that Traditional Owners have a first right of refusal to apply for a licence 3. The Act must require that a proponent address the following criteria in the application process (in addition to the proposed published criteria listed): <ol style="list-style-type: none"> a. the extent of ownership of the applicant (and the applicant's related entities) by Traditional Owners b. the applicant's history of engaging with First Nations c. the applicant's capability to engage respectfully with First Nations d. the applicant's proposed approach for engaging with Traditional Owners and seeking the free, prior

Issue	Questions	First Nations Clean Energy Network response
		<p>and informed consent of Traditional Owners to the grant of the licence</p> <ul style="list-style-type: none"> e. the applicant’s proposed approach for partnering with Traditional Owners through the life of the project f. the applicant’s proposed approach for benefit sharing with Traditional Owners g. the applicant’s targets and objectives for Aboriginal participation in the project and how these will be achieved <p>4. The Act must require that a Minister, in making a decision about whether to grant a licence under the Act, <i>must</i> (i.e. it is not a discretionary matter) consider an applicant’s responses against the criteria listed above under number 3, as well as the other proposed criteria (relating to Native Title, Aboriginal heritage and Aboriginal procurement).</p> <p><u>Native title, negotiations and free, prior and informed consent of Traditional Owners for the grant of a licence under the Act</u></p> <p>As noted above, the FNCEN considers that a principle of the Act must be that the free, prior and informed consent of Traditional Owners is given for a licence to be granted under the Act.</p> <p>For Traditional Owners to be able to properly engage and participate in processes under the Act, and prior to discussions and negotiations for the grant of any licence under the Act, Traditional Owners must be properly resourced and equipped (in terms of skills, capability and capacity) to engage in genuine and informed discussions and negotiations about the grant of licences.</p>

Issue	Questions	First Nations Clean Energy Network response
		<p>The FNCEN considers that the grant of a licence under the Act will be a future act for the purposes of the <i>Native Title Act</i> and will require the negotiation of an ILUA. The Act should accordingly make clear:</p> <ul style="list-style-type: none"> ● that a licence must not be granted by the Minister unless an ILUA has been registered pursuant to Subdivision E of Division 3 of the <i>Native Title Act</i> ● the processes that will apply in the event that parties are unable to conclude an ILUA (and not leave it to subordinate legislation or policy) ● that the South Australian Government will not exercise powers of compulsory acquisition if an ILUA is unable to be concluded for the grant of a licence, except in exceptional circumstances ● that breach of the terms of an ILUA by a proponent will lead to termination of a licence. <p><u>A general comment on REFLs</u></p> <p>The proposed Act's process allows proponents to lock up areas subject to work plans which there is no detail on in the Issues paper. This essentially provides a monopoly asset to proponents who may back load the benefits, and tender competitively.</p> <p>To ensure that only proponents who intend to develop rather than prospect and onsell, the South Australian Government needs to carefully prioritise the assessment process, and apply penalty transactional costs for any 'flipping' of licences.</p> <p>FNCEN point to clear data across mining and infrastructure projects where ILUAs have been negotiated and not implemented and</p>

Issue	Questions	First Nations Clean Energy Network response
		<p>the lack of any compliance enforcement, or transactional costs of non-compliance. Such provisions are expressly forbidden during negotiations.</p>
<p>Issue 9: Renewable Energy Infrastructure Licence (REIL)</p> <p>The primary purpose of a REIL is to provide necessary land tenure to construct, operate, maintain and undertake all incidental activities necessary for generating renewable energy.</p> <p>Components of a REIL:</p> <ul style="list-style-type: none"> intended for commercial scale renewable energy projects automatic right for the holder of the REFL (above) over the same area to apply for a REIL subject to satisfying selection criteria grant of REIL will be based on the pre-requisite REFL including technology, design and commercial feasibility size of a REIL to be determined by the Minister 30-year terms with renewal provision (to include construction, operations and decommissioning). Ministerial power to revoke a licence 	<p><i>Should the Hydrogen and Renewable Energy Act be more specific regarding the maximum size of REIL areas, or leave it to the Minister's discretion on a case-by-case basis?</i></p> <p><i>Are the issues specified above, which the selection criteria must address, sufficient to ensure a competitive allocation of REILs is achieved?</i></p> <p><i>Should a specific minimum term for REILs be stated in the Hydrogen and Renewable Energy Act, and if so, how long? Should such a term be subject to automatic renewal or extension after the term expires?</i></p> <p><i>Are the above provisions for renewing or extending and cancelling the REILs</i></p>	<p>The FNCEN considers that our comments and the principles outlined above for Issue 8 also apply for Issue 9.</p> <p>In relation to the proposed automatic right for the holder of the REFL to apply for a REIL, the FNCEN considers:</p> <ul style="list-style-type: none"> the Act must require an assessment of the REFL's holders' compliance with the criteria set out above under Issue 8 (including the FNCEN's additional points for the published criteria). If the REFL holder has not satisfactorily complied with the published criteria or has otherwise acted in bad faith towards Traditional Owners or Aboriginal people the automatic right to apply for a REIL should be revoked for the purposes of the <i>Native Title Act</i>, that the grant of a REIL must be decoupled from the grant of an REFL and accordingly is a further future act (that is, the grant of an REIL is a separate future act and would require the negotiation of a further ILUA (and the free, prior and informed consent of the Traditional Owners), with the principles for dealing with native title ILUAs outlined above under Issue 9 to apply) <p>In relation to the proposed automatic renewal provision after an initial 30 year term, the FNCEN considers:</p> <ul style="list-style-type: none"> native title holders should be provided the right to renegotiate prior to such renewal being granted. This will align the interests of the State, and native title holders.

Issue	Questions	First Nations Clean Energy Network response
	<p><i>appropriate for ensuring that the renewable energy resource(s) within a relevant Renewable Energy Priority Area will be effectively and efficiently developed?</i></p>	
<p>Issue 10: Hydrogen Generation Licence (HGL)</p> <p>A HGL will authorise the licensee to —</p> <ul style="list-style-type: none"> • establish and operate a site, which must not exceed 5 km² in area, at a location specified in the licence for the purposes of generating hydrogen for a prescribed commercial purpose; and • establish and operate facilities and systems associated with generating hydrogen for a prescribed commercial purpose; and • undertake any other activities that may be associated with, relevant or incidental to, generating hydrogen for a prescribed commercial purpose • A HGL will be granted for a term determined by the Minister who also has the power to extend or cancel a HGL. • An HGL licensee will be required to acquire an interest in the land over which the HGL applies eg. an easement, land purchase or lease. 	<p><i>Should the maximum size of HGL area be greater than 5 km², or leave it to the Minister’s discretion on a case-by-case basis to determine the size?</i></p> <p><i>Should a minimum term be assigned to a HGL, or should it be left to the Minister’s discretion as currently proposed?</i></p>	<p>The FNCEN considers that our comments and the principles outlined above for Issue 8 and Issue 9 also apply for Issue 10.</p>
<p>Issue 11: Other licences</p> <p>Associated Activity Licence (AAL)</p>	<p><i>Is there a requirement or support for an Associated Activity Licence for renewable energy or hydrogen generation?</i></p>	<p>The FNCEN considers that the grant of each AAL and other miscellaneous licences proposed under the Act should require a separate agreement with Traditional Owners to enable the valid grant of that licence for the purposes of the <i>Native Title Act</i>.</p>

Issue	Questions	First Nations Clean Energy Network response
<p>Licence to allow licensee to construct any facilities, any other infrastructure or undertake any activities which are related or incidental to the primary purpose of the above licence categories.</p> <p>Eg for a REIL, the construction, operation and maintenance of batteries to store the electricity should it not be possible to house such a facility within the REIL area.</p> <p>Research and demonstration licence (pre-feasibility)</p> <p>An additional licence type is proposed for research and development of renewable energy and hydrogen technologies, which would:</p> <ul style="list-style-type: none"> authorise research, testing and data collection for renewable energy technologies be granted through direct application be granted for a fixed term (& possible extension) be granted anywhere within the state and not limited to Renewable Energy Priority Areas and may overlap existing licences 	<p><i>Is there a requirement or support for a Research and Demonstration Licence for renewable energy or hydrogen generation?</i></p>	<p>The FNCEN considers that our comments and the principles outlined above for Issue 8 and Issue 9 also apply for the grant of AALs or other miscellaneous licences proposed under the Act.</p>
<p>Issue 12: Environmental impact assessment process (Stage 2)</p> <p>The licensee must then undertake an environmental and social impact assessment of its proposed activities under the relevant granted licence(s).</p> <p>Under the new regulatory framework, it is proposed the planning assessment and consent process under the Planning, Development and Infrastructure Act will continue to apply and it is proposed that the output of that process will feed into the Hydrogen and Renewable Energy Act approval and compliance requirements.</p>	<p><i>Are there any comments regarding the proposal to continue with the current environmental impact assessment process called for under the planning consent provisions of the Planning, Development and Infrastructure Act?</i></p> <p><i>Are there circumstances where a different approach to environment impact assessment is required,</i></p>	<p>The FNCEN considers that where EIS requirements in the <i>Planning, Development and Infrastructure Act</i> are triggered by activities under the proposed Hydrogen and Renewable Energy Act that, for the purposes of s 113 of the <i>Planning, Development and Infrastructure Act</i>:</p> <ul style="list-style-type: none"> • Traditional Owners and their representative entities must be considered (kseparately) as a “prescribed authority” / “prescribed body” (s 113(5)) for their comment and report. <p>The recent case <i>Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)</i> [2022] FCA 1121 highlights the importance of proper and meaningful engagement with Traditional Owners and Aboriginal stakeholders during the EIS process. Ensuring that there is proper and meaningful engagement designed into the EIS</p>

Issue	Questions	First Nations Clean Energy Network response
	<i>for example precinct development? What could this approach look like</i>	process (and that regulators ensure this requirement is met) will minimise project and reputational risk.
<p>Issue 13: On-ground activity approvals (Stage 3)</p> <p>The final approval stage requires a licensee to apply to the Minister administering the Act for approval to commence on-ground activities.</p> <p>The licensee must demonstrate how the proposed activities will be deployed that the planning consent conditions will be achieved and how it will engage and address any landholder concerns.</p>	<i>Are there any comments regarding proposed activity notification process?</i>	The FNCEN considers at this point that the licensee should also be required to address any concerns from Traditional Owners and other Aboriginal groups.
<p>Issue 14: Land within a REPA</p> <p>There will continue to be requirements for an applicant for a licence to enter into access agreements with the pastoral lessee, and the holder of a resources tenement. Under the framework, an owner of the land will be defined as any person who holds an interest, estate, licence, lease or tenement over the land, including Native Title.</p> <p>All owners of land will have rights under the Hydrogen and Renewable Energy Act including:</p> <ul style="list-style-type: none"> ● notification before entry to land ● dispute resolution processes, with Ministerial powers for mediation and resolution, or for passing to Warden’s Court or Environment, Resources and Development Court ● compensation for deprivation, impairment, damage or consequential loss of use of the land. 	<i>Are there any changes or inclusions to the above provisions for entry to land within a REPA and Hydrogen and Renewable Energy Act landowner rights?</i>	<p>In responding to Issue 14, the FNCEN notes our comments above about:</p> <ul style="list-style-type: none"> ● ensuring that Traditional Owners and their representative entities are properly resourced and equipped to undertake discussions and negotiations ● that Traditional Owners are supported and resourced to develop Renewable Energy Country Plan Roadmap ● the need for free, prior and informed consent in the licencing process and negotiation of ILUAs. <p>Additionally, we consider that the Act should make clear the dispute resolution processes and powers of the South Australian Government (and when and how they will be exercised) in the event that the terms of access agreements cannot be negotiated.</p>

Issue	Questions	First Nations Clean Energy Network response
<p>Issue 15: Freehold land</p> <p>There will be no changes to the rights held by owners of freehold land. Owners of freehold land will continue to determine access to the use of their land at their discretion, and any competition will be managed by the landowner and not the state.</p> <p>The Act will require a proponent who applies for a licence (REFL, REIL and HGL) over freehold land to acquire an interest in that land, either by purchasing the land or by access agreement with the freehold landowner.</p>	<p><i>Is it agreed that rights of freehold landowners are preserved for access to their land as above?</i></p> <p><i>How could traditional owners benefit from development on freehold land?</i></p>	<p>The FNCEN considers that there are range of mechanisms that could be deployed for Traditional Owners and Aboriginal people to benefit from development on freehold land.</p> <p>These include:</p> <ul style="list-style-type: none"> ● requiring applicants for the grant of REFL, REIL and HGL (and other licences that may be granted on freehold land under the Act) to address the criteria we have set out in Issue 8, i.e.: <ul style="list-style-type: none"> ○ the extent of ownership of the applicant (and the applicant’s related entities) by Traditional Owners ○ the applicant’s history of engaging with First Nations ○ the applicant’s capability to engage respectfully with First Nations ○ the applicant’s proposed approach for engaging with Traditional Owners including as to benefit sharing ○ the applicant’s proposed approach for partnering with Traditional Owners through the life of the project ○ the applicant’s proposed approach for benefit sharing with Traditional Owners ○ the applicant’s targets and objectives for Aboriginal participation in the project and how these will be achieved ● additionally requiring the applicant to address the other proposed published criteria for the grant of an REFL, i.e.:

Issue	Questions	First Nations Clean Energy Network response
		<ul style="list-style-type: none"> o Aboriginal heritage and environmental matters o Aboriginal procurement through an Industry Participation Plan <p>As noted above in our response to Issue 8, the FNCEN considers that The Act must require that a Minister, in making a decision about whether to grant a licence under the Act, <i>must</i> (i.e. it is not a discretionary matter) consider an applicant’s responses against the criteria listed above.</p> <p>The FNCEN also considers that licencees should be required to report as to their compliance with the published criteria, and that satisfactory compliance with the published criteria should be a factor as to whether a REFL holder is able to apply for a REIL.</p>
<p>Issue 16: Native Title</p> <p>Court determinations have confirmed the existence of Native Title in relation to most pastoral land in South Australia.</p> <p>It is understood that a Native Title agreement in the form of an Indigenous Land Use Agreement between the Native Title party, government and the company will apply.</p>		<p>The FNCEN agrees that ILUAs will be required to be concluded for interests granted under the Act to be valid.</p> <p>As set out in our responses to Issue 8 – 11, the Act must make clear:</p> <ul style="list-style-type: none"> ● that a licence must not be granted by the Minister unless an ILUA has been registered pursuant to Subdivision E of Division 3 of the <i>Native Title Act</i> ● about the processes that will apply in the event that parties are unable to conclude an ILUA (and not leave it to subordinate legislation or policy) ● that the South Australian Government will not exercise powers of compulsory acquisition if an ILUA is unable to be concluded for the grant of a licence, except in exceptional circumstances

Issue	Questions	First Nations Clean Energy Network response
		<ul style="list-style-type: none"> that breach of the terms of an ILUA by a proponent will lead to termination of a licence.
<p>Issue 17: Data reporting</p> <p>Renewable energy</p> <p>For a Renewable Energy Feasibility Licence, it is proposed that:</p> <ul style="list-style-type: none"> a licensee will be required to submit monthly reports to the state government of daily energy generation (such as mega-watt-hours, MWhr) For wind farms, it is proposed to provide generation data and wind speed data for each wind turbine the state government will hold this data confidentially for six months before public release. <p>Hydrogen</p> <p>It is proposed that a licensee who generates hydrogen be required to submit monthly reports to the state government of daily hydrogen generation volumes (such as kilograms). The state government will hold this data confidentially for six months before public release.</p> <p>Other technical reports</p> <p>It is proposed that a licensee under the Act who prepares any other technical report in connection with an activity conducted under the licence furnish a copy of that report to the state government within two months. Non-interpretive analytical data and field survey data will be released publicly after a confidentiality period of two years.</p>	<p><i>Are the data types, data levels and submission timeframes suitable?</i></p> <p><i>Are there any further data that should be reported to the state government?</i></p> <p><i>Is a six-month confidentiality period before public release of reported data suitable?</i></p>	

Issue	Questions	First Nations Clean Energy Network response
<p>Issue 18: Fees, charges and benefit sharing</p> <p>Licensees will be required to pay appropriate licence fees and charges to recover the cost of services including services from co-regulatory agencies.</p> <p>Licence fees will be required annually and for individual transactions. Amounts will be prescribed in regulations and consulted on.</p> <p>Rent</p> <p>An annual rent will be payable to the Crown for renewable generation licences over government-owned land and will be determined by the area of the land and in accordance with the Valuation of Land Act 1971.</p> <p>From the annual rent, it is proposed that payments will be made to the Pastoral Land Management Fund.</p> <p>The government will work with the Office of the Valuer-General to commission scenario modelling on the associated liabilities arising from the application of land-use codes.</p> <p>Benefit sharing</p> <p>a mechanism will be developed to share the future benefit of the value associated with access to natural resources within a particular area of the state.</p> <p>The mechanism will only be implemented once the industry reaches an appropriate stage of maturity where it is capable of generating a sustainable income stream.</p> <p>The mechanism will be prescribed, subject to consultation, in associated regulations.</p>	<p><i>Is there any concern regarding proposed cost recovery for government service via licence fees?</i></p> <p><i>Is there any concern regarding proposed rent for renewable energy infrastructure licences on government-owned land?</i></p> <p><i>What are the key principles that should underpin the development of a mechanism that equitably shares the benefit of the value associated with access to natural resources within a particular area of the state?</i></p> <p><i>When should the mechanism be introduced and what represents an appropriate stage of industry maturity?</i></p>	<p>The FNCEN considers that any uplift the State receives in rent or royalty payments should be shared on a legislated basis with the relevant native title co-existing landowners.</p> <p>Ideally this would be reflected as a fixed proportion by the State in recognition that only the State can issue a tenure. Additionally, the cost of negotiation for native title holders should be borne by the State, and proponents through the tender process, to ensure that equitable sharing of benefits is achieved, rather than shifting that burden to native title holders.</p> <p>The FNCEN also considers that:</p> <ul style="list-style-type: none"> the HREA should have an explicit object for a Native Title Fund (as is proposed for pastoral lease interests) for Native title holders to access to increase protection of and enhancement of native title in the REPAs. This should be a legislated percentage of the uplift in rent, contribution to licence fees, and decommissioning additional arrangements for benefit sharing and rent and payments will be dealt with in ILUAs between Traditional Owners and licensees.

Issue	Questions	First Nations Clean Energy Network response
<p>Issue 19: General provisions of the Act</p> <p>As relevant, it is proposed that all existing general provisions for exploration and production licences as under the Mining and Petroleum and Geothermal Energy Acts will also apply to these licences, including:</p> <ul style="list-style-type: none"> ● data and reporting requirements, including annual compliance reports, incident reports ● landowner rights to compensation ● landowner notifications and rights to object ● bond and security payment ● requirement for licensees to have adequate operational, technical and financial resources ● Ministerial approval requirements for registrable dealings under the various licences ● in the event of a licensee going bankrupt, the Crown has first right to any debt recovery ● consolidating powers of the Minister for multiple licences ● general requirements for operations (such as fitness-for-purpose assessments) ● Minister’s power to carry out work ● surrender, suspension or cancellation of licence ● extension of timelines for the submission of data or activity notifications and reporting requirements etc. ● extension of term or reinstatement of licence ● notice of grant etc of licence ● interference with regulated activities ● safety net provisions 	<p><i>Are there any other general provisions that should be included?</i></p>	

August 04, 2023

Pretending the water is empty may hurt offshore wind investors

The Commonwealth's offshore wind scheme makes First Nations' rights, interests and responsibilities invisible, creating enormous financial and reputational risk for investors.

Offshore wind is poised to play a critical role in Australia's energy transition.

An area has already been declared suitable off Gippsland and another off the coast of the Hunter.

Further declarations appear imminent with consultations confirming likely locations up and down the coast of New South Wales, Victoria, Tasmania, South Australia and Western Australia.

Much needed new clean energy investment is backing development.

BlackRock, the world's largest asset manager, is seeking a stake. And global developers like Shell, Equinor, Orsted, BlueFloat Energy, Iberdrola and GPG are competing with local players for feasibility licences to begin projects.

First Nations rights, interests and responsibilities in Sea Country

Beneath the swirl of excitement, proponents may be concerned a very real risk has been ignored.

For First Nations people, Sea Country is inseparable from terrestrial Country.

Just as the courts found with land, marine areas have been owned and cared for by First Nations for millenia through complex systems of responsibilities and management of rights including ownership, use, and exclusion of others.

As described in evidence by one Traditional Owner, "The earth and the sea, the water is not empty." There is an ongoing relationship with both that ethically, and legally, should not be ignored.

Australia's failure to recognise this has resulted in First Nations' relationships with Sea Country being made "invisible".

While perhaps a matter of great convenience to government, it should cause immediate concern for energy proponents.

Perpetuating the myth of *terra nullius* in Australia's offshore areas could prove costly.

Recent court case recognises 'rights holders of the sea'

A Federal Court case in December 2022 unexpectedly turned around this notion that First Nations' rights, interests and responsibilities are absent in offshore areas.

At a massive cost to Santos, that decision confirmed the company must meaningfully consult on its massive \$2.4 billion Barossa gas project with the Munupi clan from Tiwi Islands - the rights holders of the sea in that area.

As in the Munupi 'sea' case, south-western Victoria's Gunditjmara people had to prove a "special interest" in their own Country in their High Court 'land' case against Alcoa of Australia. They also won.

Although Australia's systems of law and policy still requires First Nations – who have been here for 65,000 years – to go to Court to prove a special interest in land or sea, just like Munupi did, this case and others should offer pause to offshore wind proponents and investors aiming to reduce project risk.

The Offshore Electricity Act must be refined

Despite increasing government narratives of energy policy investment certainty, this unjust 'onus of proof' is replicated in the Federal government's legislative scheme for offshore wind.

The Offshore Electricity Act 2021 conveniently maintains the invisibility of First Nations' rights, interests and responsibilities in Sea Country, perpetuating the myth of *terra nullius*.

Declarations to thousands of kilometres of Sea Country can be made without a requirement to engage with the Traditional Owners for these areas.

Similarly, the Act and regulations are silent on the role of Traditional Owners in the granting of feasibility and commercial licences, or in embedding Traditional Owners in processes or decisions.

This is short-termism.

Perpetuating *terra nullius* in Sea Country will create investor risk and uncertainty and a higher likelihood of legal contestation, delay and dispute for offshore wind projects over their operating life.

This isn't what investors and proponents want as they enter Australian waters.

Capital demands certainty and risk needs to be minimised at every point. Yet the Australian government has silenced the very people who can provide this.

Governments must design rules that include First Nations and mandate Free, Prior and Informed Consent to decrease risk, delay and uncertainty

Australia's legislative and policy systems that set the rules for engagement with First Nations are outdated by global standards.

They were formed either in an atmosphere of concocted hysteria following Mabo, Wik and the 10-point plan, or worse, in a by-gone era when First Nations' culture and accompanying rights, interests and responsibilities were conveniently made invisible and so rendered silent.

These old rules and old ways don't meet the needs of stakeholders.

Like the Munupi, Indigenous people across the globe are moving beyond minimal corporate social responsibility and tokenistic consultations to demand a new realism.

First Nations people are no longer just the passive hosts of projects or a mere regulatory hurdle to be jumped over as quickly as possible.

Promising jobs or business opportunities as the only benefit flowing from projects doesn't cut it anymore.

Proponents know this. Risk conscious financiers are increasingly insisting on the need for FPIC engagement.

Stalled progress on a variety of projects attest to the growing urgency of including Free Prior and Informed Consent (FPIC) rights in Australian legislation, and, if consent is given, to fully include First Nations in the early planning, design, execution and management of projects.

Doing so is not some utopian wish.

Rather, proper process makes sound, practical business sense for energy investors.

It will *decrease* uncertainty and project risk resulting in a range of additional economic, environmental, social and political benefits to all parties.

The Australian Government must create investment certainty for offshore wind proponents and demonstrate that perpetuating the myth of *terra nullius* is no longer adequate or appropriate.

In the emerging new zero-carbon economy, rules that render the rights, interests and inherent responsibilities of First Nations people invisible will not work effectively for anyone.

Investors beware.

By Jonathan Kneebone, First Nations Clean Energy Network

This article first appeared in [Renew Economy](#).

Additional reading

- [Summary of key legislation applying to offshore renewable development areas](#)



[offshore wind](#) [water rights](#) [sea rights](#) [investors](#) [Terra nullius](#)



OUR STORY

WHAT WE STAND FOR
WHO WE ARE
NETWORK PRIORITIES
ENDORSEMENTS

NEWS

CONTACT US

PRIVACY POLICY

TAKE ACTION

JOIN US
MEMBERSHIP
DONATE
CURRENT VACANCIES

TOOL KIT

BEST PRACTICE
NETWORK GUIDES
SUBMISSIONS
FINANCE AND FUNDING OPPORTUNITIES
POLICY OPPORTUNITIES AND BARRIERS
JOBS PATHWAY
INITIATIVE

Wherever you are, we pay respects to our Elders who have fought for the rights of our people for generations. We acknowledge the Traditional Owners who, for time immemorial, have cared for our Country. We have never ceded sovereignty. We are still here.

Original artwork by Beth Sometimes, Mparntwe-Alice Springs artist.

CAMPAÑA! theme by Code Nation on NationBuilder