Blueprint for Aboriginal benefits realisation in the Beetaloo Region

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Contents

Acknowledgements and disclaimers

The Blueprint for Indigenous Benefits realisation in the Beetaloo Region was commissioned by the National Indigenous Australians Agency (NIAA). It was written and researched by s22(1) .

s22(1) gratefully acknowledges the assistance and support provided by NIAA, particularly by s22(1) and s22(1) .

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Free, prior and informed consent (FPIC) is an international human rights standard. FPIC describes a process by which Indigenous peoples are informed about an action that will affect them and give their free consent to that action before the action is taken; the consent requirement is subject to exceptions in certain circumstances. We note that the Australian Government recognises the importance of engaging in good faith with Indigenous peoples in relation to decisions that affect them and makes efforts to consult in line with the principles of FPIC. However, the concept of FPIC does not reflect an obligation under Australian law. The scope and content of FPIC is not entirely settled at international law and is still subject to debate in international fora.

We acknowledge Aboriginal and/or Torres Strait Islander peoples as the Traditional Custodians of our land and its waters. s22(1) wishes to pay its respects to Elders, past and present, and to the youth, for the future. We extend this to all Aboriginal and/or Torres Strait Islander peoples reading this report.

The terms 'Aboriginal and Torres Strait Islander', 'Aboriginal and/or Torres Strait Islander', 'Aboriginal' and 'Indigenous' may be used interchangeably throughout this document. Through the use of these terminologies, we seek to acknowledge and honour diversity, shared knowledge and experiences as well as the right of stakeholders to define their own identities.

Executive summary

Maximising regional benefits from private investment in onshore gas projects in the Beetaloo Sub-basin in the Northern Territory (NT) is a core objective of the Australian and NT governments. The National Indigenous Australians Agency (NIAA) has partnered with s22(1) to develop a blueprint for maximising social and economic benefits to Indigenous rights and interests holders across the Beetaloo Sub-basin. This Blueprint aligns with the 2020 National Agreement on Closing the Gap, which centres on 4 Priority Reforms that aim to change the way governments work with Aboriginal and Torres Strait Islander people and communities.

The Blueprint sets out the conditions conducive to strong land-access and benefit-sharing agreements pursuant to the *Native Title Act 1993* (Cth) (NTA) and the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth) (ALRA). Agreement making between Traditional Owners, native title holders and resource companies over access to land has burgeoned over the past 30 years, particularly following the enactment of the NTA. 'Agreement making' is a broad term that includes everything from initial consultations with Aboriginal people about a project, to concluding a contractual agreement, to the implementation of that agreement. Almost always, Traditional Owners and native title holders are at a disadvantage to the companies with which they are negotiating. This report outlines the 4 factors (political/strategic power, legal rights, ethos of the companies involved, economics of the project) that are most often associated with strong benefit-sharing agreements, the most influential of which is the political/strategic power of Traditional Owners and native title holders.

Research shows that even where strong agreements are negotiated, the benefits for resident Indigenous populations can still be decidedly mixed. The Blueprint examines each of the 4 factors against information relevant to the Beetaloo Sub-basin to give a preliminary assessment of whether conditions in the Beetaloo Sub-basin are currently conducive to Traditional Owners and native title holders being able to negotiate strong agreements with unconventional gas companies. We find that the current conditions are not conducive to strong agreements being negotiated.

Among a range of observations emerging from this assessment are that Traditional Owners and native title holders have limited political and strategic capacity in the Beetaloo Sub-basin.

- The population of the sub-basin is sparse and widely distributed, with small-scale and informal corporate representative structures existing within the sub-basin.
- There is limited community information and knowledge about the impact of resource development in the sub-basin. There is a risk that companies in the Beetaloo Sub-basin will not commit to principles of corporate social responsibility in relation to Aboriginal people.
- The legislative framework operating in the Beetaloo Sub-basin does not favour Aboriginal interests.
- Most of the land within the sub-basin is held by Traditional Owners pursuant to native title, with only a small amount of ALRA land. The NTA does not require informed consent or provide native title holders with a power of veto over resource development.

Furthermore, the assessment observes that the economic benefit of the project is uncertain and variable. Some reports suggest that resource development in the sub-basin is a globally significant economic development opportunity, while the Senate Inquiry found that the economic case for gas exploration in the Beetaloo Sub-basin appears to be based on overly optimistic assumptions and unrealistic modelling (some of these permits were granted up to 15 years ago).

The Blueprint proceeds to set out leverage points for governments in relation to approvals and other decisions that are required to develop unconventional gas in the Beetaloo Sub-basin. They include the use of existing legislation including the *Petroleum Act 1984* (NT) (Petroleum Act), the NTA and the ALRA, together with practical strategies to support legislative leverage.

These strategies include strengthening agreement-making processes and resourcing Prescribed Body Corporates, Native Title Representative Bodies and Land Councils to be able to perform their functions and meet their obligations. Governments can actively require free, prior and informed consent (FPIC). The Blueprint recommends that governments require that all agreements with Traditional Owners and native title claimants and holders for the Beetaloo Sub-basin meet the standard of being strong or very strong according to the O'Faircheallaigh criteria and that an independent panel should be established to undertake verification of agreements.

The Blueprint describes the range of choices for benefits realisation available to Traditional Owner groups and communities within the region affected by the development of resources in the Beetaloo Sub-basin. Each option is subject to land tenure considerations. It is important to note that pastoral leases in place over ALRA or native title land may limit what can be done on that land, or parts of that land, to a certain extent. However, these limits are imposed not by a land-access and benefit-sharing agreement but by the specific tenure arrangements of each parcel of land, including any native title or land rights determination in place. During the agreement-making process, it is incumbent on lawyers for all parties to work out what is legally permissible for each part of the land in question.

The Blueprint concludes with a description of key principles and processes that strengthen the ability of the benefits realisation work to achieve its objectives. They include approaches to engaging critical stakeholders in ways that build and strengthen relationships, supporting effective governance, securing a range of education and training pathways and setting up reflexive and ongoing mechanisms for monitoring, evaluation and learning.

1 Background

1.1 Purpose

Maximising regional benefits is a core objective of Australian and Northern Territory (NT) governments' support for development from private investment in onshore gas projects in the Beetaloo Sub-basin, between Katherine and Tennant Creek in the NT. The National Indigenous Australians Agency (NIAA) has partnered with s22(1) to develop a blueprint for maximising social and economic benefits to Indigenous rights and interests holders (across mixed land tenure) across the Beetaloo Sub-basin.

This Blueprint aligns with the 2020 National Agreement on Closing the Gap, which centres on 4 Priority Reforms that aim to change the way governments work with Aboriginal and Torres Strait Islander people and communities. The Priority Reforms have been directly informed by Aboriginal and Torres Strait Islander people and indicate systematic changes needed to improve the life expectancy and health of their population. Focusing on the implementation of these reforms when working with the Aboriginal people of the Beetaloo Sub-basin is therefore a strategy that stands to produce valuable benefits for local people regardless of onshore gas development in the region.

The Priority Reforms aim to:

1	2	3	4
Strengthen and establish formal partnerships and shared decision-making	Build the Aboriginal and Torres Strait Islander community-controlled sector	Transform government organisations so they work better for Aboriginal and Torres Strait Islander people	Improve and share access to data and information to enable Aboriginal and Torres Strait Islander communities to make informed decisions

The aim of this Blueprint is to identify the potential leverage points in land use agreement processes under the different land tenure arrangements for Indigenous rights and interests holders to maximise Indigenous benefits from private investment in the Beetaloo Region. The process includes identifying potential government leverage points that could be enhanced or used for greater Indigenous benefit.

This Blueprint is designed to support efforts to ensure that Aboriginal people are best placed to benefit from the development of energy and resource projects in the sub-basin corridor between Katherine and Tennant Creek.

s22(1) recommends that this Blueprint be used in conjunction with the Remote Community Mining Toolkit,[1] which provides a more comprehensive guide to potential benefits throughout the life cycle of resource development, along with tools that can be used to gain the most from the resource development and case examples that show a range of approaches and opportunities.

1.2 The social and economic landscape of the Beetaloo Sub-basin

As described in the Senate Committee Interim Report of August 2021, *Oil and gas exploration and production in the Beetaloo Basin,*[2] the Beetaloo is a sub-basin in the McArthur Basin, approximately 500 km south-east of Darwin in the NT (Figure 1). The Beetaloo covers approximately 28,000 km² of the 180,000 km² McArthur Basin.

The Beetaloo and its borders are sparsely populated. Fewer than 1,500 people live in the vicinity, mostly in small communities scattered around the borders of the sub-basin. The main communities are Mataranka, Jilkminggan, Larrimah, Daly Waters, Newcastle Waters and Elliott. Other communities in the region include Katherine, Barunga, Beswick, Minyerri, Ngukurr, Dunmarra, Marlinja, Borroloola, Robinson River and Tennant Creek. As of 2016, Aboriginal people made up most of the population in all regions within the Basin area, with the Roper Gulf (85%) and Barkly (77%) regions having the highest representation in their populations.

The majority of land in the Beetaloo is used for cattle grazing and land practices, with substantial coverage by perpetual pastoral leaseholds and native title (Figure 2). The Beetaloo encompasses a number of traditional lands, including the Jawoyn, Alawa, Jingili, Walmanpa, Warumungu, Ngadji and Binbinga. There are also traditional lands directly downstream from the sub-basin.[2]

Exploration and production activities for NT onshore petroleum reserves are administered and regulated by the NT Department of Industry, Tourism and Trade. The key legislation for onshore petroleum reserves is the *Petroleum Act 1984* (NT) (the Act). The Act provides for 3 kinds of petroleum titles: exploration permits, retention licences and production licences.[2]

Exploration permits give title holders the exclusive right to explore for (but not produce) petroleum in a title area; retention licences give title holders time to work towards making a discovered resource commercially viable; and production licences give title holders the right to explore, test for and produce hydrocarbons in a title area.[2]

The Department of Industry, Science, Energy and Resources and Geoscience Australia submitted that the Beetaloo has the potential to be a world-class gas province. The Beetaloo is prospective for shale gas extraction via hydraulic fracturing and is estimated to contain significant technically recoverable unconventional petroleum resources across a number of resources.

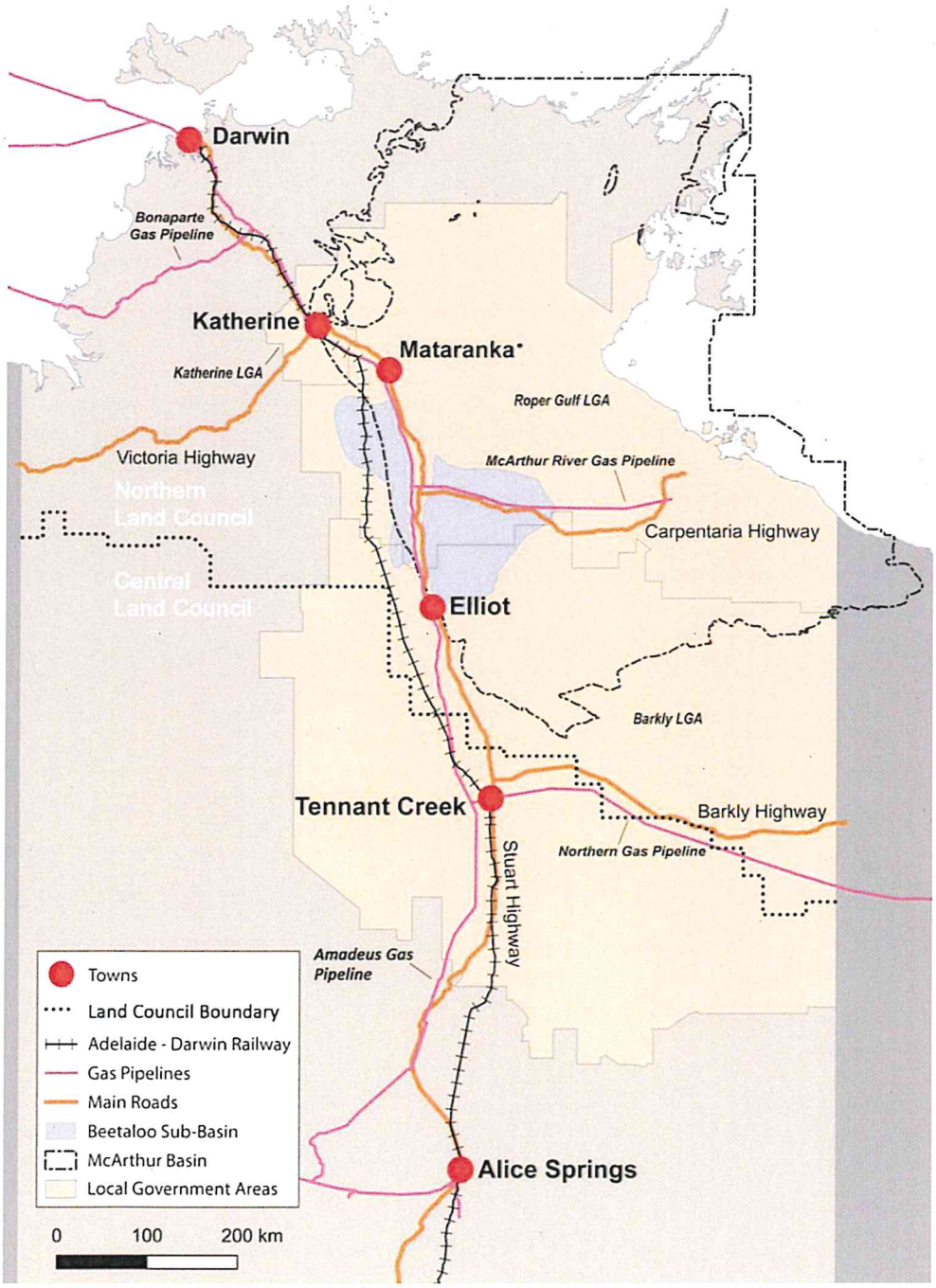

Figure 1: Location of Beetaloo Sub-basin[3]

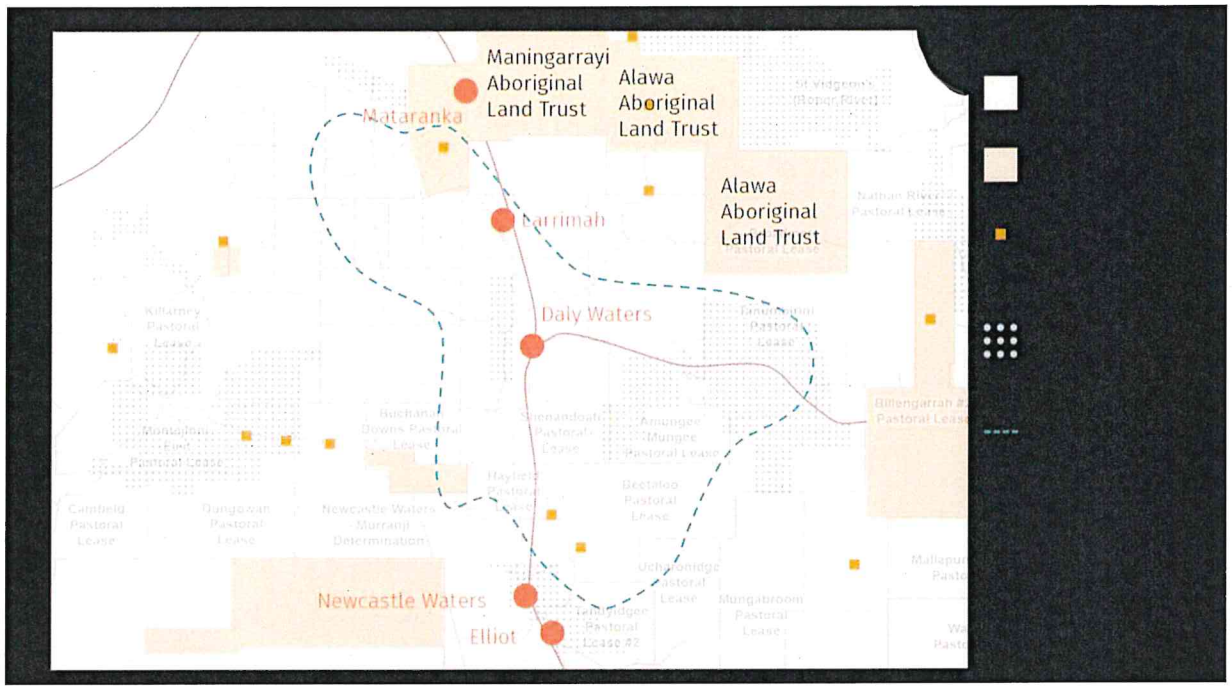

Figure 2: Beetaloo Sub-basin, Aboriginal communities and land and resource development status, including the status of mines, exploration licences and gas pipelines[4]

2 Good practice agreement making with Aboriginal people and Traditional Owners in the Beetaloo Sub-basin

2.1 Scope

This section broadly outlines:

- the conditions conducive to strong land-access and benefit-sharing agreements pursuant to the *Native Title Act 1993* (Cth) (NTA) and the *Aboriginal Land Rights (Northern Territory) 1976* (Cth) (ALRA)
- good practice for land-access and benefit-sharing agreements
- what strong land-access and benefit-sharing agreements contain
- agreement-making case studies relevant to the development of unconventional gas in the Beetaloo Sub-basin
- Given the dispersed nature of the Traditional Owner groups, suggestions for a collective approach to negotiations and examination of whether this is possible
- how governments can ensure strong land-access and benefit-sharing agreements in the Beetaloo Sub-basin
- the leverage governments have over companies to ensure a good agreement is reached
- some practical strategies to ensure this occurs.

2.2 Conditions that support strong land use and benefit-sharing agreements

This section sets out the conditions conducive to strong land-access and benefit-sharing agreements pursuant to the NTA and the ALRA. Agreement making between Traditional Owners, native title holders and resource companies over access to land has burgeoned over the past 30 years, particularly following the enactment of the NTA.

'Agreement making' is a broad term that includes everything from initial consultations with Aboriginal people about a project, to concluding a contractual agreement, to the implementation of that agreement. Almost always, Traditional Owners and native title holders are at a political, strategic, legal, financial and information disadvantage to the companies with which they are negotiating.

There are significant examples of strong agreements negotiated by politically and strategically powerful Indigenous people. There are also many examples of weak land-access and benefit-sharing agreements that leave Indigenous people worse off than they would have been without an agreement. The case studies of Browse LNG and Curtis Island LNG Indigenous Land Use Agreements (ILUAs), negotiated at the same time and resulting in very different agreements, are instructive in this regard. They are set out in section 2.5 below.

The research is very clear on the 4 primary factors that account for the wide variability seen in agreement outcomes. These 4 factors have been ascertained through many years of research into Australian and Canadian agreements, primarily in the resource extraction industry. They are:

1. **Political:** The political and strategic power of Traditional Owners and native title holders, particularly their organisational capacity, to insist that companies and governments meet their claims and obligations.
2. **Company ethos:** The ethos of the company or companies seeking to develop the resource, and how committed they are to principles of corporate social responsibility in relation to Indigenous people. The ethos of company leadership is particularly important in this regard.
3. **Legislative framework:** The legislative framework and legal rights in which the development occurs, including land-access regimes, environmental and cultural heritage regimes and whether these laws favour Aboriginal interests. The ALRA generally has stronger rights than the NTA, for example.
4. **Economics:** The economics of the project being proposed, that is, how profitable a project it is to be for the companies involved.[5]

The most influential of these factors is the political and strategic power of Traditional Owners and native title holders.

It is important to note that research has shown that even where strong agreements have been negotiated, the benefits for the resident Indigenous population can still be decidedly mixed. For example, demographer John Taylor, looking at the results of the mining boom on Indigenous communities in the Pilbara between 2001 and 2016, wrote:

> **What we see instead is a very mixed set of outcomes whereby some individuals, families and communities have clearly benefited while for others little has changed, indeed, relatively speaking, they are now invariably worse off. If pressed to allocate an approximate ratio to this observation, the general impression would be that a third of people are now economically better off and two-thirds are not.[6]**

Table 1 below examines each of these 4 factors – political and strategic power, the ethos of the company, legislative framework, economics of the project proposed – against information relevant to the Beetaloo Sub-basin from a desktop literature review (of 'grey literature') to give a preliminary assessment of whether conditions in the Beetaloo Sub-basin are currently conducive to Traditional Owners and native title holders likely being able to negotiate strong agreements with unconventional gas companies.

Table 1: Summary analysis of factors affecting the achievement of strong land use and benefit-sharing agreements in relation to conditions that exist in the Beetaloo Sub-basin

Political and strategic capacity

Traditional Owners and native title holders have limited political capacity in the Beetaloo Sub-basin. The population of the sub-basin is sparse and widely distributed,[7] with small-scale and informal corporate representative structures existing within the sub-basin.[8]

There is limited community information and knowledge about the impact of resource development in the sub-basin.[9]

Land Councils are not funded to provide technical information or expert industry advice.[10]

A range of community attitudes exist towards resource development in the sub-basin, and Land Councils are not representative of all views.[11] Some Aboriginal people within the sub-basin oppose resource development.[12]

Some perceive the consultation processes in the sub-basin as being rushed and 'top down', failing to empower or report back to existing leadership and governance structures.[13]

Ethos of companies

There is a risk that companies in the Beetaloo Sub-basin will not commit to principles of corporate social responsibility in relation to Aboriginal people.[14] Some argue that existing agreements in the sub-basin have been negotiated without free, prior and informed consent (FPIC),[15] and there has been inadequate information sharing with the community about resource development in culturally appropriate ways (e.g., no translation or interpreting).[16]

Others argue that agreement making in the sub-basin has been 'complex and opaque'.[17] Gas companies in the sub-basin have made broad statements about acting in good faith, respecting community views and ensuring information provision, but none have expressly made a public commitment to act in accordance with the principle of FPIC.[18]

One report says 'Stakeholder consultation with operators in the Beetaloo Sub-basin has confirmed extensive investment in the establishment and maintenance of a social licence to operate';[19] however, a recent report on social licence in the sub-basin found that NT residents have low trust in the extractive industries.[20]

Legislative framework

The legislative framework operating in the Beetaloo Sub-basin does not favour Aboriginal interests.[21] Most of the land within the sub-basin is subject to NTA rights and interests, with only a small amount of ALRA land. The NTA does not require informed consent or provide native title holders with a power of veto over resource development.

The ALRA provides stronger opportunities for FPIC before the grant of a petroleum exploration (but not production) licence, but there are reports (disputed by the Northern Land Council [NLC]), that consultation with communities was inadequate,[22] limited information was provided to the community and interpreters were not available.[23]

Economics of the project proposed

The economic benefit of the project is uncertain and variable. Some reports suggest that resource development in the sub-basin is a globally significant economic development opportunity,[24] securing a long-term supply of gas to the east coast of Australia.[25] The Strategic Plan for the sub-basin predicts that Beetaloo development could produce 6,000 jobs by 2040. Economic activity could increase between $18.0 billion and $36.8 billion over the same period.[26]

However, the Senate Inquiry found that the economic case for gas exploration in the Beetaloo Sub-basin appears to be based on overly optimistic assumptions and unrealistic modelling.[27] Even if resource development does bring economic development and jobs to the sub-basin, this may not significantly benefit local Aboriginal people and communities, as available jobs may not match the local skills base. There is high unemployment in the sub-basin,[28] heavy dependence on a fly-in, fly-out workforce and no existing employment on gas-related projects (although one report suggests alignment of capabilities of Aboriginal businesses in the region).[29] One report suggests that major development is likely to bring new competitors into the market that will compete to employ Aboriginal workers.[30]

Governments have invested in the Barkly Regional Deal, intended to support the economic, social and cultural future of the region.[31]

2.3 Agreement-making principles for land access and benefit sharing

Table 2 sets out a checklist for good practice agreement-making principles for developments on Indigenous peoples' land.[32] These good practice principles have been developed over almost 30 years of experience of agreement making between Traditional Owners and the mineral extraction industry, particularly in Australia and Canada.

This checklist applies to all industries and to single-company developments, joint ventures or regional planning by governments. Governments could use this checklist to gauge how development as a whole is progressing in the Beetaloo Sub-basin against good practice standards. It is important to note that these factors are more likely to be present where the 4 primary influencing factors – political and strategic power, legislative regime, company ethos and project economics – discussed above, also favour Traditional Owners and native title holders.

Table 2: Checklist for good practice agreement-making principles for developments on Indigenous peoples' land

Good practice agreement-making checklist	Presence in relevant development*
Adhering to a robust interpretation of FPIC when seeking to access and use land and resources in the Indigenous estate.	
Recognising that a company must obtain a social licence to operate that may be well above what is legally required.	
Recognising that a social licence to operate, particularly for multi-generational projects, should allow for review and renegotiation of certain clauses from time to time.	
Paying attention to the priorities of the local community.	
Ensuring that the local land holding group are fully informed about the proposal and its potential effect on them, their community and their land and resources.	
Ensuring that the land holding group are resourced to obtain qualified independent legal, scientific, business, accounting and other advice for the negotiation.	
Having all parties develop the agenda, nature and timelines of the negotiation, rather than these being determined by a company alone.	
Negotiating in a respectful manner and in good faith, while recognising the need for a robust negotiation.	
Quantifying benefits based on a 'sharing the benefit' methodology for the proposed activity, which might include ownership, equity, royalty streams and other aspects of control of the development for the relevant Indigenous groups.	
Ensuring a whole-of-company (particularly company leadership) and whole-of-lifecycle commitment to these principles, including by future owners of the project should company structure or ownership change, and that arrangements for eventual land rehabilitation are made.	
Considering paying benefits to more Indigenous people than just the Traditional Owners, including, for example, neighbouring Traditional Owners or other Indigenous people in the region.	
Adhering to the agreement fully at the implementation stage and regularly monitoring, evaluating and reviewing whether the agreement is being fully adhered to.	
Recognising that Indigenous people retain sovereignty over all land in Australia, whether they have legal rights or not.	

* For the checklist, against each line item should be a description regarding the extent to which practice in the development meets each good practice principle

2.4 Provisions for strong land-access and benefit-sharing agreements

Table 3 is based on assessment criteria for land-access and benefit-sharing agreements developed by Professor Ciaran O'Faircheallaigh, who observes that it may be intuitive to think that some groups may make trade-offs between these criteria. However, his findings are that when an agreement is strong or weak, it is usually so across all criteria.

Table 3: Strong and weak provisions in land-access and benefit-sharing agreements (known as 'the O'Faircheallaigh criteria')[33]

	Strong provisions	Weak provisions	Simplified scoring system[34]
Environmental protection	Indigenous land holders can ensure that the environment is protected, including by unilaterally stopping certain activities from occurring if the environment is in imminent danger.	The agreement limits the general law rights Indigenous land holders may have and leaves them worse off, for example, if an agreement prohibits their right to sue for environmental damage.	Scores between 0 and 6 (where 0 = weak and 6 = strong)
Cultural heritage	A high level of support for cultural heritage would stipulate that the company must avoid all damage to cultural sites without exception and that Indigenous land holders be funded to do cultural heritage protection work, can choose the technical staff working on cultural heritage issues and can ensure ongoing cultural competency training for company personnel.	Very weak clauses may simply comply with weak cultural heritage laws that allow cultural sites to be destroyed and may prohibit Indigenous land holders from objecting to cultural heritage matters under relevant legislation.	Scores between 1 and 5 (where 1 = weak and 5 = strong)
Employment and training	Good practice sees concrete employment targets set for local Indigenous people, including career pathways to ensure that workers are not limited to entry level work and are provided with opportunities, mentoring and training to develop. Accountability for these targets should be assigned to senior company human resources personnel, pathways to employment created and measures put in place to make the workplace conducive to recruitment and retention of Indigenous workers. These measures might include cross-cultural awareness training for non-Aboriginal employees and supervisors, adjustment to rosters or rotation schedules to acknowledge cultural obligations, and initiatives to maintain contact between trainees and their families and home communities.	A very weak clause could include a vague commitment to employing Indigenous people.	Minimum to substantive. Minimum clauses would, for example, make only vague references to employing Indigenous people, while substantive clauses would, for example, make concrete and substantial commitment to training and employing Indigenous people in jobs of all skill levels, with accountability at the highest levels of the company.

	Strong provisions	Weak provisions	Simplified scoring system[34]
Financial payments	A good result would be a significant income stream commensurate with the scale and likely revenue stream of the project, including offering ownership, equity or royalty-type payment in the project in recognition of the value of land access.	A poor result would be a financial payment that is equal to or less than Indigenous land holders would receive if no agreement were made (i.e. if the land was compulsorily acquired).	As a percentage of expected project output (a good result for royalty payment would be 2–3% of output value).
Business development	Good practice clauses could lend business expertise to Indigenous companies; help with the sourcing of financing for Indigenous companies; provide procurement preference clauses for Indigenous businesses; fund business management training; and provide secure, long-term, 'bankable' contracts for Indigenous companies.	Weak clauses would make a vague commitment to helping Indigenous business development.	Scores between 0 and 5.
Implementation of the agreement and ongoing Indigenous land holder monitoring of the development	A good practice clause might set aside personnel and significant financing specifically for the task of implementing the agreement; ensure structures, processes and financing are set up for the purpose of implementation for both the company and the Indigenous land holding group; contain explicit clauses about who is to do what post agreement; require senior decision-makers in the company and Indigenous land holders to focus on implementation and regular review of progress, including in relation to environmental protection and cultural heritage; and contain incentives for company personnel to implement the agreement fully.	An agreement weak on implementation would not make any mention or would make only general comments about how it would be implemented. Confidentiality requirements, whereby Indigenous land holders face legal consequences if they speak out about perceived failings of the development, are also indicators of an agreement that is weak on implementation.	The extent to which resources have been allocated to implementation, and the extent to which implementation is mandatory within the company.
Rights and interests in land	A strong clause would result in the native title being recognised or a transfer of land to Traditional Owners.	A very weak clause would result in the extinguishment of all native title rights and interests.	Scores between -5 and 5.
Aboriginal consent and support: what they will be required to do for the project into the future	A strong clause would merely require Indigenous people to acknowledge that they accept the validity of the relevant permits.	A weak clause would give open-ended support to all activities that the developer wanted to do into the future, without limitation.	Scores between 1 and 7.

2.5 Agreement-making case studies relevant to the development of the Beetaloo Sub-basin

The case studies of the Browse LNG agreements and the Curtis Island LNG agreements provide useful lessons for agreement making in the Beetaloo Sub-basin. These agreements were negotiated for similar projects in a similar timeframe. However, Kimberley native title holders negotiated a very substantial package for processing LNG on land at James Price Point in the Browse LNG agreements (noting that the project was shelved for unrelated reasons after the agreements were signed), while Port Curtis Coral Coast (PCCC) native title holders negotiated weak agreements for processing coal seam gas on their land on Curtis Island.

One gas industry employee familiar with both Browse LNG and Curtis Island LNG agreements said that these agreements were 'in a different universe, different stratosphere' when compared to each other.[35] Several Queensland PCCC native title holders said of the Curtis Island LNG agreements that they were 'crumbs off the master's table'.[36] Figure 3 shows some of the basic details about the projects and the negotiated benefits associated with their land-access and benefit-sharing agreements (which took the form of ILUAs for Curtis Island, and an s31 agreement and other agreements for Browse LNG).

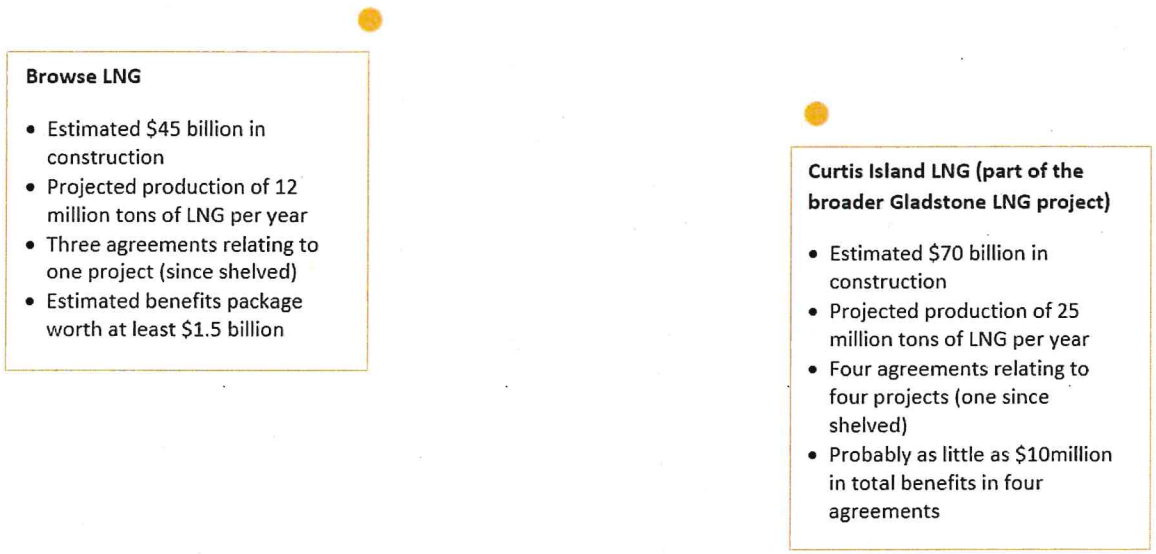

Figure 3: Locations and characteristics of Browse and Curtis Island LNG projects

The **Browse LNG agreements** were signed in June 2012, after a long process including a collective, regional approach to negotiations (outlined below) that began in 2005. The agreements were made publicly available and were assessed across all categories of the O'Faircheallaigh criteria as being strong or very strong.[37] The financial aspect of the benefits package was estimated to be worth $1.5 billion.

Other notable aspects of the agreements include, as outlined by O'Faircheallaigh:

- extensive funding for agreement implementation and monitoring of environmental impacts, including government funding for an environmental compliance officer to be employed on site for the whole project life, which could exceed 40 years
- prohibition of any further processing of offshore gas and of any industrial projects using gas as a feedstock along the Kimberley coast
- protection of Aboriginal rights to object to and seek judicial review of proposed conditions for grant of project titles for the LNG Precinct
- protective mechanisms for Aboriginal cultural heritage in addition to those provided by legislation
- a right for Aboriginal Traditional Owners to unilaterally require the developer to build a desalination plant if they feared adverse impacts from the use of water from a major aquifer.[38]

The **Curtis Island LNG agreements** were signed between 2010 and 2013. They are not publicly available, but the information gained from other sources indicates that financial benefits between all 4 ILUAs totalled $10 million across the entire life of all 4 projects.[39] Some agreements included 'training opportunities' and other, often misleading,

employment provisions as well as broad, unenforceable statements about social benefits.[40] O'Faircheallaigh was given access to the full text of related central Queensland LNG agreements. He said of these agreements that they:

- have limited financial benefits; in some cases, these consist only of one-off payments on the signing of agreements with no ongoing benefits and, in others, fixed annual payments are made only during the first 10 years of projects that can have operational lives greater than 40 years. A number of these agreements contain total financial benefits smaller than the amount the Kimberley Land Council (KLC) received to consult with Traditional Owners in preparation for negotiations in relation to the Browse LNG project
- contain no dedicated implementation funding
- provide no role for Traditional Owners in environmental management
- have no review clauses that might allow changes to what are highly disadvantageous agreements in the future
- constrain the rights of Aboriginal people to object to or criticise projects. For instance, under one agreement the Aboriginal signatories state that they 'will not ... question or challenge, or commence any claim, proceeding or action to question or challenge, the validity of (and also will not make any formal or informal objection or adverse public comment in relation to) ... the [LNG] Project'.[41]

Table 4 below provide a comparative analysis of the factors that enabled Kimberley native title holders to negotiate such a substantial package while Curtis Island native title holders received such an insubstantial one. In light of the focus by NIAA on how governments can influence agreement outcomes in the Beetaloo Sub-basin, we have focused on the influence of relevant state governments in each respective agreement-making process.

Table 4: Analysis of factors affecting the achievement of land use and benefit-sharing agreements in relation to Browse LNG and Curtis Island LNG

	Political and strategic power	Ethos of company	Legislative framework	Profitability of project
Browse LNG	Native title holders were represented by the KLC, acknowledged by many government public servants as a fearsome negotiation opponent. Said one company representative, formerly a public servant: 'If you think that you can go into the Kimberley, with the Kimberley Land Council at your throat, and end up with a good result, who are you kidding?'[42] The KLC received very significant funds both before and during negotiations. This funding could be used by the KLC at its discretion and was not conditional on certain negotiation milestones. The CEO of the KLC often called the Premier of Western Australia (WA) directly. The WA Government was a party to all negotiations, represented by high level public servants. Environmental groups were reluctant to be seen to disagree with KLC's position. KLC was able to forge important alliances with unions, churches and other civil society organisations. Significant national and international media was attracted, including ABC's *Four Corners* and the *New York Times*.	The CEO of Woodside, Don Voelte, said that his commitment to Aboriginal people in the Kimberley was one of 2 top priorities in his tenure as CEO. This was confirmed by other Woodside employees.	NTA and relevant Western Australian legislation. Most importantly, in the first stage of the Browse LNG negotiations, the WA Government promised that native title holders could say no to any development and that they would not compulsorily acquire. WA Government was committed to Kimberley native title holders having a large say over the development and, to this end, they were a party to the Browse LNG agreements. WA Government passed into legislation a commitment to no further processing of gas anywhere else on the Kimberley coast.	At the time of the agreement-making process, the project was seen as likely to be profitable.
Curtis LNG	The PCCC was represented by the Gurang Land Council until it was deregistered in 2008, following an Australian Government review. Then PCCC was represented in the Curtis Island LNG negotiations by several different law firms, having chosen not to use Queensland South Native Title Services for the ILUA negotiations.[43] The PCCC was funded by the companies to employ their lawyers for a limited time. No funding was provided for any other advice such as scientific, environmental, accounting, etc.. PCCC had no access to top politicians or public servants. The Deputy Premier with oversight of the projects had no idea what was in the ILUAs. PCCC had no significant alliances with non-government organisations or environmental groups. There were almost no media mentions, despite a protest where an effigy of an LNG company representative was burned in the middle of the Brisbane CBD.[44]	None of the companies are known for strong corporate social responsibility values in relation to native title holders. However, Santos was singled out as a company known for negotiating inadequate land-access negotiations, as well as having a bad reputation in the industry more generally. One company representative, on hearing what Santos had likely paid in the agreements, said: '[T]hat doesn't surprise me ... Santos' reputation, it's not very nice, it hasn't been for 25 years. Santos is Santos.'[45]	NTA and relevant Queensland legislation. The companies saw the compulsory acquisition as something they could easily call on: one company representative involved in negotiating ILUAs with the PCCC native title group was asked to describe the main leverage a company had in negotiation and said, 'There is compulsory acquisition; that's the main one.' Then-Queensland Deputy Coordinator General Geoff Dickie acknowledged that this comment was one he heard from companies, and he was not surprised.[46]	At the time of the agreement-making process, the project was seen as likely to be profitable.

2. 6 Achieving a collective approach to negotiations

Given the dispersed nature of the Traditional Owner groups, a key question for the Beetaloo Sub-basin is to what extent a collective approach to negotiations may be feasible. The dispersed nature of Traditional Owner groups is not itself a barrier to a collective negotiation approach, which was taken in the Browse LNG agreement-making process. This collective approach resulted in the Browse LNG agreements paying benefits to all Kimberley Aboriginal people, not just the specific native title holders of the development site (of which we are happy to provide further details). However, we do note that this approach relied heavily on the following factors, which appear not to be currently present in the Beetaloo as assessed in the literature review: strong organisational leadership and input from native title groups across the region; significant funding to Aboriginal representatives from government and companies to participate in a fully informed manner in agreement making; and significant time for the process to occur. We provide the following extract of the process to highlight some of the details, complexities, timelines and costs of what was a highly successful process, despite some shortcomings. This process was put into effect while developments were in the initial planning stages and no significant permits had been granted. This is not available to the same extent in the Beetaloo Sub-basin, where the process of unconventional gas development is more advanced.

Importance of inclusive approach and respect for Traditional Owners' views

Woodside had first approached Kimberley Traditional Owners to canvass the processing of gas on the Kimberley coast in 2005. This initial approach was rebuffed, a decision that Woodside said that it respected. Following this, Aboriginal Elders approached the KLC saying that given the significant interest in industrialising the Kimberley they wanted a single consultation process in which all companies had to come 'through one door and tell us the same message'. In 2006, then Western Australian Premier Alan Carpenter announced that the state was looking for a single site on the Kimberley coast to process all Browse Basin natural gas. He said that this development would only go ahead with the support of Kimberley Traditional Owners and would be 'a dialogue, not an imposition or a demand'. The Carpenter government set up the Northern Development Taskforce in June 2007 to consult with Traditional Owners, gas companies, scientists, environmentalists and the community about this development.

Leadership and coordination by KLC

KLC led the Aboriginal consultations for the Browse development process. The first formal Traditional Owner meeting to consider the possibility of LNG processing was held in December 2007, in accordance with a directive from Kimberley Elders. They mandated Kimberly-wide consultation because of the wunan (law) obligations and because the impact of the precinct would be felt Kimberley-wide for several generations. At this meeting, it was decided that if Kimberley Aboriginal people agreed in principle to the development, all Traditional Owners' groups would support the specific Traditional Owner group on whose land it was placed.

Accord with stakeholders

At the same time, KLC negotiated a Joint Position Statement on Kimberley Liquefied Natural Gas Development ('the Environmental Accord') with 5 prominent environmental organisations. The Environmental Accord acknowledged 'significant potential for beneficial outcomes for Kimberley Traditional Owners from LNG', subject to the development being in accordance with good practice, and detrimental impacts being limited. Kimberley coast Traditional Owners elected representatives to a Traditional Owner Taskforce that considered whether LNG processing was acceptable in principle and, if so, whether a site could be found that was approved by its Traditional Owners. Together with the state government and Woodside, this Taskforce reduced the number of possible sites from 13 to 4 for cultural, financial and engineering reasons, by September 2008.

Pressures on process

This site selection process came to a halt following the 2008 state elections which saw the Carpenter Labor government defeated. Once elected, the Barnett Liberal government cut short the existing site selection processes, announcing James Price Point, 60 km north of Broome, as the state and Woodside's preferred site in December 2008. He said that if no agreement could be reached with Traditional Owners, the government would compulsorily acquire the land.

Good practice requires adequate resourcing

The cost of the 4-year site selection process and subsequent negotiations is not entirely clear. A senior state government official told the Western Australia's Parliament that the cost of the process between 2009 and May 2012 alone was $40.4 million, of which Woodside contributed $16 million. KLC received funding of $15.6 million of this amount from the state and Woodside between January 2009 and September 2010.[47]

To conclude, this process is just one, albeit significant, example of how dispersed native title holders carried out a regional approach to agreement making. It is therefore clearly not definitive on the question of what might be possible for groups in the Beetaloo Sub-basin. However, it is highly suggestive of the time, financial input, organisational ability and community will that might be required for a collective approach to negotiations in the Beetaloo Sub-basin.

3 Leverage points for governments to ensure strong agreements in the Beetaloo Sub-basin

3.1 Use of legislation

We understand that legislation change is out of the scope of this Blueprint. Therefore, this section only considers what is possible under existing legislation, focusing on approval stages where relevant decision-makers (usually the Territory or federal minister or their delegate) must exercise their discretion in granting particular approvals. For example, legislative change would not be needed to require FPIC at certain approval points. It is within the scope of some current legislative discretion points for the relevant decision-maker to institute a policy that FPIC is required for the granting of those approvals.

This analysis shows that government can ensure strong agreements in the Beetaloo Sub-basin through ministers and other officials exercising their discretion in line with independently developed, good practice standards that ensure more benefits for Traditional Owners and native title holders.

This section sets out several leverage points in relation to approvals and other decisions that are required to develop unconventional gas (e.g. shale gas extraction via hydraulic fracturing) in the Beetaloo Sub-basin. In each case, the relevant minister may express opinions, require conditions, respond to comments or consultation or make decisions that, while within the scope of the minister's discretion under law, better reflect the aspirations of Traditional Owners and native title holders, including in some instances by the application of FPIC.

Table 5 below is a summary of potential legislative leverage points, cross-referenced against recommendations as outlined in the following section. A more complete list of legislative leverage points relevant to agreement making in the Beetaloo Sub-basin is outlined in Appendix A.

Table 5: Potential legislative leverage points for government in relation to agreement making in the Beetaloo Sub-basin

Suggested recommendation	Possible legislative leverage points
Adequate funding for representative bodies, e.g. Prescribed Body Corporates (PBC), Native Title Representative Bodies (NTRB) and Land Councils to ensure meaningful participation	*Petroleum Act* s 83
Insert FPIC requirements	*Petroleum Act* ss 20, 34, 47, 57L, 83 *ALRA* ss 40(b), 47(2)
Requirement for strong agreements, including independent assessment	*NTA* ss 24BA-24EC, 24MD(6B), 31 *ALRA* ss 42(8),[48] 45(b), 47(4)

3.2 Practical strategies to support legislative leverage

The NTA and ALRA flowcharts succinctly outline the process by which the relevant approvals are granted by the relevant government authority.[49] These flowcharts could be amended to show at which points governments have the legal authority to implement each of our recommendations contained in this section.

3.2.1 The role of governments in strengthening agreement-making processes

As the literature review has revealed, current conditions in the Beetaloo Sub-basin are not conducive to Traditional Owners and native title holders being likely to negotiate strong agreements. Therefore, governments need to ensure that they create the most beneficial circumstances for Traditional Owners and native title holders to negotiate the strongest agreements that can be achieved in current conditions.

It is open to governments where they have the requisite powers and decision-making under legislation relevant to unconventional gas development, such as the grant of a permit or licence with conditions, to ensure that there is fairness, balance and transparency in the manner in which those conditions are formulated and discretions are exercised. Considering the interests of Traditional Owners and native title claimants and holders is a vital part of any such balanced process. These decision points in legislation should conform to good practice standards such as the adoption of FPIC and good faith negotiation.

Below we discuss the following 4 proposals in relation to strengthening the soundness of agreement making:

1	2	3	4
Aboriginal representative bodies such as PBCs and NTRBs need proper funding and capacity building. We note the funding contained in the recent Memorandum of Understanding between the Department of Industry, Science, Energy and Resources and the NLC.	How governments can require FPIC	Support strong agreements through independent verification of agreements according to the O'Faircheallaigh criteria.	Governments should exercise statutory decision-making functions in a manner that better reflects the aspirations of Traditional Owners and native title holders.

The first, adequate funding for PBCs and NTRBs, should be considered a requirement of good practice agreement making. It is a threshold for the robust achievement of the second and third options (require FPIC or support strong agreements). Options 2 or 3 could be considered in the alternative. Together, option 1 with either option 2 or 3 could make a significant difference to current agreement-making conditions. The final proposal is a general suggestion that could apply to government decision-making across all leverage points.

The approaches should only be implemented after significant consultation with Traditional Owners, native title holder groups and relevant Land Councils and with their consent that this program offers constructive consultation and agreement making.

3.2.2 PBCs and NTRBs need adequate and flexible resources for agreement-making capacity

The NLC, which represents Traditional Owners and other Aboriginal people who live in its region (broadly the northern half of the NT) has specified functions under relevant legislation, including acting as an independent statutory authority of the Commonwealth. The NLC has significant rights and responsibilities in relation to resource development impact and benefits pursuant to a range of legislation; responsibilities include obtaining the consent of Traditional Owners for certain development approvals.

PBCs have a broad range of functions they must perform in perpetuity, which arises from a variety of sources of fundamentally different types, including the common law, various statutes and traditional laws and customs. Performing these functions involves far more than mere compliance with procedural or corporate reporting requirements, especially if a PBC is to achieve the purposes for which it was established: managing native title rights and interests on behalf of common law native title holders. The functions of NTRBs and Land Councils, including the NLC and Central Land Council (CLC), under the NTA and the ALRA are also directed to supporting the aspirations of Aboriginal people who are native title holders and/or Traditional Owners in the Beetaloo Sub-basin, including by supporting the Top End (Default PBC/CLA) Aboriginal Corporation Registered Native Title Body Corporates and other PBCs.

The ability of PBCs and NTRBs to achieve the aspirations of native title holders in relation to their Country; to perform their functions; and to sustain relationships with native title holders and Traditional Owners, government and other land users and proponents ultimately depends on their capacity. Evidence suggests that PBCs are inadequately funded to carry out their statutory functions, let alone achieve native title holders' aspirations.[50] The lack of resources and support for the basic functioning of PBCs is 'a critical failure within the native title system',[51] which should be addressed as a matter of urgency. PBCs need increased, ongoing and secure funding to support the development of their basic capacity to carry out their statutory and other obligations and to mature into sustainable independent corporations working in the interests of native title holders in perpetuity. Similar issues and arguments apply to the Land Councils that support them, native title holders and Traditional Owners to achieve their aspirations.

PBCs, NTRBs and Land Councils must have sufficient resources and capacity to perform their functions and meet their obligations in a manner that brings, to native title holders, the benefits of the recognition and exercise of their native title rights and interests and, to Traditional Owners, the benefit of grants of Aboriginal freehold and meets their aspirations for native title and for Country in an ongoing and sustainable manner.

Suggested recommendations for the relevant authority (Australian Government, NLC or NT Government)

Require that applicants for petroleum/unconventional gas (or other sources) development permits or licences contribute to a fund that will be distributed to representative bodies for Traditional Owners and native title holders to support robust participation of these groups in negotiating strong agreements. Plus, additional support to the NLC could be made available in the form of surge teams and secondments to assist during times of high demand.

Governments should consider the provision of independent advice from people with relevant expertise to Aboriginal representative groups involved in unconventional gas development agreements to build an information base and to enable capacity building within the Aboriginal organisations.

3.2.3 How government can require free, prior and informed consent

Another concept arising at international law that is relevant to the resourcing and capacity of PBCs and NTRBs is the principle that the FPIC of Indigenous peoples should be obtained for decisions that affect their lands and resources.[52] While this principle is not a binding principle of international law and has not been implemented directly in Australian domestic law, it is relevant to the operation of both the NTA and the ALRA in terms of native title holders and Traditional Owners achieving the highest level of benefits from development in the Beetaloo Sub-basin. For instance, the common law native title holders must give their consent before a PBC can make a decision that affects their native title.[53] Such consent should be given freely and on an informed basis before the decision is made. Given that native title holders may only make decisions about native title through their PBC, if the PBC has no capacity to properly consult them and obtain their consent to decisions affecting their native title rights and interests, they simply cannot be taken to have given FPIC to such decisions.

The principle of FPIC provides a standard that should guide the behaviour of the Australian Government (and the NT Government) when dealing with the rights of native title holders and Traditional Owners.[54] One way this can be done is by requiring that a mining company or other developer accord FPIC as a condition of a permit or under a contract made with the government. Whether or not this has been done can be verified under the ALRA.[55]

An example of how this might be done is supplied by the World Bank, which requires that those dealing with Indigenous peoples address FPIC.[56] World Bank operational policy requires that, for all projects proposed for financing that affect Indigenous people, the borrower must engage in a process of free, prior and informed consultation. The Bank provides project financing only where this consultation results in broad community support for the project by the affected Indigenous people.[57] In addition, the borrower, not the Indigenous peoples concerned, must provide a report documenting the consultation process and whether the affected Indigenous peoples' communities provide their broad support to the project. If presumably on the basis of this report, the World Bank cannot ascertain that such support exists, it will not proceed with the project.[58]

Suggested recommendations for the relevant authority (Australian Government, NLC or NT Government)
Provide fact sheets and similar publicly available information on good practice agreement making and FPIC to be distributed to all applicants for unconventional gas permits and licences.
Require that applicants must provide certified statements that the information on FPIC has been distributed to all relevant sections of their organisation, including leadership, and a sign-off by the leadership of relevant organisations for the applicant that such information has been supplied to and discussed with those entities involved in providing project finance.
Adopt an FPIC standard in relation to all applications for unconventional gas development in the Beetaloo Sub-basin. FPIC can be implemented as a condition of a permit or under a contract made with the government.
A prerequisite for the granting of permits and licences for unconventional gas development is that applicants provide a certified statement that details the consultation procedures, information supplied about the project and the written consent of Traditional Owners and native title holders as appropriately determined by their representative groups. This information should be assessed as part of independent verification (see below).

3.2.4 Require strong agreements with independent verification of agreements according to the O'Faircheallaigh criteria

Land-access and benefit-sharing agreements negotiated between Indigenous communities with traditional rights and interests in land, and companies wanting to access that land, are almost always confidential. This means that governments, unless they insist on viewing the agreements, are unable to verify whether these agreements are fairly sharing the costs and benefits of these developments.

The destruction of 46,000-year-old caves at Juukan Gorge in the Pilbara by Rio Tinto has highlighted the gap that can exist between what is said publicly by a company about its corporate behaviour and what it negotiates privately with Indigenous people when seeking to access their land. Publicly, Rio Tinto was rated as a world leader in 'communities and social performance'. It was rated on the Corporate Human Rights Benchmark as the top scoring mining company globally and in its highest scoring band of publicly listed companies as recently as 2019.[59] However, privately, Rio Tinto was negotiating agreements that allowed cultural heritage sites to be destroyed, and it 'gagged' Traditional Owners both from seeking emergency heritage law injunctions to prevent cultural heritage destruction as well as speaking publicly to protest.[60]

This example highlights the need for transparency, accountability and independent verification in agreement making.

Suggested recommendations

Require that all agreements with Traditional Owners and native title claimants and holders for the Beetaloo Sub-basin be assessed as meeting the standard of being strong or very strong according to the O'Faircheallaigh criteria.
Consider requirements for a financial surety on the part of applicants for a production licence for unconventional gas development to support the process of independent verification of the relevant agreement. A portion of the surety may be refunded where requisite agreements meet the good practice standards.
Develop an independent panel with relevant expertise to undertake verification (e.g. an independent native title legal practitioner with significant experience in agreement making). Verification should be by at least 2 panellists with a decision by a panel chair if there is a dispute. Consistent with social licence and accountability principles, the verification outcome should be made public. The actual terms of the agreements could remain confidential if confidentiality were required, although public notification should be encouraged.

3.2.5 Ensuring leading practice in statutory decision-making

Governments can better ensure strong agreements in the Beetaloo Sub-basin through ministers and other officials making decisions in a way that ensures more benefits for Traditional Owners and native title holders. The particular mechanism for doing so involves consideration of the many leverage points in Australian Government and NT Government legislation at which such decisions might be made in relation to development, including hydraulic fracturing, in the Beetaloo Sub-basin. In each case, the relevant minister must apply particular statutory criteria to make the decision but still retains the discretion to do so in a manner that is within the scope of the minister's obligations under law, but which better reflects the aspirations of Traditional Owners and native title holders and results in stronger agreements.

4 Portfolio of choices available for realising benefits

In this section, we set out the range of choices available to Traditional Owner groups and communities within the region affected by the development of resources in the Beetaloo Sub-basin. Each option is subject to land tenure considerations, as described in section 4.3 below.

The 2020 National Agreement on Closing the Gap focuses on 4 Priority Reforms that aim to change the way governments work with Aboriginal and Torres Strait Islander people and communities. The Priority Reforms aim to:

1	2	3	4
Strengthen and establish formal partnerships and shared decision-making	Build the Aboriginal and Torres Strait Islander community-controlled sector	Transform government organisations so they work better for Aboriginal and Torres Strait Islander people	Improve and share access to data and information to enable Aboriginal and Torres Strait Islander communities to make informed decisions

The realisation of benefits for Indigenous people from the development of the Beetaloo Sub-basin will meet the objectives of Priority Reforms 1 and 4. Specific details are provided on relevant content in the sections that follow.

Section 4.1 identifies types of private investment that could serve as economic levers for benefits realisation, placing particular focus on skills development, employment and business opportunities for Aboriginal and Torres Strait Islander people. Section 4.2 describes quantifying the benefits. Section 4.3 describes land tenure considerations. Section 4.4 provides an overview of examples of relevant experiences from other places in Australia. Section 4.5 presents strategies for realising social and cultural benefits in the Beetaloo.

4.1 Types of benefits

In this section, we provide brief examples of investments that Traditional Owners and native title holders could consider negotiating as part of ILUA and s19 lease agreements and with support from the government.

The experience of planning for benefits realisation in other regions of Australia indicates 3 broad groups of benefits: economic, social and cultural. For the communities in the Beetaloo Sub-basin, the emphasis placed on each will depend on the view of key stakeholders on the needs and priorities for local people in the region.

Table 6: Economic benefits

Type of investment	Context	Potential first steps
Aboriginal employment in the Beetaloo Sub-basin gas sector	The assumed peak construction workforce for the Beetaloo gas industry is approximately 450 people, with 250 people required for operation and maintenance of the gas field, gas processing and compression facilities and ancillary facilities. Levels of Aboriginal employment in the NT tend to be higher relative to the rest of Australia in local government administration, primary and secondary education, beef cattle farming and allied health services. The Beetaloo Region has relatively lower levels of Aboriginal people employed as managers, administrative workers, technicians and trade workers. There is scope for local staff to replace a proportion of the expected fly-in, fly-out workforce. Significant resources would need to be invested in training, education, skilling and accreditation of local people for most of the positions required.	Identify skill areas that offer scope for local Aboriginal employment. Coordinate with the Community Development Program and existing employment agencies. Determine training and accreditation needs. Subject to the level of local interest, work with local communities to support individuals wishing to join the workforce.

Type of investment	Context	Potential first steps
Aboriginal employment in service provision to the gas sector	New Aboriginal-controlled service companies could be established as service providers in, for example, transport, catering, security, accommodation and technical services. Barriers to entry exist, especially where new businesses would have to compete with existing ones from outside the region. These barriers include skills and knowledge, being able to source materials at the right prices and overcoming the disadvantages of being located in a remote area.	Identify relevant existing skills and experience within local communities. This type of investment is consistent with Closing the Gap Priority Reform 1: Strengthen and establish formal partnerships and shared decision-making.
Aboriginal employment in the service sector unrelated to mining and resources	The service sectors of the region are under-developed compared to urban areas of the NT, from where many services are currently received, for example, education, training, housing and health. As with most opportunities for benefits realisation, there will be a need to invest in local skills and competencies, as well as potentially new Aboriginal corporations, should new service sector employment be an objective. The process will take time to mature. Any initiative of this kind could be connected to existing programs such as the new remote jobs program and northern development vision for Australia to provide an ideal time for advancing services to the region.	Identify existing skills, experience and level of interest within local communities. Seek support for business scoping and planning from an agency such as Indigenous Business Australia (IBA) and determine investment needs.
New housing construction	Partnerships with suitable existing housing contractors would enable Aboriginal people to gain skills and experience within an established company. The building and construction industry provides the strongest employment multipliers (3.6) for each dollar invested.	In consultation with the NT Government, determine housing needs and existing plans for the region. Scope the options for increased Aboriginal employment, informed by previous initiatives.
Development of Indigenous enterprises in primary industries such as agriculture and horticulture	The literature review of the Economic Structure of the Beetaloo Region[28] found that agriculture offers an opportunity for Aboriginal employment growth in the Roper Gulf. Given other examples from elsewhere in the NT, such as mango cultivation in Ti Tree, there could be scope for enterprises to be developed in horticulture. As with other economic activities, there would need to be investments in skill development.	Identify existing skills, experience and level of interest within local communities. Seek support for business scoping and planning from an agency such as IBA and determine investment needs.

Table 7: Social benefits

Type of investment	Context	Potential first steps
Community safety initiatives	There is scope to work with existing initiatives such as the Territory Families Action Plan to improve community safety through: • enhancing local child protection services • enhancing mediation, family and domestic violence services • strengthening programs for young people. There could also be potential for Indigenous Advancement Strategy support for relevant categories with the strategy, such as Safety and Wellbeing.	Conduct a thorough assessment of existing services and programs through engaging with local providers. Determine ways in which investment through the agreement could achieve the greatest benefit.
Improvements in levels of housing occupancy, especially to reduce overcrowding	Lack of housing is consistently a problem for Aboriginal people in some parts of the region.	Find out existing housing plans for the region. Determine ways that investment could increase the availability of housing or otherwise add value.
Specialist allied health services	Establishing services that respond to high needs in a particular area, such as kidney dialysis, suicide prevention or (considering Tennant Creek) orthopaedics and occupational therapy would enable community priorities to be directly addressed. There are successful examples from the work of the CLC. Again, any initiative should complement programs that already exist.	Conduct a thorough assessment of existing services and programs through engaging with local providers, especially Aboriginal Community Controlled Health Organisations. Determine ways that investment could achieve the greatest benefit. This investment would contribute to Closing the Gap Priority Reform 2: Build the Aboriginal and Torres Strait Islander community-controlled sector.

Table 8: Cultural benefits

Type of investment	Context	Potential first steps
Maintenance and protection of sacred sites	Given that resource extraction projects present the possibility of damage to sacred sites, benefits could be achieved through establishing processes and positions for local people dedicated to protecting and maintaining those sites beyond the attention they currently receive. The Scientific Inquiry on Hydraulic Fracturing in the Northern Territory[12] points out that damage to sacred sites can interfere with the realisation of social as well as cultural benefits. It notes, for example, that custodians of the site may be held accountable by neighbouring groups who share the same traditions.	Assess needs and priorities for strengthening the maintenance and protection of sacred sites. Work with Traditional Owners and Aboriginal Areas Protection Authority (AAPA) to identify and plan potential work.
Land management	Subject to the views of the NLC and ranger programs in the region, investing in programs and associated jobs for local people to look after Country could be an option. A program could include the management of invasive animals, reduction of weed infestations, protection of threatened species and maintenance of watercourses.	Assess needs and priorities for strengthening the land management programs. Work with NLC and ranger programs to identify and plan potential work.
Strengthening of language and culture	There are many models of language and culture programs implemented in different parts of Australia, notably the Kimberley, Arnhem Land and Central Australia. A key principle is to start with what already exists in the region.	Assess needs and priorities for strengthening language and culture programs. Work with Elders and people of knowledge to identify and plan potential work. This investment would be consistent with Closing the Gap Priority Reform 2: Build the Aboriginal and Torres Strait Islander community-controlled sector.

4.2 Quantifying the benefits

At this stage in the process, the parties are often keen to start quantifying the benefits from different options. However, without having access to the contents of specific land-access and benefit-sharing agreements, it is not possible to quantify the benefits of individual agreements.

Financial payments in land-access and benefit-sharing agreements can come in many forms, including through a fixed fee model (fixed amount, paid at agreed intervals), unit-based royalty (based on the volume extracted), *ad valorem* royalty (based on the value extracted), profit-based royalty (calculated in a way that the parties must agree) or through project equity (a grant of an interest in the project). However, not all of these methods will necessarily be on the table during the negotiation; certain companies may have preferences for only certain types of payments, for example.

Which type of benefits will result in the greatest benefit to Traditional Owners and native title holders depends on a range of factors, including the current economic and social circumstances of individuals and communities, the subjective preferences of community members (some may prefer upfront cash payments for individuals; others may prefer money for a literacy program, for example) and also is unlikely to be able to be accurately quantified until several years into the implementation of the agreement.

4.3 Land tenure considerations in benefits realisation

In general, pastoral leases in place over ALRA or native title land may limit what can be done on that land, or parts of that land, to a certain extent. For example, a pastoral lease may mean there are limits on Traditional Owners and native title holders undertaking cultural burning of Country. However, it is important to understand that these limits are imposed not by a land-access and benefit-sharing agreement but by any native title or land rights determination in place. During the agreement-making process, it is incumbent on lawyers for all parties to work out what is legally permissible for each part of the land in question. For example, certain parcels of land may be subject to third-party water entitlements or a road easement, which may impact aspects of what can be negotiated over.

This Blueprint has been written before the recently proposed amendments to the ALRA through the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021. The Bill includes the establishment of a new Aboriginal-controlled body, to be called the Northern Territory Aboriginal Investment Corporation (NTAIC) and implements several changes concerning mining activity recommended by the Aboriginal Land Commissioner's 2013 review of Part IV of the ALRA. The proposed amendments streamline the process for approving exploration licence applications where the Land Council has provided consent. Please note, however, that this Blueprint does not constitute legal advice.

NIAA has asked that this Blueprint focus on what benefits are possible from *private agreements* between companies and Traditional Owners and native title holders.

4.4 Case studies on realising benefits – Imperial 2019 Drilling Program NT Exploration Permit 187 (EP187)

EP187 (Figure 4) is relevant to Beetaloo Sub-basin because of its location to the east of Beetaloo. The key similarity is that the land is used extensively by pastoralists, in this case under agreements with Traditional Owners who mainly live in Borroloola and receive revenue through those agreements.

Imperial Oil & Gas is the operator of EP187, which is located approximately 85 km south-west of Borroloola within the Carpentaria and McArthur Basin in the NT (Figure 5). EP187 is situated in the upper reaches of the McArthur River, lies to the west of the Tablelands Highway and is crossed east to west by the Carpentaria Highway.

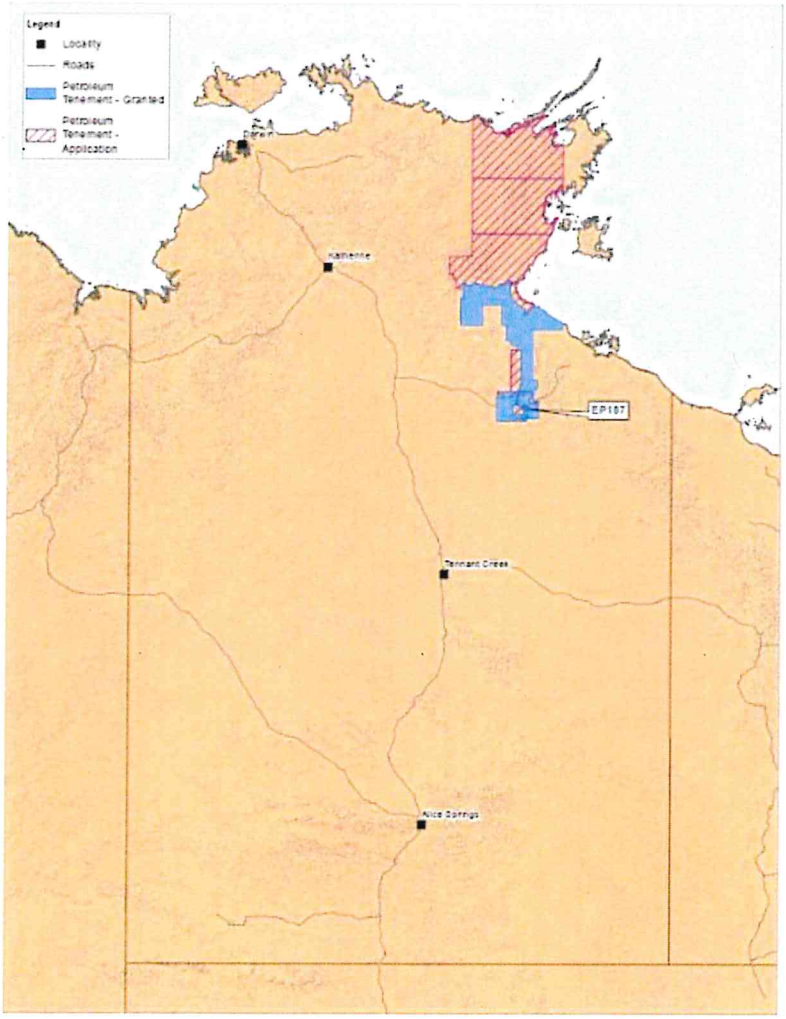

Figure 4: Location of EP187 gas fields[56]

The land is Aboriginal freehold land, held by the Mambaliya Rrumburriya Wuyaliya Aboriginal Land Trust. Borroloola is the nearest township community. The land mainly supports Aboriginal use with pastoral grazing rights awarded across the area divided into several blocks to pastoralists under s19 agreements.[61]

EP187 is useful to consider in the context of Beetaloo because there are existing revenues to Traditional Owners. The uses to which those revenues have been put, especially to realise benefits, offer some insights that could inform the agreements and decisions made for Beetaloo. Although outside the scope of this Blueprint, more research into the scope and nature of the existing agreements and strategies adopted to realise benefits for Traditional Owners would be valuable.

Central Petroleum and the Amadeus Basin

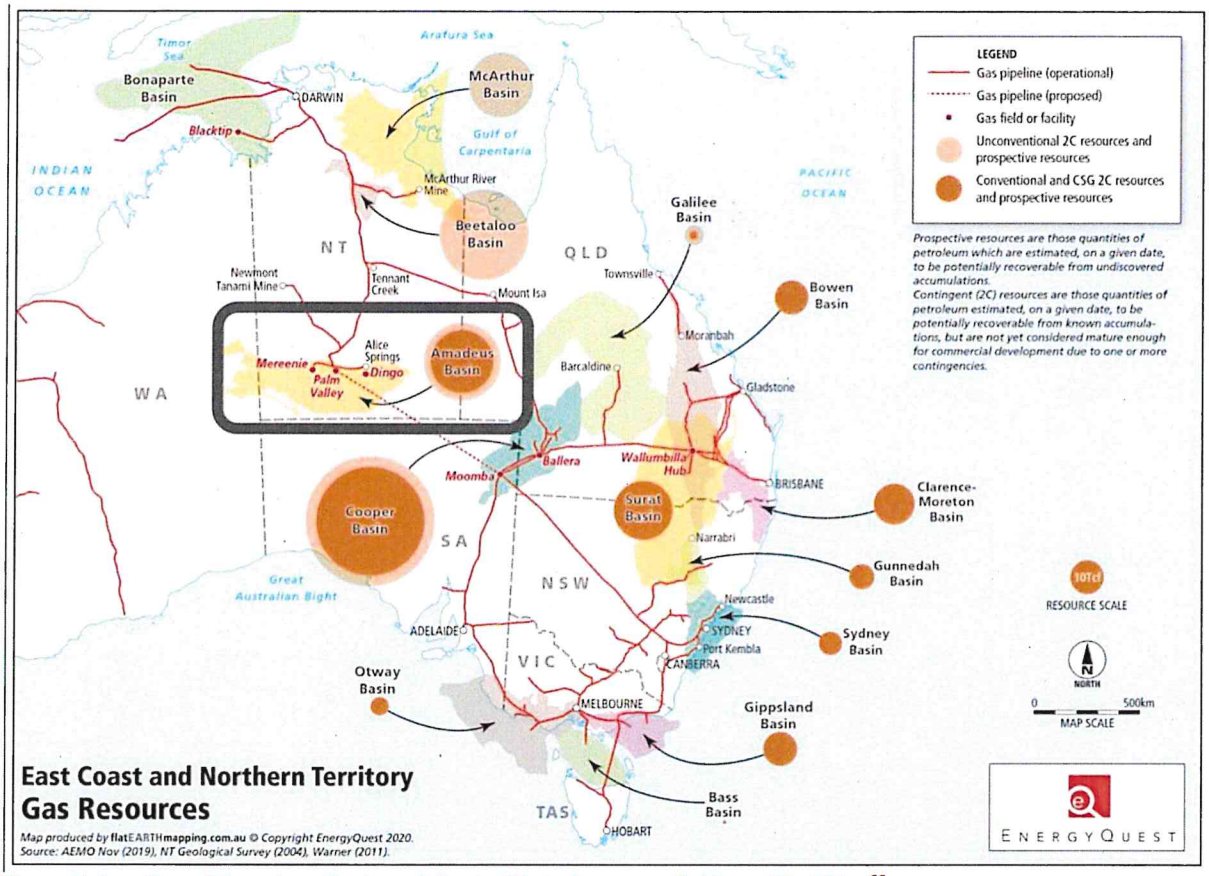

Figure 5: Location of Amadeus Basin and Central Petroleum gas fields and facilities[62]

The announcement of the development of a new gas pipeline from the Amadeus Basin to the west and south of Alice Springs in the NT presents an opportunity for new employment and royalties for the NT and Aboriginal communities through increased and more cost-competitive onshore gas production.[63] The pipeline will complete a triangular supply chain to Moomba in South Australia, connecting to the east coast and South Australian pipelines (see Figure 5). The pipeline will be built under an agreement with Central Petroleum, Australian Gas Infrastructure Group and Macquarie Mereenie.

The development of a gas field can provide the business activation needs for local economic growth and development. From this, supply chain opportunities can evolve, such as the development of gas pipelines. The construction and maintenance of pipelines will bring immediate short-term impacts for jobs and businesses able to contract services. In the longer term, there will be contracts available to maintain the pipelines, though employment levels from these can be expected to be lower. Moreover, royalties (government and private) for developing pipelines and accessing the resource can also be negotiated with Traditional Owners that provide enduring returns to communities from gas development, providing broader economic and social and cultural benefit diversification.

4.5 Strengthening the realisation of benefits

This section sets out key principles and processes that strengthen the ability of the benefits realisation work to achieve its objectives. The approaches described below should be considered as ways in which the pathways chosen from Tables 6, 7 and 8 in section 4.1 can be implemented.

These strategies are not options to be selected on an either/or basis. One, more than one, or all of them may be relevant, depending on the choices to be made in realising the benefits of the Beetaloo Sub-basin project. We recommend that the strategies for aligning work with the Priority Reforms set out in the 2020 National Agreement on Closing the Gap and setting up reflexive and ongoing mechanisms for monitoring, evaluation and learning should be applied to all benefits realisation initiatives.

4.5.1 Engage critical stakeholders in ways that build and strengthen relationships

This step can apply across Australian Government activities in the region; however, it refers more to *how* NIAA operates in the region than *what* it does. For example, NIAA Katherine, TETI Region, along with the Darwin Regional Office could offer closer to the ground engagement. The key idea is to look at existing and emerging activities in the region through an engagement lens and shape them in ways that enhance relationships between people, organisations and businesses that will need to work together to maximise benefits flowing from onshore gas development.

NIAA could support more effective engagement by creating culturally safe environments where conversations can take place and allowing for ample preparatory time with all parties to ensure they can express themselves in ways that can be understood by other participants.

The 'Building the Bush' Regionalisation Strategy of the NLC offers another avenue for engaging stakeholders. It is designed to help build the regional capacity of NLC to more quickly achieve operational objectives and key organisational goals.[64]

At this point in time, 5 critical stakeholders have been identified by NIAA as a starting point for engagement:

- IBA
- Indigenous Land and Sea Corporation (ILSC)
- NLC
- CLC
- NT Government.

Further consultation should include more extensive stakeholder mapping to identify appropriate representatives of:

- local government authorities – Roper Gulf and Barkly Regional Councils
- business associations – such as the Barkly Business Hub
- education and training institutions
- Traditional Owner groups
- Aboriginal-controlled organisations
- industry stakeholders – such as Origin, Falcon and Empire Energy.

Careful consideration will be needed to determine when and how it is most appropriate to bring representatives of these different groups together. Strengthening ties between these stakeholders over time will help open up information flows and sustained dialogue about how to make the most of onshore gas development for the Aboriginal people of the Beetaloo.

4.5.2 Support effective governance

The challenges of effective governance capacity building for Indigenous groups prompt the complex question of how this can be supported by companies, Land Councils and the NT Government. Effective governance in the context of the Beetaloo Sub-basin will require that capacities are developed in negotiation and shared decision-making, as well as in the ability to access the knowledge required to make informed decisions on key topics such as employment and enterprise.

Targeted support will be needed to enable a diverse range of Indigenous people living in the Beetaloo Region to engage meaningfully in key decisions through accountable and transparent 'two-way' governance structures. Naturally, governance training for Aboriginal people will be required, culminating in the design of culturally located processes for community-driven decision-making. However, skills and competencies in governance can only be successfully facilitated if there is a commitment among young people as well as those leading agreement making and implementation.

As the implementation of agreements progresses, demographic changes will involve younger people emerging as significant agents for the articulation of Indigenous interests. Flexibility of approach to changing representation is

required. This is also the case for the circumstances of people who may live outside the region but over time assert interests based on traditional connections to the land and waters affected by unconventional gas development.

For this reason, the parties should focus particularly on youth commitments to opportunities arising from agreements. Recognition of the importance of mutually respectful interpersonal relationships across the parties is critical in relation to younger Aboriginal people engaging with agreement outcomes. Governance of agreements will require flexible modification over time as youth with traditional interests across the Beetaloo Region grow to participate in the process and become part of agreement governance and decision-making.

4.5.3 Secure a range of education and training pathways

To benefit from employment opportunities posed by onshore gas development in the Beetaloo, local people must have the requisite skills and knowledge. Securing a range of education and training pathways for Aboriginal people in the Beetaloo will increase the choices available to them when it comes to engaging in the workforce close to home.

Table 1 and the desktop literature review Economic Structure of the Beetaloo Region[28] identified several sectors, in particular, where education and training pathways are likely to produce benefits.

Service sectors, especially education, housing and health

Without deliberate policies to develop the service sectors of the Beetaloo Region, the flow-on benefits from the resource development will flow out of the region to Katherine and Darwin and overseas where resource companies are foreign-owned. In particular, services relating to education skills and training, housing and health require further development in the region. Investment in creating a skilled workforce in these sectors will complement existing policies such as the new remote jobs program and northern development vision for Australia to provide an ideal time for advancing services to the region. The potential benefits are twofold: in addition to creating employment opportunities for people living in the region, they will have better access to services without having to travel to Katherine, Darwin or Alice Springs.

Building and construction

This industry provides the strongest employment multiplier (3.6 for each dollar invested). This may be a way of sharing the benefits of the sub-basin's development if local people have aspirations of working in this sector.

Mining and gas

The second highest employment multiplier is in the mining and gas sector (3.0 for each dollar invested). The NT economy as a whole has a high reliance on an itinerant workforce in this sector. Investing in training, education, skilling and accreditation of people living in the Beetaloo Sub-basin presents an opportunity for boosting local employment rather than relying on those from outside the NT.

Manufacturing

The third highest employment multiplier is in manufacturing (2.7 for each dollar invested). Developing local employment opportunities and business investment in this industry will also require training, education, skill development and accreditation.

Importantly, this must be paired with business development support and investment initiatives to overcome the significant investment barriers to financing in remote Australia.

Further guidance on how to convert education and training pathways into work readiness and employment is available from the Aboriginal Economic Development Strategy for the Beetaloo, prepared by Charles Darwin University's Northern Institute.[65]

Pastoral

As described by the Northern Territory Cattlemen's Association (NTCA), the Pastoral Real Jobs Program engages, trains and supports young Indigenous people for employment in the NT pastoral industry. The NTCA operates the Pastoral Real Jobs Program in partnership with the ILSC. The program began in 2008 with the aim of increasing Indigenous participation in Australia's northern pastoral industry.[66]

Through the program, up to 30 young Indigenous people are recruited, trained and placed in jobs each year. The program aims to connect young people with the program for 2 years. Year 1 is for training and placement; Year 2 is designed for sustainable, more independent employment. In its years of operation, the program delivered the following outcomes for the NT:

- Participants were trained and mentored to develop their personal capacity to work at industry-level standards.
- Indigenous young people (17–28 years old) were placed into jobs on NT cattle stations.
- Opportunities were provided for skilled Indigenous trainees to have a lasting role in the NT pastoral industry.
- The NT pastoral industry was assisted to meet labour requirements in a changing age demographic.
- Mutual cross-cultural awareness was fostered between non-Indigenous and Indigenous young Australians living and working together on NT cattle stations.
- A rise in role models was cultivated within Indigenous communities, in the heritage of Aboriginal Stockmen.

- A range of cultural, social, economic and environmental benefits were delivered to participants and their families, along with communities and organisations.

The ILSC reports that, in 2018–19, 27 positions were contracted to the NTCA and ILSC Agribusiness to develop career opportunities for young Indigenous people in the pastoral industry.[67]

4.5.4 Set up reflexive and ongoing mechanisms for monitoring, evaluation and learning

Transparent assessment of impacts, both positive and negative, as a result of the development of resources in the Beetaloo Sub-basin should be driven and informed by local communities. This means that monitoring and evaluation frameworks should be co-designed with Traditional Owners and people living in the communities who are likely to be impacted. In s22(1) experience, training and employing local people, especially Aboriginal people, to design, collect and analyse data tends to produce information and insights that are likely to be missed by others.

Conventional and proven frameworks exist for monitoring, evaluation and learning (MEL) from development programs and could be adapted to the circumstances of the Beetaloo Sub-basin. NIAA's existing evaluation framework could, for example, integrate specific evaluation activities on a yearly basis to monitor existing program and project funding that has direct linkages to Beetaloo Sub-basin activities.

The Productivity Commission has developed a progression pathway for the Indigenous Evaluation Strategy. The progression pathway is a tool that we recommend is adopted to assist agencies engaged in Beetaloo Sub-basin activity, directly or indirectly, to plan a pathway to better evaluation of policies and programs affecting Aboriginal and Torres Strait Islander people who may have links to the Beetaloo Sub-basin corridor.

Logical frameworks and theory of change methods are also well established in, for example, the policy and practice of the Department of Foreign Affairs and Trade and are applied to MEL work for investments by the Australian Government in international cooperation and aid programs.

However, it is not enough to gather and analyse information. Mechanisms are also needed to ensure that information gained from impact assessment is fed back into decision-making to shape and improve efforts to maximise the benefits realised by Aboriginal people.

Appendix A: Legislative leverage points relevant to agreements in the Beetaloo Sub-basin

Petroleum Act 1984 (NT) (Petroleum Act)

Leverage points under the Petroleum Act include:

General

- The minister administering the Petroleum Act must consider the opinions of the minister administering the *Territory Parks and Wildlife Conservation Act 1976* (NT) before granting an exploration permit or retention licence covering land in a park or reserve (s 15 Petroleum Act). Parks and reserves typically will be habitat for culturally significant species and areas of high cultural values for Aboriginal com munities in the Beetaloo Sub-basin.
- The minister administering the *Territory Parks and Wildlife Conservation Act* may:
    - express an opinion in relation to the proposed grant of an exploration permit or a retention licence covering land in a park or reserve
    - specify conditions for the grant of a production licence covering land in a park or reserve or an exploration permit or retention licence covering land in a wilderness zone (s 15 Petroleum Act).
- The minister must be satisfied that an applicant is an appropriate person to hold a permit or licence (s 15A Petroleum Act).
- The minister may accept or reject the recommendation of a panel that has reviewed the minister's determination to refuse to grant a permit or licence (s 57AE Petroleum Act).
- The minister may, in relation to a permit or licence area:
    - give directions for protecting or minimising disturbance to the environment or restoring or rehabilitating the disturbed surface of the land (s 58 Petroleum Act)
    - approve the escape or release of any petroleum from, or interference with infrastructure within, the area (s 58 Petroleum Act)
    - approve operations for the drilling of a well or for a seismic survey (s 67 Petroleum Act)
    - require the fencing of the area in accordance with the notice (s 68 Petroleum Act)
    - give directions to a permittee or licensee (s 71 Petroleum Act)
    - on the surrender or cancellation of a permit or licence, direct the permittee or licensee to remove property, plug or close off wells and restore the surface of the area where disturbed, and take measures to rehabilitate the area (s 77 Petroleum Act).
- The permissions above that may be granted typically have direct and indirect impacts on Traditional Owners' lands and waters and native title interests and cultural values. These effects must be considered at the level of the approval or grant of permission, and regulations, practices and protocols must provide for robust protections for affected Aboriginal interests where permissions are granted.
- The minister may require an applicant to lodge a security for an amount the minister thinks fit to secure compliance with the Petroleum Act or the conditions of the grant or to secure the payment of compensation to native title holders (ss 79, 80 Petroleum Act).

Exploration permits

- The minister may, in making a decision to grant an exploration permit, consider any matter the minister considers relevant (s 20 Petroleum Act).
- The minister may grant an exploration permit subject to conditions (ss 20(4), 27 Petroleum Act).
- The minister may issue guidelines relating to the consideration and determination of an application for the grant of an exploration permit (s 21E Petroleum Act).
- The permits above that may be granted typically have direct and indirect impacts on Traditional Owners' lands and waters and native title interests and cultural values. These effects must be considered at the level of the approval or grant of a permit, and regulations, practices and protocols must provide for robust protections for affected Aboriginal interests where permits are granted.

Retention licences

- The minister may grant a retention licence subject to conditions (ss 34, 40 Petroleum Act).

Production licences

- The minister may grant a production licence subject to conditions (ss 47, 54 Petroleum Act).
- The minister may grant a production licence, even if the applicant has not complied with the conditions of the exploration permit, any lawful directions given by the minister or the Petroleum Act if circumstances exist that justify the granting of the production licence (s 47(2) Petroleum Act).
- The minister may repeal or vary a declaration by a production licensee of the production licence area as a restricted area (s 57(4) Petroleum Act).
- The minister may grant an access authority, subject to conditions, in relation to a permit, licence or lease granted under repealed legislation (s 57A Petroleum Act).
- The permissions above that may be granted typically have direct and indirect impacts on Traditional Owners' lands and waters and native title interests and cultural values. These effects must be considered at the level of the approval or grant of a permit, and regulations, practices and protocols must provide for robust protections for affected Aboriginal interests where permissions are granted.

Native title and prescribed petroleum acts (including the proposed grant of a permit or licence)

- The minister may direct parties to consultations about a prescribed petroleum act to attend a meeting (s 57K Petroleum Act).
- The minister may refer an objection by a native title party to a prescribed petroleum act to the Civil and Administrative Tribunal for hearing (s 57KA Petroleum Act).
- The minister may decide whether to comply with a recommendation of the Tribunal that the prescribed petroleum act must not or may be done, after consulting with the minister responsible for Aboriginal affairs (s 57L Petroleum Act).
- The minister may impose conditions on a prescribed petroleum act relating to the payment of compensation to native title holders (s 83 Petroleum Act).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA)

Firstly, a leverage point in relation to the proposed grant of an exploration permit covering Aboriginal land arises under the Petroleum Act, as follows:

- Negotiations between an applicant for an exploration permit over Aboriginal land and the relevant Land Council for the Council's consent to the grant of the permit may only be conducted with the consent of the minister, which may be given with conditions (s 13 Petroleum Act).

Leverage points under the ALRA in relation to proposed grants of permits or licences covering Aboriginal land include:

Petroleum exploration permits

- The Governor-General may declare that the national interest requires that a petroleum exploration permit be granted (s 40(b) ALRA).
- The minister administering the ALRA Act (ALRA minister) may extend the period within which the applicant for a petroleum exploration permit must submit an application to the relevant Land Council for consent to the grant of the permit (s 41 ALRA).
- The ALRA minister may, where the Land Council consents to the grant of the permit, determine whether he or she also consents to the grant (s 42(8) ALRA).[68]
- The ALRA minister may appoint a mining commissioner to determine the terms and conditions to which the grant of the permit may be subject to conciliation (ss 42(12), 44(5), 48F ALRA).
- The ALRA minister may extend the negotiating period during which the applicant is to negotiate with the Land Council about its consent to the grant or the terms and conditions of grant of the permit (ss 42(15), 43(6) ALRA).
- The ALRA minister may cancel a petroleum exploration permit if satisfied that certain circumstances apply, including that exploration works are causing a significant impact on the land and on Aboriginals, to the extent that the Land Council would not have consented to the grant of the licence (s 47(1) ALRA).
- The ALRA minister may consent to an application being made for a petroleum exploration permit within 5 years after the cancellation of a previous licence (s 48(5) ALRA).
- The permissions above that may be granted typically have direct and indirect impacts on Traditional Owners' lands and waters and native title interests and cultural values. These effects must be considered at the level

of the approval or grant of a permit, and regulations, practices and protocols must provide for robust protections for affected Aboriginal interests where permissions are granted.

Petroleum production licences

- The ALRA minister may consent to the grant of a petroleum production licence (s 45(b) ALRA).
- The ALRA minister may, if the applicant for a petroleum production licence and the relevant Land Council fail to agree on the terms and conditions, after a request by either of them, appoint a mining commissioner to try by conciliation, or failing that by arbitration, to resolve the matters in dispute (ss 46(8), 46(10), 48F ALRA).
- The ALRA minister may cancel a petroleum production licence if satisfied that certain circumstances apply, including that exploration mining works are causing a significant impact on the land and on Aboriginals, to the extent that the Land Council would not have consented to the grant of the licence (s 47(3)(a), (b)) ALRA).
- The ALRA minister may consent to an application being made for a petroleum production licence within 5 years after the cancellation of a previous licence (s 48(5) ALRA).
- The permissions above that may be granted by the ALRA minister typically have direct and indirect impacts on Traditional Owners' lands and waters and native title interests and cultural values. These effects must be considered at the level of the approval or grant of a permit, and regulations, practices and protocols must provide for robust protections for affected Aboriginal interests where permissions are granted.

Native Title Act 1993 (Cth) (NTA)

Under the NTA, the grant of a petroleum exploration permit or production licence will be subject to the right to negotiate where the proposed grant affects native title. Before the act is done, the minister must:

- notify the relevant Land Council, and any registered native title body corporate and any registered native title claimants in relation to the land covered by the proposed grant (native title party) (s 29 NTA)
- allow all native title parties to make submissions to it regarding the proposed grant (s 31 NTA)
- negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the proposed grant, with or without conditions (s 31 NTA).

Leverage points under the right to negotiate process include decisions by the minister in relation to:

- considering submissions made by the native title parties (s 31 NTA)
- negotiating in good faith with the native title parties and the proposed grantee, including in relation to any conditions attaching to the proposed grant of the permit or licence (s 31 NTA)
- including a statement in the notice of the proposed grant of an exploration permit that the minister considers that the proposal attracts the expedited procedure, which, if the inclusion of the statement is not objected to, allows the minister to grant the permit or licence without considering the submissions or negotiating with the native title parties (ss 32, 237 NTA)
- withdrawing any expedited procedure statement in the notice (s 32 NTA)
- applying for a determination by the National Native Title Tribunal in relation to the proposed grant after 6 months of negotiations (s 35 NTA).

Additional leverage points include:

- any decision by the Northern Territory Government minister with responsibility for the NTA to make a determination in relation to the proposed grant if the National Native Title Tribunal determination is delayed (s 36A NTA)
- any decision by the relevant Australian Government minister to overrule any determination by the National Native Title Tribunal in the national interest or the interests of the Territory (s 42 NTA).

Some Acts of the NT in relation to approvals for unconventional gas development may be covered by the procedures set out in s 24MD NTA. Leverage points in relation to these procedures include decisions by the NT in relation to:

- responding to the exercise of the procedural rights of an ordinary title holder (s 24MD(6A) NTA)
- consulting any objectors to the proposed approval about ways of minimising the impact of the proposed approval in relation to the land and any access to the land or how unconventional gas extraction including hydraulic fracturing might be done (s 24MD(6B)(e) NTA)
- ensuring that any objections to the proposed approval are heard by an independent person or body (s 24MD(6B)(f) NTA)
- considering whether to comply with the determination of any such independent person or body (s 24MD(6B)(g) NTA).

Native title issues in relation to the proposed grant of a petroleum permit or licence may also be resolved through the making of an ILUA between the NT and native title parties (ILUA) (part 2, division 3, subdivisions B–E NTA). Leverage points also arise in relation to decisions to make an ILUA and agree to provisions in it.

Other Northern Territory Government and Australian Government legislation

Leverage points in other relevant legislation include:

Environment protection legislation

- The minister may approve an Environmental Management Plan, with or without conditions, in relation to regulated activities that have or will have an environmental impact or risk, including land clearing, earthworks and hydraulic fracturing (reg 11 Petroleum (Environment) Regulations 2016 (NT)).
- The NT EPA may determine if environmental impact assessment is required and the level of assessment (s 55 *Environment Protection Act 2019* (NT)).
- The relevant minister may grant an environmental approval of a regulated activity after an environmental impact assessment has been carried out, or the making of a determination by the NT EPA that an environmental impact assessment is not required (s 69 *Environment Protection Act 2019* (NT)).
- The Australian Government minister has powers to determine if an action that significantly impacts nationally significant species of plants and animals, habitats and heritage places (including Indigenous heritage) is a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The environmental and social impacts of controlled actions must be assessed (typically via environmental impact assessment with requirements for public submissions) and the minister under s 130 EPBC Act decides whether or not to approve the action and any project conditions if approved.
- Under sections 24D and 24E of the EPBC Act, an action which 'involves a coal seam gas development or a large coal mining development' requires referral to and approval from the Australian Government Minister for Environment if the action has, will have or is likely to have a significant impact on a water resource (Water Trigger). The Water Trigger, therefore, makes a water resource a matter of national environmental significance for some activities. [Note: shale gas extraction is currently not covered, but this could be a leverage point with regard to the potential extension to shale gas]. Many Aboriginal communities in Beetaloo Sub-basin are highly dependent on groundwater.

Water

- The relevant minister may grant a groundwater extraction licence (s 60A *Water Act 1992* (NT)).
- The Controller of Water Resources may decide whether to commence proceedings for offences in relation to conduct that results in hydraulic fracturing waste coming into contact with water (ss 17A-17C Water Act). There is a likely impact on groundwater, groundwater-dependent ecosystems and sacred sites such as springs which will strongly affect Aboriginal cultural values.
- If the grant of a groundwater extraction licence affects native title, before the act is done, the relevant minister must notify the relevant Land Council, any registered native title body corporate and any registered native title claimants in relation to the land covered by the act and allow them to comment on the act (ss 24HA NTA). The relevant minister may take account of any comments received when deciding whether to grant the licence.

Northern Territory Aboriginal Sacred Sites Act 1989 (NT)

- The Aboriginal Areas Protection Authority (AAPA) may grant an Authority Certificate, which allows work to be carried out or use made of land (or not carried out or used), with or without conditions (s 22 Sacred Sites Act).
- The relevant minister may extend the period for consultation with custodians of sacred sites or a conference with them beyond 60 days (ss 19F, 19L Sacred Sites Act).
- The relevant minister may decide any matter referred by an applicant aggrieved by certain decisions of the AAPA (s 19H Sacred Sites Act).
- The relevant minister may require an applicant who is liable for charges in respect of a non-standard application or a conference to lodge a security in the amount the minister thinks fit (s 19J Sacred Sites Act).
- The relevant minister may permit a new application for the grant or variation of an Authority Certificate where it has been refused by the AAPA (s 24 Sacred Sites Act).
- The relevant minister may decide whether to refer an application for review of a decision of the AAPA to the AAPA (s 30 Sacred Sites Act).
- The relevant minister may, after a review carried out by the AAPA, uphold the decision of the AAPA or issue a Minister's Certificate with or without conditions as the minister thinks fit (s 32 Sacred Sites Act).

Other legislation

- The Competent Authority under the *Dangerous Goods Act 1998* (NT) may grant a licence in relation to the use and transport of hazardous chemicals and dangerous goods used in the petroleum sector (reg 5H Dangerous Goods Regulations 1985 (NT)).

- The licensing authority may grant a dangerous goods vehicle licence for a road vehicle (reg 173 Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Regulations 2011 (NT)).

Mining

In addition to decisions relating to the development of unconventional gas in the Beetaloo Sub-basin, leverage points may arise in relation to proposals for mining: see legislation including the *Mineral Titles Act 2010* (NT) and the *Mining Management Act 2001* (NT).

Improvements to pastoral leases

Leverage points may also arise in relation to approvals and other decisions that enable improvements to pastoral leases in the Beetaloo Sub-basin.

Pastoral Land Act 1992 (NT)

Under the Pastoral Land Act:

- The relevant minister may vary a reservation in, or condition or provision of, a pastoral lease (ss 43, 44 Pastoral Land Act).
- The relevant minister may grant a perpetual lease in place of a pastoral lease convert (s 62 Pastoral Land Act).
- The Pastoral Land Board may grant a permit to use pastoral lease land for non-pastoral purposes (s 85A Pastoral Land Act), and in doing so must comply with the requirements of part 2, division 3, subdivision G of the NTA (s 87 Pastoral Land Act).

If any of these acts under the Pastoral Land Act affects native title and is covered by part 2, division 3, subdivision G NTA, before the act is done, the relevant minister or the Pastoral Land Board must notify the relevant Land Council, any registered native title body corporate and any registered native title claimants in relation to land covered by the act and allow them to comment on the act (ss 24GB, 24GD, 24GE NTA). The relevant minister or the Pastoral Land Board may take account of any comments received when deciding whether to vary a reservation in, or condition or provision of, a pastoral lease; grant a perpetual lease; or grant a permit to use pastoral lease land for non-pastoral purposes under the relevant provision of the Pastoral Land Act.

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33 This table is extracted from O'Neill L, Riley B, Hunt J and Maynard G (2021) Clean energy agreement making on First Nations land: What do strong agreements contain? Centre for Aboriginal Economic Policy Research, Australian National University. While this Guide was written for clean energy projects, it states it is applicable for all industries operating on First Nations land. It is based on Professor Ciaran O'Faircheallaigh's assessment criteria for land access and benefit sharing agreements, see O'Faircheallaigh C (2004) Evaluating Agreements Between Indigenous People and Resource Developers, in Langton M et al (eds) Honour Among Nations, Melbourne University Press, 309.
34 Please note that this table, and particularly the scoring system, has necessarily been simplified. Any assessment of an agreement will necessarily involve some subjective judgments on the part of a reviewer.
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