



Environmental
Defenders Office

**Submission on the First Nations Clean Energy Strategy
Consultation Paper**

9 February 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

Submitted to:

First Nations Clean Energy Taskforce
Department of Climate Change, Energy, the Environment and Water
Submitted via: DCCEEW [Consultation Hub](#)

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy and Law Reform
T: (02) 9262 6989
E: rachel.walmsley@edo.org.au

Casey Kickett
Director, First Nations Program
E: casey.kickett@edo.org.au

Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations' cultural heritage through both First and Western laws. We recognise that First Nations' Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as the right to freely determine one's political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws which existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure that the environment and ecosystem which nurtures, supports, and sustains human life, is also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the Land.

A Note on Language

We acknowledge that there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the First Nations. We acknowledge that not all First Nations people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is used to describe the laws which exist within First Nations'. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises that there are many different terms used throughout First Nations for what is understood in the Western world as 'First Laws'.

EDO's role

EDO is a non-Indigenous community legal centre, which works alongside First Nations around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction. EDO has and continues to work with First Nations clients who have interacted with Western laws, including Western cultural heritage laws in many ways, including litigation and engaging in Western law reform processes. In EDO's respect for First Nations self-determination, EDO has provided high level key recommendations for Western law reform to empower First Nations to protect their Countries and cultural heritage. The high-level recommendations in this submission comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the First Nations Clean Energy Strategy Consultation Paper. EDO supports the development of the First Nations Clean Energy Strategy as a priority for the Australian Government and believes that First Nations communities must be at the forefront of developing the actions, policies and programs which will be implemented as part of the Strategy.

In light of the Paris Agreement temperature goals and federal commitments for a clean energy transition, there is an urgent need to ensure renewable energy projects and transmission capacity are operational as soon as possible. This energy transition must deliver on the necessary systems change to limit dangerous climate change; but also deliver on the obligation to provide (clean) energy security for all.

However, the energy transition will undoubtedly have impacts for First Nations communities, including relating to cultural heritage, land, and Sea Country. At all levels and in all jurisdictions, it is crucial that transition planning therefore engages with First Nations cultural heritage protection, consultation and benefit sharing in a different way than has been the historical experience in respect to the fossil fuel industry and other mining developments. The Strategy is an opportunity to ensure this outcome.

EDO is guided by the significant work of the First Nations Clean Energy Network, and endorses the First Nations Clean Energy Network's [Guidance Paper](#) (Potential actions to highlight in responses to the government's First Nations Clean Energy Strategy Consultation Paper, January 2024). In EDO's respect for First Nations self-determination, in this submission EDO has provided high level key recommendations for Western law reform to remove barriers so First Nations communities can protect their Countries and cultural heritage as they deem fit; but defers to the Network's Guidance Paper for further recommendations on specific projects and funding initiatives.

As such, the focus of this submission is on three key law reform areas. First, the need to rapidly and equitably phase out fossil fuels and transition our energy system; second, the need for free, prior and informed consent for any projects on First Nations peoples' lands and waters; and third, the importance of cultural heritage protection as the energy transition gathers pace.

Summary of Recommendations

Recommendation 1: The Strategy should outline how an equitable energy transition will empower and benefit First Nations communities.

Recommendation 2: The Strategy must outline how principles of FPIC will be integrated into laws, policies, and decision-making processes for renewable energy projects.

Recommendation 3: The Strategy should coordinate jurisdictional reform of cultural heritage laws in line with international obligations.

Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the First Nations Clean Energy Strategy Consultation Paper (**Consultation Paper**). EDO supports the development of the First Nations Clean Energy Strategy as a priority for the Australian Government, and believes that First Nations communities must be at the forefront of developing the actions, policies and programs which will be implemented as part of the Strategy.

In acknowledging the urgency of the energy transition, and the need for a rapid decarbonisation across all energy systems, EDO acknowledges that renewable energy projects will have impacts on and, in some instances, significant consequences for First Nations communities and cultural heritage. An estimated 54% of projects extracting clean energy minerals overlap with Indigenous lands globally,¹ while First Nations peoples hold rights and interests in over 50 % of Australia's land mass,² yet 'vast areas of lands and waters' are expected to be required for the transition.

This is an obvious tension, and the Federal Government must take a lead in setting appropriate policy and legislative frameworks for the transition. This is particularly so given the federated regulatory landscape, in which State and Territory mining and cultural heritage laws frequently fail to protect First Nations interests, land, water, and cultural heritage.³ At all levels and in all jurisdictions, it is crucial that transition planning engages with First Nations cultural heritage protection, consultation and benefit sharing in a different way than has been the historical experience in respect to the fossil fuel industry and other mining developments. The Strategy is an opportunity to ensure this outcome.

To navigate this transition, EDO has developed [12 principles for renewable and energy transition projects](#), which recommends that any proposed renewable energy transition project must involve consultation with First Nations peoples that is early, iterative, and culturally appropriate.

First Nations peoples must be empowered and resourced to engage in the design, delivery and benefits of projects, policies, and decision-making processes relating to transition minerals mining and renewable energy infrastructure, as they see fit.

EDO's 12 principles for renewable and energy transition projects

We are also guided by the significant work of the First Nations Clean Energy Network (**the Network**) in this area, and note the Network's [Aboriginal and Torres Strait Islander Best Practice Principles for Clean Energy Projects](#), which provides a guide for both governments regulating clean energy projects, but also clean energy companies themselves. EDO also endorses the First Nations Clean Energy Network's [Guidance Paper](#) (Potential actions to highlight in responses to the government's First Nations Clean Energy Strategy Consultation Paper, January 2024). In EDO's respect for First Nations self-determination, in this submission EDO has provided high level recommendations for Western law reform to empower First Nations to protect their Countries and

¹ Deanna Kemp, John Owen and Kado Muir, '54% of projects extracting clean energy minerals overlap with Indigenous lands, research reveals' (The Conversation, 2 December 2022) <https://theconversation.com/54-of-projects-extracting-clean-energy-minerals-overlap-with-indigenous-lands-research-reveals-195438>

² First Nations Clean Energy Taskforce, First Nations Clean Energy Strategy Consultation Paper (2023) 7.

³ See, [New NT mining laws destroy Borroloola community's bid for environmental justice \(22 December 2023\)](#).

cultural heritage; but defers to the Network’s Guidance Paper for further recommendations on specific projects and funding initiatives.

As such, the focus of this submission is on three key law reform areas. First, the need to rapidly and equitably phase out fossil fuels and transition our energy system; second, the need for free, prior and informed consent for any projects on First Nations peoples’ lands; and third, the importance of cultural heritage protection as the energy transition gathers pace.

1. Australia must rapidly decarbonise our energy systems, and phase out fossil fuels, in an equitable manner.

Australia must reduce greenhouse gas emissions consistent with a carbon budget based on science and our international commitments to keep global warming under 2 degrees Celsius and pursue a limit of 1.5 degrees Celsius above pre-industrial levels.⁴ The scientific, social, economic, human rights and environmental imperatives for limiting warming to 1.5 degrees Celsius are clear – this is particularly so for overburdened communities who are more likely to bear the brunt of climate inaction. First Nations communities are not only more likely to be at risk from the impacts of global warming, but also be disadvantaged from climate policies and measures which lack equity considerations.⁵ Limiting global temperature increase to 1.5°C is critically important for the survival and sovereignty of Indigenous and First Nations Peoples, including in the Torres Strait Islands and Pacific States, who are already suffering significant climate harm.

Energy poverty and disadvantage are also problems for many First Nations communities around Australia, with unreliable and expensive energy systems the norm for many remote communities, and access to household generation and storage limited.⁶ The benefits of large-scale renewable energy projects situated near, or impacting on, First Nations communities, may simply bypass those communities despite widespread energy insecurity, and despite the best efforts of ad-hoc and small scale initiatives.⁷ There is therefore an urgent need for the energy transition to both deliver on the necessary systems change to avert exacerbated climate change; but also to deliver on the obligation to provide (clean) energy security for all.⁸

In light of these factors, and in line with federal commitments,⁹ renewable energy projects and transmission capacity must be operational as soon as possible. In this large-scale energy transition from fossil fuels to renewable energy there are significant opportunities for Australia to

⁴ Paris Agreement ref

⁵ Kate Crowley and Oshan Jayawardena, ‘Energy disadvantage in Australia: policy obstacles and opportunities’ (2017) International Conference on Improving Residential Energy Efficiency, IREE (<https://www.sciencedirect.com/science/article/pii/S1876610217334835>).

⁶ First Nations Clean Energy Network, Access to energy is a right - but not if you're living in remote areas (17 January 2024) https://www.firstnationscleanenergy.org.au/access_to_energy_is_a_right_but_not_if_you_re_living_in_remote_areas.

⁷ See e.g. Aneeta Bhole and Amy Gunia, ‘Why Australia’s green energy movement needs to include Aboriginal communities’ (SBS News, 3 November 2021).

⁸ Sustainable Development Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all.

⁹ Federal Government’s commitment to deliver 82% renewable electricity by 2030.

be a leader in renewable energy technology and production, and a clear imperative to cease the extraction and use of fossil fuels (both domestically, and of those we export internationally). Australia also has a role in supplying minerals necessary for the energy transition. But the benefits of the energy transition must be equitably distributed, and First Nations communities empowered to make decisions about such projects themselves.

The Strategy can play a key role in guiding the equitable transition. For example, the First Nations Clean Energy Network reviewed current energy system governance and transmission planning against First Nations outcomes including participation, co-design and co-ownership. The Network found that despite the Federal Government's stated ambition to ensure First Nations participation in Australia's energy transition, there are no legislative or policy frameworks which actually embed First Nations outcomes in transmission planning prior to decision-making.¹⁰ The Strategy must set out how this can be remedied.

At minimum, energy access must be framed in the Strategy as a human right rather than a service provided by the market,¹¹ and First Nations peoples guaranteed a base right of access to clean, reliable and affordable energy.¹² Barriers to clean energy security must be addressed through proactive programs to ensure reliable and clean power in First Nations communities, as well as better protections for communities currently experiencing energy insecurity. Governments at all levels, led by the Strategy, must work to remove barriers to lower cost, clean energy for First Nations communities. This must include remote and regional communities, as well as First Nations people living in metropolitan areas, including in social and supported housing. Moreover, First Nations communities must be enabled and empowered to actively participate in the energy transition, as they see fit, without structural, legal or financial barriers – and to share in the benefits of the transition.

Recommendation 1: The Strategy should outline how an equitable energy transition will empower and benefit First Nations communities.

2. Free, prior and informed consent must be obtained for any renewable energy project impacting First Nations peoples.

EDO supports the Guiding Principles outlined in the Strategy, particularly as they are informed by the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), and Australia's commitment to the United Nations 2030 Agenda for Sustainable Development. The Goals, Objectives, and eventually implementation of the Strategy must similarly mirror the rights of First

¹⁰ First Nations Clean Energy Network, Emerging issues impacting First Nations in transmission infrastructure planning (December 2023) (https://www.firstnationscleanenergy.org.au/emerging_issues_impacting_first_nations_in_transmission_in_infrastructure_planning).

¹¹ Sustainable Development Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all.

¹²First Nations Clean Energy Network, Key learnings and reform asks from the Northern Territory roundtable (May 2023).

Nations communities to be able to make decisions about their lands and cultural heritage, and for the duty to obtain free, prior and informed consent (**FPIC**) to be upheld.

The duty is drawn from article 32(2) of UNDRIP adopted by Australia on 3 April 2009, which states:

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

While UNDRIP is not legally binding, the rights (and consequential obligations on States) contained within it are derived from pre-existing human rights and developed under treaties to which Australia is a party, and which are binding on Australia. FPIC is grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by at least three treaties that Australia is a party to: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.¹³

When a First Nations person or community is identified as a relevant person to be consulted on a project under the law or regulation, those consultations should be based on FPIC. The process of obtaining FPIC must be iterative, by which decision-makers seek input throughout the decision-making process.¹⁴ It is important First Nations people are able to influence the outcome of decision-making processes affecting them, rather than simply ‘having their views heard’ by a proponent or decision maker.¹⁵ This means that through consultations, First Nations people must have the ability to alter the decision at issue or to develop accommodations of their interests at stake. The taking of cultural resources should not occur without consent,¹⁶ and when First Nations peoples’ resources have been taken, used, or damaged without consent, the law must provide a right to redress.¹⁷

In practice, this means First Nations communities are able to participate effectively in decision-making about renewable energy infrastructure, informed by comprehensive information within reasonable timeframes, and have access to justice mechanisms in cases where decisions are not taken in line with the law. This approach must encompass multiple forms of engagement, be done

¹³ Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human rights-based approach*, UN Doc A/HRC/39/62, (10 August 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement>> [3].

¹⁴ See for example, Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mexico*, CERD/C/MEX/CO/16-17 (4 April 2012) [16]-[17]. (“effective” consultations must be carried out “at each stage of the process”).

¹⁵ Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human rights-based approach*, UN Doc A/HRC/39/62, (10 August 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement>> [15].

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (**UNDRIP**), articles 10, 11; The Equator Principles, EP4 (July 2020) https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf (**Equator Principles**) 12.

¹⁷ UNDRIP, article 28(1).

in an iterative and culturally sensitive way, and ultimately should be in service of the community and its vision for renewable energy development in the region – not as a result of pre-decided conclusions. Community rights to participation and engagement must be backed in by transparency and accountability measures.

Currently, no relevant cultural heritage, environment or development legislation in Australia adequately reflects the requirements of free, prior and informed consent obligations under our international law commitments.¹⁸ It is therefore critical that the principles from UNDRIP, and particularly FPIC, are a core component of the Strategy. This should not be just as a guiding principle or overarching concept, but integrated into the Objective, and subsequently the policy or law reform initiatives which result from operationalising the Strategy. As a starting point, and at a minimum, any renewable energy project – including wind and solar farms and associated energy transmission infrastructure, but also green hydrogen projects or projects relating to extraction and processing of minerals required for the renewable energy transition – must adhere to the standard of FPIC.

Recommendation 2: The Strategy must outline how principles of FPIC will be integrated into laws, policies, and decision-making processes for renewable energy projects.

3. Cultural heritage protection must be strengthened as a priority.

EDO supports the Objective to ‘embed cultural and heritage protection [that] supports First Nations peoples and all Australians to recognise, respect and celebrate our cultural heritage,’ and agrees that more can and must be done to strengthen legislation and protect First Nations cultural heritage sites which are frequently damaged, disturbed, or displaced.¹⁹ Australia’s approach to cultural heritage protection requires a true transformative change, which must be pursued at the national level by the Federal Government, as well as in the states and territories. With the exception of now-repealed cultural heritage legislation in Western Australia, very little in substance has changed since the destruction of the 46,000-year-old heritage sites at Juukan Gorge in Western Australia in 2020.²⁰ EDO remains concerned about the lack of urgency to amend the federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).²¹ Cultural heritage protection in Australia must therefore be strengthened as a priority, with the Strategy another key policy measure to ensure consistency across jurisdictions.

As noted above, cultural heritage legislation must be consistent with Australia’s international obligations and UNDRIP, with First Nations peoples giving their free, prior and informed consent in relation to decisions which impact their heritage. The following principles expound on this recommendation and should be integrated into the Strategy.

¹⁸ See further analysis in [EDO, Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia 14 August 2020](#).

¹⁹ First Nations Clean Energy Taskforce, First Nations Clean Energy Strategy Consultation Paper (2023) 17.

²⁰ See [EDO, Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia 14 August 2020](#).

²¹ See, the [First Nations Heritage Protection Alliance](#).

- First Nations must be the primary decision-makers about their heritage. First Nations decision-making processes must be respected, supported and properly resourced. These processes must be aligned with cultural protocols as First Nations see fit, to ensure respectful and meaningful partnerships and relationships are developed with First Nations communities and individuals.
- Policy and laws must reflect that First Nations peoples are the experts in their own heritage and are not outweighed by Western scientists when defining whether a heritage site is significant, or how it is significant.
- Should cultural protocols be a part of the heritage reform process, they must be developed through extensive consultation, co-design and co-implementation with First Nations in the relevant jurisdiction in accordance with the principles of free, prior and informed consent and self-determination, which must form the basis of all work with First Nations.
- State & territory legislation must be compatible with Australia's international obligations on racial discrimination.
- Western cultural heritage law reforms must provide statutory entrenchment of decision making about heritage by First Nations in relation to what is considered heritage, the significance of heritage and protection of heritage.
- Cultural heritage law reforms must provide for merits appeal rights for First Nations in relation to decisions that impact their heritage. Further, merits appeal provisions must be reviewed across the Australian jurisdictions.
- Definitions of heritage need to be guided by First Laws and heritage must be viewed as living and connected to Country and Sea Country.
- Cultural heritage legislation needs to mandate 'respect' for First Nations cultural values and where the destruction of a site will have a detrimental effect on culture or cultural identity as identified by First Nations peoples, the site must be protected to be in-line with Australia's obligations under international law.
- All cultural heritage legislation must be very clear and transparent on how decision-makers weigh up different considerations and interests in decision-making. Clear statements of reasons should be required, including explanations of how decisions are consistent with free, prior informed consent requirements.
- First Nations must have the legal right to enforce First Laws and Western laws to protect their heritage and to seek redress for illegal damage to their heritage.
- The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) must prioritise First Nations leadership in proactively managing areas that have been listed as heritage places.
- Determining significant impact on heritage pursuant to the EPBC Act must be assessed through a decision-making process led by First Nations.
- First Nations-led innovations in governance of Country should be prioritised, supported, resourced and encouraged.

- Legislation should enshrine a duty to develop and act in conformity with cultural protocols which exist from First Laws, and to uphold internationally recognised First Nations rights of free, prior and informed consent and self-determination.
- Reform the *Underwater Cultural Heritage Act 2018* (Cth) to ensure that First Nations underwater cultural heritage is properly identified, defined and protected.

As a starting point, EDO recommends a review of Western cultural heritage laws to determine how to operationalise free, prior and informed consent, including Commonwealth laws.²² This review must be led by First Nations. In each of the States and Territories, a review led by First Nations should be undertaken to consider the most culturally appropriate methods of determining who has the right and power to speak for cultural heritage of an area. In conjunction, cultural heritage, environment, water, development, native title and planning laws (at Local, State/Territory and Commonwealth levels) must be assessed such that they operate coherently to protect First Nations heritage. The Strategy can play a role in coordinating and incentivising this work, by setting out a process, and resourcing, for both Commonwealth and jurisdictional reform.

Recommendation 3: The Strategy should coordinate jurisdictional reform of cultural heritage laws in line with international obligations.

Conclusion

EDO is of the view that environmental justice must be upheld regardless of the type of project or development in question – including renewable energy projects. The above recommendations should be implemented into Australian law for all projects. However, the urgent renewable energy transition presents an opportunity to re-model and re-assess many of our regulatory and approval systems, and put in place Strategies and laws that deliver outcomes for climate and communities.

It is crucial that First Nations communities not only share in the benefits of the switch to renewable energy systems, but are able to lead and drive the transition. Australia’s planning, environment, cultural heritage and climate laws can, and should, be designed to deliver outcomes for climate, nature and communities, and First Nations peoples should be empowered to be squarely at the front of this. The Strategy presents an opportunity to coordinate and update our legal processes and protections, and EDO supports its development.

*Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.*

²² Including both the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), relevant parts of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and the *Underwater Cultural Heritage Act 2018* (Cth).