



25th August 2022

Submission to the Victorian Transmission Investment Framework Consultation

The Federation of Victorian Traditional Owner Corporations (the Federation) is an Aboriginal controlled state-wide body advocating for the rights and interests of Victorian Traditional Owner Corporations. We welcome the opportunity to make a submission to provide feedback on Victorian Transmission Investment Framework (VTIF) Preliminary Design.

We commend the Department of Environment, Land Water and Planning's (DELWP) commitment to partnering with Traditional Owners to develop Renewable Energy Zone (REZ) infrastructure, putting into practice the principle of self-determination as is required under *Pupangarli Marnmarnepu*. It will be necessary to invest appropriate resources to find innovative approaches to enable Traditional Owners to play a lead role in planning and decision-making in relation to REZ development, and to ensure Traditional Owners maximise benefits from REZ development as part of a holistic approach to rebuilding the economic base of Victorian Traditional Owners that recognises, and is consistent with, their unceded rights and interests.

This submission draws on conversations with Traditional Owner Corporation representatives. Traditional Owners are largely supportive of renewable energy developments as the outcome of limiting global heating is aligned with their objectives and responsibilities for caring for Country, while they have concerns about localised impacts on sites of cultural significance and environmental values. Traditional Owners are seeking to be engaged as partners in renewable energy developments in a way that enables them to:

- exert their unceded rights and obligations to protect Country,
- contribute to achieving their economic development objectives of accessing independent sources of income, and
- find new procurement and employment opportunities for Traditional Owner businesses and individuals which would enable more of their community to live and work on Country.

This will contribute to the restoration of Traditional Owner's economic base independent of government funding which is a key pillar of self-determination.

We commend the recognition that Traditional Owners are rights holders, not stakeholders, which is a different status to other community stakeholders when it comes to REZ development, and DELWP's commitment to taking a tailored approach to engaging Traditional Owners that respects their needs, time and expectations from the earliest stages of each REZ development through to implementation. We also commend the commitment to taking a place-based approach. This should be based on acknowledging the differing status of recognition of land rights under the *Native Title Act 1993*, *Traditional Owner Settlement Act 2010*, and *Aboriginal Heritage Act 2006*, and the

corresponding differing levels of establishment of representative bodies. These rights and institutional arrangements can be expected to continue to evolve during the lifetime of REZ infrastructure.

Many of the REZs cross Country where Traditional Owners do not have formal recognition. Engagement processes should be based on best practice principles set out in the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) and literature on engagement and benefit sharing arrangements with Australian Traditional Owners¹, including recognising that Traditional Owners retain sovereignty over all land in Australia, whether this is recognised in Australian law or not.

Who should participate in the process for developing REZs? How should they be engaged to achieve the proposed outcomes?

For Traditional Owner groups who have formal recognition under the above pieces of legislation, Traditional Owner Corporations (TOCs) are bodies that solely have the formal authority to represent the Traditional Owner Nation's collective rights and interests for a specific area and facilitate input into planning, decision-making and negotiation processes such as those associated with REZ developments. It is important to recognise that each of the TOCs are at differing stages of establishment, with differing internal capacities and capabilities, and demands on their time and resources. The agenda, nature and timeliness of engagement processes should be determined in collaboration with the TOCs, not only by DELWP or REZ project developers.

TOCs have a broad range of responsibilities and obligations and are called on to contribute to many planning processes. They need to be adequately resourced to meaningfully participate in the complex and technical processes for developing REZs, including having dedicated staff to build the required knowledge bases, including internal engagement with TOC directors, management and community members to be able to partner from an informed and empowered position. TOCs should also be resourced to obtain qualified and independent legal, technical, scientific, business and other advice to enable informed positions in relation to REZ planning processes.

Designing an engagement process with Traditional Owner groups that do not have formal recognition needs to be undertaken with care in order to mitigate against a range of inherent risks, including:

- As there is no agreed representative body, there is the risk of amplifying or legitimising the voices of certain organisations or individuals which do not represent the collective rights and interests of Traditional Owners for that area.
- Creating conflict amongst a group or between groups, for example where Traditional Owner groups hold or assert rights and interests over an overlapping area. This could hinder or detract from progress towards formal recognition.

¹ O'Neill, L., Riley, B., Hunt, J., & 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 lessons can be learnt from previous engagement processes, they should be tailored to each region and for the purpose of the engagement, based on the understanding the community dynamics and relationships are constantly evolving. There are a number of measures that can be taken to mitigate against inherent risks of such processes:

- They should be designed with Traditional Owners, informed by background research, and led by suitably experienced and qualified engagement practitioners;
- All staff involved should have had cultural competency & cultural safety training;
- Ensure engagement is inclusive, aiming to empower all Traditional Owners who assert rights over Country; and being clear that meeting facilitators are not in a position to determine who are the right people to speak for Country;
- Use various methods of engagement, so participants are able to participate in a forum they feel comfortable & culturally safe in, including in-person and online meetings and options for independent engagement such as written submissions or phone calls;
- Creating a respectful and culturally safe process, including:
 - Being mindful of the sensitivity of the topics being discussed;
 - recognise any protocols established between Traditional Owner groups and organisations;
 - Respecting Traditional Owner culture, elders, people and agreement making processes;
 - Respecting that some people may choose not to participate;
- Discuss and plan approaches for avoiding and dealing with conflict prior to engagements, such as setting a 'code of conduct' for meetings;
- Linking engagement to Traditional Owner goals and objectives, and having appropriate and flexible timeframes for engagement;
- Be transparent about how information will be used, collected, and managed, and how it can be returned to Traditional Owners;
- Where confidentiality is requested, it should be protected;
- Ensure Traditional Owners are appropriately compensated for their time and associated costs of participating.

An example of a recent engagement process from which some lessons can be learnt was that undertaken for the development of Nation Statements, that were prepared as part of ***Water is Life: Traditional Owner Access to Water Roadmap***. This included engagement with Traditional Owner groups without formal recognition. Key features that resulted in successful engagement processes with these groups were:

- The engagement process was informed by Traditional Owners with the objective to develop Statements that identified a suite of water legislative and policy reforms to inform Government commitments in *Water is Life*.
- The approach included three possible streams² that Nations chose from to participate in and/or opt out of, and up to three pathways of engagement supported by Federation, Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and/or DELWP.

² Nation scale workshops, regional forums and state-wide forums.

- It built on existing relationships that MLDRIN and the Federation had developed over many years,
- Regional workshops, which comprised representatives from different Traditional Owner groups, were held on Country and were chaired by a Traditional Owner elder. The chair was independent (i.e. not from the area of the workshops), and carried cultural authority to hold participants to the code of conduct and ensured cultural protocols were adhered to
- The meetings were facilitated by a non-indigenous professional facilitator with extensive experience working with Victorian Traditional Owners,
- The resulting statements were a valued outcome for the Traditional Owners, and informed Government commitments to water policy and legislative reform in *Water is Life*.

These processes may be more resource intensive but will be essential for achieving the goals of partnering with Traditional Owners as set out in the VTIF design document. Robust and respectful early engagement processes will avoid costly issues arising at a later stage of project development and will be the basis of a building positive relationships between Traditional Owner groups, VicGrid and others involved with project development.

Strategic Land Use Assessment process- what, who and how?

TOCs are well placed to provide input to the Strategic Land Use Assessment (SLUA) process that will inform the design and planning of REZ pathways. The Aboriginal Cultural Heritage Register and Information System (ACHRIS) holds records of all registered cultural heritage places and objects in Victoria. This is a useful starting point for considerations of cultural heritage implications under the SLUA process. Traditional Owners are uniquely placed to guide the recognition of Aboriginal cultural landscapes, including specific landscape features and other values of cultural significance that are integral to culture and Country. Further investigations regarding potential impacts on Aboriginal cultural heritage and cultural landscapes will be required and must be undertaken in a sensitive and culturally strong approach. It must be acknowledged that across all tenures, the vast majority of potential Aboriginal sites, places, objects and landscape features of cultural significance remain un-assessed, unrecorded and unregistered. Potential impacts on intangible cultural heritage and cultural landscape values will need to be considered in the planning of generation and transmission infrastructure. As well as providing input regarding sites of cultural significance, Traditional Owners also have an interest in areas of bio-cultural significance, and the potential impacts that generation and transmission infrastructure may have on their economic interests in the region. There are established processes for the Traditional Owner groups without formal recognition participating in cultural heritage assessment processes, these could be built upon for this SLUA process.

The VTIF documents state that the establishment of Regional Reference groups are being considered as potential bodies to be established as part of the process of capturing stakeholder views. To ensure genuine partnership with Traditional Owners with significant decision-making responsibility to be shared, it is recommended that a Traditional Owner representative, or representatives, be included in the reference group.

The Immediate Protected Area (ImPA) Eminent Panel process could be referred to in the design of such a body being involved in the SLUA process. The ImPA Eminent Panel process was developed in

partnership with Traditional Owners and is an example of Traditional Owners partnering in planning and decision-making. The Panel is made up of three members, two appointed by the Minister, and one nominated by Traditional Owners. The panel leads the conversation with the community around the future of a particular ImPA and works with the Environmental Assessment Council to undertake scientific assessment of the areas. Based on assessment of this information, the Eminent Panel makes recommendations to the Minister regarding the future of the ImPA.

This arrangement has enabled Traditional Owners to contribute to the process in regard to their Country and Culture through their nominated representative (e.g. the representative could be a non-TO staff member from a TOC). Adopting a process like this does not take away from the need for TOC involvement in providing expert input to the information that is considered in the Panel process and is seen as having equal value to other inputs.

Approaches to Benefit Sharing Arrangements with Traditional Owners

Benefit sharing agreements and processes should be based on thorough consultations with Traditional Owner groups and aligned with meeting their needs, aspirations and development objectives. Most of the TOCs will have identified their development priorities in their Whole of Country Plans and other internal strategy documents. These form a starting point for more comprehensive conversations with TOCs.

Every Traditional Owner group or nation is at a different stage in their pathway to activating their rights and interests and more work may need to be done with some Traditional Owner groups to clarify their development priorities to ensure they are optimally targeted. There will need to be differing benefit sharing arrangements amongst groups, especially for groups without formal recognition, as there will not be a representative body which can coordinate and negotiate these arrangements internally.

The VTIF design document points to benefit sharing arrangements building on the Victorian Government's Social Procurement Strategy. Many Traditional Owner groups have indicated that they are keen to build their businesses' capacities to be able to position themselves to make the most of the procurement opportunities that will arise from the expansion of the renewable energy sector. It can be expected that capacities and capabilities of Traditional Owner businesses will vary greatly amongst Traditional Owner groups, and therefore it is recommended that a targeted information, training and education program be developed to enable Traditional Owner businesses and individuals to understand the opportunities, make strategic decisions about preparing for and taking up these opportunities.

It is noted that Victorian Government is considering a range of options for improving benefits accruing to Traditional Owners through the proposed mechanisms that are part of the VTIF. We encourage a holistic view and innovative approaches to ensuring Victorian Traditional Owners are able to access benefits from the expansion of the renewable energy sector, based on a recognition of unceded rights, and that are comparable to Traditional Owner groups in other parts of Australia, where the land tenure context is less of an impediment to obtaining the recognition of land rights

through Native Title processes. A large proportion of renewable energy generation projects in Victoria are likely to be based on freehold title land or offshore, which do not trigger requirements for negotiation of benefit sharing arrangements with Traditional Owners based the current legal context. This disparity can be addressed through policy levers that could be incorporated into the VTIF, such as obligations imposed on renewable energy generation projects in return for gaining 'access rights' to use REZ infrastructure. Benefits sharing arrangements should be designed with reference to best practice approaches in the sector recommended by the Clean Energy Council³ and First Nations Clean Energy Network⁴, and other literature on the topic¹.

This submission has pointed to some strategies and complexities of partnering with the Traditional Owner groups in the development of REZ infrastructure given the diversity of their formal recognition and institutional establishment. This is not an exhaustive assessment, and due to the significant opportunity and risks at stake, it is recommended that a technical working group designed by Traditional Owners be formed to bring together Traditional Owner representatives and sector experts with an understanding of the Victorian Traditional Owner landscape to conduct a thorough assessment of the differing components of Traditional Owner engagement with the renewable energy sector in Victoria, enabling the provision of strategic advice on the design of the VTIF based on the best available information. The Federation is well placed to facilitate such a process, having done so to inform strategy and policy development for a broad range of sectors, and having established networks with Traditional Owner groups and appropriate sector experts.

Key recommendations:

- Adequately resource Traditional Owner groups to engage in REZ development processes, including accessing required technical, scientific, legal and business advice.
- Tailor place-based approaches to engaging each Traditional Owner groups in REZ development processes, including adequately resourcing culturally safe engagement processes with Traditional Owner groups without formal recognition.
- Ensure engagement processes are designed by Traditional Owners.
- Identify ways include Traditional Owner representatives as partners at the highest levels of planning and decision-making.
- Engage with Traditional Owners in a way that recognises that they retain sovereignty over all Australian land, whether this is recognised in Australian law or not.
- Enable diverse benefit sharing arrangements suitable for differing circumstances, priorities and aspirations of different Traditional Owner Groups.
- Support the development of tailored training and education programs for Traditional Owners to enable them to take up procurement and employment opportunities.
- Develop innovative approaches to Traditional Owner benefit sharing from renewable energy developments through the policy levers embedded in the VTIF.

³ Clean Energy Council (2019) A Guide to Benefit Sharing Options for Renewable Energy Projects, at <https://www.cleanenergycouncil.org.au/advocacy-initiatives/community-engagement/benefit-sharing-for-renewable-energy-projects>

⁴ <https://www.firstnationscleanenergy.org.au/resources>