



25 June 2024

## Submission on the Draft Renewable Energy Zone Community Benefits Plan

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 the Draft Renewable Energy Zone Community Benefits Plan (REZCB Plan).

This submission is informed by analysis of components of the Victorian Transmission Investment Framework, including the benefit sharing regime, that was part of a project funded by the Indigenous Land and Sea Corporation. The project brought together Traditional Owners and sector and legal experts to enable informed Traditional Owner contributions to a number of renewable energy reform processes. It builds on engagement and contributions from representatives of Traditional Owner Corporations on this work including at a meeting held on 14<sup>th</sup> May 2024.

The renewable energy transition is set to see a significant transformation of Victorian land and sea Country, while also bringing billions of dollars of investment. We commend VicGrid for their commitment to partner with Traditional Owners in co-designing models for dedicated Traditional Owner benefits, based on the acknowledgement of their unique relationship with Country and Sea Country, and the impacts on their traditional lands and cultural and legal rights and interests that can be expected from development of renewable energy infrastructure. However, this work must be done efficiently to ensure framework design relevant to Traditional Owners apply from the outset, at the same time as other elements.

With the right legislative and regulatory settings, the renewable energy transition can result in both decarbonisation of the Victorian economy, and also Traditional Owners self-determination by contributing to rebuilding the economic base of Traditional Owners which has been degraded by land dispossession and colonial practices.

The REZ benefit sharing mechanism has the potential, with the right design, to contribute to generating an equitable share of benefits for Traditional Owners from the renewable energy transition. However, the scheme must include clear provisions to ensure Traditional Owner benefits under the scheme do not replace consultation and agreement with Traditional Owners on specific projects and accordingly do not represent compensation for statutory or social licence, and are separate to and will not impact on any negotiated agreements or entitlements flowing from *Native Title Act 1993* (NT Act) or *Traditional Owner Settlement Act 2010* (TOS Act) rights or any other rights.

We submit that that the government must support additional measures which incentivise and enable project-based Traditional Owner engagement and agreement making, with options to achieve this discussed below.

This submission will set out the land justice context which should be considered in the design of the REZCB Plan, and highlight key variables and recommendations regarding the source, quantum and administration of the Traditional Owner fund component of the REZCB Plan.

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## 1. Key Recommendations

- As benefits under the REZCB Plan are being derived from the use of resources and impact of infrastructure on Country, Traditional Owners groups should be the beneficiaries of Traditional Owner funds under the scheme with:
  - Traditional Owner Corporations, established under the Victorian *Aboriginal Heritage Act 2006* (AH Act), NT Act and/or TOS Act, self-determining the administration and use of dedicated funds; and
  - special arrangements made in regard to funds derived from the use of resources, and impact of infrastructure on the Country of Traditional Owners which do not have formal recognition under the above legislation.
- Financial contributions should be collected under the REZCB Plan for renewable energy projects (generation, storage and/or transmission) on lands or waters (including sea Country) of Traditional Owner groups without formal recognition, with the funds held in trust until appropriate formal recognition has been achieved.
- Traditional Owner Benefits should be at least equal to Regional Community and landowner benefits and be derived from payments related to the entire length of transmission projects and all generation and storage projects within a REZ on all tenure types.
- In a case where multiple Traditional Owner groups have traditional owner lands within a REZ, the distribution of benefits should be negotiated between groups, with a default approach if agreement cannot be reached (with the 'default' being based on the percentage of physical impact on traditional lands, with a loading for neighbouring group cultural impact/loss).
- There should be a range of options for the administration and distribution of the Traditional Owner benefits, where groups can opt in to have monies related to their traditional lands held in a centralised Traditional Owner trust, or opt out if this is seen as advantageous, and for these arrangements to be able to be changed over time as the circumstances and capacities of each Traditional Owner group evolves.
- Financial contribution amounts collected for distribution to Traditional Owners should be passed through as gross amounts – ie: not be reduced by administrative costs associated with fund management, administration or distribution.
- Complimentary regulatory and policy mechanisms should be instituted which incentivise engagement of renewable energy project proponents and Traditional Owner groups and the negotiation of social license agreements, including procurement requirements and criteria.

## 2. Land Justice context

The design of the REZCB Plan should be informed by the land justice context that was detailed during the Yoorrook Justice Commission's recent Land, Sky and Waters inquiry. The inquiry heard previous energy developments have resulted in significant degradation of Country, while seeing no meaningful benefits flowing to Traditional Owners of the Country upon which projects were developed. As an emerging sector there is an opportunity for this situation to be rectified in the case of renewable energy.

There has been only limited formal recognition of land rights in Victoria via the NT Act, due to historic patterns of land dispossession and colonial practices. The Victorian government created the TOS Act based on acknowledgement of these circumstances. It was intended to create an alternative method to settle native title claims out of court and to allow for the recognition of Traditional Owners and granting of certain rights over Crown Land via the negotiation of a Recognition and Settlement Agreement (RSA). The recognition of Traditional Owners rights under the TOS Act has also been limited, with only 4 Traditional Owner groups entering into RSAs.

The REZCB Plan must be designed to suit the particular Victorian context, with a mosaic of different levels of recognition of Traditional Owner rights and interests, including with respect to Sea Country. Under the NT Act and TOS Act, only approximately 10% of the Victorian landmass has been returned to the Traditional Owner estate<sup>1</sup>. This is significantly less than in other states. For example, in Queensland Aboriginal land rights have been granted over approximately one third of the state. Of the land acquired by Victorian Traditional Owners, most of it is has existing management regimes such as national parks and state reserves, with very little able to be used for commercial purposes such as the development of renewable energy infrastructure. Victoria has a relatively high percentage of freehold title, with 60% of Victorian land covered by freehold title, while a further 20% of Crown land was formally freehold, both of these tenure types extinguish native title according to the NTA (while noting specific provisions in the NT Act under sections 47A, 47B and 47C allow prior extinguishment to be disregarded under certain circumstances). The TOS Act recognises Traditional Owner interests in all Crown and public land regardless of prior extinguishment.

The AH Act is a third way that the Victorian government formally recognises Traditional Owners interests over their traditional lands, by appointing a Traditional Owner Corporation as a Registered Aboriginal Party (RAP) with responsibilities for managing Aboriginal cultural heritage for the entirety of their appointed area, including over private tenure. In this way, the AH Act can be seen as tenure blind. RAPs have been recognised under the AH Act over approximately 75% of the state, for the remaining 25% of the state there is no RAP, so default provisions involving approval of cultural heritage management plans by the Secretary or the Aboriginal Heritage Council in limited circumstances. Further formal recognition of Traditional Owner rights and interests can expect to continue to evolve during the lifetime of renewable energy infrastructure projects under the above acts, and also potentially via the Treaty process that has commenced under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*.

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<sup>1</sup> chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://assets.nationbuilder.com/fncen/pages/430/attachments/original/1700611485/Victoria\_-\_Policy\_Overview\_-\_First\_Peoples\_and\_Clean\_Energy-2.pdf?1700611485

Traditional Owners have never ceded sovereignty and assert that their rights and interests in land pre-exist and co-exist with Australian law. Renewable energy infrastructure developments will impact Traditional Owner's rights and interests on all tenure types, whether it be freehold or Crown land, and in respect of waters including sea Country. Via various planning and approvals processes including those to be utilised by the Victorian Transmission Investment Framework, the Victorian Government will be creating new development rights, which will add value to pieces of land and further disenfranchise Traditional Owners from the development of their lands. As Traditional Owners maintain they still have a residual connection over all land and waters in Victoria, and associated cultural responsibilities to care for them, they should be afforded access to an equitable share of this added value, as well as be enabled to make decisions about Country, which includes being actively involved in managing the impacts and benefits of renewable energy projects on their cultural landscapes and cultural heritage. While we acknowledge this is beyond the scope of this consultation, we would welcome the opportunity to discuss possible reforms to planning processes to ensure that Traditional Owners' role in decision making is preserved.

If benefit sharing is based on certain tenure types, then it would reinforce land injustice issues, as highlighted at the Yoorrook Justice Commission inquiry. It would reward landholders recognised under current laws, while excluding Traditional Owners from benefit sharing based on the effects of historic land dispossession and cultural disruption.

The Traditional Owner Funds created via the REZCB Plan can contribute to addressing this land injustice and to Traditional Owners economic independence which would enable them to meet the objectives they see would benefit their communities and Country. It is imperative that these funds are in addition to complementary agreements negotiated between project proponents and Traditional Owners, which can cover both economic development and non-monetary benefits such as agreements regarding managing impacts on cultural values, heritage and landscapes.

Having sound benefit sharing and agreement making arrangements in place regarding projects on all tenure types will create certainty for project developers and Traditional Owners, assist developers satisfy Environmental, Social and Governance reporting (ESG) and social licence aspirations, avoid repeating Traditional Owner disenfranchisement from historic land injustices and help meet ambitious goals set out in state and federal government renewable energy targets in an efficient manner.

### 3. General comments on the Draft REZ Benefits Sharing Plan

The consultation document does not provide some key details regarding the Traditional Owner benefits under the plan. We welcome the commitment in the draft Plan to formalise, in legislation, community benefits sharing via the REZ Community Energy Funds and Traditional Owner benefits (p6, section 3). The proposed model includes the creation of dedicated funds for Traditional Owners impacted by generation, storage and transmission infrastructure. The draft REZCB Plan also proposes that Traditional Owners would be eligible to receive benefits in other categories of beneficiaries:

- As landholders which host transmission infrastructure when it crosses Crown land, and
- As significantly-affected neighbours - formally recognised Traditional Owner Corporations when transmission infrastructure crosses Crown land.

#### 3.1 Positives and Opportunities of the proposed REZCB Plan

While it is not detailed in the consultation document, the finalised REZ Community Benefit Plan has the potential to enable Traditional Owners to access benefits from renewable energy projects on all tenure types, if it is derived from all generation and storage projects within a REZ paying access fees for connecting to the transmission network, the entire length of transmission lines as is detailed for REZ Community Energy Funds for regional communities.

Under existing legislation, Traditional Owner groups can negotiate benefit sharing agreements with proponents on freehold title on a voluntary basis. However, such negotiations would require Traditional Owners to be able to dedicate capacity and resources to proactively negotiate fair outcomes from such agreements.

The creation of a mandatory payment from all renewable energy projects would also be advantageous in creating a backstop ensuring some benefits flow to all groups in a way that is not dependent on internal capacity and access to resources and expert advice. This could be particularly advantageous for Traditional Owner groups with limited capacity, and Traditional Owner groups from areas without formal recognition that do not have established representative organisations. In the latter case, funds should be collected for these Traditional Owner groups and held in trust until recognition disputes are resolved and representative bodies are established.

Mandatory payments from all projects could also be advantageous for smaller projects, as Traditional Owners will not need to dedicate separate resources to the negotiation of project specific agreements.

#### 3.2 Risks of the proposed REZCB Plan

There is a risk that the proposed REZ benefit sharing model, if it involves Government overseeing engagement with proponents and levying and distributing funds to Traditional Owners (potentially via Traditional Owner Trusts), could streamline and centralise benefit sharing in a way that becomes a disincentive for place-based engagement and agreement making to establish localised social licence.

Direct negotiation of project-based agreements has the potential to achieve broader outcomes for Traditional Owners and open opportunities for greater economic development, and also non-financial benefits such as arrangements for active participation in managing impacts on cultural

heritage and cultural landscapes and cultural awareness exchanges. Direct relationships with companies and other entities involved in generation, storage and transmission projects are important to Traditional Owners and better enable cultural responsibilities to be respected and for cultural awareness to be promoted.

Therefore, it is crucial that the final Plan and associated legislation ensure the clear principles set out in section 4 (p6) of the draft Plan are reflected in enabling instruments and that complementary policy and practices provide robust incentives for localised engagement and agreement-making with Traditional Owners, including through REZ tendering and procurement criteria and broader approvals screening assessments. This is discussed further below.

For example, consistent with section 4 (p6) of the draft Plan, legislation enabling the REZCB Plan must clearly state that payments under the scheme do not constitute “consideration” for agreement making with proponents under the NT Act, TOS Act or cultural heritage legislation.

## **4. Key Considerations in the design of the REZ CB Plan**

### **4.1 Identification of Traditional Owner fund recipients**

The Draft REZCB Plan mentions both First Peoples and Traditional Owners as beneficiaries of dedicated Traditional Owner funds. The benefits being generated are due to the impacts of a renewable energy project on a particular area of Country. As rights to culture and Country are held collectively it is appropriate that, as is outlined in some parts of the draft plan, Traditional Owner Corporations established under NT Act, TOS Act or AH Act should be the bodies which receive and determine the use of funds from the scheme in line with the principles of self-determination.

For areas where there is no formal recognition of Traditional Owners, based on acknowledgement that recognition and rights will continue to evolve during the lifetime of renewable energy projects, funds should be collected and held in Trust until sufficient recognition has been resolved. First Nations Legal and Research Services, as Victoria’s Native Title Service Provider, should be consulted in regards to identification of appropriate approaches to engaging with Traditional Owners without formal recognition regarding the management of REZCB Plan funds.

### **4.2 Administration and distribution of Traditional Owner benefits**

A key consideration in the design of the REZCB Plan is identifying processes for how Traditional Owner benefits will be administered and distributed.

It is understood that VicGrid is considering establishing Traditional Owner Trusts into which Traditional Owner funds will be paid. Such arrangements risk being overly bureaucratic and disempowering for Traditional Owners. Some groups may see advantages of it being more efficient and fair for funds being paid directly to their representative body.

The financial contributions collected for distribution to Traditional Owners should not be reduced by administrative or accounting costs. The gross monetary amount of contributions collected should be passed through to Traditional Owner nominated entities, or held in trust (if directed by relevant Traditional Owners or if default circumstances apply).

In line with the principles of self-determination, flexible options to choose which approach best suits each group should be made available, as well as the ability to change the arrangements over time as, for example, a Traditional Owner Corporation builds adequate capacity to manage these funds.

## 5. Source and quantum of Traditional Owner benefits

### 5.1 Approaches to distribution of Traditional Owner Funds if there are multiple Traditional Owner Groups with lands within a REZ

There may be situations where there are multiple Traditional Owner groups who have traditional lands within a REZ, and it will be important to clarify how funds will be distributed in such circumstances. There are a number of ways this could be calculated:

- based on negotiated agreements between groups;
- divided equally between groups with traditional lands within a REZ;
- based on the percentage of each group's traditional lands within a REZ; or
- based on the percentage of land directly impacted by a project's infrastructure.

If the latter approach was adopted, then neighbouring Traditional Owner groups whose interests are indirectly impacted by infrastructure could be addressed via eligibility for the significantly-impacted neighbours category of the scheme.

In line with the principals of self-determination, it is recommended that Traditional Owners determine the process and methodology for determining distributions on a case-by-case basis.

### 5.2 Clarity regarding source of funds

The Draft REZCB Plan proposes a specific approach to sourcing funds for each regional community fund (REZ Community Energy Fund) via access fees to connect grid infrastructure paid by all generation and storage projects within a REZ, as well as from Land Easement Tax payments for the entire length of transmission lines (at \$8000 per km per year). It states that payments to significantly impacted neighbours will be sourced directly from transmission companies. And while it specifies the approach to calculating the quantum of funds for landholders hosting transmission infrastructure, it does not specify the source of these payments. While the draft Plan only states that Traditional Owner benefits are expected to be sourced from mandatory contributions from transmission, generation and storage companies. The final REZCB Plan should clearly state how each category of payment will be funded, including the extent to which broader public funds will be drawn upon to meet payments to any stakeholder or group of stakeholders.

### 5.3 REZCB Traditional Owner Funds and tenure issues

As outlined earlier, the Federation's position is that Traditional Owner should receive payments under the proposed scheme for transmission infrastructure crossing all tenure, including private land. The Draft Plan proposes that Traditional Owners would be eligible for host landholder payments for transmission infrastructure crossing Crown land. However, if this approach is decided upon then the final Plan should confirm that these payments will apply to all Crown and public land, to more clearly reflect non-freehold arrangements and better align with TOS Act arrangements and potentially native title arrangements that may apply to certain public land.

The Draft Plan also proposes that for new major transmission infrastructure, Traditional Owners would be eligible for significantly affected neighbour benefits, but only for formally recognised groups and only on Crown land. It is the Federation's position that, as AH Act applies to all land regardless of tenure, and accordingly, Traditional Owner should be entitled to significantly affected neighbour benefits regardless of tenure or formal recognition.

The draft Plan proposes that eligibility for significantly impacted neighbour payments will depend on all of four criteria being met (ownership, proximity, visual amenity and efficacy of mitigation measures). It is noted that for Crown land, eligibility will include Traditional Owner Corporations (formally recognised under relevant laws).

Further, clarification is needed about which of the eligibility requirements Traditional Owners would need to demonstrate (Crown land and/or public land alone, or these tenures plus proximity, visual amenity etc.) Placing the burden on Traditional Owner groups to provide 'proof' on demonstrating other criteria is not reasonable. Ongoing cultural connection and cultural amenity considerations (including sensitive land use – access, use, enjoyment) associated with Crown and public land proximate to transmissions lines should be sufficient.

Further, with respect to the proposed 'exceptional circumstances' payments (above the otherwise maximum \$40,000 one-off payment), similar considerations should apply in assessing how such payments may be required for Traditional Owner groups (and noting that any such payment does not displace or reduce liability under other laws for damage to cultural heritage). However, the circumstances under which payments should be made to Traditional Owners in this category could be difficult to determine, given that culturally significant areas are on all tenure types, and may not be easily geographically demarcated. Further, there may be cumulative considerations with multiple areas affected (rather than a single property or dwelling when compared to other near neighbours). The cumulative nature of near neighbour impacts must be taken into account when considering the exceptional circumstances of Traditional Owners.

Further information is required about how fixed contributions for Traditional Owners from transmission, generation and storage companies will be implemented including whether this will apply to all projects within a REZ or only with respect to Crown and public land within a relevant REZ.

This submission, based on the above Land Justice context contends that Traditional Owner benefits should be at least equal to Regional Community benefits, and derived from the same sources, the Land Easement Taxes for the entire length of transmission lines, and access fees paid by all generation and storage projects for connecting to transmission networks on all tenure types, not only Crown and public land. Taking a 'tenure blind' approach such as this will be more appropriate



from a land justice perspective and more efficient to administer, avoiding the complications of when and how Traditional Owners would be eligible in the other categories of community benefits outlined above. If this arrangement is adopted then Traditional Owners would only need to be considered in the significantly-affected near neighbour category if infrastructure does not cross their traditional lands, but it is determined that their interests are still affected.

A ‘tenure blind’ approach can be seen as appropriate in Victoria given the high percentage of freehold title and the likelihood that most renewable energy infrastructure will be built on freehold title lands. Further, it acknowledges that renewable energy infrastructure will impact the cultural values and responsibilities of Traditional Owners on all tenure types, irrespective of formal recognition of legal interests.

#### 5.4 REZCB Traditional Owner Funds as a floor payment

The Draft Plan also suggests that the quantum of payments will be limited as they are derived from the payment of transmission network access fees (which are yet to be determined) and Easement Land Tax payments, and that the quantum is proposed to be set at a rate that does not impede ongoing capital investment or additional discretionary contributions by proponents to communities. If this is the case contributions under the REZCB Plan should be clearly defined as a floor payment, and additional measures must be instituted which incentivises proponents to reach these additional agreements with Traditional Owners.

## 6. Additional measures to enable Traditional Owner renewable energy benefits and outcomes

### 6.1 Regulatory incentives for project-scale Traditional Owner engagement and agreement making

As outlined above, it is recommended that complementary regulatory mechanisms be instituted including the reform of infrastructure licencing, commissioning tender processes and procurement frameworks to require project proponents engage and negotiate agreements with Traditional Owners.

Examples of such measures can be seen in other jurisdictions. The tender guidelines of the Commonwealth’s Capacity Investment Scheme, which will provide revenue underwriting for successful tendered projects, include First Peoples engagement and social license commitments as merit criteria for assessing applications<sup>2</sup>. The guidelines detail the expectation that proponents will provide evidence of best practice First Peoples engagement and place-based design, and evidence of commitments and shared benefits with communities and First peoples that will have a long-lasting and meaningful benefit on the beneficiaries. While the South Australian Hydrogen and Renewable Energy Act 2023 (SA) draft regulations includes a requirement for Indigenous Land Use Agreements to be in place prior to the grant of licences for large scale renewable energy and hydrogen projects<sup>3</sup>.

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<sup>2</sup> <https://aemoservices.com.au/tenders/cis-sa-vic>

<sup>3</sup> [https://assets.nationbuilder.com/fncen/pages/336/attachments/original/1694065594/South\\_Australia\\_-\\_policy\\_overview\\_-\\_First\\_Nations\\_and\\_Clean\\_Energy\\_September\\_2023.pdf?1694065594](https://assets.nationbuilder.com/fncen/pages/336/attachments/original/1694065594/South_Australia_-_policy_overview_-_First_Nations_and_Clean_Energy_September_2023.pdf?1694065594)

This approach is advocated in the Clean Energy Council and KPMG report *Leading Practice Principles: First Nations and Renewable Energy Projects*<sup>4</sup>.

## 6.2 Resourcing Traditional Owners

There is an urgent need for direct funding to assist Traditional Owners engage in the co-design of how the Traditional Owner benefits funds will operate, and implementation of the scheme. There is a significant risk that under resourcing may lead to deficiencies in the design of the Traditional Owner funding arrangements, and result in these measures not operating when broader arrangements start (and contributions could be collected and distributed).

Also, there is strong need to provide Traditional Owners entities with adequate and consistent resourcing to enable them to secure internal staffing capacity and expertise to engage with project proponents in a manner aligned with free, prior and informed consent and self-determination.

These additional resources are needed to:

- secure expert legal, taxation, banking, environmental science and industry expertise to assist Traditional Owners to consider and develop options to respond to and negotiate anticipated and actual proposals for new projects;
- conduct cultural mapping;
- engage their communities in decision-making processes;
- build internal capacity; and
- develop nation-scale renewable energy strategies.

In the light of an expected increase in renewable energy project consultations in the next 12-24 months with the large number of approvals processes due to commence, Traditional Owners require immediate assistance and resourcing. This will provide Traditional Owners with adequate time and expertise to conduct preparations to meaningfully engage in current consultations and begin preparations to participate in expected consultations and negotiations next year in line with ambitious timeframes put forward by government.

## 7. Closing remarks

This submission has outlined the land justice context, and the opportunity for the proposed REZ Community Benefit scheme to make a meaningful contribution to ensuring all Victorian Traditional Owners can access an equitable share of benefits and economic development opportunities that will flow from the renewable energy transition.

We have detailed some key issues with different components of the scheme to be considered as part of the co-design process of designing the dedicated Traditional Owner fund that will be established, recommending that the settings should be ambitious and equitable, based on acknowledgement of impacts of renewable energy infrastructure on Traditional Owner interests and cultural values on all landscapes. We see this will be more efficient to implement, avoid placing extra burdens on Traditional Owner groups, while enabling all Traditional Owners to benefit from renewables and not reinforcing the impacts of land dispossession and colonial practices.

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<sup>4</sup> <https://assets.cleanenergycouncil.org.au/documents/resources/reports/Leading-Practice-Principles-First-Nations-and-Renewable-Energy-Projects.pdf>

We have also recommended that a number of complementary measures be adopted, to afford Victorian Traditional Owners with adequate resources and improvements to approvals, tendering and procurement frameworks, potentially that would be afforded for Traditional Owners in other states with larger areas of land rights established under Australian laws.

The submission is not exhaustive, and we encourage further engagement with Traditional Owner groups to finalise the details of the plan. This submission was prepared with advice from Traditional Owner Groups, First Nations Legal and Research Services and with input from other experts with whom we could engage within the time available. The positions taken in the submission are that of the Federation, and we strongly recommend engaging with the Federation, FNLRS (and their expert advisors) in subsequent co-design processes, to complement direct engagement with Traditional Owners.

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