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DELIVERING MAJOR CLEAN ENERGY PROJECTS

REVIEW OF THE EPBC ACT FOR RENEWABLE ENERGY PROJECTS IN QUEENSLAND, NEW SOUTH WALES AND VICTORIA

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1 Introduction

Herbert Smith Freehills (**HSF**) and Clean Energy Investor Group (**CEIG**) have reviewed the assessment of renewable energy projects under Australia's primary Federal environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

This report focusses primarily on the assessment of renewable energy projects (principally wind and solar) across Queensland, New South Wales and Victoria, and follows our reviews of statutory planning approval processes in those jurisdictions.[1]

Consistent feedback throughout the preparation of the previous reviews and our own experience is that much of the delay, financial impost and procedural impediments to the delivery of renewable energy projects result from interfaces with the EPBC Act.

Significant EPBC Act delays exist for renewable energy projects

Our analysis of available data from the EPBC Act Public Portal managed by the Commonwealth Department of Climate Change, Energy, Environment and Water (**DCCEEW**) demonstrates significant delays relating to administrative processes and project assessment under the EPBC Act.

While each individual project timeframe is influenced by unique factors, proponents are experiencing a range of common problems with the consistent, predictable and certain administration of the EPBC Act, which contribute to project delays, lead to uncertain outcomes and undermine the efficient delivery of renewable energy projects that is vital for the energy transition.

The critical role of the EPBC Act in protecting matters of national environmental significance (**MNES**) is self-evident. The Commonwealth project assessment framework must operate effectively to consider and mitigate environmental impacts, and provide avenues for stakeholder engagement, which are fundamental to maintaining social licence, financing, and ultimately the successful delivery of projects.

Substantive EPBC Act reform has not been delivered

The EPBC Act has been in operation for almost 25 years. A consistent finding of audits, statutory reviews and Senate Committee inquiries has been that the EPBC Act has not been effective in achieving its objectives of protecting MNES, and at the same time is imposing a significant cost to projects in terms of time, money and deliverability.

Despite these inquiries identifying significant EPBC Act issues, substantive reform has not been delivered. Bills comprising Stage 2 of the Federal Government's Nature Positive Plan are still before the Senate, and the future of these bills and the proposed Stage 3 of the Nature Positive Plan remains unclear at the date of this report.

As environmental decline continues in Australia (and globally), it becomes more imperative to protect and repair remaining environmental values and areas. This tension between ensuring environmental protection and restoration, while delivering the critical infrastructure projects that are required to transition our energy systems and address climate risk, has not been resolved. Ultimately, this requires a regional approach to environmental policy and decision making, with a significant investment in data, regional scale repair and protection, and greater certainty on "go" and "no go" areas.

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[1] HSF and CEIG, *Delivering Major Clean Energy Projects in NSW – Review of NSW Statutory Planning Approvals Processes* (December 2023). Available from: https://www.ceig.org.au/wp-content/uploads/2022/07/HSF-CEIG-Report-Delivering-major-clean-energy-projects-in-NSW-14-December-202380.pdf

HSF and CEIG, *Delivering Major Clean Energy Projects in Queensland and Victoria – Review of Qld and Vic Statutory Planning Approvals Processes* (April 2024). Available from: https://www.ceig.org.au/wp-content/uploads/2024/04/HSF-_-CEIG-Report-Delivering-major-clean-energy-projects-in-QLD-and-VIC.pdf

Our recommended "quick wins" can accelerate EPBC Act assessments

The findings in this report do not challenge or undermine the crucial need to protect and enhance biodiversity in Australia.

Our recommendations draw on our own experience as legal advisors in advising on the delivery, financing, assessment of renewable projects, and legal proceedings and transactions associated with those projects.

This report focusses primarily on "quick wins" through administrative processes. We recognise that Federal legislative reform is required to deliver on major changes including through landscape scale assessments, environmental offsets and changes to decision making processes – and we do not cut across the importance of the proposed Stage 2 and 3 nature positive reforms.

Our recommendations draw on the objectives of:

- acknowledging that the role of the EPBC Act in protecting MNES is critical and should not be eroded;
- recognising that renewable energy projects are critical to meet renewable energy goals at Federal, State and Territory levels, but more fundamentally in addressing the impacts of climate change;
- focussing on administrative processes where possible as "quick wins", recognising that major legislative amendments are a longer term and more uncertain pathway; and
- minimising process and complexity that does not contribute to meaningful environmental outcomes.

The recommendations have also been informed by the proposals contained in Stage 2 and Stage 3 of the Nature Positive plan, which is discussed in Section 4.2 of this report. Our recommendations are summarised in Section 2 of this report, with further detail on the formulation of this report and our analysis of available data in subsequent sections.

We are grateful to CEIG – the executive and its members – for sharing their observations and experiences with us, and in assisting us in developing recommendations directed at improving the effectiveness of the EPBC Act. We are also grateful to the various representatives of the Queensland State Government and DCCEEW who met with us and shared their experience as regulators of renewable energy projects.

2 Summary of recommendations

1 Improve the efficiency of the referrals process	• Reviewing, and if required, amending the referral form to address common issues detected in the gateway process (DCCEEW has confirmed that this process is already underway). • Improving the referral forms such that only necessary and relevant information is required. DCCEEW have also stated they are exploring ways to improve the referral form and the referral process. • Preparing renewable energy project sector-specific guidance in response to common issues for referrals, including proponent structures, offsets expectations, habitat assessment and survey requirements. • Make the referrals available for the public consultation process as soon as they are received. • Increasing administrative resourcing for the gateway stage and increasing training for assessment officers so there is a better understanding of the unique characteristics of renewable energy projects. DCCEEW has reported significant progress in refining the gateway step over the past 12 to 18 months and are looking to implement further improvements. • Consider amending the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (**EPBC Regulations**) to reflect desired changes to the referral form, if necessary.
2 Improve consistency and efficiency in assessment approaches	• Considering opportunities to align State and Territory definitions of habitat with Commonwealth definitions. • Considering if additional State and Territory processes can be accredited under assessment bilateral agreements. We appreciate that this recommendation will require a significant investment in time and may require legislative amendments to be fully effective. • Working with each of the State and Territory jurisdictions to understand what the State and Territory assessment process covers and their approach to avoid the Commonwealth duplicating the process. Historically, Commonwealth officers working within State and Territory jurisdictions has been a successful way of increasing the understanding of those processes.
3 Issue RFIs only where necessary and meaningful for the assessment	• As a matter of practice, the reason for a request for information (**RFI**) should be clearly communicated to a proponent. This will assist in the clarity of the RFI and require articulation as to how the RFI contributes to the assessment for the purposes of the EPBC Act. We note that this was proposed in the Stage 2 amendments, however could be adopted as an administrative practice. • The Commonwealth, States and Territories ensure that the Commonwealth understands relevant State or Territory processes such that RFIs are not duplicative of any assessment that is more properly related to State or Territory matters. • The Commonwealth engage with the States and Territories to review accredited assessment processes with a view to ensuring that required information for assessments is shared and obtained during the accredited assessment process to streamline the Commonwealth's decision making process.

4 Improve efficiency and provide greater certainty for the assessment process	• Produce or update, as required, standard guidelines and information requirements for assessments (for example, standardised Public Environment Report (**PER**) guidelines, conditions and templates for assessment documents) that are developed in consultation with key stakeholders. Documents should be developed in a way to be prescriptive, clear and limit the need for further information requests. These documents should also aim to make the assessment processes more efficient and increase the predictability of outcomes. • Develop clear and updated policies on assessment processes. • Consider a framework to accredit suitably qualified experts so that advice in respect of habitat, surveys and assessment is not re-prosecuted. • Provide sector specific guidance and clarity around what is "habitat", survey requirements and "significant impact", including alignment with State and Territory mapping and definitions where possible. • Improve and increase cooperation between the Commonwealth, and States and Territories, with respect to assessment processes, including identifying information from State and Territory approvals processes that can be shared across assessments, even outside a bilateral process. • Ensuring that information requirements for assessments is limited to matters relevant to the relevant controlling provisions. • Provide greater clarity around the scope of Commonwealth environmental assessment, including social and economic impacts, including drawing on State and Territory assessments where possible.
5 Increase resourcing and improve administrative efficiencies	• Actively encourage proponents to invest in the pre-lodgement process, including coordinated meetings with State and Territory agencies if appropriate. • Provide guidance on required materials for pre-lodgement, with a view to being able to communicate to proponents where projects are likely to be challenging to approve (ie an informal "early no"). • Increase suitably qualified staff and investing in training specific to renewable energy projects. • Develop assessment officers' expertise in renewable energy projects, including site visits. • Review assessment processes to identify opportunities for consistency and learnings. • Investigate steps to minimise officer turnover. • Develop an updated EPBC Act Public Portal to provide greater transparency on referral and assessment progress, particularly to help identify whether progress on an assessment is sitting with the proponent or with DCCEEW. • Consider measures such as proponent charters, memorandum of understanding (**MOUs**) or rapid assessment programs targeted at ensuring assessment milestones and expectations are met.

6 Improve EPBC Act approval conditions	• Develop, consult on and publish standard environmental conditions that facilitate predictability, consistency and efficiency in approvals. • Provide clear guidance on expectations for "nested approvals" or subsequent management plans, including timeframes and processes for assessment. • Avoid conditions that simply adopt or duplicate State or Territory conditions, or do not remain consistent when State or Territory conditions are modified. • Consider legislative amendments to allow for assessments solely on project changes, and to provide greater flexibility in changing conditions of approval. • Develop an internal review process that allows conditions to be reconsidered after an approval has been granted.

7 Improve environmental offsets	• Consider updating the environmental offsets policy to allow for greater flexibility in discharging environmental offsets obligations through financial offsets. While we appreciate that such a policy shift will come with governance and reporting requirements, if this can be managed through existing State or Territory processes, it may provide a mechanism in the shorter term until legislative amendments can establish a Commonwealth system for offsets. • Work with the State and Territory governments to consider if State or Territory offsets requirements can be either used or updated to be used to prevent duplication of offsets conditions at a Commonwealth level. This may include recognition of financial contributions under a State or Territory based offset scheme, which discharge any EPBC Act offset requirements. • Work with State and Territory governments, and suitably qualified environmental offsets professionals, to consider if there are opportunities to develop larger scale, strategic environmental offsets that can be contributed to by individual projects. • Following the above, consider if existing environmental offsets conditions for renewable energy projects can be reviewed to bring forward delivery. • We also recommend advancing the proposed legislative amendments, including those reflected in the national environmental standards, to facilitate changes to environmental offsets. This could, for example, include financial contribution offsets or more flexible options for implementing offsets at the landscape level. • That reconsideration be given to opportunities for the Nature Repair Market to operate to deliver strategic environmental offsets, recognising that this will require legislative amendment. • DCCEEW has confirmed that, independent of work related to the offsets reform as part of the Nature Positive Plan, they are preparing additional guidance concerning offset proposals, offset management plans and proposed offset calculation under the Offsets Policy (2012).

8 Allow recognition of the positive climate contributions of renewable energy projects	• As part of considering any environmental, social and economic impacts, consider the nature of renewable energy projects, which inherently contribute to achieving broader Government policy. • Develop an assessment approach and related guidelines that acknowledge the positive environmental contribution of industries such as renewable energy as part of a broader clarification on what will be considered for social and economic matters.
9 Look for opportunities for landscape scale assessments for REZs	• Work with State and Territory governments to identify suitably located and development-ready renewable energy zones (**REZs**) to allow for a landscape style environmental assessment. We acknowledge that particular care will need to be taken to ensure that projects that are already well advanced are not held back by this approach. • Consider whether a single referral with appropriate assessment requirements and governance arrangements can be applied as a pilot to deliver a single EPBC Act approval for a REZ, with a single environmental offset requirement and common infrastructure assessment. • Collaborate with the industry to develop a data-sharing framework to facilitate communication relating to areas of high wind and solar resources, as well as other technical or resource constraints. Advance legislative amendments for strategic assessments to improve their workability as a landscape scale assessment tool. • Advance legislative amendments for regional planning to provide for more efficient landscape scale assessment of projects, particularly focussed on renewable energy projects.
10 Consult with industry and financiers in the finalisation of the draft Onshore Wind Farm Guidance	• Continue to consult with industry on the proposed guidelines to ensure that the final document provides clear assessment outcomes that are consistent with State and Territory policies and do not materially inhibit the assessment, approval and financing of wind energy projects.

3 Scope of the report

HSF has worked with CEIG to review the assessment processes for renewable energy projects under the EPBC Act. This report identifies key roadblocks and common issues experienced by the renewable energy sector in the operation of the EPBC Act and makes recommendations to improve the efficiency and effectiveness of the assessment of renewable energy projects under the EPBC Act.

In developing those recommendations, we have also had regard to the Australian Government's proposed Stage 2 and Stage 3 Nature Positive reforms of the EPBC Act as at the date of this report.

This report has been prepared with feedback received in consultation with CEIG members, and representatives of the Queensland State Government and DCCEEW.

4 Australia's national environmental laws

4.1 Assessment and approval under the EPBC Act is a critical path for renewable energy projects

In Australia, environmental protection operates under a framework of shared responsibility between State, Territory and Commonwealth governments. Under the Australian Constitution, the Commonwealth Government has limited direct legislative powers concerning the management and protection of the environment.

The EPBC Act is the Commonwealth Government's primary environmental legislation. One of the primary objects of the EPBC Act is the protection of MNES. The MNES which are commonly relevant for renewable energy projects include:

- the world heritage values of a declared World Heritage property;
- the National Heritage values of a National Heritage place;
- the ecological character of a declared Ramsar wetland;
- listed threatened species and listed threatened ecological communities; and
- a listed migratory species (for example, migratory birds).

The EPBC Act is triggered by a proposed action that has, will have or is likely to have a significant impact on a MNES, which is determined by the Minister to be a "controlled action". A project that the Minister determines to be a controlled action requires approval under the EPBC Act before it can lawfully proceed.

Based upon our analysis of available data from the EPBC Act Public Portal, it is increasingly likely that renewable energy projects are controlled actions under the EPBC Act, with the controlling provisions often being listed threatened species and ecological communities (and or listed migratory species in the case of wind farms).

Planning assessments and approvals are also required under State or Territory laws. These planning processes often include extensive consideration of State or Territory environmental, social, or economic matters. In certain cases, a State or Territory environmental assessment process is accredited under the EPBC Act by way of a bilateral agreement. However, a project that goes through a bilateral accredited process will still require a separate approval at the State or Territory level, as well as at the Federal, EPBC Act level.

In Queensland, New South Wales, and Victoria, key aspects of the bilateral assessment pathways relevant for renewable energy projects are set out in Table 1 below.

Table 1: Assessment and approval process for a renewable energy project under the EPBC Act.

State	Accredited State assessment process under an EPBC Act bilateral agreement
Queensland	The Queensland bilateral recognises the Environmental Impact Statement (**EIS**) assessment processes undertaken pursuant to: • Chapter 3, Part 1 of the *Environmental Protection Act 1994* (Qld); or • Part 4 of the *State Development and Public Works Organisation Act 1971* (Qld). The bilateral does not cover assessment under the *Planning Act 2016* (Qld) including any assessment undertaken under State Code 23 for wind farms.
New South Wales	The New South Wales bilateral recognises the assessment processes of major projects undertaken pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), which include State significant infrastructure and State significant development projects. The bilateral does not cover the processes contained in Part 5 of the EP&A Act, for example when an EIS is not needed or applications where a local government is the consent authority.
Victoria	The Victorian bilateral relevantly recognises assessment processes undertaken pursuant to: • assessment by an environment effects statement process under the *Environment Effects Act 1978* (Vic) (**EE Act**); • assessment by an environment report under a 'no environment effects statement required on condition of an environment report' decision under the EE Act; and • certain planning permit assessments under the *Planning and Environment Act 1987* (Vic) (**P&E Act**), where actions are assessed by an advisory committee appointed under section 151 of the P&E Act (which includes a formal public hearing), or where assessment documentation is provided to the responsible Victorian Minister, and in either case the advisory committee or Victorian Minister prepare an assessment report, provided the assessment processes meet the requirements in Schedule 1 of the Victorian bilateral agreement.

This two-tiered process creates opportunity for substantial overlap and duplication through assessment (even where accredited assessments are used), conditions and enforcement.

4.2 Proposed reforms to the EPBC Act

The EPBC Act has been in operation since 16 July 2000, and despite two independent statutory reviews concluding that there are significant issues with the operation and administration of the legislation, the Act has not undergone substantial amendments since it was made.

There are a number of hurdles to amending the EPBC Act, including that:

- The EPBC Act is primarily based upon Australia's obligations under various international agreements, so any substantial reform is constrained by those agreements;

- The EPBC Act leaves primary decision making at Ministerial level, in recognition of the balancing of matters of national environmental, economic and social concern in the decision making process. There is fundamental disagreement between stakeholders as to whether this decision making process is appropriate, or whether more prescriptive decision making rules should be imposed;
- The EPBC Act applies universally to all projects or developments which are likely to have a significant impact on MNES, whether it be a resources, agricultural, transport, housing or renewable energy project. The consequences of any reform must be considered and developed in the context of their implications for a wide range of sectors and stakeholders; and
- Fundamentally, environmental decision making is complex and is subject to a number of competing interests. The lack of uniformity in State and Territory project assessment processes also makes consistency in Commonwealth decision making processes difficult to achieve. Wholescale reform of the EPBC Act is a significant undertaking in terms of stakeholders, complexity, scale and time, and should not be underestimated.

The most recent independent statutory review was undertaken by Professor Graeme Samuel in 2020[2] and resulted in the Federal Government's response proposed in the Nature Positive Plan.[3]

There are currently three Bills before the Australian Senate that comprise Stage 2 of the proposed Nature Positive reforms. These Bills seek to:

- Establish Environment Protection Australia (EPA), a statutory body that will have compliance and assessment functions under the EPBC Act, initially through the delegation of Ministerial powers;[4]
- Establish Environment Information Australia (EIA)[5] a statutory body that will have functions for data management, defining a nature positive baseline, and other reporting functions; and
- Amend the EPBC Act to allow for delegation of Ministerial powers to the Chief Executive Officer of the EPA, and other amendments around compliance mechanisms, penalties, and auditing.[6]

The future of Stage 2 is unclear as at the date of this report, with the Bills still before the Senate. The proposed Stage 3 reforms, which aimed to be much broader reforms of the EPBC Act, have been deferred. The proposed Stage 3 reforms included a replacement of the EPBC Act, inclusive of new national environmental standards, a revised assessment process (including the referrals process and accreditation requirements). The reform proposal also included the establishment of revised environmental offset arrangements, referred to as 'restoration actions and restoration contributions'.

4.3 The assessment and approval pathway under the EPBC Act for renewable energy projects

The current EPBC Act assessment pathway is set out in Table 2 below.

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[2] Professor Graeme Samuel AC, *Second Independent Review of the EPBC Act* (Final Report, January 2021). Available from: https://www.dcceew.gov.au/sites/default/files/documents/epbc-act-review-final-report-october-2020.pdf.

[3] DCCEEW, *Energy, the Environment and Water, Nature Positive Plan: better for the environment, better for business* (Report, December 2022). Available from: https://www.dcceew.gov.au/environment/epbc/publications/nature-positive-plan.

[4] *Nature Positive (Environment Protection Australia) Bill 2024* (Cth).

[5] *Nature Positive (Environment Information Australia) Bill 2024* (Cth).

[6] *Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024* (Cth).

Table 2: Assessment and approval process for a renewable energy project under the EPBC Act.

Step	Description
1. Referral	The person proposing to take the action must complete the referral form, which includes the information prescribed in Schedule 2 of the EPBC Regulations. The referral is subject to a 10 business day public notification period, where any person can submit comments on the referral to the Minister.
2. Controlled action determination	The controlled action decision is a determination by the Minister for the Environment (or the delegate) as to whether the proposed action has, will have or is likely to have a significant impact on MNES. The Minister may decide that a proposed action is: • Not a controlled action, meaning that no further assessment or approval under the EPBC Act is required; • Not a controlled action provided the action is undertaken in a particular manner; • A controlled action, which means that assessment and approval under the EPBC Act is required before the action can commence; and • Clearly unacceptable, which means that the action cannot proceed. The Minister is required to make this decision within **20 business days** of receiving a referral. If the Minister decides that an action is a controlled action, the Minister must also designate a proponent for the action.
3. Assessment approach decision	For an action that is determined to be a controlled action, the Minister must determine the assessment approach under the EPBC Act. Where a proposed action falls within the scope of an assessment bilateral agreement, then that assessment approach will automatically apply. Otherwise, the EPBC Act prescribes a number of different assessment pathways, being: • The referral information; • Preliminary Documentation; • PER; • EIS; and • Public Inquiry. While the decision on the assessment approach is discretionary, policy documents published by DCCEEW indicate that the decision considers factors such as the number of controlling provisions, the nature and scale of the potential impact, the level of public interest and the adequacy of existing information.
4. Undertaking Assessment	The proponent then undertakes the assessment in accordance with the assessment approach decision.

5. Decision	Following the assessment process, the Minister must decide to: • Approve the controlled action; • Approve the controlled action subject to conditions; or • Refuse the controlled action. In making the decision, the Minister must consider matters relevant to the particular controlling provision, and must consider economic and social matters. The Minister is required to make this decision within **40 Business Days** of receiving the final assessment documentation. This timeframe is subject to "stop the clock" provisions and extensions.

5 A significant national legislative and policy framework exists to support the energy transition

Outside of the EPBC Act framework, the Commonwealth Government has developed a substantial legislative and policy framework to support the energy transition and encourage the rapid deployment of renewable energy projects.

5.1 Climate change legislation

The *Climate Change Act 2022* (Cth) (**Climate Change Act**) aims to advance an effective and progressive response to the urgent threat of climate change, by drawing on the best available scientific knowledge.

The Climate Change Act legislates two greenhouse gas emissions reduction targets being:

- A **2030 Target** of 43% reduction in emissions compared to 2005 levels; and
- A **2050 Target** of achieving net zero emissions.

5.2 Other Commonwealth policy

Decarbonising the electricity system, is a key part of achieving the 2030 and 2050 targets. To support this objective, the Commonwealth has developed a substantial energy transition policy framework. This includes an **82% by 2030 renewable energy generation target**. This target is supported by:

- The **Rewiring the Nation Initiative** which aims to modernise and expand Australia's electricity grid to facilitate the transition to energy resources, allocating more than $15 billion to priority transmission projects; and
- The **Capacity Investment Scheme** under which the Commonwealth will underwrite 32 gigawatts of dispatchable and variable generation capacity.[7]

Transforming the energy system, primarily through the increased deployment of renewable energy technologies, is the key pathway to achieving the greenhouse gas emissions reductions necessary for overall decarbonisation. In addition to Commonwealth targets, many of the Australian States and Territories have also adopted policy to support the energy transition through the development of renewable energy projects.

[7] For a further summary, see Climate Change Authority, *Climate Policy Tracker* (Policy Document, November 2023). Available from: https://www.climatechangeauthority.gov.au/climate-policy-tracker

6 The operation and administration of the EPBC Act is delaying the delivery of renewable energy projects

Despite the policy support for the energy transition, there are substantial delays in assessment and approval under the EPBC Act for renewable energy projects.

We have undertaken an analysis of referrals available on the EPBC Act Public Portal[8] as of 12 November 2024 for solar farms, wind farms and associated transmission infrastructure in Queensland, New South Wales, and Victoria between 2018 and 2024.[9]

6.1 Referrals are more likely to be controlled actions

Our data analysis found that:

- The number of actions for renewable energy projects being referred under the EPBC Act is increasing. In our data set, for 2018, there were 20 referrals. In 2024, there were 39 referrals.
- There is an increasing likelihood that a project will be a controlled action. In 2020, 61% of referrals for renewable energy projects in our dataset were controlled actions. In our dataset, the number of referrals being controlled actions increased to 70% in 2023.

Table 3: Number of controlled actions for renewable energy projects in NSW, Qld and Vic.

	2018	2019	2020	2021	2022	2023	2024
Number of referrals	20	15	23	29	40	40	39
Number of controlled actions	9 *4 Qld* *5 NSW*	5 *1 Qld* *1 NSW* *3 Vic*	14 *9 Qld* *5 NSW*	19 *9 Qld* *7 NSW* *3 Vic*	26 *8 Qld* *15 NSW* *3 Vic*	28 *9 Qld* *14 NSW* *5 Vic*	23[10] *10 Qld* *9 NSW* *4 Vic*
% of referrals which are controlled actions	45%	33%	61%	66%	65%	70%	58%[11]

[8] Available from: https://epbcpublicportal.environment.gov.au/all-referrals/

[9] The dataset as of 12 November 2024 was based upon referrals using the industry type of 'Energy Generation and Supply (Renewable)'. Renewable energy projects which have been categorised outside of this industry type have not been included. The dataset was further filtered to exclude referrals outside of New South Wales, Victoria and Queensland. A manual filtering process was also applied to further focus the dataset on solar farms, wind farms and associated transmission projects. This excluded, for example, pumped hydro referrals.

[10] For 2024, there are 6 referrals awaiting a controlled action determination. These are referrals: 2024/10001, 2024/10010, 2024/09971, 2024/09965, 2024/09992 and 2024/09909.

[11] This percentage is subject to change (and in all likelihood increase) once the outstanding referral decisions have been made.

6.2 A large backlog of projects are awaiting assessment and decision

The backlog for controlled actions under the EPBC Act to obtain final decision under the EPBC Act is substantial. In our dataset:

- For referrals made in 2021,[12] 19 were controlled actions and only 6 of those 2021 controlled actions have a final decision.
- For referrals made in 2022, 26 projects were controlled actions and only 3 of those 2022 controlled actions have a final decision.
- For referrals made in 2023, 28 projects were controlled actions. No controlled action made in 2023 has a final decision.
- For referrals made in 2024,[13] 23 of these referrals were controlled actions. No controlled action made in 2024 has final a decision.

Table 4: Number of controlled actions and number of controlled actions with a final decision.

	2018	2019	2020	2021	2022	2023	2024
Number of controlled actions	9	5	14	19	26	28	23
Number of controlled actions with final decision	7	1	11	6	3	0	0

6.3 Delays in administrative processes under the EPBC Act exist

Validation gateway

The average number of days for administrative processes under the EPBC Act is increasing. DCCEEW applies a non-legislated "gateway process" or "validation process" to ensure that referrals comply with the EPBC Regulations.

Our data analysis found that:

- For referrals made in 2018, the gateway process took an average of 23 days from the date the project was referred to the time that DCCEEW determined that the referral was valid.
- For referrals made in 2023, the gateway process took an average of 92 days. There was a slight improvement in 2024, with the gateway process taking an average of 73 days.

Controlled action determination

The period of time to determine whether a referral is a controlled action under the EPBC Act is increasing.

[12] A referral 'made in 2021' is a referral with an EPBC project number commencing with 2021. Examples are: 2021/9066 Gawara Baya or 2021/9057 Callide Wind Farm.

[13] As of 12 November 2024.

Our data analysis found that:

- In 2021, the average number of days from the date when a referral was lodged to when the controlled action decision was made was 62 days.[14]
- In 2023, the average number of days from the date a referral was lodged to when the controlled action decision was 136 days. Again, there was a slight improvement in 2024 with it taking an average of 113 days.

Assessment and approval

The assessment timeframe for renewable energy projects under the EPBC Act is lengthy and increasing. Our data analysis found that:

- For controlled actions in 2019, it took an average of 505 days between the date the referral was lodged to the date any final approval was granted.[15]
- For controlled actions in 2021, it took an average of 831 days between the date the referral was lodged to the date any final approval was granted.
- For referrals made in 2022, only three controlled actions have obtained final approval. For these three controlled actions, it took an average of 525 days from the date the project was referred to the date final approval was obtained.

For referrals that were made in 2023 and 2024 (that are controlled actions under the Act), there are no final approvals and therefore no 'average number of days' can be calculated.

Table 5: Timeframes under the EPBC Act.

	2018	2019	2020	2021	2022	2023	2024
Average number of days between the referral date and the valid date	23	65	33	27	60	92	73
Average number of days between the referral date and the controlled action determination	88	140	68	62	108	136	113
Average number of days between the referral date and final approval	791	505	678	831	525[16]	NA[17]	NA[18]

[14] This period is the average number of days between the date on which the action was referred and the date the controlled action decision was made. It includes the period by which the referral was being 'validated' as part of the referral gateway process administered by DCCEEW.

[15] This is the average number of days between the referral date and the date on which a project is approved under the EPBC Act. This group is only projects which are controlled actions (as a 'not a controlled action' does not require assessment and approval under the EPBC Act).

[16] Only three controlled actions have approval. These are: 2022/09339 Everleigh Solar Park Project, 2022/09333 Stony Creek Wind Farm, and 2022/09214 Yanco Delta Wind Farm. Our dataset has 23 controlled actions still awaiting final approval.

[17] No controlled action from 2023 has final approval.

[18] No controlled action from 2024 has final approval.

7 Key issues and recommendations

In developing these recommendations, we have considered the above issues, feedback from CEIG members and government representatives, and focussed primarily on what we consider to be administrative "quick wins" that improve the efficiency and effectiveness of assessing renewable energy projects under the current EPBC Act framework.

Our recommendations draw on our own experience as legal advisors in advising on the delivery, financing, assessment of renewable projects, and legal proceedings and transactions associated with those projects. We also make some general recommendations concerning areas of potential longer-term legislative reform, noting however the current and historical difficulties in amending the EPBC Act.

7.1 Improve the efficiency of the gateway and referral processes

Concerns have been raised in respect of the gateway or validation process, including:

- **The timeframe for the gateway process is both significant and unpredictable.** As an administrative and not legislative process, there is no statutory timeframe for decisions to be made. Our data analysis indicated that referrals made in 2024 took on average 73 days to progress through the gateway process. There is limited transparency on the gateway process, other than confirming that a referral meets the requirements of the EPBC Regulations. DCCEEW has indicated that the gateway step is an important process to ensure that all the minimum legal descriptions of an action is in place. DCCEEW noted that delays in this process arise from proponents not providing the required information in their application and or the late payment of referral fees.
- **Proponents perceive that DCCEEW lacks an understanding of renewable energy projects.** Proponents commonly face issues engaging with DCCEEW in relation to some of the unique renewable energy project characteristics, for example, the legal structures used by renewables projects as well as engineering or technical aspects, such as the need for flexibility in the layout, resulting in delays at the gateway stage.
- **The feedback and information requirements to have a referral accepted as valid are more properly part of the assessment process.** Information requirements and changes to referrals are being requested by DCCEEW on matters that can and should properly be dealt with through the assessment phase. This includes information about offsets, areas of impact and the project description.
- **Some requests being made of proponents at the gateway stage are inconsistent or outside the ambit of the EPBC Act.** Requests in relation to related actions and cultural heritage negotiations are examples that we have been given of requests that delay the advancement of a referral, but that are not required for the referral to advance to the public notification stage.

Recommendation 1:

Improve the efficiency of the referrals process

The referrals form is already a well-established and advanced format for providing the necessary information to DCCEEW.

However, consideration could be given to:

- Reviewing, and if required, amending the referral form to address common issues detected in the gateway process. DCCEEW has confirmed that this process is already underway.
- Improving the referral forms such that only necessary and relevant information is required. DCCEEW have also stated they are exploring ways to improve the referral form and the referral process.
- Preparing renewable energy project sector-specific guidance in response to common issues for referrals, including proponent structures, offsets expectations, habitat assessment and survey requirements.
- Make the referrals available for the public consultation process as soon as they are received.
- Increasing administrative resourcing for the gateway stage and increasing training for assessment officers so there is a better understanding of the unique characteristics of renewable energy projects. DCCEEW has reported significant progress in refining the gateway step over the past 12 to 18 months and are looking to implement further improvements.
- Consider amending the EPBC Regulations to reflect desired changes to the referral form, if necessary.

7.2 Increase consistency and efficiency in assessment approaches

The EPBC Act provides for the Minister to determine whether an action is a controlled action and the assessment approach for a controlled action (see Section 4.3 of this report above). In our experience as legal advisors and discussing issues with the sector, we have observed:

- **Renewable energy sector stakeholders, particularly financiers, generally expect projects to be referred under the EPBC Act, even if the view is that they are not controlled actions (and therefore referral is not mandatory).** This contrasts with the historical engagement of other sectors with the EPBC Act.
- **Lack of clarity regarding why higher levels of assessment is imposed on renewable energy projects.** There is a trend of more rigorous assessment approaches being applied to renewable energy projects compared to other projects. Our experience suggests that the increase in assessment levels is more related to the volume of submissions on a referral rather than the number of controlling provisions or environmental risk.
- **Inconsistencies in the assessment approach decided by the Minister.** Concerns have been raised concerning the lack of consistency around the assessment approach, both in relation to other similar projects, and with published policy. The recommendations below are directed at resetting the assessment approach decision, informed also by State and Territory processes.

Recommendations around standardisation of particular documents are focussed on realigning documents to the core purpose and functions of the EPBC Act, and not on those developed for "the last project" nor on what previous proponents have accepted.

Recommendation 2:

Improve consistency and efficiency in assessment approaches

We recommend that the Commonwealth undertake a review to improve the efficiency of assessment approaches, including by consideration of:

- Considering opportunities to align State and Territory definitions of habitat with Commonwealth definitions.

- Considering if additional State and Territory processes can be accredited under assessment bilateral agreements. We appreciate that this recommendation will require a significant investment in time and may require legislative amendments to be fully effective.
- Working with each of the State and Territory jurisdictions to understand what the State and Territory assessment process covers and their approach to avoid the Commonwealth duplicating the process. Historically, Commonwealth officers working within State and Territory jurisdictions has been a successful way of increasing the understanding of those processes.

7.3 Requests for information

A common frustration experienced by project proponents is the frequent and sometimes inconsistent RFIs received during various stages of the EPBC Act assessment process that "stop the clock" and impose additional assessment burden on proponents. We understand that this frustration relates to the nature of the requests, the reasonableness of the requests, the timing of the RFIs, the receipt of multiple RFIs and inconsistencies as project officers change at the Departmental level.

For projects that have proceeded through a bilateral assessment process, the role of the RFIs is unclear. The bilateral process is accredited as meeting the Commonwealth's assessment requirements, and we would expect that it would only be in rare circumstances that RFIs or extensions for decision making processes are required in a bilateral process.

Recommendation 3:

Issue RFIs only where necessary and meaningful for the assessment

We recommend that DCCEEW review its processes with respect to RFIs:

- As a matter of practice, the reason for an RFI should be clearly communicated to a proponent. This will assist in the clarity of the RFI and require articulation as to how the RFI contributes to the assessment for the purposes of the EPBC Act. We note that this was proposed in the Stage 2 amendments, however could be adopted as an administrative practice.
- The Commonwealth, States and Territories ensure that the Commonwealth understands relevant State or Territory processes such that RFIs are not duplicative of any assessment that is more properly related to State or Territory matters.
- The Commonwealth engage with the States and Territories to review accredited assessment processes with a view to ensuring that required information for assessments is shared and obtained during the accredited assessment process to streamline the Commonwealth's decision making process.

7.4 Improve certainty for the assessment process

The assessment process under the EPBC Act is a lengthy and expensive process for renewable energy proponents. At the same time, this process does not appear to be delivering the information that is necessary for DCCEEW to undertake its function in an efficient and timely manner, as evidenced by the RFI process.

Proponents have raised concerns relating to:

- **The scope and feasibility of assessment requirements**. These concerns relate to the approach to assessments in terms of matters such as:

  - what is habitat, particularly where projects have already been designed to avoid vegetated areas, or proposed in areas that have been historically subject to agricultural or resources activities. This impacts the extent of "impact" and offsets and therefore costs for projects;
  - the re-prosecution of surveys where assessments have been undertaken by suitably qualified ecologists or other experts; and
  - the scope of assessment, often extending beyond the remit of the EPBC Act (such as visual assessments where heritage is not a controlling provision, or extensive queries about cultural heritage matters).
- **Duplication of assessment undertaken under a State or Territory process.** A longstanding criticism of the EPBC Act assessment process is that it duplicates assessment for a project that is undertaken at the State or Territory level, without a clear environmental benefit or outcome.
- **The goal posts of what is required to be assessed being changed during the EPBC Act assessment process.**

Recommendation 4:

Improve efficiency and provide greater certainty for the assessment process

We recommend that DCCEEW:

- Produce or update, as required, standard guidelines and information requirements for assessments (for example, standardised PER guidelines, conditions and templates for assessment documents) that are developed in consultation with key stakeholders. Documents should be developed in a way to be prescriptive, clear and limit the need for further information requests. These documents should also aim to make the assessment processes more efficient and increase the predictability of outcomes.
- Develop clear and updated policies on assessment processes.
- Consider a framework to accredit suitably qualified experts so that advice in respect of habitat, surveys and assessment is not re-prosecuted.
- Provide sector specific guidance and clarity around what is "habitat", survey requirements and "significant impact", including alignment with State and Territory mapping and definitions where possible.
- Improve and increase cooperation between the Commonwealth, and States and Territories, with respect to assessment processes, including identifying information from State and Territory approvals processes that can be shared across assessments, even outside a bilateral process.
- Ensuring that information requirements for assessments is limited to matters relevant to the relevant controlling provisions.
- Provide greater clarity around the scope of Commonwealth environmental assessment, including social and economic impacts, including drawing on State and Territory assessments where possible. Provide greater clarity around the scope of Commonwealth environmental assessment, including social and economic impacts, including drawing on State and Territory assessments where possible.

7.5 Allocate resources to align with Commonwealth energy transition policies

As the scale and urgency of the challenge to decarbonise the energy system increases, the number of referrals for renewable energy projects is also increasing. The result of this is that any resource shortage is going to be exacerbated as more and more projects are referred (and controlled) under the EPBC Act.

Feedback that we have received is that proponents are frustrated by frequent changes in project officers over the course of an assessment, leading to inconsistency through the process. We note an allocation in the previous budget to strengthen and streamline environmental approval decisions, and encourage that the funding and assessment timeframes continue to be reviewed. There has also been a decrease in the average number of days for the gateway process and the assessment approach decision as between 2023 and 2024.

Recommendation 5:

Increase resourcing and improve administrative efficiencies

We recommend that DCCEEW:

- Actively encourage proponents to invest in the pre-lodgement process, including coordinated meetings with State and Territory agencies if appropriate.
- Provide guidance on required materials for pre-lodgement, with a view to being able to communicate to proponents where projects are likely to be challenging to approve (ie an informal "early no").
- Increase suitably qualified staff and investing in training specific to renewable energy projects.
- Develop assessment officers' expertise in renewable energy projects, including site visits.
- Review assessment processes to identify opportunities for consistency and learnings.
- Investigate steps to minimise officer turnover.
- Develop an updated EPBC Act Public Portal to provide greater transparency on referral and assessment progress, particularly to help identify whether progress on an assessment is sitting with the proponent or with DCCEEW.
- Consider measures such as proponent charters, MOUs or rapid assessment programs targeted at ensuring assessment milestones and expectations are met.

7.6 Reduce complexity for conditions imposed on projects

Proponents of renewable energy projects have raised issues concerning the conditions imposed by EPBC Act approvals. Issues raised by proponents relate to:

- **Long term projects**. Proponents express concern over conditions imposed on renewable energy projects that assume active management throughout their lifespan. Given that these projects are long-life assets and largely passive once constructed, such conditions can lead to complexities and challenges in project management and compliance.
- **Duplication of State or Territory imposed conditions**. Conditions imposed by EPBC Act approvals often duplicate the same subject matter as State or Territory conditions, adopt State or Territory conditions, or provide inconsistent requirements to State or Territory conditions.
- **Uncertainty**. Conditions often have a lack of clarity regarding precisely what obligation is imposed by the condition itself (particularly around timing).

- **Lack of flexibility**. Limited ability to change conditions or projects post-approvals, which is particularly problematic where wind farms typically require micro siting of key components, and the long duration of assessment timeframes means that by the time construction commences, technologies have changed significantly.
- **Lack of internal review process**. Proponents have also raised concerns that there are limited ways of having conditions internally reviewed by DCCEEW.

Recommendation 6:

Improve EPBC Act approval conditions

We recommend that DCCEEW:

- Develop, consult on and publish standard environmental conditions that facilitate predictability, consistency and efficiency in approvals.
- Provide clear guidance on expectations for "nested approvals" or subsequent management plans, including timeframes and processes for assessment.
- Avoid conditions that simply adopt or duplicate State or Territory conditions, or do not remain consistent when State or Territory conditions are modified.
- Consider legislative amendments to allow for assessments solely on project changes, and to provide greater flexibility in changing conditions of approval.
- Develop an internal review process that allows conditions to be reconsidered after an approval has been granted.

7.7 Improve environmental offsets

Although incorporated in most approvals under the EPBC Act, environmental offsets are a creature of the EPBC Act Environmental Offsets Policy (October 2012) and the offsets calculator.

Through the process of developing the Nature Positive reforms, environmental offsets have been consistently raised as an issue, in particular around:

- The inability to provide financial contribution offsets under the EPBC Act, and the requirement for 90% direct offsets.
- Issues around the “core business” of proponents not being to deliver environmental offsets, and the difficulties for renewable proponents in managing any long term offset requirements.
- Offsets being delivered on a “project by project” basis which does not lead to larger more strategic offset outcomes.
- A lack of available offsets, particularly with the high land use requirements of certain renewable energy developments.
- The timing of offsets and implications for project delivery.
- Uncertainty around legal security of offsets which are reliant on State or Territory systems and individual agreements with landowners.
- Inconsistency and duplication with State and Territory systems. In some jurisdictions there is inconsistency in the way offsets are conditioned and applied, leading to a need to adjust offset outcomes secured at a State or Territory level after Commonwealth approvals. This also does not lead to the most efficient and valuable use of offsets.

We also recognise that, as part of the proposed Stage 3 of the Nature Positive Reforms, a draft national environmental standard was developed and released in relation to restoration actions and contributions.

Recommendation 7:

Improve environmental offsets

We recommend that DCCEEW:

- Consider updating the environmental offsets policy to allow for greater flexibility in discharging environmental offsets obligations through financial offsets. While we appreciate that such a policy shift will come with governance and reporting requirements, if this can be managed through existing State or Territory processes, it may provide a mechanism in the shorter term until legislative amendments can establish a Commonwealth system for offsets.
- Work with the State and Territory governments to consider if State or Territory offsets requirements can be either used or updated to be used to prevent duplication of offsets conditions at a Commonwealth level. This may include recognition of financial contributions under a State or Territory based offset scheme, which discharge any EPBC Act offset requirements.
- Work with State and Territory governments, and suitably qualified environmental offsets professionals, to consider if there are opportunities to develop larger scale, strategic environmental offsets that can be contributed to by individual projects.
- Following the above, consider if existing environmental offsets conditions for renewable energy projects can be reviewed to bring forward delivery.

We also recommend advancing the proposed legislative amendments, including those reflected in the national environmental standards, to facilitate changes to environmental offsets. This could, for example, include financial contribution offsets or more flexible options for implementing offsets at the landscape level.

We recommend that reconsideration be given to opportunities for the Nature Repair Market to operate to deliver strategic environmental offsets, recognising that this will require legislative amendment.

DCCEEW has confirmed that, independent of work related to the offsets reform as part of the Nature Positive Plan, they are preparing additional guidance concerning offset proposals, offset management plans and proposed offset calculation under the Offsets Policy (2012).

7.8 Recognise the positive environmental contributions from renewable energy in assessments

The EPBC Act is administered in a way that is project agnostic so that renewable energy projects are treated in the same way as all other projects. This is despite the Commonwealth and each of the State and Territory Governments having extensive legislative and policy frameworks which recognise the urgency of energy transition, and provide mechanisms, including significant funding programs, to encourage the delivery of renewable energy projects.

During consultation, our attention was drawn to article 16f of the European Union's *Renewable Energy Directive III* which states that (emphasis added):

> "…until climate neutrality is achieved, Member States shall ensure that, **in the permit-granting procedure, the planning, construction and operation of renewable energy plants**, the connection of such plants to the grid, the related grid itself, and storage assets **are presumed as being in the**

overriding public interest and serving public health and safety when balancing legal interests in individual cases…"[19]

Recommendation 8:

Allow recognition of the positive climate contributions of renewable energy projects

We recommend that DCCEEW:

- As part of considering any environmental, social and economic impacts, consider the nature of renewable energy projects, which inherently contribute to achieving broader Government policy.
- Develop an assessment approach and related guidelines that acknowledge the positive environmental contribution of industries such as renewable energy as part of a broader clarification on what will be considered for social and economic matters.

7.9 Support landscape scale assessment for renewable energy zones

Each of Queensland, New South Wales and Victoria have introduced REZs through State legislation, aiming to concentrate renewable energy projects to improve efficiencies in supporting infrastructure and consolidation of impacts.

To our knowledge, individual projects within REZs continue to be assessed on a "project by project" basis, which leads to uncertainty in timing, inconsistency in requirements and lost opportunity for broader assessment and strategic offsets. Properly assessed and located, supported by good quality data, REZs can be ideal zones to undertake a landscape style assessment under the EPBC Act, either through a single referral for the whole of the REZ (which likely will identify "no go" zones and maximum clearing extents), or alternatively through other processes.

We recognise that strategic assessments are one tool available under the EPBC Act, but that have complexity and limitations in implementation. We also recognise that the Stage 3 reforms had proposed amendments to the strategic assessment regime, and the introduction of regional planning as a way of achieving landscape scale assessment.

Recommendation 9:

Look for opportunities for landscape scale assessments for REZs

We recommend that DCCEEW:

- Work with State and Territory governments to identify suitably located and development-ready REZs to allow for a landscape style environmental assessment. We acknowledge that particular care will need to be taken to ensure that projects that are already well advanced are not held back by this approach.
- Consider whether a single referral with appropriate assessment requirements and governance arrangements can be applied as a pilot to deliver a single EPBC Act approval for a REZ, with a single environmental offset requirement and common infrastructure assessment.

[19] Directive (EU) 2023/2413 [2023] OJ L 335, 39. Available from: https://eur-lex.europa.eu/eli/dir/2023/2413/oj

- Collaborate with the industry to develop a data-sharing framework to facilitate communication relating to areas of high wind and solar resources, as well as other technical or resource constraints. Advance legislative amendments for strategic assessments to improve their workability as a landscape scale assessment tool.
- Advance legislative amendments for regional planning to provide for more efficient landscape scale assessment of projects, particularly focussed on renewable energy projects.

7.10 Continue consultation on the draft Onshore Wind Farm Guidance

DCCEEW released for consultation draft Onshore Wind Farm Guidance (May 2024), which has the potential to introduce delay and uncertainty to delivery of onshore wind farm projects. The particular areas of concern in the draft guidelines are:

- Requirements for two years of bird and bat surveys; and
- Standardising curtailment of wind farms at dawn and dusk as a mitigation measure.

Recommendation 10:

Consult with industry and financiers in the finalisation of the draft Onshore Wind Farm Guidance

We recommend that DCCEEW:

- Continue to consult with industry on the proposed guidelines to ensure that the final document provides clear assessment outcomes that are consistent with State and Territory policies and do not materially inhibit the assessment, approval and financing of wind energy projects.

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