

Productivity Commission Inquiry

Investing in cheaper energy and the net zero transformation

Submission in Response to Commission Interim Report of August 2025

By

Dr Peter Burnett
Honorary Associate Professor
ANU Law School
[REDACTED]

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Outline of Submission and Preliminary Matters.

This submission is confined to issues associated with securing faster approvals for renewable energy projects, ie. to issues associated with the Commission's draft recommendations 2.1, 2.2 and 2.3.

Various proposed reforms to *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act) can expedite renewable energy approvals to facilitate the net zero transformation, but these will take some time to legislate and implement. In contrast, this submission canvasses an innovative approach to expediting environmental approvals in the short term, under the law as it stands. The thrust of the submission is that EPBC Act approval decisions could be expedited through the proactive management of the environmental assessment and approval process, at relatively low cost and without compromising environmental outcomes. Indeed, in my view it would be possible to schedule a series of assessments of renewable energy projects, according to a more general plan to assess projects with a certain cumulative energy output over a given period. This would involve working in close partnership with states and territories (abbreviated hereafter as 'states') and employing so far unused inquiry powers under the EPBC Act.

Dr Peter Burnett is an Honorary Associate Professor at the ANU Law School. He has held various senior executive positions in the federal and ACT Governments and in particular headed the division responsible for the administration and reform of the EPBC Act from 2007-2012. Peter holds a PhD in environmental law and policy, a Masters of Public Law, and bachelor's degrees in arts and law.

Proactive Management for Expedited Outcomes

At present, the assessment of projects referred for approval under the EPBC Act is not managed proactively. Rather, the proponent refers the project for assessment and it then works its way through the system, with the environment department making intermediate decisions at certain points — for example by setting tailored guidelines for assessment or seeking further information — and the proponent responding. There is general agreement that these processes take too long.

Because the process is with the proponent for more than three quarters of the total assessment time,¹ there may be some scope for a proponent to speed up the process unilaterally by taking

¹ Samuel, Independent Review of the EPBC Act, Interim Report, June 2020, 66

relevant actions (eg responding to requests for information) in a shorter timeframe; correspondingly, the government could speed up its end of the regulatory process (and to some degree already has) by engaging additional staff, upgrading IT systems and the like. Viewed holistically however, the system does not allocate to anyone the task of managing the overall assessment and approval process with a view to securing a final decision expeditiously, or by a planned date.

My major argument is that this could change, without changing the law. First principles of project management suggest that a project will move through a process expeditiously if someone is assigned responsibility for achieving that result, even more so if this is done through the cooperation of the parties concerned. There are relevant examples of this in Australia. One is the Federal Court's 'docket' system, under which each case is assigned to a judge who, among other things, ensures the expeditious hearing of the case by issuing appropriate directions to the parties during the pre-trial period. Another is the centralised referral management and coordination unit established in the Office of the EPA following the Vogel-McFerran Review in 2023, with the aim of providing better oversight of referrals and improving timeframes.²

I explain below how project management principles might be applied to speed up the assessment of projects under the EPBC Act, but should first provide some policy and legislative context.

When a project is referred for assessment and approval under the EPBC Act, the Act provides for Minister to determine an 'assessment approach'; leaving aside assessment by accredited state processes, there are five levels of assessment of ascending complexity and, broadly speaking, the minister chooses the appropriate level having regard to the nature and scale of likely impacts, the completeness of available information and the degree of public concern regarding the proposal.

The highest level of assessment is assessment by public inquiry. There are two distinguishing features of assessment by inquiry. The first is that the environmental impact assessment is prepared by one or more commissioners appointed by the minister; assessments at all other levels are undertaken by the proponent, under the regulatory supervision of the environment department. The second is that an inquiry must hold at least one public hearing (see s. 110); all other levels of assessment involve the publication of assessment documents (usually by the proponent) and the opportunity for written public comments.

² For the text of the review, see https://assets.nationbuilder.com/ccwa/pages/25427/attachments/original/1740631162/Att_1_-_Document_stamped_for_Release_under_the_FOI_Act-compressed.pdf?1740631162; for the government response, see <https://www.wa.gov.au/government/publications/streamline-wa-independent-review-of-wa-environmental-approvals-processes-and-procedures>.

Although some states use inquiry panels (variously described) for environmental impact assessments, the EPBC Act provisions for assessment by inquiry have never been invoked. The inference that might be drawn from the Act — reflected in the published Environmental Impact Assessment Manual — is that an inquiry would only be considered where there are complex environmental impacts, including impacts outside the control of a single proponent, and a high degree of public concern.³

However, that is not necessarily the case and I can see no reason in principle why assessment by inquiry could not be used for projects that, although large, do not necessarily involve impacts of the highest scale or complexity, or the highest levels of public concern. But why use an inquiry process if the projects concerned do not have the highest levels of complexity or public concern? Because inquiries are conducted independently, according to terms of reference set by the minister, including a specified time within which the inquiry must report, they offer significant flexibility for the minister to tailor terms of reference to facilitate the expeditious delivery of environmental assessments of major renewable energy projects, in a manner that also enhances public confidence.

Moreover, if the federal and state governments worked to coordinate their regulatory processes, it should be possible in at least some states for commissioners appointed to hold an inquiry under the EPBC Act to work in a coordinated way with a state assessment panel, or even for the same persons to be appointed to undertake both a federal and a state inquiry process into the same development proposal or set of similar proposals. (This possibility would need to be the subject of specialist legal advice in each state, but, having looked at the relevant laws in NSW and Victoria, my preliminary view is that, while close administrative coordination would be required, there is no legal impediment in at least those two states to this approach, as elaborated below. Note also that section 107(4) of the EPBC Act allows an inquiry to address state issues at the request of the state minister, opening the possibility of a single, federally conducted, inquiry; however, this would only be a feasible option if state law allowed a state regulator to act on a federal inquiry report.)

Of course, the use of inquiries would come at some administrative cost to government, but this would be small compared to the potential economic and environmental gains from accelerating the renewable energy transition by streamlining the assessment and approval of major renewable energy projects. That process could work as described in the next section.

³ The Environment Assessment Manual is available at:
<https://www.dceew.gov.au/sites/default/files/documents/environment-assessment-manual.pdf>.

Proposal in Detail

The joint approach I propose would work as follows:

1. The federal and relevant state governments would directly invite intending proponents of major renewables projects to discuss the possibility of a joint assessment, or advertise the availability of joint assessments (or both). Eligibility would be limited to projects where the proponent has already concluded that their project is likely to trigger environmental approval laws (this triggering is usually on the basis that the project likely to have a significant environmental impact).
2. The two governments and an interested proponent ('the parties') would prepare a plan ('project plan') for the environmental assessment and consideration of approval that would outline various steps to be taken through the process and assign responsibility for them (eg. information gathering); the project plan would include a timeline, including various milestones and a timeframe for final government decisions after assessment. It would also nominate senior people from each party to coordinate progress and resolve any issues arising. The project plan would be a non-binding administrative document, expressly limited to outlining shared aspirations and arrangements for guiding the project through statutory decision-making processes; for legal reasons it would exclude any content that might impinge, or even be perceived to impinge, on the statutory responsibilities and independence of decision-makers.
3. The proponent would then refer the project to both governments under their respective environmental laws. These laws require initial and separate decisions as to whether the project triggers an impact threshold and each government would make such a determination. However, because the proponent is applying on the basis that the project is likely exceed the impact threshold, and against the backdrop of a proposed cooperative process, the referral would be made on that basis, allowing each government to move expeditiously to make such a determination on a coordinated basis.
4. In conjunction with the triggering 'significant impact' decisions, the two governments would determine that the project be assessed by inquiry (however described under the relevant laws). The terms of reference issued by each government would be in complementary terms; they would either separately appoint the same persons to conduct the inquiry ('two hat model') or authorise persons separately appointed to work collaboratively with those appointed by the other jurisdiction ('joint process model'), including to hold at least one joint public hearing. Provided the two governments remain vigilant to comply with their own laws at every point, I see no reason in principle why they should not coordinate the timing of these decisions and align the inquiry terms of

reference (however described) with the project plan.

5. The joint inquiry or inquiries would then proceed according to the complementary terms of reference, submitting either a single report based as far as possible on common material, while also including separate but complementary findings and recommendations relevant to each jurisdiction; or alternatively, submitting separate but complementary reports based as far as possible on common material (eg findings about environmental impacts).
6. The two governments would coordinate the making of final and, as far as possible, complementary approval decisions, (Complementarity might be increased over time, initially through the alignment of technical requirements such as data-gathering and monitoring protocols but eventually through policy change, eg. alignment of offset policies.)

Potential Risks and Concerns

1. Doesn't the proposal depend on very high levels of cooperation with states, territories and proponents?

Yes, this approach would require high levels of cooperation, including in ways not previously tried, and a shared desire to make the arrangements work would be essential. However, the potential gains are significant and most other solutions are not available in the short term. Further, risks associated with this novel approach can be mitigated, for example by establishing small joint teams of bureaucrats under a brief to resolve any difficulties arising.

2. Inquiry mechanisms were designed for proposals involving very significant impacts and high levels of public concern, so are they really suitable for projects that, although significant in scale, have to date been dealt with through more routine approaches?

The beauty of the inquiry mechanism is first, the ability of the minister to tailor the terms of reference to the task, including by setting timelines and determining procedures; and second, the ability to appoint highly qualified people from outside the bureaucracy as commissioners. The exception to the ability to tailor is the EPBC Act requirement to hold at least one public hearing, but that hearing could be relatively informal, as there is no requirement to operate in a legalistic manner.⁴ It would also be possible to ask the same panel to inquire into multiple projects, eg. several adjacent projects in a Renewable Energy Zone, delivering efficiencies of

⁴ Although the Act gives commissioners the power to summon witnesses and to apply for warrants, these are powers of last resort and I would draw no implication from their existence that an inquiry should operate legalistically. In that regard, there is no requirement that commissioners should be legally qualified and the Act specifies that an inquiry is not bound by the rules of evidence.

scale.

3. Isn't the joint exercise of federal and state powers legally fraught?

As discussed above, provided care is exercised to coordinate assessment processes within legal requirements and to avoid any making any arrangement that could even be perceived to be fettering the independent statutory discretion of a minister or other decision-maker to approve a project or otherwise, I do not see any legal impediments to the approach I propose. Potential impediments associated with the conferring of *decision-making* power on an official of another jurisdiction do not apply, as the proposed approach is confined to the coordination of assessment and advice processes, leaving all substantive decisions to be made by the usual decision-makers.

4. Could a joint arrangement fail, leaving the proponent even worse off?

While there is always some risk in taking a novel approach, a desire on the part of governments to make a cooperative process work in the interests of significant economic, environmental and social gains, in combination with careful attention to good process by officials, can keep this risk very small.

Other Comments on Draft Recommendations

Recommendation 2.1 Reform national environment laws

I support this recommendation, except in relation to environmental offsets, where in my view a proponent should only be able to contribute to a government offsets fund if an actual complying offset has been identified. Without such a nexus, the proponent may be paying for a hypothetical offset, opening the possibility that the offset fund manager is subsequently unable to find an actual offset to acquire. The result, which I understand has already occurred in several Australian jurisdictions, is that the fund manager is left holding offset funding that they are unable to spend.

Recommendation 2.2 Set up a specialist 'strike team' for priority projects

While I am not opposed to this recommendation, my submission offers an alternative approach.

Recommendation 2.3 Establish a Coordinator-General for priority projects

While not opposed to this recommendation, if the Coordinator-General sits outside the regulatory processes, they can facilitate and cajole, but may also find themselves unable to deliver certain outcomes because regulators are operating within, and often bound by, existing laws and

processes. My proposal is directed towards the proactive management of regulatory processes by regulators themselves; perhaps both approaches could operate in a complementary way.