
Minister Plibersek's decision on the Victorian Renewable Energy Terminal

Background and context

The Victorian government intends for offshore wind generation to contribute to its renewable energy targets. If the government is successful, offshore wind energy would contribute 2GW of generating capacity by 2032, 4GW by 2035, and 9GW by 2040.

Achieving these offshore wind energy targets and establishing the offshore wind industry relies heavily on the construction of the Victorian Renewable Energy Terminal (the Terminal), a port that would receive and assemble offshore wind components for installation in Victoria's offshore wind zones.

As further detailed in [Implementation Statement 3](#), the Victorian government's preferred location for the Terminal is [Port of Hastings](#) in Western Port Bay, and would be owned, operated, and managed by the state government-owned Port of Hastings Corporation (the Port Corporation).

In 2023, the Port Corporation [referred a Terminal proposal](#) for Western Port Bay to the Victorian Planning Minister and federal Environment Minister for determination on how the environmental impact of the Terminal should be assessed under state and federal laws (Project referral). In Victoria, the referral determination process is undertaken under the *Environment Effects Act 1978* (Vic) (EE Act), and federally under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). At time of writing no scoping requirements for the Terminal have been provided by the Planning Minister under the EE Act.

The entirety of Western Port Bay, and most of the Western Passage,¹ is a wetland of international significance listed under the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* ([Ramsar Convention](#)).² Australia has signed the Ramsar Convention. The EPBC Act, among other things, gives effect to Australia's obligations under the Ramsar Convention by making Ramsar-listed wetlands a matter of national environmental significance (MNES). All MNES are protected from development (or 'activities') unless a development proposal is referred to the federal Environment Minister under the EPBC Act to determine whether it is a 'controlled action', and if so, whether it requires formal assessment and approval.

The Project referral identified that the Terminal could be expected to have significant adverse impact on the Western Port Bay Ramsar Wetland site (Ramsar wetland), and to EPBC Act-listed threatened species and ecological communities and migratory species, both of which are MNES. These impacts would be the result of two key activities:

1. Reclamation of 29 hectares of seabed – that is, permanent removal of 29 hectares of Ramsar-listed wetland – for wharf structure; and

¹ The channel of water between Bass Strait and Western Port Bay.

² Full text of the Ramsar Convention available at: [Original_1971_convention_e.pdf \(ramsar.org\)](https://www.ramsar.org/Original_1971_convention_e.pdf).

2. Dredging up to 92 hectares within the Ramsar site, including the Western Passage, to increase depths for ship access to wharf structure.

The Project referral did not contain any proposed impact management measures or rehabilitation activities, stating that the Terminal is still in early stages of impact assessment and planning.

The EPBC Act decision and consequences for the Victorian government

The EPBC Act decision

On 5 January 2024 the federal Environment Minister Tanya Plibersek (Environment Minister) [published her decision](#) on the Project referral. She determined that the Terminal is 'clearly unacceptable' and will have unacceptable impacts on the Ramsar wetland (the EPBC Act decision).³ This means that the Terminal is not a 'controlled action' and cannot progress through EPBC Act assessment.

The Environment Minister relied on expert advice from her Department, predominantly the Department's Wetlands Section Line Area, that the Terminal posed significant risk to the *entire* Ramsar wetland – i.e. significantly greater than the Terminal's immediate footprint.

The permanent removal of wetland to construct the wharf and dredging to deepen the Western Passage and parts of the Bay was determined to have an unacceptable impact on the basis that these activities would:⁴

- permanently alter shoreline and bathymetry (depth and contour of seabed landforms) which would create a dead zone and permanently alter downstream sedimentation and water exchange. These changes would adversely impact critical processes and components that form the ecological character of the entire Ramsar wetland, and which could not be mitigated or offset;
- directly contribute to loss of intertidal mudflats and feeding areas for migratory species;
- increase sedimentation and turbidity throughout the entire Ramsar wetland;
- increase contaminants and exotic species; and
- adversely interrupt the tidal regime on which intertidal mudflats, seagrasses and other vegetation (e.g. mangroves) rely to survive and which provide suitable feeding habitats and food webs for migratory species and other protected fauna.

Further, the Environment Minister accepted advice from Wetlands Section Line Area that even if best practice avoidance and mitigation measures were developed and implemented, the direct and indirect impact of the Terminal was unavoidable and would destroy or reduce the ecological character of the Ramsar wetland.⁵ These impacts could not be offset because no alternative site for offsetting purposes exists.

³ The decision, statement of reasons, and Port Corporation referral documents are published on the EPBC Act Public Portal, available at: [Referral summary - EPBC Act Public Portal \(awe.gov.au\)](#)

⁴ See Statement of Reasons, paragraphs [17] – [42].

⁵ Statement of Reasons, paragraph [45].

What does the decision mean?

As noted above, the Environment Minister's determination that the Terminal is 'clearly unacceptable' means that it cannot, as it currently exists, proceed through EPBC Act assessment.⁶ In effect, the Terminal is unable to be approved. Any activities undertaken for the Terminal would breach the EPBC Act and expose the Port Corporation liable to a fine of up to \$15.65 million.⁷

The Environment Minister's determination that the impact of the Terminal on the Ramsar wetland is 'clearly unacceptable' is significant for its rarity. Only 10 projects have been determined as such since the EPBC Act came into force.⁸ The Minister's opinion that the Terminal's impact to the Ramsar wetland could not be mitigated, avoided or offset indicates the severity of the actual or potential adverse impact on a matter of national environmental significance.

The Port Corporation has three options under the EPBC Act:⁹

- withdraw the project entirely.
- withdraw the Project referral, modify it and refer the modified proposal (which would be treated as a new referral); or,
- request the Environment Minister to reconsider the referral.

Can the Victorian government 'override' the decision?

No. Victorian decision-makers do not have power to 'override' a federal decision made lawfully under federal legislation.

The EPBC Act decision means that the Terminal cannot proceed for assessment, including under the environment effects statement (EES) process provided for in the *EE Act*. The Victorian and federal governments have entered into a bilateral agreement that sets out the procedures for environmental impact assessment where a project proposal requires assessment under both state and federal law, in this case through the EES process. If the Terminal proceeded through EES assessment the Victorian Planning Minister would be acting in breach of the bilateral agreement and inconsistently with federal law.

Further, states can only make laws for matters that the federal Parliament is not explicitly permitted to under the federal Constitution. Matters relating to environment protection are not explicitly referenced in the federal Constitution as something federal Parliament can make laws about. However, the 'external affairs' power in the federal Constitution, among others, allows federal Parliament to give effect to Australia's obligations under conventions that concern environmental protection and conservation, such as the Ramsar Convention, by making the EPBC Act.

To avoid inconsistency, section 109 of the Constitution provides that where a state law is inconsistent with a federal law the federal law will prevail, and the state law will be invalid.¹⁰

This means that Victoria cannot simply legislate its way out of the EPBC Act decision by, for example, passing a law to construct the Terminal in a Ramsar-listed wetland. To do so would be inconsistent

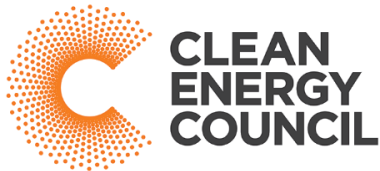
⁶ EPBC Act s 74B.

⁷ EPBC Act s 16(1)(b) – body corporate who takes an action that has, will, or is likely to have a significant impact on the ecological character of a Ramsar wetland attracts a 50000 penalty unit fine. The current federal penalty unit is \$313.

⁸ EPBC Act project determinations are available here: [All referrals · EPBC Act Public Portal \(awe.gov.au\)](#)

⁹ EPBC Act s 74C(3).

¹⁰ *Commonwealth of Australia Constitution Act* (Cth) s 109.



with the EPBC Act that exists to protect MNES by controlling development that could significantly impact MNES, and therefore invalid.

What next?

At time of writing, it is not clear how the Port Corporation or the Victorian government will act in response to the EPBC Act decision.

To be successful in obtaining a 'controlled action' determination and proceed through environmental impact assessment, a modified Terminal proposal would need to overcome the concerns outlined in the Environment Minister's Statement of Reasons. This would include the significant challenges associated with proving how adverse impact could be minimised or avoided.

A successful reconsideration of the EPBC Act decision would face significant hurdles not least because the Environment Minister appears to be resolute in her decision about the impacts of the Terminal as it is currently described in the Project referral.

Further, a reconsideration request process includes public engagement. The Western Port Bay community, among other Victorian environmental advocacy organisations, have successfully argued that the impacts of large developments on the Ramsar wetland are unacceptable.¹¹

The Victorian and federal governments could make formal legal arrangements to permit construction and operation of the Terminal in the Ramsar wetland. This would likely be accompanied with significant political and domestic and international social licence challenges.

It is, of course, open to the Victorian government to consider alternative sites for the Terminal. Offshore wind project developers are also able to engage directly with other ports in Victoria regarding upgrading their port capabilities to a suitable level for importing and construction of offshore wind farms.

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¹¹ For example the successful campaign to prevent approval of AGL's floating gas terminal at Crib Point, and current community opposition to the HESC coal-to-hydrogen export terminal. For more information see: [Home - Save Westernport](#).