

# Submission on the Draft Energy Policy Framework

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The NSW Young Lawyers Environment and Planning Sub-Committee (**Sub-Committee**) makes the following submission in relation to the Department of Planning and Environment's Draft Energy Policy Framework.

## **NSW Young Lawyers**

NSW Young Lawyers is a Committee of the Law Society of New South Wales that represents the Law Society and its members on issues and opportunities arising in relation to young lawyers i.e. those within their first five years of practice or up to 36 years of age. Through its 15 sub-committees, each dedicated to a substantive area of law, NSW Young Lawyers supports practitioners in their professional and career development by giving them the opportunity to expand their knowledge, advance their career and contribute to the profession and community.

The NSW Young Lawyers Environment and Planning Sub-Committee is comprised of a group of volunteers and subscribers interested in our natural and built environment. The Sub-Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Sub-Committee also takes an interest in international environmental and climate change laws and their impact within Australia.

As set out in its Climate Change and the Law Policy Statement of 1 November 2019, NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO<sub>2</sub> (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

## Summary of recommendations

The Sub-Committee welcomes the publication of the Draft Energy Policy Framework (**Draft Framework**) by the Department of Planning and Environment (as it was then named) (**Department**), which the Sub-Committee views as a crucial step towards facilitating the renewable energy transition by seeking to make the assessment and approval of onshore wind, solar and transmission projects more transparent and consistent. To ensure further clarity and consistency, the Sub-Committee makes the following recommendations to the Department for its consideration:

1. The Department should consider methods to ensure the definition of 'dwelling' minimises any loophole(s) that risk creating uncertainty for proponents and stakeholders to the greatest extent possible, for example, by confining the definition of 'dwelling' to dwellings the subject of development consent prior to the lodgement of a project's development application.
2. The Department should clarify and clearly communicate at what point the Draft Framework will have legal force, and that proponents are not required to adhere to draft or interim guidelines.
3. The Department should:
  - a. clarify the nature of the 750 MW storage criteria and how this informs the Minister's statutory power to declare any project type or specific project to be State Significant Infrastructure (**SSI**) and Critical State Significant Infrastructure (**CSSI**); and
  - b. update the existing Department of Planning, Industry and Environment's 'Declaration of SSI and CSSI: State Significant Infrastructure Guide' (March 2021) (**SSI and CSSI Guide**) to include additional examples and guidance relevant to specific types of large-scale renewable energy projects.

## A. Introduction

1. The Sub-Committee welcomes the opportunity to comment on the Draft Framework released by the Department.
2. This submission addresses the following aspects of the Draft Framework:
  - a. The definition of 'dwelling';
  - b. the legal force of draft guidelines; and
  - c. the use of the SSI and CSSI planning pathways for transmission, wind and solar projects.

## B. Dwellings

3. A consent authority is required to assess the likely impacts of a proposed development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.<sup>1</sup> This commonly includes the visual and noise impacts of a proposed renewable energy project on neighbouring dwellings.
4. The Sub-Committee understands that under the Draft Framework, the Department intends to define a 'dwelling' consistently across the planning, assessment and approval legal framework.
5. The Standard Instrument – Principal Local Environment Plan (**Standard Instrument**) defines dwelling as “a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile”.<sup>2</sup>
6. The Draft Framework extends this definition to include a dwelling that has development consent, but is yet to commence or complete construction, or a dwelling the subject of a yet to be determined development application which was lodged prior to the lodgement of a wind or solar project development application.<sup>3</sup>
7. The Sub-Committee is concerned that the proposed definition of 'dwelling' may create a legal loophole that allows persons to submit development applications in bad faith to hamper renewable energy projects.
8. Renewable energy projects of the scale the subject of the Draft Framework are often State significant projects and proponents are required by the Department and the legislation to consult early in the scoping and planning process with potentially impacted stakeholders. As a result, there is a window during which there is a risk that an applicant in bad faith, knowing of a proposed renewable energy project, may prepare and lodge a development application with the ulterior motive of blocking a renewable energy project on their land *before* the development application for the project is lodged.

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<sup>1</sup> *Environmental and Planning Assessment Act 1979* s 4.15(1)(b).

<sup>2</sup> Standard Instrument – Principal Local Environmental Plan 2006 (NSW).

<sup>3</sup> See, for example, Department of Planning and Environment, Draft Wind Energy Guideline: Technical Supplement for Landscape and Visual Impact Assessment (November 2023) s 1.3.

9. For the purposes of assessing the likely impacts of a proposed project, we encourage the Department to consider methods to ensure this loophole is minimised to the greatest extent possible, for example, by confining the relevant part of the definition of 'dwelling' to dwellings granted development *consent* prior to the lodgement of a project's development application.

**Recommendation 1:**

The Department should consider methods to ensure the definition of 'dwelling' minimises any loophole(s) that risk creating uncertainty for proponents and stakeholders to the greatest extent possible, for example, by confining the definition of 'dwelling' to dwellings the subject of development consent prior to the lodgement of a project's development application.

## C. Application of Draft Framework

10. We understand there remains uncertainty for stakeholders as to when draft guidelines come into effect and at what point planning officers will request that proponents of renewable energy projects apply draft guidelines and policies to their proposed developments.<sup>4</sup>
11. We submit that the Department should maintain a process of assessment and approval that adheres to the presently in-force guidelines, not the Draft Framework, until such time as the Draft Framework is finalised.
12. This approach is essential considering that guidelines are open to being characterised by the Court as 'instruments' under the *Interpretation Act 1987* (NSW) and, to an extent, have the force of law.<sup>5</sup>
13. It would be contrary to the rule of law – that subordinate legislation such as instruments or guidelines should remain subject to parliamentary supervision – for a draft or interim guideline to be applied as if it were a guideline that has been through the proper processes and subject to the delegated functions of the Department within the statutory planning process.
14. The Sub-Committee asks that the Department clarify and clearly communicate that proponents are not required to adhere to draft or interim guidelines, to ensure certainty for proponents, the community and the Department's officers.

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<sup>4</sup> Clean Energy Investor Group, Herbert Smith Freehills, Delivering Major Clean Energy Projects in NSW: Review of NSW Statutory Planning Approvals Processes' (Report, 14 December 2023) <<https://www.herbertsmithfreehills.com/news/2023-12/herbert-smith-freehills-identifies-quick-wins-to-speed-up-clean-energy-project-approvals-in-nsw>> 15.

<sup>5</sup> See, for example, *Granville Hotel Operations Pty Ltd v Independent Liquor and Gaming Authority* [2023] NSWCA 248; *CK Design Pty Ltd v Penrith City Council (No 2)* [2022] NSWLEC 97.

**Recommendation 2:**

The Department should clarify and clearly communicate at what point the Draft Framework will have legal force, and that proponents are not required to adhere to draft or interim guidelines.

## **D. Use of SSI and CSSI declarations for transmission, wind and solar projects**

15. Presently, there is a risk of uncertainty when it comes to determining what major renewable energy projects are likely to be declared SSI or CSSI due to the interrelationship between the Draft Framework and the existing SSI and CSSI Guide.
16. The draft Wind Energy Guideline refers to the SSI and CSSI Guide for relevant guidance and identifies that the Minister “will consider requests to declare wind energy development CSSI if it includes a significant energy storage system (for example, by delivering capacity of 750 megawatts or more)”.<sup>6</sup> The proposed updates to the Large-Scale Solar Energy Guideline 2022 are set to include a similar change for solar energy projects consistent with the draft Wind Energy Guideline.
17. Two uncertainties may arise as a result of the above:
  - a. first, it is unclear whether the 750 MW storage criterion seeks to act as a strict threshold required to be met by a major wind energy project before the Minister or a State Environmental Planning Policy can declare it to be SSI or CSSI, and how this criterion relates to the statutory power to declare any project to be SSI or CSSI; and
  - b. second, although the SSI and CSSI Guide provides some useful guidance on circumstances and key considerations relevant for the Minister in making SSI and CSSI declarations, there are few mentions of energy and transmission projects and no examples of specific circumstances in which a renewable energy project could be declared SSI or CSSI.
18. To ensure legal consistency for projects utilising State significant approval pathways and to provide further clarity to stakeholders, the Sub-Committee submits that:
  - a. the Department should clarify the nature of the 750 MW storage criterion, and what other renewable energy projects may justify a SSI or CSSI declaration, and how this informs the Minister’s statutory power to declare any project type or specific project to be SSI or CSSI; and
  - b. the SSI and CSSI Guide should be updated to include additional examples and guidance relevant to specific types of large-scale renewable energy projects that may be declared SSI or CSSI.

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<sup>6</sup> Department of Planning and Environment Draft Wind Energy Guideline (November 2023) s 2.6.

**Recommendation 3:**

The Department should:

- a) clarify the nature of the 750 MW storage criterion and how this informs the Minister's statutory power to declare any project type or specific project to be SSI or CSSI; and
- b) update the SSI and CSSI Guide to include additional examples and guidance relevant to specific types of large-scale renewable energy projects.

## E. Concluding Comments

NSW Young Lawyers thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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