



Appendix V

Approvals Pathway Report

February 2018

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1 Introduction

1.1 Purpose of this report

This report provides an assessment of the options to obtain project approvals for the different packages of work to be delivered as part of North East Link.

North East Link is likely to be delivered as one Primary Package and one or two Secondary Package(s), as discussed in **Appendix S Procurement Analysis**.

1.2 Objectives

The objectives of the planning approvals strategy are to:

- Establish a robust planning assessment and approval pathway for North East Link which enables effective community and stakeholder engagement on the likely impacts of North East Link
- To effectively manage risks associated with the assessment and approvals process, including minimising the risk of legal challenge to any of the approvals granted
- Provide flexibility in the assessment and approvals process to facilitate the capture of private sector innovation during the tender process, and ultimately the preferred tenderer's design
- To obtain all key approvals necessary to develop North East Link in a timely manner with process certainty.

2 Approvals required for North East Link

A comprehensive and integrated impact assessment of North East Link is likely to be required, as the works have the potential for significant environmental effects on biodiversity assets and values, water environments, air quality, Aboriginal and cultural heritage and public amenity, including landscape and visual values and increased traffic noise during both the construction and operation phases. A formal impact assessment process will enable identification of avoidance and mitigation strategies to minimise adverse impacts on the environment.

North East Link will require planning approval under the *Planning and Environment Act 1987* (Vic) (P&E Act) in the form of a Planning Scheme Amendment (PSA) providing project-specific planning controls permitting use and development of land for the purposes of North East Link, to the exclusion of all other provisions in the relevant planning schemes. The PSA is the key Victorian planning approval required for North East Link.

North East Link will most likely also require a number of other key approvals for which the State will be responsible to obtain, including:

- An Environment Protection Authority (EPA) works approval under the *Environment Protection Act 1970* (Vic) (EP Act), in respect of installation of any tunnel ventilation system
- An approved Cultural Heritage Management Plan (CHMP) under the *Aboriginal Heritage Act 2006* (Vic) (AH Act).

Approval from the Commonwealth Minister for Environment and Energy may also be required, in the event that North East Link is determined to be ‘a controlled action’ under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

A range of additional approvals will also be required, generally requiring a greater level of project design. Such approvals, usually obtained by the appointed construction contractor, may include:

- Heritage permits and consents under the *Heritage Act 1995* (Vic)
- Approvals under the *Road Management Act 2004* (Vic)
- Licences under the *Water Act 1989* (Vic)
- Permits and approvals under the *Flora and Fauna Guarantee Act 1988* (Vic) and *Wildlife Act 1975* (Vic).

3 Possible and preferred planning assessment and approval pathway

The project is likely to generate wide community interest and the selected planning assessment and approval pathway needs to be transparent and provide adequate opportunity for community consultation and stakeholder engagement.

3.1 Possible planning assessment and approval pathways

There are three main planning assessment approval pathways available for North East Link. These are:

- EES and PSA (recommended): an impact assessment via an Environment Effects Statement (EES) under the *Environment Effects Act 1978* (Vic) EE Act and planning approval by way of a PSA under the P&E Act. Sub-options include:
 - Concurrent EES and PSA processes (not recommended)
 - Sequential approach with the PSA approved under section 20(4) of the P&E Act after the EES assessment process (recommended).
- PSA only: limited environmental impact assessment as part of a planning approval process by way of a PSA under the P&E Act
- CIS and single approval decision: an impact assessment by way of a Comprehensive Impact Statement (CIS) and subsequent Planning Minister's approval decision granting all applicable Victorian planning and environmental approvals required for North East Link under the *Major Transport Projects Facilitation Act 2009* (Vic) (MTPF Act).

3.2 Preferred assessment and approval pathway

An EES assessment process followed by a PSA under section 20(4) of the P&E Act is the preferred assessment and approval pathway for North East Link. This process has been successfully applied for many major projects, including the Peninsula Link, Melbourne Metro Rail Project and West Gate Tunnel Project. The reasons for selecting this as the preferred assessment and approval pathway are outlined in this section.

It is considered that the range, complexity and magnitude of issues potentially presented by North East Link warrant a comprehensive and integrated assessment. Consequently, a planning scheme amendment process under the P&E Act without a comprehensive environmental impact assessment process, is unlikely to be considered adequate.

The assessment process under the EE Act and the CIS assessment process under the MTPF Act, each provide for a comprehensive assessment of a full range of planning, environmental, social and economic effects with adequate opportunity for community consultation and stakeholder engagement.

The EES assessment process is a well-established and widely understood process which has been successfully used on many Victorian Government infrastructure projects. The CIS assessment process, by contrast, is relatively new, and is not well understood by key stakeholders or the community. To date, the assessment and approval provisions of the MTPF Act have only been used to assess and approve one project - the East West Link (Eastern Section) Project.

The EES assessment process is likely to be more flexible than the CIS assessment process. An EES process assesses the environmental effects of a project and whether it is capable of providing suitable mitigation strategies to enable acceptable outcomes to be achieved. It culminates in the Minister's assessment which *informs* statutory decision makers on whether or not to grant the requisite approvals for the project. The CIS assessment process, by contrast, is directed to assessing the impacts of a project to determine whether the applicable approvals necessary for development of the project ought to be granted and if so on what conditions. This may require a greater degree of design detail and design certainty at the time of preparing the CIS.

There is greater potential for the project's design to be developed concurrently with an EES assessment process than with a CIS assessment process. Under a CIS, the design needs to be developed with sufficient certainty and specificity to enable all relevant application material to be included in the CIS for each applicable approval sought for the project.

The EES process better accommodates innovation from the market when tenders are received after the Minister for Planning's assessment. The extent of the change from the reference design assessed and approved is able to inform the Minister for Planning's decision on the requirement for any additional assessment or approvals. Under a CIS assessment process, by contrast, there is a greater likelihood of needing to update or amend the Minister's approval decision to accommodate changes from the reference design.

There are additional documentation requirements in the preparation of a CIS over an EES. As a CIS is both an assessment and approvals process, the CIS necessarily contains much more information on the applicable approvals required for the project than an EES where the application documentation is prepared separately from the EES. In addition to the application documentation, the CIS must also contain the requirements of all applicable laws applying to the approvals sought, and details of the applicable law criteria under such laws and how such criteria apply to the project.

There is arguably less risk of a legal challenge to subsequent approval decisions by statutory authorities following an EES assessment process than the Minister's approval decision under the MTPF Act following a CIS assessment process. Approvals risk is also reduced with multiple approval decisions needing to be made following an EES, as opposed to a single approval with a CIS.

Use of the CIS assessment process requires amendment of the Project Proposal Guidelines to make them consistent with amendments made to the MTPF Act in 2013, whereas no amendment is necessary before using the EES assessment process.

Use of the EES assessment process does not prevent use of the MTPF Act for project delivery following a planning scheme amendment authorising use and development of North East Link and designation of the project area.

If the project is a 'controlled action' under the EPBC Act, there is a requirement to prepare and exhibit a revised CIS under the accredited assessment requirements of the Bilateral Agreement between the Commonwealth and Victorian State Government, which does not apply to an EES assessment process, and which may add to the length of the CIS assessment process.

There is otherwise no significant time advantage between the two assessment and approval processes, provided there is careful management of the EES assessment process to ensure that it is conducted in a time efficient manner.

Table 1 provides an assessment of the preferred EES and PSA process against the objectives outlined in Section 1.2.

Table 1 Assessment of the EES process against planning approvals strategy objectives

Objective	EES assessment process
Robust planning assessment and approval pathway with effective community and stakeholder engagement	<p>Provides a robust assessment process with the ability to co-ordinate with key project approvals including PSA, EPA works approval, CHMP and approval under the EPBC Act (if a controlled action).</p> <p>Also provides for effective community and stakeholder engagement during the process.</p> <p>Process is understood and has been followed for many public and private sector projects.</p> <p>No amendment to the Ministerial Guidelines is necessary.</p>
Effective management of assessment and approval risk	<p>Assessment and approval risk is capable of effective management, particularly where:</p> <ul style="list-style-type: none"> • The draft PSA is included in the EES and a joint Inquiry and Advisory Committee is appointed under the EE Act and the P&E Act to consider and advise on the PSA • The works approval application is exhibited concurrently with the EES and the works approval issues substantially in accordance with the Minister's assessment. <p>The risk of challenge to the PSA decision on administrative law grounds will remain, as will the ability for either House of Parliament to revoke the PSA within 10 sitting days.</p>
Flexibility in the assessment and approvals process to capture private sector innovation	<p>Provides flexibility in the assessment and approvals process as the EES is directed to an assessment of the potential for <i>significant</i> impacts and effects.</p> <p>The EES assessment process is better suited to assessing project alternatives or options for project elements or components.</p> <p>As key approvals are issued subsequent to the Minister's assessment, there is greater potential to respond to recommendations made before approvals are granted and for the approvals to be issued for a project with greater design detail at the end of the process.</p>
Obtain all key approvals in a timely manner, and with process certainty	<p>Time efficiencies in the assessment process are capable of being achieved with careful management and adequate resourcing.</p> <p>Process certainty can exist largely as a consequence of the large number of projects which have followed the process.</p>

3.3 Statutory assessment and approvals process based on a reference design or actual design

Consideration has also been given to undertaking statutory assessments and approvals based on a reference design or an actual design.

It is recommended that the assessment and approvals process be based on a reference or concept design (possibly with variations for key components), with a level of design detail similar to the reference design for Melbourne Metro Rail Project. This will allow early commencement of the formal statutory assessment and approvals process.

This assessment approach will allow:

- The planning and procurement processes to be conducted concurrently yet independently of each other to achieve program efficiencies
- The procurement process to be conducted and completed in a competitive environment with potential cost savings for the State as it will be in a stronger position to achieve acceptable commercial outcomes
- Greater flexibility in the assessment process including the ability to assess potential design alternatives for key components in line with Department of Environment, Land, Water and Planning (DELWP) and community expectations.

Assessment and approval based on an actual as opposed to a reference design would also delay public exhibition of the EES until after procurement and selection of a preferred tenderer's design.

3.4 Using MTPF Act for project delivery

The MTPF Act provides for the declaration of transport projects assessed by the Premier as being of economic, social or environmental significance to the state or a region of the state. Such declaration can be made to allow a declared project to use the project delivery provisions of the MTPF Act including in relation to land acquisition and assembly.

It is recommended that request be made to the Premier for declaration of North East Link under section 10(1)(b) of the MTPF Act for the purposes of project delivery and that this request be made following the Minister for Planning's determination on the approval pathway (assuming an EES) for North East Link. This will provide powers to enable compulsory land acquisition (if required) under the *Land Acquisition and Compensation Act 1986* (Vic).

4 Overview of preferred planning approval pathway

As outlined in Section 3.2, an EES assessment process followed by a PSA under section 20(4) of the P&E Act is the preferred assessment and approval pathway for North East Link.

An EES may be required for works having the potential to have a significant impact on the environment at a state or regional level, requiring a comprehensive and integrated assessment addressing a range of environmental, economic and social issues.

It is proposed that a submission is made to the Minister for Planning to seek declaration of the project as 'public works' under Section 3(1) of the EE Act, as North East Link could reasonably be considered to be capable of having a significant effect on the environment.

An EES is required for declared 'public works' determined by the Minister for Planning as capable of having a significant effect on the environment. Melbourne Metro Rail Project and the West Gate Tunnel Project are recent examples.

If a 'public works' declaration is made under section 3 of the EE Act, an EES must be prepared. No part of a project, subject to a public works declaration, may proceed until the Minister for Planning's assessment has been prepared and considered by the Minister for Roads and Road Safety (being the relevant Minister concerned with the undertaking of those works).

To the extent that any early, enabling or complementary works may need to be undertaken before the Minister's Assessment report has been considered by the relevant Minister (being the Minister for Roads and Road Safety responsible for North East Link), it will be important to ensure that these works are excluded from the project which is the subject of the 'public works' declaration.

A key feature of the EES assessment process is that it is an assessment process only, with requisite approvals to be obtained from relevant statutory decision makers following their consideration of the Minister's assessment. This enables any necessary adjustments to be made to the project before seeking approvals including adjustments in response to the assessment process and the Minister for Planning's assessment in particular.

There is also an opportunity to co-ordinate approvals procedures with the EES assessment process, including EPA works approval and PSA.

If an application for an EPA works approval is advertised concurrently with the EES and approval granted substantially in accordance with the Minister's Assessment under the EE Act, then there is no third party right of review against the EPA's works approval decision.

A draft PSA can also be included in the EES and an Advisory Committee appointed under section 151 of the P&E Act can advise on the form the proposed PSA and whether it is an appropriate means by which to facilitate use and development of the project. The Advisory Committee can also be appointed under the EE Act to conduct a formal Inquiry into the environmental effects of the project and a single report given to the Minister for Planning. This is the process that was adopted for Melbourne Metro Rail Project and West Gate Tunnel Project.

The preferred planning approval pathway is summarised in Figure 1.

Figure 1 Planning approval pathway

