



Best Practice in environment effects statements

Tim Power, Freehills

tim.power@freehills.com

Freehills

Best Practice in environment effects statements

Tim Power, Freehills

tim.power@freehills.com

Who cares what the lawyer thinks?

Legislation and guidance

Environment Effects
Act 1978

Guidelines

EPBC Act

Bilateral agreement





Understand the process and its expectations

Planning approval options for Victorian projects

Other Victorian approvals

Interface with EPBC Act

Potential for conditional 'no EES' decision

Most importantly, it's not a 'box-ticking ' exercise

Referrals

Pre-referral engagement with government

Flexibility with project description and process

Think through the implications of what you say in the referral

Misleading statements

REFERRAL OF A PROJECT FOR A DECISION ON THE NEED FOR ASSESSMENT UNDER THE *ENVIRONMENT EFFECTS ACT 1978*

REFERRAL FORM

The *Environment Effects Act 1978* provides that where proposed works may have a significant effect on the environment, either a proponent or a decision-maker may refer these works (or project) to the Minister for Planning for advice as to whether an Environment Effects Statement (EES) is required.

This Referral Form is designed to assist in the provision of relevant information in accordance with the *Ministerial Guidelines for assessment of environmental effects under the Environment Effects Act 1978* (Seventh Edition, 2006). Where a decision-maker is referring a project, they should complete a Referral Form to the best of their ability, recognising that further information may need to be obtained from the proponent.

It will generally be useful for a proponent to discuss the preparation of a Referral with the Department of Planning and Community Development (DPCD) before submitting the Referral.

If a proponent believes that effective measures to address environmental risks are available, sufficient information could be provided in the Referral to substantiate this view. In contrast, if a proponent considers that further detailed environmental studies will be needed as part of project investigations, a more general description of potential effects and possible mitigation measures in the Referral may suffice.

In completing a Referral Form, the following should occur:

- Mark relevant boxes by changing the font colour of the 'cross' to black and provide additional information and explanation where requested.
- As a minimum, a brief response should be provided for each item in the Referral Form, with a more detailed response provided where the item is of particular relevance. Cross-references to sections or pages in supporting documents should also be provided. Information need only be provided once in the Referral Form, although relevant cross-referencing should be included.
- Responses should honestly reflect the potential for adverse environmental effects. A Referral will only be accepted for processing once DPCD is satisfied that it has been completed appropriately.
- Potentially significant effects should be described in sufficient detail for a reasonable conclusion to be drawn on whether the project could pose a significant risk to environmental assets. Responses should include:
 - a brief description of potential changes or risks to environmental assets resulting from the project;
 - available information on the likelihood and significance of such changes;
 - the sources and accuracy of this information, and associated uncertainties.
- Any attachments, maps and supporting reports should be provided in a secure folder with the Referral Form.
- A CD or DVD copy of all documents will be needed, especially if the size of electronic documents may cause email difficulties. **Individual documents should not exceed 2MB.**

3. Project description

Aim/objectives of the project (what is its purpose / intended to achieve?):
Background/rationale of project (describe the context / basis for the proposal, eg. for siting):
Main components of the project (nature, siting & approx. dimensions; attach A4/A3 plan(s) of site layout if available):
Ancillary components of the project (eg. upgraded access roads, new high-pressure gas pipeline; off-site resource processing):
Key construction activities:
Key operational activities:
Key decommissioning activities (if applicable):
Is the project an element or stage in a larger project? <input type="checkbox"/> No <input type="checkbox"/> Yes If yes, please describe: the overall project strategy for delivery of all stages and components; the concept design for the overall project; and the intended scheduling of the design and development of project stages).
Is the project related to any other past, current or mooted proposals in the region? <input type="checkbox"/> No <input type="checkbox"/> Yes If yes, please identify related proposals.

4. Project alternatives

Brief description of key alternatives considered to date (eg. locational, scale or design alternatives. If relevant, attach A4/A3 plans):
Brief description of key alternatives to be further investigated (if known):

5. Proposed exclusions

Statement of reasons for the proposed exclusion of any ancillary activities or further project stages from the scope of the project for assessment:
--



Consultants

Consider their expert witness experience
from the outset

Scope

Trust

PLANNING PANELS VICTORIA

PLANNING PANELS – EXPERT EVIDENCE

1. Circulation of expert reports

- 1.1 Expert witness reports must be submitted five working days prior to the commencement of the Hearing, or at an earlier date directed by the Panel. An earlier date will be specified for more complex reports.
- 1.2 Parties must disclose at the Directions Hearing, the evidence (if any) they will be calling at the Public Hearing.
- 1.3 Copies of witnesses' reports or statements must be circulated in accordance with Directions made at the Directions Hearing. If no specific directions are made, six copies of their reports or statements must be given to the Panel Coordinator at least five working days before the Hearing. Copies will be given to the Panel and to other parties as directed. Other people may obtain copies by contacting the Panel Coordinator.
- 1.4 A soft copy of reports should be provided as follows:
 - 1) as a 'pdf' and in Microsoft Word format to Planning Panels Victoria, and
 - 2) as a 'pdf' to the Planning Authority suitable for uploading on the Planning Authority's website
- 1.5 Before the Hearing, copies of witnesses' reports or statements will normally be available for perusal by submitters at the offices of the Planning Authority and Planning Panels Victoria, Level 1, 8 Nicholson Street, East Melbourne.

2. Expert's duty to the Panel

- 2.1 An expert witness has a paramount duty to the Panel and not to the party retaining the expert.
- 2.2 An expert witness has an overriding duty to assist the Panel on matters relevant to the expert's expertise.
- 2.3 An expert witness is not an advocate for a party to a proceeding.

3. Content and form of expert's report

- 3.1 The report of an expert must include the following:
 - 1) the name and address of the expert,
 - 2) the expert's qualifications and experience,
 - 3) a statement identifying the expert's area of expertise to make the report,
 - 4) a statement identifying any other significant contributors to the report and where necessary outlining their expertise,
 - 5) all instructions that define the scope of the report (original and supplementary and whether in writing or oral), and
 - 6) the identity of the person who carried out any tests or experiments upon which the expert relied and the qualifications of that person.
- 3.2 Where an expert has prepared a report that has been used to inform the preparation of an amendment or proposal the expert should not provide a revised version of that report. The expert should provide a brief report that includes:
 - 1) an unambiguous reference to the report, or reports that the expert relies upon,
 - 2) a statement identifying the role that the expert had in preparing or overseeing the exhibited report(s),
 - 3) a statement to the effect that the expert adopts the exhibited report and identifying:

- any departure of the expert from the finding or opinions expressed in the exhibited report,
- any questions falling outside the expert's expertise,
- any key assumptions made in preparing the report, and
- whether the exhibited report is incomplete or inaccurate in any respect.

3.3 Where a report has not been used to prepare an amendment or proposal, the report should include:

- 1) the facts, matters and all assumptions upon which the report proceeds,
- 2) reference to those documents and other materials the expert has been instructed to consider or take into account in preparing his or her report and the literature or other material used in making the report,
- 3) a summary of the opinion or opinions of the expert,
- 4) a statement identifying any provisional opinions that are not fully researched for any reason (identifying the reason why such opinions have not been or cannot be fully researched), and
- 5) a statement setting out:
 - any questions falling outside the expert's expertise, and
 - whether the report is incomplete or inaccurate in any respect.

3.4 The expert must declare at the end of the report:

I have made all the inquiries that I believe are desirable and appropriate and no matters of significance which I regard as relevant have to my knowledge been withheld from the Panel.

4. Where the expert changes his or her opinion on a material matter

4.1 An expert witness who changes an opinion on a material matter on the basis of another expert's report or for any other reason must, communicate that change of opinion in writing to the party retaining the expert and that party must file with the Panel, notice of such change of opinion as soon as practicable.

4.2 Such a document must specify reasons why his or her opinion has changed.

5. Where the Panel directs expert witnesses to meet

5.1 Expert witnesses retained by parties are encouraged to meet to narrow any points of difference between them and to identify any remaining points of difference. The Panel may also direct that they meet.

5.2 If expert witnesses meet they must each set out in writing by a document filed with the Panel any agreed points and all remaining points of difference.

5.3 If any expert witness directed by the Panel to meet with any other expert is instructed not to reach agreement in respect of points of difference, the fact of such instructions must be reported in writing to the Panel by the expert witness.

6. Generally

6.1 Parties to a proceeding must ensure that any expert retained by them to provide a report for use in the proceeding is aware of the contents of this direction, at the time of such retainer.

7. Form of report

7.1 Written material presented at the hearing should be in the following form:

- 1) Two-hole punched,
- 2) Stapled, not bound,
- 3) Photographs or other visual material should be presented in binders in A4 or A3 format, not on large boards. This makes the material easier to transport and file.

Panels - what are they?

Appointed by Minister for Planning with approval of Governor in Council

Can have multiple statutory functions

- planning scheme amendments
- works approval applications

Terms of reference

Rules of evidence

- expert evidence



Panels - recurrent issues

Project definition

Cumulative impacts

Insufficient detail of 'second order impacts

Stakeholder engagement

Social impact assessment

Government agency engagement



Commonwealth interface

EPBC Act

Accreditation of Victorian assessment
process

Have been some problems - panel report

Concluding thoughts

EES needs to

- present a project narrative
- be credible
- be systematic and comprehensive

Be wary of cutting corners

- risk-based assessment
- perception of risk

Freehills

Best Practice in environment effects statements

Tim Power, Freehills

tim.power@freehills.com