

## APPENDIX B

### PLANNING AND BUILDING REGULATORY FRAMEWORKS

#### PLANNING

##### The Planning and Environment Act

In accordance with the *Planning and Environment Act 1987*, the Minister for Planning prepares and amends the Victoria Planning Provisions and may prepare and amend a planning scheme for any area of Victoria. A municipal council maintains, administers and enforces the planning scheme in force in its municipality. It may prepare an amendment to its planning scheme with the authorisation of the Minister and, as the responsible authority, decides on applications for permits for the use and development of land in its municipal district, within the strategic framework established by the planning scheme.<sup>1</sup>

##### The Victoria Planning Provisions

The Minister must prepare and approve standard planning provisions—the Victoria Planning Provisions—to ‘assist in providing a consistent and co-ordinated framework for planning schemes in Victoria’.<sup>2</sup> Mr Jeffrey Gilmore, Executive Director of Planning Policy and Reform in the Department of Planning and Community Development, described the VPPs as:

... a document containing a comprehensive suite of standard planning provisions for Victoria. It is not a planning scheme and does not of itself apply to any land. It is a state-wide reference used, as required, to construct or amend planning schemes in accordance with the Ministerial Direction. It is a statutory device to ensure that consistent provisions for various matters apply across Victoria, and that the construction and layout of planning schemes is always uniform.<sup>3</sup>

The VPPs are made up of the State Planning Policy Framework, a set of zones and overlays from which each council can construct its planning scheme, and particular provisions, general provisions, definitions and incorporated documents that apply consistently across all planning schemes.<sup>4</sup>

##### The State Planning Policy Framework

The SPPF includes general principles for land use and development and specific policies dealing with metropolitan development, settlement, environment, housing, economic development, infrastructure and some particular uses and developments. It informs councils of relevant policies and gives context to their planning and decision making so that they can ‘endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development’.<sup>5</sup>

Parts of the SPPF environment policy are relevant to bushfire risk management—in particular, clause 15.07, Protection against Wildfire, and clause 15.09, Conservation of Native Flora and Fauna. These are discussed in Sections 6.4.1 and 6.5.1.

##### Zones

The VPPs contain a set of standard zones that councils may apply to determine how particular land may and may not be used and developed. Within each zone there are ‘as of right’ uses, uses that require a permit and prohibited uses.<sup>6</sup>

The zones are grouped as residential, industrial, business, rural, public land and special purpose. The rural zones—Rural Living Zone, Green Wedge Zone, Green Wedge A Zone, Rural Conservation Zone, Farming Zone and Rural Activity Zone—are most relevant to the Commission’s inquiry.<sup>7</sup>

##### Overlays

Overlays are a further layer of planning controls that councils may apply to land. The standard overlays contained in the VPPs focus more on requirements for the development of land than on the uses to which land may be put, and more than one overlay may be applied to a given parcel of land. The overlays in the VPPs are grouped as environment and landscape, heritage and built form, land management and other overlays.<sup>8</sup>

The principal planning tool for managing bushfire risk, the Wildfire Management Overlay, is a land management overlay. The purposes of the WMO are as follows:

- To identify areas where the intensity of wildfire is significant and likely to pose a threat to life and property
- To ensure that development which is likely to increase the number of people in the overlay area:
  - Satisfies the specified fire protection objectives.
  - Does not significantly increase the threat to life and surrounding property from wildfire.
- To detail the minimum fire protection outcomes that will assist to protect life and property from the threat of wildfire.<sup>9</sup>

The content and implementation of the WMO are discussed in detail in Section 6.4.3. The environment and landscape overlays all contain controls on the removal of vegetation; they are discussed in Section 6.5.4.

### Particular and general provisions

The VPPs contain provisions that apply across planning schemes to particular uses and developments, in addition to the requirements of a zone or an overlay.

Two particular provisions are relevant to reducing bushfire risk:

- clause 52.17, Native Vegetation, which provides for the protection and conservation of native vegetation—in particular, by requiring a permit for the removal of native vegetation
- clause 52.43, Interim Measures for Bushfire Protection, which enables some removal of vegetation for bushfire protection without a permit.<sup>10</sup>

Two new provisions were introduced into the VPPs following the 2009 bushfires:

- clause 52.38, Bushfire Recovery, which removes permit requirements for particular bushfire recovery activities such as demolition and removal of buildings and construction of temporary buildings. This is an interim control that applies until 31 March 2011
- clause 52.39, 2009 Bushfire Replacement Buildings, which removes permit requirements for the rebuilding and use of dwellings damaged or destroyed in the 2009 bushfires.

The VPPs also contain a set of general, largely administrative provisions that apply across planning schemes. These include clause 65, Decision Guidelines, and clause 66, Referrals and Notice Provisions. The general provisions are followed in the VPPs by lists of definitions and documents incorporated in the VPPs. The incorporated documents include Victoria's Native Vegetation Management—a framework for action.<sup>11</sup>

### Planning Schemes

Each council must construct a planning scheme using the VPPs. The planning scheme must include state standard provisions selected from the VPPs—the SPPF, zones, overlays, the particular provisions and the general provisions—and local provisions developed by the council, primarily through its Local Planning Policy Framework and local schedules to zones and overlays and other provisions.<sup>12</sup>

### The Local Planning Policy Framework

A council must prepare a Municipal Strategic Statement, which forms part of its LPPF. The MSS contains the council's strategic planning, land-use and development objectives, its strategies for achieving those objectives, and an explanation of the relationship between those objectives and strategies and the controls on the use and development of land in the planning scheme.<sup>13</sup>

Although the LPPF provides the local policy context for a planning scheme, councils are not completely free to set their own local policies. They are given detailed guidance about the content, structure and language of local planning policies, which emphasises the performance-based approach of the Victorian planning system. The LPPF must not operate inconsistently with the SPPF, and any amendment proposed by a council to its planning scheme, including the LPPF, requires the authorisation of the Minister.<sup>14</sup>

### Review and amendment of planning schemes by councils

The Act requires a council to review its planning scheme in line with council elections, effectively once every four years. Amending a planning scheme can be a long and involved process. A council must first obtain authorisation from the Minister to prepare a proposed amendment. It must then prepare the proposed amendment and a detailed explanatory report and publicly exhibit both documents. Submissions received by the council within a month of the exhibition period must be considered by the council and may be referred to a panel.<sup>15</sup>

The panel may conduct a hearing, consider the submissions and any other relevant material, and report its findings and any recommendations. The council must consider the panel's report and must make it available to the public. If the council decides not to accept a recommendation made by the panel, it must give the Minister reasons for its decision. The council may then adopt the amendment, perhaps with some changes to the original proposal. In most instances the amendment must be approved by the Minister before it takes effect in the planning scheme.<sup>16</sup>

The Act also allows for a 'fast track' alternative to this process. The Minister can amend a planning scheme with limited or no notice of the proposed amendment if it is considered that compliance is not warranted or not in the interests of Victoria or any part of it.<sup>17</sup>

### Planning permit applications

If a planning scheme requires a permit for the use or development of land, an application for a permit may be made to the responsible authority—in most cases the council. The council must generally make a decision on the application within 60 days.<sup>18</sup>

Notice of the application may be required to be given to a range of people and bodies, usually including the owners and occupiers of adjoining land and any other person whom the council considers may be caused material detriment by the grant of the permit. Anyone who might be affected by the grant of a permit may object. The council must also refer the application to any relevant referral authority.<sup>19</sup>

In deciding on a permit application, the council must consider the relevant planning scheme, the objectives of planning in Victoria, all objections and other submissions received by the council, any decision and comments of a referral authority, and any significant environmental effects. Having considered those matters, the council may decide to issue the permit, issue the permit with conditions (including any conditions required by the referral authority) or refuse to grant the permit.<sup>20</sup>

A decision of a council may be appealed to the Victorian Civil and Administrative Tribunal by the permit applicant or third parties in some instances.<sup>21</sup>

## BUILDING

### The Building Act and Regulations

Building in bushfire-prone areas of Victoria is regulated by the following:

- the *Building Act 1993* and the Building Regulations 2006
- the Building Code of Australia, which includes specific bushfire provisions and is adopted in the Building Regulations
- an Australian standard adopted in the Building Code of Australia—AS 3959, Construction of Buildings in Bushfire-prone Areas.

The Act regulates building work and building standards. Building work, defined as ‘work for or in connection with the construction, demolition or removal of a building’, is controlled by a system of building and occupancy permits issued by municipal or private building surveyors, in accordance with the Act and the Regulations. Building standards are established by Regulations made under the Act and may incorporate by reference the Building Code of Australia or any other document.<sup>22</sup>

### The Building Code of Australia

The BCA is ‘a uniform set of technical provisions for the design and construction of all new buildings, other structures and new building work throughout Australia’. The states and territories are committed to achieving national consistency in building regulations through this national code.<sup>23</sup>

The Australian Building Codes Board develops and maintains the BCA. The board is established by agreement between the Commonwealth and state and territory governments; it also includes the Australian Local Government Association, and there are four industry representatives and an independent chairperson. The board reports to the Building Ministers Forum, which is made up of Commonwealth and state and territory Ministers responsible for building regulation.<sup>24</sup>

The BCA is a ‘performance-based’ code, setting out the performance requirements buildings in Australia must meet and ways in which the requirements can be met. The BCA has a hierarchy: each facet starts with an objective, which is underpinned by functional statements, performance requirements and building solutions. Two types of building solutions meet the performance requirements:

- Deemed-to-satisfy, or DTS, provisions detail technical descriptions (often contained in an Australian standard) of how a building is to be constructed and equipped to meet the performance requirements. The provisions are prescriptive: although they can include options for building materials or forms of construction, the choices are limited to the options included in the deemed-to-satisfy provisions.
- Alternative solutions are specially designed solutions. An applicant must demonstrate that they meet the performance requirements.<sup>25</sup>

Legislation in each state and territory gives effect to the BCA. In Victoria the BCA is ‘called up’ by r. 109 of the Building Regulations. The BCA is amended annually, in about February or March, and in most cases the revised BCA is automatically adopted by the legislation in each jurisdiction on 1 May of each year. BCA 2008 applied on 7 February 2009, although when the Commission heard evidence about building regulation BCA 2009 applied, and BCA 2010 has since been adopted in Victoria.<sup>26</sup>

The BCA classifies buildings into a number of classes, which in general terms are as follows:

- Class 1a—a house
- Class 1b—a small boarding house, guest house, hostel or similar
- Class 2—an apartment building or block of flats
- Class 3—a hotel, motel or other residential building in which numbers of unrelated persons are accommodated; for example, the residential part of a school, aged care facility or prison
- Class 4—a single dwelling (such as a caretaker’s flat) in a Class 5, 6, 7, 8 or 9 building
- Class 5—an office or other commercial building
- Class 6—a shop, restaurant or showroom
- Class 7—a car park or warehouse
- Class 8—a factory or other industrial building
- Class 9a—a health care building
- Class 9b—an assembly building, including a school or a hospital
- Class 9c—an aged care building
- Class 10a—a shed, garage, or similar
- Class 10b—a structure such as a fence or swimming pool.<sup>27</sup>

The BCA makes specific provision for the construction of Class 1, 2 and 3 buildings, but not the other classes of buildings, in designated Bushfire-prone Areas. The relevant provisions for houses, apartments and other residential buildings in the 2009 edition of the BCA are as follows:

- The objective is to safeguard the occupants from injury and protect a building from the effects of a bushfire. Class 1 buildings have the additional objectives of safeguarding occupants from illness and avoiding the spread of fire.
- The functional statement is that a building constructed in a designated Bushfire-prone Area is to provide resistance to bushfires to reduce the danger to life and reduce the risk of the loss of the building.
- The performance requirement is that a building constructed in a designated Bushfire-prone Area must be designed and constructed to reduce the risk of ignition from a bushfire while the firefront passes.
- The deemed-to-satisfy solution to meet the performance requirement is construction in accordance with AS 3959, Construction of Buildings in Bushfire-prone Areas.<sup>28</sup>

### **Australian Standards adopted by the Building Code of Australia**

AS 3959 is one of 7,000 technical standards developed by Standards Australia and one of many referred to in the BCA.<sup>29</sup>

Standards Australia is a not-for-profit public company limited by guarantee. Its main activity is preparing and maintaining national and international standards and promoting their adoption, and its membership is drawn from Commonwealth and state and territory government departments and statutory bodies, professional, trade and industry associations, consumer organisations, trade unions, research organisations, and educational institutions. Although the company is independent of government, the Commonwealth Government recognises it as the peak standards body in Australia through a memorandum of understanding.<sup>30</sup>

The content of a standard is the responsibility of a voluntary technical committee. The annual value of the committees' in-kind contribution to the activities of Standards Australia has been estimated at \$80 million.<sup>31</sup>

Standards Australia chooses the members of technical committees with a view to ensuring balanced participation of the interests that will be particularly affected by the standard.<sup>32</sup> In 2009 the FP020 Committee—the committee responsible for AS 3959—was made up of representatives of the Australasian Fire and Emergency Service Authorities Council, the Australian Building Codes Board, the Australian Institute of Architects, the Australian Institute of Building Surveyors, the Australian Steel Institute, the Australian Window Association, CSIRO, Engineers Australia, the Fire Protection Association Australia, the Housing Industry Association, Master Builders Australia, the Plastics and Chemicals Industries Association, the Property Council Australia, Think Brick Australia, the Timber Preservers Association of Australia, the Wood Council Australia, and Bodycote Warringtonfire (testing interests).<sup>33</sup>

Technical committees develop standards under the oversight of the Standards Development Committee, which makes the ultimate decision to publish a standard and is responsible for arbitrating when consensus cannot be achieved by a technical committee because of sustained objection by a major sector.<sup>34</sup>

Standards Australia develops standards based on the principles of transparency and consensus. Consensus involves interested parties coming together, expressing their views, discussing their differences, and seeking to find a workable agreement they are committed to implement.<sup>35</sup>

In practice, the consensus process involves the responsible technical committee approving the content of a standard through a formal ballot of committee members, in accordance with the following procedure:

- All negative votes must be accompanied by technical reasons for the vote.
- The committee must give thorough consideration to the reasons for the negative vote and try to find a resolution that is acceptable to the committee as a whole.
- Consensus is achieved when the majority of members have collectively accepted the content of a document and have voted affirmatively and there is no major interest group that has collectively maintained a negative stance.<sup>36</sup>

- 1 Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [1.17]; *Planning and Environment Act 1987*, ss. 8, 8A, 8A(2), 11, 13–14, Part 1A, Part 4, Division 1
- 2 *Planning and Environment Act 1987*, s. 4A
- 3 Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.29]
- 4 Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.8]–[2.13], [2.32]–[2.35], [2.44]–[2.49]
- 5 Exhibit 678 – VPP Clause 11 – Introduction, Goal and Principles (TEN.114.001.0016) at 0016; Exhibit 678 – VPP Contents (TEN.114.001.0001) at 0001–0002; Exhibit 678 – Clause 12 – Metropolitan Development (TEN.114.001.0019); Exhibit 678 – Clause 14 – Settlement (TEN.114.001.0040); Exhibit 678 – Clause 15 – Environment (TEN.115.001.0001)
- 6 Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.10], [2.44], Attachment 5 (WIT.3018.001.0117)
- 7 Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.10], [2.45], Attachment 6 (WIT.3018.001.0119), Attachment 16 (WIT.3018.001.0267), (WIT.3018.001.0273), (WIT.3018.001.0281), (WIT.3018.001.0289), (WIT.3018.001.0296), (WIT.3018.001.0303)
- 8 Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.11], [2.46], Attachment 7 (WIT.3018.001.0125)
- 9 Exhibit 678 – VPP Clause 44.06 – Wildfire Management Overlay (TEN.111.001.0036) at 0036
- 10 Exhibit 678 – VPP Clause 52.17 – Native vegetation (TEN.111.001.0041); Exhibit 678 – VPP Clause 52.43 – Interim measures for bushfire protection (TEN.111.001.0057)
- 11 Exhibit 678 – VPP Clause 65 – Decision guidelines (TEN.111.001.0062); Exhibit 678 – VPP Clause 66 – Referrals and notice provisions (TEN.111.001.0064); Exhibit 678 – VPP Clause 72 – General terms (TEN.114.001.0085); Exhibit 678 – Clause 74 – Land use terms (TEN.114.001.0089); Exhibit 678 – Clause 81 – Documents incorporated in this scheme (TEN.114.001.0112), (TEN.114.001.0113) at 0114; Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.12]–[2.13], [2.48]–[2.49]
- 12 *Planning and Environment Act 1987*, s. 7
- 13 *Planning and Environment Act 1987*, ss. 6(1)(aa), 12A(3); Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.37]–[2.38]; Exhibit 689 – Statement of Abbey (WIT.4016.001.0001) [12], [22]–[26]
- 14 *Planning and Environment Act 1987*, ss. 7(4), 8A(2)–(6); Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.36]; Exhibit 689 – Statement of Abbey (WIT.4016.001.0001) [17]–[18]; Exhibit 678 – VPP Practice Note – Writing a Local Planning Policy (TEN.209.001.0094) at 0096–0098
- 15 *Planning and Environment Act 1987*, s. 12B, Part 3, Part 8; Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.62], [4.1]–[4.27]; Gilmore T13853:3–T13853:14, T13862:6–T13863:9
- 16 *Planning and Environment Act 1987*, ss. 26(1), 27(1), 29(1), 31, 35; Planning and Environment Regulations 2005, r. 10
- 17 *Planning and Environment Act 1987*, s. 20(4); Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [4.11]; Gilmore T13863:10–T13863:20
- 18 *Planning and Environment Act 1987*, Part 4, s. 79; Planning and Environment Regulations, r. 31; Exhibit 679 – Statement of Gilmore (WIT.3018.001.0001) [2.70]–[2.117]; Gilmore T13853:15–T13855:7
- 19 *Planning and Environment Act 1987*, ss. 52, 55
- 20 *Planning and Environment Act 1987*, ss. 60(1), 61(1)
- 21 *Planning and Environment Act 1987*, s. 84B; Gilmore T13849:31–T13850:9
- 22 *Building Act 1993* ss. 1, 3, 7, 9, Parts 3 and 5; Exhibit 168 – Statement of Arnel (WIT.3000.002.0001) [11]–[15]
- 23 Exhibit 177 – Statement of Donaldson (WIT.6001.002.0001) [25], Annexure 4 (WIT.6001.002.0229) at 0233–0234
- 24 Exhibit 168 – Statement of Arnel (WIT.3000.002.0001) [1]; Exhibit 177 – Statement of Donaldson (WIT.6001.002.0001) [7]–[9], [12], [15], [17], Annexure 4 (WIT.6001.002.0229), Annexure 7 (WIT.6001.002.0365); Arnel T5170:30–T5171:4
- 25 Exhibit 168 – Statement of Arnel (WIT.3000.002.0001) [30]–[31]; Exhibit 177 – Statement of Donaldson (WIT.6001.002.0001) [26]–[30]
- 26 Exhibit 177 – Statement of Donaldson (WIT.6001.002.0001) [32]–[33]
- 27 Exhibit 179 – Statement Harding, Attachment 1 (WIT.7503.001.0025); Arnel T5165:20–T5166:29
- 28 Exhibit 177 – Statement of Donaldson (WIT.6001.002.0001) [38], Annexure 13 (WIT.6001.002.0417), Annexure 16 (WIT.6001.002.0455)
- 29 Exhibit 168 – Statement of Arnel (WIT.3000.002.0001) [31]; Exhibit 177 – Statement of Donaldson, Annexure 12 (WIT.6001.002.0416), Volume Two Part 1.4 pp. 39–48; Tucker T5303:14–T5303:22
- 30 Exhibit 171 – Statement of Tucker (WIT.7501.001.0001) [7]–[9], 'Exhibit' 2 (WIT.7501.001.0031) at 0033, 0036, 'Exhibit' 4 (WIT.7501.001.0080), 'Exhibit' 5 (WIT.7501.001.0083)
- 31 Tucker T5282:6–T5282:10
- 32 Exhibit 171 – Statement of Tucker, 'Exhibit' 15 (WIT.7501.001.0112) at 0115–0116; Tucker T5273:28–T5274:23; Eadie T5370:5–T5371:5
- 33 Exhibit 172 – Statement of Eadie (WIT.7502.001.0001\_R) [134]
- 34 Exhibit 171 – Statement of Tucker, 'Exhibit' 15 (WIT.7501.001.0112) at 0115–0116; Tucker T5271:30–T5272:11
- 35 Exhibit 171 – Statement of Tucker, 'Exhibit' 15 (WIT.7501.001.0112); Tucker T5271:4–T5271:12, T5272:26–T5272:29
- 36 Exhibit 171 – Statement of Tucker, 'Exhibit' 15 (WIT.7501.001.0112) at 0120–0121; Tucker T5271:13–T5271:29