

**Board of Inquiry into the McCrae landslide**

**Before: The Chairperson,  
Ms Renée Enbom KC**

**County Court of Victoria,  
250 William Street, Melbourne, Victoria**

**Friday, 9 May 2025 at 10.30am**

**(Day 3)**

**Mr M. Costello KC with Mr A. Di Stefano and  
Ms A. Kittikhoun appeared as Counsel Assisting.**

**Ms K. Evans KC with Ms E. Pepler and Mr C. McDermott  
appeared on behalf of the State of Victoria.**

**Ms K. Foley SC with Ms E. Bateman, Mr C. Viney and  
Dr W. Phillips appeared on behalf of the Mornington  
Peninsula Shire Council.**

**Ms D. Siemensma appeared on behalf of South East Water  
Corporation.**

1 CHAIRPERSON: Mr Di Stefano.

2

3 MR DI STEFANO: Good morning, Chair. We start with  
4 Mr David Simon --

5

6 CHAIRPERSON: Is Mr Simon in the room?

7

8 MR DI STEFANO: -- who I call.

9

10 <DAVID SIMON, affirmed:

11

12 <EXAMINED BY MR DI STEFANO:

13

14 CHAIRPERSON: Mr Simon, Mr Di Stefano is one of the  
15 counsel assisting this inquiry. He's going to ask you some  
16 questions, and when he's finished others at the Bar table  
17 might have some questions for you.

18

A. Sure.

19

20 MR DI STEFANO: Good morning, Mr Simon.

21

A. Good morning.

22

23 Q. If you could please state again your full name for the  
24 transcript.

25

A. David Simon.

26

27 Q. And what's your professional address?

28

A. 90 Besgrove Street, Rosebud.

29

30 Q. Thank you. And your occupation?

31

32 A. I'm normally the manager of development services at  
33 Mornington Peninsula Shire, but I'm currently acting  
34 director of planning and environment.

35

36 Q. Thank you. And you're attending today to give  
37 evidence pursuant to a notice to appear; is that correct?

38

A. Correct.

39

40 Q. Notice to attend, I should say?

41

A. Correct.

42

43 Q. And there are three witness statements that have been  
44 prepared for you?

45

A. Correct.

46

47 Q. Can a copy of the witness statements and the exhibits  
please be provided to Mr Simon. Thank you. If you're

1 happy to and those are going to be your evidence in this  
2 inquiry, can you please sign those?  
3 A. Yes.

4  
5 Q. Thank you. Chair, I tender those three witness  
6 statements and their exhibits, being the witness statements  
7 dated 11 April, 17 April and 7 May 2025.

8  
9 CHAIRPERSON: Thanks, Mr Di Stefano. The witness  
10 statement of David Simon dated 11 April 2025 will be  
11 exhibit CA12

12  
13 **EXHIBIT #CA12 WITNESS STATEMENT OF DAVID SIMON DATED**  
14 **11 APRIL 2025**

15  
16 CHAIRPERSON: The witness statement of David Simon dated  
17 17 April 2025 will be CA13.

18  
19 **EXHIBIT #CA13 WITNESS STATEMENT OF DAVID SIMON DATED**  
20 **17 APRIL 2025**

21  
22 CHAIRPERSON: And the third witness statement of David  
23 Simon dated 7 May 2025 is CA14.

24  
25 **EXHIBIT #CA14 THIRD WITNESS STATEMENT OF DAVID SIMON DATED**  
26 **7 MAY 2025**

27  
28 MR DI STEFANO: Thank you, Chair. Mr Simon, you are  
29 currently, as you said, the acting director of planning and  
30 environment at the shire?

31 A. Correct.

32  
33 Q. And you started in that role on 17 March 2025?

34 A. Correct.

35  
36 Q. How long had you worked at the shire for prior to  
37 starting that role in March?

38 A. Since 3 August 2021.

39  
40 Q. And that entire time you've been at the shire you've  
41 worked in planning roles?

42 A. Yes.

43  
44 Q. And prior to working with the shire your statement  
45 explains that you've worked in town planning since  
46 approximately 2006?

47 A. Correct.

1  
2 Q. And you've also worked at a variety of different  
3 councils, including the South Gippsland Shire Council and  
4 the Surf Coast Shire Council?

5 A. Correct.  
6

7 Q. Are you able to assist the inquiry by explaining in  
8 general terms how overlays work in the Mornington Peninsula  
9 Shire planning scheme?

10 A. Sure. At a very high level I suppose they're a  
11 control or one of multiple controls within a planning  
12 scheme. So the planning scheme is made up of different  
13 parts. At the very start of it it's got the municipal  
14 planning strategy - sorry, the planning policy framework as  
15 well, which is a sort of, I suppose, overarching policies  
16 relating to, like, statewide matters. It can also contain  
17 regional sort of clauses or local clauses.  
18

19 Then you have the zones, which apply to every piece of  
20 land, and then you've got overlays, and overlays,  
21 I suppose, invariably apply to different properties in  
22 different ways depending on I suppose the environmental  
23 constraints of the land, their location in terms of  
24 neighbourhood character, heritage, whatnot. So there are a  
25 number of different types of overlays, and I don't think  
26 any two are the same, and they're there for different  
27 purposes.  
28

29 On top of that you've also got - and, sorry, I'm  
30 explaining the broader context of this because I think --  
31

32 Q. No, no, I appreciate it. You're answering well.  
33 Thank you.

34 A. -- it's important, or probably will become apparent  
35 why that's important. Then you've also got particular  
36 provisions after the overlays, which are again statewide.  
37 They have schedules that can be locally varied from time to  
38 time and contain things like exemptions. Then you've also  
39 got general provisions at the back of the scheme, which  
40 contain some exemptions or some guidance on things like  
41 existing use rights as an example.  
42

43 Then the final part of the scheme, which is the sort  
44 of overarching bit which basically dictates how the scheme  
45 is to be interpreted, when it came into effect, and  
46 I suppose the meaning of terms as well, so it's got a  
47 dictionary definition of what's - or how you would go about

1 interpreting land use definitions or other general terms.

2

3 Q. Yes. And so when an application is made to the shire  
4 for a planning permit or planning approval that application  
5 is made to a particular - it will be allocated to a  
6 particular planning officer?

7 A. Correct.

8

9 Q. And that planning officer will have to consider all of  
10 the elements, in effect, that apply to that given piece of  
11 land within the planning scheme?

12 A. Correct, and also, I suppose to caveat that, I think -  
13 because every application is different on every site, so  
14 depending on what the proposal is will depend on whether or  
15 not it actually requires a planning permit under the zone  
16 overlay or particular provision or not.

17

18 Q. Yes. And is it the case that overlays can apply to  
19 part of a property, not the entire property?

20 A. Correct.

21

22 Q. So the way that the planning officer determines that  
23 is they have a - the shire maintains a system, a digital  
24 system, which is a map that records the overlays that apply  
25 to a particular point?

26 A. Probably with one small caveat there. The shire  
27 doesn't necessarily maintain that. We do have an internal  
28 GIS that has that. But, because the planning scheme is a  
29 state-based document, the zones and overlays by their  
30 nature are actually I suppose state based, and that's shown  
31 in VicPlan, if you like, and so that - well, VicPlan and  
32 the Vic property system will show which zone or overlay  
33 applies, and it also might show things that aren't  
34 technically an overlay in a planning scheme, such as  
35 Aboriginal cultural heritage sensitivity and also  
36 bushfire-prone areas, which aren't a planning scheme  
37 overlay. Then there might be other overlays which, say,  
38 the council has in existence which are in the GIS that  
39 aren't actually in the planning scheme but might require  
40 some consideration to be given to them.

41

42 Q. When you say overlay in that context do you mean a  
43 digital overlay as opposed to the statutory overlay?

44 A. Correct.

45

46 Q. Yes. I'm sure we're going to get confused on that,  
47 but we'll try our best not to.

1 A. I'll try and separate the two.

2  
3 Q. Yes. In terms of the tiers of the scheme, it's  
4 correct, isn't it, that it's the council that administers  
5 that scheme irrespective of the source of that - of  
6 the source of the relevant planning control document?

7 A. Largely, yes. Again, with a caveat. Clause - as  
8 I said, you know, in terms of the layout of the scheme,  
9 there is a clause in the back of the scheme in that sort of  
10 general part, in the clause 70s - off the top of my head  
11 I can't remember exactly which one, but I think it's 72.02  
12 or 73.02. In that part it dictates, I suppose, who is the  
13 responsible authority and when for considering an  
14 application, and there might be exemptions for - the  
15 general rule is that councils do process almost all the  
16 permits on the peninsula, but there's exemptions such as  
17 Arthurs Seat Eagle, was an example, where the Minister for  
18 Planning is the responsible authority and where council has  
19 no power to consider anything. And there's other various  
20 things in there as well, particular applications is an  
21 example in the particular provisions where it might be for  
22 State Government housing or federal government-funded  
23 housing, NDIS-type stuff, where council would not be the  
24 responsible authority. So that's all set out in that  
25 clause.

26  
27 Q. Yes. And approximately how many personnel are in the  
28 planning department, if that's the correct departmental  
29 name?

30 A. Yes, so there's probably two components to that.  
31 There's the statutory planning team, which reports to me as  
32 the manager of development services. We've got  
33 approximately 62 full-time equivalent positions. About 50  
34 of those are statutory planners, and about 12 of those are  
35 planning support or planning administration.

36  
37 Q. Yes.

38 A. And then, to clarify as well, strategic planning does  
39 not sit within my substantive role, that sits in another  
40 area, and it's got approximately 11 full-time equivalent  
41 roles. Then there's also planning compliance, which sits  
42 in a different team. Off the top of my head I don't know  
43 what the FTE count is there, but I believe that there's  
44 about five or six FTE dedicated to planning compliance.

45  
46 Q. Yes. So you in your current role oversee the  
47 statutory planning team?

1 A. Correct.

2

3 Q. And the strategic planning team, who is it that  
4 oversees that?

5 A. It's Katanya Barlow.

6

7 Q. Yes. And what's her title?

8 A. Manager of strategic and infrastructure planning.

9

10 Q. Yes. Have you ever been part of the strategic  
11 planning team?

12 A. At various times, yes. Well, both in New South Wales  
13 and Victoria. So when I started off my career in New South  
14 Wales I was part of a broader development services team  
15 that included engineers; strategic/statutory planners;  
16 rangers, like local laws officers; building surveyors; and  
17 environmental health officers. Then in Victoria for a  
18 period of time I did also manage the strategic planning  
19 team at South Gippsland Shire Council for short periods of  
20 time.

21

22 Q. Yes. And can you explain for the chair the difference  
23 in work between the statutory planning team and the  
24 strategic planning team?

25 A. So statutory planning concerns itself with the  
26 day-to-day sort of operation of issuing planning permits or  
27 considering planning permits and giving advice to the  
28 public about whether they do or don't need them and, if  
29 they do need them, what's required to be submitted with an  
30 application and what the considerations are.

31

32 Strategic planning is more the process of  
33 administering what is in the scheme and for what reasons.  
34 So as an example, you know, if you want to apply, there's  
35 state-based provisions - for, say, heritage overlay or  
36 environmental significance overlay, erosion management  
37 overlay there's the state-based provision. But if you want  
38 to have a local schedule for that to address that  
39 particular issue, generally - not always, but generally -  
40 the council will be the planning authority instead of a  
41 responsible authority under the Planning and Environment  
42 Act for processing and putting in place that overlay.

43

44 The caveat there I suppose for strategic planning is  
45 that the minister themselves can make amendments to the  
46 planning scheme. Also private developers can lodge  
47 planning scheme amendments with council to consider, or

1 more often than not with council. I suppose they could in  
2 some instances approach the State Government for that. But  
3 invariably it would usually be processed by the council.  
4

5 And also the Act - I don't think this is done often,  
6 but I think it's section 9 of the Act allows the Minister  
7 for Planning to give authority to other ministers or other  
8 departments to basically go through the planning scheme  
9 process. An example might be, and I don't know that it's  
10 been utilised, but someone like Melbourne Water, as an  
11 example, to advance a flood overlay or a land subject to  
12 inundation overlay. But to my knowledge I think that's  
13 pretty rare.  
14

15 Q. So is it fair to kind of summarise that detailed  
16 explanation to say the strategic planning team is directed  
17 to policy considerations of what the planning requirements  
18 are as opposed to the statutory planning team, which  
19 administers the planning requirements?  
20

21 A. Correct.  
22

23 Q. And you mentioned erosion management overlays in your  
24 answer there. It's obviously - you were in court  
25 yesterday. You know it's a matter of significant interest?  
26

27 A. Yes.  
28

29 Q. You would have had experience with those, I assume, in  
30 your previous roles at other shires?  
31

32 A. Correct, yes.  
33

34 Q. And are you able to explain to the chair generally how  
35 an erosion management overlay, or an EMO, operates?  
36

37 A. I'm not sure if it's possible, but it might be best  
38 explained if we actually put maybe a copy of the clause up.  
39

40 Q. Yes. It's INQ.0003.0001.0001. Perhaps we could start  
41 at .0086, please.  
42

43 A. That might be showing the planning policy framework  
44 that I alluded to earlier, but that's not the actual EMO  
45 itself.  
46

47 Q. Yes, I realise that, but I thought we might as well  
start here.  
48

49 A. Okay. Sure.  
50

51 Q. So if you could explain to the chair in reference to  
52 your answer earlier what is this part of the planning  
53



1 scheme?

2 A. So this is I suppose the planning policy framework  
3 which - the Victoria planning provisions establishes,  
4 I suppose, the layout of the scheme, as I described  
5 earlier, in sections. So clause 13 - before you get to  
6 this bit where it says 13.04-2L, L signifies that it's a  
7 local component of the state planning policy framework.  
8 Before that there would probably be one that has like an R  
9 or doesn't have a letter necessarily, and that signifies  
10 that it's a state-based one.

11  
12 So when you get to this part of it it basically is  
13 setting a broader policy objective or strategy for erosion  
14 management overlays, and it's a bit strange, I've never  
15 actually picked up there's a question mark in the middle of  
16 it, in the title. But here it only I suppose mentions or  
17 calls out specifically two of these, and that might be as a  
18 result of when they were implemented versus some of the  
19 other controls. So this isn't, I suppose, a permit  
20 trigger, if you like, or a permit requirement. This is an  
21 overarching policy that may apply if a permit is triggered.

22  
23 Q. Yes. So it sets out objectives as opposed to  
24 requirements?

25 A. Correct.

26  
27 Q. And you can see there under the last dot point before  
28 the table it has the loss of life risk defined?

29 A. Yes.

30  
31 Q. Are you able to explain to the chair the relevance of  
32 that?

33 A. To some extent, yes, and I suppose referring back to  
34 the evidence of Mr Paul and Mr Pope in the questions they  
35 received around probably what is the threshold that council  
36 in this case as the responsible authority would be willing  
37 to accept in relation to considering applications, and,  
38 look, I suppose outside - I want to quantify or, sorry, to  
39 clarify my response that I'm not an expert in geotechnical  
40 investigations, and so stipulating that sort of a  
41 requirement is beyond my scope, so I'm only going off  
42 what's obviously in our scheme.

43  
44 But essentially what it's saying is that when council  
45 is considering an application the development, if it was to  
46 be supported, should - well, basically - sorry, I'll  
47 rephrase that. In considering an application a development

1 should be discouraged, and therefore probably leaning  
2 towards not issuing a planning permit, if the geotechnical  
3 hazard and risk assessment shows that the loss of life  
4 would exceed those parameters.

5  
6 Q. Yes. So it basically creates a policy standard for  
7 consideration in context of risk to life?

8 A. Correct.

9  
10 Q. If we could go then to page .0755, please.

11 A. Would you like me to explain?

12  
13 Q. Yes, please.

14 A. So I suppose pretty typically for - and I might refer  
15 to this as the sort of parent clause, if you like, to the  
16 overlay schedules. So this clause would appear in every  
17 single planning scheme across the state that would have an  
18 EMO. If that particular scheme doesn't have an EMO, this  
19 would not actually appear within that scheme in the layout.  
20 So you would essentially have to have the schedule in place  
21 for that to then actually appear, otherwise it would be  
22 kind of pointless sitting there within the context of that  
23 particular scheme.

24  
25 Because we have six existing schedules, obviously its  
26 parent clause is appearing in there. At the top you've got  
27 a purpose statement, so obviously that's to protect areas  
28 prone to erosion, landslip, other land degradation or  
29 coastal processes, minimising land disturbance and  
30 inappropriate development. You've got the provision there  
31 to allow any schedule below that to have its own objectives  
32 or additional objectives, and that might become apparent as  
33 we work through this as to why, and a statement of risk.

34  
35 Then you've got what the state provisions are for the  
36 trigger of a planning permit. So set out there, as you can  
37 see, it says a permit is required to construct a building  
38 or construct to carry out works including roadworks,  
39 domestic swimming pools and any other matters specified in  
40 clause 62.02, and I'll perhaps come back to that briefly  
41 just to explain why that's important or relevant as well.  
42 It sets out what a VicSmart can be in that particular  
43 overlay. It also then has the vegetation removal permit  
44 trigger separate to the buildings and works, because in the  
45 State of Victoria you've got this sort of concept of  
46 separating out your relevant considerations, which isn't  
47 the same in some other states. So if you're triggering a

1 permit you can either trigger a permit for use, development  
2 or other things, like vegetation removal. So that's  
3 fundamentally different to like how some other states  
4 operate.

5  
6 And then perhaps can we go to the next page?

7  
8 Q. Could I just quickly clarify, for vegetation removal,  
9 is that also a state provision?

10 A. Correct. That one is, yes.

11  
12 Q. Yes.

13 A. So this table of exemptions, and I believe it  
14 continues on, has all the potential exemptions for  
15 vegetation removal within the context of an EM0. Some of  
16 these will appear very similarly but not exactly in other  
17 provisions of the scheme, so whether it was, say, an  
18 environmental significance overlay, significant landscape  
19 overlay, vegetation protection overlay, clause 52.17 of  
20 the planning scheme, which applies only to native  
21 vegetation removal, it has a similar table but if you read  
22 the provisions carefully even for something like where they  
23 might say - perhaps we might go to the next page because  
24 I think it might include something like planted vegetation  
25 as an example.

26  
27 Q. There it is in the middle of the page?

28 A. Yes. So, say, where it says planted vegetation here  
29 in the EM0, the column on the left may appear the same, but  
30 then the conditions in the column on the right may be  
31 different for when that exemption applies or not. So it  
32 can be quite complex for a --

33  
34 Q. So you might have something that's exempted from one  
35 schedule but not from another?

36 A. Correct.

37  
38 Q. Or one overlay and not from another?

39 A. Correct, or even the native vegetation provision or  
40 clause 52.17, it might be exempt under the EM0 but not  
41 52.17 or the other way around.

42  
43 Q. Yes. And if we can move on then to --

44 A. Sorry, and it might also serve - below this table  
45 there should be more provisions that are also somewhat  
46 relevant.

1 Q. Yes. I'm happy to go there.

2 A. Yes.

3

4 Q. Go to the next page, please.

5 A. So - as I said earlier as well, so the Victorian  
6 planning provisions separate out permit requirements, and  
7 so in this case as well subdivision is separate. So  
8 depending on what you're proposing, so if it's just a  
9 development or veg or subdivision, there might be various  
10 things you have to consider under the overlay.

11

12 Then it gives power to a schedule as well. I suppose  
13 in addition to these things is to specify application  
14 requirements as well, and that will be relevant because  
15 I suppose in the evidence given by Mr Paul and Mr Pope, you  
16 know, when it comes to considerations if this parent clause  
17 doesn't give you the power to consider certain things and  
18 the schedule doesn't give you power to consider certain  
19 things, then the council actually has no power to consider  
20 those, and that can often be a misunderstanding of - people  
21 can often think, like, that's council's remit or something  
22 without properly understanding the context of the planning  
23 system or the planning scheme.

24

25 It also specifies the exemptions from notice and  
26 review. Review in that context is whether or not you can  
27 appeal to VCAT as a third party or as an applicant, but in  
28 this case a third party. So applications are normally  
29 advertised, but there's certain overlays that might  
30 actually exempt that from needing - as an example, you  
31 know, you apply for a permit to build your house or  
32 extension to a house on your property. If the only  
33 relevant trigger is the EMO and, say, not other things like  
34 the zone or other particular provisions, this would  
35 actually specify - it says, "An application on this overlay  
36 is exempt from the requirements of section 52(1) of  
37 the Act," and then 64 and 82. That essentially is  
38 referring back to the Act, which sets out when and if you  
39 should provide public notice, and whether or not you've got  
40 appeal rights then. So in this case council would not  
41 notify your neighbour of the application and you would have  
42 no right to review it.

43

44 Q. Because it's excluded by this exemption?

45 A. Specifically excluded. Then possibly most  
46 importantly, but not necessarily, the decision guidelines.  
47 So the decision guidelines will appear again differently in

1 different overlays, and what you've got here is a - and it  
2 goes over the page, but you've got a set of things that  
3 council must consider if and when this overlay --  
4

5 Q. Is triggered.

6 A. -- is triggered, and I might point out, which again  
7 will become relevant, and particularly based on some of the  
8 evidence that Mr Paul gave, that the AGS is not actually --  
9

10 Q. Specifically mentioned, yes.

11 A. -- specifically identified here in the parent clause.  
12 So unless your schedule in a local provision of the - you  
13 know, whether it's the Mornington Peninsula planning scheme  
14 or Bass Coast or wherever, Surf Coast or wherever, Mildura,  
15 if it doesn't pick up the AGS it's not relevant.  
16

17 Q. Yes. And, sorry, continue.

18 A. Yes, sorry, and just one other thing that I'll point  
19 out is that there are some things here that may not be  
20 relevant or superseded by virtue that - as an example,  
21 there is something there - or a guideline that I think has  
22 been updated in more recent times, but where it says "your  
23 dam, an asset or liability", you know, there are versions  
24 of that document, and so we need to be careful about  
25 whether it's referring to an old outdated version or the  
26 current version.  
27

28 Q. Well, it doesn't specify, does it?

29 A. It doesn't specify. And the only other thing I would  
30 probably point out is that because this - and I mentioned  
31 earlier about the permit triggers. This overlay is unique  
32 in that it calls out clause 62.02-2 of the planning scheme,  
33 and that's the State Government provision that may override  
34 any other clauses of the scheme, to the extent that you  
35 don't actually want to trigger a permit for certain things  
36 yourself. So, as an example, one of the things that you  
37 can potentially call out is - you know, you might want to  
38 trigger a planning permit for a deck as an example.  
39

40 Q. When you say "you might want to trigger", who is the  
41 "you"?

42 A. The council or the Minister for Planning.  
43

44 Q. So an application is made and there's a desire to  
45 consider that application against particular requirements?

46 A. Yes, against, say, this overlay but not others.  
47

1 Q. Yes, yes.  
2 A. However, there's a part of clause 62.02 that you  
3 cannot override even with an overlay.  
4  
5 Q. Yes.  
6 A. And that's the subclause (1) in that provision versus  
7 subclause (2).  
8  
9 Q. Yes.  
10 A. As an example, not that it will never be relevant, but  
11 that decision guideline relating to dams and their  
12 liability may not always be triggered in the first place,  
13 and I can explain that later and why I think that is  
14 perhaps unfortunate that the State Government planning  
15 provisions don't address that issue. But it might be a  
16 misconception sometimes in the community because of the  
17 drafting of the clauses, and even within planning circles,  
18 about when you can or can't consider certain risks like,  
19 say - an example - for a dam.  
20  
21 Q. And that's because there's a provision in the Act that  
22 creates a higher order priority for effectively an  
23 exemption to the application of this or any overlay?  
24 A. So it doesn't stem from the Act. It actually stems  
25 from clause 62.02.  
26  
27 Q. Of the - okay.  
28 A. Correct. So in a lot of instances, say that - that  
29 guide - not the guideline, but it kind of is a guideline,  
30 your dam, an asset or a liability, may not actually be  
31 relevant because clause 62.02 specifies that a permit is  
32 not required for a dam if a licence is required under the  
33 Water Act from Southern Rural Water.  
34  
35 Q. Yes. So it takes it out of the hands of the council  
36 completely?  
37 A. It takes it - yes, correct. And so even if a dam was  
38 proposed on the side of a hill like this, potentially it's  
39 not within the remit of council to consider it despite the  
40 EMO suggesting that there is a consideration.  
41  
42 Q. Yes. And that's not unique to the Mornington  
43 Peninsula Shire?  
44 A. It's not. It's statewide.  
45  
46 Q. Yes. And it's the state that controls the inclusion  
47 of that clause?

1 A. Correct.

2

3 Q. Yes. And is it also the state that controls the  
4 inclusion or otherwise of these decision guidelines? Are  
5 they uniform against state --

6 A. These ones are, yes.

7

8 Q. -- Victorian EMOs?

9 A. Yes.

10

11 Q. And are you aware of when these particular guidelines  
12 were last considered or any amendments to them were made?  
13 You may not be, but --

14 A. Look, I could probably give an indication. I don't  
15 know, in short, exactly when, but each clause there or  
16 subclause has a date next to it on the left-hand side.

17

18 Q. Yes.

19 A. And so each of those subclauses can potentially be  
20 varied at different times without affecting the others.  
21 And so as you can see, VC229, as an example, last updated  
22 clause 44.01-8, the decision guidelines, on - is it  
23 20/3/2023? It's a bit blurry.

24

25 Q. Yes.

26 A. Yes, 20/3. But, if you go up to the application  
27 requirements or the subdivision permit trigger, the last  
28 time that was touched was VC146 or 148, sorry.

29

30 Q. In 2018?

31 A. Yes, in 2018.

32

33 Q. Yes. Thank you. And so the - there are six schedules  
34 to this EM0?

35 A. In the Mornington Peninsula planning scheme, yes.

36

37 Q. Yes. And you explain in your statement the evolution  
38 of those schedules. Am I right in summarising that that  
39 they have been brought in on an area-specific basis over  
40 time?

41 A. Correct.

42

43 Q. With the earliest one being, you say in your  
44 statement, some time in the 1970s, in a predecessor form,  
45 I assume?

46 A. Correct, yes. So it would have been pre-current  
47 planning scheme and pre-amalgamation of the things. So,

1 going back to - or before the current version of the  
2 planning scheme there was like interim development orders  
3 and things like that that applied across the state, and  
4 they would have again been potentially like the, I don't  
5 know, Western Port planning authority or something instead  
6 of the council that administered that particular provision,  
7 and then some of the overlays may be a remnant of that that  
8 just got translated into the current form and content of  
9 planning schemes.

10  
11 Q. Picked up and put into the right spot in the current  
12 scheme?

13 A. Correct.

14  
15 Q. And if we can turn to page 0764, please. This is  
16 schedule 4 to the EMO. So schedules 4 and 5, you state in  
17 your statement, were introduced some time in January 2011?

18 A. I believe that's correct, yes.

19  
20 Q. And they apply to the area in the vicinity of Tanti  
21 Creek and Flinders?

22 A. Correct.

23  
24 Q. And are you able to explain at a general level how  
25 these EMO schedules differ from schedules 1 through 3?

26 A. Yes. Effectively the schedules sort of 1, 2 and - or  
27 3 is an example as well. 1 and 2 in particular I suppose  
28 are the older remnant sort of ones, and there's - from what  
29 I can understand and from what we can gather, have been  
30 implemented quite a long time ago, and perhaps when they've  
31 been put into the current version of the planning scheme,  
32 if you look at their schedules, where that parent clause  
33 that we were talking about gives it power to do certain  
34 things, like have its own objectives or purpose, a  
35 statement of risk, additional application requirements,  
36 decision guidelines as well, and call ups and things, the  
37 EMO1 and 2 basically don't contain any guidance or any  
38 additional information requirements whatsoever. So to that  
39 extent I would say they're probably not a great tool for a  
40 planner or an engineer or whoever's considering the  
41 application to - other than the state control - give  
42 consideration to what the person who implemented it was  
43 thinking at the time and to what the relevant risks are to  
44 consider.

45  
46 Q. Yes. So is it fair to say that what those EMOs have  
47 been - what they effectively do is just apply the parent



1 clause to a given area?  
2 A. Correct, and then may add more to it. So I'm not sure  
3 if maybe we can bring up the --  
4  
5 Q. Yes. Which would you like?  
6 A. I think it might be good to show the 4 and the 5.  
7  
8 Q. Yes, sorry, yes, 4 and 5 we're definitely going to go  
9 to. That's at 0764 of that document.  
10  
11 COURT OPERATOR: It's a large document.  
12  
13 MR DI STEFANO: That's okay. No worries.  
14  
15 WITNESS: About 1,300 pages, I think.  
16  
17 MR DI STEFANO: I had to reduce PDF size on my iPad. So if  
18 I could just, while we're getting that up, jump ahead a  
19 bit. 4 and 5 - schedules 4 and 5, that is - explicitly  
20 refer to a quantitative risk assessment in accordance with  
21 the AGS guidelines?  
22 A. I believe that's correct, yes.  
23  
24 Q. Yes. And that quantitative risk assessment is not  
25 required in any of schedules 1 to 3 or schedule 6?  
26 A. Technically that's correct, yes.  
27  
28 Q. Technically. And by "technically" I assume you're  
29 caveating based on the informal practice of applying or  
30 requiring that in circumstances where there's a high  
31 susceptibility on the GIS data?  
32 A. That and not just that perhaps, and I'm sure we'll  
33 obviously get to that point.  
34  
35 Q. Yes.  
36 A. But I caveat that because, yes, if the schedule  
37 doesn't specifically call out that sort of a requirement,  
38 I suppose what you're leaning on or referring to then is  
39 that parent clause that we were discussing. So it does  
40 have application requirements.  
41  
42 Q. Yes.  
43 A. And, to the extent that it might require a report to  
44 be submitted or council to consider certain things,  
45 arguably a planner or an engineer, whoever is assessing  
46 that application, would potentially still be able to ask  
47 for the same information even if it's not specifically

1 called out. But again that could be challenged by a permit  
2 applicant to say, "Well, your scheme doesn't specifically  
3 say that. I want to understand why you're asking me for  
4 that particular document."

5  
6 Q. Yes. So say you have a property that doesn't fall  
7 within EM04 or 5 and the council planner, for whatever  
8 reason, requests - it might be the 2012 GIS data or  
9 otherwise, requests a quantitative assessment, what is the  
10 source of power for them to do that, if not what's  
11 contained within the schedule?

12 A. So I think - unfortunately it's probably a complicated  
13 answer, but I'll try and summarise it as best I can.  
14 Essentially what you'd be leaning on is the application  
15 requirements and decision guidelines of the parent clause,  
16 clause 44.01.

17  
18 Q. Yes.

19 A. And that's irrespective of whether we had a land  
20 susceptibility layer in our GIS separate to that, and I'll  
21 give an example as - EM01 is an example. Because it is  
22 quite an old layer, actually my understanding is, and this  
23 is in the Cardno 2012 report itself, it spells out that  
24 that data is quite old, we're not actually sure of - we  
25 think it's based on three previous geological maps of the  
26 area that are very sort of large scale, if you like, so  
27 there's a lot of margin for error.

28  
29 Q. Yes.

30 A. And so those layers, the EM01 and 2 as an example,  
31 probably more EM01, has limited accuracy anyway, if I can,  
32 like, kind of say that in general terms. And I can explain  
33 and perhaps I could show you how that works --

34  
35 Q. Yes, we'll get a map up at some point which shows  
36 those --

37 A. Yes. How they intersect.

38  
39 Q. I understand your point, they're just broadbrush?

40 A. Correct.

41  
42 Q. They apply over an area irrespective of within that  
43 area what you would infer would be different landslide  
44 susceptibility?

45 A. Correct, yes. And then I suppose with the EM04 and 5,  
46 yes, they specifically call that out because they've had a  
47 study that was conducted. I believe those ones were around

1 2007 or 09, off the top of my head.

2  
3 Q. Yes, it says 2007 in your statement?

4 A. Yes. So because there was a sort of more - I wouldn't  
5 say site specific, but more region specific than a whole of  
6 shire sort of analysis done, that modelling and, you know,  
7 the assumptions that we heard from both experts over the  
8 last couple of days goes into more detail and is based on  
9 the more sort of factual evidence of that specific location  
10 or region, so again along, say, a creek line corridor.

11  
12 Q. Yes.

13 A. So obviously that would be, again in my opinion - I'm  
14 not a geotechnical engineer, but that would be a more  
15 accurate basis for determining applications because they  
16 can more closely look at the local variations in things  
17 like groundwater and whatever else that the EM01 and EM02  
18 perhaps didn't consider.

19  
20 Q. Yes.

21 A. And similarly, you know, the experts, as they say,  
22 like, even with the 2012 model, it's based on a number of  
23 assumptions and extrapolates data information, and some of  
24 that is - it explicitly excludes consideration of water  
25 tables and things like that, so - yes.

26  
27 Q. Yes, we'll definitely get to that.

28 A. Yes.

29  
30 Q. If we can just have page 764, please, 0764. Thank  
31 you. So this is schedule 4 to the EM0. I don't want to  
32 kind of flick back through pages because I'm worried about  
33 what I might do, but the previous three schedules have  
34 significantly less detailed requirements?

35 A. Correct.

36  
37 Q. And you can see there under "Application requirements"  
38 that there's a specific list of effectively documents that  
39 are required in satisfaction of the authority, which is the  
40 shire, which include a site-specific geotechnical hazard  
41 and risk assessment report?

42 A. Correct, yes.

43  
44 Q. And then if we can go over the next page, please. The  
45 first level of dot point on the next page is a geotechnical  
46 hazard assessment, and then the third dot point on the next  
47 page, and I'll just read it, is, "If any of the land is

1 also affected by EM05, a quantitative risk assessment of  
2 the site in accordance with the 'Practice note guidelines  
3 for landslide risk management', Australian Geomechanics  
4 Journal, volume 42, No.1 ... procedures for loss of life  
5 and either quantitative or qualitative for property loss."  
6 So that's the 2007 AGS guidelines that we've been  
7 discussing?  
8 A. Correct.  
9  
10 Q. And a requirement that there be a quantitative risk  
11 assessment against that?  
12 A. Correct.  
13  
14 Q. And that only applies where a part of the land is also  
15 affected by EM05?  
16 A. Correct.  
17  
18 Q. So where it says "if any of the land", is that any of  
19 the land that is to be developed?  
20 A. Well, I think by - yes, by reference to, you know, as  
21 we said earlier, like, these things can apply to just part  
22 of a lot or land, then I think, yes, it has to be read in  
23 the context of it only applies to that part of the land  
24 that is within the EM04 or 5, not the other parts of the  
25 land.  
26  
27 Q. Yes. And so you in your various roles at the shire  
28 would have been the planning officer for applications like  
29 this?  
30 A. A while ago, yes.  
31  
32 Q. And who is it that - once you receive that  
33 quantitative risk assessment, who is it that within the  
34 shire looks at it and gives a view about whether or not  
35 it's satisfactory?  
36 A. Generally speaking - so as was sort of touched on the  
37 other day that council has lots of internal services and  
38 expertise, and in some instances we don't have the  
39 expertise in-house, but generally most councils will have a  
40 development engineering team, and so an application would  
41 be referred from the - like, the assessing officer to the  
42 engineering team, who have more experience and  
43 understanding of these things. But where it affects  
44 I suppose matters such as this where it's a very  
45 specialised engineering field within the engineering  
46 discipline, as we've heard from the experts, there may be  
47 an instance where that particular shire or even city

1 councils with more resources don't have that specialist  
2 input, so they may require that to be assessed by an  
3 external party.  
4

5 Q. This is the peer review?

6 A. Yes, so there's I suppose two components there.  
7 Council could essentially hire an external expert to come  
8 in and give that advice as well, or there is the option to  
9 have a peer review system where the council says to the  
10 applicant saying, "You go and get the geotech engineer for  
11 this plus an independent peer review that you also fund  
12 essentially and provide that to us," and there's  
13 essentially a double-check of that because council may not  
14 have that in-house expertise.  
15

16 Q. Yes. So the EMO, it applies additional conditions and  
17 creates the requirement for additional documents to be  
18 submitted in satisfaction of those conditions?

19 A. Yes, correct.  
20

21 Q. It also, though, requires applications in certain  
22 circumstances where otherwise an application wouldn't be  
23 required?

24 A. Correct.  
25

26 Q. So could you give an example of where someone might be  
27 proposing to do some works on their property, they might  
28 talk to a private town planner and say, "Do I need a  
29 planning permit," and be told, "No," but if an EMO had  
30 applied they would be told "yes"?

31 A. Yes. Probably many different examples of that.  
32

33 Q. Yes.

34 A. One as an example could be any - pick any zone,  
35 industrial, residential, commercial. The zone itself does  
36 not give consideration necessarily to the EMO or any other  
37 specific overlay, like flooding, whatever. So they could  
38 come to council or a private consultant and say, "Do I need  
39 a permit to construct this building on this zoned land,"  
40 and they could say, "No, because the zone itself doesn't  
41 trigger a permit," and if there's no other overlays then  
42 there's no trigger and you proceed to a building permit  
43 stage.  
44

45 Q. So, for example, if someone, say, wanted to construct  
46 a low deck on their property that may in one circumstance  
47 not require a permit, but if it was covered by an EMO it

1 may require a permit?

2 A. It may require it, and this is probably where  
3 clause 62.02 becomes relevant and the parent clause of the  
4 EMO, 44.01, is that unless that schedule calls that out,  
5 like a deck, and specifically a deck with a, you know,  
6 floor area that's less than 800 millimetres off the  
7 ground --

8

9 Q. Yes.

10 A. Unless it specifically calls that out, if your deck  
11 was even 900 millimetres above ground level or, you know,  
12 two and a half metres above ground level, it may not  
13 trigger it because depending on what the zone is, if you  
14 don't have an overlay to cover it and specifically require  
15 that, then it wouldn't be relevant.

16

17 Q. Yes. And what about for a retaining wall?

18 A. So there's numerous other provisions of schemes that  
19 can trigger for earthworks as well or retaining walls. So  
20 it's not necessarily the case it wouldn't trigger a permit  
21 anyway, and these examples do exist on the peninsula but in  
22 other schemes across the state too. So as an example here,  
23 and if we use, say, 10-12 View Point Road as an example --

24

25 Q. Yes.

26 A. -- there's not an EMO applying to the land, but the  
27 design and development overlay 3 or schedule 3 to our  
28 planning scheme can take the permit trigger for various  
29 things, works on, like, sloping land and also where there's  
30 a difference in finished land - floor level of the land  
31 greater than a metre.

32

33 Q. Yes.

34 A. So even though, say, a DDO arguably isn't the right  
35 control for erosion and sediment control, inevitably it is  
36 in the scheme there. Another example might be  
37 environmental significance overlay, schedule 25, which also  
38 applies to that land, and it's got a broader brush trigger  
39 where essentially everything triggers a permit unless it's  
40 exempt in the schedule, where some of these - like I said,  
41 the parent clause might have its own exemptions before you  
42 get to the schedule. So the ES025 in this instance could  
43 also be considered to trigger a planning permit. So, yes,  
44 it won't always be the case that simply because there's no  
45 EMO there is no trigger and there is no consideration.

46

47 Q. Yes. So to use the 10-12 View Point Road example, if

1 the owner of that property had gone to a private town  
2 planner and said, "I want to build a retaining wall that's  
3 900 mm tall from ground level, do I require a planning  
4 permit," if there was an EMO applying to that property the  
5 answer would have been yes?  
6 A. I think it's - maybe, because it depends on what the  
7 EMO schedule said, I think.  
8  
9 Q. Yes.  
10 A. And similarly in that example the ES025 would still -  
11 I think could - I would have to have a look at it, but --  
12  
13 Q. Yes, I understand. I'm asking you a detailed --  
14 A. Yes, correct.  
15  
16 Q. A hypothetical with too much detail, yes.  
17 A. No, it's okay. And I think that, say, the - like as  
18 an example there, if you said it's a 900 mm high retaining  
19 wall, and the follow-up questions would be, "Well, but are  
20 you exceeding behind that," because, again, it might be  
21 relevant, not just the wall but the area around it --  
22  
23 Q. What the ground level is.  
24 A. If you were battering and the batter became more than  
25 a metre off the existing ground level, then the answer  
26 still could be, yes, you're triggering a permit because of  
27 the fill.  
28  
29 Q. Yes.  
30 A. Not so much that. But in the ES025 that qualification  
31 doesn't exist. So off the top of my head I'd say that  
32 maybe the ES025 still triggers a permit for that.  
33  
34 Q. Yes. So ES025 and the other, you say, vegetation  
35 removal overlays, they might be triggered. But those  
36 overlays aren't specifically designed to accommodate for  
37 landslide or landslip risk, and if they did trigger they  
38 wouldn't then activate the powers under the EMO to require  
39 additional documents in conformity with the EMO; is that  
40 fair to say?  
41 A. Again, because it's quite a general statement and --  
42  
43 Q. Yes. Well, maybe I'll break it down. So those other  
44 schedules, they're not designed to deal with landslide or  
45 landslip risk?  
46 A. Primarily, no. However - and, again, rightly or  
47 wrongly, some of these schedules are quite dated. So,

1 again, on the peninsula you've got schedules that predate  
2 the current planning scheme from, you know,  
3 pre-amalgamation of mashing things together. So, as an  
4 example, the DD03 or other DDOs may have what under current  
5 practice wouldn't be included in a DDO, but there are  
6 remnants of the old scheme. So they will still potentially  
7 consider in the decision guidelines the risk of erosion,  
8 and so by extension I suppose the risk of erosion could  
9 lead to landslip. So I think if you've got a DDO like we  
10 do in this case I don't think it's fair to say --

11  
12 Q. That there is no consideration?

13 A. That there is no consideration, correct. And the  
14 ES025 similarly also has that in its decision guidelines.  
15 It also has --

16  
17 Q. Erosion specifically?

18 A. Correct, and in the objectives and - we can go to that  
19 if you like or I can point that out --

20  
21 Q. No, no, I understand that point, and I think it's  
22 useful context to understand how the EMO fits within these  
23 other overlays?

24 A. Yes. Look, there might be other - there's not just  
25 some. These are the ones that I know of, but, as an  
26 example, where councils have the land subject to - not -  
27 subject to inundation overlay or flood overlay, right, it's  
28 for a different purpose. But if you look at the reasons  
29 for why a permit is triggered or the objectives of that  
30 clause, and then you look at the decision guidelines, it  
31 does call out erosion in streams or along creek lines,  
32 because obviously the impact of water flowing through those  
33 streams and creek lines, if you were to remove vegetation  
34 or do works in the area, yes, the primary concern is  
35 probably is building in that area appropriate or not.  
36 However, secondary to that, and probably just as  
37 importantly, what impact does that have on erosion and  
38 landslip risk. It might not specifically say "landslip" or  
39 "landslide" --

40  
41 Q. Yes, I understand.

42 A. -- but by extension --

43  
44 Q. Might incidentally affect that?

45 A. Correct.

46  
47 Q. But in that same sense so could any form of planning



1 requirement - or maybe not any. But just to come back to  
2 this requirement for the quantitative risk assessment,  
3 where the EMO doesn't apply do you still have the power to  
4 require a quantitative risk assessment, so no EMO applies,  
5 maybe one of the other schedules applies?

6 A. I think, again, the answer is difficult, like, it's  
7 complicated, and I think it's changed in - in terms of  
8 context and time. Up until very recently I would say the  
9 answer is yes. And the reason it's complicated is because  
10 in Victoria you've got a long line of decision-making and  
11 perhaps until more recently clarity around if a permit is  
12 triggered under, say, multiple overlays or multiple  
13 provisions of the scheme - there's a decision of VCAT and  
14 Supreme Court decisions that sort of suggest that in terms  
15 of integrated decision-making, if you've got multiple  
16 permit triggers, then as a combo you can consider things  
17 that are more general - general in nature when you're  
18 considering that application.

19  
20 So, as an example, in 10-12 View Point Road if you've  
21 got the DDO and ESO, as an example, triggers a permit and  
22 you've also got the general residential zone vegetation  
23 protection overlay, if they've all triggered a permit, or  
24 even some combination of them, and the proposal was not  
25 necessarily complex but appeared to require consideration  
26 of broader things, it would be fair to say that, yes, you  
27 have power to ask for consideration of those matters.

28  
29 Q. So you're in effect shoehorning into another more  
30 general requirement the specific - in the example I'm  
31 giving, the specific requirement for a quantitative risk  
32 assessment based on --

33 A. Correct.

34  
35 Q. -- a line of best fit between multiple overlays; is  
36 that --

37 A. Correct. And it's not until more recent times where  
38 last year there was a change in the planning and  
39 environment regulations which accompany the Act itself, and  
40 the State Government chose to - and I think this is  
41 probably a good move; it's again just an opinion - but  
42 clarifies what particular provisions of the scheme trigger  
43 a permit and what was the consideration and sort of,  
44 I suppose, narrows the attention of the decision-maker to  
45 those matters. And that I believe - and, again, there  
46 could be various reasons for why that has happened - but,  
47 again, there were multiple decisions of either VCAT or the

1 Supreme Court where that was in debate about what is within  
2 consideration and what's not. And one of the examples is  
3 an oil pipeline. There is no overlay for risk assessments  
4 for oil pipelines, as an example. But an objector who owns  
5 that pipeline and that asset objected to a development next  
6 door on the basis that the risk is too high for the  
7 occupants of that development because of the pipeline or  
8 gas - oil pipelines. And that might be the case.

9  
10 But if the permit is being triggered, say, just under  
11 the general residential zone, there is nothing in the  
12 general residential zone to say that that is a relevant  
13 consideration to the decision-maker or for the objector to  
14 actually appeal it in the first place. Obviously that is  
15 played out in the courts to actually consider whether or  
16 not it is relevant. And because of this more recent line  
17 of decision-making that kind of says, "No, the  
18 decision-maker is more confined," I suppose and now with  
19 the State changing the regulations to specify that,  
20 probably in more recent times the answer might flip to,  
21 "No, it's not relevant." But I must stress that that's  
22 only the last part of 2024 that that's occurred.

23  
24 Q. Yes.

25 A. In more recent times there have been other changes to  
26 the planning scheme, not the Act or the regs, that also  
27 might limit that consideration.

28  
29 Q. Yes.

30 A. So there is a change in, I suppose, context that may  
31 be very relevant.

32  
33 Q. Yes. So, perhaps to try to summarise what's been a  
34 very useful but quite detailed discussion, where EM05 or 4  
35 don't apply but a decision-maker within a planning - a  
36 statutory planner requests a quantitative risk assessment  
37 or wants to request it, they may have power based on a  
38 general clause within another overlay --

39 A. Correct.

40  
41 Q. -- to request something akin to that?

42 A. Correct.

43  
44 Q. But it's also fair to say that it would be effectively  
45 within their discretion to form the view that they need to  
46 and then to ask for that?

47 A. Correct.

1  
2 Q. And that would also then, as a natural corollary, be  
3 subject to the applicant pushing back on that and saying,  
4 "Well, where's the power?"  
5 A. Correct.  
6  
7 Q. Yes. And are you aware of instances where applicants  
8 have pushed back against the requirement for a quantitative  
9 risk assessment?  
10 A. Well, not just that but in anything we request.  
11  
12 Q. Yes.  
13 A. Authorities often request information under section 54  
14 of the Act when they're assessing a planning permit, and  
15 often there will be push back from an applicant not just on  
16 that but on many other things.  
17  
18 Q. And is it fair to say in your experience that the more  
19 costly and onerous a requirement is the more likely someone  
20 is to push back on it?  
21 A. Correct.  
22  
23 Q. And is it also fair to say that the quantitative risk  
24 assessment probably falls at the higher end of that scale  
25 in terms of onerousness and cost?  
26 A. Generally, yes, I think.  
27  
28 Q. In terms of the EMOs, the six EMOs, just to round off  
29 on this kind of general part of the discussion, it's fair  
30 to say that they've evolved. The shire has six EMOs by  
31 evolution, not design?  
32 A. Correct.  
33  
34 Q. And it's not part of a broader strategy that the shire  
35 has formed the view that having those six EMOs is the best  
36 overall practice?  
37 A. I think it's a difficult thing to say. I think  
38 I would have to speculate as to what predecessors, not just  
39 of mine but directors and things over time have considered  
40 is reasonable and relevant to that consideration. But,  
41 yes, they have evolved over time due to reports or even  
42 State Government data as an example.  
43  
44 Q. Yes. In a sense, to be fair to you, the 2018 and 2023  
45 reviews both recommend or effectively are a reconciliation  
46 of all of the EMOs.  
47 A. Correct. They do.

1  
2 Q. So the answer is in the documents. Are you able to  
3 just briefly explain what the process is for amending a  
4 schedule, in particular an EMO?

5 A. Yes. So I suppose at a very high level, and I touched  
6 on that earlier about how a planning scheme amendment might  
7 be changed and obviously there's different authorities that  
8 can - or even a private developer can do it. In the  
9 council context if council was to lead that planning scheme  
10 amendment process it would generally as a first step start  
11 to prepare the documents that are required for that  
12 planning scheme amendment. And, again, they vary because  
13 it could be the text or it could be text and maps. So you  
14 would generally start preparing it. But you would also  
15 want to have certainty around whether or not the minister  
16 is going to - the first step is the authorisation of that.  
17 So you would need to seek authorisation to prepare the  
18 planning scheme amendment.  
19

20 Q. From the minister?

21 A. From the minister, yes. And, again, the minister can  
22 say "yes" or "no". And the preparation of that - I don't  
23 want to oversimplify it either, but there's many,  
24 I suppose, relevant - there's a ministerial direction or  
25 guideline, if you like, that stipulates what authority must  
26 include or they do in order to get to that point. You  
27 can't simply approach the planning minister on a whim and  
28 say, "Hey, can we proceed with a planning scheme  
29 amendment?" They will say, "No, show us the form and  
30 content of what you are wanting to do and why you are  
31 wanting to do it." And that would apply similarly to a  
32 developer or other authority leading that.  
33

34 So, if you get authorisation to proceed, normally you  
35 would go then to preparing the documentation and all of  
36 that stuff, like, further because, again, you may not have  
37 done all of the work required. And then you would  
38 essentially seek in this case generally - not generally.  
39 At Mornington Peninsula Shire we would always go back to  
40 the council to seek not just the approval to seek  
41 authorisation but then also to go out for exhibition to the  
42 community. And the caveat there is that, if you seek to  
43 exhibit the documents, that's kind of the more general  
44 rule, but the Minister for Planning can exempt the  
45 requirement to exhibit a document or documents that lead to  
46 a planning scheme amendment, and it can exempt themselves  
47 as well and all sorts of things. So exhibition is probably

1 the general rule of thumb for a council-led planning scheme  
2 amendment, but maybe not always.

3  
4 And so if you go to exhibition and you get objections  
5 or submissions, if you can't resolve those objections or  
6 submissions you would then normally - you would try to  
7 resolve them first. But, if you can't, you would generally  
8 go back to your council and the Minister for Planning and  
9 seek appointment of a panel, like a professional planning  
10 panel, through Planning Panels Victoria. And they would  
11 have, I suppose, a semi-formal style hearing, similar to  
12 VCAT but for planning scheme amendments. And they would  
13 then provide recommendations, essentially, to the council  
14 and to the Minister for Planning about whether or not the  
15 proposal should proceed in its current form or whether it  
16 requires changes and everything. It would also take into  
17 consideration anyone that wishes to be heard that submitted  
18 objections or anything to it.

19  
20 And then, following that, it would go back to council.  
21 Once the panel gives its recommendations, it would go back  
22 to council for consideration. If the council sought to  
23 adopt a position - and that could be either, again, adopt  
24 all of the planning panel's recommendations or make some or  
25 none - they can either choose to abandon that, like,  
26 planning scheme amendment or they can seek to ask the  
27 minister to adopt that. So they've essentially adopted a  
28 position at that point. And at that point it becomes a  
29 seriously entertained planning scheme, even if it then sits  
30 with the minister indefinitely. So then, ultimately, the  
31 minister is the decision-maker at the end of the day.

32  
33 Q. And is the minister's decision to amend an overlay  
34 subject to any kind of appeal right? I mean, maybe that's  
35 a question beyond your scope.

36 A. I could try to answer it as best I can. So generally  
37 speaking, no, there is no appeal right to that or no  
38 High Court. However, there has been a challenge before.  
39 I'm not sure if you have ever heard of Winky Pop as an  
40 example. That was more around not following natural  
41 justice principles and whatever else or prejudicing the  
42 decision on that at a council level.

43  
44 Q. Likely we won't have to deal with that.

45 A. Hopefully not.

46  
47 Q. So specifically in respect of EMO schedules 4 and 5

1 what would the process be for the council? You've outlined  
2 it now at the high level. So for EM0s 4 and 5 what would  
3 the process be to extend the area of application to all of  
4 the high susceptibility areas within the 2012 GIS data?

5 A. I suppose I think, with respect, I probably want to  
6 clarify that as well. I don't think it would be a matter  
7 of extending the EM04 and 5, primarily because they are  
8 based on, like I said, more location specific studies.  
9 It's not to say that you couldn't look at them again and  
10 change them. Obviously the study that informed them was  
11 2007. But I tend to think that, again, subject to a review  
12 by a qualified professional and advice around landslip  
13 risk, perhaps you wouldn't amend the EM04 and 5; you could  
14 just leave them as they are.

15  
16 But what you would probably want to do is re-examine  
17 the rest of the shire and see whether or not changes are  
18 required there. And, again, the reason I say that is  
19 because, as we heard from some of the experts and is in the  
20 Cardno 2012 report as well, there's a recommendation to  
21 potentially update that mapping every five to 10 years to  
22 keep currency. But I think that also depends on what went  
23 into that study in the first place and informed it. So if  
24 there hasn't been any variation to the factors that went in  
25 to informing that then there possibly is no need to review  
26 the 4 and 5.

27  
28 Q. Yes. But assume as a premise to my question that it  
29 had been decided that the application of conditions like  
30 EM05 --

31 A. Yes.

32  
33 Q. -- were to be applied to all of the area that was high  
34 susceptibility in the 2012 mapping, what would the process  
35 be? It's the same process as you've just outlined?

36 A. Correct, yes. You would have to go through that  
37 planning scheme amendment process.

38  
39 Q. So you would have to approach the minister?

40 A. Yes.

41  
42 Q. Get the provisional permission to begin the work. The  
43 preparation of the documents would presumably be much  
44 quicker because you would have the mapping and you would  
45 have the controls already in the schedule?

46 A. Look, I think there's the very difficult question  
47 again around, if we were to simply go to the minister now

1 with the 2012 Cardno report, there is I would say, again in  
2 my opinion, a high likelihood that they might say, "No,  
3 that report in its current form and with the assumptions  
4 and its age, is maybe not suitable for direct inclusion  
5 into a new EMO with the same principles that we're applying  
6 here." And, again, if you want me to expand on that I'm  
7 happy to.

8  
9 Q. No, I understand your point. Your point is the  
10 requirements would be the same but perhaps you would hit  
11 roadblocks based on the lack of currency of the --

12 A. Well, perhaps not just the currency but even the  
13 accuracy of that overlay itself and the assumptions it was  
14 based on at that point in time.

15  
16 Q. What about interim or emergency extensions?

17 A. So I think this is something that council has been,  
18 I suppose, in more recent times investigating to apply an  
19 interim control. It may have I think slightly more chance  
20 of success of being applied as an interim control, but even  
21 that I think is contingent upon whether the minister thinks  
22 that that would be appropriate in the circumstances. And,  
23 again, I caveat that one because we wouldn't be the  
24 ultimate decision-maker there as a council but also  
25 because, general speaking, if they apply an interim control  
26 they would probably do that - using a different example, if  
27 you wanted an interim heritage control you would probably  
28 or possibly have already done some work to inform that  
29 heritage provision. And the purpose of seeking the interim  
30 control would be to make sure that between the time it  
31 takes to actually do the study and then get a proper  
32 heritage overlay in place someone can't just go and knock  
33 down a heritage item.

34  
35 Q. Yes.

36 A. But you would have to have some level of preparation  
37 and work done before they'll grant you the interim control.  
38 So generally speaking - and I don't want to say, like,  
39 always or whatever but, generally speaking, I think the  
40 Department of Transport and Planning and the minister would  
41 give you advice to say, "Unless you've got a reasonable  
42 basis for applying that interim control, which almost  
43 informs the permanent control to come later, then it may  
44 not be appropriate."

45  
46 Q. Yes.

47 A. And we've got other examples on the peninsula like

1 interim design and development overlays as an example and  
2 things like that.

3  
4 Q. I noticed that schedule 6 was added in 2025, although  
5 when I reviewed the schedule itself it appears that work on  
6 that started in 2019. Is that kind of six-year timeframe  
7 typical for how long it takes to add an additional schedule  
8 to --

9 A. Again, difficult to answer, but probably for some  
10 added context there, yes, that may - C271 I believe you're  
11 referring to is the planning amendment for EM06.

12  
13 Q. Yes.

14 A. So that only came into effect in Jan 2025. And, yes,  
15 I believe it started in 2019. For added context, that is  
16 based on data or evidence that is State Government data  
17 around sea level rise and everything that's applying to the  
18 Western Port side --

19  
20 Q. Yes, it's coastal.

21 A. And that is actually data from 2014. So it's taken  
22 from 2014 to 2025 to implement that in full, from start to  
23 finish.

24  
25 Q. I think it's now worth turning to the GIS data. Can  
26 I have document MSC.5012.0001.4440 brought up, please.  
27 This is a big PDF so hopefully it doesn't cause any  
28 heartache. So this is the source of the 2012 GIS  
29 susceptibility information?

30 A. Yes.

31  
32 Q. And if we can scroll to page 3, please. It's 4442.  
33 So the second paragraph reads, "The assessment recommended  
34 that the maps be combined with a review of numerous  
35 consultants' reports to enable the development of a map  
36 that classifies the shire into areas of high, medium and  
37 low landslide susceptibility. Since the release of the  
38 initial report there have been significant improvements in  
39 the available GIS data."

40  
41 The next paragraph, "The study was then expanded to  
42 make use of the newly available photogrammetric digital  
43 data, review and include the council and consultants'  
44 reports, produce a database of slope failures and generate  
45 a landslide susceptibility map and scope of geotechnical  
46 investigation for the shire." So I'm right in summarising  
47 that the purpose of this report was to develop a shire-wide



1 susceptibility analysis?

2 A. Correct.

3

4 Q. And the approach taken - and I'm going to attempt to  
5 summarise it and, if you're unhappy with my summary, we can  
6 go through the individual details - was to effectively  
7 establish a landslide model or a landslip susceptibility  
8 model which took into account the orientation of a slope,  
9 the angle of the slope, and the particular rock or soil,  
10 the geology of that slope, and then to analyse known  
11 landslides and develop a probability analysis effectively  
12 based on those three variables of landslide susceptibility?

13 A. Yes.

14

15 Q. And then using the shire-wide dataset on those three  
16 variables effectively plot which areas are red for high  
17 susceptibility, which areas are green for medium  
18 susceptibility - I think I'm getting the colours right.

19 A. Yellow for moderate and green for --

20

21 Q. Yellow for moderate. My apologies; you're right.  
22 That's roughly correct?

23 A. Yes.

24

25 Q. As far as you understand it?

26 A. Yes.

27

28 Q. And once the model was developed then that was  
29 verified against - it back-verified, in a sense, against  
30 the areas of known landslip and sites of known landslip to  
31 reverse engineer the accuracy of the assumptions built into  
32 it?

33 A. Correct. Yes.

34

35 Q. If I can have page 4445, please, be brought up. So at  
36 the bottom of this page it has the conclusions, and it says  
37 in the second paragraph there, "The study does not  
38 eliminate the need for geotechnical investigations for each  
39 site, and an individual landslip risk assessment will be  
40 required for a proposed development. An appropriate  
41 geotechnical investigation by an experienced geotechnical  
42 engineer or geologist may override the landslip  
43 susceptibility determined from the GIS." So, effectively,  
44 it's general data that requires specific analysis for a  
45 particular application in a given area?

46 A. Correct.

47

1 Q. And then it goes on to say that the modelling is based  
2 on geology primarily, but that other factors such as the  
3 depth of groundwater, the presence of a perched water  
4 table, vegetation and the depth of rock weren't able to be  
5 considered and that "if there is shallow bedrock" - I'm  
6 reading from the second last line - "in the area of a  
7 landslip, the susceptibility assessment is likely to be  
8 conservative. Conversely, if there is a perched water  
9 table or shallow ground water the predicted landslip  
10 susceptibility zones may underestimate the landslip  
11 susceptibility."

12 A. Correct.

13  
14 Q. So it's acknowledging its own use of a fairly - a  
15 heuristic based on these three variables and the need for  
16 individual data analysis?

17 A. Correct.

18  
19 Q. This wasn't the first or only landslide susceptibility  
20 analysis prepared for the shire. At page - and we don't  
21 need to go to it, but at page 4471 there's references to  
22 earlier analyses, and you're aware that's in your evidence?

23 A. Yes.

24  
25 Q. And they were taken into account in the purpose of  
26 preparing this. Page 4479 defines a high susceptibility  
27 zone, what that means. If we could have that brought up,  
28 please. The short point is the definition is an area where  
29 significant landslides are possible, and it goes on to say  
30 that it may be due to other - the various variables.

31 I actually don't think I need to read that out.

32 A. That's okay.

33  
34 Q. So can we go to 4515, please. Sorry, if we go to just  
35 the page before, 4514. I just want to do this before we go  
36 to the break, if we can. 4514, please. The page starts  
37 halfway down the page there's a heading that says "McCrae".  
38 So just the page before that, please. Yes. So this begins  
39 the analysis on the McCrae area and says, "The cliffs at  
40 McCrae have been shown to be unstable in the past due to  
41 both natural and manmade causes." It refers to an earlier  
42 study in 2007 that's in your evidence.

43 A. Yes.

44  
45 Q. And then if we go to the next page, please. There  
46 you'll see the susceptibility analysis for the McCrae area.

47 A. Part of it, yes.

1  
2 Q. Part of it.  
3 A. Yes.  
4  
5 Q. That's true. And we have a better quality - well,  
6 Mr Oz's statement included a close-up image of what  
7 I understand is the GIS data that you have access to within  
8 the council.  
9 A. Correct.  
10  
11 Q. That's in effect the export of this data.  
12 A. Correct. I'm aware of what's in his statement.  
13  
14 Q. Yes. So you can see there the subject site appears to  
15 be half - well, the slope itself appears to all be coded  
16 high susceptibility, the escarpment?  
17 A. Yes, look, I would say, yes, generally, although -  
18 I mean, I have looked at not just here but in other areas  
19 around whether or not that red area aligns with LiDAR  
20 contour levels, and invariably in places it doesn't where  
21 you might actually have the cliff edge, and it might be  
22 saying the yellow area or even, I suppose, the green, which  
23 implies low susceptibility, and so the mapping itself needs  
24 to be treated with a level of caution again probably  
25 because of some of those qualifying factors within the  
26 report itself around the scale of the mapping that's been  
27 used to inform it. So if you follow where the areas of red  
28 are they don't always necessarily align with the steepness  
29 of the land or, like, a cliff edge.  
30  
31 Q. Yes. And I think that may be a function of the  
32 resolution of the LiDAR that was used for this particular  
33 mapping.  
34 A. I tend to think it's more a factor of the underlying  
35 geological maps that inform and are overlaid with other  
36 data. The geological maps are a scale of 1:63,000, which  
37 is about 1:630 metres.  
38  
39 Q. Yes.  
40 A. And so --  
41  
42 Q. One millimetre movement on that map could be a  
43 10-metre difference.  
44 A. Correct, yes. So, in effect, it's probably that  
45 rather than the LiDAR that's inaccurate, because the LiDAR  
46 is accurate to in this case probably plus or minus I think  
47 10 centimetres.

1  
2 Q. Yes.  
3 A. In some cases even more accurate, and that's  
4 acknowledged in this report. So where there are  
5 differences of that data I tend to think that it's the  
6 other data that's of not of a greater scale or clarity than  
7 the LiDAR.  
8  
9 MR DI STEFANO: Yes. Chair, is that an appropriate time?  
10  
11 CHAIRPERSON: Mr Simon, have a 15-minute break. We'll be  
12 back at 12 o'clock.  
13 A. Sure.  
14  
15 **SHORT ADJOURNMENT**  
16  
17 MR DI STEFANO: Thank you. Mr Simon, I'm going to try to  
18 be a little bit quicker for the next 30 minutes or so, and  
19 that's not meant to be in any sense a criticism of you.  
20 It's been a very useful discussion. I think it's really  
21 useful for the board to understand. But can I take you to  
22 paragraph 67 of your 11 April 2025 statement, which is  
23 MSC.9000.0001.0002, at page 25.  
24  
25 Now, when this statement was prepared - maybe I'll  
26 withdraw that. The data that we were just looking at, the  
27 draft report, was provided as an annexure to your 17 April  
28 statement?  
29 A. Correct.  
30  
31 Q. In your 11 April statement you said in evidence, "It  
32 is my understanding that the Cardno 2012 GIS assessment did  
33 not look at the likelihood (or probability) of landslides,  
34 or landslips or the severity of landslides or landslips in  
35 the McCrae area." Is that still your evidence?  
36 A. In short probably no in that I think based on what we  
37 have sort of discussed it does look at likelihood to some  
38 extent, and perhaps it's more need clarification I think in  
39 that if, it does look at the probability, that it may not  
40 accurately reflect that probability.  
41  
42 Q. Yes. And is that to do with what you said earlier  
43 about the topographical lines not necessarily matching up?  
44 A. Well, to some extent, yes.  
45  
46 Q. And also to do with the kind of nature of the dataset  
47 and the rules that were used and the limitations that were

1 explained in the report?

2 A. Correct.

3

4 Q. Yes. Okay. I understand that. I want to talk  
5 briefly about the reviews that were conducted which  
6 recommended a revisiting of the EMOs. I don't think we  
7 need to go through them in detail. You've explained them  
8 in your 17 April statement at paragraph 72 onwards. Just  
9 in short, in 2018 there was a review of the Mornington  
10 Peninsula planning scheme.

11 A. Correct.

12

13 Q. Were you at the shire then?

14 A. No, I was not.

15

16 Q. So you weren't involved in any way in that review?

17 A. No.

18

19 Q. And that review recommended, for the transcript at  
20 page 0206, that there were updates to the EMOs?

21 A. Sorry, can you help clarify that?

22

23 Q. Yes.

24 A. Updates from 2018 do you say or --

25

26 Q. The 2018 review recommended - it's at paragraph 74 of  
27 your statement --

28 A. Sorry, it's not showing.

29

30 Q. Sorry, if we can go to paragraph 74. I'm sorry, this  
31 is paragraph 74 of the 17 April statement.

32 A. Yes. Okay.

33

34 Q. Sorry, this is the wrong statement. It's the 17 April  
35 statement, not the 11 April statement, that I'm talking  
36 about. I don't have a doc ID on my version. If that can  
37 be brought up. I can read it to you. It says the  
38 recommendation from 211 of the 2018 review was, "Complete  
39 the comprehensive review and update the shire's landslip  
40 susceptibility data and modelling and update the ordinance  
41 and mapping of the shire's EMOs." You weren't involved in  
42 that review, though. So I'm just adding that as context.

43 A. Yes.

44

45 Q. So that recommendation wasn't - it had an estimated  
46 timing of 2021 or so as the desired completion date of it?

47 A. That's my understanding, yes.

1  
2 Q. And in 2023 there was a subsequent review?  
3 A. Correct.  
4  
5 Q. And you were at the shire then?  
6 A. I was.  
7  
8 Q. Were you involved in that review?  
9 A. Not directly in terms of not preparing it or doing the  
10 assessment of it. That obviously sits with the strategic  
11 planning team.  
12  
13 Q. Yes.  
14 A. But, yes, I suppose my team being one of the key teams  
15 to have input into it, yes, we would have been directly  
16 involved.  
17  
18 Q. I understand. At paragraph 75 of your statement you  
19 note that review - I have the doc ID here now for the  
20 17 April statement. It is MSC.9999.9999.0002. The 2023  
21 review noted that recommendation 211 hadn't been carried  
22 out, and at paragraph 25 of your statement, "Strategic work  
23 is required to undertake a comprehensive review and update  
24 the shire's inland landslip susceptibility data and  
25 modelling. Following this review an update of the  
26 ordinance and mapping of the environmental management  
27 overlays will likely be required. This work is yet to be  
28 funded, resourced or programmed." Are you aware of whether  
29 or not the drafters of that review were aware of the 2012  
30 GIS data?  
31 A. In short, no, I'm not sure if they were aware.  
32 I assume they would have taken into consideration any  
33 other, you know, information that they had available to  
34 them at the time. But, no, I can't speak on their behalf.  
35  
36 Q. And are you aware of whether they gave any  
37 consideration to the 2022 landslide?  
38 A. To my knowledge, no.  
39  
40 Q. Recommendation 211 in the 2023 review is given a  
41 medium priority as its priority. Are you aware of what the  
42 process is of determining the prioritisation of various of  
43 the recommendations in the 2023 review?  
44 A. Not directly. And, again, it's probably more a  
45 question of, like - I could offer an opinion or perhaps  
46 speculate. But I'm not sure if that would be --  
47

1 Q. You're an experienced statutory planner who is now the  
2 head of not the strategic planning --  
3 A. Yes.

4  
5 Q. But I think you can give an opinion in your experience  
6 to the extent you're happy to.

7 A. Sure. Look, I think the categorisation of what is  
8 prioritised with a sort of low, medium or high in that  
9 context I think would be dependent upon what other work the  
10 strategic planning team is also doing at that time, what  
11 are the resources or funding available to do any further  
12 work, and potentially again factors such as what's relevant  
13 to risk or other things. So, as an example at the time,  
14 they were preparing planning scheme amendment C219 and also  
15 various other overlays. So, once they've I suppose put  
16 those in train, as I mentioned earlier with the planning  
17 scheme amendment process even though it's not probably  
18 tight on timeframes like the assessment of a planning  
19 permit there are still timeframes involved. So, as an  
20 example, if you already had three or four other amendments  
21 under way you wouldn't be able to just simply cease doing  
22 those amendments even if you thought it might be best to  
23 cease them and divert attention to other ones, not  
24 necessarily saying the EM0 in this case but any other one,  
25 because you would run the risk of having those amendments  
26 be deemed to be abandoned or lapsed, and so you would  
27 potentially waste years and years worth of strategic work  
28 simply because you haven't continued through with the  
29 resourcing and funding of those already under way planning  
30 scheme amendments.

31  
32 Q. Yes. If we could have document MSC.5014.0001.0532  
33 brought up, please. We've got internet down. So are you  
34 aware of whether the committee that performed the 2023  
35 review considered whether to seek interim or emergency  
36 extension to the EM0 to cover all of the high  
37 susceptibility areas?

38 A. In short, no. I mean, to my knowledge, no.

39  
40 Q. Okay. Thank you. Can I turn to the informal process  
41 for landslide susceptibility assessment concept, which you  
42 would have heard me discuss with Mr Oz at some length.

43 A. Correct.

44  
45 Q. It's at 63 to 67 of your 17 April statement, just to  
46 orientate others. So you've been at the shire for a  
47 significant period of time. Can you explain to the chair

1 what your understanding is of the practice in respect of  
2 high susceptibility applications in high susceptibility  
3 areas?

4 A. Yes. I suppose it also probably requires a little bit  
5 of an understanding of the planning permit process when a  
6 planning application is lodged, and I'll try and be as  
7 brief as I can. Essentially, when applications are  
8 received by the shire there's a matrix document that  
9 identifies, I suppose, who would be responsible for each  
10 part of the planning permit process or decision. It's  
11 essentially like a decision matrix for identifying what the  
12 right process is to follow and who can sign off on things  
13 or who can allocate a file, as an example.

14  
15 So, essentially, all new planning permits or  
16 amendments to planning permits would be allocated - like,  
17 would receive it from the permit applicant, there would be  
18 a check of it to make sure everything is there and ready to  
19 go, and then it would be allocated by a team leader or  
20 principal planner with experience in the field, and they  
21 would decide who to allocate the application to. They  
22 would review not just the planning scheme provisions, like  
23 the overlays within the planning scheme, but they would  
24 review the GIS layer, which has those other overlays that I  
25 mentioned, one of them being the land susceptibility  
26 mapping, and they would make notes or - you know, when  
27 they're allocating it to someone they would make notes to  
28 say, "Look, there are these other things that you need to  
29 be aware of" or there might be some issue with the design  
30 or something like that. So then that would go generally to  
31 the planner, and then they would start the process of  
32 assessing it.

33  
34 The first step of that is a preliminary assessment and  
35 filling out the delegate report. As part of that  
36 consideration they would also open their GIS layers and  
37 have a look at those set parameters, the zone, the overlay,  
38 the particular provisions of the scheme, and anything else  
39 that might be of relevance. And then essentially where,  
40 I suppose, this is probably leading to is that one of those  
41 considerations would be the land susceptibility mapping and  
42 an internal sort of guideline, I suppose, to assist in  
43 that.

44  
45 Q. Yes. And when you say an internal guideline you don't  
46 mean - until recently you don't mean a documented  
47 guideline; you just mean a common practice that you've



1 experienced within the shire?

2 A. Correct.

3

4 CHAIRPERSON: Mr Simon, how do new planners within the  
5 shire know to look at the GIS data? Is there an internal  
6 document directing them to look at the data?

7 A. Yes, in short. It's probably a bit complicated in  
8 that over the last few years we've been trying to refine  
9 our systems and processes and sort of internal policies.  
10 But even when I arrived at the shire in 2021 there would be  
11 multiple sort of internal documents around inducting new  
12 staff. So if you had a new graduate from university that's  
13 come in and never touched a file before they would,  
14 I suppose, be directed or led to council's corporate  
15 management system, the system that - their records  
16 management system, the system that processes applications,  
17 the GIS layers and all that. So they would have a buddy  
18 system where they would have someone more senior and  
19 experienced show them all these things.

20

21 And there would be probably - again, we're trying to  
22 rationalise all this and it's been a work in process, but  
23 essentially even prior to my time there would have been  
24 documents and things that would assist someone  
25 understanding what their roles and responsibilities are.  
26 And templates. So we have a lot of templates in the system  
27 that generates a preliminary assessment, allocation notes,  
28 a delegate report that gets filled out and signed off at  
29 the end of the process as well.

30

31 CHAIRPERSON: So does the induction documentation direct  
32 planners to look at the GIS data?

33 A. Yes. And even the document I'm aware of - never - it  
34 was pre my time, but a document I'm aware of from I think  
35 it was probably pre-COVID times where, say, the development  
36 engineering team would come regularly to a planning meeting  
37 or with new inductees and they would have a PowerPoint  
38 presentation that says, "Here are the key things that  
39 development engineering does and looks at," and one of  
40 those things would be landslip risk. So that's how it  
41 would be picked up.

42

43 And also there would have been a referrals matrix.  
44 I think it was basically an Excel spreadsheet that would  
45 identify exactly that, what the engineering team did want  
46 to know about or didn't want to know about, so that you  
47 could avoid unnecessary referrals as well.

1  
2 CHAIRPERSON: Thank you.  
3

4 MR DI STEFANO: Thank you. Can I have document  
5 MSC.5005.0044.5961 brought up, please. This is a document  
6 referred to at paragraph 63 of your statement, of your  
7 17 April statement. This was prepared in March of this  
8 year; is that correct?

9 A. It's probably the latest revision, yes. But there  
10 would have been probably other work done prior to that  
11 where it's possibly changed over time. And they're not  
12 necessarily an official document or anything that we've  
13 actually used or implemented.  
14

15 Q. So are there other versions of this document?

16 A. There may be. I can't actually speak to that because  
17 I'm not the author of the report. But we've been working  
18 on something like this - when I say "we" as in the planning  
19 leadership sort of team - in conjunction with the  
20 development engineering team to try and come up with  
21 something to more formally document the process. And  
22 that's, I suppose, probably irrespective of the McCrae  
23 landslides, 2022 or 2025, however you look at it, because  
24 this is something that again it's not just the McCrae area  
25 that's potentially of landslide susceptibility and risk,  
26 it's the whole of the peninsula that we have a potential  
27 issue with that we need to look at. So this is a document  
28 to try and capture that risk again conservatively  
29 shire-wide to ensure that there are checks and balances in  
30 place.  
31

32 Q. Are you aware of whether production has been made of  
33 any of the previous documents that contain a similar  
34 process that you're referring to?

35 A. To my understanding, no, and perhaps - or rather,  
36 I think, is because I'm not sure that they were ever relied  
37 upon or put into practice because it still required more  
38 time and energy to go into understanding what the relevant  
39 parameters are to inform a position.  
40

41 Q. Okay. So then is this the first document that has  
42 been put into practice as an active memo, if you like?

43 A. Other than things that may have been around prior to  
44 my time, yes, to my knowledge.  
45

46 Q. Yes. And do you have any reason to think there were  
47 things prior to your time?

1 A. Yes. Again, I've never actually sort of been involved  
2 in the preparation or the process in that. So my knowledge  
3 is limited. But I'm aware that, say, on previous files  
4 going back pre-COVID there would have been communications  
5 between applicants and council about the landslip  
6 susceptibility mapping. So there would have been - I'm  
7 assuming that; I can't guarantee that - but I'm assuming  
8 that people were following a set procedure or being  
9 conservative about referring documents or referring  
10 applications to develop engineering and then asking for  
11 that information.  
12

13 Q. Could we go to the second page of this document.  
14 Sorry, just stay on this page. It says here it has steps.  
15 Step 1 is the site in an EMO. And then step 2 says, "Is  
16 the site in an area of high (red) landslide risk?" Then if  
17 we go over to the next page, "This layer is assessed one of  
18 two ways, through the planning module landslip  
19 susceptibility layer or the investigations module." As it  
20 says there, both use the same mapping or produce the same  
21 mapping, and that's the 2012 GIS mapping that we were  
22 looking at before as translated into your data?

23 A. Correct.  
24

25 Q. Your system, I should say?

26 A. Yes, our systems.  
27

28 Q. And then you can see, "If the work take place within  
29 or the works are likely to impact the land shows as red in  
30 the landslip susceptibility layer, the statutory planner  
31 continues to step 3." And then step 3 requires additional  
32 steps, including potentially the reference to an engineer?

33 A. Correct.  
34

35 Q. It doesn't mention specifically the quantitative  
36 assessment?

37 A. Sorry, in step 3?  
38

39 Q. Well, in the document?

40 A. Yes. Yes, that's right.  
41

42 Q. So do you consider this to be the equivalent of  
43 applying EM05 then?

44 A. Not necessarily in that, I suppose, this is probably a  
45 precursor to requesting such information if it's considered  
46 relevant for that particular application.  
47

1 Q. Yes.

2 A. And, again, as I said earlier, like, it really does  
3 depend on not just the site but also what's being proposed  
4 in a particular application as to whether it's relevant or  
5 not.

6

7 Q. Yes. And it also - the trigger event, if it's not  
8 within an EMO, is if it's high landslip susceptibility; is  
9 that correct?

10 A. Yes.

11

12 Q. Yes. You would have heard me have a discussion with  
13 Mr Oz yesterday about some of the adjectives used in his  
14 statement to describe how uniformly applied the informal  
15 process is that's documented in this document is across  
16 planning within the shire, and he said or his statement  
17 states that it's his understanding that the shire  
18 practice - I withdraw all of that. "It has been the  
19 shire's practice to impose additional planning requirements  
20 on all properties that are mapped as falling within the  
21 areas coloured red." And are you able to confidently say  
22 that that requirement is applied to all properties that are  
23 coloured red?

24 A. To my knowledge, yes. And I think again the only  
25 caveat there is depending on what the application is for,  
26 and that was perhaps beyond the realm of Mr Oz's ability to  
27 clarify. And I think that's an important distinction,  
28 though, because, irrespective of whether there's an EMO or  
29 not, the same logic can apply because, as an example, if we  
30 were considering an application on 10-12 View Point Road,  
31 even if there is an EMO, there's matters that could be  
32 exempt anyway by State provisions such as a swimming pool,  
33 as an example, unless the schedule specifically calls that  
34 out as a risk and obviously considers it.

35

36 So to the extent that - I suppose the logic behind  
37 this stepping, and I'm not saying it's necessarily  
38 bullet-proof, but the logic is that as you step through if  
39 you've got an application under consideration already,  
40 irrespective of an EMO, if it's in the red area it should  
41 form part of your consideration even in the absence of an  
42 EMO. So the same rules would apply if there was an EMO,  
43 essentially.

44

45 Q. We just looked at the document and it doesn't contain  
46 all the same rules as would apply when there's EM04 or 5?

47 A. Correct.

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Q. So, even on the face of the new summary document, it doesn't completely map the requirements that are required under EM05?

A. That's correct. But it would be no different to the EM01, 2 and 3 then either.

Q. That's true.

A. Yes.

Q. It also doesn't apply when no application is made because no EM0 requires an application to be made?

A. Correct.

Q. So do you think it's fair to describe it as being comprehensive, as Mr Oz does, in paragraph 47? I can read you the whole quote if the context --

A. It's probably not necessary. I think as comprehensive as it can be, yes

Q. But not as comprehensive as if EM05 applied to that area?

A. Well, going back to the point I made earlier, EM05 is not really relevant because it's based on its own specific geotechnical assessment of that area. So I think to assume that that would --

Q. Sorry, the requirements within EM05?

A. The requirements, yes.

Q. Yes. You're aware that - well, at least it's in your statements - that planning permit applications were made in respect of 10-12 View Point Road?

A. Correct.

Q. And in your 11 April statement you respond to the question asked of you by the board of inquiry for, "In relation to each affected property identified (based on the shire's records)" - and I interpose to note that affected properties include 10-12 View Point Road?

A. Correct.

Q. 5.4, "Any construction plans or other planning documents submitted to the shire for the purpose of any construction upon each affected property."

A. Yes.

1 Q. Can we have document MSC.5014.0001.0666 brought up,  
2 please. And can we scroll to the bottom of this document,  
3 please. So you'll see here that this is an email exchange  
4 between someone from an engineering firm with CivilTest,  
5 who are geotechnical engineers?

6 A. Correct.

7  
8 Q. And if you look at the next email up you can see the  
9 response from CivilTest. The same page but if you zoom in  
10 at the top of that. It says, the last sentence there,  
11 "Please also contact the Mornington council for further  
12 information as they may require a detailed slope  
13 assessment." If we can look at the next email, please. So  
14 that's CivilTest telling a domestic engineer that, "You  
15 might require a more detailed slope assessment."

16 A. Yes.

17  
18 Q. And then the response is, "Thank you." And then if we  
19 can look at the next response up from that. There's a  
20 question about doing the slope stability analysis. And if  
21 we can look at the next email. Thank you very much. You  
22 can see in the second sentence, "However the sunroom and  
23 terrace area is very steep and needs a slope assessment."  
24 So this is coming from CivilTest. "Please contact  
25 Mornington Peninsula Shire, as they normally have specific  
26 requirement for sites on a steep slope like this, and then  
27 we can quote for a slope stability assessment ...".

28  
29 If we go to the top email. That email chain is  
30 forwarded to the shire, and the top email is the shire's -  
31 sorry, if you go to the very first page of the document.  
32 You'll see there, "Please find attached GIS screen dump  
33 showing Mornington Peninsula Shire landslip susceptibility  
34 mapping in the vicinity of the above property."

35  
36 And then the third paragraph, "The proposed  
37 development works appear to be located within the potential  
38 medium landslip susceptibility areas of the site." Then  
39 the next paragraph, "Please find attached a copy of  
40 potential geotechnical investigation work required for a  
41 moderate landslip susceptibility area." So this is in  
42 effect a play out of what you have just described in terms  
43 of correspondence coming in for an application for a  
44 planning permit, an analysis within the shire of that, and  
45 an assessment of the landslip susceptibility?

46 A. To an extent, yes.

1 Q. To an extent.

2 A. Yes.

3

4 Q. But, when you say "to an extent", this also reflects  
5 the human judgment aspect of that?

6 A. Correct.

7

8 Q. Of that process?

9 A. It does, yes.

10

11 Q. Here the relevant statutory planning officer has  
12 assessed this as being of a medium risk.

13 A. Sorry, well, maybe just to clarify, Tony is a  
14 development engineer, not a planner.

15

16 Q. My apologies. My apologies. So can you explain why  
17 this would end up with a development engineer, not a  
18 planner?

19 A. I suppose, in short, similar to that internal working  
20 document we've been developing and working on, effectively  
21 the rationale is that they would be better placed - even  
22 though they're not a geotechnical expert, they would be  
23 better placed to provide some guidance or advice as to when  
24 it would be appropriate or not to request that geotech  
25 engineering assessment, mainly because, again, a lot of  
26 planners, whilst they might have other various  
27 qualifications or backgrounds before they enter the  
28 planning realm, unless they are a geotech engineer they're  
29 probably going to struggle to have the level of knowledge  
30 required to make that call. And so the development  
31 engineers would often be consulted, whether formally or  
32 informally through the planning permit process, around  
33 whether they think it would be relevant.

34

35 And in this case, again, without even seeing the map  
36 of the land and the slope and everything, I can almost  
37 guarantee I know why Tony has gone back to clarify it's  
38 actually not that high risk, it's in moderate, because of  
39 the location of those works. To be fair or respectful as  
40 I can be to the person that suggested it was potentially  
41 high risk, maybe they didn't look at the contours of the  
42 land, because those additions on either side of the house  
43 are quite a flat area.

44

45 Q. Let's go to the plans so we can look at exactly what  
46 we're talking about. So the plans are at  
47 MSC.5002.0001.0090. So we're talking here about a planning

1 permit application for amendments to 10-12 View Point Road,  
2 which is the property from which both of the 2022 and 2025  
3 landslips emanated?

4 A. Correct.

5  
6 Q. And if you zoom in on the collection of circles with  
7 dotted lines around them, please, on the middle right of  
8 this diagram. Thank you. You can see here that in the top  
9 right it says, "Existing trees shown dashed to be removed."  
10 And you can see there there's one, two, three, four, five,  
11 what looks like six or seven trees throughout that middle  
12 section of the terrace that are being permitted --

13 A. Yes.

14  
15 Q. -- or applied to be removed. And then an additional  
16 tree, if you look at the front near the driveway there's  
17 another dashed tree to be removed. And if we zoom out  
18 again we can see here that these are the trees that are at  
19 the top of the escarpment. You can see the contour lines  
20 there in that.

21 A. Yes.

22  
23 Q. So, just to come back to what you explained to us  
24 before, personnel within the council, whether in the  
25 engineering team or the planning team, have looked at this  
26 application and the location of those proposed works and  
27 formed the view that that's medium - this has a medium  
28 susceptibility of landslip, not high susceptibility of  
29 landslip?

30 A. Correct. And I think it might be helpful to - if we  
31 do have an overlay of where the red area applies to this  
32 land, because it's not uniform or covering the whole area,  
33 I think we'll find - I could be wrong, but I think we'll  
34 find that the extensions which are - I'm not sure if it  
35 helps for me to point to this screen here, but my  
36 understanding is that - sorry.

37  
38 Q. We've had enough IT troubles without the TV blowing  
39 up.

40 A. Sorry about that. The area of red roughly follows  
41 this edge, which has been invariably referred to as cliff  
42 edge. But not - again, as I said earlier, the red doesn't  
43 necessarily align with that all the way along. And the  
44 area of yellow will probably come somewhere through here.  
45 The relevant extensions and the garage we're talking about  
46 is the extension here to the west, extension there to the  
47 east, and that garage.



1  
2 Q. So if you zoom in there where your red cursor is you  
3 can see "proposed terrace"?  
4 A. Correct.  
5  
6 Q. So as I understand these drawings --  
7 A. This bit here is the wall for this terrace.  
8  
9 Q. That's right. And so there's proposed works basically  
10 to the top of the cliff edge?  
11 A. Close, yes. I mean, that's the edge.  
12  
13 Q. Within metres. Within metres of the cliff edge.  
14 A. Yes, that one.  
15  
16 Q. And the removal of trees also within metres of the  
17 cliff edge.  
18 A. Correct. But I believe - and, again, I could be wrong  
19 - if we go to a plan where we show an extract of --  
20  
21 Q. Yes, we can do that.  
22 A. The red would roughly come through here somewhere.  
23  
24 Q. Can we have MSC.5014.0001.0068 brought up, please. We  
25 might need someone to look at that TV. Maybe not now. If  
26 possible if we can have them side by side, but I don't want  
27 to ask too much. Okay. So maybe I think we can all see.  
28 Where the red - what you were describing before is where  
29 the red 10-12 View Point Road is outlined here, the  
30 property boundary in blue, and the red is the high  
31 susceptibility zone and it kind of cuts back alongside the  
32 cliff line and it looks like it comes up almost to the back  
33 of the house and then cuts across. So the area in yellow  
34 there, which is medium, pretty squarely covers the area  
35 that was the subject of this permit.  
36 A. Yes. I would say that the majority of the works that  
37 were as part of the permit are either in the green or the  
38 yellow.  
39  
40 Q. Yes. So then, in your view, that was the correct  
41 application of the informal practice?  
42 A. Based on the evidence we've got, yes.  
43  
44 Q. Yes. And are you aware that that planning permit was  
45 extended multiple times? This is planning permit P15/1503.  
46 A. Can you clarify "extended"?  
47

1 Q. Yes, the time for performance of the works was  
2 extended by secondary consent.  
3 A. So, to clarify, secondary consent is not necessarily  
4 an extension of the planning permit in terms of the time  
5 that you can enact on the permit, and that's a separate  
6 thing in the Act relating to the expiry of the permit  
7 itself. Secondary consent is a mechanism under - generally  
8 the first or second condition of a planning permit might  
9 outline that "works must be generally in accordance with"  
10 or words to that effect, must generally be in accordance  
11 with the endorsed plans, unless otherwise with the consent  
12 of the responsible authority. I won't go into the details  
13 of why that exists or whatever else, but suffice to say  
14 there's numerous VCAT decisions like red dot decisions of  
15 VCAT about when secondary consent is appropriate and all  
16 that.  
17  
18 Q. That's okay. Thank you.  
19 A. So there was one application subsequent to this, like,  
20 the original, that sought secondary consent. And then  
21 I believe the second one on that site was actually  
22 withdrawn. I don't think it was actually enacted on.  
23  
24 Q. Yes. So if the red area here had been covered by EM05  
25 do you think the same outcome would have occurred in  
26 respect of this planning application? Would the same  
27 documents have been required or do you think it's more  
28 likely that the planning officer would have asked for the  
29 quantitative assessment?  
30 A. I think that's a difficult - I think I'd have to  
31 speculate to answer that question.  
32  
33 Q. I'm asking you to speculate.  
34 A. Yes. Yes, I think the same outcome would likely have  
35 occurred in that context.  
36  
37 Q. You accept, though, don't you that - if I can list to  
38 you what I think are the inferiorities of the informal  
39 process against the EM05.  
40 A. Sure.  
41  
42 Q. It relies, firstly, on an application actually being  
43 made.  
44 A. Correct.  
45  
46 Q. Which may or may not be triggered, as we discussed  
47 earlier. It relies on the particular statutory planning

1 officer who receives that application making a judgment  
2 call based on lines, and we've discussed about how the  
3 actual topographical lines which the GIS data is based on  
4 aren't necessarily accurate down to the order of metres  
5 which would be required in certain circumstances. I mean,  
6 this might be one.

7  
8 EMOs are mandatory and have statutory force,  
9 irrespective of a discretionary request within the shoehorn  
10 of another power. In a sense a corollary of the previous  
11 points but separately, I think, with the informal practice  
12 you can't be 100 per cent confident that it's been  
13 uniformly applied across all high susceptibility areas  
14 because, for example, just an error might be made in  
15 reviewing the - or someone might be too new and they might  
16 not have fully absorbed the training.

17 A. I think that's also fair to say, though, even if an  
18 EMO does apply.

19  
20 Q. That might be true.

21 A. They might miss that, and that does happen.

22  
23 Q. And also there would be scenarios where, as we  
24 discussed earlier, people would push back on application of  
25 the informal system as opposed to an EMO, which they  
26 couldn't possibly push back on because it's by force of  
27 law.

28 A. Yes, to an extent I would agree with that because,  
29 again, we have people push back on, say, a landscaping plan  
30 when clearly - say, for a two unit development, we ask for  
31 a landscape plan, which is clearly required in the planning  
32 scheme, and we have a developer push back to say, "I'm not  
33 providing you a landscape plan."

34  
35 Q. Yes. Thank you. In the period between 2022 and 2025,  
36 January 2025 at least, is it fair to say that based on the  
37 enquiries you've made you're not aware of the shire having  
38 changed any of its policies in respect of planning  
39 applications in high susceptibility areas?

40 A. With respect to that, no, not directly; no.

41  
42 Q. Thank you. Can I turn to a different topic. It's  
43 really just something to note for the benefit of the chair.  
44 Your 17 April statement includes as schedule 2 a list of  
45 what appears to be all of the correspondence between  
46 Mr Dane Pope and the shire in respect of his  
47 investigations, and it contains an explanation of those

1 documents and also links to the documents themselves.  
2 I just note that for the benefit of the chair to commend  
3 the openness that the council's had in responding to that  
4 particular aspect, proactively putting that material before  
5 the inquiry. It's very useful.  
6

7 I don't have any specific further questions, but is  
8 there anything that you would like to add to the discussion  
9 we've had in respect of the application of the informal  
10 system?

11 A. I think probably to just highlight that I think some  
12 of the - or the rationale behind some of my answers leads  
13 to probably more the question around, you know, is the EMO  
14 itself the appropriate tool or is it fit for purpose to  
15 capture or mitigate risk. And I think I've reflected  
16 strongly on that and, I suppose, some of the line of  
17 questioning you had for Mr Oz yesterday ran to that point  
18 around should council have done something. But I think, to  
19 be fair, that's not necessarily asking the right question,  
20 with respect. I understand why you're asking that.  
21

22 Q. You don't need to use "respect"; that's fine.

23 A. It's very relevant; right? It's a very relevant  
24 point. But I think if you look at what the EMO does, not  
25 just on the Mornington Peninsula but statewide, if it's not  
26 fit for purpose in its current form and doesn't allow  
27 council to proactively mitigate risk, then where does that  
28 sit? And I think that if you have a planning permit  
29 process at the moment that really only looks prospectively  
30 at potential future risk, not the existing risk, and even  
31 the mapping that we've got there, the red areas and such,  
32 they - even the 2012 report itself says that the red areas  
33 don't include runout. So you could be proposing something  
34 on 10-12 View Point Road that it does affect downhill, yet  
35 that risk technically hasn't been mapped. It's  
36 considered --  
37

38 Q. Or that particular land is not susceptible to  
39 landslip, but it is susceptible to the consequences of  
40 landslip.

41 A. Correct. So I think if you were to look at it  
42 holistically I think the starting point would be does the  
43 EMO - is it fit for purpose and does the Act itself give it  
44 power to be fit for purpose if that's the aim. And I tend  
45 to think the answer to that question is probably no because  
46 it also doesn't pick up all those things that might be  
47 exempt, like a children's cubby house as an example. So if

1 you can go and build a children's cubby house on that slope  
2 with no planning permit at all then, rightfully, planning  
3 is not the place for mitigating that risk. I think then if  
4 the question is, "Where does that sit," yes, I don't know  
5 that there's legislation to currently cover that.  
6

7 Q. Thank you. I can say to you that at this stage in the  
8 investigation of the inquiry we are looking at cause and  
9 looking at what could and should have been done, but  
10 recommendations will of course go to what could be done,  
11 and we'll invite submissions and you'll have an opportunity  
12 to provide your experience on that particular question.  
13 I should note that your statement notes that you've got -  
14 currently considering as a council plans to amend the EMO.  
15 But we can discuss that on a later opportunity.  
16

17 No further questions, Chair.  
18

19 CHAIRPERSON: Thanks, Mr Simon. That was very helpful.  
20 I've just got one question for you. Following the 2022  
21 landslides do you know if council sought authorisation from  
22 the planning minister to extend EM04 and 5 on an interim or  
23 emergency basis to 10-12 View Point Road and neighbouring  
24 properties?

25 A. To my knowledge, no. I suppose the basis for that -  
26 they may have, but I doubt that. And the basis for that  
27 would be, if we were to try and apply the parameters that  
28 apply to EM04 and 5, they in themselves wouldn't have  
29 necessarily mitigated the risk of what occurred on the  
30 property in 2022 or 2025, and I think primarily because you  
31 would have to first understand the cause of that which, as  
32 we've heard from the experts, is likely at least in part  
33 due to water. And if they weren't caused as a direct  
34 result of building works, at least in 2022, then there  
35 would be really no rationale for then saying, "Hey, we need  
36 an EMO on here," because if the EMO only controls works it  
37 would kind of be applying the wrong tool to cure the wrong  
38 problem, if that makes sense.  
39

40 So if the area where the 2022 landslide happened - and  
41 we don't have it up on the map - but if that wasn't subject  
42 to any works and maybe excess water in the soils was the  
43 cause, then even had the EMO applied previously and was  
44 applied rigorously to that 2015 decision, then the chances  
45 are the landslide still would have happened. So it  
46 wouldn't have been - I suppose it wouldn't have actually  
47 been a preventative or mitigating measure to apply to that

1 land.

2

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13

CHAIRPERSON: So is the answer you don't think, following the two landslides in '22, that the council did approach the minister?

16

A. To my knowledge, no.

18

CHAIRPERSON: And do you know whether there was any consideration given to doing that?

20

A. To my knowledge, no. They may have.

22

CHAIRPERSON: Who would know the answer to that question?

23

A. I probably don't need to speculate too much. I think the manager, Katanya Barlow, and the team leader of strategic planning, Claire Dougall, would probably know the answer to that. I think they probably would have been the ones to contact the department or not.

28

CHAIRPERSON: Thank you. Are there any questions? No. That completes your evidence, Mr Simon. Thank you for coming.

32

A. Thank you.

33

CHAIRPERSON: I'll excuse you from this hearing block. I think you'll probably be required again in a further hearing block. Thank you.

37

A. Thank you, Madam Chair.

38

MR DI STEFANO: Madam Chair, there are no further witnesses for this afternoon.

41

CHAIRPERSON: Thank you, Mr Di Stefano. We will, unless there are any other matters, adjourn until 10 o'clock on Monday.

45

**AT 12.47 PM THE HEARING ADJOURNED UNTIL MONDAY, 12 MAY 2025**

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