

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS.
P462/2024, P469/2024, P532/2024
PERMIT APPLICATION NO. PA2201858

CATCHWORDS

Section 82 of the *Planning and Environment Act 1987* (Vic); Alpine Resorts Planning Scheme; Public Park and Recreation Zone; Comprehensive Development Zone – Schedule 2, Use by or on behalf of Minister; Development by or on behalf of Minister; Native vegetation removal; Policy support for year-round activity in alpine resorts; Impact on ski trails and ski fields; Snow clearing; Road safety; Impact on significant fauna; *Flora and Fauna Guarantee Act 1988* (Vic); *Alpine Resorts Management Act 1997* (Vic).

APPLICANTS

P462/2024	Jonathan Spring
P469/2024	Cross Country Skiing Association Victoria Inc.
P532/2024	Jaithmathang Traditional Ancestral Bloodline Original Owners First Nation Aboriginal Corporation

RESPONSIBLE AUTHORITY Minister for Planning

RESPONDENT Alpine Resorts Victoria (Trading as Falls Creek Alpine Resort)

SUBJECT LAND Unleased Crown land comprising CA 9H, 2015, 2019, 2022, 2026, 2051, 2056, Lakeside Precinct, Falls Creek Alpine Resort
FALLS CREEK VIC 3699

HEARING TYPE Hearing

DATE OF HEARING 9, 10, 11, 14, 15, 16, 17, 30 & 31 October and 1 & 15 November 2024

DATE OF ORDER 8 January 2025

CITATION Spring v Minister for Planning [2025] VCAT 10

ORDER

Permit granted

- 1 In applications P462/2024, P469/2024 and P532/2024 the decision of the responsible authority is varied.



- 2 In planning permit application PA2201858 a permit, as it relates to the permissions under review, is granted, and is directed to be issued for the land at Unleased Crown land comprising CA 9H, 2015, 2019, 2022, 2026, 2051, 2056, Lakeside Precinct, Falls Creek Alpine Resort in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:

Planning scheme clause	Matter for which the permit has been granted
Clause 36.02-1	Use the land for a Food and Drink Premises and Information Centre.
Clause 36.02-2	Construct a building or construct or carry out works.
Clause 52.17-2	Remove, destroy or lop native vegetation, including dead vegetation.
Clause 52.27	Use land to sell or consume liquor.

Alison Glynn
Senior Member

Seuna Byrne
Member

APPEARANCES

For Jonathan Spring and Jaithmathang Traditional Ancestral Bloodline Original Owners First Nation Aboriginal Corporation

Jonathan Spring, in person. He called the following witnesses:

- Dean Heinze, ecologist
- Ewen Silvester, environmental chemist – alpine peatland expertise.
- Nick Clemann, biologist – herpetology.
- Peter Harris, traffic engineer.

Stephen Rutter made submissions on day 4 on behalf of Jaithmathang Traditional Ancestral Bloodline Original Owners First Nation Aboriginal Corporation.



For Cross Country Skiing Association Victoria Inc.

William Houghton, KC with Andrew Walker, barrister. They called the following witnesses:

- Charles Meredith, ecologist.

Lay witnesses:

- James Louw, treasurer, Cross Country Skiing Association Victoria Inc.
- Sandra Paul, president, Cross Country Skiing Association Victoria Inc.
- Written lay witness statements from Glen Clark, Kim Franzke, Lauro Brändli and Robert Catto were also circulated prior to the hearing.

For Minister for Planning

Briana Eastaugh, solicitor, Maddocks on all days except 17 October 2024. Kristin Richardson, solicitor, Maddocks on 17 October 2024.

For Alpine Resorts Victoria (Trading as Falls Creek Alpine Resort)

Susan Brennan, SC with Jordan Wright, barrister, instructed by Rhodie Anderson, solicitor, Rigby Cooke Lawyers. They called the following witnesses:

- Charmaine Dunstan, traffic engineer.
- Matt Looby, ecologist.
- Brett Lane, ecologist.
- Robert Kelderman, town planner.
- Callum Brown, lay witness: Alpine Resorts Victoria, Head, Assets Management.



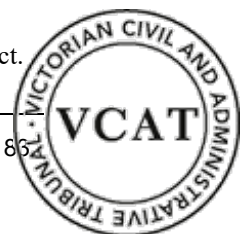
INFORMATION

Description of proposal	<p>The proposal includes converting an existing storage shed at the foreshore of the Rocky Valley Dam for use as a food and drink premises and the associated use of an information centre. To establish the use, alterations and additions are proposed the existing building.</p> <p>The proposal also includes altering the road access through the area from Bogong High Plains Road ('BHP Road') and expanding an existing public car park to the east of the shed. The changes to the road network are designed to establish a new ski trail to the east and south of the car park and roadway.</p> <p>The buildings and works rely on removing native vegetation.</p>
Nature of proceedings	<p>Proceedings P462/2024, P532/2024 & P469/2024 are applications under s 82 of the <i>Planning and Environment Act 1987</i> (Vic) ('PE Act') – to review the decision to grant a permit.</p>
Planning scheme	<p>Alpine Resorts Planning Scheme ('scheme')</p>
Zone and overlays	<p>Public Park and Recreation Zone ('PPRZ')</p> <p>Comprehensive Development Zone Schedule 2 – Alpine Recreation ('CDZ2') – small part of site only.</p> <p>Bushfire Management Overlay Schedule 1 ('BMO1')</p> <p>Note: Erosion Management Overlay Schedule 1 – Management of geotechnical hazard ('EMO1') applied at the time the responsible authority made its decision. Amendment C31alpr removed the EMO1 from the subject land on 25 October 2024. No notice or review rights applied to this overlay and therefore it was not a permission that was before the Tribunal, regardless of the amendment.</p>



Permit requirements	<p>Clause 36.02-1 (PPRZ) – To use land for a food and drink premises and information centre that is not undertaken by or on behalf of the public land manager.</p> <p>Clause 36.02-2 (PPRZ) – To construct a building or construct or carry out works that are not undertaken by or on behalf of the public land manager.</p> <p>Clause 52.17-1 – To remove, destroy or lop native vegetation, including dead native vegetation.</p> <p>Clause 52.27 – To use land to sell or consume liquor.</p> <p>Clause 44.06-2 (BMO1) – To construct a building or construct or carry out works associated with retail premises and leisure and recreation uses.¹</p>
Key relevant scheme policies and provisions	Clauses 02, 12.01, 12.04, 15.01, 17.04, 18.01, 36.02, 52.17, 52.27, 65 and 71.02-3.
Land description	The site of the planning application is known as the Lakeside Precinct, Falls Creek. It sits north of the Rocky Valley Dam, at the south-east corner of the Falls Creek Alpine Resort, adjacent to BHP Road and the Alpine National Park, approximately 1 kilometre south-east of Falls Creek village. The Rocky Valley Dam wall is located to the east.
Tribunal inspection	We undertook an accompanied inspection of the subject land and surrounds, including visiting areas known as Windy Corner and the Nordic Bowl, on 21 October 2024.

¹ Under cl 44.06-7, the BMO permission is not subject to the notice or review rights of the PE Act. As such this permission is not subject to this review.



REASONS²

WHAT IS THIS PROCEEDING ABOUT AND OUR KEY FINDINGS?

- 1 Falls Creek Alpine Resort ('resort') is one of a number of alpine resorts in Victoria that are managed by Alpine Resorts Victoria ('ARV') and is subject to the provisions of the Alpine Resorts Planning Scheme ('scheme').
- 2 The scheme directs a need to consider the *Alpine Resorts Strategic Plan 2020-2025 Responding to a Changing Climate*³ ('2020-2025 strategic plan').⁴ The 2020-2025 strategic plan makes the following comment:⁵

The snow season in the alpine resorts will continue to be impacted by climate change through changes to natural snow fall conditions and patterns, including reductions in natural snow fall over time.
- 3 Strategic objective 1 of the 2020-2025 strategic plan acknowledges that 'investment in new assets to boost sustainability of green season activities, without impacting continued investment in the snow season, remains a challenge that we must address'.⁶
- 4 As part of its obligations to address this challenge, ARV proposes to repurpose an existing shed, known as the ANARE shed,⁷ for a licensed food and drink premises that can service visitors to the resort throughout the year, including in what is referred to as the 'green season' and 'white season', being the non-snow and snow seasons, respectively.
- 5 Part of the proposal is to expand an existing public car park to the north-east of the ANARE shed and alter the alignment of the road to the car park from Bogong High Plains Road ('BHP Road'). The works also include constructing a dedicated area of ski trail to the south and east of the expanded car park. Currently, the existing road, car park area and part of the BHP Road are used by cross country skiers as access trails to the inner and outer cross-country trail network in the white season. The area is used by cyclists and walkers in the green season.
- 6 Figure 1, below, is a Google Maps image of the subject land and surrounds. Figure 2 is an extract from the proposed site works plans of the area and surrounds, depicting the areas of works to the ANARE shed and the road. Figure 3 is a photo of the existing ANARE shed, taken from a point just south of the 'Rocky Valley Lookout', identifiable in the Google Maps image provided in Figure 1.

² The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

³ Victorian Government, Alpine Resorts Co-ordinating Council, 2019.

⁴ For example, at cl 02.02 (Vision) and cl 12.04-1S (Sustainable development in alpine areas).

⁵ Page 14.

⁶ Page 26.

⁷ The ANARE shed is the former Australian National Antarctic Research Expedition shed.





Figure 1: Google Maps aerial photo of the subject land and nearby surrounds (date extracted: 4 December 2024).

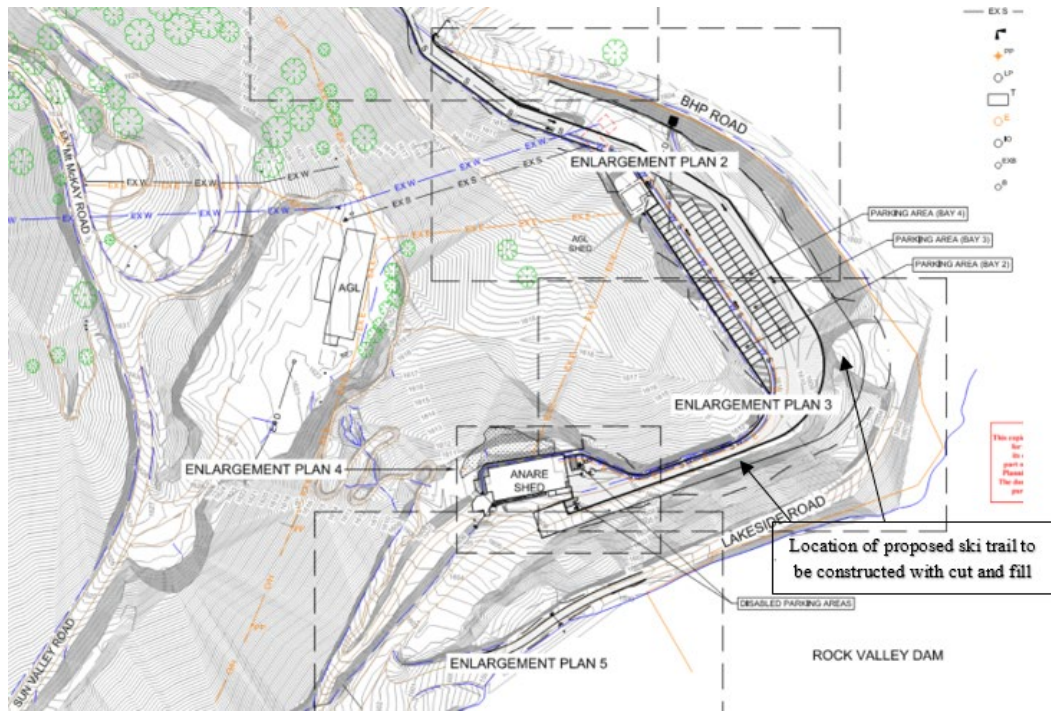


Figure 2: Proposed overall site plan, extracted from the advertised civil drawings, showing the location of the ANARE shed and the proposed expanded car park relative to BHP Road and Rocky Valley Dam. The Tribunal’s annotation shows the location of proposed works to create a new ski trail.



Figure 3: Photo of the ANARE shed, looking east from closer view (extracted from the evidence statement of Mr Looby, dated 9 September 2024, cover page). The image appears to be taken just south-east of the 'Rocky Valley Lookout' marker visible in Figure 1 and is dated April 2022.

- 7 The Tribunal has been asked by three different review applicants who oppose the proposal to review a decision of the Minister for Planning ('responsible authority') to issue a Notice of Decision to Grant a Planning Permit ('NOD') for the use and development associated with the proposal. These review applications are made in accordance with s 82 of the *Planning and Environment Act 1987* (Vic) ('PE Act').
- 8 Application P462/2024 is made by Dr Spring who questions if sufficient consultation has been undertaken, particularly with the Jaithmathang Traditional Ancestral Bloodline Original Owners First Nation Aboriginal Corporation ('the Jaithmathang Corporation'). Dr Spring also submits that:
 - the project will result in significant increases in visitors to the project that will lead to significant traffic safety risks; and
 - result in unreasonable damage to the environment including loss of endangered ecological communities.
- 9 Application P469/2024 is made by the Cross Country Skiing Association Victoria ('XCSAV'). The XCSAV opposes the proposal on grounds including that it will:
 - Lead to an unreasonable loss of cross country ski terrain, and determinately impact on the use of Falls Creek as Australia's premier destination for cross country skiing and skiing events.
 - Lead to an unreasonable loss of native vegetation that has significance as habitat for endangered, threatened and/or vulnerable species.
 - Result in increased traffic on BHP Road that is incompatible with use of BHP Road for cross country skiing.

- 10 Application P532/2024 is made by the Jaithmathang Corporation. The corporation concurs with submissions of Dr Spring about consultation, the Cultural Heritage Management Plan ('CHMP') and concerns about loss of ecological communities.
- 11 Dr Spring and the Jaithmathang Corporation applications for review also questioned if a CHMP prepared for the project was inconsistent with the planning proposal.
- 12 A preliminary hearing was held in August 2024 to consider preliminary questions of fact and law about whether the activity proposed in the planning permit application before us is inconsistent with an approved CHMP for the area. The hearing also examined if the Tribunal had jurisdiction to consider if the CHMP was validly approved under s 65(2) of the *Aboriginal Heritage Act 2006* (Vic) ('AH Act').⁸ The Tribunal found the CHMP is not inconsistent with the proposal before us and the Tribunal does not have jurisdiction to consider if the CHMP is validly approved. We do not explore these matters further in our reasons.
- 13 We consider the remaining issues regarding the impact of the proposal on the environment, traffic safety and ski fields in context of the relevant permissions under review before us. For reasons we later explain, these include permissions we find are required, and before us, being to:
- Remove 0.239 hectares of native vegetation to establish the expanded car park, altered road and new ski trail.
 - Undertake buildings and works where they are not exempt in the Public Park and Recreation Zone ('PPRZ') that applies to most of the land.
 - Establish the food and drink premises use, including the service of alcohol, and use the information centre, where they are not carried out by or on behalf of the public land manager in the PPRZ.
- 14 We note that no planning permit is needed to remove or move snow.
- 15 Having considered the submissions and evidence in context of the permissions before us, and the relevant scheme policies and provisions, we find that:
- The use of the food and drinks premises and an information centre is consistent with the objectives of the zone and policy of the scheme.
 - The use and development directly assist in broadening the support services for year-round recreation and tourism activities at the resort and the adjoining Alpine National Park ('ANP') as sought by cl 02.03-6, cl 12.04-1S and cl 17.04-1L of the scheme. We find the balance of policy supports the proposed uses and development, subject to relevant impacts being addressed.

⁸ *Spring v Minister for Planning* [2024] VCAT 907.



- The operation of the uses, with access provided by BHP Road, may lead to changes in the cross-country trail network and a reduction in the use of trails through loss of part of BHP Road as a ski trail if this road is cleared of snow in winter. However, there is policy support in the scheme to diversify tourism and recreation opportunities throughout the year and we are satisfied that on balance, the proposal achieves this.
- The other works proposed are appropriate to the site's location in the resort.
- We find that the impact on the broader alpine landscape is minimal due to the re-use and small expansion of existing buildings and works.
- The likely additional traffic resulting from the additional car parking proposed can be accommodated by the existing road network.
- The impact on native vegetation has been appropriately avoided, minimised and offset.
- The impact on habitat more broadly is appropriately managed within the scope of the permit application under the PE Act, having regard to the objectives of the *Flora and Fauna Guarantee Act 1988* (Vic) ('FFG Act').
- While there are some likely negative impacts from the proposal, we are satisfied that in addressing the conflicting objectives the balance of policy and directions of the scheme the proposal achieves net community benefit.

16 We will therefore vary the decision of the responsible authority. A permit is granted subject to conditions, for the permissions under review. Our reasons for these findings are set out below, after we set out some context to the framework for decision making.

WHAT IS PROPOSED?

Use

- 17 The proposal comprises:
- Using most of the ANARE shed, including a mezzanine level, for a food and drink premises (226 square metres, excluding the outdoor deck) operating 7.00am – 6.00pm, daily. This proposed use is to be separately operated by a presently unknown third-party operator under lease from the ARV.
 - Using part of the ANARE shed for an information centre (36 square metres). The information centre is proposed to be operated by Parks Victoria under lease from the ARV.
 - The sale of liquor for on-premises consumption within the food and drink premises (including the outdoor deck) between 7.00am –



6.00pm, daily. The food and drink premises would have a maximum of 100 patrons at any one time.

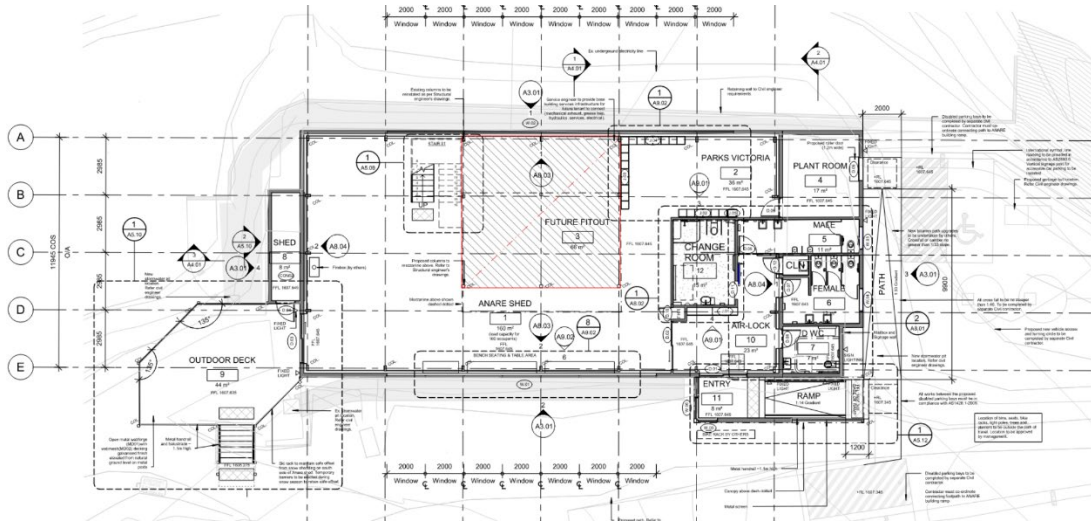


Figure 4: The proposed Ground Floor Plan, extracted from the advertised plans.

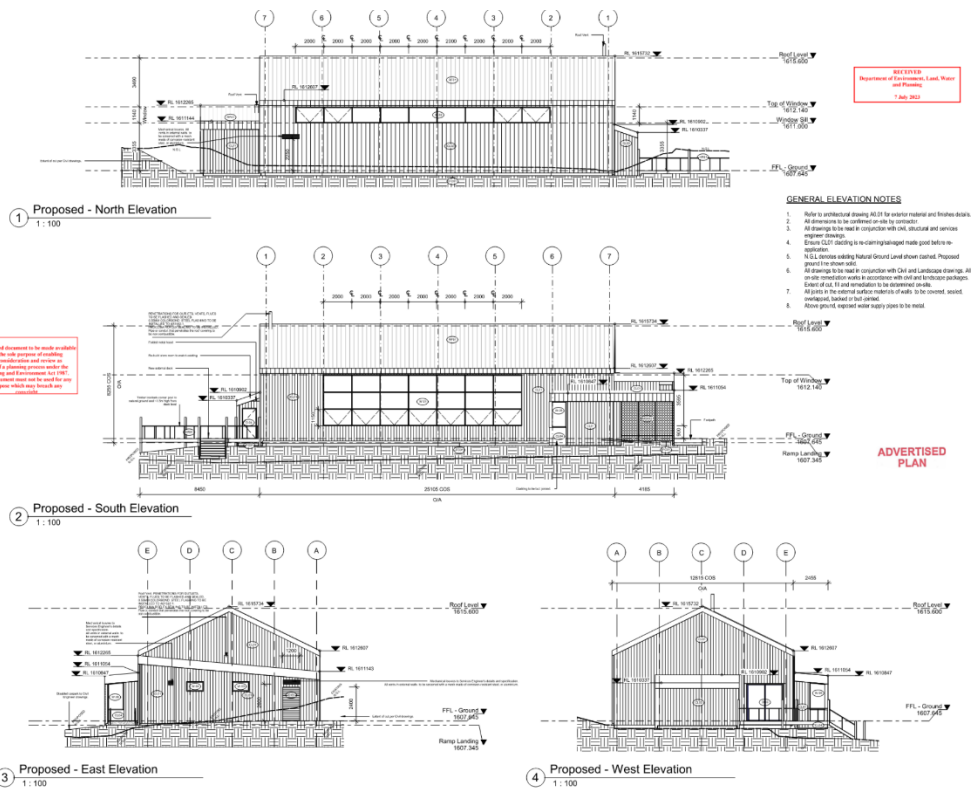


Figure 5: The proposed ANARE shed elevations, extracted from the advertised plans.

Buildings and works

18 The proposed buildings and works that require a planning permit include:

- Alterations to the ANARE shed, including the insertion of new door openings and windows providing panoramic views towards the Rocky Valley Dam and ANP, beyond. The shed will be clad with reclaimed

metal cladding. Shale grey corrugated metal sheeting is proposed for the roof.

- Construction of a 56 square metre extension on the eastern side of the ANARE shed comprising publicly accessible toilet facilities and a plant room. The extension sits lower than the main structure, with a maximum height of approximately 4.6 metres (the ANARE shed has a maximum height of approximately 8.255 metres, measured to the roof ridge).
- Construction of an outdoor deck (51 square metres) adjacent to the south-west corner of the ANARE shed, accessed via new glazed doors in the western elevation of the shed. The deck will have a metal mesh surface, timber posts and stainless-steel handrails.
- Construction of an eight square metre shed/storeroom attached to the western elevation of the ANARE shed, accessed from the deck. The shed will be clad with fibre cement sheeting in a grey finish, with a folded metal skillion roof. The shed has a maximum height of approximately 3.8 metres above finished surface level.
- The insertion of a mezzanine level within the food and drink premises.
- Works to alter the alignment of the road, and expand the existing car park that aligns with this road, to provide a total of 73 car spaces, including two disabled car spaces adjacent to the ANARE shed.



Figure 6: Artist's impression of the proposed south-west perspective of the ANARE shed, extracted from the advertised plans.

Vegetation removal

- 19 Planning permission is sought to remove 0.239 hectares of remnant native vegetation. Other non-native, or regrowth of native vegetation is also proposed to be removed, but this does not require a planning permit.

Proposal context

- 20 The ARV submission states the proposal is to provide upgraded facilities that will be available for year-round use, consistent with the policy direction in the scheme for all alpine resorts,⁹ and in particular Falls Creek.¹⁰
- 21 ARV states the intention of the proposal is to expand the use of the general area known as the Lakeside Precinct, around the ANARE shed, in the green season. During this time the facilities can support recreational opportunities, for:
- sightseeing;
 - mountain biking;
 - water activities on the Rocky Valley Dam;
 - trailhead facilities for the proposed expansion of the Falls Creek to Mt Hotham trail; and
 - other walking activities in and around Falls Creek and the Bogong High Plains in the ANP.
- 22 ARV submissions state that, consistent with application material forming part of the permit application, the ARV Board has not yet decided whether it will clear snow from BHP Road, between Windy Corner and the Lakeside Precinct. It submits that to do so would expand the use of the Lakeside Precinct during the white, or winter, season.
- 23 For the purposes of the proceeding, ARV submits the Tribunal should proceed on the assumption that this section of the road would be cleared of snow by ARV to facilitate winter access to the Lakeside Precinct, and the recreational opportunities available at and from that location during the snow season.¹¹
- 24 We have assessed the proposal on the basis that the food and drink premises may operate during the winter months. We note that the existing road and car park can already be used in winter months if snow is cleared from BHP Road.
- 25 The proposal before us does not include any works to alter BHP Road. Vegetation is proposed to be cleared to facilitate a change to the location of the intersection of BHP Road with the road and car park traversing the subject land.¹² The scope of review under the PE Act does not include

⁹ For example, at cl 02.03-6 (Economic development), cl 12.04-1S (Sustainable development in alpine areas) and cl 17.04-1L (Alpine tourism).

¹⁰ At cl 17.04-1L (Falls Creek tourism).

¹¹ Reiterating that snow clearing does not require a planning permit.

¹² We note that on various public maps (including Vicmap, Vicplan and the Digital Twin Victoria public portal) the road through the subject land is either an unnamed road or described as Lower Lake Road. In some maps, the gravel track closer to the water's edge, visible in Figure 1, is labelled Lower Lake, or Lakeside Road. Other documents refer to the road as the 'ANARE shed access road'.

assessing the protocols established between VicRoads and ARV about the management of BHP Road during the white season.

WHAT IS THE DECISION-MAKING CONTEXT?

Existing site context

- 26 The subject land is an area of land zoned PPRZ and a small section of CDZ2. Figure 7, below, shows a black dashed outline of the area of works.
- 27 This area is part of 9.6 hectares of land abutting the Rocky Valley Dam that was excised from the ANP and incorporated into the resort as part of a land swap between ARV and Parks Victoria in 2013.¹³ At the time of this change, most of the subject land was rezoned from Public Conservation and Resource Zone ('PCRZ') to PPRZ through Amendment C26 to the scheme.¹⁴
- 28 The explanatory report to Amendment C26 sets out in relation to the subject land:

The Public Park and Recreation Zone (PPRZ) will be applied to the 9.6 hectare area of land on the Rocky Valley Storage foreshore. The PPRZ is an intermediary zone between the CDZ2 and the PCRZ providing a buffer to the Rocky Valley Storage that can be used for passive recreation.
- 29 The ANARE shed is currently used for storage of boats and miscellaneous equipment of the ARV and recreational groups. Several boats are also stored outside of the shed. A boat ramp, constructed in 2022, sits at the southern part of the site area, on the northern shoreline of Rocky Valley Dam.
- 30 The area also comprises existing trails that are used as walking and mountain bike trails in the green season and for cross country skiing, snow shoeing and walking in the white season. At the time of our site visit vehicle access was possible to the area and beyond to the west along the road traversing the subject land.
- 31 We understand from submissions that during the declared snow season, BHP Road and the roads extending out from BHP Road south of Windy Corner (including Sun Valley Road, Lower Lake Road and other unnamed roads) are not normally cleared of snow and are used as part of the cross-country ski trail network. Public information for skiing at Falls Creek denotes the roads through the subject land and BHP Road as trails or access trails.
- 32 The subject land includes an existing car park area that is not line-marked. Much of the broader area is also used informally for vehicle parking, such

¹³ Approximately 11.9 hectares of land from the west of the resort was transferred into the ANP as part of the swap in accordance with the *Alpine Resorts and National Parks Acts Amendment Act 2013* (Vic).

¹⁴ Gazetted on 15 August 2013.



as the boat storage directly south of the ANARE shed. On the day of our visit other vehicles were parked in various locations near the existing toilet facilities and near the boat ramp. The parking forms part of the land's existing use for recreation, particularly in the green season when it is understood that cars may park for cyclists and walkers to access trails. To the south of the land is the Rocky Valley Dam. This is located within the ANP, as is the dam wall to the east of the subject land.

- 33 To the north-west of the works area is a larger shed used by AGL Electricity that has access via Sun Valley Road. This road connects to the road forming part of the subject land and also to BHP Road. We understand this shed is accessed regularly in both the green and white season¹⁵ by AGL for servicing the hydroelectric infrastructure associated with the Rocky Valley Dam.

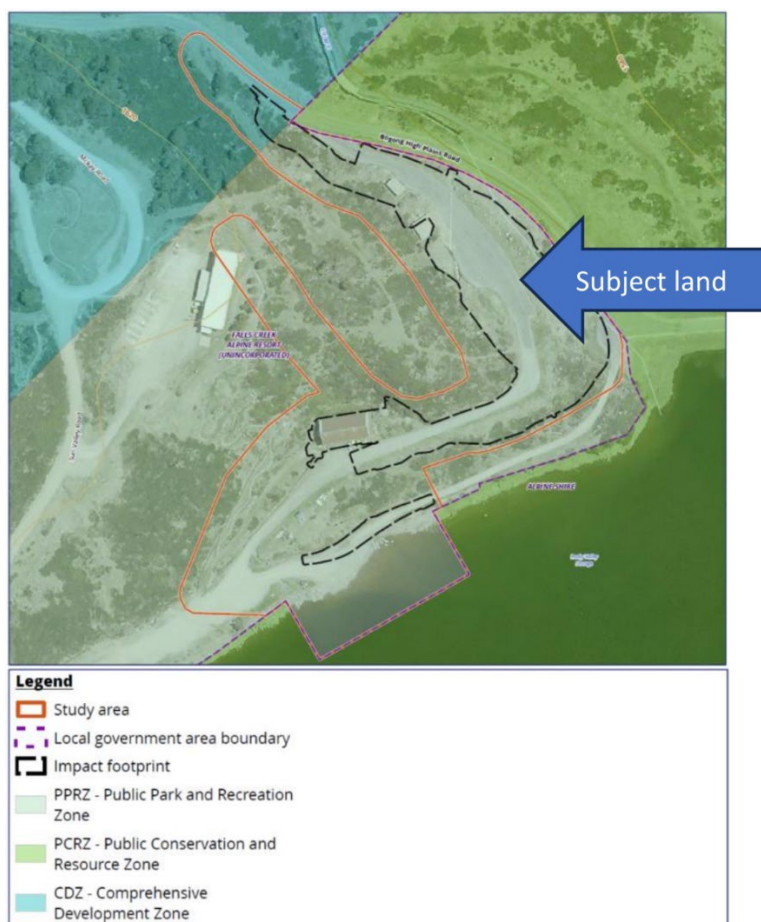


Figure 7: Aerial photo of the subject land overlaid with the Zoning Plan (extracted from the evidence statement of Mr Kelderman, dated 22 September 2024, page 36) showing the subject land is predominantly within the PPRZ. A small portion in the north is within the CDZ2. The land to the south and east, in the ANP, is within the PCRZ.

- 34 The area includes both remnant and non-remnant vegetation. Some of the non-remnant vegetation is native and also includes some exotic planting. The car park and the ANARE shed area are located on land that has been

¹⁵ By over-snow vehicle, or ski-doo.

modified to accommodate their works in previous years. This is evident in the existing flat surface of the car park, the graded slope between the car park and BHP Road as well as contoured land associated with roads, walking and ski trails. There is also evident cut into the slope of the land to accommodate the toilet block, AGL shed and the ANARE shed. There is also a remnant quarry cut at the south-east corner of the land.

- 35 Near the subject land, BHP Road is a government road on title¹⁶ and is a declared arterial road. ARV manages this road through the declared snow season, within the resort boundary. This includes traffic management and snow clearing, in accordance with a memorandum of understanding between VicRoads and ARV.¹⁷

What is the statutory planning context?

- 36 We must decide whether to grant the planning permissions that are under review. From our review of the scheme, and having considered the submissions and evidence, we find these permissions comprise:
- To use the land for a food and drink premises (including the associated car parking) in accordance with cl 36.02-1 of the scheme;
 - To use the land for an information centre in accordance with cl 36.02-1;
 - To construct a building and construct or carry out works for the food and drink premises, information centre and amended car parking in accordance with cl 36.02-2;
 - To remove, destroy or lop native vegetation in accordance with cl 52.17-1; and
 - To use land to sell or consume liquor in accordance with cl 52.27.
- 37 This finding derives from the following analysis of the relevant scheme provisions.

Public Park and Recreation Zone (PPRZ) provisions

- 38 Nearly all of the subject land is located in the PPRZ.¹⁸ This zone has provisions set out at cl 36.02, with the following purposes:

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To recognise areas for public recreation and open space.

To protect and conserve areas of significance where appropriate.

To provide for commercial uses where appropriate.

¹⁶ Crown Allotment 2022 Parish of Darbalang.

¹⁷ Dunstan evidence statement, dated 12 September 2024, [3.2] and Brown evidence statement, Attachment 3.

¹⁸ Kelderman evidence statement, dated 22 September 2024, Figures 2 and 3, page 36.



Use of the land in PPRZ

- 39 Under cl 36.02-1, a permit is not required to use land for a retail premises¹⁹ if the following Section 1 condition is met:

Must be either of the following:

A use conducted by or on behalf of a public land manager, Parks Victoria or the Great Ocean Road Coast and Parks Authority, under the relevant provisions of the *Local Government Act 1989*, the *Reference Areas Act 1978*, the *National Parks Act 1975*, the *Fisheries Act 1995*, the *Wildlife Act 1975*, the *Forest Act 1958*, the *Water Industry Act 1994*, the *Water Act 1989*, the *Marine Safety Act 2010*, the *Port Management Act 1995*, or the *Crown Land (Reserves) Act 1978*.

A use specified in an Incorporated plan in a schedule to this zone.

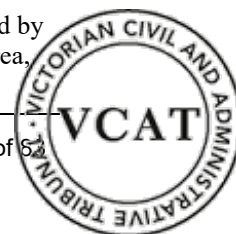
- 40 If this condition is not met, a retail premises is a Section 2 use (permit required) subject to the following condition:

Must be associated with the public land use.

- 41 It is common ground that the use of the food and drink premises is proposed to be leased to a private operator and therefore is not a Section 1 use.
- 42 We are satisfied that this use is associated with the public land use as one that can service recreational users of the alpine resort and visitors to the adjoining ANP. Therefore we are satisfied the condition to the Section 2 use is met. A permit for the use is required.
- 43 All of the land is currently used for what is informal outdoor recreation associated with boating, cycling, walking and winter activities.²⁰ The car park existing on the land services these uses, particularly the green season uses. The car park is to be expanded with 13 of the car parking spaces available for use of the food and drink premises.
- 44 It is also common ground that an information centre is not a land use term listed in cl 73.03. Under cl 36.02-1, 'any other use not in Section 3' is a Section 1 use (no permit required) subject to the same Section 1 condition as set out above for a retail premises. If the condition is not met, an information centre is a Section 2 (permit required) use. It is common ground that while Parks Victoria is listed in the exemptions of cl 36.02-1, it is not the public land manager for this land and therefore its lease of part of the ANARE building is not by or on behalf of the public land manager.

¹⁹ Food and drink premises is nested under retail premises at cl 73.04-11 (Retail premises group nesting diagram).

²⁰ cl 73 provides a definition of informal outdoor recreation as 'Land open to the public and used by non-paying persons for leisure or recreation, such as a cycle track, park, picnic or barbecue area, playground, plaza, and walking or jogging track.'



Buildings and works in PPRZ

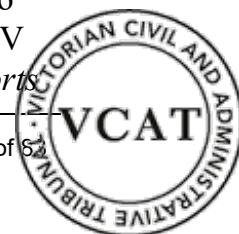
- 45 From our review of the scheme, along with submissions and information provided to us, we find a permit is required to construct a building or construct or carry out works for the proposal in accordance with cl 36.02-2 of the scheme, other than for the proposed pathways and trails, landscaping, planting, fencing less than one metre in height, and drainage or underground infrastructure. This finding derives from the following analysis.
- 46 Clause 36.02-2 states a permit is required to ‘construct a building or construct or carry out works.’ The permit requirement is not confined to section 2 uses in the way that many other zone provisions exist in zones of other planning schemes. However, the permit requirement states:

This does not apply to:

- **Pathways, trails, seating, picnic tables, drinking taps, shelters, barbecues, rubbish bins, security lighting, irrigation, drainage or underground infrastructure.**
- Playground equipment or sporting equipment, provided these facilities do not occupy more than 10 square metres of parkland.
- Navigational beacons and aids.
- **Planting or landscaping.**
- **Fencing that is 1 metre or less in height above ground level.**
- A building or works shown in an Incorporated plan which applies to the land.
- **A building or works carried out by or on behalf of a public land manager**, Parks Victoria or the Great Ocean Road Coast and Parks Authority, under the *Local Government Act 1989*, the *Reference Areas Act 1978*, the *National Parks Act 1975*, the *Fisheries Act 1995*, the *Wildlife Act 1975*, the *Forest Act 1958*, the *Water Industry Act 1994*, the *Water Act 1989*, the *Marine Safety Act 2010*, the *Port Management Act 1995* or the *Crown Land (Reserves) Act 1978*.

(Tribunal’s emphasis added)

- 47 Based on these exemptions a permit is not required under the PPRZ provisions for the construction of the new trails, fencing and underground services. We note the works to construct the amended car park overlap with works that form the new trail to the eastern and southern edge of the expanded car park. Part of the trail also relies on removal of native vegetation.
- 48 On day 1 of the hearing, we asked parties to clarify the permissions required and to identify the permissions under review. In particular, we queried whether or not the last of the exemptions in cl 36.02-2 applied to the proposal, given the buildings and works are to be undertaken by ARV which operates as a public body under the provisions of the *Alpine Resorts*



Act 1997 (Vic) ('AR Act'). In this context, we also questioned whether ARV is bound by the provisions of the scheme, consistent with s 16 of the PE Act.

- 49 By order of 18 October 2024, we required the responsible authority and ARV to provide written submissions addressing whether the exemption provisions of s 16 of the PE Act applied and, if not, what permit permissions under the scheme were required. We also invited the review applicants to provide written submissions addressing these matters.²¹
- 50 Submissions were received from the responsible authority and ARV.²²
- 51 No written submissions were received from other parties in response to our 18 October 2024 orders.

Section 16 of the PE Act

- 52 Section 16 of the PE Act provides that a planning scheme is binding on all Ministers and states:

Application of planning scheme

A planning scheme is binding on every Minister, government department, public authority and municipal council except to the extent that the Governor in Council, on the recommendation of the Minister, directs by Order published in the Government Gazette.

- 53 There is an order of the Governor in Council published in the Government Gazette on 10 February 1988 ('1988 order') that exempts various ministers from the PE Act, including the Minister for Conservation, Forests and Lands.
- 54 The responsible authority submitted that the 1988 order is a statutory instrument, being an order made under s 16 of the PE Act, for the purposes of s 3 of the *Administrative Arrangements Act 1983 (Vic)*. The responsible authority's submission then sets out that:²³
- In searches conducted to respond to the Tribunal's order, we have not been able to identify any order which verifies that the reference to the Minister for Conservation, Forests and Lands in the 1988 Order can be construed as a reference to the Minister for Environment for the purposes of the 1988 Order and therefore these proceedings.
- 55 The ARV's submission made similar comments and agreed that, in the absence of clarity, the exemption did not apply.
- 56 Based on the submissions and on the information available to us, there is no clear thread of authority to confirm that the now Minister for Environment is exempt from complying with the scheme under s 16 of the PE Act. We therefore conclude that the PE Act and its subordinate provisions, including

²¹ Submissions by any party on the issues raised were directed to be filed by 28 October 2024.

²² Written submissions from the responsible authority and ARV, both dated 28 October 2024 were received by the Tribunal.

²³ Responsible authority's submission, dated 28 October 2024, [20].



the scheme applying to the subject land, are binding on the ARV and apply to the proposal before us.

Are the works by or on behalf of the public land manager?

57 The ARV's submission²⁴ states:

[25] ARV considers that, given the Minister for Environment's ultimate role and responsibility for Crown land reserved under the CLR Act (including specifically the Resort), and the extent of control that the Minister for Environment has over ARV and its functions and powers under the ARM Act, it is open to the Tribunal to conclude that ARV exercises its functions in a capacity that is auxiliary to or representative of the Minister for Environment, and that ARV has a direct representative relationship of the type envisioned by the Practitioner's Guide.

[26] It would follow that it is open to the Tribunal to conclude that the development proposed on the land within the PPRZ has the benefit of the exemption in Clause 36.02-2.

58 The ARV's submission, however, goes on to state:

[29] Notwithstanding what is set out above, all parties have prepared on the basis that the exemption in Clause 36.02-2 does not apply to the proposed 'buildings and works' in the PPRZ, and in terms of the issues that the Tribunal would be required to determine, very little turns on the question of whether the permit requirement in Clause 36.02-2 applies or not.

[30] Accordingly, if the Tribunal forms the view that the exemption does (or may) apply, ARV requests that the Tribunal also provide reasons setting out the decision of the Tribunal on the alternative assumption that the exemption does not apply.

59 The responsible authority's submission is that while there is scope that ARV could be acting on behalf of the Minister for Environment:

[45] ...additional circumstances are required here to establish that the Minister for Environment, as the public land manager, is the 'real and substantial' proponent of the works and the position that the buildings and works would be conducted 'by or on behalf' of the public land manager. Such circumstances have been highlighted in previous cases and include matters such as the public land manager:

[45.1] being responsible for the design, construction and/or funding of the buildings and works;

[45.2] specifically directing the party conducting the buildings and works to undertake those buildings and works such as through a contractual arrangement present in previous

²⁴ Submission dated 28 October 2024.



cases such as SGL (albeit that was in the context of the 1988 Order);

[45.3] retaining ownership of the buildings and works.

[46] On this basis the Minister does not consider that it has been established that the Respondent, in undertaking the development of the car park and the ANARE shed upgrade, is acting in a manner auxiliary to, or representative of, the Minister for Environment as the public land manager of the Subject Land.²⁵

- 60 The responsible authority therefore concludes that the proposed buildings and works are not exempt under cl 36.02-2 of the PPRZ.
- 61 We observe that on a number of the relevant copies of title provided to the Tribunal there is a heading ‘Crown Land Administrator’ with ‘Alpine Resorts Victoria’ listed under this heading.²⁶ We make no finding as to any relevance this may have as to the public land manager status for the subject land. We have proceeded on the undisputed position presented by ARV and the responsible authority that the Minister for Environment is the public land manager.
- 62 From the submissions and material provided we also find that it has not been satisfactorily demonstrated to us that ARV is acting by or on behalf of the Minister for Environment for the purposes of the planning permit application before us.
- 63 We make these findings on the basis that the permit application form completed by ARV included a request for permission for buildings and works in the PPRZ. The permit application material also includes two letters to the Falls Creek Resort Management Board (ARV’s predecessor) providing written consent from the Department of Environment, Land, Water and Planning (as it was then known) under delegation from the Minister for Environment, in the Minister’s capacity as the public land manager, for the application for permit being made,²⁷ in accordance with the application requirements of cl 36.02-3 in the PPRZ.
- 64 Based on the information before us and the submissions provided, it has not been demonstrated that the exemption in cl 36.02-2 relating to buildings and works undertaken by or on behalf of a public land manager applies in this instance.

Comprehensive Development Zone – Schedule 2 (CDZ2)

- 65 On day 1 of the hearing, we sought clarification from the responsible authority, inviting comment from other parties, as to whether the works in the CDZ2 triggered a permit under this zone, given the works are to relocate the road that traverses the subject land and its intersection with BHP Road. We asked this in the context of cl 62.02 of the scheme, which

²⁵ Responsible authority submission 28 October 2024.

²⁶ Tribunal book 1: for example, page 10.

²⁷ Dated 16 September 2022 and 5 May 2023.



exempts roadworks from the need for a planning permit unless specifically required by the scheme. No such specific requirement exists in the provisions of the CDZ2.

- 66 Both the responsible authority and ARV advised verbally that they agreed the works are roadworks as the access is part of the road network through the resort. The XCSAV orally questioned whether the works were roadworks or earthworks.
- 67 The further written submissions of the responsible authority and ARV, in response to our 18 October 2024 order, confirmed their respective positions that the works in CDZ2 constitute roadworks and the proposed earthworks are directly connected with, or arising from the roadworks. As such they conclude the works can be deemed to be exempt from the need for a permit in accordance with cl 62.02.
- 68 As put by the responsible authority:
- [49] The works comprise roadworks and associated earthworks relating to the proposed new access entry point into the Subject Land.
- [50] Clause 62.02-2 of the Scheme provides that:
- Buildings and works not requiring a permit unless specifically required by the planning scheme**
- Any requirement in this scheme relating to the construction of a building or the construction or carrying out of works, other than a requirement in the Public Conservation and Resource Zone, does not apply to:
- ...
- Roadworks.
- [51] As the earthworks in this instance are directly connected with, and arising from, the roadworks, the Minister's view is that there is no permit triggered for those earthworks under the CDZ2.²⁸
- 69 None of the review applicants responded in writing to our 18 October 2024 orders. The XCSAV made some further oral comments during the hearing that it remained unclear that the works are roadworks.
- 70 We also made orders on 18 November 2024 inviting parties to comment on draft, without prejudice permit conditions. In response to this order, the XCSAV responded with uninvited commentary about the planning permissions it says are required.²⁹
- 71 Both the responsible authority (by email) and the ARV, in its reply submission about conditions,³⁰ raised concern about the unsolicited

²⁸ Responsible authority submission, 28 October 2024.

²⁹ Letter dated 25 November 2024.

³⁰ Dated 2 December 2024.



submissions of XCSAV about permit triggers. The ARV sought us to confirm that we would disregard the further submissions of XCSAV and if we did not, that it be able to reply to the submissions.

72 No leave was sought or granted to provide further submissions about permit triggers in the 18 November 2024 order, so we have not considered these submissions. We have therefore not sought further comment from other parties on the submissions made about permit triggers by the XCSAV.

73 Both 'road' and 'works' are defined in s 3 of the PE Act as follows:

"road" includes highway, street, lane, footway, square, court, alley or right of way, whether a thoroughfare or not and whether accessible to the public generally or not;

...

"works" includes any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil;

74 The project includes works to move an existing road to a new location and intersection with BHP Road. In context of the PE Act definitions and from our review of the material and submissions, we find that the works occurring in the CDZ2 are roadworks.

75 We also note that while not considering the further written submissions made by XCSAV to our 18 November 2024 order, these XCSAV submissions acknowledge that little turns on whether a permit is triggered for works in the CDZ2 area given the limited extent of works that are proposed within this area.³¹ As we examine later, we have still considered the limited works in the CDZ2 to the extent that:

- A permit is required to remove vegetation in the CDZ2 area, under cl 52.17.
- To be satisfied the proposal results in an acceptable outcome in the PPRZ area, we find there is also a need to address the construction and environmental management of the works proposed, including the works in the CDZ2. Therefore, we find it relevant to apply permit conditions to manage the works in the CDZ2 area.

76 We also note there appears to be some disparity between this application requirement in the CDZ2 schedule and cl 62.02-3.

77 Clause 62.02-3 – Vegetation removal, sets out that:

Any requirement in this scheme relating to the construction or carrying out of works does not apply to the removal, destruction or lopping of trees and the removal of vegetation.

This does not apply if a permit is specifically required to remove, destroy or lop trees or to remove vegetation.

³¹ XCSAV's further submissions dated 25 November 2024, [11(a)].

- 78 Clause 4.1 of the CDZ2 schedule sets out that a permit is required to construct a building or construct or carry out works. It does not specifically require a permit to remove, destroy or lop trees or to remove vegetation. However, cl 4.3 of the CDZ2 schedule, titled ‘Site development plan and planning permit application requirements’ has a sub heading at cl 4.3-2 titled ‘native vegetation’.
- 79 Under the ‘native vegetation’ permit application requirement heading there is a need to provide information about native vegetation proposed to be removed, including:
- An assessment of the effect of the development against Victoria’s Native Vegetation Management – A Framework for Action.
 - An assessment of the effect of the development on any flora or fauna listed under the *Flora and Fauna Guarantee Act 1988*.
- 80 This appears to be another matter where the scheme is inconsistent and anomalous. We say for two reasons:
- While the CDZ2 has application requirements for the provision of information pertaining to the removal of native vegetation, our reading of cl 62.02-3 together with CDZ2 is that no permit is triggered under the zone for native vegetation removal.
 - *Victoria’s Native Vegetation Management – A Framework for Action* is a 2011 document referred to in the CDZ2 but is not an incorporated or background document listed in the scheme.³² We understand this document has been superseded by the *Guidelines for the removal, destruction or lopping of native vegetation* (Department of Environment, Land, Water and Planning, 2017) (‘Guidelines’) which is referred to in cl 52.17 and is an incorporated document of the scheme at cl 72.04.
- 81 For the purposes of our review, we have considered the removal of native vegetation in context of cl 52.17 across both the PPRZ and CDZ2 areas. As we set out later in our reasons, we have also had regard to the Guidelines, as required by cl 52.17. As set out later in our reasons, we have also had regard to the objectives of the FFG Act.

Provisions of the scheme that require, enable or exempt a permit (cl 52)

Removal of native vegetation under cl 52.17

- 82 Clause 52.17-1 sets out that a permit is required to remove, destroy or lop native vegetation, including dead native vegetation, unless specific exemptions apply, including a table of exemptions provided at cl 52.17-7.
- 83 We concur with parties’ submissions that a permit is required to remove nominated native vegetation on the subject land in accordance with cl

³² As listed at cl 72.04 and 72.08.



52.17-1. We note the NOD refers to cl 52.17-2. We read this as a typographical error as the permit requirement is in cl 52.17-1.

Sale and consumption of liquor in cl 52.27

- 84 Clause 52.27 sets out that a permit is required to use land to sell or consume liquor, including where a licence is required under the *Liquor Control Reform Act 1998* (Vic).
- 85 The proposal includes the capacity for the food and drink premises to sell or allow for the consumption of liquor, so a permit is required under this clause.

Other permit and exemption issues

- 86 On day 1 of the hearing, we confirmed that while the NOD included permission granted under the Erosion Management Overlay ('EMO') in accordance with cl 44.01 and the Bushfire Management Overlay ('BMO') in accordance with cl 44.06, neither of these permissions are the subject of review as they are exempt from the notice and review provisions of the PE Act.
- 87 We note that since the NOD was issued, the EMO was removed from the subject land by planning scheme amendment C31alpr on 25 October 2024.
- 88 We make no findings regarding whether the proposed buildings and works require planning permission under the BMO.
- 89 No planning permit is sought or required to reduce the number of car parking spaces provided under cl 52.06-3. The required number of spaces in the table to cl 52.06-5 is met for the food and drink premises. The information centre and informal outdoor recreation are both uses not listed in the table and therefore parking is to be provided to the satisfaction of the responsible authority, only, in accordance with cl 52.06-6.
- 90 Clause 52.06-8 requires a parking layout plan to be prepared to the satisfaction of the responsible authority, with the design of the plan directed by provisions of cl 52.06-9. Consistent with previous decisions of the Tribunal, cl 52.06-8 is not a provision that reviewable by an applicant under s 82 of the PE Act.³³ We do consider the car park design as it relates to works under the PPRZ.

Existing use rights

- 91 Finally, in making submissions about permissions for buildings and works, some question was raised as to whether the car park use relies on existing use rights given it has existed and been used for many years.
- 92 The existing car park is used to service the existing public park and recreation uses and therefore is ancillary to the use of the land for informal

³³ E.g. *Save Our Seat Inc v Mornington Peninsula SC* (Includes Summary) (Red Dot) [2014] VCAT 1494, and *Alphington Grammar School v Yarra CC* [2024] VCAT 148



outdoor recreation. The altered car park will in part be used to service the food and drink premises use but we are satisfied the remainder of the car park is associated with the use of the land for informal outdoor recreation, which is a use that does not require a planning permit, being a Section 1 use under cl 36.02-1. The works associated with expanding the car park require a planning permit under cl 36.02-2 in the PPRZ, as it is the construction or carrying out of works not undertaken by or on behalf of the public land manager.

What is the relevant policy context?

93 The provisions directing the need for a permit require us to consider both the Municipal Planning Strategy (‘MPS’) and the Planning Policy Framework (‘PPF’). Parties referred us to many elements of the MPS and PPF. We do not recite them all but comment on elements below that we find particularly relevant to the specific considerations before us in the context of our site within the resort.

94 In addressing policy, we have considered the strategic directions of cl 02.03 of the MPS, although the MPS states these directions are to be read in the context of strategic framework plans at cl 02.04. The relevant Falls Creek plan at cl 02.04 is dated November 2004, some 20 years ago, and makes no reference to the subject land at all. It is not included in either the village or ski field areas.

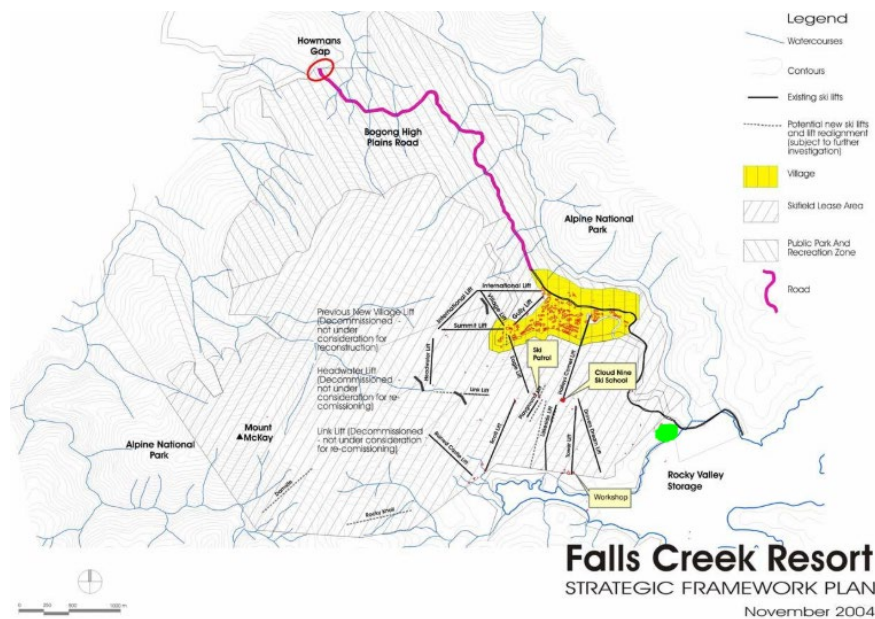


Figure 8: Falls Creek Resort Strategic Framework Plan, November 2004, extracted from cl 02.04, with the Tribunal’s green highlight of the approximate location of the subject land being outside the identified village and ski field lease area.

95 Given the subject land was not added to this scheme until 2013, 11 years after the date of the strategic plan, this is not surprising. However, the dated nature of the strategic framework plan for the resort at cl 02.04 means



it provides little assistance in understanding the strategic directions of cl 02.03 insofar as they relate to the subject land.

- 96 There are other inconsistencies in the policy framework. For example, cl 12.04-1L (Sustainable development – alpine resorts) states the policy applies to ‘all alpine resorts as identified on the Context Plan at Clause 02.01.’ However, there is no context plan at cl 02.01. There was general agreement between parties that given the subject land is within the resort boundary of Falls Creek that we should have regard to the policy at cl 12.04-1L regardless of the inability to identify the land due to a lack of plan at cl 02.01 or that the PPRZ, applying to most of the subject land, is not in the strategic framework plan at cl 02.04.
- 97 Consistent with the direction in cl 02.02 of the scheme (Vision), we have had regard to the 2020-2025 strategic plan for alpine resorts. We note that strategic action 4.4 of the 2020-2025 strategic plan is to ‘improve the effectiveness and efficiency’ of the scheme.³⁴ The action is accompanied by commentary that there are inefficiencies and inconsistencies in the drafting of current policies and provisions within the scheme. The strategic plan then comments, ‘a more efficient planning scheme would have a positive flow-on effect of reducing the volume of permit applications and overall administrative burden.’³⁵
- 98 Given the length of submission needed from the parties to identify what policy is applicable and how it is applicable, and the need to dismiss what appear to be errors in the scheme, we agree with this statement of the 2020-2025 strategic plan.
- 99 Our consideration of policy below and in the assessment of issues has been undertaken in context of the policy, as referred to by all parties, despite the lack of up-to-date reference and mapping and what appear to be errors in cross referencing, or lack of referencing.

Settlement policy

- 100 The XCSAV comments that the proposal is outside of the resort village and referred to elements of cl 02.03-1 (Settlement and housing) and cl 11.01-1L (Alpine villages) that seek to consolidate villages across all alpine resorts to land within existing village boundaries to limit intrusion into the ski fields, ensure effective use of infrastructure, maximise accessibility to facilities and limit environmental impacts.³⁶ Clause 02.03-1 also has strategic directions for settlement and housing aimed at ‘providing further ski field infrastructure to address demand, designed and built in accordance with the environmental capacity of the resorts.’
- 101 Clause 11.01-1L only applies to land within the resort villages as shown in the Village Strategic Framework Plan at cl 02.04 and the Comprehensive

³⁴ *Alpine Resorts Strategic Plan 2020-2025*, page 33.

³⁵ Ibid.

³⁶ Paraphrased from cl 02.03-1 – all resorts.



Development Zone – Schedule 1 (‘CDZ1’) area.³⁷ It is therefore not directly relevant to our decision as the subject land is in the PPRZ, with a small component in the CDZ2. The subject land is well outside the boundaries of the Falls Creek village, being the CDZ1 area.

- 102 Policy at cl 12.04-1S (Sustainable development in alpine areas) has an objective to facilitate sustainable use and development of alpine areas ‘for year-round use and activity’. In addition to strategy to implement the 2020-2025 strategic plan, relevant strategies to implement the objective include:

Ensure that the use and development of land is managed to minimise the disturbance of indigenous flora and fauna and sensitive landscapes.

Ensure that there is a mixture of use and development to cater for users of alpine areas in all seasons.

Promote development for active recreation solely at Falls Creek, Lake Mountain, Mt Buffalo, Mt Baw Baw, Mt Buller and Mt Hotham.

Ensure that increases in skier, pedestrian and vehicular activity in the resorts do not compromise public safety or the accessibility and capacity of ski fields, services, commercial activity and development of trailheads.

- 103 Specific to Falls Creek, there is also relevant strategy to:³⁸

Support the development of attractive major facilities along the Bogong High Plains Road, to enhance the arrival experience for visitors to the resort.

Encourage small scale commercial and retail development in the ski fields if it:

- Fulfils a demonstrated need for snow users.
- Is integral to a development for passive alpine recreation.
- Does not impede ski runs or major skier routes.

Environmental and sustainable development policy

- 104 Consistent with broader statewide biodiversity policy at cl 12.01, cl 02.03-2 (Environmental and landscape values) includes relevant directions across all alpine resorts that are aimed at:

- Protecting significant flora and fauna species and communities, including the Alpine Bog Community and the Mountain Pygmy-possum.
- Protecting biodiversity values through appropriate development of the villages and ski fields.
- Managing the off-site effects of development and land use to minimise their environmental impact.

³⁷ Clause 11.01-1L (Policy application).

³⁸ Clause 12.04-1L (Sustainable development – Falls Creek Alpine Resort).



- Ensuring land use and development close to the boundaries of the national parks are compatible with their scenic and environmental values.

105 Clause 02.03-3 (Environmental risks and amenity) includes relevant directions across all alpine resorts that are aimed at:

- Preparing for extreme weather conditions and changes to snow depth levels.
- Minimising the risk associated with ground stability by managing the removal of vegetation, the siting and design of buildings, works and infrastructure and the presence of drainage lines, subterranean water levels and movement.
- Using design and construction measures that incorporate sustainable design principles.

106 Clause 02.03-4 (Natural resource management) includes relevant directions across all alpine resorts that are aimed at:

- Ensuring use and development protects waterways and water quality in the snow season and the green season.
- Providing service infrastructure that does not adversely affect the water quality of the catchments.

Built environment and heritage policy

107 Clause 02.03-5 (Built environment and heritage) includes relevant directions across all alpine resorts that are aimed at:

- Ensuring that the design, scale, height and materials of development are sympathetic to the existing natural and built form character of the resorts.
- Protecting and preserving pre and post-contact history within the resorts as a key influence on the future location, siting and design of development.

108 These strategies are supported by further policy at cl 15.01-2L (Built form in alpine resorts). Relevant strategies include protecting vistas to ski fields through the location, design and siting of development as well as limiting the impact of development on the environment and adjacent development, through the use of design and construction management techniques.

Economic development policy

109 Clause 02.03-6 (Economic development) includes relevant directions across all alpine resorts that are aimed at:

- Promoting ‘all seasons’ visitation through active and passive recreation that operate year round.
- Maintaining commercial and service facilities to meet the needs of all visitors.



- Facilitating the right mix of commercial, retail, accommodation, entertainment, community and service facilities for the ongoing viability of resorts as year-round destinations.

110 Relevant to the alpine area, cl 17.04-1L (Alpine tourism) reiterates other objectives by seeking to ‘provide for year-round recreation, having regard to environmental, social, ecological, economic, aesthetic and safety considerations.’ Relevant to the proposal before us, the objective is supported by strategies across all resorts to:

Provide for a range of tourism and recreation opportunities and facilities that are compatible with the alpine environment of the resorts.

Facilitate sufficient skifield terrain catering to a range of skill levels, cross-country trails, snow play areas and associated infrastructure.

Support the use of the resorts as year-round destinations, capitalising on the natural beauty, environmental qualities and infrastructure of the resorts.

Encourage the integration of the cross country trail system with the trails of adjoining State and National Parks.

111 Specific to Falls Creek, also at cl 17.04-1L (Falls Creek tourism), is an objective to ‘develop a range of year-round tourism, commercial and recreation facilities in multipurpose venues compatible with the environment of Falls Creek’. Relevant strategies to implement this objective include:

- Improve the interface between the ski field areas and Village Plaza, the Village Bowl, Gully Portal and Windy Corner.
- Encourage development of the cross country trail system, particularly in the Rocky Valley Dam area and the Nordic Bowl.

Transport policy

112 Clause 02.03-7 (Transport) includes relevant directions across all alpine resorts that are aimed at:

- Providing safe and efficient movement of vehicles, pedestrians, cyclists and skiers throughout resorts, particularly within the Villages.
- Locating and siting transport terminals, including bus and helicopter infrastructure, together with integrated intra and inter-Village transport solutions.
- Facilitating car parking for visitors, residents and commercial operators during the winter and summer seasons.
- Providing safe and appropriate access and facilities for emergency services.

113 There are again corresponding local policies at cl 18.01-2L (Transport systems – Falls Creek). These include relevant strategies to:



- Protect public spaces to allow maintenance of the ‘ski-in/ski-out’ feature of Falls Creek, enabling safe and efficient skier movements.
- Facilitate pedestrian and skier links to adjoining recreational experiences within the Alpine National Park.

WHAT ARE THE KEY ISSUES TO ADDRESS WITHIN THIS CONTEXT?

114 In context of the decision-making framework of the scheme and PE Act we find the key questions we need to determine are:

- Is the proposed use and development acceptable in the context of its location in the resort? This includes:
 - Is the use and development consistent with policy and the zone purposes applying to the land?
 - Will the proposal lead to unreasonable/unacceptable traffic safety impacts?
 - Will the proposal provide an acceptable outcome?
- How should intangible Aboriginal heritage be considered?
- Is the proposed native vegetation removal acceptable?
- Are the likely environmental impacts acceptable?
- Is the proposed liquor licensing acceptable?

115 We address these below.

IS THE PROPOSED USE AND DEVELOPMENT ACCEPTABLE IN CONTEXT OF ITS LOCATION IN THE RESORT?

116 There are several specific issues that the applicants separately and collectively raise in opposition to the proposal. These include submissions from the XCSAV that the proposed use and development is contrary to policy in the scheme about the location of commercial facilities in the resort and policy that they submit seeks to protect ski fields and ski trails.

117 The XCSAV and Dr Spring also submit the proposal will lead to unacceptable safety impacts on the road network and impact the landscape values of the site.

118 This leads us to address the following issues:

- Is the use and development consistent with policy and the zone purposes applying to the land?
- Will the proposal lead to unacceptable traffic safety impacts?
- Will the proposal provide an acceptable landscape outcome?



Is the use and development consistent with policy and the zone purposes applying to the land?

- 119 The XCSAV submits that as the subject land is located outside of the Falls Creek Village, as defined by policy and the application of the CDZ1, the proposed use and development is discouraged at what they submit is a remote location of the resort.
- 120 The XCSAV submits the zone controls of the CDZ2 and PPRZ only contemplate limited development and small scale commercial or retail use in the ski fields and do not support what they refer to as ‘out-of-centre’ retail or commercial development.
- 121 The only policy in the scheme that provides direction about ‘out-of-centre’ development is in cl 17.02-2S. This has an objective to ‘manage out-of-centre development’ and goes on to refer to retail, commercial and recreational facilities outside of activity centres. There is no designated activity centre in Falls Creek. There is policy direction to consolidate urban type development to within the villages, but policy at cl 02.03 identifies the need to provide some limited commercial development in the broader resort area.
- 122 The proposed food and drink premises and information centre are in the PPRZ. The PPRZ includes a purpose to ‘provide for commercial uses where appropriate’.³⁹ Specific policy referred to by the XCSAV that seeks to focus commercial use and development in nodes within the village is policy specifically identified as applying to land in the village.⁴⁰ It is not policy that applies to the subject land.
- 123 The proposal is consistent with the 2020-2025 strategic plan, referred to in cl 02.02, as it provides for ‘new assets to boost sustainability of green season activities’.⁴¹ This strategic plan also sets out that such new assets should not impact on ‘continued investment in the snow season’.⁴² The 2020-2025 strategic plan then identifies that ‘there are opportunities to diversify offerings in the snow season to include activities less dependent on traditional snow cover’.⁴³
- 124 Our review of policy across the MPS and PPF is that the use and development directly assist in broadening the support services for year-round recreation and tourism activities at the resort and the adjoining ANP as sought by the MPS at cl 02.03-6 and the PPF at cl 12.04-1S and cl 17.04-1L. We find the balance of policy supports the proposed uses and development, subject to relevant impacts being addressed.

³⁹ Clause 36.02 (Purpose).

⁴⁰ Clause 11.01-1L (Policy application).

⁴¹ Strategic Objective 1, page 26.

⁴² Ibid.

⁴³ Ibid.



- 125 The strategic support provided by the scheme and the strategic plan needs to be balanced against potential detrimental impacts. These include that:
- The XCSAV submits the proposal will result in a loss of ski trails and will unreasonably detract from the capacity of the resort to provide for Nordic ski activities.
 - Dr Spring and the XCSAV submit the proposed increase in activity will lead to unacceptable impacts on the safe use of BHP Road, if used for vehicle access during winter months to access the proposed uses.
 - The XCSAV submits there is no policy support for additional car parking at the subject land.
- 126 XCSAV also submits ARV has not sufficiently demonstrated a need for the proposal. In *Tulcan Pty Ltd v Knox CC*⁴⁴ the Tribunal commented:

[11] Need is a fundamental concept in town planning, because town planning is essentially concerned with shaping our physical environment to meet the social economic and environmental needs of the community. However in individual development applications the role of need is complex. At one end of the scale, there are ubiquitous land uses in relation to which the Tribunal has said that need is not a matter for the planning system, rather it is a matter for the competitive market place. On the other hand there are important community based uses where the Tribunal has found that the need for the use can outweigh other important, and ordinarily decisive, planning considerations. An often quoted example of this latter case is the helipad at the Alfred Hospital.

[12] Nevertheless, there is a middle ground in which need may not be a decisive factor in the case of an individual development application, but will be a factor which influences the balances to be struck between competing planning policy consideration.

[13] General characteristics of these middle ground cases are:

- There is an unmet demand for the particular land use;
- The market is often prepared to meet the demand, provided that the obstacles to establishment are not too high;
- There is expressed planning policy support for the particular use type, in the case of a retirement village and boarding houses the housing diversity policies are an example;
- The use proposed is different from the norm, when the norm is defined as the predominant use type, such as conventional family housing in a suburban situation.

⁴⁴ [2003] VCAT 1627, footnotes omitted.



- There can be conflicts between planning policies directed towards preserving existing character and amenity and these land uses, for example the intensity of the physical development associated with the retirement villages, or the social implications of a housing type primarily directed at disadvantaged men.

127 Consistent with these comments, in *BAMFA Properties v Manningham CC*⁴⁵ the Tribunal commented that ‘a demonstrated need for a facility or use may be a relevant factor in a decision but lack of a need will rarely, if ever, be a ground for refusing to grant a planning permit’.

128 There is policy support in the scheme to diversify tourism and recreation opportunities throughout the year. The scheme and the PE Act do not require the ARV to prove a demonstrated need for the specific proposal. The positive and negative attributes of the proposal must be assessed as questions of merit, to determine on balance if there is an overarching net community benefit of a proposal.

Potential impact on ski trails or ski fields

129 The XCSAV submits the use of the ANARE shed for the proposed uses through the winter season, relying on the associated car parking in the amended car park area, will lead to ARV clearing snow from BHP Road during the white season. They submit this will, in turn, adversely impact on the availability and connectivity of cross country ski trails. Ms Paul, who presides over the organisation of the Hoppet in her capacity as the ‘Chief of Race’, provided lay evidence that in her view, both the Hoppet and FIS racecourses would be severely impacted by the clearance of snow from BHP Road where cross country ski trails currently use part of BHP Road for both the international events and for general skier use.

130 Policy at cl 12.04-1L encourages small scale commercial and retail development in the ski fields if it:

- Fulfils a demonstrated need for snow users.
- Is integral to a development for passive alpine recreation.
- Does not impede ski runs or major skier routes.

131 There were varying submissions as to whether the fact that skiers use BHP Road in the snow season makes it a major ski route. There is no definition in the scheme of a ski run, ski route, or a major ski route. Information leaflets and signage issued by ARV to visitors lists ‘Trail details’ and ‘Trail access’. BHP Road is listed as part of the ‘Trail access’ list, as is Pretty Valley Road.

132 We also observe that cl 02.03-7 (Transport – Falls Creek) states, ‘pedestrians and skiers have priority over movement of vehicles, except on Bogong High Plains Road’.

⁴⁵ [2008] VCAT 364 (11 March 2008).



- 133 The ARV acknowledges the submissions of XCSAV that the Falls Creek resort is advertised as Australia’s home of cross country skiing, including on the Falls Creek resort webpage. This is because of the extensive cross country ski trails for both beginners and more advanced skiers and the ability for skiers to easily access terrain.
- 134 There is also no dispute that Falls Creek hosts key cross country skiing events, notably the Kangaroo Hoppet. Annual reports of the Falls Creek Management Board refer to this event as the largest and most prominent cross country ski race in the southern hemisphere. Mr Louw’s lay evidence is that the Hoppet typically attracts over 1,000 skiers each year, including interstate and international visitors. Mr Louw’s evidence included a number of extracts from the Falls Creek Management Board / ARV, Annual reports. These include a statistic in the 2019 annual report that in 2018/19 the Hoppet races attracted ‘over 1,100 participants including 22% from 24 international nations’.⁴⁶
- 135 **The Kangaroo Hoppet** is a single-day ski event consisting of three races over different distances (42 kilometres, 21 kilometres and 7 kilometres). We understand it is usual for increased use and patronage of the cross country ski trails in the week leading up to the event, with entrants arriving early and testing the trails.
- 136 The event is reliant on sufficient snow fall. In 2023 and 2024 the event did not run due to a lack of snow cover.
- 137 We also understand from submissions that International Ski and Snowboard Federation (‘FIS’) accredited races and training courses are important to the status of Falls Creek as the premier cross country skiing location in Australia.
- 138 No planning approval under the scheme or PE Act is required to clear snow.
- 139 What is before us is to consider the potential consequences of the ANARE shed being used for the proposed purposes during the white season with the shed uses relying on car parking within the subject land. One consequence is that access to the car park would require road access via BHP Road. When snow is over BHP Road, the snow would need to be cleared to provide safe access for private motor vehicles to the car parking associated with the proposed uses.
- 140 There was extensive cross-examination of witnesses as to the convenience or usability of alternative ski trail and network options if skiers are unable to use BHP Road as a skiable trail access. There was also some confusion between parties as to what the effect of closing BHP Road may mean, with the lay evidence statement of Mr Brown⁴⁷ incorrectly depicting how ARV

⁴⁶ Attachment to Mr Louw’s lay witness statement: Falls Creek Management Board – Annual Report, page 14.

⁴⁷ Current ARV Head of Assets Portfolio Management and former Director Infrastructure & Mountain Response at Falls Creek Alpine Resort.



may amend trails if BHP Road is cleared of snow. This led to a corrected plan⁴⁸ and updated evidence statements provided by Ms Paul and Mr Louw in response.⁴⁹

141 **Relying on the corrected plans that show how the trail system may work if BHP Road is cleared of snow, we understand that:**

- About 1.2 kilometres of BHP Road that is currently used by cross country skiers in the white season for access to Nordic trails would no longer be available.
- Ski-in / ski-out access from the village would be retained using the Aqueduct trail. This trail would not be altered, other than a need to cross BHP Road by foot at one point.
- Day visiting cross country skiers that do not park at the expanded Lakeside Precinct car park would need to catch a shuttle bus to the Nordic Bowl or the Lakeside Precinct, from the Falls Creek Village or Windy Corner. The shuttle bus is a service that is not under our review. It would be an operational decision of ARV to establish a shuttle bus system if it chose to do so as a replacement or for supplementary access to the outer network of cross country ski trails.
- A small section of trail would be established parallel to BHP Road for about 80 metres between what is described as ‘the Hoppet start’, being south of the main Nordic bowl area, and the created ski trail proposed in place of the existing roadway, across the subject land.
- Two other existing trails, one known as the Horse Yard trail, the other known as part of Little Panorama / Panorama Loop would be altered as part of their current ‘loop’ uses BHP Road as a ski trail.

142 Ms Paul’s evidence is that removing the loop function from trails will render the Horse Yard and Panorama trails useless as they will become dead ends. Part of the Panorama Trail is understood to form part of the homologated FIS courses.⁵⁰

143 Ms Paul’s evidence is also that the operational changes proposed by ARV to run the Hoppet by moving snow, or retaining snow on BHP Road for the week of the Hoppet event and using the created ski trail to the east and south of the expanded car park, would be insufficient or unworkable for the Hoppet.

144 XCSAV also tabled written lay evidence statements from cross country skiers concerned about the loss of BHP Road for skier use. These included evidence statements from:

⁴⁸ Figure 2 XC Ski Trail Project Impacts, dated 18 October 2024.

⁴⁹ Each dated 8 November 2024, filed with the leave of the Tribunal in accordance with the order dated 4 November 2024.

⁵⁰ Official Map of 3.75km FIS course, evidence statement of Ms Paul, dated 24 September 2024, page 169.



- Matthew Brumby, para-athlete. He expresses concern about how he would access the main Nordic Bowl ski area if he were unable to ski directly from Windy corner or the Village, using his sit-ski. He states that ‘[e]ven if there was a car park out at the Lakeside, I would still have to contend with getting out of the car there, where I would have to contend with increased snow drifting and bad weather. I would also have no option to get to the trails if the car spaces at Lakeside were full.’⁵¹
- Glen Clark, a ski instructor and tour operator at Mt Hotham. His statement reflects on impacts of what he describes as the ‘scourge of having the Great Alpine Road bisecting’ the ski trail network of Mt Hotham. This includes dirt, dust and vehicle pollution on ski trails, as well as potential safety concerns with skiers intermingling with walkers and vehicles. He expresses concern that opening BHP Road may lead to similar impacts to those experienced at Mt Hotham.
- Kim Franzke, Principal at Tawonga Primary School and main organiser of the Tawonga Primary School ski program. Her evidence explains that currently students travel by shuttle bus from the main village to Windy Corner. If this is extended to a trip to the Nordic Bowl or Lakeside it will add travel time and potentially split student groups from the group leader, creating logistical issues for student coordination and safety. She also states that parts of BHP Road form a good learner trail for inexperienced skiers.
- Lauro Brändli, professional cross-country ski racer based in Switzerland. His evidence supports the importance of the Kangaroo Hoppet as a ski challenger event, expressing concern that if the event did not occur it would ‘be a huge threat for Falls Creek as a cross-country ski destination and the whole cross-country skiing community in Australia’ as Falls Creek would lose its visibility on the global cross country skiing stage.⁵² He also expresses concern at the potential loss of FIS races from possible changes to the ski trails.
- Robert Catto-Smith, cross country ski coach. His evidence sets out his view that BHP Road is a lynchpin in the trail network, with parts of the road being sheltered trail and holds snow well. He expresses concern at the potential need for skiers to walk to trails and the interface with vehicles if managing larger skier groups.

145 **Mr Brown’s evidence** is that the ARV is committed to maintaining the Kangaroo Hoppet event at Falls Creek, however, the design and function of the event may need to change. This is in response to the potential use of the

⁵¹ Brumby evidence statement, notably [5] and [8].

⁵² Brändli evidence statement, [13].



ANARE shed area but also to address increasing impacts of climate change, that are reducing regular snow coverage in this part of the resort.⁵³

Assessment

- 146 While we appreciate the desire for the XCSAV to maintain the trails as they currently exist, including skiing on BHP Road, and the road that traverses the subject land, our assessment needs to consider how the proposal can support the aspirations of the resort as a whole for a variety of recreation activities. In the white season this includes cross country skiing but also general access for day visitors to visit and enjoy the landscape of the area.
- 147 Whether the proposal for the ANARE shed may lead to BHP Road, which is a designated road, being used by vehicles rather than as a ski trail during winter is ultimately an operational decision for ARV in its capacity as road manager and resort manager.
- 148 If the ANARE shed is used during the snow season, leading to cleared access of BHP Road, it may make parts of the cross country trail network function differently to the way they currently operate. None of the changes that the ARV submit may occur if BHP Road is cleared of snow will close the whole of the cross country skiing area. A substantial network of trails will remain accessible for cross country skiing.
- 149 The changes will also potentially lead to changes to the location or route of the Kangaroo Hoppet. However, we note ARV submits it could move snow onto the road and close the road to accommodate the current event course. We were informed by ARV that managing snow to locate more snow onto areas needed for skiers is already regularly undertaken throughout the resort. The proposal does not prohibit or restrict snow being moved.
- 150 There is nothing before us to indicate that cross country skiing cannot continue to occur, only that for some visitors, the way it occurs may change if BHP Road is cleared of snow. The submissions and evidence of the cross country skiing community put to us is that this change will result in more inconvenient access for beginner skiers and impact on expert trails. XCSAV also submits that if the Kangaroo Hoppet event does not occur it will decrease the number of visitors to Falls Creek during the snow season. Its view is that the changes proposed by ARV to snow and trail management will render both the Kangaroo Hoppet and FIS courses unworkable.
- 151 In the scope of the overall benefits the proposed visitor centre at Lakeside can provide, and the broadening of the tourism and recreation facilities offered at this location, we are satisfied the operational changes that may occur as a result of accessing the facility in the winter season should not result in a refusal of the planning permit or some form of permit condition that limits the use of the facility to the green season. In addition to being

⁵³ At [27] and [28] of the evidence statement of Mr Brown, dated 23 September 2024.



unnecessary, we consider such a condition would be both impractical and unworkable.

- 152 We find it is inappropriate to limit the proposed uses on the basis that BHP Road must not be made available for private motor vehicles to access the proposed facility. We cannot direct a road authority when to open or close a road. If the ARV determines not to open BHP Road, then either the proposed facility would not operate, or alternative access and parking arrangements would need to be provided. This will be an operational decision of the ARV linked to its potential lease arrangements with the future operator, and how the resort chooses to manage snow and road access.
- 153 If the road manager chooses to open BHP Road to provide access to the proposed uses in the snow season, we are satisfied the access arrangements do not prevent the continued use of the resort for cross country skiing to the extent that we find it would unreasonably conflict with the policies and provisions of the scheme. The operation of the use, with access provided by the opened BHP Road, will lead to changes in the cross country trail network and a reduction in the use of some trails through loss of part of BHP Road as a ski trail. However, in the scope of the benefits the uses can bring to a broader visitor base, we are satisfied the potential that may occur through different operational conditions is acceptable.
- 154 We also note that the changes to the Lakeside car park include the provision of two disabled car parking spaces, close to the ANARE shed, and a new access ramp to the facilities of the shed. One space sits in a sheltered location, having the ANARE shed to its west and embankments to its north and east. The other sits across the existing road and has direct access to the new trail.
- 155 The XCSAV also referred us to the Falls Creek Masterplan of 2016. This plan refers to the Lakeside Precinct as providing green season leisure activities including a summer beach kiosk and equipment hire. The masterplan is not referred to in the scheme, so we give it limited weight. The masterplan proposal to create ‘a new lake edge setting to support summer trail and water-based activities, along with special events and activities hosted by Falls Creek’ does not mean the area cannot be used in winter. Indeed, the area is already used in winter for cross country skiing and snow shoeing.
- 156 To any extent that the 2016 masterplan may have directed that the improvements to the Lakeside precinct are to improve green season activities, this does not lead us to a conclusion that the use can only occur in the green season. The scheme directs a need to provide year-round activities and facilities.⁵⁴

⁵⁴ For example, at cl 02.03-6 (Economic development), cl 12.04-1S (Sustainable development in alpine areas), cl 17.04-1L (Alpine tourism) and cl 17.04-1L (Falls Creek tourism).



Will the proposal lead to unreasonable traffic safety impacts?

Traffic impacts arising from the proposal

- 157 Dr Spring submits the proposal will result in unsafe transport infrastructure, with an increased dependence on cars to access the Lakeside precinct. He submits this will result in cross country skiers mixing with other road users at trail–road intersections and not promote walking and cycling to this precinct or the adjacent ANP. As such, he says the proposal will have a negative impact of the health and wellbeing of road users.
- 158 In making these submissions Dr Spring relies on the *Road Management Act 2004* (Vic), the Victorian Road Safety Strategy 2021 – 2030, along with a road safety audit (‘RSA’) prepared and addressed in traffic safety evidence provided by Mr Harris. The RSA leads to submissions of Dr Spring that he considers the existing BHP Road, between Windy Corner and the Lakeside Precinct, is too narrow to provide safe access and has limited to no shoulder on the side of the pavement to provide for slips or mishaps as can occur on slippery or icy roads, and limited visibility due to weather conditions in alpine environments.
- 159 XCSAV agrees generally with Dr Spring’s submission, stating they consider the traffic impacts of the proposal have not been properly assessed. In particular, they submit the proposal introduces a new commercial use, in a remote location, which is proposed to be accessible in winter when the driving conditions are the most challenging. They agree with Dr Spring that an RSA should have been prepared before the application was finalised to determine if BHP Road is fit for purpose and whether any remedial works and/or management measures are required.
- 160 The XCSAV submits it is not sufficient to merely state ARV is likely to complete an independent RSA. If works are required to make the road access safe, XCSAV submits they should be identified now, and a commitment made to implementing all of the required measures.
- 161 Clause 65.01 of the scheme states that before deciding on an application, various matters must be considered, as appropriate. These include:
- The orderly planning of the area.
 - The adequacy of loading and unloading facilities and any associated amenity, traffic flow and road safety impacts.
 - The impact the use or development will have on the current and future development and operation of the transport system.
- 162 The consideration of these matters needs to be proportionate to the likely impact from the increase in traffic from the proposal. Evidence about road safety was provided by Mr Harris, on behalf of Dr Spring, and evidence

about traffic and road safety by Ms Dunstan on behalf of ARV. A conclave of these two experts was conducted before the hearing.⁵⁵

- 163 The conclave report of the experts noted in a review of the scope of the proposal's associated changes to the road network that:

A consequence of the proposal is changes to the management of BHP Road, which will open BHP Road between Windy Corner and the Lakeside Precinct during Declared Snow Season to service the development to facilitate year-round operation.

ARV is the responsible road manager for roads and road related areas, within the Alpine Resorts, including BHP Road. ARV's responsibilities include snow and ice clearing operations through Alpine Resorts and to the snowline on the BHP Road towards Mt Beauty. No permit is required for these works.

Bogong High Plains Road is an arterial road that is managed by DTP (outside of the Alpine Resorts boundaries) and ARV (within Alpine Resorts boundaries).

Within the resort boundaries, the management of BHP Road is delegated by DTP to ARV under a 'Schedule of Agreed Principles – Management arrangement for Alpine Resort Access Road' dated 8 July 2009.¹ The road is also managed under the resort operational Service Level Manual and various Memorandums of Agreement (MOAs) issued by DTP (such as a seasonal speed reduction (60km/h reduced to 40km/h) between Howmans Gap and the resort village).⁵⁶

- 164 The conclave report addresses expected traffic generation from the proposed uses, commenting that a 'specific assessment or reference to the expected traffic generation was not within the scope of PH's [Peter Harris'] Expert Statement or RSA'.⁵⁷

- 165 The conclave reports that Mr Harris considers the traffic volume assessment in Ms Dunstan's evidence statement is a reasonable estimate of the likely volume of traffic generated by the uses. This is that use of the enlarged car park may generate an additional 331 vehicles per day on BHP Road during the snow season.⁵⁸ Ms Dunstan's evidence is that 'it is highly likely that much lower traffic volumes will occur outside of peak times, and on many days during peak winter season when the weather is poor'.⁵⁹ We also note that a car park already exists on the subject land and generates traffic in non-snow periods. It is also capable of being used in winter, if ARV chose to clear BHP Road of snow.

⁵⁵ 35507R – Expert Conclave Statement – Road Safety – Traffic – 19 September 2024. Prepared by Traffix Group, signed by both experts on 23 September 2024.

⁵⁶ Item 2 – Associated changes, Conclave statement outcomes, page 2.

⁵⁷ Conclave report – page 3.

⁵⁸ As set out in Table 4, page 59 of Ms Dunstan's evidence, dated 12 September 2024.

⁵⁹ Dunstan evidence statement, page 59.



- 166 Ms Dunstan's evidence is that the traffic volume, which equates to 56 vehicles per hour,⁶⁰ or less than one per minute, is low and can be comfortably managed with a reduced speed limit of 40km/hr as already occurs within the resort in winter. We note that the speed limit of BHP Road is a matter for the road manager.
- 167 The permit application does not include any changes to BHP Road and roadworks are exempt from the need for a planning permit in the PPRZ and CDZ2. The scope of our review is to be satisfied that likely additional traffic generated as a result of the proposal can be acceptably accommodated in the road network.
- 168 As the designated road manager during the winter season, ARV is required to ensure BHP Road is sufficiently safe to meet requirements of the *Road Management Act 2004* (Vic) and associated State policy. BHP Road is narrow in parts and has narrow shoulder widths. This is an existing condition. When the road is open, drivers using the road must drive to these conditions. We find Ms Dunstan's evidence about road safety is to be preferred over Mr Harris' evidence for the following reasons:
- Mr Harris' physical review of the road was during winter 2022, when the road was partly covered in snow.
 - Ms Dunstan's evidence comprises a broader consideration of the impact of the likely additional traffic from the proposal on the existing road network and the existing traffic in the area. We accept her evidence that the traffic volumes likely to arise from the proposal are relatively low.
 - Much of Mr Harris' review was a desktop safety audit of the current road condition, not the impact of the additional traffic likely to arise from the proposal. It is this additional traffic that we must address, not whether the road should be cleared of snow. Whether the road should be cleared of snow, or made open to the public during the winter season is an operational decision and one that ARV needs to address as road manager, having regard to its obligations as such.
- 169 We do not see a need to undertake an RSA prior to making our decision, or as a condition of the permit. Dr Spring comments there is no traffic history for driving in winter on this section of BHP Road. Whether this section of road is safe for winter use, with or without the proposal before us, is a matter for the road manager to assess in determining whether to open the road for public access. The proposal itself does not open the road. It adds to reasons why the road authority may clear the road of snow for winter use. This is an operational decision for the ARV as both road manager across the resort and lessor of the ANARE shed facility. In context that the road could

⁶⁰ In a two-way direction. Her estimate is that in AM Peak this would be 42 entry / 14 exit and in PM peak it would be 14 entry / 42 exit).



already be used, it is the potential additional traffic on the road, as a result of the new uses, that is relevant.

- 170 We agree with XCSAV that in considering whether BHP Road provides safe access to the proposed car park during the declared snow season, it is relevant for us to consider policy at cl 12.04-1S. This includes strategy across all alpine resorts to '[e]nsure that increases in skier, pedestrian and vehicular activity in the resorts do not compromise public safety or the accessibility and capacity of ski fields, services, commercial activity and development of trailheads'.
- 171 This strategy requires consideration of managing competing access activities, including accessibility to ski fields, as well as services, commercial activity and development of trailheads.
- 172 If BHP Road is cleared of snow during the ski season, it would lead to a crossing point of the Aqueduct trail at which cross country skiers would need to take off their skis to walk across the road. Dr Spring submits the proposal will result in unacceptable road safety issues including the creation of this intersection of skiers and vehicle traffic that he submits would be unsafe. This is mainly due to sightline limitations. Both Dr Spring and the XCSAV are also concerned the crossing will create an unreasonable inconvenience for skiers and remove the ski-in / ski-out capacity from the village to the Nordic Bowl.
- 173 Various photos and videos were shown to us of how the crossing arrangement worked in 2022 when BHP Road was cleared of snow to allow vehicles to access the Lakeside Precinct as part of the construction of a boat ramp at the Rocky Valley Dam edge.
- 174 The examples illustrate to us that clearing the road of snow is not something that may only occur if the proposal is approved. It is an operational matter that has already occurred in the past. Granting the permit does not mean that the snow must be cleared from the road, but rather there is a possibility that it may. Granting the permit may lead to the road being cleared of snow more often, assuming the facilities are opened during the winter months.
- 175 As a safety issue, we are satisfied from Ms Dunstan's evidence that appropriate management of the road, through speed restrictions and improved sight lines (through better management of snow clearance than what occurred in 2022) can occur. The exact measures required to be undertaken to achieve this outcome are matters for the road manager to address in determining that the road is safe to open during the winter months.
- 176 In summer, BHP Road is currently open. No evidence or submission was put to us that the existing crossing of Aqueduct trail and BHP Road is currently causing significant safety or inconvenience for green season users of this trail, including walkers and cyclists. We are satisfied the likely



additional traffic on the road can continue to operate acceptably in the green season, including this existing crossing point.

- 177 More broadly, we accept the submission of ARV that there must be a presumption of regularity that BHP Road will continue to be managed by the road authority in accordance with its statutory obligations and that if ARV seeks to clear BHP Road of snow and allows it to be used by vehicles during the snow season to access the proposal, this is a matter for it to address in accordance with its obligations as road manager.

Car parking location and design

- 178 Both Dr Spring and the XCSAV submit that increasing the area of hard stand for the car park area is contrary to the PPRZ provisions and environmental policies of the scheme due to an increase in paved area.
- 179 The XCSAV submissions referred to cl 18.02-4L (Car parking – Falls Creek). This policy states it applies to land identified as ‘P’ on the Falls Creek Village Strategic Framework Plan at cl 11.01-1L. There is no such plan at cl 11.01-1L. Clause 11.01-1L relates only to the Falls Creek Village in CDZ1. There are two Strategic Framework Plans at cl 02.04. The only one that includes areas marked ‘P’ is one for the village area to which the CDZ1 applies. Our reading of the policy at cl 18.04-2L is therefore that it is not relevant to the matter before us.
- 180 This is of little consequence as there is also broader alpine resort policy at the same clause number of 18.02-4L (Car parking – alpine resorts) which has strategies to:
- Facilitate safe and efficient car parking within the alpine resorts that meet visitor needs.
 - Minimise the impacts of car parking on adjacent properties and the alpine environment.
 - Ensure that developments do not lead to a reduction in the existing provision of public car parking.
- 181 The provision of delineated car parking in a modified manner as part of the proposal can meet the needs of visitors throughout the year. This includes green season activities and also, if utilised through snow clearing, white season activities through providing parking at a location that can service visitors to this part of the resort. The proposal does not lead to a reduction of existing public parking. The question of whether the works adversely impact the alpine environment is one we address below in the discussion of environmental impacts.
- 182 The application plans show a location for bus parking for a 14.5 metre long coach. Ms Dunstan’s evidence is that:
- The proposed parking layout requires these buses to undertake a three-point turn. In my opinion, it would only be appropriate for coaches/buses of this size to access this area outside of the winter

period, due to the requirements for reversing manoeuvres in the carpark. These larger buses can be accommodated within the existing dedicated car parking areas for these sized vehicles within the resort area. Alternatively the car parking design would need to be revisited to remove the need for a reversing manoeuvre.⁶¹

- 183 Ms Dunstan's evidence assumes the road beyond the ANARE shed is not open or not available for use. This is affirmed in application documents that show one of the disabled car parking spaces being located across the road, and application description documents referring to bollards being put in place during the summer period to prevent vehicle access to the west.
- 184 Our reading of plans, and from our inspection, is that currently, during the green season vehicles can travel along other roads to the boat ramp area and other roads in the area where there are larger areas for turning of large vehicles, or for larger vehicles to loop around to BHP Road in either direction. This includes using Sun Valley Road / Mt McKay Road, past the AGL shed, in combination with the ANARE shed access Road / Lower Lake Road / unnamed road that traverses the area of the proposal. We also note that if this disabled space was moved to sit directly south of the ANARE shed, or removed,⁶² then road access could be maintained west of the shed during summer months.
- 185 We consider the issue of bus or large vehicle turning and access through the site is a matter for the road authority to address and not a matter that should be limited by the planning permit. Traffic management by the road manager can ensure only smaller vehicles can enter and exit the subject land during winter periods. We understand ARV already does this for some vehicles, such as large buses and affirmed in Kim Franzke evidence statement about the use of large buses in the resort.⁶³
- 186 We remain satisfied the proposal can operate with the use of smaller vehicles through traffic management arrangements of the road system. The road manager has authority to exclude larger buses by using restrictions that can be imposed on public roads. The car park and roads will continue to be managed in accordance with obligations of the ARV to manage roads as road manager under the AR Act.
- 187 Waste management during the snow season may require a waste truck to enter the car park and make a three-point turn to exit. This can be accommodated by accessing the waste collection outside of main operational hours. This is a matter we have addressed in the waste management plan permit condition.

⁶¹ Dustan evidence statement, page 55.

⁶² Noting Dunstan's evidence statement sets out that only one disable space is necessary to meet Australian Standards.

⁶³ Franzke evidence statement, [8].



Will the proposal provide an acceptable landscape outcome?

Building design and landscape impacts

- 188 XCSAV submits that the scheme seeks to protect the valued landscape character of the alpine area and to minimise the extent of earthworks associated with development proposals.
- 189 XCSAV submits the extensive cut and fill required to establish the car park is not consistent with these aspirations. This includes the embankment created at the edge of the car park to support a new ski trail to traverse the car park area. XCSAV says this will introduce significant new infrastructure into what it says is a remote part of the resort, inconsistent with design and environmental policies applying to the area. Its submission is that ‘what is currently an idyllic snow covered landscape in winter will be transformed into a utilitarian at grade car park. This is inconsistent with the outcomes sought by the Scheme in this location’.⁶⁴
- 190 Snow currently covers the existing car park, toilet amenities and a pumping station as well as the existing ANARE shed for parts of the year. The car park area is already a hard surface area supported by an embankment sloping down to the Rocky Valley Dam. There is a part of this embankment that was generally described by parties as a former quarry area.
- 191 Relative to many other parts of the overall resort area, we find this area is not remote. As we discuss further below in the assessment of environment and native vegetation, much of the area has been disturbed over many years through the development and use of the dam, the ANARE shed, the AGL facilities and the quarry. It is not a pristine environment, or a particularly natural landscape relative to some parts of the resort, or the ANP. It has many elements of human intervention and is a modified landscape that contains some remnant vegetation as we discuss further below.
- 192 It is not an untouched natural landscape that needs to be protected in a way that would lead to the refusal of the proposal as it relates to the alteration of the site in the broader landscape.
- 193 We agree with ARV that the proposal minimises disturbance on the general landscape, including the ANP to the south and east, by repurposing the existing ANARE shed and establishing new landscaping on the proposed embankment to surround the car park. In this respect we are satisfied the proposed building works are of a scale, design and height with materials that are sympathetic to the natural and built form character of the resort, such as through the use of reclaimed metal cladding for the exterior of the shed additions, as sought by cl 02.03-5 of the scheme.
- 194 The area of bitumen is larger, but not significantly so, with part of the existing road converted to a grassed area that can be used as a summer and

⁶⁴ At [69] of XCSAV’s submissions dated 7 October 2024.



winter trail. Overall, we consider the impact on the landscape values of the area are very limited and can be managed through the proposed new planting associated with the proposal.

- 195 Clause 02.03-5 also refers to protecting and preserving pre and post-contact history of the resort. The retention and repurposing of the ANARE shed is a positive attribute to protecting post-contact heritage. A CHMP has also been prepared and approved for the site as was discussed in a preliminary hearing on this specific issue.⁶⁵ We further address the issue of intangible cultural heritage below.

Intangible cultural heritage

- 196 The Jaithmathang Corporation submits that in preparing the proposal, ARV has not meaningfully consulted or respected cultural protocols. They submit this has led to environmental damage that threatens not only the fragile alpine ecosystem but the cultural heritage that is intrinsically linked to it. In particular this includes the potential loss of species, such as skinks, that form cultural totems in their community.
- 197 What is before us is to address the habitat of species in context of the permit triggers under cl 52.17 and the extent to which the buildings and works in the PPRZ may result in cultural or social impacts.
- 198 The objectives to address the environment in the scheme do not address intangible cultural heritage associated with ecosystems as a whole or the individual components of these ecosystems, such as animals or birds that may have totemic values to people. The scheme policies address habitat for species, being the land in which species may live.
- 199 Separate to environmental policies, the scheme includes heritage policy at cl 15.03-2S (Aboriginal cultural heritage). This policy has an objective:
- To ensure the protection and conservation of places of Aboriginal cultural heritage significance.
- 200 To achieve the objective the clause includes strategies:
- Identify, assess and document places of Aboriginal cultural heritage significance, in consultation with relevant Registered Aboriginal Parties, as a basis for their inclusion in the planning scheme.
- Provide for the protection and conservation of pre-contact and post-contact Aboriginal cultural heritage places.
- Ensure that permit approvals align with the recommendations of any relevant Cultural Heritage Management Plan approved under the *Aboriginal Heritage Act 2006*.
- 201 There is no site of Aboriginal heritage significance identified in a Heritage Overlay of the scheme applying to the subject land.

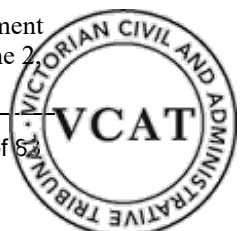
⁶⁵ *Spring v Minister for Planning* [2024] VCAT 907.



- 202 There is an approved CHMP for the proposal (being CHMP-18478) approved on 24 October 2023 by the Director of Heritage Services – First Peoples – State Relations, under authority delegated by the Secretary of the Department of Premier and Cabinet. The approved CHMP was then provided to the responsible authority before as part of the permit application material on which it made its NOD.
- 203 As a preliminary question, a separate division of the Tribunal considered and made findings about the approved CHMP for the proposal in *Spring v Minister for Planning*.⁶⁶ The findings from this preliminary hearing included that there was no inconsistency with the approved CHMP 18478 and the permit application. The preliminary hearing determination also found there is no jurisdiction for the Tribunal to question the validity of CHMP 18478.
- 204 Mr Rutter, making separate submission on behalf of Jaithmathang Corporation reiterated their position that, in their view, the CHMP is flawed and incomplete. His submission is also that it is the reptiles and the Mountain Pygmy-possum, that are known to inhabit the alpine area, which have intangible cultural heritage value as totems.
- 205 Dr Spring submits the approved CHMP 18478 does not include assessment of Aboriginal intangible heritage and therefore we should consider this issue in addition to the matters addressed in the CHMP. He relies on advisory notes prepared by the Commonwealth Government for species protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') that 'lizards, including skinks, hold immense significance to Indigenous Australians through their prominent role in ceremony, lore, mythology, totems, art, and kinship. They are deeply tied to the Dreaming as totemic Creation beings that have shaped Country over millennia'.⁶⁷
- 206 The ARV submits it is necessary to appreciate that cl 15.03-2S makes specific reference to the AH Act, and s 79B of the AH Act provides separate scope for the consideration of intangible heritage. ARV notes that under this section such heritage is something that is not widely known to the public. ARV submits that as the significance of skinks to Indigenous Australians is set out in the EPBC Act advisory guidance, it is widely known.
- 207 Whether widely known or not, we find the relevant consideration is how any intangible Aboriginal heritage should be addressed in the context of the review application under s 82 of the PE Act and the scheme. It is the PE Act and scheme that set the parameters for considering the proposal. Intangible heritage is not defined in the scheme. A plain English definition

⁶⁶ [2024] VCAT 907.

⁶⁷ Conservation Advice for *Liopholis Guthega* (Guthega skink): Australian Government Department of Climate Change, Energy, the Environment and Water. Provided at Tribunal Book – Volume 2, page 2457.



indicates intangible heritage is heritage that is incapable of being seen or touched.⁶⁸

208 The objective and policies at cl 15.03-2S are to ensure ‘places’ of conservation are protected. This is consistent with the objectives of the PE Act that include:

- To provide for the fair, orderly, economic and sustainable use, and development of land.⁶⁹
- To conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value.⁷⁰

209 The need to confine our decision making to the matters to which the PE Act and scheme allow is reinforced in *Hunt Club Commercial Pty Ltd v Casey CC*⁷¹ where the Tribunal commented:

Town planning is not a panacea for all perceived social ills, nor is planning decision-making a forum for addressing all issues of social or community concern. At its heart, planning is about the use, development and protection of land. It has a spatial context that is primarily concerned with the fair, orderly, economic and sustainable use and development of land.

210 We do not question the intangible cultural value that animals of the area may have as totemic symbols for the Jaithmathang Corporation members, but we find it is not a matter that has context in implementing policy at cl 15.03-2S which is to address identified heritage places and acknowledge where a CHMP may apply. We also note no policy or provision of the scheme addresses intangible heritage. Nor is there any documentation that any part of the native vegetation proposed to be removed is protected under the AH Act.⁷²

211 We appreciate the concerns of the Jaithmathang Corporation as to whether it has been sufficiently consulted or engaged and whether issues of intangible Aboriginal heritage have been properly addressed. However, we find this is a matter that extends beyond the scope of considerations that can be properly addressed in this application.

IS THE LOSS OF NATIVE VEGETATION AND ENVIRONMENTAL IMPACT ACCEPTABLE?

212 The proposal includes the removal of remnant native vegetation. This requires a permit under cl 52.17 of the scheme. The applicants are

⁶⁸ The Macquarie dictionary (online) defines ‘intangible’ as ‘incapable of being perceived by the sense of touch, as incorporeal or immaterial things’, extracted 19 December 2024.

⁶⁹ Section 4(1)(a), our emphasis added.

⁷⁰ Section 4(1)(d), our emphasis added.

⁷¹ (includes Summary) (Red Dot) [2013] VCAT 725, [15].

⁷² Being one of the decision guidelines in the Guidelines.



concerned about the loss of vegetation and its impacts on the habitat of rare or endangered animals known, or presumed, to live in the area.

- 213 More broadly, the applicants submit the proposal will lead to unreasonable environmental impacts. These are mostly interrelated to the loss of vegetation for habitat for rare or endangered animals known, or presumed, to live in the area. Dr Spring also submits the proposal may lead to impacts on water quality in the Rocky Valley Dam and Creek as a result of contamination of water from either the sewage collection system proposed or from salt that may be applied to BHP Road as part of the management of de-icing the road, if opened.
- 214 In support of submissions made, the XCSAV called expert ecological evidence from Dr Meredith.
- 215 The ARV called evidence from Mr Looby, who was the project ecologist for the proposal, including overseeing the preparation of a report – *Lakeside precinct at Falls Creek flora and fauna assessment*, Final report prepared by Biosis for Alpine Resorts Victoria – Falls Creek, Project No. 36850, dated 25th May 2023 ('Biosis report'). Given Mr Looby worked on the proposal both before and during the application process, he accepts he is not an independent expert ecologist in this proceeding. We find his evidence is still helpful, acknowledging this background. His evidence gives context to how the native vegetation assessment and broader ecological assessments for the project were prepared. His evidence also includes an updated Site Environment Management Plan ('SEMP') that seeks to address some conditions in the NOD and matters arising from the statements of grounds of the applicants.
- 216 The ARV also called ecological evidence from Mr Lane, as an independent, peer review of the Biosis report.
- 217 Dr Spring called evidence from:
- Dr Heinze, a researcher and expert authority on alpine animals, notably the Mountain Pygmy-possum.
 - Mr Clemann, a researcher and expert in alpine reptiles and frogs, provided evidence about the character and habits of skinks that may be impacted by the proposal.
 - **Dr Silvester**, a researcher and expert in peatland moss vegetation, provided evidence about the potential impact of the proposal on this vegetation community.
- 218 The six environmental experts met in a conclave held before the hearing, with the outcomes of this conclave documented and circulated to the Tribunal and all parties.⁷³

⁷³ Joint Expert Witness Conclave Statement dated 2 October 2024.



219 We have had regard to all of the witness statements and the conclave report. As with other evidence and material, we do not recite all of the evidence provided. Where relevant we extract or comment on specific elements of evidence relevant to our reasoning below.

Department of Energy, Environment and Climate Action referral

220 The planning application was referred to the Department of Energy, Environment and Climate Action ('DEECA') for comment in its capacity as a determining referral authority pursuant to the CDZ2 provisions and as a recommending referral authority pursuant to cl 66.02-2 - Native Vegetation.

221 In our consideration of the roadworks in the CDZ2, we asked parties if this would impact on the conditions required by DEECA in the CDZ2 area for a SEMP. No party contested the ability for us to apply these conditions as they remained relevant to the project as a whole.

222 We discuss later that we find the DEECA conditions are necessary and important to the environmental management of the works proposed across the project as a whole, including the removal of vegetation and environmental works necessary. We therefore have relied on the material in the DEECA letter as information relevant to our consideration of environmental issues for the proposal as a whole.

223 During the planning application process DEECA was not satisfied the proposal had met its obligations under the Guidelines.⁷⁴ Changes were made to the application and a letter from DEECA to the responsible authority, dated 17 August 2023, sets out that the authority does not object to a planning permit being granted based on the changes made and subject conditions set out in its letter. This included a requirement for further information about the calculation of vegetation offsets to include vegetation that must be deemed lost as it sits within the bushfire defensible space of the ANARE shed.

224 An updated letter on 18 March 2024 confirmed this information was provided and DEECA did not object to the grant of a permit subject to updated permit conditions based on the altered offset calculations.

225 We give the absence of an objection from DEECA to the proposal considerable weight, being the relevant referral authority under provisions of the scheme for native vegetation removal and environmental impacts.

Context of other State and Federal environmental protection provisions

226 Throughout the hearing various submissions were made about habitat protection on the site in context of the FFG Act and the national EPBC Act.

⁷⁴ The DEECA letter of 17 August 2023 sets out that it requested further information on 10 November 2022 (DEECA FIR) and, following the submission of further information, DEECA provided a second response on 22 February 2023.



- 227 Surveys undertaken of fauna through the planning application process have identified there is habitat on the subject land that supports several species protected under the FFG Act. It is also acknowledged by ARV that separate approval will need to be obtained under the EPBC Act for actions associated with the proposal. Any approval by other bodies under either the FFG Act or the EPBC Act are not before us. They may be a precursor to commencing the development, but any approvals required under the FFG Act or EPBC Act are not a precursor or prerequisite to obtaining a planning permit.
- 228 The August 2023 letter from DEECA also states that it ‘provides additional comments and advice regarding assessment of impacts to threatened fauna, which may result from native vegetation impacts, in Appendix 1’. This appendix document sets out matters that relate to assessment under the FFG Act. We read this appendix as advice provided separate to its role as a referral authority.
- 229 The ARV submits that as a public authority, the Tribunal is also required to comply with s4B of the FFG Act, ‘so far as it is consistent with the proper exercising of [our] function’.⁷⁵ Therefore the ARV submits that we need to have regard to the objectives of the FFG Act and the relevant statements and management plans for species listed in the FFG Act as part of the impacts on biodiversity from the proposal. Other parties made no specific submission on this matter. The ARV submits these issues are addressed in totality through the submissions and evidence provided.
- 230 The Tribunal exists as a statutory authority in accordance with the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (‘VCAT Act’). The VCAT Act establishes that our scope of authority is to review statutory decisions made under other enactments. The review of applications P462/2024, P469/2024 and P532/2024 are all made as seeking a review of a decision by a responsible authority to issue a notice of decision to grant a planning permit under s 82 of the PE Act. It is therefore the PE Act that provides the scope of our consideration and the lens through which we must address any policies regarding habitat and habitat protection. It is not before us to determine if approval should or can be granted under either the FFG Act or the EPBC Act as they are separate approvals under separate statutes that are not the subject of our review.
- 231 We have considered the FFG Act in the context that it is a matter the responsible authority needed to have regard to, noting that s 4B(1) of the FFG Act states:
- 4B Ministers and public authorities to give proper consideration of objectives
- (1) In performing any of their functions that may reasonably be expected to impact on biodiversity in Victoria,

⁷⁵ At [177] of ARV’s submissions, dated 7 October 2024.



including a function under this Act **or any other Act**, a Minister and a public authority must give proper consideration to the objectives of this Act, so far as is consistent with the proper exercising of their functions.

(Tribunal's emphasis added)

- 232 On review, the Tribunal must consider the matters that were taken into account by the responsible authority, as set out in s 84B(1) of the PE Act. In this instance we accept that under s 4B of the FFG Act a responsible authority under the PE Act, and therefore the Tribunal on review, must consider the objectives of the FFG Act as set out above.

Native vegetation removal

- 233 It is proposed to remove 0.239 hectares of native vegetation. A permit is required to remove this native vegetation in accordance with cl 52.17. The subject land also includes areas of non-native vegetation that is proposed to be removed, as marked in yellow in Figure 9, below. No planning permit is required to remove non-native vegetation.



Figure 9: Plan of vegetation removal (depicts native (highlighted in red) and non-native vegetation removal (highlighted in yellow)) extracted from Mr Looby's evidence statement.

- 234 The assessment of the proposal, as it relates to vegetation removal, starts in the context of the three-step approach, as set out in cl 52.17. The purpose of cl 52.17 is:

To ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. This is achieved by applying the following three step approach in accordance with the *Guidelines for the removal, destruction or lopping of native vegetation*

(Department of Environment, Land, Water and Planning, 2017) (the Guidelines):

1. Avoid the removal, destruction or lopping of native vegetation.
2. Minimise impacts from the removal, destruction or lopping of native vegetation that cannot be avoided.
3. Provide an offset to compensate for the biodiversity impact if a permit is granted to remove, destroy or lop native vegetation.

To manage the removal, destruction or lopping of native vegetation to minimise land and water degradation.

- 235 The Guidelines are an incorporated document of the scheme. As such they form part of the scheme and the decision-making context we must address. The Guidelines also set out decision guidelines that ‘[e]fforts to avoid the removal of, and minimise the impacts on, native vegetation should be commensurate with the biodiversity and other values of the native vegetation and focused on areas of native vegetation that have the most value.’⁷⁶
- 236 The provisions of cl 52.17 and the incorporated Guidelines form the basis for determining if the removal of vegetation under this clause is acceptable.

Expert evidence

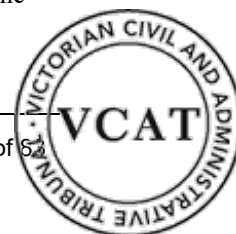
- 237 Outcomes of the conclave include that relevant experts providing evidence on fauna or ecology agree the survey methods and the results presented in the Biosis report generally documented the flora, vegetation and alpine bog areas of the site.⁷⁷ All experts present at the conclave agreed that the site has an overall high biodiversity value.
- 238 There were, however, differing views as to the proposal’s impacts on the biodiversity, based on the extent of vegetation to be lost as habitat for fauna that may be impacted by the proposal.
- 239 Mr Clemann’s evidence in the conclave, which he affirmed in questions put to him in cross-examination, is that he finds the Guidelines do not provide an adequate framework for the protection of native animals. He described the Guidelines in the conclave as ‘an unmitigated disaster for threatened species.’⁷⁸ Dr Heinze also commented that the Guidelines had ‘limited scope’.⁷⁹

⁷⁶ The Guidelines, page 12 and page 24.

⁷⁷ Conclave report, page 11, item 4.1, noting that Mr Heinze stated, ‘no comment’ and Mr Clemann stated, ‘not area of expertise.’ Mr Lane and Mr Meredith also questioned the mapping of threatened flora, however, Mr Looby’s evidence explained that it was not unusual that an assessment for a planning permit application would not pick this up. His comment is it is relevant to the FFG Act approval process and it can be addressed through that approval process. Mr Lane acknowledged in questions that while he identified the information gap, it was not critical to the assessment process for the planning permit application.

⁷⁸ Joint Expert Witness Conclave Statement – 2 October 2024, Topic 2.3, page 4.

⁷⁹ Ibid.



- 240 We reiterate we must make our assessment of native vegetation removal in accordance with the Guidelines, and the three-step approach, as the framework that directs decision making under cl 52.17. In assessing the three-step approach, we have also given greater emphasis to the evidence of the three ecologists, being Dr Meredith, Mr Lane and Mr Looby, given their experience in preparing and reviewing such assessments. The remaining experts were subject matter specialists in the conservation of particular fauna species, not on how the provisions of the Guidelines and cl 52.17 should be addressed. We discuss their evidence in more detail in the discussion of broader environmental impacts below.
- 241 The three ecology experts agree that the vegetation mapped accords with the Guidelines and the assessment under the Guidelines is acceptable.
- 242 Mr Lane’s evidence also comments that in his view table 11 in the Biosis report ‘addresses the requirements of Section 4 and 4B of the FFG Act, as set out in DELWP (2021)’. We note that he goes on to comment, under the heading of ‘Flora’ that ‘the information in it is not detailed enough for a comprehensive evaluation by a decision-maker of FFG Act-listed threatened flora species impacts’.⁸⁰ Orally he confirmed he considered this a minor issue in his peer review of the Biosis report, as it is a matter that ultimately needs to be addressed at the FFG Act approval stage.⁸¹
- 243 We agree the identification of flora for the purposes of the cl 52.17 assessment is acceptable. This is also noting the referral comments of DEECA do not raise any issue with the documentation of vegetation. The responsible authority recommended to us an amended permit condition from that in the NOD to require a more detailed documentation of flora as part of the SEMP. This was not opposed by ARV, and we have included this in Appendix A.
- 244 Dr Meredith’s evidence is that the Biosis reports that examine the ‘avoid and minimise’ steps refer to car parking area removed through the design and application process so as to avoid some loss of native vegetation. However, his evidence is there is no consideration given to the option of the project not proceeding which would avoid all removal of native vegetation and fauna habitat.⁸²

What is the value of the vegetation proposed to be removed according to the Guidelines?

- 245 A native vegetation removal report, generated by DEECA as the basis for assessment and submitted with the application⁸³ under cl 52.17 sets out that

⁸⁰ Evidence statement of Mr Lane, dated 30 August 2024, section 3.7.3.

⁸¹ It is also consistent with his documented comments from section 6.2 of the conclave report – page 19.

⁸² Meredith evidence statement, page 12.

⁸³ Dated 19 May 2023, forming part of the advertised material of the application as amended under s 57A of the PE Act.



native vegetation in the study area belongs to three Ecological Vegetation Classes ('EVCs'):

- Sub-Alpine Woodland (EVC 43);
- Sub-Alpine Shrubland (EVC 42); and
- Sub-Alpine Wet Heathland (EVC 210).

246 The majority of the 0.239 hectares of native vegetation to be removed is within the Sub-Alpine Shrubland EVC 42, which has a EVC conservation status of 'rare'. Mr Looby's evidence sets out that the 'rare' status 'means the EVC is rare as defined by geographic occurrence, but it is neither depleted, degraded nor currently threatened to an extent that would qualify as Endangered, Vulnerable or Depleted'.⁸⁴

247 This vegetation is identified in the Biosis report as having moderate or low value. Viewing the site and relevant aerial photos it is evident the area is not a pristine area of native vegetation as may be found in more remote parts of the resort or the ANP. Aerial photos clearly show the area has been modified over many years, including by the construction of the Rocky Valley Dam, BHP Road, roads through the site, the ANARE shed and the AGL shed, as well as man-made ski, walking and cycle trails. We accept that in this context, remnant vegetation found on the subject land will have been somewhat disturbed.

248 Up to 44 square metres (0.0044 hectares) of 'endangered'⁸⁵ Sub-Alpine Wet Heathland ('Alpine Bog') (EVC 210) located to the immediate north of the ANARE shed is also proposed to be removed. As endangered, it carries a higher significance to be retained. It was acknowledged by Mr Looby and Dr Silvester that this vegetation community has already been disturbed from its likely pre-European settlement form, through the establishment of the ANARE shed and the road to the south of the shed. This has split the existing Alpine bog community in two. The area behind the shed is understood to be the higher quality community.

249 A small area of Sub-Alpine Woodland EVC 43 is located at the northern end of the area studied by Biosis and has a conservation status of 'least concern'. Our reading of the mapping is that this area is either not affected, or only slightly impacted, by the proposed works. Mr Looby's evidence sets out this was part of the area removed, and therefore vegetation loss avoided, prior to lodging the planning application. His evidence is this was to avoid the loss of one large tree within this EVC area that provides foraging habitat for the Gang-gang Cockatoo.

250 Relevant to the Guidelines assessment, the native vegetation removal report sets out that the application, as it now stands, includes no large trees for removal. In considering the assessment under the Guidelines, it is relevant

⁸⁴ Looby evidence statement, page 20.

⁸⁵ EVC conservation status.



that an additional 1.737 hectares of native vegetation has been removed in the Falls Creek resort area in the preceding five years. This needs to be considered as part of a cumulative of vegetation removal.

- 251 The native vegetation removal report indicates a general offset amount of 0.173 general habitat units is required, with a minimum strategic biodiversity value score of 0.739. The offset is proposed to be located within the Falls Creek Resort boundaries.
- 252 Although a number of threatened and endangered flora and fauna species are recorded as present (or presumed to be present) within the subject land, the proposal, as amended during the planning application process led to only general, rather than species offsets are required in accordance with the Guidelines.⁸⁶
- 253 The Guidelines set out when a ‘Species’ or ‘General’ offset is required, stating:⁸⁷
- Species offset** is required when the removal of native vegetation has a significant impact on habitat for rare or threatened species. Species offsets must compensate for the removal of that particular species.
- General offset** is required when the removal of native vegetation does not have a significant impact on any habitat for rare or threatened species.
- 254 Some of the environmental experts were critical of the Guidelines’ approach to habitat for fauna on the basis they undervalue the importance of vegetation as habitat for species. The Guidelines set out that the ‘species-general offset test measures the proportional impact from the removal of native vegetation on the habitat of rare or threatened species, according to the *Habitat importance maps*, and compares this to the species offset threshold’.⁸⁸
- 255 Before accepting an offset, the three-step approach firstly needs to identify that the avoid and minimise steps have been achieved. It is, however, relevant that the proportional impact from the proposed removal of the native vegetation, based on the Native Vegetation report and calculations under the Guidelines only require a general offset. Under the Guidelines calculation, the proposed loss of native vegetation as habitat is not considered to have a significant impact on habitat of rare or threatened species.

Assessment under the three-step approach

- 256 The Guidelines set out that the three-step approach is to avoid, minimise and offset the removal of native vegetation ‘to achieve no net loss to

⁸⁶ Looby evidence statement, pages 12 and 28.

⁸⁷ At 5.3.1 (Type of offset (species or general)), the Guidelines, page 15.

⁸⁸ The Guidelines, page 15.



biodiversity as a result of the removal, destruction or lopping of native vegetation.⁸⁹ The Guidelines go on to comment:⁹⁰

It is a precautionary approach that aims to ensure that the removal of native vegetation is restricted to only what is reasonably necessary, and that biodiversity is appropriately compensated for any removal of native vegetation that is approved.

Efforts to avoid the removal of, and minimise the impacts on, native vegetation should be commensurate with the biodiversity and other values of the native vegetation and focused on areas of native vegetation that have the most value.

Areas of native vegetation to be retained must be able to maintain the same values in the future and should not be degraded over time by a proposed use or development associated with the removal.

257 The Guidelines, as they relate to the ‘avoid’ step state:⁹¹

Maintaining native vegetation that currently exists is an effective way to ensure native vegetation continues to deliver its important values into the future.

Avoiding the removal of native vegetation can be achieved by locating or designing a development so that native vegetation is not removed.

An application to remove native vegetation must demonstrate or provide appropriate evidence to show that no options exist to avoid native vegetation removal, that will not undermine the objectives of the proposed use or development.

258 The applicants submit, relying on respective expert evidence, ARV did not properly consider options to avoid, including not removing vegetation by either locating the proposed information centre and food and drink premises in a different part of the resort, or by not moving the road that allows for the new ski trail to the side of the road.

259 ARV emphasised the last part of the avoid guidance set out above, which is that the proposal needs to demonstrate that no options exist to avoid native vegetation removal, ‘that will not undermine the objectives of the proposed use or development’.⁹²

260 We must address the Guidelines as a whole, which includes the caveat for the avoid and minimise steps to be balanced against the objectives of a project. We note if the avoid step was directed at avoiding any loss, little to no development would ever occur in areas that retain native vegetation. We also find the need to ‘avoid’ must be relative to significance of the vegetation, as we examine further below.

⁸⁹ The Guidelines, page 12.

⁹⁰ Ibid.

⁹¹ The Guidelines – page 12.

⁹² At [1] Avoid] and [2] Minimise], the Guidelines – page 12.

- 261 ARV also took issue with Dr Meredith’s evidence that ‘[g]iven the documented very high biodiversity values at the national and state level at the subject site and the level of impacts from the proposal (a coffee shop and carpark), it is my opinion that the proposed development is not appropriate at this site.’⁹³ When asked about this in cross-examination, Dr Meredith affirmed his view of the project was to establish a coffee shop, which he considered was not of sufficient importance to outweigh the loss of vegetation and habitat.
- 262 The project provides an information centre, improved toilet facilities and disabled parking that is close and accessible to those facilities. It provides a base, as a trail head for walking, cycling and potentially winter activities in a location that connects with the ANP and can provide a point of respite for recreational users. This includes the facilities associated with the boat ramp and potential use of the dam for water activities in summer months. We therefore understand the project as a whole is more than establishing a coffee shop and we address the impacts on biodiversity for the project as a whole.
- 263 We also understand the project relies on its proposed location adjacent to Rocky Valley Dam so as to provide for a range of recreational uses. This location is derived from changes to the ANP boundary and changes to the zoning of the land undertaken in 2013.
- 264 In principle, we are satisfied the location for the project is acceptable in the context of strategic planning policies that seek to facilitate and encourage development of the Lakeside Precinct for year-round recreational activities beyond skiing. Below we examine if, within the subject land, sufficient vegetation removal has been avoided, to the extent that it does not undermine the objectives of the proposed use or development.
- 265 Within the subject land itself we assess the loss of vegetation that could be further avoided or minimised, through examination of the two main vegetation communities to be impacted. This leads us to examine:
- The impact from the vegetation removal associated with the realigned road where it intersects with BHP Road, broader works to expand the car park area and establish the trail to the east and south of the road. These works impact what the Biosis report refers to as moderate to lower quality Sub-Alpine Shrubland – EVC 42.⁹⁴
 - Vegetation removal directly to the north of ANARE shed and an area close to Lower Lake Road, adjacent to the Rocky Valley Dam. These works impact an area of Alpine Bog EVC 210 that is identified as endangered.

⁹³ Meredith evidence statement, page 14.

⁹⁴ At [Table A5.2 – Native vegetation assessment of treeless native vegetation within the study area] of the Biosis report dated 25 May 2023, submitted with the permit application.



Should the loss of vegetation and habitat at the road and car park areas be further avoided?

- 266 The area in the vicinity of the northern road is identified by Mr Looby as moderate quality native vegetation. Targeted fauna surveys undertaken as part of the flora and fauna report prepared by Biosis for the application identify this area is suitable habitat to support the Broad-toothed Rat, the Alpine She-oak Skink and the Guthega Skink. Fauna surveys undertaken identified these species in the area, along with the Tussock Skink.
- 267 Mr Looby's evidence is that DEECA modelled habitat for the Guthega Skink does not occur within the proposed construction footprint, however the Biosis flora and fauna assessment determined that suitable habitat was present due to the presence of Sub-alpine Shrubland and rocky boulders. As a precautionary measure, the habitat loss has assumed the Guthega Skink and Alpine Bog Skink may be living in the area as it is habitat suitable for these species.⁹⁵
- 268 XCSAV submits if the existing road through the site was retained in its current alignment and the car park not expanded, then much more remnant native vegetation could be retained. The XCSAV submits that not relocating the road, and therefore not creating the new ski trail, would mean skiers could continue to use the existing road and car park area for ski access and avoid loss of native vegetation associated with the rearranged road entry.
- 269 Not creating the new trail and therefore not realigning the road would avoid some vegetation loss, however, we find to do so would not meet the project objectives to provide for improved year-round facilities including improved trail access and improved amenities. We also question if retaining the existing road and car park alignment would achieve the desired outcome sought by XCSAV of a retained use of the road for ski access. Retaining the road in its current alignment may reduce vegetation loss, but it would not necessarily mean ski access along the road and across the car park would be preserved in winter. As we have already discussed, the land currently used for ski access in winter is a road. Whether this road is cleared of snow is not a decision for us to make.
- 270 What the proposal does achieve by moving the road, is ensure if snow is cleared from the road, ski access is maintained beside the realigned road via the new trail. We note this trail would have capacity to be used for walkers in green season months, as well as skiers in white season months. In this context, ARV submits it has endeavoured to avoid as much vegetation removal as possible while also addressing the project objectives to establish the facility for year-round use.

⁹⁵ Noting the Guthega Skink is listed as endangered under the EPBC Act and critically endangered under the FFG Act. The Alpine Bog Skink is listed as endangered under both the EPBC and FFG Acts.



- 271 Mr Looby's evidence is that sufficient changes to the project have already been made to avoid loss. This includes reducing and moving the area of proposed roadway and car park away from the area where the larger number of fauna were identified. This is also noting his evidence is that the quality of the vegetation to be removed in the southern part of the project is of lower quality and therefore of less concern in the assessment of 'avoid'.
- 272 Dr Meredith's evidence is that the Biosis report focuses on the impacts of remnant vegetation and does not examine sufficiently the impact on native fauna. In response to questions put to him he acknowledged he did not take issue with the Biosis report's description of the heathland vegetation as being of moderate or lower value. As we have already set out, his concerns about avoidance of vegetation removal are made in the context of what he says are the limited merits of the project. We discuss issues of fauna protection further, below, as part of assessing the broader environmental impacts of the permit application.
- 273 Mr Clemann and Dr Heinze are experts in fauna protection and neither of them provided an analysis of the proposal against cl 52.17 of the scheme. Their concerns about loss of vegetation relate to impacts on fauna. We address these matters further, below.
- 274 Mr Looby's evidence states the vegetation to be lost 'does not play a key role in landscape values'.⁹⁶ It is low lying heathland. As part of the broader works proposed, new replacement vegetation is proposed. From our own inspection and review of the application material, submissions and evidence, we are satisfied that in a landscape context, the proposed removal is acceptable.
- 275 As an assessment against cl 52.17, we are satisfied the project has avoided native vegetation removal to the extent the impact on biodiversity can be reasonably managed, and therefore provides an acceptable outcome. This is subject to conditions necessary to address the need for vegetation offsets, the impact on fauna and the objectives of the FFG Act we address further, below. We note for the purposes of cl 52.17, the loss of habitat is insufficient to require specific offsets for species and that the required general offset has been accounted for.

Should the loss of Alpine bog and associated habitat around the ANARE shed be further avoided?

- 276 Dr Meredith questioned if the flora and fauna assessment prepared by Biosis had correctly identified the impacts on the endangered Alpine Bog community because of the alterations being undertaken to the ANARE shed. His evidence is it has not been sufficiently demonstrated how the impacts of construction will be limited to a 0.5 metre wide strip behind the building.

⁹⁶ At [6.18 in Table 3], page 50, Looby evidence statement.



- 277 Dr Silvester, an expert in the behaviour and management of Alpine Bog communities, also questioned if the works could be limited to the extent set out in the proposal. He also questioned how drainage to the ANARE shed would work and the impact of this drainage on the Alpine bog.
- 278 The application proposes a potential loss of 44 square metres of this endangered EVC. During the hearing, ARV proposed an alternative solution to the drainage for the ANARE shed, so it directed drainage away from the Alpine bog community. This would also reduce the potential construction impacts to the rear of the ANARE shed. When questions were put to Dr Silvester about this, he stated he was satisfied that provided the alternative drainage could be provided, it would minimise his concerns about the loss or impact on the Alpine bog community.
- 279 We are satisfied the alternative drainage arrangement is one that should be applied to further avoid impacts on this endangered vegetation community. In doing so, we note we found Dr Silvester’s evidence on this issue helpful, in light of his own acknowledgement he wore many different ‘hats’ in assessing the proposal, as both a resident of the nearby area, a member of different advocacy groups, and also an expert in Alpine bogs. Despite his potential conflicts in providing independent evidence to the Tribunal, we found his views about how the Alpine bog community could be managed to be of great assistance and made with sufficient impartiality.
- 280 We understand Dr Meredith’s concerns about the Alpine bog EVC to be related to impacts that may arise if the proposed construction is not managed appropriately. Mr Looby’s evidence sets out the Alpine bog EVC is limited to highland areas of mainland Australia and Tasmania, with a recent estimate of the Victorian extent of the community at 4,372 hectares.⁹⁷ In this context, his evidence is the proposed removal of 0.0044 hectares represents < 0.0001% of the remaining extent of this community within Victoria.
- 281 The proposal includes a SEMP that can manage construction to avoid and minimise disturbance to the Alpine Bog area, along with other vegetated areas. The SEMP includes a construction management plan which addresses construction activities to minimise disturbance on species and the Alpine bog area.
- 282 We will impose permit conditions, uncontested by ARV, to amend the drainage design around the ANARE shed to further minimise the loss of the Alpine Bog community. With this we are satisfied the loss of biodiversity associated with the EVC 210 community is both avoided to the extent possible and the impacts minimised. A suitable offset site is also available within the resort to manage the offset still required.

⁹⁷ Looby evidence statement, page 10.



Offsets and conclusions about cl 52.17

283 The application as it relates to cl 52.17 includes the provision of offsets for vegetation lost. The offset location is in a more remote and vegetated area, within the resort boundary, and in an area that is of comparable vegetation communities to those lost. We are satisfied, having accepted the vegetation has been avoided and minimised to the extent that is acceptable for the project objectives, the proposed offsets are also acceptable.

Other environmental impacts

284 The works proposed by the project may have environmental impacts beyond the removal of vegetation and landscape impacts we have already addressed. In particular, in the scope of addressing the objectives of the FFG Act and the decision guidelines of cl 65.01 of the scheme, we have had regard to how the works may impact habitat for fauna species that either do, or are presumed to, live in the area. We have also had regard to other potential impacts, such as impacts on drainage and water quality.

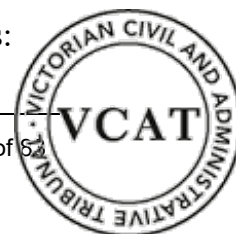
285 In addressing issues about possible impacts to the environment and the relevance of the FFG Act, the applicants referred us to the Appendix 1 of DEECA's letter of 17 August 2023. In this letter, DEECA does not oppose the permit being issued. The Appendix 1 to this letter, however, sets out DEECA comments about species in relation to the FFG Act. The advice of DEECA, as a public authority, was not to oppose the permit in context of the planning provisions, despite it identifying potential concerns in the context of an approval under the FFG Act. It also suggested permit conditions in the context of considering the objectives of the FFG Act. Most of these conditions were incorporated into the NOD and are not opposed by ARV.

286 Our role is to determine if a planning permit should issue, taking into account a broad range of factors as required under the PE Act. One of these considerations is the objectives of the FFG Act as part of an overall assessment as to whether the proposal, as a whole, achieves net community benefit.

287 We do not make a determination as to whether the project can or will be approved under the FFG Act, or the EPBC Act. We acknowledge species affected by the proposal are listed under the FFG Act and therefore, caution in managing the project before us needs to be taken, consistent with the objectives of the FFG Act. This, however, still needs to be undertaken in the context that the planning permit approval relates to works to the land, not animal management, per se. This is for the same reasons that we set out about intangible heritage, at paragraphs 210 and 211.

Potential impacts on fauna

288 Surveys undertaken by Biosis through the application process included targeted fauna surveys. These detected the following threatened species:



- Alpine She-oak Skink.
- Broad-toothed Rat.
- Mountain Pygmy-possum.
- Tussock Skink.

Potential impacts on reptiles

289 As already set out, the cl 52.17 assessment assumes the Guthega skink and the Alpine Bog skink may dwell in the area, as a precautionary measure to address any potential impact, in addition to the animals found in the targeted survey. Therefore, the assessment of loss of habitat under cl 52.17 took into account the impact on habitat as habitat that may be used by the Guthega Skink, listed as critically endangered in the FFG Act and the Alpine Bog Skink, listed as endangered in the FFG Act.

290 Mr Clemann’s evidence makes a number of general statements about his concerns about the decline of habitat for native species and the impact of humans on areas of native habitat. Specific to the issues before us, he is particularly concerned that, based on his expertise and experience in monitoring alpine reptile species, the proposal may have underestimated the populations of Alpine She-oak Skinks, Alpine Bog Skinks, Alpine Water Skinks and Guthega Skinks that may be living in the area and may be impacted by the proposed works. He is also concerned the project may impact on the Alpine Tree Frog. He is not satisfied any offset accounted for in the cl 52.17 provisions addresses the actual ecological loss of these animals.

291 His evidence is he does not support the proposed relocation strategies set out in the draft SEMP and associated Construction Management Plan and management protocol for threatened skinks, prepared by Biosis.⁹⁸ His evidence is that attempting to move or relocate the reptiles, if found, will lead to their death. This is because his knowledge of the reptiles living and assumed living in the area is they are very territorial, and cryptic (or hard to survey).

292 Mr Clemann did not undertake his own surveys or visit the site for the purposes of preparing his evidence. He relies on his expertise as a researcher and monitor of reptiles in alpine areas. We accept Mr Clemann has extensive knowledge and understanding of the habits of the relevant reptile species that may be affected. His specific knowledge of the proposed management of ecology for the project was less extensive and therefore we find his evidence about the potential impacts on ecology is limited in this context.

⁹⁸ Management protocol for threatened skinks – Lakeside Precinct, Falls Creek – Draft Plan 9 September 2024, attached to Mr Looby’s evidence.



293 We were also provided with copies of conservation advice produced by the Australian Government – Department of Climate Change, Energy, the Environment and Water for the purposes of the EPBC Act. The advice sheets provide some context to the habits and home range movements for different species. For example, the conservation advice document for the Guthega Skink states:⁹⁹

The home range movements of the Guthega skink is highly localised, and adults have considerable site fidelity, with most basking and foraging occurring within proximity of familiar burrows (Green & Osborne 2012; Atkins 2018). Long-term monitoring data has documented only small dispersal events in juvenile animals and shown that adults are rarely found more than 10 m from their established burrow system.

294 Mr Clemann is critical of the SEMP as it refers to moving animals up to 100 metres, but preferably no more than 30 metres stating. Mr Clemann’s opinion, as reflected in the conclave report, is such translocation distances increase the area of impact of the project beyond the footprint of disturbance.

295 In response to questions put by Dr Spring in cross-examination on this issue, Mr Looby explained that the distances referred to in the SEMP derive from an existing licence Biosis has to relocate animals. Mr Looby also explained in his evidence in chief, the likely need to move or relocate species is across quite small distances and not what could be understood as a species translocation as described by Mr Clemann.

296 Dr Spring referred Mr Looby to a ‘Procedure statement for translocation of threatened native fauna in Victoria.’¹⁰⁰ The document states:¹⁰¹

Translocation means the deliberate human-assisted movement or removal of fauna from one locality and subsequent release either in the wild or in captivity or confinement at another locality. Note that the release site may be outside the State of Victoria.

297 Mr Looby’s written evidence also commented:¹⁰²

Biosis holds a current management authorisation under the *Wildlife Act 1975* which authorises the capture and relocation of threatened fauna where habitat impact is minimal and where animals are immediately relocated to a suitable location within the same habitat patch and no more than 100 metres from point of capture. Appropriate hygiene protocols are required to be followed as detailed in the proposed capture and relocation procedure to avoid spread of disease, though this is expected to be a low risk given short distance of relocation (maximum 30 metres).

⁹⁹ Dated 20 August 2024, commencing at Tribunal Book – Volume 2, page 2455.

¹⁰⁰ January 2023.

¹⁰¹ Page 2.

¹⁰² Looby evidence statement, page 57.



The *Procedure statement for translocation of threatened native fauna in Victoria* (DEECA 2023) states that Translocation Proposals are not required to be submitted to the Translocation Evaluation Panel (TEP) where the fauna is proposed to be moved to suitable habitat within 100 metres of the capture site. Any animals captured for relocation would be placed up to a maximum distance of 30 metres from capture. Guidance will be sought from species experts regarding the suitability of proposed release sites, as recommended in DEECA (2023). I do not consider local capture and relocation to be species translocation.

298 From our own review of the ‘Procedure statement for translocation of threatened native fauna in Victoria’, we agree with Mr Looby. The relocation proposed is not broad scale species translocation from one locality to another as referred to in the protocol. What is proposed is small scale capture and relocation, as described in the project. We examine this further, below.



Figure 10: Construction Management Plan with reptile survey – 22 October 2024, as tabled by ARV during the hearing.

299 In Figure 10 above we have extracted a part of the proposed Construction Management Plan, tabled during the hearing, which maps the 22 sightings of Alpine She-oak Skinks (blue triangles) and 25 sightings of Tussock Skinks (green triangles) in the subject land area. A number of these sightings were in the identified ‘no go’ areas of the subject land. As was explained by Mr Looby, the triangles represent 47 total sightings of skinks, but not necessarily sightings of 47 individual skinks. Experts

acknowledged that the sightings may have recorded an individual skink multiple times. We have assumed for the purposes of habitat consideration that sightings recorded by the triangles represent individual animals. We have also presumed that Guthega and She-oak skinks may inhabit all of the EVC43 area.

- 300 The marked-up Construction Management Plan correlates with Mr Looby's comments that any relocations are likely to be over quite small distances, in the order of less than 10 metres. We also note the draft Management protocol for threatened skinks – Lakeside Precinct, Falls Creek,¹⁰³ attached as an appendix to Mr Looby's evidence comments:¹⁰⁴

If capture and relocation is being undertaken a Management Authorisation will need to be obtained from DEECA prior to the commencement of works.

- 301 We are satisfied sufficient measures have been put in place to manage the project in a way which minimises the potential impacts from loss of habitat for identified fauna. There are other issues of animal welfare the ARV needs to address in delivering the project. These are matters that sit outside of the planning application.
- 302 Given the other protocols in place, we are satisfied the SEMP, and associated management documents provide an approach that is acceptable in extent for the scope of the planning application. This is noting that other broader environmental approvals may also be required under the FFG Act and EPBC Act.
- 303 In saying this, we note if approvals are granted under the FFG Act and other animal licensing arrangements with DEECA are approved that rely on different management regimes than in an SEMP endorsed as part of the permit, then the permit holder will need to amend the documents that form part of the planning permit, so the documents align.
- 304 Mr Clemann's evidence is also that insufficient consideration has been given to the potential location of the Alpine Tree Frog in the area, being a species also listed on the FFG Act. His comments in the conclave were that while not recorded within the resort, the species was previously present within the Bogong High Plains, and reintroduction of the Alpine Tree Frog to the area may occur in the future.
- 305 The surveys undertaken by Biosis were accepted by DEECA for the purposes of the planning application. The proposal includes retention of habitat where possible and reintroduction of habitat suitable for reptile species. We do not see there is a need to undertake further surveys or make changes to the project to address the potential presence of the Alpine Tree Frog given DEECA and other experts conclude the Biosis report has

¹⁰³ 9 September 2024, at PDF page 110 onward of Looby evidence statement.

¹⁰⁴ Ibid, page 8.



adequately identified existing and potential species within the subject land area.

Impacts from reptiles or small mammals traversing the open car park area

- 306 Mr Clemann's evidence is that widening the car park area may create further barriers or create isolation for reptiles. His evidence is this may have serious negative consequences for the genetic health of populations.
- 307 Dr Meredith's evidence comments cleared roads and car parks are also likely to provide easy access for introduced predators, increasing predation pressure and further exacerbating barrier effects.
- 308 Dr Heinze's evidence is also that the car park area creates an exposed area the Broad-toothed Rat and Mountain Pygmy-possum would need to traverse, exposing them to human impacts and animal predation. Dr Heinze and Dr Meredith also express concern about clearing of snow from the road during winter, as they say it will also have the effect of fragmenting the area by removing the protected crevices (sub-niveal space) utilised by small mammal species, including the nationally threatened Broad-toothed Rat.
- 309 There is already a sealed car park and road on the subject land. The proposed works will only widen, not create, a barrier. Mr Looby's evidence is that reptiles were observed using the hard stand areas for basking. BHP Road may be cleared of snow, but again, the planning application cannot manage snowfall or regulate snow management. The ongoing consideration of environmental protection of species recognised under the FFG Act and EPBC Act will remain a management issue for the ARV as both road manager and resort manager.
- 310 The proposal also includes construction of a tunnel under the car park to aid movement of small mammals, at the suggestion of DEECA in the appendix to its 17 August 2023 letter. Relevant experts, opposed to the development, questioned the utility of this tunnel. However, the experts generally agreed it should not cause harm. Dr Meredith's evidence comments that a single crossing could become choke point and a focus for predators.
- 311 On the basis it may provide some benefit, we are satisfied it should be retained on plans. We will however amend proposed permit conditions to require the tunnel to be marked on the landscape plan and also that the details of the plan be prepared in consultation with DEECA as set out in its suggested conditions in Appendix 1 of its letter of August 2023.
- 312 The main works to the road and car park are balanced by planting of new native vegetation that can reconstruct habitat. We consider the widened area is not a new barrier, but rather a slightly wider existing barrier. This is noting skinks were surveyed in the areas of non-native vegetation and hard stand.

Other potential impacts on the Broad-toothed Rat and Mountain Pygmy-possum

- 313 The Biosis report identifies one Mountain Pygmy-possum was sighted in the targeted surveys undertaken. The experts agreed this animal was most likely travelling through the area, as the vegetation and ground within the subject land is not prime habitat for this species. We were taken to a broader mapping of the core habitat of the Mountain Pygmy-possum across Falls Creek where core habitat has been identified and further protected through application of an Environmental Significance Overlay in the scheme.
- 314 Experts also agree the dispersal movements of the possum are not well understood. Dr Heinze's evidence comments boulderfields and recognized core habitats as mapped are not necessarily all of the areas where Pygmy-possums breed or raise young. Dr Meredith's evidence is the lack of information about the movement of the Mountain Pygmy-possum through the area and increase in barriers to dispersal for fauna, through the widened car park and road area will impact the endangered Mountain Pygmy-possum.
- 315 We are satisfied in the context of the planning application that suitable mitigation measures are in place to address wildlife movement through the subject land. We do not agree the project needs to await the results of long-term research or monitoring of potential species in the area before it can proceed. Such long-term study was not considered necessary for the site's inclusion in the PPRZ. Nor did DEECA object to the application for any such reason. We again note that where relevant, separate approval may still be required through the FFG Act and EPBC Act and these are matters outside of our consideration.

Potential impacts on drainage and water quality

- 316 Dr Spring submits if BHP Road and other roads are more regularly cleared of snow it will increase salt used to de-ice cleared roads. We reiterate that whether the ARV clears snow from roads, it is a matter for it to consider as road and resort manager. With this, any environmental techniques to clear and maintain cleared roads are matters it must address under its duties under the AR Act. They are not matters before us.
- 317 More broadly the SEMP, with its associated Construction Management Plan includes management protocols to address erosion and sedimentation risks during construction to avoid any unreasonable impacts on drainage in the area and water quality of the Rocky Valley Dam. Any issues arising from chemicals or minerals used in the construction activities can be addressed through these protocols.
- 318 A Waste Management Plan is also required. This can address matters of sewage collection to avoid unreasonable impacts on the area.



IS THE LIQUOR LICENSING OF THE PREMISES ACCEPTABLE?

- 319 No party specifically opposes the licensing of the use of the food and drink for the sale or consumption of liquor under cl 52.27 of the scheme.
- 320 We understand from a review of the officer report, some objectors to the planning application raised issue with the licensing of the premises. Relevant conditions were included in the NOD to address issues that may arise from the proposed licensing.
- 321 We agree with Mr Kelderman's evidence, there are no residential or other noise-sensitive uses within proximity of the building and no other nearby licensed premises that might otherwise warrant cumulative impact considerations. The premises will only be open during the day (i.e. until 6pm) rather than at night and have no more than 100 patrons at any time.
- 322 We agree the premises has some parallels with facilities existing across the ski fields, such as Cloud 9 and Blue Brumby. However, we understand the purpose of the proposed facility is a broader, year-round use, consistent with policy in the scheme. We find the proposal, as it relates to the sale and consumption of liquor, acceptable.

OTHER ISSUES

- 323 Various submissions were made by the applicants that, in their view, ARV did not undertake sufficient community consultation with specific groups, or the community in general, in preparing the proposal and through the planning application process.
- 324 Notice of the planning application was given in accordance with s 52 of the PE Act. There is nothing to indicate any defect in this process. Whether the ARV could have, or should have, or still should consult further with the community over operational issues beyond the scope of the planning application, is a matter for ARV to consider under the provisions of the AR Act.

DOES THE PROPOSAL ACHIEVE NET COMMUNITY BENEFIT?

- 325 The XCSAV submits:¹⁰⁵

Whilst all year round use of the resort is supported, the primary function of the resort is to provide active recreation in the form of skiing – which includes cross country skiing. Accordingly, development within the resort should facilitate cross country skiing, and not make it more difficult and less appealing.

- 326 We accept the proposal may lead to some impacts to cross country skiing, particularly if use of the facility during the white season leads to clearing of snow on roads. However, neither the PPRZ or CDZ2 have purposes to prioritise skiing over other passive or active recreational activities. The scheme has clear strategic intent in the MPS and PPF to broaden the

¹⁰⁵ XCSAV written submissions, [31].



offering of facilities and services to support year-round recreational use. The proposal provides a direct community benefit in achieving this aim.

- 327 Any decision to clear snow from roads that may also be used as ski trails is a decision for the ARV to make as the operator of the resort.
- 328 We are satisfied the proposed use and development, even if operating during the white season and resulting in the clearing of snow from BHP Road, does not unacceptably impact the overall functioning of the resort in the context of the purposes for which the land is zoned.
- 329 The XCSAV submit ‘ARV has fallen well short of establishing that the proposal will achieve a net community benefit’.¹⁰⁶ They state the benefits have not been quantified, are not significant and do not outweigh the significant disbenefits, when assessed through the lens of the applicable strategic planning policy framework and zoning controls that apply.¹⁰⁷
- 330 We are reviewing the decision made by the responsible authority. We must determine if the proposal is acceptable when assessed against the relevant policies and provisions, and decision guidelines of the scheme. In this context, there is not a burden of proof that needs to be made out by the ARV of quantitative benefits.
- 331 One of the requirements of cl 65.01 is to consider the MPS and PPF. In doing so, cl 71.02-3 sets out that responsible authorities:
...should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. However, in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations.
- 332 From our assessments above of the relevant policies and provisions applying to the land, we are satisfied the proposal achieves net community benefit in context of this clause. While there are some likely negative impacts, we are satisfied that in addressing the conflicting objectives the balance of policy and directions of the scheme support the proposal, subject to conditions.

CONCLUSION

- 333 For the reasons given above, the decision of the responsible authority, as it relates to the permissions under review, is varied. A permit, as it relates to the permissions under review, is granted, subject to conditions set out in Appendix A.
- 334 The conditions include matters as explained in the reasons above. This includes, for reasons we have already set out, we do not find it appropriate

¹⁰⁶ XCSAV submission, [45] and [84].

¹⁰⁷ Paraphrased from XCSAV submission, [84].



or necessary to impose a permit condition to limit the use to outside the declared snow season as identified by XCSAV as a condition that could be applied.¹⁰⁸ Also, for reasons already set out, are satisfied the ecological impacts and vegetation removal are acceptable and therefore there is no need to reduce the car park area to further avoid or minimise native vegetation loss.

Limitation of our conclusions

335 Consistent with the determination of the Supreme Court in *Myers v Southern Grampians Shire Council*¹⁰⁹ ('*Myers*') the Tribunal can only issue a permit for the permissions under review. In this case, the decision of the responsible authority to grant a planning permit under the BMO and the EMO are not before us.

336 Our findings and determinations therefore do not relate to the permit as it relates to these permissions. The conditions in Appendix A correspondingly do not include the conditions specifically relating to those permissions.

337 Our decision varies the responsible authority's decision by amending the conditions set out in the NOD, as set out in Appendix A.

338 As set out at paragraph 171 of *Myers*:

[171] ...if there is any material difference or inconsistency between the plans supported by the Tribunal and the conditions, it is a matter for the applicant for permit and the responsible authority to harmonise, if necessary, by endorsing plans in accordance with Condition 1 of the decision made by the responsible authority or by making a s72 application to bring all of the permissions into conformity.

339 Consistent with *Myers*, and other subsequent decisions of the Tribunal,¹¹⁰ we leave it to the responsible authority to consider how to align the permissions already granted for the use and development in accordance with the BMO with the permissions granted in this review. This is noting, as previously set out, that we understand the EMO no longer applies to the land.

Alison Glynn
Senior Member

Seuna Byrne
Member

¹⁰⁸ XCSAV submissions 25 November 2024, [3].

¹⁰⁹ [2023] VSC 658, [168]-[171].

¹¹⁰ For example, *Box v Stonnington* [2024] VCAT 149.



APPENDIX A – PERMIT CONDITIONS

APPENDIX A – PERMIT DESCRIPTION AND CONDITIONS

PERMIT NO	PA2201858
PLANNING SCHEME	Alpine Resorts Planning Scheme
RESPONSIBLE AUTHORITY	Minister for Planning
ADDRESS OF THE LAND	Unleased Crown land comprising CA 9H, 2015, 2019, 2022, 2026, 2051, 2056, Lakeside Precinct, Falls Creek Alpine Resort FALLS CREEK VIC 3699

THE PERMIT ALLOWS:

Planning scheme clause	Matter for which the permit has been granted
Clause 36.02-1	Use the land for a Food and Drink Premises and Information Centre.
Clause 36.02-2	Construct a building or construct or carry out works.
Clause 52.17-2	Remove, destroy or lop native vegetation, including dead vegetation.
Clause 52.27	Use the land to sell or consume liquor.

CONDITIONS TO APPLY TO THE PERMIT:

- 1 At all times what the permit allows must be carried out in accordance with the requirements of any document approved under this permit to the satisfaction of the responsible authority.

Approved and endorsed plans – changes required – architectural plans

- 2 Before the development starts or vegetation is removed, amended architectural plans must be submitted to and approved by the responsible authority. The plans must be:
 - (a) Prepared to the satisfaction of the responsible authority
 - (b) Drawn to scale with dimensions
 - (c) Submitted in electronic form
 - (d) Generally in accordance with the plans prepared by Studio B Architects and dated 5 May 2023, but amended to:



- i Show the details of the ‘Material Schedule’ to include CL01 as ‘reclaimed metal cladding or similar’;
- ii Show the details of the material and colour of the ‘FC01’ that is shown to the base of the ANARE shed. Details must be included in the ‘Material Schedule’ sheet. The material and colour must be muted and non-reflective and be suitable to the alpine environment; and
- iii Delete the material named ‘Timber board formwork concrete wall’ and referenced ‘M01’ in the ‘Material Schedule’, or, if the material is to be used, the elevation plans to be revised to show where the material will be used.
- iv Delete the annotation “Retaining wall to Civil engineer requirements”.
- v Add a notation to the effect that 13 car spaces are to be available for the food and drink premises.

Approved and endorsed plans – changes required – civil plans

- 3 Before the development starts or vegetation is removed, amended civil plans must be submitted to and approved by the responsible authority. The plans must be:
- (a) Prepared to the satisfaction of the responsible authority
 - (b) Drawn to scale with dimensions
 - (c) Submitted in electronic form
 - (d) Generally in accordance with the plans prepared by Foresight, Revision K and dated 27 April 2023, but amended to:
 - i Show the particulars, including any associated earthworks, of the drainage system to the north of the ANARE shed, which must be designed to ensure that the drainage profile of the Alpine Sphagnum Bogs and Associated Fens Community upslope of the ANARE shed is slow draining and avoids alterations to the groundwater table; and
 - ii Include a notation to state that access to the north of the ANARE shed by machinery is to be restricted.

Approved and endorsed plans – changes required – Landscape Plan

- 4 Before the development starts or vegetation is removed, a revised Landscape Plan must be approved and endorsed by the responsible authority. The Landscape Plan must:
- (a) Be prepared to the satisfaction of the responsible authority
 - (b) Be prepared by a suitably qualified person
 - (c) Have plans drawn to scale with dimensions



- (d) Be submitted to the responsible authority in electronic form
- (e) Be generally in accordance with the plans prepared by Peter Boyle and dated 15 May 2022 (Drawing No's L.01 and L.02), but amended to show:
 - i The location of the road and car parking spaces consistent with the location of the road and car parking spaces as identified in the architectural plans prepared by Studio B Architects and dated 5 May 2023 and the civil plans prepared by Foresight, Revision K and dated 27 April 2023; and
 - ii The 'Planting Schedule' consistent with the 'Ecological Vegetation Classes (EVCs 42, 43 and 210)' as identified in the Flora and Fauna Assessment' report, prepared by Biosis and dated 25 May 2023 and listed in the Site Environmental Management Plan (SEMP) prepared by Biosis and dated and signed 9 September 2024.
 - iii The location of the proposed wildlife crossing and planting around its entry points.
 - iv Areas of native revegetation to reinstate and connect patches of native vegetation (that provide habitat for threatened species) and link those areas to the proposed wildlife crossing to facilitate movement between the areas and the crossing.

Approved and endorsed plans – changes required – vegetation removal plan

- 5 Before the development starts or vegetation is removed, a revised Vegetation Removal Plan must be submitted to, approved and endorsed by the responsible authority. The Vegetation Removal Plan must:
- (a) Be prepared to the satisfaction of the responsible authority
 - (b) Be prepared by a suitably qualified person
 - (c) Have plans drawn to scale with dimensions
 - (d) Be submitted to the responsible authority in electronic form
 - (e) Be generally in accordance with 'Figure 3.1 Vegetation proposed for removal' plan (included in the Flora and Fauna Assessment report, prepared by Biosis and dated 25 May 2023), but amended to:
 - i Amend the notation on the plan associated with the new road into the site to read 'Impacts due to road upgrades in areas of moderate quality native vegetation supporting Broad-toothed Rat, Alpine She-oak Skink and Guthega Skink habitat.'



Approved and endorsed plans – changes required – Site Environmental Management Plan (SEMP)

- 6 Before the development starts or vegetation is removed, a revised Site Environmental Management Plan (SEMP) must be submitted to, approved and endorsed by the responsible authority. The SEMP must:
- (a) Be prepared to the satisfaction of the responsible authority
 - (b) Be prepared by a suitably qualified person
 - (c) Have plans drawn to scale with dimensions
 - (d) Be submitted to the responsible authority in electronic form
 - (e) Be generally in accordance with Site Environmental Management Plan prepared by Biosis and dated and signed 9 September 2024, but amended to show:
 - i Part A – SEMP Cover Form, under the heading ‘Construction Techniques / Activities’ – details to identify that construction activity to the north of the ANARE shed must be low impact;
 - ii Part A – under the heading ‘Environmental risks’, in Table 2: Environmental risk, in Item 5: A requirement, and detail of the process and program, for identification and salvage of threatened flora species considered suitable for salvage, which is to include, as appropriate: a pre-construction survey, salvage and relocation to a nursery, and/or collection of seeds and propagation of clones, and replanting after construction works are completed as part of the site rehabilitation;
 - iii Part B – Site Construction Management Plan, under the heading ‘Construction Zone and Vehicle Access’ – a new dot point to provide that access to the north of the ANARE shed by machinery is to be restricted.
 - iv Part C – Site Rehabilitation Plan:
 - (1) under the heading ‘Planting’, a requirement to replant any threatened flora that were salvaged/seeded/cloned in accordance with Condition 6e(ii) above;
 - (2) under the heading ‘Maintenance and extent of monitoring and follow-up works on site’: Details of a monitoring plan for the Alpine She-oak Skink, which is to include tile surveys in the rehabilitated area and in adjoining areas, including those used for relocation of any captured individuals, in the second (for baseline) and fifth years after completion of rehabilitation works to assist in understanding of the re-colonisation of the rehabilitated areas by that species, and the success of relocations;



- (3) ongoing prevention of pedestrian access to the Alpine Bog Community behind the ANARE shed, including by appropriate fencing and signage to inform and educate the public about the Alpine Bog Community.

Approved and endorsed plans – Wildlife Crossing Plan

- 7 Before the development starts or vegetation is removed, a detailed Wildlife Crossing Plan must be submitted to, approved and endorsed by the responsible authority. The Wildlife Crossing Plan must:
 - (a) Be prepared, in consultation with the Department of Energy, Environment and Climate Action ('DEECA'), to the satisfaction of the responsible authority
 - (b) Be drawn to scale with dimensions (if applicable)
 - (c) Submitted in electronic form
 - (d) Show the following details:
 - i A design that enables movement of fauna at the completion of construction (particularly for Broad-toothed Rat and Mountain Pygmy-possum) between vegetation north and south of the proposed road upgrade.

Approved and Endorsed Plans – no document previously submitted – Waste Management Plan

- 8 Before the development starts or vegetation is removed, a Waste Management Plan must be submitted to, approved and endorsed by the responsible authority. The Waste Management Plan must:
 - (a) Be prepared to the satisfaction of the responsible authority
 - (b) Be drawn to scale with dimensions (if applicable)
 - (c) Submitted in electronic form
 - (d) Show the following details:
 - i Identification of expected types of waste, including sewage waste;
 - ii Arrangements for effluent wastewater collection from the blackwater tanks (until such time a permanent connection to a sewer line is operational) including details on the type and size of trucks required, the likely frequency of collection and the hours for blackwater waste collection which must occur in non-peak times;
 - iii Methods proposed to reduce, reuse and recycle where possible;
 - iv Location, size and design of waste storage infrastructure;



- v Acknowledgement that all waste must be removed from the Alpine Resort;
- vi The location of sufficient waste storage and garbage collection facilities, either as freestanding hut(s) or room(s) within the development site. The facilities must be publicly accessible at all times.
- vii Methods to ensure waste vehicles do not interfere with safe access to car parking spaces during peak operation times.

The responsible authority may consent in writing to vary these requirements.

Waste management (including wastewater) and collection must be carried out in accordance with the requirements of the endorsed Waste Management Plan to the satisfaction of the responsible authority.

Layout not altered

- 9 The layout of the use, development and vegetation removal must not be altered without the prior written consent of the responsible authority.

Site Environmental Management Plan (SEMP)

- 10 All construction activity and site rehabilitation works must be undertaken in accordance with the endorsed Site Environmental Management Plan to the satisfaction of the responsible authority, unless otherwise approved in writing by the responsible authority. All persons working on the site must be provided with a copy of the endorsed Site Environmental Management Plan and must adhere to and retain a copy of the endorsed Site Environmental Management Plan on site at all times during the construction period.

Completion of landscaping

- 11 Before the use starts, the landscaping and rehabilitation of the site as shown on the endorsed Landscape Plan must be carried out and completed to the satisfaction of the responsible authority.

Run-off

- 12 No polluted and/or sediment laden run-off is to be discharged directly or indirectly into drains or watercourses that flow into the Alpine National Park.

Stormwater flows

- 13 Overland stormwater flows into the Alpine National Park must be maintained at the same rate post-development as at present.

Hours of Operation – information centre

- 14 The information centre use must only operate between the following times



- (a) 7:00am and 6:00pm daily.

The responsible authority may consent in writing to vary these hours.

Hours of Operation – food and drink premises

- 15 The food and drink premises use must only operate between the following times:

- (a) 7:00am and 6:00pm daily

The responsible authority may consent in writing to vary these hours.

Limit on number of persons – food and drink premises

- 16 At any time no more than 100 patrons may be present in the food and drink premises (inside and on the outdoor deck).

The responsible authority may consent in writing to vary this number of patrons.

Licensed premises

- 17 Liquor must only be sold, supplied and consumed in the area demarcated by the red line in the endorsed plans.

- 18 The sale and consumption of liquor may only occur between the hours of 7am and 6pm daily. The responsible authority may consent in writing to vary these requirements.

- 19 The maximum number of patrons allowed to be served liquor at any one time is as follows:

- (a) Maximum of 100 patrons (inside and outside the premises).

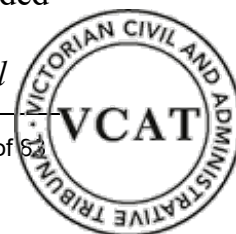
The responsible authority may consent in writing to vary these requirements.

- 20 At all times when the use is operating, a designated manager must be in charge of the premises to the satisfaction of the responsible authority. The manager must be authorised to make statements at any time on his/her behalf to any authorised police officer, any authorised officer of the responsible authority, or any authorised officer under the *Liquor Control Reform Act 1998*, and to take action on behalf of the operator in accordance with a direction by such officer.

Music and noise

- 21 Music played within the food and drink premises and the area defined in the 'red line' plan must be limited to the hours of 7am and 6pm daily. The responsible authority may consent in writing to vary these requirements.

- 22 At all times noise emanating from the land must comply with the requirements of the *Environment Protection Regulations 2021* (as amended from time to time) as measured in accordance with the *Noise limit and assessment protocol for the control of noise from commercial, industrial*



and trade premises and entertainment venues to the satisfaction of the responsible authority.

Bicycle facilities

- 23 A minimum of 4 bicycle spaces must be provided in the bicycle rack located adjacent to the entrance of the ANARE shed. The bicycle spaces must be constructed to comply with the design requirements specified in cl 52.34-6 of the Alpine Resorts Planning Scheme, to the satisfaction of the responsible authority.

Relocation of services

- 24 The relocation of and the connection to any water, sewerage, drainage, gas, electricity, telecommunication or other utility service must be done at the expense of the permit holder or developer and be to the satisfaction of the utility service provider.

Shutdown

- 25 All external construction activity must cease, unless the responsible authority consents in writing to another date after consultation with the Falls Creek Alpine Resort Management, during:
- (a) The period between Christmas Day and New Year's Day inclusive;
 - (b) The Easter holiday period;
 - (c) Any major event in the resort as may be notified by the Falls Creek Alpine Resort Management; and
 - (d) The period between 15 May and the end of the declared snow season.

Site condition

- 26 The site must be left in a clean and tidy condition at all times and prior to occupation and/or use of the ANARE shed building, all construction waste must be completely removed from the site to the satisfaction of the responsible authority. Any waste or litter must be immediately removed from the site and surrounding area at the direction of the responsible authority.

Department of Energy, Environment and Climate Action (DEECA)

Replanting

- 27 All batter and cut stabilisation work must be replanted with appropriate native species (in accordance with the relevant EVC/s) to the satisfaction of the responsible authority.

Notification of permit conditions

- 28 Before works start, the permit holder must advise all persons undertaking the vegetation removal or works on site of all relevant permit conditions



and associated statutory requirements or approvals to the satisfaction of the responsible authority.

Endorsed plans

- 29 Before the development starts, or any native vegetation is removed, the DEECA Native Vegetation Removal Report (Report ID: BIO_2023_176 [dated 19 May 2023]) must be endorsed and form part of the permit.

Protection of retained vegetation

- 30 Before the development starts, a plan to the satisfaction of the responsible authority identifying all native vegetation to be retained and describing the measures to be used to protect the identified vegetation during construction, must be prepared and submitted to and approved by the responsible authority. The plan must include:

- (a) A requirement to erect a native vegetation protection fence / barrier around:
 - i All patches of native vegetation proposed for retention (within 15 metres of any proposed buildings and works); and
 - ii The tree protection zones of all native trees to be retained (within 15 metres of any proposed buildings and works). All tree protection zones must comply with AS 4970-2009 Protection of Trees on Development Sites, to the satisfaction of the responsible authority.
 - iii *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) listed Alpine Sphagnum Bogs and Associated Fens endangered community / *Flora and Fauna Guarantee Act 1988* (FFG Act) listed Alpine Bog Community north of the ANARE shed, identified to be within the defensible space under the Bushfire Management Overlay for the ANARE Shed.
- (b) Details of activities which are prohibited in vegetation protection areas.
- (c) Details of actions / measures to be completed to maintain the health of the protected vegetation and viability during construction (e.g. mulching, watering, etc.).
- (d) Details of protection measures / structures maintenance requirements.

When approved, the plan will be endorsed and will form part of this permit. All works constructed or carried out must be in accordance with the endorsed plan to the satisfaction of the responsible authority.

- 31 Except with the written consent of the responsible authority, within the area of native vegetation to be retained and any tree or vegetation protection zone associated with the permitted development, the following is prohibited:



- (a) Vehicular or pedestrian access.
- (b) Trenching or soil excavation.
- (c) Storage or dumping of any soils, materials, equipment, vehicles, machinery, or waste products.
- (d) Entry and exit pits for the provision of underground services.
- (e) Any other actions or activities that may result in adverse impacts to retained native vegetation.

Native vegetation permitted to be removed, destroyed or lopped

- 32 The native vegetation permitted to be removed, destroyed or lopped under this permit must be no more than 0.239 hectares of native vegetation, within Location 3.

Native vegetation offsets

- 33 To offset the removal of 0.239 hectares of native vegetation, the permit holder must secure the following native vegetation offset in accordance with *Guidelines for the removal, destruction or lopping of native vegetation* (DELWP 2017) before any native vegetation is removed:
- (a) a general offset of 0.173 general habitat units:
 - i located within the North East Catchment Management boundary or Falls Creek Alpine Resort (Unincorporated) Council
 - ii with a minimum strategic biodiversity value of 0.739.
- 34 Before any native vegetation is removed, evidence the required offset has been secured must be provided to the satisfaction of the responsible authority. This evidence must be one or both of the following:
- (a) an established first party offset site including a security agreement signed by both parties, and a management plan detailing the 10-year management actions and ongoing management of the site, and/or
 - (b) credit extract(s) allocated to the permit from the Native Vegetation Credit Register.

Offset evidence

- 35 A copy of the offset evidence will be endorsed by the responsible authority and form part of this permit. Within 30 days of endorsement of the offset evidence, a copy of the endorsed offset evidence must be provided to Planning and Environmental Assessments at the Department of Energy, Environment and Climate Action at pe.assessments@deeca.vic.gov.au

Goulburn Murray Water

- 36 All construction and ongoing activities must be in accordance with sediment control principles outlined in ‘Construction Techniques for Sediment Pollution Control’ (EPA, 1991) to the satisfaction of the responsible authority.



- 37 All construction and ongoing activities must be in accordance with the endorsed SEMP to the satisfaction of the responsible authority.

Expiry – Development and use

- 38 This permit will expire if one of the following circumstances applies:
- (a) The development is not started within 2 years of the issued date of this permit.
 - (b) The development is not completed within 4 years of the issued date of this permit.
 - (c) The uses do not start within 2 years of completion of the development.

In accordance with Section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

– End of conditions –

