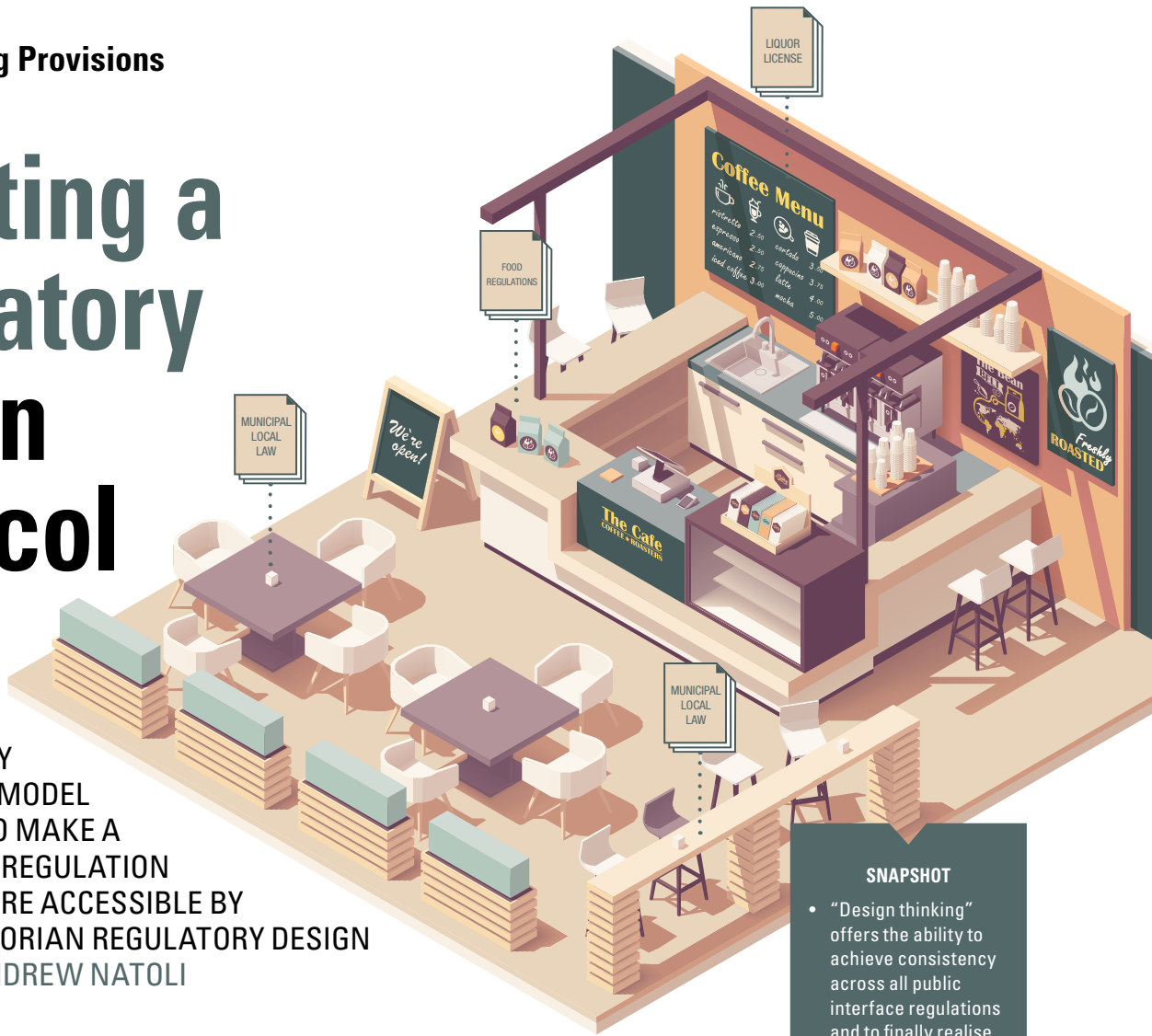# Adopting a regulatory design protocol

THE VPP WERE A PIONEER IN REGULATION BY DESIGN AND THE MODEL OFFERS A PATH TO MAKE A WIDER RANGE OF REGULATION SIMPLER AND MORE ACCESSIBLE BY ADOPTING A VICTORIAN REGULATORY DESIGN PROTOCOL. BY ANDREW NATOLI

The recession of the early 1990s hit the Victorian economy more deeply than other states and triggered wide-ranging reforms to facilitate investment and create jobs, including one of the most innovative and significant reforms the Victorian planning system had seen, the introduction of the Victoria Planning Provisions (VPP). The VPP created a standard template for all planning schemes and made many common provisions consistent across the state.

Twenty-five years later, the VPP remain an enduring early example of "regulation by design", created at a time when "design thinking" was only applied to tactile products and Collingwood's factories were occupied by blue collar workers and not "product" designers.

Victoria's economic recovery from the COVID-19 crisis will once again require an extraordinary response from its regulatory systems. The experience of the VPP reforms and its legislative architecture give Victoria a unique ability to deliver groundbreaking reform that will facilitate investment and actually deliver the promise and benefits of "digital ready" regulations.

Design thinking

Design thinking is not new, but it is now being deployed by a new breed of agencies and "product designers" to improve how citizens interact with public services and technology.

Design is more than just appearance, it is about how things work, informed by applying processes and methods to examine the interaction between people and technology.[1] At the centre of design thinking is the idea that any service or system is best thought of as a product whose sole purpose is to help the end user solve real world problems. Human centred design (HCD) approaches focus on researching, developing and testing interventions to optimise how an end user experiences using the product and how the benefit sought is delivered.

Progressive public law makers are exploring the application of HCD principles to policy development, the crafting of regulation and the design of the delivery platforms to translate and parse regulations to machine readable code.[2]

SNAPSHOT

- "Design thinking" offers the ability to achieve consistency across all public interface regulations and to finally realise the benefits of machine readable regulations through a central digital platform.
- The VPP are an early and enduring example of "regulation by design" that implemented a consistent planning scheme structure and format across all planning schemes and facilitated the state's economic recovery from the 1990s recession.
- Adopting a Victorian Regulatory Design Protocol, based on the VPP experience, could place Victoria at a unique competitive advantage in its recovery from the COVID-19 crisis.

The goal of regulation by design

The common vision driving these programs is for citizens to one day access the rules of government through a single digital platform that can integrate multiple agencies and regulations to identify all the legal obligations and entitlements relevant to the circumstances and location of that citizen or their business.

The demands the current pandemic has placed on governments could not make the potential benefits of this vision any more obvious. Just imagine if public health officials had access to a single statewide platform that:

- set out standard classes of residential and business activity so that activities with the highest potential for human physical interaction could be quickly identified across a range of regulatory settings
- provided a state standard template and protocol for drafting digital ready health directions that:
  - clearly and unambiguously express the classes of activities that are permitted, regulated and prohibited
  - if a class of activity requires approval, details what decision guidelines, standards and assessment pathway settings apply
  - can be stored in a database and readily plugged into a central portal and parsed according to end user queries
  - is already easily accessed and understood by the public and officials
- can be simply used to construct packages of entitlements that assist those classes of business activities and employees hardest hit by the public health directions
- provided a single statewide online interface (perhaps an app) that could be quickly updated to consistently advise residents and business operators of their legal obligations across a range of regulatory settings – a single source of truth.

The benefits

The benefits of simplifying legislation were succinctly put by the Victorian Law Reform Commission (VLRC) in 1987 and remain apt:

"Plain English in legislation is important because it helps members of the public to comply with their legal obligations and to obtain benefits to which they are entitled.

"Plain English in legislation is also important because it saves money. Poorly drafted laws impose costs on those who administer them and on those whose conduct they are intended to control. Time is wasted in trying to understand them".[3]

Despite progress, this aspiration has yet to be fully realised. For example, a person wanting to open a small café in an existing shop can be required to obtain four separate permissions under separate legislation. To be aware of their legal obligations, the operator must navigate to four separate websites, discover and understand how to characterise their business correctly for the purposes of each piece of regulation and then apply to different authorities, using different online forms or hard copy systems.

A new business operator must deal with the vagaries of each regime, different definitions, regulatory constructs and instruments. The oddities of each regime are exacerbated by their different authors and sometimes by local aspirations to just be different.
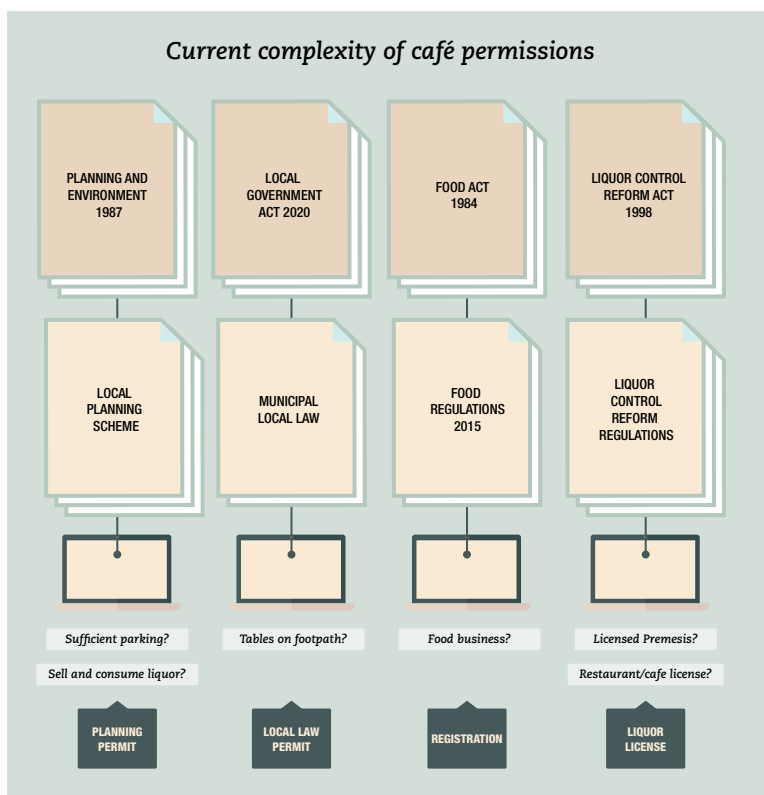
In an era where private enterprise has successfully "designed out" complexity elsewhere in our daily lives,[4] Victorians are surely entitled to expect that regulating authorities will also use any opportunity to do the same, particularly where clear, consistent and accessible rules can only deliver greater compliance, cheaper administration and better outcomes.

The obstacles

Government efforts so far have generally applied design thinking as a simple technology layer, a series of HTML blankets spread over a bed of complex and inconsistently structured regulations.

This "inconsistency" obstacle was highlighted as a key challenge by New Zealand's Service Innovation Lab when it examined opportunities for creating machine consumable rules, concluding that the task was difficult if the policy and legislation has not been developed with this output in mind.[5]

It seems that deep re-design of public regulations is "off-limits" and current efforts are instead focused on bespoke solutions to translate existing regulations into "codable" or machine consumable rules. Design thinking instead seeks to integrate different disciplines and dissolve hard traditional boundaries, not reinforce them.

Current complexity of café permissions

PLANNING AND ENVIRONMENT 1987	LOCAL GOVERNMENT ACT 2020	FOOD ACT 1984	LIQUOR CONTROL REFORM ACT 1998
LOCAL PLANNING SCHEME	MUNICIPAL LOCAL LAW	FOOD REGULATIONS 2015	LIQUOR CONTROL REFORM REGULATIONS
Sufficient parking? *Sell and consume liquor?*	*Tables on footpath?*	*Food business?*	*Licensed Premesis?* *Restaurant/cafe license?*
PLANNING PERMIT	LOCAL LAW PERMIT	REGISTRATION	LIQUOR LICENSE

Victoria Planning Provisions

From plain English to plain methods

While public interface regulations each have their tradition and legal origins, they all essentially perform the same types of functions – to permit, regulate or prohibit an activity. Despite this fundamental commonality, little consistency has been achieved in the way different agencies execute these basic functions in regulations.

Consistency is the most powerful usability principle, ". . . when things always behave the same, users don't have to worry about what will happen. Instead, they know what will happen based on earlier experience".[6] Similarly, for legal drafting, "never change your language unless you wish to change your meaning . . ."[7] In terms of technology, it is a principle that is innate to computer programming and the paradigm of object-oriented programming (OOP), which seeks to organise code into re-usable objects, reducing errors and the burden of maintaining code and minimising the need for users to understand hidden complexity.

Just as the plain English movement of the 1980s sought to burst the mystique of legal language in public laws, "a plain methods" movement is now needed to address inconsistent regulatory structures and methods and unlock the potential of law as a technology. When methods of regulating people and their activities are standardised across multiple regulations, it will become possible for the law to behave like and be accessed like any database, allowing users to zero in on and understand their legal obligations and comply with the law, ideally through a central platform.

VPP – the Macintosh of regulation

The inertial forces that hinder deeper regulatory design today are the same that faced the Victorian Planning System in the early 1990s and which were overcome through the development of the pioneering VPP – a regulatory product like no other and the likes of which have not been seen since.

The concept of the VPP emerged in response to a state economy struggling to deal with the impacts of recession. To start the overhaul of the planning system, the Kennett government appointed an advisory committee of industry professionals (the Perrott Committee) to advise on ways to improve the system. The committee found that the complexity of both planning schemes and their administration meant the system had lost sight of the outcomes it was intended to achieve.[8]

Before the internet even existed, the Perrott Committee recognised the important role that electronic access would play in the usability of the planning system and that "logical and consistent formats are easier to deal with and easier to access".[9]

When introduced in 1997, the VPP established a standardised statewide template from which councils were required to source and construct their local planning scheme.

A key usability feature, for both administrators and end users, was the modularity in construction and production. Amending a state standard provision only required one change to the VPP, which then flowed through to all planning schemes, increasing the efficiency of their maintenance and reducing the potential for drafting errors. For end users, this also meant that planning schemes could be accessed on a clause by clause basis, without
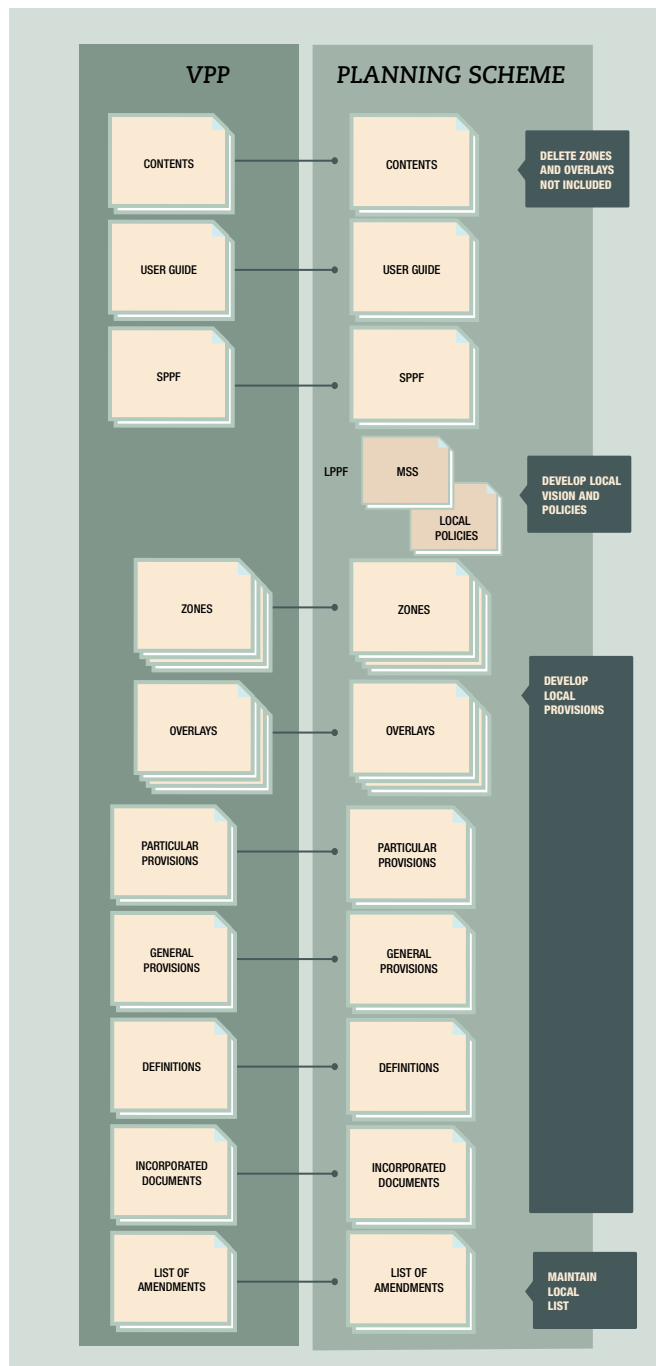
having to wade through pages of complexity. End users would often not even need to access the head provision because they were standard across all planning schemes, and all a user needed to do was see if a schedule implemented any local variation.

In terms of regulation design, the modular structure of the VPP is uniquely modern and aligns with programming models like OOP. OOP also uses modularity in the design of code to shield users from complexity and re-use standard code to reduce errors.

To think of the VPP as just a set of statutorily enforced MS

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Word templates would be a mistake. In the same way that famous design icons like the Apple Mac were developed, at every level of the VPP's interventions – from its supporting legislative architecture, simplified suite of zones and subject-based overlays, the VPP Manual and training, all the way to the use of specific fonts, tables and colour-coded dividers in the hard copy version – there was a clear intent to improve the way people, in a holistic way, experienced the preparation, administration and use of local planning schemes in Victoria.

Indeed, it is perhaps not surprising to learn that the officer leading the VPP design was a self-confessed Apple fanboy who saw the VPP as the "operating system" for planning schemes and was influenced by the design principles underpinning the Mac operating system and the principles of the Apple Human Interface Guidelines, the rules for the design of the MacOS.

Many other jurisdictions were envious when Victoria entered the VPP era. Importantly, as foreseen by the Perrott Committee, the consistent structure of the new schemes enabled electronic access to all planning schemes through a centrally administered portal almost from its inception. Not only were all planning schemes up to date and in one location, their modular structure meant that users could easily access the relevant provisions without needing to wade through one enormous document. Today, this is a function that many planners and lawyers in Victoria undoubtedly take for granted, but it is still not possible in many other jurisdictions. Victoria was also the first to implement an app that gave instant smart phone access to the zoning provisions of any lot in Victoria.

The value of the VPP's modularity was demonstrated by the Victorian government's recent planning response to the COVID-19 pandemic when Amendment VC193 implemented a single provision to amend all local planning schemes to temporarily exempt food businesses from various planning requirements. For local laws, however, there is no ability to implement a quick standard response.

Since its implementation, the VPP has been subject to numerous wide-ranging reviews in the name of cutting red tape, strengthening local policy or simply becoming smarter.[10] All these reviews have reaffirmed the value of the VPP concept and its legislative architecture.

Amendment VC148 recently implemented wide-ranging reforms to modernise the VPP structure, driven by new principles of "digital first" and "proportionality". These reforms have laid the foundations for the next phase of a finer grain standardisation or micro-modularisation of planning policies and controls, which will be critical to achieving digital ready schemes and charting a path for other regulation to follow.

Aiming high – a Victorian regulatory design protocol

Looking to the immediate future, there is now a unique opportunity to build and pilot a Victorian Regulatory Design Protocol (VRDP) for broader application to other suitable types of subordinate legislation. Like the original VPP project, this exercise should be design-led and develop legal solutions that aim for a contemporary end user digital experience.

Broader implementation of the protocol could be based on a similar architecture to the VPP under either the *Subordinate Legislation Act 1994* or new legislation requiring nominated public interface regulations to transition over time. The protocol should:

Establish a standard set of activity classes

As we have seen with recent COVID-19 health directions, targeting specific classes of activities can be critical to achieving policy outcomes. Any integrated digital gateway must be designed to be as simple as possible for users to enter and identify their activity without having to re-characterise their business across different regulatory regimes.

Establish consistent structures and protocols for drafting approval triggers and prohibitions

Strict drafting protocols and standard structures (such as the use of tables) for defining the line between permitted and regulated activities and prohibited activities will be critical. These will enable regulations to be "digital ready" and plugged straight into a central user interface, produce clearer regulations and reduce the potential for ambiguity and drafting errors.[11] Making it easier for users to identify their legal obligations through consistent digital platforms will also reduce costs for administrators, particularly councils, which devote considerable public resources to telephone inquiries and staffing the public counter.

Victoria Planning Provisions

Facilitate the consolidation of multiple applications to improve efficiency

A common statewide digital platform would enable users to make a single application for multiple permissions. As the cafe example illustrates, property related applications require the same base level of information which could easily be submitted through one form to multiple authorities.

Explore the potential to integrate multiple permissions to reduce duplication

A common statewide digital platform would unlock the potential to better integrate permissions relating to a single business or property. There is already significant overlap between regimes, and this can be problematic for operations like a quarry, which can be subject to different conditions under different permissions that regulate the same issue such as noise. An integrated digital platform could establish an electronic wallet that contains all the live approvals for a single property, creating greater transparency for authorities and the public, reducing the potential for overlap and greatly improving administrative efficiency.

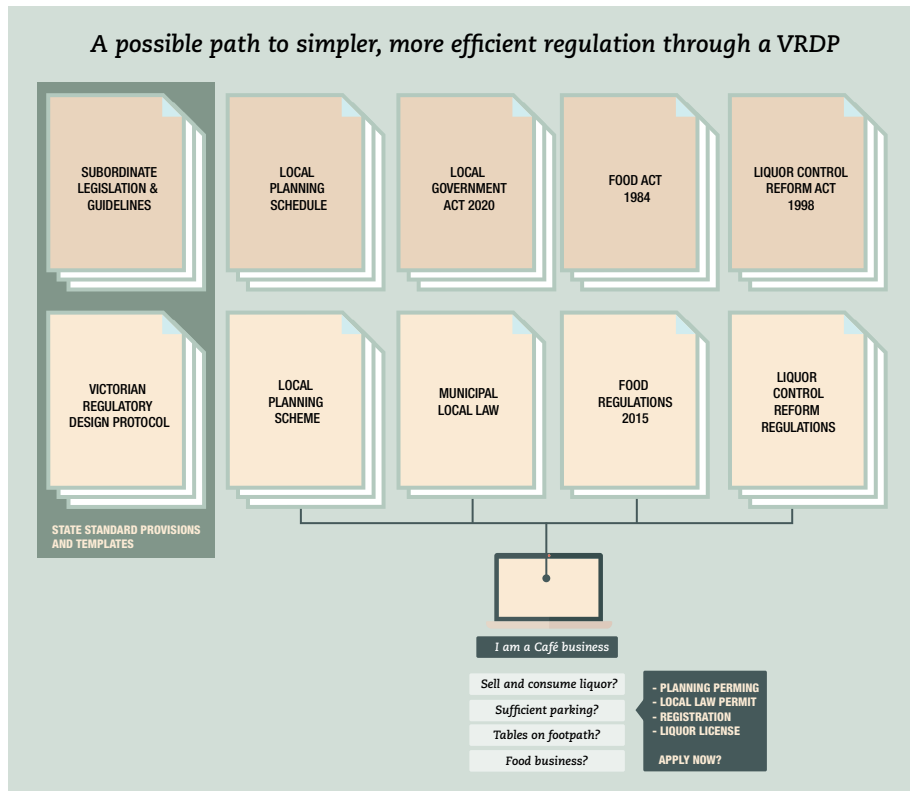## Initiate a pilot for a real-world test

Ideal candidates are state and local laws and regulations that affect small businesses that are exposed to disproportionately high regulatory burdens and costs.[12] These types of regulations also tend to overlap and often regulate identical matters from one municipality to the next.

You will likely never see the VPP alongside the Apple Mac in the pages of a coffee table book of 20th century design icons, however, Victorians would do well to reflect on and appreciate its legacy and the competitive advantage it has given Victorian planning today.

While other states continue with multiple one-off websites for individual regulations, Victoria has the experience and the opportunity to springboard from the success of the VPP model to a next generation, fully integrated digital regulatory platform. ∎

A possible path to simpler, more efficient regulation through a VRDP

STATE STANDARD PROVISIONS AND TEMPLATES

SUBORDINATE LEGISLATION & GUIDELINES — VICTORIAN REGULATORY DESIGN PROTOCOL

LOCAL PLANNING SCHEDULE — LOCAL PLANNING SCHEME

LOCAL GOVERNMENT ACT 2020 — MUNICIPAL LOCAL LAW

FOOD ACT 1984 — FOOD REGULATIONS 2015

LIQUOR CONTROL REFORM ACT 1998 — LIQUOR CONTROL REFORM REGULATIONS

I am a Café business
Sell and consume liquor?
Sufficient parking?
Tables on footpath?
Food business?

- PLANNING PERMING
- LOCAL LAW PERMIT
- REGISTRATION
- LIQUOR LICENSE

APPLY NOW?

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1. Norman D, *The Design of Everyday Things* (revised and expanded edition), Basic Books, 2013, at 5.
2. Eg, NSW Government's Policy Lab, the New Zealand Government' Service Innovation Lab, and CSIRO's Data61 all have ongoing initiatives to develop the potential for machine readable government rules and regulations.
3. VLRC, *Report No. 9, Plain English and the law* (1987), page xii.
4. Eg, platforms like Uber Eats integrate the products and services of numerous businesses to dramatically simplify the user experience of selecting and purchasing.
5. See https://www.digital.govt.nz/blog/ labplus-better-rules-for-government-discovery-report/
6. J Nielsen, "The top ten mistakes in web design" (1 January 2011) posted at https://www.nngroup.com/articles/top-10-mistakes-web-design/.
7. Piesse, *Elements of Drafting* (10th edn, 2004) p19, cited in Butt P, *Modern Legal Drafting* (3rd edn, 2013), at 3.21.
8. Planning Panels Victoria, *Final Report New Format Planning Schemes* (April 1999), p5.
9. Minister for Planning's Projects Steering Committee, Committee Recommendation and Project Team Reports (August 1993), Department of Planning and Community Development, p28.
10. For a summary of these reviews, see *Reforming the Victoria Planning Provisions, A discussion paper* (October, 2017), Appendix 3.
11. Numerous tribunal and court decisions highlight how very minor nuances in drafting can lead to lengthy and expensive disputes that could easily have been avoided if lessons had been learned and clear drafting rules were in place, eg, see *Mrocki v Bayside CC* [2015] VCAT 1731 and *Shadda Abercrombie v Salter Architects & Anor* [2018] VSCA 74, which both concerned ambiguously drafted "maximum" height controls.
12. Department of Economic Development, Jobs and Resources, Small Business Regulation Review Action Statement (2018), p15.