

JULY 2024

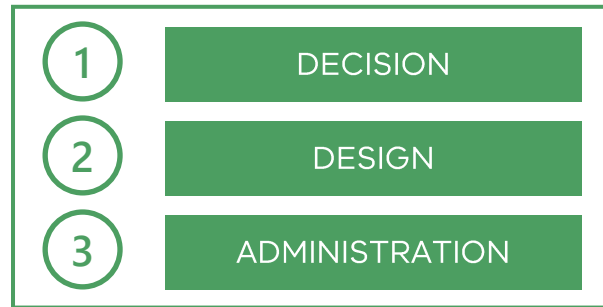
Victorian Framework for Fit and Proper Tests

Guide

When and how to use this guide

This guide provides step by step guidance on applying the Victorian Fit and Proper Test (FPT) Framework (the Framework). This guide is intended for those seeking to shape the FPT policy settings and regulatory design.

Framework stages



Additional resources and preparation for using the guide

- Read the relevant sections of the Victorian Permissions Framework and its associated Guides and Better Regulation Victoria's guides to implementing 'better practice' permissions.
- Check the relevant legislation in your area for its direction on FPTs.
- Understand the risks of harm that to be managed.
- Assess whether there are links between a person's characteristics (such as education, age, criminal history), character and the risk of harms occurring.
- Keep in mind that there may be more efficient alternatives to FPTs which achieve the same objectives of harm reduction.

The Victorian FPT framework is designed to:

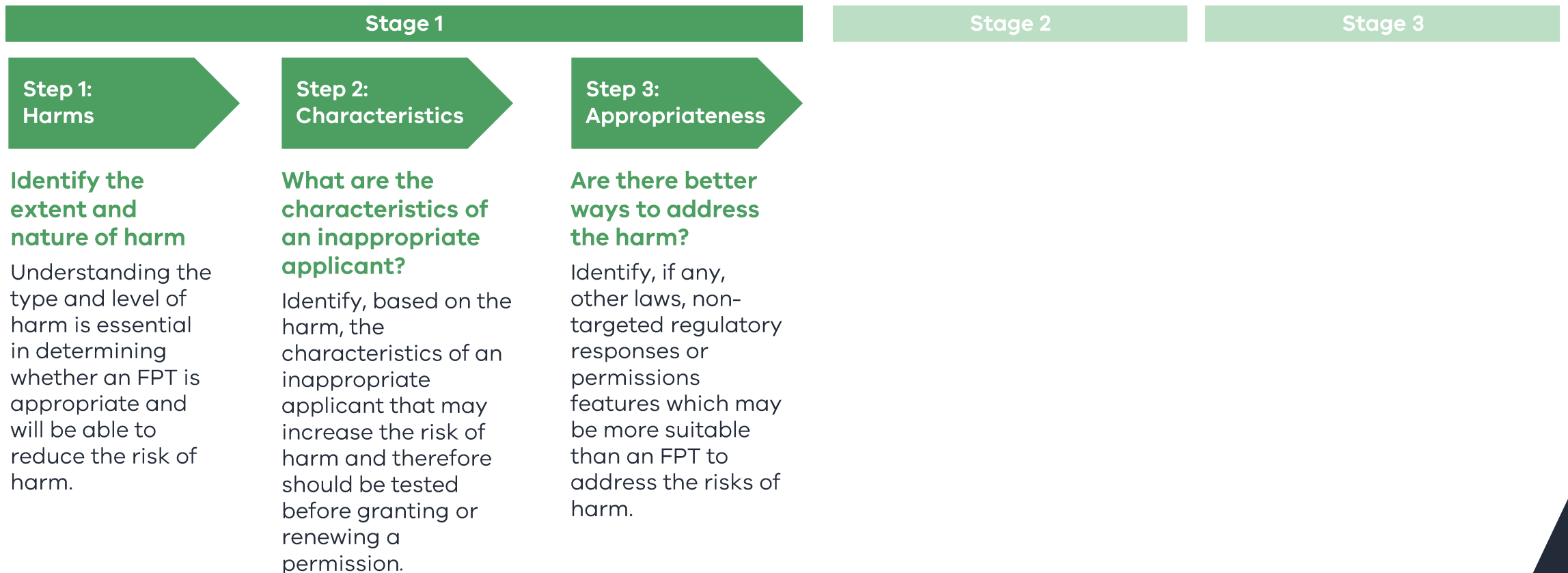
- Promote efficient and effective FPTs by guiding the design of standardised and objective FPTs, while also targeting the risk of harm
- Provide guidance on reducing regulatory burden when developing FPTs
- Ensure that characteristic tests are linked to the risk of harm to minimise unfair and unnecessary discrimination associated with character-based assessment

The guide will help you:

- Understand whether an FPT is the best regulatory tool to reduce the harms or if imposing permission conditions or other approaches after issuing a permission might be more effective
- Understand what characteristics are appropriate to include
- Design an FPT that is proportionate to risk
- Design an FPT with consideration of legislation and necessary levels of evidence

Stage 1: Decision

The purpose of Stage 1 is to determine if an FPT is an appropriate measure to reduce the risk of harm. An FPT should only be considered when the burden it will impose on businesses and the regulator is commensurate with the risk of harm being managed.



Step 1: Risks

Stage
1

Step 1:
Risks

Key questions

- *What harm(s) are being managed?*
- *What is the likelihood of negative outcomes and the consequence if those outcomes occurred?*
- *Is the risk of harm from an inappropriate applicant being granted a permission so high that all applicants need to be pre-screened?*

What is the nature and extent of harm and how is it related to an FPT?

Licences, permits and other permissions impose requirements to provide information and gain approval from regulatory authorities before a regulated activity is commenced.

Assess the likely harms that could occur from inappropriate applicants being granted permission. Use the risk matrix at Attachment 1.

Identify where the consequences are so difficult to remedy, remedies are inadequate or unduly costly or slow that the risk needs to be controlled before it happens.

Identify the detectability of harm. Harms which are difficult to detect can be difficult to remedy.

An FPT is only suitable where pre-screening and eliminating some applicants from being provided a permission reduces the risk of harm. If the risk of harm is high for all potential applicants, consider other regulatory controls in the Victorian Permissions Framework.

Example

Electrical work – high risk

There is a high risk of harm associated with electrical installation work. Faulty wiring can cause fire and give electrical shocks which can be life threatening. Appliances can also be damaged by power surges caused by faulty installations. Energy Safe Victoria licences and registers all electrical tradespersons in Victoria. The *Electricity Safety Act 1998* sets out licence requirements which include both necessary experience and qualifications.

Recreational fishing – low risk

Under the *Fisheries Act 1995*, a recreational fishing licence is required for all forms of recreational fishing in Victoria's marine, estuarine and inland waters. Recreational fishing involves a low likelihood of harm with relatively minimal consequences. The risk of harm to the environment and others in the community is low.

Step 2: Characteristics

Stage
1

Step 2:
Characteristics

Key questions

- *What characteristics does an inappropriate applicant have?*
- *Are any characteristics of the applicant closely connected with the risk of harm?*

Are there any applicant characteristics closely linked to harm?

Assessing characteristics is the primary mechanism for an FPT. Characteristics may include:

- Past regulatory compliance
- Criminal history
- Financial capability
- Education and qualifications

All FPTs involve an Identity check. An identity check is not by itself an FPT but must be undertaken before other components of the FPT are considered.

Any characteristics assessed in an FPT should be closely linked to the risk of harm. Analysis should demonstrate the nexus or predictive ability of the characteristic to harm.

By focusing on characteristics this will make the FPT design undertaken in stage 2:

- objective and measurable
- able to be sourced digitally, where possible, and
- able to be transparently evaluated.

Example

Criminal history

Conducting gaming activities requires a licence under the *Gambling Regulations Act 2003*. Some gaming venues handle significant amounts of cash. An applicant for a gaming licence with criminal history would significantly increase the risk of harm that cash may be misused or involved in money laundering. The characteristic of having a recent criminal conviction related to financial fraud is closely linked to the risks of harm.

Financial history

The *Education and Training Reform Act 2006* requires teachers to register with the Victorian Institute of Teaching to undertake teaching duties. This is to promote child safety and wellbeing. Whether the applicant has been insolvent or bankrupt is not directly relevant to the harms that this registration aims to control.

Step 3: Appropriateness

Stage
1

Step 3:
Appropriateness

Key questions

- *Could the harms be better addressed by other permission features or regulatory regimes? If so, what are they?*
- *Why is an FPT a more suitable option to address the harm compared to other mechanisms?*

Is an FPT the best approach?

FPTs are not always the best methods of managing harm even when the risk is high and applicant characteristics are correlated with increased risk of harm. Alternative methods may be more cost effective and better achieve the required regulatory outcomes. Examples of alternatives that may be more appropriate include:

- Existing law not specific to the industry e.g., fair trading laws to reduce false advertising
 - Helps promote consistency and reduce regulatory burden for the regulator and permission holder
 - Provides remedies after harm has occurred.
- Targeted non-regulatory responses
 - Non-regulatory tools include education and market-based incentives such as lower fees for people who have good compliance history.
- Permission features
 - Consider if conditions could be better specified to reduce the need for an FPT or reduce the frequency or scope of the FPT required

Combinations of responses may also be helpful. It is important to consider other ways to manage risk to ensure FPTs are not carried out unnecessarily.

Example

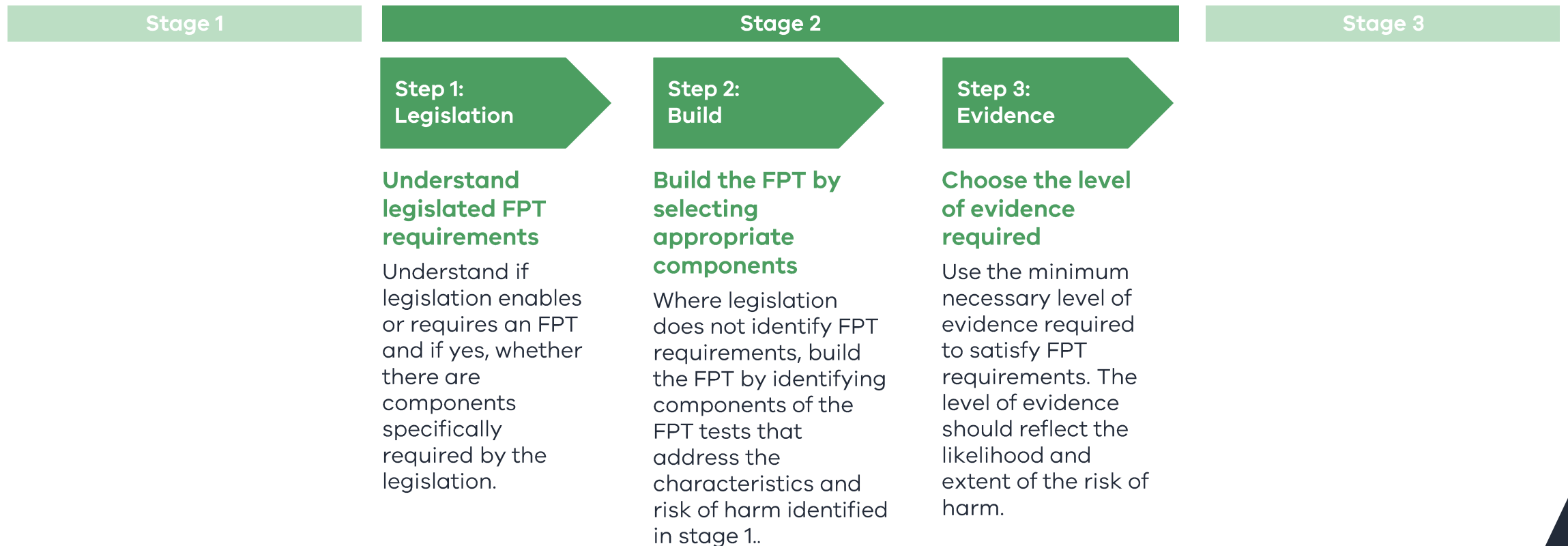
Real estate licence

An applicant for a licence under the Estate Agents Act 1980 may only be approved if the Business Licensing Authority is satisfied that the applicant is 'fit and proper,' due to high risks associated with access to significant sums of other people's money.

It is important that all estate agents are financially responsible, trained and educated as well as removed from any criminal linkages to reduce these associated risks of harm. An FPT of all applicants is a reasonable way to ensure risks are managed effectively for this licence.

Stage 2: Design

The purpose of Stage 2 is to determine the optimal design of the FPT. Only components which are directly related to the risk of harm should be included. Evidentiary requirements should be minimal to satisfy the level of risk being managed.



Step 1: Legislation

Stage
2

Step 1:
Legislation

Key questions

- Does legislation enable an FPT for the permission?
- Does the legislation specify the requirements that the regulator should consider when conducting an FPT?

What does the relevant legislation say?

FPTs cannot be administered without a power in legislation. Examine legislation to understand if an FPT can be administered and, if so, what can be considered when undertaking the FPT.

Best practice legislation sets out the requirements to establish fitness to hold a permission. Among other things, provisions should specify that providing false or misleading information will result in revocation or penalties.

Some legislation refers to a 'fit and proper person' without specifying what is to be considered in establishing this. In this case, regulators need to develop clear and transparent operational policy outlining their administrative interpretation of the legislation. In the longer term, consider legislative change to ensure legislation aligns with best practice.

Consult the Office of Chief Parliamentary Counsel/Department of Treasury for guidance on **Model Legislative Provisions** when considering legislative amendments. Guidance is being developed and will be published later in 2024.

Example

Rooming House Operators

The *Rooming House Operators Act 2016* sets out detailed licence application and renewal disqualification criteria (s17 and s18). This includes:

- a conviction within the preceding 10 years of an offence involving fraud, dishonesty, drug trafficking, child pornography or violence punishable by a term of imprisonment over 3 months.
- a conviction within the preceding 5 years of specific offences against various acts including the *Rooming House Operators Act 2016* and the *Public Health and wellbeing Act 2008*.
- Insolvency under administration

The Act provides for penalties for giving false or misleading information.

Step 2: Build

Stage
2

Step 2:
Build

Key questions

- *What characteristics are being managed by the permission?*
- *What components of an FPT may be selected to screen applicants for these characteristics?*
- *Are any of the components of the existing or proposed FPT not necessary to control the risk of harm?*

What components are linked to the risk of harm?

When designing an FPT, select from a range of potential FPT components such as

- Criminal history
- Financial history
- Education, qualifications and training

Components selected should be directly related to the risk of harm being managed by the permission and linked to characteristics as identified in stage 1.* Components not directly and significantly relevant to reducing the risk of harm should be excluded from an FPT to reduce unnecessary regulatory burden and costs for both applicants and the regulator.

Only the minimum necessary components should be selected. Identity verification is a baseline requirement for all FPTs. Common FPT requirements include education and training and criminal history. Where FPTs require consideration of specific matters, bespoke components may be added. Assessment of personal integrity and character are generally only for use in situations of exceptionally high risk.

FPTs should only be applied to individuals when doing so directly reduces the risk of harm. For example, in some cases FPTs should be applied to more than just the permission holder, if those individuals (e.g. other office holders) represent a risk of increased harm.

Example

Financial history

In the building industry there have been repeated issues of illegal phoenixing (where a company goes into external administration to avoid paying creditors before re-emerging as a new entity run by the same individuals).

If registered building practitioners are not financially able to run a building related business, this may put creditors at a risk of financial harm. A test of financial history through an external administration test helps to directly reduce this risk of harm.

*See page 15 for further examples.

Step 3: Evidence

Stage
2

Step 3:
Evidence

Key questions

- *What level of assurance is needed when checking applicant characteristics?*
- *Is the level of evidence required by the FPT the minimum necessary required to satisfy each required element of the FPT and its level of assurance? How will audits complement this?*
- *Do operational policies clearly indicate the type and required level of evidence to satisfy each FPT component?*

What is the minimum level of information validation needed?

Evidence requirements should be attuned to the level of risk of harm being managed. Policy makers must consider the type of evidence, the age of evidence and the consideration period.

- In lower risk cases, applicant attestation should be acceptable evidence that FPT requirements are met.
- When the risk is higher, the regulator should require evidence to be provided by the applicant.
- In the highest risk cases, evidence should be sourced directly from third-parties by the regulator.
- When accepting evidence provided by applicants, the age of acceptable documents should be attuned to the level of risk. The acceptable age of evidence should decline as risk increases. An audit program, tailored to risk, of applicant attestations and provision of information helps support permission integrity.

Policy makers must also consider the length of time being considered. For example, in lower risk cases the history of the applicant over the previous three years should be assessed, rising to ten years in the highest risk cases.

Example

Recreational Fishing Licence

An individual is applying for a 28-day recreational fishing permit. Section 49(5) of the Fisheries Act 1995 (Vic) provides that a permit may not be issued unless the decision-maker is satisfied the applicant is fit and proper to hold such a licence. In these circumstances, identification of the applicant, completion of an online form (requiring a date of birth and contact information), a declaration that the individual is not exempt from holding a licence and is aware that making a false or misleading statement is an offence will be sufficient for issuing the permit.

Stage 3

FPT evidence administration

- Stage 3 focuses on efficient administration of Fit and Proper Tests.
- Stage 3 will be developed in 2025.

Document version control

The Fit and Proper Test Framework and Guide will be expanded and continuously improved over time.

Version	Date	Description of changes
1	July 2024	Initial publication
2	December 2024	Revision to examples. Case studies removed, will be included in Stage 3 update in 2025.

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