

ENFORCEMENT

7

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ENFORCEMENT

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7.1 Enforcement and the planning system

7.1.1 Why is enforcement important?

Planning schemes are designed to regulate the use and development of land so that it meets agreed community objectives. A planning scheme is a law (technically, a subordinate instrument) that regulates the way land can be used and developed. As with any other law or regulation, planning schemes are only effective if their requirements are enforced.

PEA s. 14(a)

The responsible authority is required by law to efficiently administer and enforce the planning scheme.

The responsible authority will typically be the council of the municipal district to which the planning scheme applies.

The objectives of enforcement are to:

- ensure compliance with
- avert or prevent threatened breaches of
- stop existing breaches of, and
- punish for breaches of

the planning scheme, planning permits and their conditions and agreements made under section 173 of the *Planning and Environment Act 1987* (the Act).

7.1.2 When is enforcement action appropriate?

PEA s. 126

Any person who uses or develops land in contravention of or fails to comply with a planning scheme, or a planning permit, or an agreement under section 173 is guilty of an offence.

Enforcement should occur when there is a clear breach of the Act, a planning scheme, permit condition or section 173 agreement and the breach warrants enforcement, especially if it causes detriment to the community. The main emphasis of enforcement should be on obtaining compliance rather than on prosecuting offenders. Adopting a conciliatory approach through a process of education, communication and negotiation will more often provide a positive outcome. The various enforcement options should be viewed with this in mind.

7.1.3 What enforcement options are available?

Depending on the nature and seriousness of the problem, the responsible authority can do one or more of the following:

- IA 2006 s. 8

 - **Preliminary negotiation:** Negotiate informally with the alleged offender. The role of enforcement often includes educating an alleged offender who may not be conversant with planning considerations and laws. This type of positive conciliation may avoid the need for formal action and should usually be the first step taken.
- PEA s. 130

 - **Official warning:** Issue an official warning pursuant to the *Infringements Act 2006* where an infringement notice is considered excessive under the circumstances.
- PEA s. 114

 - **Planning infringement notice:** Issue a planning infringement notice, which provides a monetary penalty and provides the responsible authority with the option to require remedial action. This is usually for less serious breaches.
- PEA s. 120

 - **Enforcement order:** Make an application to the Victorian Civil and Administrative Tribunal (VCAT) for an enforcement order to achieve compliance.
- PEA s. 120

 - **Interim enforcement order:** Make an application to VCAT for an interim enforcement order where there is a need for immediate action.
- MCA 1989 s. 25,
CPA s.7

 - **Prosecution:** Commence prosecution proceedings in the Magistrates' Court. This must be commenced within 12 months of the alleged offence. This time limit means that a responsible authority should not continue negotiation to secure compliance if there is a risk that the opportunity to prosecute will become unavailable. Prosecution in the Magistrates' Court may be needed to follow up non-compliance with either an infringement notice or an enforcement order.
- PEA s. 125

 - **Court injunction:** Seek an injunction from a court of competent jurisdiction (Supreme, County or Magistrates' Court) to restrain a person from contravening an enforcement order or interim enforcement order.
 - **Common law injunction:** Seek a common law injunction from a court of competent jurisdiction to restrain a person from contravening a law.
- PEA ss. 87, 88,
89

 - **Cancel or amend a permit:** Make an application to VCAT to cancel or amend a permit – for example for a substantial failure to comply with the conditions of a permit.
- PEA s. 123

 - **Carry out work:** Undertake work to secure compliance with an enforcement order or interim enforcement order and recover the cost of doing so.

THE ENFORCEMENT SYSTEM - Corrective Action versus Prosecution

The enforcement system separates the functions of VCAT (which deals with the planning issues in relation to enforcement orders and disputes) and the courts (which deal with prosecutions).

Enforcement order proceedings are designed to prevent or stop existing unlawful planning activities and to achieve compliance, reinstatement or remedial works. They are not designed to punish. Only a section 126 prosecution under the *Planning and Environment Act 1987* will do that.

A section 126 prosecution is designed to punish for what has occurred and provide a deterrent against a recurrence. It cannot directly achieve a cessation of the act complained of (or rectification or reinstatement) unless the person who is prosecuted voluntarily does this in an attempt to lessen a penalty, or agrees to do it as a condition of any bond imposed by way of penalty.

It is therefore necessary to choose which of the enforcement mechanisms is the most appropriate in the circumstances. This choice will be influenced by considering any differences in procedure and standards of proof, the delay involved in getting to a final hearing and decision and what is sought to be achieved by the enforcement.

In a criminal proceeding, for example a prosecution in the Magistrates' Court, the offence must be proved beyond a reasonable doubt. In a civil proceeding, for example applying to VCAT to have a planning permit cancelled, the burden of proof is to a civil standard on the balance of probabilities.

7.1.4 What administrative arrangements should a responsible authority make?

To make its enforcement action effective, a responsible authority should consider training an officer in enforcement methods and skills. Appropriate delegations and authorisations should also be in place to enable the officer to take any necessary action, including:

- PEA ss. 133, 134 • entry to properties to carry out and enforce the Act, regulations, planning scheme, planning permits, enforcement orders or agreements made under section 173
- PEA s. 130 • issuing planning infringement notices
- PEA ss. 114, 120 • applying for enforcement orders and interim enforcement orders
- PEA s. 87 • applying for the cancellation or amendment of planning permits
- LGA ss.224, 232 • instituting proceedings on behalf of the council under any Act, regulation or local law.

7.1.5 What is the role of the *Local Government Act 1989*?

Section 224 of the *Local Government Act 1989* allows a council to appoint an officer to be authorised 'for the purposes of the administration of any Act, regulations or local laws which relate to the functions and powers of the Council'.

The powers of an officer authorised under the *Local Government Act 1989* are extensive. The authorised officer may enter any land or building at any reasonable time to carry out and enforce the *Local Government Act 1989* or any Act without notice.

While an officer could be authorised under the provisions of both the *Local Government Act 1989* and the *Planning and Environment Act 1987*, the officer should be careful not to confuse the powers and duties under each Act. It would be unwise for an officer authorised under the *Local Government Act 1989* to enter property using provisions of the *Planning and Environment Act 1987* unless that was the only authorisation relevant to the circumstances. Although there is an inconsistency between the two Acts, the more specific (and restrictive) provisions of the *Planning and Environment Act 1987* are likely to prevail in these circumstances.

7.1.6 Monitoring compliance and responding to contraventions

Regular checks and inspections can be carried out by an authorised officer of a responsible authority to ensure that the use or development of land does not contravene a planning scheme, section 173 agreement or planning permit. However, due to the extent of use and development activity that goes on across a municipality, most responsible authorities rely on a complaint alleging a planning breach to trigger an investigation. A lesser number of investigations are carried out as routine inspections to monitor planning scheme compliance.

The complaint may raise matters that require referral to other council branches, such as health, building or local laws or it may fall under the jurisdiction of other authorities or agencies, including:

- Victoria Police (for example, wilful damage)
- Department of Justice (for example, prostitution and liquor licensing)
- Environment Protection Authority (for example, major industrial noise/odour, contaminated land)
- Service authorities and providers (for example, infrastructure damage)
- Work Cover Authority (unsafe working environment)
- Department of Immigration (suspected illegal immigrant workers).

In some circumstances it may be appropriate for a joint site inspection to be conducted. This would be particularly relevant where the cause of complaint falls across more than one jurisdiction.

Where the owner of the land is not the occupier, the investigating officer may consider advising the owner of the matter at this preliminary stage. This gives the owner the opportunity to undertake measures to resolve the issue and may result in a more timely resolution.

Assembling Information

In each case, the investigating officer should start with a desk top audit and an initial assessment to assemble relevant facts, including (as relevant):

- zone and overlays applicable to the land and relevant provisions of the planning scheme
- occupancy and use history (particularly where existing use rights may be a consideration)
- planning and building history, including planning permits, endorsed plans or section 173 agreements relevant to the land
- consultation with the planner who provided any advice or assessed any applications relevant to the land (where possible)
- aerial and street photography (both current and historic).

The desk top audit will assist the investigating officer to form an initial view on the nature of the suspected breach, based on information from the initial complaint and the research conducted.

Eye witness accounts can establish when an offence was committed. In the absence of a witness, aerial photography, physical evidence on the ground and receipts or other documents may provide proof that something happened on a day, or between dates.

7.1.7 Site Inspections

Following a desk top audit, an initial inspection of the land will help obtain first hand evidence of a contravention. An officer must be authorised to enter the land.

PEA s. 133

The following persons are authorised to enter any land at any reasonable time to carry out and enforce the Act, the regulations, a planning scheme, a permit condition, an enforcement order or an agreement under section 173 of the Act or, if the person has reasonable suspicion, to determine whether any of them has been or is being contravened:

- an authorised person of the Department of Environment, Land, Water and Planning
- an authorised officer of the responsible authority
- any other person whom the Minister authorises to assist an authorised officer of the Ministry or authority.

PEA ss. 134(1)

Prior to entering a property for enforcement purposes an authorised officer is required to either:

- obtain the occupier's consent, or
- provide two days prior notice if the land is not a brothel (special entry provisions in the *Sex Work Act 1994* apply to brothels) or
- obtain a warrant.

PEA s. 136

An authorised officer may request the assistance of the Victoria Police to gain entry to land where an occupier refuses to allow entry following the provision of two days notice.

MCA s. 75

The option to take out a warrant may be necessary where entry to a property is required without giving two days notice and the occupier refuses consent. A warrant is obtained from the Magistrates' Court.

Caution should be exercised when entering all construction sites. The officer should seek out any site office or on-site constructions manager in the first instance to advise of the reason for the inspection, to obtain consent, and to obtain a hard hat and vest if necessary.

All evidence compiled should be assembled and recorded methodically and clearly by the authorised officer to facilitate a fair and accurate assessment of the alleged contravention. This documentation and material is important as it is the basis on which an authorised officer or responsible authority decides if further monitoring or enforcement is warranted. It would also be part of the responsible authority's supporting information for any case the authority may make in a hearing before VCAT or during the course of legal proceedings.

PEA s. 135

On entering land, the Act provides for evidence to be obtained through a variety of means. The inspection record should detail the address of the land and the matters being investigated, together with:

- time and date of the inspection
- persons in attendance
- details of activities or development noted at the time of the inspection
- names of any persons interviewed

- details of any interviews
- photographs, measurements, sketches, recordings and samples, as required.

In some instances, regular inspections of a site may be required to monitor activities or changes. Each inspection is to be recorded.

What if an authorised officer is obstructed when trying to inspect a property?

If the breach or elements of the breach are not clearly apparent from outside the land, the investigating officer should request consent to enter the land from the occupier. The officer should identify himself or herself by name as an officer of the council and explain the reason for the inspection. It is good practice for the officer to provide a business card. Formal identification, such as proof of authorisation, a warrant or notice, should be made available if requested.

A person in attendance at a premises under investigation may choose to cooperate with the investigating officer and allow immediate entry to the property, but can insist on being given two clear days notice - unless the officer has a warrant or the officer believes on reasonable grounds the premises is being used for the purposes of a brothel.

It is an offence to obstruct an authorised officer from taking action in accordance with the Act, including obtaining entry to land to conduct an inspection. A penalty of 60 penalty units applies to such an offence.

PENALTY UNITS

Penalty units are used to define the amount payable for fines in relation to offences under Victorian Acts and Regulations. The value of a penalty unit is set each year in accordance with section 6 of the *Monetary Units Act 2004*. For the Financial Year of 2014-2015, the value is \$147.61.

The rate for a penalty unit is indexed each financial year so that it is raised in line with inflation. Any change to the value of a penalty unit occurs on 1 July each year and is published in the Victoria Government Gazette.

7.1.8 Negotiating compliance

For less serious or less urgent breaches the responsible authority may consider negotiating compliance by writing to the alleged offender advising them of the breach. The letter should explain:

- the nature of the breach / complaint
- the findings of the investigation
- what needs to be done to achieve compliance
- specific timeframes to achieve compliance
- if any referrals have been made to other departments or external agencies
- details of the enforcement options available to the responsible authority should compliance not be achieved and associated penalty provisions.

The responsible authority may also consider serving an official warning under the *Infringements Act 2006* and include this in the letter. More information about Official Warnings is provided below.

At the end of the period specified for the achievement of compliance, the enforcement

PEA ss. 134, 135, 137; MUA 2004 s.6; SWA 1994 s. 78

officer should conduct a second inspection. (This may be carried out at an earlier date where the respondent has contacted council advising that necessary actions have been taken to obtain compliance).

Where compliance has not been achieved at the time of the second inspection, the following actions may be taken:

- where appropriate, discuss the non-compliance with the alleged offender and:
 - negotiate an extended timeframe for the achievement of compliance
 - reaffirm other enforcement consequences if compliance is not achieved.
- provide further correspondence to the alleged offender detailing the failure to comply within the specified period and emphasise to both owner and occupier that continued non-compliance is evidence of a breach which may result in further actions, including punitive measures and the potential for prosecution. The correspondence should provide a second opportunity to achieve compliance, again providing an extended timeframe for compliance to be achieved.

Where compliance is still not achieved and all attempts to negotiate compliance have failed, it may be necessary to employ other enforcement options.

7.1.9 Official warnings

IA s. 8; I(RPD&F)
Regs r. 6

If the responsible authority believes on reasonable grounds a person has committed an offence but in considering all the circumstances, decides an infringement notice is not appropriate, they can serve an official warning in writing in accordance with section 8 of the *Infringements Act 2006* (with prescribed details outlined in the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006*).

Issuing an official warning can also be used in negotiating compliance as detailed above.

The prescribed format of an official warning does not provide for any scope to direct an offender to rectify a breach, to cease a non-compliant use and/or development or show-cause why the responsible authority should not take further action. These types of directions should be specified in a covering letter accompanying the official warning.

IA s. 10

An official warning does not affect the power of the responsible authority to:

- commence proceedings against the person upon whom the official warning was served
- serve an infringement notice
- take no further action
- take any other enforcement action provided for in the Act.

IA s. 11

However, the responsible authority must withdraw an official warning if it is going to commence proceedings or serve a planning infringement notice.

An official warning may be withdrawn at any time within six months of the serving of the official warning.

I(RPD&F) Regs
r. 7(2)

An official warning must be withdrawn by serving a withdrawal of an official warning on the person on whom the official warning was served. A withdrawal of an official warning must be in writing and contain the prescribed details.

7.2 Planning infringement notices

7.2.1 When is a planning infringement notice appropriate?

Planning infringement notices provide responsible authorities with a means of dealing quickly and more easily with some less serious breaches of planning schemes, planning permits and agreements. They also provide an owner or occupier of land who has committed an offence a means of expiating that offence, without conviction or a finding of guilt.

PEA s. 130

If an authorised officer of a responsible authority has reason to believe that a person has committed an offence against section 126 of the Act, the officer can serve a planning infringement notice on the alleged offender.

7.2.2 What must an infringement notice include?

IA s. 13;
I(RPD&F) Regs
r. 8

Under section 13 of the *Infringements Act 2006* an infringement notice must:

- be in writing and contain the prescribed details, including the infringement penalty (the prescribed details are contained in regulation 8 of the Infringements [Reporting and Prescribed Details and Forms] Regulations 2006)
- state that the person is entitled to elect to have the matter of the infringement offence heard and determined in the Magistrates' Court (additional requirements also apply to an infringement notice served on a child).

PEA s. 130(2A)

In addition to these requirements, the details of the additional steps (if any) required to expiate the offence must be included in an infringement notice. Any form of infringement notice can be used as long as it includes the prescribed information.

7.2.3 What can an infringement notice require?

PEA s. 130(4)

In addition to requiring the payment of an infringement penalty, additional steps that can be required under an infringement notice to expiate an offence may include, but are not limited to:

- stopping the development or use
- modifying the development or use
- removing the development
- preventing or minimising any adverse impacts of the use or development that constituted the offence
- entering into an agreement under section 173 of the Act
- anything else required to remedy the contravention.

7.2.4 What happens if an infringement notice is served?

A person served with an infringement notice can either:

IA s. 16

- choose to pay the penalty and take other steps required by the notice
- elect to have the matter of the infringement offence heard and determined in the Magistrates' Court
- apply to have the decision to serve the infringement notice internally reviewed by

IA s. 22;
I(RPD&F) Regs
r. 8(m)

the responsible authority (the requirements for internal reviews is contained in Division 3 of the *Infringements Act 2006*)

- ignore the infringement notice.

PEA s. 130 (5), (6)

If a planning infringement notice requires additional steps to be taken to expiate an offence and before the end of the specified remedy period, the person served with the notice informs the responsible authority that those steps have been taken, an authorised officer must, without delay, find out whether or not those steps have been taken. That officer is then required to serve on the offender a further notice confirming whether or not the required steps have been taken.

IA s. 32

Once the penalty has been paid and any required additional steps taken, the offender has 'expiated' the offence and no further proceedings can be taken. It is therefore important for a notice to state precisely what steps are needed, such as stopping, modifying or removing the development or use that constituted the offence.

If the person believes that they have not committed an offence, it is advisable that they contact the responsible authority to clarify the situation and, if necessary, obtain legal advice. However, if the person recognises that an offence has been committed and that the requirements of the notice are a reasonable way of rectifying the situation, it is wise to pay the penalty and comply with the other requirements of the notice.

The failure to pay the infringement penalty by the date specified in the infringement notice may result in further enforcement action being taken.

A responsible authority proposing to use planning infringement notice procedures should note that:

- Serving an infringement notice gives an alleged offender the opportunity to expiate an offence by paying the penalty and carrying out the other requirements. Anybody receiving an infringement notice can choose to ignore it, although this action could result in prosecution by the responsible authority and the incurring of further costs. However, unlike other infringement offences, a planning infringement offence is not a 'lodgeable' infringement offence under the *Infringements Act 2006*.

This means that any failure to comply with a planning infringement notice cannot be referred to the Perin court system for resolution. It must instead be heard at the Magistrates' Court by prosecuting the original offence (for a breach of section 126 of the Act) that gave rise to the issue of the planning infringement notice. It is not a prosecution of any failure to comply with the planning infringement notice itself. An unsatisfied planning infringement notice does not generate a new offence, so it cannot be prosecuted.

- Unless the notice is withdrawn, the responsible authority must be prepared to prosecute an offender through the Magistrates' Court every time a penalty is not paid or the required additional steps are not carried out. Failure to prosecute will render infringement notices an empty threat. An infringement notice should not be served unless there is enough evidence about the offence to take the case to court as the offender is entitled to have the matter of the infringement offence heard and determined in the Magistrates' Court.
- If a prosecution follows an infringement notice, the court cannot force the offender to carry out the required additional steps set out in the notice. If the responsible authority wants to try and directly achieve the carrying out of these additional steps, it needs to apply for an enforcement order at VCAT.

CPA s.7

- The 12 month period allowed for commencing a prosecution relating to the subject matter of an infringement notice is calculated from the time of the offence, rather than from the discovery of the offence or the deadline for a contravened planning infringement notice.

For more information on the infringement notice process, refer to the *Infringements Act 2006*, the Infringements (Reporting and Prescribed Details and Forms) Regulations 2006 and the Victorian Department of Justice website www.justice.vic.gov.au.

7.2.5 Can an infringement notice be withdrawn?

IA s. 18, CPA s.7

The responsible authority may withdraw an infringement notice by serving a withdrawal notice. A withdrawal notice can be served within 12 months of the date that the offence was committed, being the 'statute of limitations' for offences under the Act and therefore the time permitted for bringing a proceeding in the Magistrates' Court.

7.2.6 When might withdrawal of a notice be appropriate?

IA s. 18(4)

A notice cannot be withdrawn in situations where the required steps have been taken by the offender and the penalty has been paid.

Withdrawal may be appropriate if the alleged offender can convince the responsible authority that there was no offence, or that they will rectify the alleged offence if the notice is withdrawn.

Withdrawing a notice may also be necessary if the responsible authority realises, after serving it, that the notice was an inappropriate action in the circumstances. The authority may decide that it wants positive action to fix the problem and should have sought an enforcement order. It may realise that the evidence available could not lead to a finding of guilt by the court.

A responsible authority should, wherever possible, avoid having to withdraw a notice. If the points above are carefully considered before a notice is served, a responsible authority should rarely have to withdraw an infringement notice.

IA Act s. 19

A withdrawal notice must be in writing and contain the prescribed details and state that the responsible authority intends to proceed in respect of the infringement offence by:

- continuing proceedings and issuing a summons; or
- issuing an official warning; or
- taking no further action; or
- taking any other specified action permitted under the *Infringements Act 2006* or the *Planning and Environment Act 1987* i.e. commencing proceedings in the Magistrates' Court or applying for an enforcement order at VCAT.

7.2.7 Internal Reviews

IA Act s. 22

An alleged offender or their representative may apply to the responsible authority for review of the decision to serve the infringement notice.

IA Act s. 24;
I(RPD&F) Regs
r.10

The review must be undertaken by an officer not involved in the issuing of the infringement notice. Usually this is a more senior person in the agency. Reviews must be completed within 90 days after the agency receives the application. However, this can be extended if the agency seeks additional information to consider the matter.

Once the decision is made, the agency must provide the applicant with written confirmation of the decision within 21 days.

You can find more information about internal reviews in the Attorney-General's Guidelines to the *Infringements Act 2006* available on the Department of Justice website, www.justice.vic.gov.au.

7.2.8 Paying penalties

PEA ss. 129

Penalties are to be paid directly to the responsible authority. Most councils provide for payments online, over the phone, by post or in person. Contact the relevant council to determine their payment method options.

IA s. 29

The responsible authority should be ready to take further action promptly (such as serving a penalty reminder notice, prosecution or seeking an enforcement order), if a penalty is not paid or any required additional steps are not taken by the date specified.

7.3 Enforcement orders

7.3.1 What is an enforcement order?

An enforcement order is intended to prevent or stop unlawful planning activity and to achieve reinstatement. Enforcement order proceedings are not designed to punish by way of a financial penalty. Part 6 - Division 2 of the Act addresses prosecution which is discussed below in Section 7.4 of this chapter.

PEA s. 114

Any person, including a responsible authority, may apply to VCAT for an enforcement order to rectify a breach of a planning scheme, planning permit or section 173 agreement, or to avoid the commission or continuance of such a breach.

It is important that the system allows any person to apply for an enforcement order, as it provides:

- a form of sanction against an authority that is not properly enforcing the planning scheme, (such as if a responsible authority is reluctant to take action on a particular case or where it is itself acting in contravention of planning laws)
- protection to an authority from unwarranted demands that it take enforcement action, (that may not be appropriate or in the public interest).

An individual can take the matter directly to VCAT rather than relying on the responsible authority.

A responsible authority is able to seek an enforcement order through VCAT at the same time as it prosecutes a planning offence in the Magistrates' Court (and seek an appropriate penalty).

PEA s. 124

Any enforcement order or interim enforcement order is binding on every subsequent owner and occupier to the same extent as if the order had been served on them, so there is no need to serve new notices.

7.3.2 How is an enforcement order made?

PEA s. 114

A person seeking an enforcement order may apply to VCAT for the order. An enforcement order can be issued against an owner, occupier or any other person who has an interest in the subject land, such as a developer.

An application for an enforcement order is made to VCAT using the Application for Enforcement Order and Interim Enforcement Order Form. A fee is payable and VCAT provides various lodgement options. The form and VCAT's *Practice Note PNPE4 – Enforcement Orders and Interim Enforcement Orders* which provides guidance on the procedure to be followed in relation to enforcement orders, are available on VCAT's website, www.vcat.vic.gov.au.

PEA s. 115

When a person applies for an enforcement order, VCAT will direct they give notice of their application to the responsible authority, the person against whom the order is sought, the owner and the occupier of the land, and any other persons that may be affected by the grant of the enforcement order.

VCAT requires a stricter standard of evidence in these applications than in other types of appeals. Evidence is normally given on oath or affirmation rather than by assertion or written submissions. The applicant's case needs to be proven on the balance of probabilities – but the degree of proof required *must* reflect the gravity of the facts to be proved.

7.3.3 Options for the respondent to an enforcement order

On being served with an application, a person against whom an order is sought ('the respondent') has two options:

PEA s. 117

1. **Contest the application:** This is done by lodging an objection with VCAT under schedule 1, clause 56 of the *Victorian Civil and Administrative Act 1998*. VCAT must then give specified persons a reasonable opportunity to be heard or to make written submissions in respect of the application.

PEA s. 116

2. **Take no action:** If no other objections are lodged from other relevant parties, VCAT may directly make an order under section 116 or may reject the application. The order may be in the terms set out in the application or in different terms if the Tribunal thinks fit.

7.3.4 Objections to an application for an enforcement order

VCATA Sch. 1
Cl. 56

Relevant interested or affected parties may object to the grant of an enforcement order by lodging a statement with VCAT within 14 days from the date of service of the application. This includes a person against whom an order is sought (for situations where they may believe there is no contravention or an order ought not to have been made in the circumstances).

An objection must be in writing and must set out the grounds for making the objection using VCAT's *Form B - Statement of Grounds*. This Form will be included with the copy of any application for enforcement order that is served on relevant parties. A copy of any objection must also be served on the applicant and the responsible authority (if not the applicant) within the 14 day period.

PEA s. 116

If VCAT does not receive any objections to an application for an enforcement order, it can make any order it thinks fit (in accordance with section 119 of the Act – see below), or it can reject the application altogether.

PEA s. 117(1)

If VCAT receives an objection to the application within the period specified in the notice, it must give the following persons a reasonable opportunity to be heard or to make written submissions in respect of the application:

- the responsible authority
- any person against whom the enforcement order is sought
- the owner of the land
- the occupier of the land
- the applicant for the enforcement order
- any other person whom it considers may be adversely affected by the enforcement order
- any person whom it considers has been or may be adversely affected by the contravention.

VCAT will typically schedule a hearing to consider the matter. All relevant parties will be sent a notice of the hearing. If the applicant, respondent or any other affected person does not attend the hearing VCAT may make orders in that person's absence.

PEA s. 117(2),
PEA s. 119

Following the consideration of all relevant matters VCAT may reject the application, or issue an enforcement order in accordance with section 119 of the Act to:

- direct a person to stop a use or development within a specified time
- direct a person not to start a use or development
- require that a building be maintained in accordance with the order
- direct that other things be done within a specified period to restore the land:
 - as closely as possible to its condition before the contravention occurred; or
 - to some other specified condition; or
 - to some other condition acceptable to the responsible authority or a specified agency, or
 - otherwise ensure compliance with the Act, scheme, condition of planning permit or section 173 agreement.

VCATA s. 116(2)

A copy of the order must be served on all relevant persons. This is done by VCAT or by a party specified by VCAT.

7.3.5 Awarding costs

VCAT's approach to awarding costs in applications for enforcement orders is different to its approach in other matters. VCAT has awarded costs in enforcement matters more commonly than in normal planning reviews especially where, despite requests and warnings, there is a 'persistent and unjustified' failure to comply with planning controls.

VCATA s. 109

Although enforcement proceedings warrant a different approach to costs than that taken in normal planning reviews, the successful party is not entitled as a matter of course to being awarded costs. Each case must be viewed on its merits.

7.3.6 Interim enforcement orders

PEA s. 120(1);
VCATA s. 68(3)

Where circumstances require more immediate action, a responsible authority or person who has applied to VCAT for an enforcement order under section 114, may also apply for an interim enforcement order.

The application form, available from VCAT, allows for an application to be made for an interim order at the same time as the enforcement order. Refer above to Section 7.3.2 of this chapter for information about the form and procedures.

Interim enforcement orders are similar to interlocutory injunctions made by courts. The purpose of these proceedings is to preserve the status quo until the hearing and subsequent determination of the case.

PEA s. 120(2)

The important distinguishing feature of an interim enforcement order application is that it may be considered by VCAT without notice to any person. Hence these applications can ensure a prompt response.

PEA s. 120(3)

Before making an Interim enforcement order, VCAT must consider:

- the effect of not making the interim enforcement order
- whether the applicant should give any undertaking as to damages
- whether or not it should hear any other person before the interim enforcement order is made.

Other matters which may be considered include the urgency of the matter and whether irreparable harm will be caused if the order is not granted.

PEA s. 120(9)

If VCAT makes an interim enforcement order without notice to a person, it must give any affected person an opportunity to be heard within seven days after making the order.

PEA s. 120(4)

The service of an interim enforcement order and the types of remedial measures it may require are similar to those of an enforcement order, and may include stopping or preventing commencement of a use or development.

PEA ss. 120(10),
121

VCAT has the power to cancel or amend an enforcement order or interim enforcement order at any time.

PEA s. 150(4);
VCATA ss. 75(2),
78(1)

The Acts make specific provision for payment of compensation for loss or damage as a result of proceedings which have been brought vexatiously or frivolously, or in order to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings. This should be considered before seeking an interim enforcement order which may cause significant loss to affected parties.

7.3.7 What happens if an enforcement order is not complied with?

PEA s. 14

A responsible authority has a statutory duty to enforce any enforcement order or interim enforcement order.

PEA s. 122(5);
VCATA s. 133

If a person has not complied with an order, they can be prosecuted in the Magistrates' Court for this offence. In such a prosecution, it is not necessary to prove the scheme and controls or the breach of them, only that the order was properly made and had not been complied with. To assist in obtaining compliance, the penalties for failure to comply with an enforcement order or interim enforcement order are substantial. They involve both imprisonment under the *Victorian Civil and Administrative Tribunal Act 1998* (which is not a penalty available for prosecution under section 126 of the Act) and fines.

VCATA s.122

An enforcement order that has been contravened can be filed in the Supreme Court. The enforcement order effectively becomes an order of the Supreme Court and can be prosecuted accordingly.

PEA s. 123

Furthermore, the responsible authority can carry out any work required by an enforcement order or interim enforcement order that was not carried out within the specified period. With the consent of VCAT, any other person may also carry out these works. The cost of carrying out these works is then recoverable as a debt from the person in default.

Any responsible authority or other person contemplating taking such direct action should proceed with great caution and only on the basis of well-informed legal advice.

7.4 Prosecution for a breach of the Act

7.4.1 The role of prosecution in planning enforcement

PEA ss. 126, 127

The statutory planning system ultimately relies on the fact that planning schemes are part of the law of Victoria and that any person who uses or develops land in contravention of, or fails to comply with a planning scheme, planning permit or section 173 agreement, or an enforcement order, is guilty of an offence. Penalties apply and are referred to in more detail below.

Prosecution for a breach under section 126 of the Act take place in the Magistrates' Court. Prosecution for a breach of an enforcement order or interim enforcement order under section 133 of the VCAT Act, takes place in the Supreme Court. It is a form of criminal proceeding and offences must be proved on the same standard as any other criminal proceeding – that is, beyond a reasonable doubt.

7.4.2 When is it appropriate to prosecute for an offence?

If a person has not complied with an infringement notice, some further action must be taken. It is not an offence to ignore an infringement notice. However, a person who ignores a notice does not exiate the offence and so remains open to prosecution or other action relating to the infringement notice.

Alternatively, the responsible authority may consider the breach to be so significant, or that because of the risk of future breaches, an infringement notice would be inappropriate and prosecution would be the most appropriate action to take in the first instance.

PEA s. 127

If the responsible authority is concerned about continuing unlawful use of land, prosecution for the offence may be the most appropriate remedy. A penalty of up to 1200 penalty units is provided. If the offence does not stop when a person is convicted, a further penalty of up to 60 penalty units per day, for as long as the offence continues, may be applied. The continuing penalty will most often make the offender cease the offending use. (See Section 7.1.6 of this chapter for information about penalty units).

This does not help very much if the offence was to carry out development which has been completed, and the responsible authority wishes to see the development removed or modified to comply (or at least, nearly comply) with the scheme. The offence was to carry it out and prosecution does not provide a basis to secure its removal or require restoration works.

In such cases, it may be more appropriate to seek an enforcement order to direct that the development be removed or modified. If this is not complied with, there would be an ongoing offence of failing to comply with the order. However, remembering that both processes may happen simultaneously, prosecution may still be appropriate if the responsible authority considers that the nature of the offence makes it appropriate that the person be fined and/or convicted.

PEA ss. 122(5)

Even if the offence relates to an alleged unauthorised use, it may still be preferable to seek an enforcement order to direct that the use cease, especially if there is room for some dispute as to whether the use in fact breaches the planning scheme. The standard of proof necessary at VCAT is a civil standard (balance of probabilities) which is less than the criminal standard (beyond a reasonable doubt) which applies in the Magistrates' Court. Additionally, VCAT may be better placed than the Magistrates' Court to consider technical interpretation matters. There is the added consideration that, if VCAT makes an enforcement order, any failure to comply with that order can be separately prosecuted in the Magistrates' Court without the need to separately prove the original breach of the scheme to criminal standards.

Section 126 is not the only offence section in the Act. Other offences include:

- section 137, which creates an offence of obstructing an authorised person or member of the police force taking action under sections 133-136 (powers of entry). The penalty provided for in section 137 is 60 penalty units.
- section 169, which creates an offence of behaving in an insulting or obstructive manner at a panel hearing. The penalty provided for in section 169 is 60 penalty units.

(See Section 7.1.7 of this chapter for information about penalty units.)

7.4.3 Procedure in prosecution

MCA s. 25

Prosecution normally takes place in the Magistrates' Court which holds jurisdiction to hear and determine (amongst other things) all summary offences. An offence under the *Planning and Environment Act 1987* is a *summary* offence - an offence that can be heard by a magistrate sitting alone, rather than a judge and jury.

The Act is silent on who can prosecute for an offence. At least, for the purposes of section 126, it would be the responsible authority and its authorised officer. As well as the person breaching the planning control being guilty of a section 126 offence, the owner and the occupier of the land are also guilty of that offence.

PEA s. 128

If a body corporate (also known as a corporation) commits an offence against a specified provision of the Act, an officer of the body corporate also commits an offence against the provision if the officer failed to exercise due diligence to prevent the commission of the offence by the body corporate. The specified provisions are sections 48(2), 93(3), 126(1), 126(2), 126(3) and 137. Section 128(3) of the Act sets out the matters a court may have regard to in determining whether an officer of a body corporate failed to exercise due diligence. An officer of a body corporate may:

- rely on a defence that would be available to the body corporate if it is charged with the same offence, and in doing so, bears the same burden of proof as the body corporate
- commit an offence whether or not the body corporate has been prosecuted for, or found guilty of, that offence.

PEA s. 129

If an offence has been prosecuted by the responsible authority, any penalty is paid to the responsible authority.

If the prosecution is successful, an order for costs will usually be made against the defendant in favour of the person who has brought the charge. However, if the defendant is successful and the prosecution fails, the defendant is normally entitled to an order for costs. The costs, which are usually ordered by a court to be paid, are called party/party costs and do not provide a full indemnity for the costs incurred by a successful party.

VCATA s. 98(1)

In comparison to seeking an enforcement order at VCAT, prosecuting a planning non-compliance offence in the Magistrates' Court is more difficult to prove because it has to be proven beyond a reasonable doubt whereas at VCAT the burden of proof is the lower civil standard. Additionally, in the Magistrates' Court the normal rules of evidence apply, whereas VCAT is not bound by the rules of evidence.

It is beyond the scope of this guide to give advice on Court procedure. If prosecution is contemplated, legal advice should be sought. Similarly, a person who is being prosecuted under the Act needs to take the matter seriously and obtain legal (and possibly other professional) assistance, because the penalties which may be imposed are significant.

7.5 Injunctions

7.5.1 Types of injunction proceedings

An injunction is a court order that requires a party to do or refrain from doing a specific act. A party that fails to comply with an injunction faces penalties and may have to pay damages or accept sanctions.

In planning, there are two ways an injunction can be obtained from a court to restrain non-complying activities. The Act only mentions one of these. Section 125 allows an application to a court or the Tribunal for an injunction restraining any person from contravening an enforcement or interim enforcement order. The other option is a general common law injunction.

SCA ss. 31, 33, 37; CCA s. 37; MCA s. 100

The Supreme Court, the County Court and the Magistrates' Court (subject to some limitations) have power to grant injunctions under section 125 and of the general common law variety.

VCATA s. 123

The Tribunal also has the power to grant an injunction applied for under section 125.

In addition to a section 125 injunction, a responsible authority has the option to seek a general common law injunction. The two types of injunction are discussed in more detail below.

7.5.2 Section 125 injunctions

PEA s. 125

A section 125 injunction is used to restrain a person from contravening an enforcement order or interim enforcement order.

The Act gives a responsible authority or any other person the right to apply for the injunction. The Act avoids the technical arguments which general common law injunctions attract such as whether the intervention or fiat (consent) of the Attorney-General is necessary.

Section 125 injunctions may be applied for whether or not proceedings have been instituted for an offence against the Act. However, there must be a contravention of an existing enforcement order or interim enforcement order.

7.5.3 General common law injunctions

The general common law injunction is an 'interlocutory injunction' which is intended to operate and preserve the present state of affairs or stop someone from doing something until a final or permanent injunction is made after a full hearing of the case.

A prima facie case (in common law, evidence that would be sufficient to prove a particular proposition or fact, unless rebutted) must be made out for an interlocutory injunction and the court may require an undertaking as to damages from the person seeking the injunction.

Legal advice should generally be sought before commencing such action and in preparing the required court documents.

If an injunction is breached, the person in default can be charged with contempt of court.

In view of the availability of the enforcement order and injunction mechanism at VCAT, it is unlikely that a person would seek a general common law injunction for a planning enforcement matter.

Injunction proceedings under the general common law to restrain a breach of the law (in this case, a breach of the planning controls) must, in most cases, be taken either by the Attorney-General personally, or by a person authorised to act for the Attorney-General with the Attorney-General's knowledge and consent. A responsible authority is usually regarded as having a sufficient public interest not to require the Attorney-General's fiat, (consent to act on his or her behalf) but a decision about this needs to be made on a case-by-case basis.

7.6 Cancellation and amendments of permits

7.6.1 Can a permit be cancelled or amended?

PEA s. 87

When non-compliance with a planning scheme involves a permit, VCAT may, if requested to do so, cancel or amend the permit.

VCAT may only do this when there has been:

- material mis-statement or concealment of facts in the original permit application; or
- a substantial failure to comply with the conditions of the permit, or

- a material mistake in the granting of the permit, or
- a material change of circumstances since the permit was granted, or
- a failure to give notice as required by the Act.

Cancellation is probably the ultimate sanction against the person wishing to use or develop the land under a planning permit.

7.6.2 Who may apply for cancellation or amendment?

PEA ss. 87(3),
89(1)

The responsible authority or specified persons can apply to VCAT for an order cancelling or amending a permit.

PEA ss. 88, 89(3),
91(5)

An application needs to be made as soon as possible. VCAT may refuse to hear an application unless the person making it has done so as soon as they became aware of the facts supporting the application.

Further, VCAT is unable to cancel or amend a permit (at least in relation to development) if the development has already been substantially carried out, or, in relation to a subdivision, if the plan of subdivision has been registered.

There is no prescribed form of application, but VCAT has recommended one in its *Practice Note PNPE3 - Cancellation and Amendment of Permits and Stop Orders*. The practice note gives guidance as to the procedure to be followed in relation to applications for the cancellation and amendment of planning permits. The form is available on VCAT's forms and guides webpage at www.vcat.vic.gov.au.

PEA s.93

There is provision for an interim stop order to be made pending the final hearing of the application. This is like an interim enforcement order and usually attracts an undertaking as to damages. See Section 7.6.4 of this chapter for more details.

7.6.3 Hearing and order

VCATA Sch 1
Cl 56

A person seeking to oppose an application for cancellation or amendment must file a 'statement of grounds' with VCAT. VCAT's *Form B - Statement of Grounds* should be used when filing a statement.

PEA s. 90A

The Act specifies what VCAT must take into account in coming to its decision. These are set out in section 84B(2).

The approach to costs in these types of proceedings is much the same as that in enforcement order proceedings. See Section 7.3.5 of this chapter.

PEA s. 92; PE
Regs r. 38, 39

If an order is made cancelling or amending a permit, the responsible authority must serve notice of that within 7 days of receiving VCAT's decision. The notice must be given to:

- the responsible authority
- the owner and the occupier of the land concerned
- any person who asked for the cancellation or amendment of the permit
- any relevant referral authority
- any other person who VCAT considers may have a material interest in the outcome.

7.6.4 Compensation obligations

PEA s. 93, 94(1),
(4)

Where a stop order is made, pending a hearing of a request to cancel or amend a permit and VCAT ultimately decides not to cancel or amend the permit, an applicant is liable to compensate the permit holder for any loss or damage suffered as a result of the stop order.

Irrespective of whether a stop order is made, if a permit is cancelled or amended by VCAT, a responsible authority is liable for extensive compensation to the (former) permit holder, unless the reason for cancellation or amendment was due to:

- substantial non-compliance with a permit condition, or
- material mis-statement or concealment of facts in the original permit application, or
- a material mistake in the granting of the permit that arose because of the permit applicant's conduct.

7.7 Evidence

One of the problems with enforcement proceedings is to obtain evidence which is appropriate, relevant, sufficient and accurate enough to show non-compliance has occurred or, in some cases, is going to occur.

The evidence necessary for these purposes and to gain a successful outcome is often quite complicated.

Basically, the evidence needs to prove the existence of the planning control, any activity contrary to the planning control and the liability facing the person who is the subject of the proposed or existing proceedings.

Apart from the evidence necessary to prove formal matters such as the planning controls, evidence of other matters is needed. That evidence can consist of direct observations, photos, notes, admissions and information gained during an inspection. Mere assertions are not enough.

VCAT requires a more stringent standard of evidence in enforcement proceedings and in permit cancellation and amendment proceedings than in other types of reviews. Evidence is normally given on oath or affirmation rather than by assertion or written submissions. The applicant's case needs to be proven on the balance of probabilities - but the degree of proof required must reflect the gravity of the facts to be proved.

The standard of evidence required at VCAT is a civil standard - 'on the balance of probabilities' which is less than the criminal standard - 'beyond a reasonable doubt' which applies in the Magistrates' Court (relevant in planning prosecutions).

7.7.1 Proof of formal matters

As part of proving the ingredients of the offence or non-compliance, it is frequently necessary to provide details of a planning scheme, permit, section 173 agreement, ownership and occupation of the land, that the land is in the municipal district of the responsible authority and other similar matters.

Short-cuts to the proof of such matters are provided by the legislation, either dispensing with proof of them altogether or providing for certificates to constitute conclusive or prima facie evidence of those matters.

If the person proceeded against is not a human being (for example, a corporation, which is still a legal ‘person’), it is necessary to prove that the person legally exists. In the case of the corporation, a company search of the relevant corporation obtained from the Australian Securities and Investments Commission (or ASIC) is generally such proof.

Sometimes there will be a question of whether existing use rights protect a particular activity. The proof of such rights is the responsibility of the person seeking to take advantage of them.

Where legislation contains exceptions, provisos, exemptions or qualifications, the burden of proving that they apply in any prosecution is the responsibility of the accused.

7.7.2 Evidence of other matters

Because of the passage of time between an event occurring and the giving of evidence in relation to it, proposed witnesses (including complainants) should make running notes of what they observed and experienced. The witnesses can then use these notes to refresh their memories when giving evidence.

A great deal of valuable evidence is usually obtained in the form of admissions made by the contravener when interviewed by an officer of the responsible authority. Those admissions can be used as evidence against the contravener.

Where the person proceeded against is a body corporate, such as a company, care needs to be taken that the person interviewed is a person legally capable of speaking and making admissions on behalf of the corporate body.

Interviews are usually more fruitful where the officer has formal proof and other relevant documents to show to the alleged contravener during the asking of questions.

Frequently, it is necessary for entry to be made to and an inspection made of premises to ascertain if non-compliance exists. Valuable evidence can also be gathered during such a visit. In the case of brothels, the *Sex Work Act 1994* gives special rights of entry, discussed immediately below.

7.8 Brothels

A ‘brothel’ means any premises made available for the purpose of sex work by a person carrying on the business of providing sex work services at the business’s premises.

The *Sex Work Act 1994* creates numerous offences in relation to the operation of brothels. Only some of these strictly relate to planning laws.

In addition to the normal enforcement mechanisms generally available, the *Sex Work Act 1994* has some special mechanisms for brothels. These include the power for a Magistrates’ Court to declare premises to be a proscribed brothel, thus ‘quarantining the premises’ from occupation or use. Breach of the declaration is an offence.

SWA s. 80(1)

The declaration application is made by a member of the police force or an authorised officer of the responsible authority, depending on what ground is relied on to support the application. Authorisation of a council officer is not provided under the *Sex Work Act 1994*. In such circumstances council would rely upon the overarching authorisation set out in section 232 of the *Local Government Act 1989*.

SWA ss. 80(3A),
83, 85, 89

Other provisions of the *Sex Work Act 1994* facilitate enforcement by providing procedural aids not found in, or more flexible than those contained in, the *Planning and Environment Act 1987*.

7.9 Using other legislation for enforcement

A land use related offence may not necessarily be within the jurisdiction of the Act. Alternative courses of action under other legislation may sometimes be more appropriate. Other legislation that may be relevant includes:

- the *Heritage Act 1995* (such as for demolition of a historic building) – contact Heritage Victoria
- the *Health Act 1958* (such as for unsanitary premises and nuisances) – contact the relevant state health department or the council’s health department
- local laws under the *Local Government Act 1989* (such as for parking infringements) – contact the council. In most cases the same council will also be the responsible authority for the planning scheme
- the *Environment Protection Act 1970* (such as for excessive noise and disposal of wastes) – contact the Environment Protection Authority or the council, depending on which body has responsibility for the particular part of that Act
- the *Sex Work Act 1994* (for illegal brothels) – contact the council or the Victoria Police Force.

Individuals may also be able to bring civil proceedings in nuisance cases if statutory remedies are not available, or as an alternative to them. Legal advice should be sought in such cases.

7.10 Other information sources

Further reading and assistance can be found on the VCAT website. The Planning and Environment List practice notes are especially helpful (Refer: www.vcat.vic.gov.au). In particular:

- VCAT Practice Note PNPE3 - *Cancellation and Amendment of Permits and Stop Orders*.
- VCAT Practice Note PNPE4 - *Enforcement Orders and Interim Enforcement Orders*.

Another useful source of other information is LexisNexis’ guide to planning and environment law in Victoria.

7.11 Enforcement checklist

Delegation and authorisation

- Has an officer of a responsible authority been authorised or delegated to perform the necessary enforcement powers and duties, such as site inspections?

Nature of offence

- Have the nature and effect(s) of the alleged contravention been clarified for example, activity, person responsible, identity of the land?

Appropriate method of enforcement

- What method of enforcement is appropriate in the first instance for a particular offence:
 - negotiation
 - official warning
 - planning infringement notice
 - enforcement order
 - interim enforcement order
 - injunction
 - prosecution
 - cancellation or amendment of a permit?

Others may be needed subsequently.

Entering a property

- Has the consent of the occupier of land been obtained to enter a property? Alternatively, if the property is not a brothel, has two clear days notice been given to the occupier or a warrant obtained before entering a property?

Evidence

- Can sufficient documentary and other evidence be obtained to uphold a contravention of the Act, planning scheme, planning permit or agreement?

Compliance

- Has all evidence and action been reviewed to determine whether compliance has been achieved or further enforcement action is required?

Payment of penalty

- Has the appropriate penalty payment been received?