

Contents

5.1	Opportunities for review of planning decisions	3
5.1.1	Introduction.....	3
5.1.2	Summary of the review process	3
5.1.3	Legislative provisions	4
5.1.4	Establishing the scope of an application for review	10
5.1.5	Exemption from objectors' review rights for specified types of permit applications.....	10
5.2	Making an application for review	11
5.2.1	What must the person making the application for review do?	11
5.2.2	Who are the parties to an application for review?	13
5.2.3	Arrangements for the hearing	13
5.2.4	Can an application for review be withdrawn?	14
5.3	What happens at the hearing?.....	17
5.3.1	Who hears an application for review?.....	17
5.3.2	Attendance by the parties	17
5.3.3	Procedure at hearings.....	18
5.3.4	Submissions	19
5.3.5	Expert evidence	20
5.3.6	Questioning an expert witness	20
5.3.7	What factors must be taken into account in deciding an application for review?.	20
5.3.8	The decision.....	21
5.3.9	Costs	22
5.3.10	Reviews relating to VicSmart permit applications	22
5.3.11	Major Cases List.....	23
5.4	Other types of applications for review	24
5.4.1	Introduction.....	24
5.4.2	Procedural defects in the planning scheme amendment process.....	24
5.4.3	Application to review notice and more information requests by a responsible authority.....	24
5.4.4	Failure to grant a permit within the prescribed time	25
5.4.5	Applications relating to extensions of time	27
5.4.6	Affected persons may seek leave to apply for a review of a decision to grant a permit	27
5.4.7	Cancellation and amendment of planning permits	28
5.4.8	Enforcement orders and interim enforcement orders.....	29
5.4.9	Applications under sections 149, 149A and 149B of the <i>Planning and Environment Act 1987</i>	29
5.4.10	Amendments to agreements.....	30

5.5	Procedures	30
5.5.1	Directions hearing.....	30
5.5.2	Urgent hearing.....	31
5.5.3	Practice days.....	31
5.5.4	Compulsory conference.....	31
5.5.5	Mediation.....	32
5.5.6	A question of law.....	32
5.5.7	Intervention by a Minister.....	33
5.6	Further information about reviews	34
5.6.1	VCAT Practice Notes.....	34
5.6.2	VCAT Forms.....	34
5.6.3	VCAT Decisions.....	34
5.6.4	Guideline decisions.....	35
5.6.5	General Information.....	35

5.1 Opportunities for review of planning decisions

5.1.1 Introduction

Applications can be made to the Victorian Civil and Administrative Tribunal (VCAT) to review different types of planning decisions made by a responsible authority.

This chapter provides a general overview of the procedures and processes in the *Planning and Environment Act 1987* (the Act) and the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) for the independent review of planning decisions by VCAT. The chapter provides general information only and is not a substitute for planning or legal advice that may be required in particular circumstances.

PEA s. 4(2)(j)

The right to an independent review of specified decisions is set down in the Act. One of the objectives of the Act is 'to provide an accessible process for just and timely review of decisions without unnecessary formality'. The Act establishes opportunities for VCAT to independently review decisions about planning permits made by the responsible authority administering the planning scheme. VCAT makes an independent assessment of the relevant issues. Most of the applications for review involve decisions about planning permits for the use and development of land.

VCAT also has other decision-making powers in circumstances where no review of an earlier decision is made because the application is made direct to the Tribunal. For example, applications to cancel permits, and applications for enforcement orders.

An application made to VCAT to review a decision or planning matter is an 'application for review'. The 'applicant for review' is the party who made the application.

5.1.2 Summary of the review process

The VCAT Act sets out VCAT's jurisdiction, powers and authority. The president or head of VCAT is a Supreme Court Judge. VCAT has three divisions: the Civil, Administrative and Human Rights Divisions. Each Division has lists of members who specialise in the various types of applications for review. Members of the Planning and Environment List are qualified and experienced legal practitioners, planners and other specialists.

The process of reviewing the decision begins when an application for review is made to the Principal Registrar, VCAT Planning and Environment List located at 55 King Street, Melbourne.

The Registrar may arrange mediation, a directions hearing or a compulsory conference to try to settle the matter or to clarify an aspect of the dispute. Most applications proceed to a hearing before a member of the Planning and Environment List, who is appointed by VCAT to decide the application.

The hearing gives all parties to the application for review the opportunity to present written and oral submissions, to call or give evidence and to ask questions of witnesses. VCAT decides the merits of the application and can affirm, modify or set aside the decision being reviewed. If the decision is set aside, VCAT can make a new decision.

The Tribunal's decision contains an order to give effect to its decision. For example, the order may direct that a permit is not issued, or that a permit is issued with specified conditions.

VCATA ss. 116,
117

Sometimes VCAT will indicate its decision at the end of the hearing and orally give reasons for that decision. However, the decision can be reserved. In all cases a written decision is issued to all parties sometime after the hearing. If oral reasons have not been given, the decision must include written reasons.

VCAT's decision is final and binding on all parties unless there is an appeal to the Supreme Court on a question of law.

VCATA s. 109

Parties to an application for review normally meet their own costs for preparing and presenting submissions at the hearing. However, VCAT can require a party to pay some or all of another party's costs if one party has been unnecessarily disadvantaged by another party's conduct. The failure of the applicant for review to attend the hearing without a good reason is a circumstance where costs might be awarded to another party.

5.1.3 Legislative provisions

The provisions for review of planning decisions are set out in the:

- *Planning and Environment Act 1987* (the Act)
- *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act)

The accompanying rules and regulations are set out in the:

- *Planning and Environment Regulations 2015* (the Regulations)
- *Victorian Civil and Administrative Tribunal Rules 1998*.

Table 5.1 provides a summary of general information about the more common types of decisions that are subject to independent review by VCAT. The Table does not include every opportunity for review that is provided in the legislation. Applicants for review should confirm their review rights, the precise nature of the application for review and the relevant provisions of the Act with the responsible authority. It may also be prudent to obtain planning or legal advice.

In the first instance it is essential to identify the type of application for review to be made, or the decision that is disputed, and to confirm that an application for review to VCAT can be made. This information will also help to clarify the scope of the matter and the relevant planning considerations.

Table 5.1 Summary of provisions for common types of applications for review to VCAT

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
s. 39	Failure by the Minister, a planning authority or a panel to comply with procedures relating to a planning scheme amendment which has not been approved (Divisions 1, 2 or 3 of Part 3; or Part 8 of the Act)	A person who is substantially or materially affected by the failure	Not later than one month of becoming aware of the failure	PEA s. 39(1)
s. 77	Refusal to grant a permit	Applicant for permit	Within 60 days after the responsible authority gave notice of refusal to grant a permit under section 65	PER r. 29
s. 78(a)	Requirement to give notice of an application under ss. 52(1)(d) or 57B of the Act	Applicant for permit	s. 52(1)(d) – Within 30 days of requirement to give notice s. 57B – No time prescribed	PER r. 30(1) N/A
s. 78(b)	Requirement for more information about a permit application under s. 54(1) of the Act	Applicant for permit	Within 60 days after the responsible authority requested the information	PER r. 30(2)
s. 79	Failure to grant a permit within the prescribed time: <ul style="list-style-type: none"> • for a VicSmart permit application 	Applicant for permit	After 10 business days from: <ul style="list-style-type: none"> • the day the responsible authority received the application; or • if more information was required, from when the information was provided taking account of the periods that the time does not run	PER r. 31

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
	<ul style="list-style-type: none"> for any other permit application 		After 60 days from: <ul style="list-style-type: none"> the day the responsible authority received the application; or if more information was required, from when the information was provided taking account of the periods that the time does not run	
s. 80	Condition(s) in a permit	Applicant for permit	Within 60 days after the responsible authority gave notice of decision to grant a permit under s. 64 of the Act, or, if no notice was given, within 60 days after the date the permit issued	PER r. 32
s. 81(a)	Refusal to extend time to commence development or use or to complete development An application for review cannot be made under s 81(a) if the request for the extension to the responsible authority was not made within the time specified in s 69(1)	An affected person	Within 60 days of the decision	PER r. 33(1) (a)
s. 81(aa)	Refusal to extend time for a subdivision plan to be certified in circumstances mentioned in s. 6A(2) of the Act An application for review cannot be made under s 81(aa) if the request for the extension to the responsible authority was not made within the time specified in s 69(1)	An affected person	Within 60 days of the decision	PER r. 33(1) (a)
s. 81(b)	Failure to extend time within one month of request to extend time	An affected person	After one month from making the request, and within 60 days from that time	PER r. 33(1) (b)
s. 81(2)	Refusal to extend time within which information must be given by the applicant	Applicant for permit	Before the final lapse date for the permit application	PER r. 33(2)

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
s. 82	Decision to grant a permit	An objector who lodged an objection in writing to the grant of a permit, unless the application is exempt from the right to review under s. 82(1) of the Act	Within 21 days of the notice of decision to grant a permit	PER r. 34
s. 82AAA(a)	Decision to grant a permit	A recommending referral authority who objected to the grant of a permit	Within 21 days of the notice of decision to grant a permit	PER r. 34A
s. 82AAA(b)	Decision not to include a condition on a permit	A recommending referral authority who recommended that the condition be included on a permit	Within 21 days of the notice of decision to grant a permit	PER r. 34A
s. 82B	Request to VCAT for leave to make an application for review of a decision to grant a permit for an application in which a written objection was received	A person affected by the decision but who did not object to the grant of a permit, unless the application is exempt from the right to review under s. 82(1) of the Act	Does not apply if a permit has been issued	PEA s. 82B(6)
ss. 87(3), 88, 89(1)	Application to VCAT to cancel or amend a permit	The responsible authority; a referral authority; the owner or occupier of the land; any person who is entitled to use or develop the land concerned; or any person under s. 89 of the Act (persons who objected or would have been entitled to object if they should have been given notice of the application, or they have been adversely affected by a material misstatement or concealment of fact in relation to the application, or a substantial failure to comply with the conditions of the permit or any material mistake in relation to the grant of a permit)	No prescribed time, but VCAT must be satisfied that the request was made as soon as practicable and that the limits on the power to cancel or amend a permit in s. 88 of the Act are satisfied	N/A
s. 97P(1)(a)	Refusal to issue a certificate of compliance	The applicant for a certificate of compliance	Within 60 days of the decision	PER r. 46
s. 97P(1)(b)	Failure to issue a certificate of compliance within the prescribed time	The applicant for a certificate of compliance	After 30 days from the date of the application for a certificate	PER r. 47
s. 97Q	Request to VCAT to cancel or amend a certificate of compliance	A person who believes they have been adversely affected by a material misstatement or concealment of fact or a material mistake	No time prescribed	N/A
s. 114	Application to VCAT to make an enforcement order	The responsible authority or any person	No time prescribed	N/A
s. 120	Application to VCAT to make an interim enforcement order	The responsible authority or any person who has applied for an enforcement order under s. 114 of the Act	No time prescribed	N/A

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
ss. 149(1)(a), 149(1)(b), 149(1)(c)	<p>Review of a decision in relation to a matter if:</p> <ul style="list-style-type: none"> • (1)(a) a planning scheme; • (1)(a) a permit condition; • (1)(b) an agreement under s.173; or • (1)(c) an enforcement order; <p>requires that the matter:</p> <ul style="list-style-type: none"> • must be done to the satisfaction of the specified body / person [(a),(b),(c)]; • must not be done without the consent or approval of the specified body [(a) and (b)]; or • makes no provision for settling disputes in relation to the matter (b) 	A specified person (as prescribed under s. 148 of the Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	Within 30 days of the decision	PER r. 53
s. 149(1)(d)	Review of a decision if the specified body fails to make the decision in relation to 149(1) (a), (b) or (c), within a reasonable time (if there is no prescribed time for the decision)	A specified person (as prescribed under s. 148 of the Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	No time prescribed	N/A
s. 149A	<p>Application for a determination / declaration if a matter relates to:</p> <ul style="list-style-type: none"> • the interpretation of the planning scheme or a permit in relation to land or a particular use or development of land • whether or not s. 6(3) of the Act applies to a particular use or development • the continuation of a lawful use, or permitting the use of buildings or works for a lawful purpose before the coming into operation of the planning scheme or amendment 	A specified person (as prescribed under s. 148 of the Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	No time prescribed	N/A
s. 149B	Application for a declaration concerning any matter which may be the subject of an application to VCAT under the Act; or anything done by a responsible authority under the Act	Any person	No time prescribed	N/A

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
s. 184(1)	Application for an amendment to a proposed agreement under s. 173 of the Act if the use or development of the land is conditional upon the agreement being entered into and the owner objects to any provision of the agreement	The owner of the land	Within 60 days of being given a copy of the proposed agreement	PER r. 56(1)
s. 184A(1)(a) and (b)	Review of a decision to: <ul style="list-style-type: none"> • amend the agreement in a different manner to the proposal • end the agreement in a different manner to the proposal 	The person who applied to amend or end the agreement	Within 21 days after the responsible authority gave notice of its decision	PER r. 56A(1)
s. 184B	Review of a decision to amend or end an agreement	A party to the agreement (other than the person who applied to amend or end the agreement)	<ul style="list-style-type: none"> • If the party must be given notice of the responsible authority's decision to amend or end the agreement under s 178E(30) (a) or (b), within 21 days after the responsible authority gave notice • If no notice must be given, no prescribed time 	PER r. 56B
s. 184C	Review of a decision to amend or end an agreement	An objector	Within 21 days after the responsible authority gave notice of its decision	PER r. 56C
s. 184D	Review of a decision to amend or end an agreement	Any person entitled to object to a proposal but did not object because the person was not given notice of the proposal under s 178C	No prescribed time	N/A

- PEA – *Planning and Environment Act 1987*
- PER – *Planning and Environment Regulations 2015*

5.1.4 Establishing the scope of an application for review

Most applications for review to VCAT involve decisions made by the responsible authority to grant or refuse to grant a permit under a planning scheme. Planning permits relate to the use and development of land. In some circumstances a permit will be required to change the use of land. In other circumstances, a change of land use will not require a permit, but a permit may be required to construct a building or to carry out works.

In the case of applications for review concerning the use and development of land, it is recommended that the parties identify *why* and for *what purpose* a planning permit is required with direct reference to the relevant parts of the planning scheme. The reason why a permit is required for a particular proposal will establish the scope of the relevant planning considerations at the hearing. The relevant planning considerations include the State Planning Policy Framework and Local Planning Policy Framework, the purpose of the zone and/or overlay and any decision guidelines contained in the planning scheme.

VCAT has established a specific procedure for applications for review that relate to VicSmart permit applications. More information about this procedure is provided in Section 5.3.10 of this chapter.

5.1.5 Exemption from objectors' review rights for specified types of permit applications

PEA s. 82

Some provisions in the planning scheme exempt particular types of permit applications from review by objectors under section 82(1) of the Act. This section enables an objector to apply to VCAT for the review of a decision by the responsible authority to grant a permit. If an application is exempt from section 82, an objector does not have a right of review of the decision made by the responsible authority.

For example, this exemption applies in the General Residential Zone for permit applications which seek to subdivide land into lots each containing an existing dwelling or car parking space. It also applies to VicSmart permit applications.

An objector to the grant of a permit should confirm with the responsible authority that the planning scheme does not exempt the application from the review rights of section 82(1) of the Act.

PEA ss.83A,
83(2)

In some instances councils give notice of an application that is not required by the Act, resulting in an objection being lodged. Such objections may not lead to rights to seek a review of a decision.

While planning schemes only expressly specify the review rights of section 82(1) when exempting a class of application from notice and review, objectors who received such a notice are also excluded from participation in other review types. These other review types include appeals against refusal, failure and conditions. The reasons for this are set out by the Tribunal in *West Valentine Pty Ltd v Stonnington City Council* [2005] VCAT 224 (9 February 2005).

5.2 Making an application for review

5.2.1 What must the person making the application for review do?

Lodge the application for review within the prescribed time

An application for review must be made to VCAT within the prescribed time. The prescribed time varies for different types of applications for review. Table 5.1 provides information about the prescribed time for making applications for review. The time limits for making an application for review are prescribed by the Act and the Regulations.

An application for review by an objector to the grant of a permit must be made no later than 21 days after the responsible authority gave notice to the objector of its decision to grant a permit. The time runs from when notice was given, not from when it was received.

Where the permit has been refused or the applicant wishes to have the conditions reviewed, an application for review must be made no later than 60 days after the responsible authority gave notice of its decision.

A request to VCAT to extend the time for making an application for review is unlikely to be successful unless unusual circumstances apply, or all parties consent to the application being made out of time.

Requirements for an application for review

Specific application for review forms are available from VCAT and must be completed by the applicant for review. The relevant form for the type of review being applied for must be used.

For the most common types of cases, the applicant is required to provide a 'statement of grounds' as part of the application for review. The statement of grounds is a short summary of the grounds that the applicant for review wishes to present to VCAT at the hearing. It is important because it explains to the other parties the reasons for the review and the applicant for review's position.

A fee must be paid when the application is lodged. Information about fees and the waiving of fees can be found on the relevant application for review form. The forms can be obtained on VCAT's website www.vcat.vic.gov.au

In summary, an application for review must:

- be made in accordance with the prescribed form
- identify the nature of the application for review and the applicable section of the Act
- provide details of the land and the permit application or permit
- state the grounds upon which the review is based
- be accompanied by the prescribed fee
- be lodged within the prescribed time.

The completed application for review form – including the statement of grounds and the required fee – must be sent to or lodged with the Principal Registrar, VCAT Planning and Environment List at 55 King Street, Melbourne within the prescribed time.

VCATA s. 68

VCATA Sch. 1
Cl. 56

Notice to other parties by the applicant for review

After an application for review is made, VCAT instructs the applicant for review to serve a copy of the application on all other parties. These instructions must be complied with or the application may be struck out.

Statement of grounds by other parties

A person wishing to contest an application for review, must lodge a statement of grounds with both VCAT and the applicant for review within 14 days of receiving a copy of the application for review. Unless VCAT and the applicant for review receive a statement of grounds from an objector within 14 days from the date of the notice, the objector will not be recognised as a party to an application for review and may not receive any further correspondence from VCAT about the application.

If a person fails to provide a statement of grounds within 14 days, the Tribunal cannot allow them to be heard as a party to the review unless it has considered the views of the applicant for review and the responsible authority. Requests to be heard in these circumstances are usually made and decided on at the commencement of the hearing or at an earlier directions hearing. (Refer to chapter 5.5.1 for more information about directions hearings.)

All persons should establish their right to be heard as a party to the proceeding before VCAT by circulating a statement of grounds to the other parties within 14 days of receiving notice as directed by VCAT.

VCATA s. 84A

At the hearing, the arguments presented by a party are not necessarily restricted to those included in the circulated statement of grounds. However, if additional grounds are introduced during the hearing, VCAT will ensure that the other parties have a reasonable opportunity to consider and reply to them. This may include adjourning the hearing and the possibility of costs being incurred.

Administrative arrangements

VCAT acknowledges receipt of an application for review by writing to the applicant for review. It provides further instructions to the applicant for review to ensure that all other parties are given adequate notice of the application and the applicant's statement of grounds.

The applicant for review and the other parties are required to follow VCAT's written instructions in relation to notice to other parties, procedures, circulation of statement of grounds and any other matter. Failure to do so can result in the application for review being dismissed without a hearing.

VCATA s. 82

VCAT may direct the consolidation of applications for review into one proceeding (in the case of multiple applications for review by objectors) or a combined hearing. It is common practice for applications for review relating to the same land to be heard together. For example, a review of the conditions in a permit and a review of the decision to grant a permit concerning the same permit application will usually be combined and heard together.

The Registrar of VCAT keeps a register of all applications for review. These can be inspected during office hours.

5.2.2 Who are the parties to an application for review?

Applicant for review

VCATA s. 59(1)
(b)(i)

The person who makes the application for review is a party to the application and is known as the applicant for review. Table 5.1 identifies the person (permit applicant, objector to the grant of a permit, or other party) who can make an application for review.

Objector

PEA s. 83(2)

An objector is a party to a proceeding for review if the objector is given notice of the application for review and lodges with VCAT a statement of grounds on which they intend to rely at the hearing.

Responsible authority

VCATA s. 59(1)
(b)(ii)

The responsible authority is automatically a party to most applications for review.

Referral authority

PEA s. 83(1)

A determining referral authority is a party to a proceeding for refusal to grant a permit if it had objected to the grant of a permit or the permit application was refused because a condition required by the referral authority conflicted with a condition required by another referral authority. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

PEA s. 83(3)

A recommending referral authority is a party to a proceeding for review if the authority is given notice of the application for review. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

Affected persons

VCATA ss. 59, 60

VCAT may order that a person be joined as a party to a proceeding if it considers that the person's interests are affected by a proceeding, or that the person ought to be bound by or have the benefit of an order of the Tribunal. Any other person whose interests may be affected by an application for review can apply to VCAT to be made a party.

VCATA s. 61

An unincorporated association cannot be a party to a proceeding. However, it is usual practice to allow a member of such an association to make a submission at the hearing, or be joined as a party in their own right.

5.2.3 Arrangements for the hearing

Responsible authority to supply information

VCAT Practice Note – PNPE2 Information from Decision Makers sets out the information to be provided by a responsible authority or other decision making body on receiving notice that an application for review has been made.

The responsible authority must provide VCAT's Registrar with the documents and information in writing set out in Practice Note – PNPE2 within 10 business days of receiving notice of an application for review. The required information depends on the type of application for review. The information required may include:

- a full copy of the application for permit, including plans and accompanying documents
- a copy of the responsible authority's decision

- the name of the planning scheme, zone, and any overlay or other control applying to the subject land
- the planning scheme provision under which a permit was required
- details of public notice required to be given
- the officer's report on the application for permit
- names and addresses of all objectors and other parties to the application for permit.

In applications for review of a decision to refuse to grant a permit, or a failure to decide to grant a permit, VCAT requires the responsible authority to provide draft permit conditions in advance of the hearing. This does not mean the Tribunal has decided to grant the permit. However, it gives the responsible authority and other parties an opportunity to comment on the draft conditions during the hearing.

VCAT also requires the responsible authority to provide a realistic estimate of the time required for the hearing and to indicate whether or not the application for review raises a question of law.

Setting the hearing date

The Registrar sets the date of the hearing. Any request to change the date of a hearing must be made following the procedures in *VCAT Practice Note PNVCAT1 – Common Procedures*.

VCATA s. 99

VCAT advises all parties when and where the application for review is to be heard.

Most hearings are held at VCAT, 55 King Street, Melbourne. Hearings may be held in regional centres which must be specifically arranged and depend on a suitable venue being available.

Giving notice of an application for review

PEA s. 52

Notice to the owners and occupiers of adjoining land has usually been given for applications for permit which are subject to an application for review.

PEA s. 83B

If notice of an application for permit was not given, or the notice was not adequate, the President of VCAT can direct notice of the application for review is given. If the applicant for review fails to comply with the direction for notice, the application for review lapses.

PEA s. 83(2)

A person who objects to the grant of a permit (as a result of receiving notice at the direction of VCAT) is a party to the proceeding, provided a statement of grounds is lodged with the Tribunal.

5.2.4 Can an application for review be withdrawn?

VCATA s. 74

The applicant for review can withdraw the application for review only with the formal agreement of VCAT. A withdrawal can result in an order for costs being made against the applicant for review if the other parties have spent time and money preparing for the hearing and short notice of the request for withdrawal is given. A written request to withdraw an application for review must be made to the Registrar at the earliest opportunity.

Where leave is granted by the Tribunal for the withdrawal of an application, the usual course is for the Tribunal to also make the following orders for the different review types:

- Section 77 – Refusal to grant a permit: that no permit be issued, if parties have agreed that no permit is to issue.
- Section 79 – Failure to grant a permit: that no permit be issued, if the applicant has agreed not to pursue the permit application.
- Section 80 – Conditions on a permit: that the contested conditions remain unchanged from the condition included on a permit or notice of decision, if parties have reached agreement on that basis.
- Section 82 – Objector review: that a permit be issued in accordance with the notice of decision issued by the council, if all parties have agreed that a permit is to issue based on the same plans and with the same conditions specified in the notice of decision.

If agreement has been reached with the council and other parties to vary the plans or conditions, then a consent order should be sought from the Tribunal.

Procedures for withdrawing an application or seeking a consent order are set out in *VCAT Practice Note PNVCAT1 – Common Procedures*.

Can the hearing date be adjourned?

If a party wishes to seek an adjournment, a written request for an adjournment must be made to the Registrar giving detailed reasons for the request. *VCAT Practice Note PNVCAT1 – Common Procedures* sets out the procedure for any party to apply for an adjournment. In the Planning and Environment List, the consent of other parties will usually be required for an adjournment. The Tribunal may refuse an adjournment, even if all parties consent, and the parties must work on the basis that the hearing is proceeding unless or until they are notified that the Tribunal has granted the adjournment.

Any request for an adjournment should be made well before the hearing date to avoid successful claims for costs.

Can amended plans be considered at the hearing?

The Tribunal can make any amendment to the application for permit. The permit applicant may request VCAT to agree to amend the permit application.

The usual types of request include changing the name of the permit applicant, the description of the land or the nature of the proposal. Most often, the Tribunal is asked to agree to a request to substitute revised plans for the original plans submitted with the permit application. Application plans cannot be substituted without the Tribunal's formal agreement.

As a guiding principle, amendments should not be used to materially increase the scale or intensity of a proposal or to introduce significant new aspects that have not been considered by the responsible authority or primary decision maker based on the original application.

VCAT must also be satisfied that all parties have had a reasonable opportunity to consider the changes and how they might be affected.

VCAT Practice Note – PNPE9 Amendment of Plans and Applications sets out the steps that must be followed if a permit applicant seeks to amend plans in a permit application or an application to amend a permit. At least 30 business days before the hearing date, a permit applicant must file with the Tribunal and give all parties to the proceeding, the following documents:

- a completed *PNPE9 Form A: Notice of Amendment of an Application*
- a written statement describing the changes from the previous plans or other changes made to the application and:
 - setting out why the changes are applied for
 - demonstrating how the changes will improve the proposal or respond to issues that have been raised in the course of the decision-making process
- a clearly readable, scaled copy (with dimensions) of the amended plans, highlighting where changes have been made
- details of any other amendment to the application and supporting material.

The permit applicant must also give any objector to or person notified of the permit application who is not a party to the hearing copies of the following documents:

- a completed *PNPE9 Form A: Notice of Amendment of an Application*
- a written statement describing the changes from the previous plans or other changes made to the application and:
 - setting out why the changes are applied for
 - demonstrating how the changes will improve the proposal or respond to issues that have been raised in the course of the decision-making process
- a *PNPE9 Form B: Statement of Grounds*.

The completed Notice of Amendment of an Application must include a date by which a statement of grounds must be lodged with VCAT. That date must be at least 17 business days from the day the notice is posted.

The permit applicant must also give notice to persons of how to access copies of amended plans. Documents can either be inspected at the main office of the responsible authority or a request can be made to the permit applicant for copies.

A person that receives notice of an amended application may:

- if already a party to the hearing, amend their Statement of Grounds at any time before the hearing; or
- if not a party to the hearing, lodge with VCAT:
 - a written application to be joined as a party to the hearing
 - complete a *PNPE9 Form B: Statement of Grounds*
 - a written objection setting out the reasons for the objection; or
- lodge a written request for an adjournment of the hearing in order to have sufficient time to consider the changes to the plans; or
- lodge a written application for directions in relation to the amendment application including directions that further notice of the permit application be given.

A copy of these documents must be delivered or posted to the permit applicant and the responsible authority.

VCAT may adjourn the hearing so that the amended plans may be considered at the beginning of the full hearing or it may hold a directions hearing before the full hearing to discuss the matter.

Parties should not assume that the Tribunal will automatically agree to amend the application for permit, even if all parties support the request. This means that parties will have to be prepared to discuss both sets of plans at the hearing.

VCAT will also consider whether notice of the revised plans should be given to other persons in addition to the parties to the application for review. Notice will be given if the Tribunal considers that the revised proposal has different impacts compared to the original, or if it affects different owners and occupiers.

5.3 What happens at the hearing?

5.3.1 Who hears an application for review?

VCATA s. 64, sch.
1 pt 16 cl.52

Members of the Planning and Environment List of VCAT are appointed by the President to hear and decide an application for review. Members of the Planning and Environment List are qualified legal practitioners, planners or other professionals with relevant expertise. Most applications are heard by either a single member or two members sitting together.

5.3.2 Attendance by the parties

VCATA s. 62;
PNVCAT1,
PNPE1

Most parties attend the hearing to present their submission in person or through a representative. Attendance is an effective way of convincing VCAT to support the arguments and provides the opportunity to respond to the material put by other parties at the hearing, and to question expert witnesses. The applicant for review and the responsible authority's representative are required to attend the hearing.

Objectors do not have to attend the hearing. An objector can inform VCAT in writing that they are not attending the hearing and request that their written submission be taken into account in deciding the application. However, it is recommended that objectors attend the hearing to present their case and to participate in the hearing.

A party may attend in person and present its own case, or be represented by another person.

VCATA ss. 51(5),
99(2)

If the applicant for review fails to attend a hearing (personally or by representative) VCAT must confirm the decision of the responsible authority. Costs may be awarded against the applicant.

If another party fails to attend the hearing and VCAT is satisfied that adequate notice of the hearing was given, the matter can still be heard and determined in the absence of the party.

VCATA s. 120

A proceeding can be reopened within specified time limits following the request of a person affected by an order who neither appeared or was represented at the hearing due to circumstances beyond their control. However, it is unusual for such a request to be granted. Strong grounds would be required for such a request to succeed.

5.3.3 Procedure at hearings

VCATA ss. 97, 98

Hearings are open to the public and conducted by VCAT in a structured manner to ensure all parties are given a reasonable opportunity to be heard. VCAT is not bound by the rules of evidence or any of the formal court practices. However, it must act fairly and is bound by the rules of natural justice. This means that all parties must be given the opportunity to be heard.

Hearing notices are published on the VCAT website the evening before the hearing day and can be inspected on the day of the hearing in the ground floor foyer of VCAT at 55 King Street Melbourne. The hearing notices are also published in the daily Law List in *The Age*. These notices contain advice about the commencement time for the hearing, the hearing room and its location, and the Tribunal Members appointed to conduct the hearing. The party should proceed to the hearing room and take a seat at the table and fill in the appearance sheet. This sheet is the record of the parties who attended the hearing.

When the Tribunal Members enter the hearing room, it is usual to stand until invited to be seated. The presiding member is addressed as Mr Chairman or Madam Chair, and the other parties and Tribunal Members are addressed as Mr or Ms with their surname.

While the atmosphere at a hearing before the Tribunal is relatively informal compared to a court hearing, there is a structured order of proceedings and courteous behaviour is expected.

VCAT Practice Note PNPE1 – General Procedures sets out the usual order of presentation of submissions to VCAT. The usual procedure is for the parties or their representatives to speak in the following order:

- the responsible authority
- the council if it is not the responsible authority
- the referral authority or relevant statutory authorities
- the objector(s)
- any other person or body who is not a party
- the permit applicant
- a right of reply to parties other than the permit applicant.

This order of presentation is usually followed, but it can be changed at VCAT's direction.

VCATA s. 102

A party may call an expert witness to give evidence. Witnesses are available for cross-examination by other parties, in the order of appearance. More information about giving evidence and cross-examination of witnesses is provided later in this chapter.

Parties making submissions, such as the objectors and the responsible authority, are not subject to cross-examination or questions by other parties. However, VCAT may allow questions for clarification by other parties and can ask questions of parties during or after their presentation.

Each party may have a reasonable opportunity to respond to the case put by the other parties by way of right of reply. A right of reply is not to be used as an opportunity to simply repeat submissions which a party has already made; rather it should be confined to matters arising from the submissions of the other party(s), which have not already been addressed by the replying party.

VCATA s. 129

VCAT can inspect the site and surrounds before deciding the application for review.

5.3.4 Submissions

VCATA s. 102

The VCAT website contains information and guidelines to help parties make an effective submission to the Tribunal. The guidelines contain advice about the structure and content of submissions, as well as the general procedures followed at a hearing.

VCAT will only consider issues relevant to the decision being reviewed. Therefore, a submission should directly address the decision or planning matter that is the subject of the review. For example, building height is not relevant if the application for review concerns the decision to grant a permit to reduce a car parking requirement.

A submission to VCAT must set out the arguments relied on by the party in support of its case and the reasons it takes the view that it does.

Written submissions by the responsible authority must support its original decision and establish the context of the application for review. Relevant information includes:

- a description of the subject site
- a description of the proposed use and/or development
- the history/background of the application
- the relevant planning policies and provisions as they affect the subject site and surrounds
- summary of objections
- the matters taken into account by the responsible authority in reaching its decision and the reasons for the decision.

Submissions may be presented orally or in writing, or both. Most parties prepare a written submission in advance of the hearing. Written submissions are not compulsory, but they are the most common and the preferred form of presentation to the Tribunal.

A party should provide sufficient copies of the written submission and any other documents for the Tribunal Member(s) and all other parties at the hearing. At least six copies are usually required. If there are a large number of parties involved, additional copies will be required. At the Tribunal's invitation submissions are distributed at the hearing to the other parties a few minutes before the presentations begin.

Submissions may include visual material such as locality plans. Photographs of the site and surrounding area can be an effective way of demonstrating the relevant points. Photographs should be accompanied by information about where and when they were taken.

Projection facilities are available in some hearing rooms. If a party wishes to use these facilities, a request should be made to the Tribunal registry ahead of the scheduled hearing.

5.3.5 Expert evidence

VCATA ss. 97, 98

VCAT will take into account material presented to it at the hearing, including the evidence presented by witnesses. A lay person may give evidence, however, it is more likely to be given by an expert witness.

Expert evidence is not required to decide most applications for review. However, expert evidence in relation to a key issue may be of assistance to VCAT in some cases. For example, where traffic and parking impacts are disputed, expert evidence from a traffic engineer may assist the Tribunal in deciding the merits of the application. Expert evidence from a conservation architect may assist the Tribunal in deciding the merits of an application to demolish a building in a heritage area.

VCAT Practice Note PNVCAT2 – Expert Evidence sets out the obligations of an expert witness and requirements for presenting expert evidence to the Tribunal. The practice note clearly states that an expert witness's duty is to assist the Tribunal on relevant matters. An expert witness is not an advocate for the party retaining the expert. The guidelines contain requirements for the content and form of the expert's report. Circulation of the expert's written report to all parties and the Tribunal is required at least 10 working days before the hearing.

5.3.6 Questioning an expert witness

VCATA s. 102

Expert witnesses will be made available for questioning (cross-examination) by the other parties. The questioning normally follows the same order as that used when presenting submissions to VCAT (see section on 'Procedure at Hearings' in this chapter). Questions must relate to the evidence given or to other matters relevant to the application for review within the expertise of the witness.

After the cross-examination by other parties, the person who called the witness then has the opportunity for further questions to clarify any matters raised. New areas of questioning cannot be introduced at this stage.

Questions in cross-examination may draw out information or illustrate a weakness in the line of argument put by the witness. It may be helpful to make notes during the initial submission about points to query. A party can ask questions of the witness but cannot use this opportunity to make statements about their views.

5.3.7 What factors must be taken into account in deciding an application for review?

PEA s. 60(1)

Before deciding on an application the responsible authority must consider a range of matters, as specified in section 60(1) of the Act. Section 60(1A) of the Act also lists matters that the responsible authority may consider, if the circumstances appear to so require.

PEA s. 84B

In addition to setting out the matters that the responsible authority must consider in assessing an application, the Act includes a complete list of the matters that VCAT must take into account in determining an application for review.

The Tribunal must firstly take into account of and have regard to the matters that the original decision-maker:

- took into account and had regard to; or
- was required to take into account and have regard to.

Not all the matters listed in section 84B of the Act will be relevant in all cases; but where they are relevant, they must be considered. The matters likely to be relevant in most cases include:

- the planning scheme
- the objectives of planning in Victoria
- any relevant state environment protection policy
- the extent of participation of persons residing or owning land in the vicinity of the subject land in application procedures required to be followed before the responsible authority could make a decision
- any amendment to a planning scheme which has been adopted by the planning authority, but not, as of the date on which the application for review is determined, approved by the Minister or planning authority
- any agreement made pursuant to section 173 of the Act affecting the subject land.

Planning schemes cl 91

VicSmart permit applications are exempt from some decision-making considerations in sections 60 and 84B(2) of the Act. The responsible authority and Tribunal must not have regard to these 'exempted' considerations.

PEA s. 84AB

The Tribunal may confine a review to particular matters in dispute if all the parties agree. If a review is so confined, the matters that must be considered under section 84B are also confined to the particular issues in dispute.

5.3.8 The decision

The form the decision takes

VCATA s. 116;
PEA s. 85

VCAT's decision or 'order' must be in writing and will contain the reasons for the decision or record that oral reasons were given. All parties involved in the application for review receive a copy of VCAT's decision.

A decision is not final until it is issued in writing and authenticated by being stamped with the Tribunal's seal.

The decision may contain a direction for the responsible authority. For example, the decision might be that the permit is granted and the responsible authority is directed to issue the permit.

VCATA s. 117

VCAT is required to give reasons for its decision. If the reasons are given orally, a party may request the Tribunal to give the reasons in writing. The request must be made within 14 days of the order being made.

Acting on a decision of the Tribunal

PEA s. 86

If VCAT directs the responsible authority to issue a permit, the permit must be issued within three business days after:

- receiving a copy of the order, if the responsible authority is a Minister; or
- the first ordinary meeting of the responsible authority is held following receipt of the order.

PEA s. 52(1), (4)

No further action is required by the responsible authority when a notice of decision to grant a permit has been issued and VCAT directs that the application for review be allowed in favour of the objector(s), (that is, a refusal notice is not required to be issued).

VCAT's decision is final and binding on all parties to the application for review. However, an appeal to the Supreme Court on a question of law may be made. The outcome of an appeal to the Supreme Court may uphold, quash or change VCAT's decision.

5.3.9 Costs

VCATA ss. 109,
111 PEA s. 150(4);
VCATA sch. 1 pt
16 cl. 63

Each party to an application for review usually meets its own costs. It is unusual for VCAT to order that a party pay a specified part of the costs of another party.

However, VCAT has the power to make an order for costs if it is fair to do so in circumstances where a party has acted unreasonably to the disadvantage of other parties.

In determining whether or not to make an order for costs, the Tribunal may also consider whether the proceeding was brought primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceeding.

If VCAT considers that the proceedings have been brought vexatiously or frivolously, or primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings, and that any other person has suffered loss or damage as a result, it can order the person who brought the proceedings to pay costs to that other person. The amount is assessed by VCAT and may include compensation for loss or damage and an amount for costs.

It is recommended that a party obtain legal advice if it is concerned about the potential for costs to be awarded against it.

5.3.10 Reviews relating to VicSmart permit applications

Applications for review relating to VicSmart permit applications are heard and determined in the VCAT Short Cases List (see Chapter 3.8.16 for more information about VicSmart applications).

The Short Cases List is a sub-list of the Planning and Environment List and handles short and less complex disputes that allow parties to have their matter heard and determined within a short timeframe. Tribunal members hearing cases in this list are encouraged to provide oral decisions at the conclusion of the hearing. Site inspections are unlikely to be taken.

The applicant for review of a VicSmart matter must complete VCAT's VicSmart application form and submit the following information with the application:

- a copy of the responsible authority's decision (unless the review relates to a failure of the responsible authority to make a decision within the prescribed time)
- all application documents and plans
- if the land is affected by a registered restrictive covenant, a copy of the covenant
- where the application required referral under clause 66 of the planning scheme, a copy of any written response from the referral authority
- a copy of the council officer's report (if available)
- where the review relates to a failure of the responsible authority to decide within the prescribed time, a calculation of elapsed days from when the permit application was received by the responsible authority.

The application form can be obtained from VCAT's website www.vcat.vic.gov.au.

For more information about the VCAT review process for VicSmart, its operation, and preparing submissions, refer to the information sheet *VCAT Review Process for VicSmart (June 2014)* on the department's website.

5.3.11 Major Cases List

The VCAT Major Cases List is a sub-list of the Planning and Environment List and handles certain applications for review involving larger developments.

A permit applicant or permit holder may elect to have an application for review dealt with in the Major Cases List if the following criteria are met:

1. The application is one of the following types:
 - An application for review by a permit applicant under section 77 or 79 of the Act.
 - An application for review by a permit applicant or permit holder under section 80 of the Act.
 - An application for review by an objector under section 82 or 82B of the Act.
 - An application by a permit holder, owner or occupier of the subject land under section 87A of the Act.
2. The development meets any of the following requirements:
 - The development does not include a 'dwelling' as defined in the *Victoria Planning Provisions*.
 - The development is within the Residential Growth Zone within the meaning of the *Victoria Planning Provisions*.
 - The estimated cost of the development is \$10 million or more.

Other applications in the Planning and Environment List (that is, applications other than under sections 77, 79, 80, 82, 82B or 87A of the Act) are not eligible for inclusion in the Major Cases List even if the estimated cost of development meets the eligibility criteria. However, the Tribunal may fix a related application for hearing together with an application already included in the Major Cases List if satisfied that it is appropriate to do so.

The applicant for review must elect at the time of commencement of the application if the proceeding is to be included in the Major Cases List, by:

- lodging the relevant application for review on the Major Cases List form with the Tribunal; and
- paying the prescribed application fee.

The Major Cases List application forms can be found on the VCAT website. A different (higher) application fee applies where the applicant elects to have the proceeding included in the Major Cases List.

If an applicant does not choose to have an eligible proceeding included in the Major Cases List, it will be processed and heard in accordance with the usual procedures and timeframes that apply in the Planning and Environment List for applications of that type.

VCAT Practice Note PNPE8 – Major Cases List provides information about the Major Cases List, its operation, eligibility for inclusion in the List, application procedures and timelines.

5.4 Other types of applications for review

5.4.1 Introduction

The previous sections of this chapter addressed applications to VCAT that required it to review an earlier decision made by the responsible authority.

Other types of applications to VCAT require it to make a decision or a declaration in its own right as distinct from the remaking of an earlier decision by another authority. Examples of these types of applications to VCAT include: the cancellation or amendment of a planning permit; the making of an enforcement order; or determining whether a permit was lawfully granted.

The next section of this chapter describes the more usual applications of this type made to VCAT.

5.4.2 Procedural defects in the planning scheme amendment process

PEA s. 39

A person who is affected by a failure of the Minister, a planning authority or a panel to comply with the procedural requirements for an amendment to a planning scheme, can refer the matter to VCAT. This can only be done before the amendment has been approved and must be within one month of the person becoming aware of the alleged failure.

VCAT can make a declaration and a direction in relation to the procedural defect. The direction may be that the planning authority must not adopt or approve the amendment until the Minister, planning authority or a panel takes action specified by VCAT.

VCAT's role in applications of this nature is to review whether or not the procedures set down in the legislation have been correctly followed. VCAT does not review the merits of the planning scheme amendment. It cannot vary a decision made by a planning authority or the Minister in relation to the amendment, or set aside a decision or make a substitute decision.

5.4.3 Application to review notice and more information requests by a responsible authority

Giving notice about an application for permit and amended applications

PEA s. 78(a)

The applicant for a permit can apply to VCAT for a review of a requirement by the responsible authority to give notice of an application under sections 52(1)(d) or 57B of the Act. These sections set out the considerations to be given by the responsible authority regarding notice of an application for permit or an amended application. The applicant may consider that the responsible authority's notice requirements are excessive or irrelevant in relation to the use or development proposed in the permit application.

PEA s. 52

There is no right of review by VCAT in relation to notice requirements under section 52(1) (a), (b) and (c), which relate to giving notice to owners and occupiers of adjoining land, to a council, or to any person to whom the planning scheme requires notice be given. The application for review can relate only to a requirement under section 52(1) (d) or 57B.

PEA s. 85(1)(c)

VCAT may decide to confirm or change the requirement for the giving of notice in accordance with section 52(1)(d) or 57B.

Request for more information

PEA s. 78(b) The applicant for a permit can apply to VCAT for review of a request for more information made under section 54 of the Act. This includes a requirement made by the responsible authority because a referral authority made a requirement under section 55(2). Such an application for review might be made if the applicant for permit considered the requirement to be unreasonable or unnecessary in relation to the use or development proposed.

PEA s. 85(1)(d) After hearing the application for review of a requirement for more information under section 54, VCAT can direct the responsible authority to consider the application for permit as made, or confirm or change the requirement made by the responsible authority.

Extension of time for giving information

PEA s. 85(1)(da) VCAT can also decide on the time within which information is to be given under section 54 in the case of applications for review of the refusal or failure of the responsible authority to extend the time under section 54A.

5.4.4 Failure to grant a permit within the prescribed time

PEA s. 58, 79 The responsible authority must consider every application for a permit. There is no time limit for a responsible authority to make a decision on an application. However, if the responsible authority does not make a decision within the prescribed time, the permit applicant may make an application for review of the responsible authority's failure to decide the application.

Calculating the prescribed time

ILA s. 44; PEA s. 3(1); PE Regs r. 32

There are important rules set out in the Regulations about when the prescribed time starts and when it stops.

The prescribed time starts from the date the responsible authority receives the application (or amended application) unless either of the following apply:

- Further information has been sought within the prescribed time under section 54 of the Act. The prescribed time starts from the day on which the information is given.
- The applicant has applied for a review of a requirement to give further information and VCAT has confirmed or changed the requirement. The prescribed time starts from the day on which the information is given.

The prescribed time is calculated as follows:

- **VicSmart applications:** 10 business days. A business day means a day other than a Saturday, Sunday or a day appointed under the *Public Holidays Act 1993* as a public holiday or public half-holiday. In calculating the 10 business days for a VicSmart application, the first business day (that is, the day the application is received) is excluded and the last business day is included.
- **All other applications:** 60 days. Weekends and public holidays are included in the 60 days. If the last day falls on a weekend or a public holiday, the 60 days expires on the next business day. In calculating the 60 days for any other application, the first day (that is, the day the application is received) is excluded and the last day is included. Weekends and public holidays are included in the 60 days. However, if the last day falls on a weekend or public holiday, the 60 days expires on the next business day.

A different calculation of the prescribed time may arise where the application has been required to be referred to a referral authority. If you are considering an application against the responsible authority's failure to decide an application for permit, it is essential to check the relevant dates against the Regulations.

The VCAT website contains a table *Calculating Elapsed Days in Failure Applications*, which is useful for calculating the number of elapsed days in relation to an application for review under section 79 of the Act.

Determining an application after a failure review is lodged

The applicant for permit must advise the responsible authority at the time that the application for review has been made. Section 84 of the Act provides that the responsible authority can make a decision on an application for permit. However, it must not issue the permit, notice of decision or notice of refusal.

PEA s. 84

If the responsible authority decides to grant a permit, it must advise the Registrar of VCAT. The Registrar must refer the responsible authority's decision to a presidential member of VCAT for further consideration and decision about the application for review.

The presidential member may decide that a permit can be issued and that a hearing is not required because there are no parties other than the applicant and the responsible authority involved.

However, most applications for a review of the failure of the responsible authority to grant a permit involve objectors and proceed to a full hearing unless resolved by consent.

VCAT will only be prepared to consider resolving an application for review of a failure to grant a permit in the circumstances described below – otherwise the application for review proceeds to a hearing:

- The responsible authority decides to grant a permit without conditions and the President has not directed that the application for review be advertised (because advertising was not considered necessary).
- The responsible authority decides to grant a permit without conditions. The application for review has been advertised and no other party has asked to be heard.
- The responsible authority decides to grant a permit subject to conditions. The application for review has not been advertised and the applicant for permit notifies the Registrar that the proposed conditions are acceptable.
- The responsible authority decides to grant a permit subject to conditions. The application for review has been advertised, no requests to be heard have been made and the applicant for permit notifies the Registrar that the proposed conditions are acceptable.
- The responsible authority has received objections to the grant of a permit. The Registrar has advised the objectors of the application for review and inquired as to whether they wish to be heard. After a period of 14 days, no request to be heard has been received.

Reimbursement of VCAT application fee

An applicant to the Tribunal under section 79 of the Act is entitled to have the responsible authority reimburse the whole of any fees paid by the applicant in the review proceeding (this includes the fee for making the application for review and daily hearing fees). However, this does not apply if the responsible authority satisfies the Tribunal that there was reasonable justification for the responsible authority to fail to grant the permit having regard to:

- the nature and complexity of the permit application
- the conduct of the applicant in relation to the permit application
- any other matter beyond the reasonable control of the responsible authority.

5.4.5 Applications relating to extensions of time

An affected person can apply for review of the following:

- a decision to refuse to extend the time within which a development or use is to be started or completed
- the time for certification of a plan under sections 23, 24A or 36 of the *Subdivision Act 1988*
- the failure of the responsible authority to extend the time within one month after the request for extension was made
- a decision to refuse to extend the time for the provision of more information in respect of an application for permit.

However, an application for review of a decision to refuse to extend the life of a permit or a failure of the responsible authority to extend the life of a permit cannot be made if the initial request to the responsible authority for the extension of time was not made within the time specified under section 69(1) or (1A) of the Act.

An application cannot be made directly to VCAT if there has been no request made first to the responsible authority.

The Tribunal can direct that the time must be extended for a specified period, or must not be extended.

5.4.6 Affected persons may seek leave to apply for a review of a decision to grant a permit

Seeking 'leave to apply' is the formal term used by VCAT to describe a request for permission from VCAT for a specified purpose. For example, the applicant for permit must seek and obtain the leave of the Tribunal before amended plans can be substituted for the original plans.

The Act allows any person to apply to VCAT for permission to make an application for review of the decision to grant a permit under section 64 of the Act, if they are affected by any application in which a written objection to the grant of the permit was received by the responsible authority. This provision applies to affected parties who were not objectors to the grant of a permit.

An objector has a right of review under section 82 of the Act. Therefore, the leave of the Tribunal is not required for the objector to make an application for review within the prescribed time.

PEA s. 82B(2), (3)

Before making a decision about a person's application for leave to apply for review of a decision, VCAT must give the responsible authority, the applicant for the permit and the affected person an opportunity to be heard unless the applicant for permit consents to the request for the leave to be granted.

VCAT may grant the leave if it believes it would be just and fair in the circumstances to do so. Leave to make an application for review cannot be granted if a permit has been issued.

These provisions do not apply if a permit has been issued under section 63 of the Act (grant of permit if no objectors) or the application for permit is exempt from the review rights of section 82(1).

5.4.7 Cancellation and amendment of planning permits

PEA s. 87(1)

Under section 87(1) of the Act, VCAT has the power to cancel or amend a planning permit if it considers there has been:

- a material misstatement or concealment of fact in relation to the application for the permit
- any substantial failure to comply with the conditions of the permit
- any material mistake in relation to the grant of the permit
- any material change of circumstances which has occurred since the grant of the permit
- any failure to give notice in accordance with the Act
- any failure to comply with the referral authority requirements contained in section 55, 61(2) or 62(1).

PEA s. 89(1)

Section 89 of the Act provides for any person who objected, or would have been entitled to object to the issue of a permit, to request VCAT to cancel or amend the permit if the person believes that he or she:

- should have been given notice of the application and was not; or
- has been adversely affected by a material misstatement or concealment of fact in relation to the application for the permit; or any substantial failure to comply with the conditions of the permit; or any material mistake in relation to the grant of a permit.

PEA s. 87A

In addition to the powers under section 87, VCAT has the power to cancel or amend a permit that has been issued at its direction if it considers it appropriate to do so. The request under this section must be made by the owner or occupier of the land concerned or any person who is entitled to use or develop the land concerned.

VCAT Practice Note PNPE3 – Cancellation and Amendment of Permits and Stop Orders sets out the procedures to be followed in applications for review to amend or cancel a permit under sections 87, 87A and 89 of the Act and applications for orders to stop development under section 93 of the Act.

PEA s. 88

It is important to note that section 88 of the Act provides limits on VCAT's power to cancel or amend a permit under section 87. VCAT will need to be satisfied that the application was made as soon as practicable and before the construction of buildings or the carrying out of works or before the development is substantially carried out

or completed. If the development or construction is completed, the Tribunal cannot amend or cancel the permit under section 87 of the Act. These limits do not apply to a cancellation or amendment of a permit under section 87A.

Supplementary guidance on making an application to cancel or amend a permit is also available in the VCAT Planning and Environment List *Guidelines for Cancellation and Amendment of Permits Under Sections 87 and 89 of the Planning and Environment Act 1987*.

If the permit relates to the use of the land only, an application to cancel or to amend the permit can be made at any time.

5.4.8 Enforcement orders and interim enforcement orders

PEA ss. 114, 120

VCAT has the power to make enforcement orders and interim enforcement orders under sections 114 and 120 of the Act. These orders may relate to a breach of the Act, a planning scheme or conditions in a permit. Enforcement orders are usually requested by the responsible authority, but can also be requested by other persons.

VCAT Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders issued by VCAT provides guidance on making an application for an enforcement order or interim enforcement order, including advice on the procedures to be followed.

Interim enforcement orders are intended for urgent cases. They enable the maintenance of existing circumstances pending the hearing of the enforcement order application.

The conduct of a hearing for an enforcement order application is not the same as other application hearings. Evidence is normally given on oath or affirmation, rather than by assertion or written submission. Enforcement orders can have serious effects on existing rights. This can mean that facts which are in issue need to be established on the balance of probabilities, bearing in mind the serious nature of the proceedings and consequences.

PEA s. 116

It should be noted that VCAT has the discretion not to make an enforcement order, even if a breach of the legislation or permit condition is found to have occurred. VCAT will consider the consequences of making an enforcement order as part of its decision whether or not to make the order.

VCAT has the power to order the payment of costs in enforcement order applications where it considers that circumstances justify it doing so. Such circumstances might include, for example, the bringing of an unfounded enforcement order application or a persistent and unjustified failure to comply with planning laws. Orders for costs are more common in enforcement order applications compared to other applications to the Tribunal.

5.4.9 Applications under sections 149, 149A and 149B of the *Planning and Environment Act 1987*

PEA ss. 149, 149A, 149B

An application for review to VCAT under section 149 of the Act is appropriate where there is a dispute between a party and the responsible authority in relation to a matter that falls outside the permit application process. Such matters include, for example, whether or not a plan is to the satisfaction of the responsible authority or whether or not something can be done with the consent or approval of the responsible authority.

An application to VCAT for a determination under section 149A is used if the matter relates to the interpretation of the planning scheme or a permit, lawful continuing use rights or an agreement made under section 173.

Under section 149B, a person can make an application to VCAT for a declaration concerning any matter which may be the subject of an application to VCAT under the Act, or anything done by a responsible authority under the Act.

An application for a declaration under section 149A or 149B must identify a respondent who has a real interest in opposing the application. This will often be the responsible authority. VCAT may be reluctant to make a declaration if the issues involved are not properly contested by an opposing party. A declaration is a discretionary remedy. VCAT is not obliged to make a declaration just because the circumstances which would enable it to do so have been made out. VCAT will consider whether a declaration is necessary or whether other suitable remedies are available.

An application to VCAT under these sections of the Act must be in writing and include the:

- name and address of the proposed respondent
- nature of the declaration or determination being sought
- precise matter to which the application relates
- grounds upon which the declaration or determination is sought.

The responsible authority is a party to any proceedings under sections 149 and 149A of the Act. Persons who may have earlier objected to the grant of a permit are not automatically made parties to the proceedings under sections 149, 149A and 149B. However, VCAT may advise persons other than the applicant for review. The persons can then seek leave to be made parties to the proceeding under section 60 of the VCAT Act.

After hearing the application, VCAT can determine the matter and make any declaration it considers appropriate.

5.4.10 Amendments to agreements

PEA s. 184

Section 184 of the Act provides for an owner of land who is affected by a proposed agreement under section 173 of the Act to make an application to VCAT to amend the agreement. The particular provisions are summarised in Table 5.1.

5.5 Procedures

5.5.1 Directions hearing

There are many circumstances when a directions hearing in advance of the full hearing of the proceeding will enable a preliminary matter to be addressed that might otherwise delay the hearing. *VCAT Practice Note PNVCAT5 – Directions Hearings and Urgent Hearings* sets out the usual practice for these types of hearings.

A directions hearing can clarify procedures to be followed in complex cases. It can also establish that there are adequate grounds for review; decide who are, or who should be made parties to the application for review; or who should have notice of the application for review. Following the directions hearing an order is issued in writing to all parties.

VCAT frequently conducts directions hearings and orders are issued orally and in writing to all relevant parties. Most directions hearings are of short duration, usually half an hour or so.

A party to an application for review can request a directions hearing. In the Planning and Environment List an application should be made using the *PNPE6 – Practice Day Request Form* available on the VCAT website. Written requests are made to the Registrar and must set out the nature of the directions sought and the reason for the request. A copy of the request must be given to all the other parties to the proceeding. All parties are advised when a directions hearing is arranged. Parties are invited to attend and address the Tribunal on the matters to be considered.

5.5.2 Urgent hearing

There are certain pressing matters that require prompt attention from the Tribunal, such as to prevent or stop existing unlawful planning activities through an interim enforcement order or an application to stop development pending hearing of an application to cancel or amend a permit.

For such cases the Tribunal offers an urgent hearing procedure. The procedure is set out in *VCAT Practice Note PNVCAT5 – Directions Hearings and Urgent Hearings*.

5.5.3 Practice days

PNVCAT5

In the Planning and Environment List, directions hearings are held on a practice day, conducted each Friday commencing at 10am or otherwise as specified in a notice given by VCAT. The hearing schedule can be checked using the Tribunal hearing listings on the VCAT website or in the Law List in *The Age* newspaper.

A practice day hearing may also be held to consider an urgent application. An urgent hearing may also be held at other times, as specified in a notice given by VCAT.

5.5.4 Compulsory conference

VCATA s. 83

VCAT or the Principal Registrar can require the parties to a proceeding to attend a compulsory conference conducted by either VCAT or the Principal Registrar in advance of the full hearing of an application for review.

A compulsory conference has a similar purpose to a directions hearing. However the Tribunal initiates the conference and attendance is mandatory.

A compulsory conference is used to:

- identify and clarify the nature of disputed issues in the proceeding
- promote settlement of the proceeding
- identify the question of fact and law to be decided by the Tribunal
- allow directions to be given concerning the conduct of the proceeding.

Notice in writing is given to all parties by the Principal Registrar. A compulsory conference is generally not open to the public and the proceedings are at the discretion of the presiding member.

5.5.5 Mediation

VCATA s. 88

VCAT can initiate mediation between the parties to try to reconcile differences and settle a dispute without the need for a full hearing of the proceeding. Mediation under section 88 of the VCAT Act is arranged at the discretion of the Principal Registrar. Consent of the parties is not required and attendance is compulsory. If a party does not attend mediation they may be struck out as a party.

Selection for mediation is made on the basis that the material on VCAT's file suggests that there is a reasonable chance of the dispute being resolved through mediation.

Written requests for mediation can also be made by a party and should be directed to the Registrar.

A member of the Planning and Environment List conducts a mediation session. If the mediation is successful the member will usually make any orders necessary to give effect to the settlement. If the mediation is not successful the case will be listed for conventional hearing before another member.

Anything said in a mediation session is confidential and is not conveyed in any subsequent hearing unless all the parties agree.

5.5.6 A question of law

A question of law may be relevant in an application for review. Deciding a question of law is significant because it establishes a legal interpretation which may apply in other applications. A question of law may be known in advance of the hearing or it may be unforeseen and only become apparent during the hearing of the proceeding. VCAT does not expect a lay person to recognise a question of law.

PNPE1

Any party who becomes aware of a question of law to be decided in a forthcoming hearing must advise the Registrar immediately so that VCAT can be constituted with a legal practitioner. All the other parties to the proceeding should also be notified immediately and, preferably, no later than 10 business days before the hearing date.

The failure of a party to identify a question of law, which ought reasonably to have been raised prior to the hearing date or at the commencement of the hearing, may be taken into account by VCAT when determining costs. This is because another party may have been unnecessarily disadvantaged.

PNPE2

VCAT requires the responsible authority to provide certain information within 10 business days after a notice of an application for review has been served. The information includes advice about any question of law to be decided in advance of the full hearing.

If the legal matter identified before the hearing commences could determine the outcome of the application, without consideration of the merits of the case, the party should make application for a practice day hearing. This may allow the question of law to be decided in advance of the full hearing.

However, if the question of law is not resolved at a directions hearing and the matter proceeds to a full hearing, the Tribunal will be constituted with a legal practitioner who will decide the question of law, whether or not that member presides.

VCATA Sch. 1 Pt.
16 Cl. 66

Sometimes a question of law is not evident until the full hearing has commenced. If the Tribunal is constituted without a legal practitioner a question of law can be decided by that member if all parties agree to the matter being decided by the presiding member. The question of law will otherwise be decided by a judicial member or a member who is a legal practitioner nominated by the President. The member may also elect to refer a question of law to a judicial member or a member who is a nominated legal practitioner.

VCATA s. 148

A party to a proceeding before VCAT has the right of appeal to the Supreme Court of Victoria against the Tribunal's decision on a question of law only. The right of appeal is subject to leave to appeal being granted by the Court. A question of law might, for example, concern the interpretation of a section of the legislation, or an alleged failure to take into account a mandatory consideration required in the legislation.

The right of appeal is confined to the question of law and involves a review of the applicable legal issue only. The Court cannot review the evidence or any other matter that VCAT took into account in reaching its decision. As Ormiston J said in *City of Camberwell v Nicholson* (unreported 2 December 1988):

'My task is to determine only whether the Tribunal has formed a mistaken view as to the relevant law or whether its conclusion is such that nobody could properly reach if it correctly understood that law.'

An application for leave to appeal to the Supreme Court must be made within 28 days of VCAT's decision.

It is recommended that a party contemplating an appeal to the Supreme Court obtain legal advice.

5.5.7 Intervention by a Minister

VCATA Sch. 1 Pt.
16; Cl. 57, 58, 59

The VCAT Act provides the opportunity for a Minister of the Crown with the power to intervene in a proceeding for review of a decision made to the Tribunal. The relevant clauses contain the circumstances for intervention and the applicable timeframes. In summary, a Minister can intervene at any time if he or she considers that the proceeding raises a major issue of policy and the determination of the review could have a substantial effect on the future planning of the area.

VCATA Sch. 1 Pt.
16 Cl. 58

The Minister for Planning can 'call in' a proceeding under the Act, provided the Tribunal has not commenced to hear the proceeding and the Minister considers that the proceeding raises a major issue of policy, and that the determination of the proceeding could have a substantial effect on the achievement or development of planning objectives.

VCATA Sch. 1 Pt.
16 Cl. 58

The Minister can direct the Registrar to refer the matter to the Governor in Council for determination; or invite VCAT to hear the proceeding and refer it to the Governor in Council for determination; or hear the proceeding and then refer it to the Governor in Council for determination. Such a direction or invitation must be made not later than seven days before the date fixed for the hearing.

Clause 60 of Schedule 1 of the VCAT Act provides the Tribunal with the power to refer an application for review directly to the Governor in Council for determination in prescribed circumstances.

If a matter is referred to the Governor in Council before the hearing commences, a hearing before the Tribunal will not take place.

The Governor in Council determines the proceeding referred to it by a Minister or the Tribunal, and makes any orders in relation to the proceeding.

From time to time, the Minister for Planning releases guidelines on the use of the 'call-in' powers under the VCAT Act. Further information about the Minister's intervention powers and details about procedures and guidelines for requests is provided in *Planning Practice Note 29: Ministerial Powers of Intervention in Planning and Heritage Matters*.

5.6 Further information about reviews

5.6.1 VCAT Practice Notes

Copies of the VCAT Practice Notes are available from VCAT's public information counter or on-line at www.vcat.vic.gov.au. The practice note series are numbered for reference and include:

- *PNPE1 – Planning and Environment List General Procedures*
- *PNPE2 – Information from Decision Makers*
- *PNPE3 – Cancellation and Amendment of Permits*
- *PNPE4 – Enforcement Orders and Interim Enforcement Orders*
- *PNPE6 – Practice Day Request Form*
- *PNPE9 – Amendment of Plans and Applications*
- *PNVCAT1 – Common Procedures*
- *PNVCAT5 – Directions Hearings and Urgent Hearings.*

5.6.2 VCAT Forms

Copies of the standard VCAT forms are available from VCAT's public information counter or online at www.vcat.vic.gov.au.

A standard form is used to make an application for review, an application for enforcement order and an application to cancel or to amend a planning permit.

5.6.3 VCAT Decisions

VCAT maintains computer indexes of all previous decisions by reference number, municipality, address and subject matter. Copies of individual decisions are available from VCAT for a photocopy fee.

All significant decisions since October 1996 can be accessed using the Australian Legal Information Institute (AustLii) website at www.austlii.edu.au. New decisions are added monthly.

There are also several reporting services available to subscribers. These include:

- Victorian Planning Reports – Guide to Planning Appeals and Planning Panels: www.vprs.com.au
- LexisNexis – Planning and Environment Victoria: www.lexisnexis.com.au.

Commentary on significant VCAT decisions can also be found in Planning News, the newsletter published by the Planning Institute of Australia – Victorian Division (for subscription enquiries telephone (03) 9654 3777).

5.6.4 Guideline decisions

A ‘guideline decisions’ practice has been established in the Planning and Environment List of VCAT, in order to identify decisions which contain principles that can be followed or applied in planning decision making.

Guideline decisions articulate principles that can be followed or applied in other decision making. They may be principles concerning:

- planning and environment law;
- practice or procedure at VCAT;
- interpretation of planning or environmental legislation;
- interpretation of planning scheme provisions; or
- interpretation or application of policy.

Guideline decisions may set out new principles or clarify established principles, especially when there has been debate or uncertainty about their application or if they are applied in new or important circumstances.

Guideline decisions are identified on the VCAT web site and are available to view or print using the AustLii website.

5.6.5 General Information

General information about the operation of VCAT, including review procedures and requirements in accordance with the relevant acts and regulations, is available from VCAT:

- Website: www.vcat.vic.gov.au
- Telephone: (03) 9628 9777
- Address: 55 King Street, Melbourne 3000.

Council planning departments can also be contacted for information about VCAT reviews.

The information provided is general only and is not to be taken as a substitute for any legal advice which may be required depending on the circumstances of an individual case and the interests of a particular party.

Copies of the VCAT publications and forms referred to in this chapter are available from VCAT’s website, public information counter or by calling a customer service officer.

Academic text books such as Statutory Planning in Victoria, fourth edition, the Federation Press 2011 by Eccles D & Bryant T, provide further advice about VCAT and the application review process.