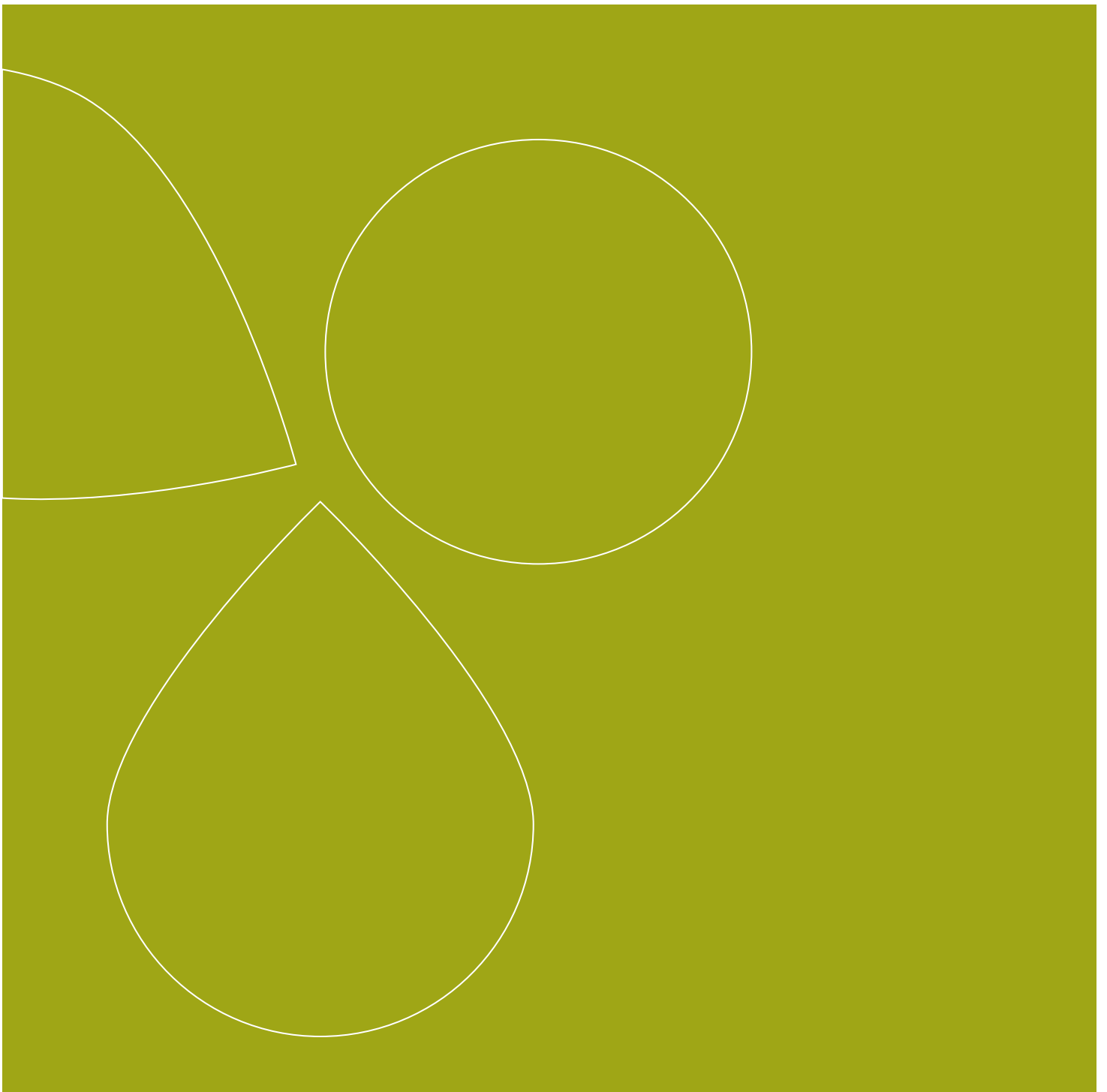


Enforcement Kit



Enforcement Kit

A working guide to seeking enforcement in planning matters and nuisance under the Health Act

About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre practising public interest planning and environment law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

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SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice.

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1.0 Background

1.1 Introduction

This booklet is only a working guide for you to seek enforcement of planning and environmental controls in Victoria.

It is not intended as a substitute for legal advice. EDO (Victoria) Ltd recommends this booklet as an educative tool and as a preliminary step to seeking formal legal advice in relation to instigating an enforcement action.

1.2 Overview

Enforcement action in relation to planning and environmental matters may be taken under the Planning and Environment Act 1987 (Vic) (**PE Act**), the Health Act 1958 (Vic) (**Health Act**) or the Environment Protection Act 1970 (Vic) (**EP Act**).

1.3 Enforcement under the Planning and Environment Act 1987

The PE Act is the principal piece of legislation regulating planning activity in Victoria. Several enforcement measures exist under the PE Act to ensure compliance with relevant planning schemes and planning permits.

These include: proceedings for an enforcement order (**EO**) before the Victorian Civil and Administrative Tribunal (**VCAT**). This would be used where use or development of land fails to comply with a planning scheme or the conditions of a planning permit or section 173 agreement (section 114 PE Act); proceedings brought before VCAT for the cancellation or amendment of planning permits (sections 87 – 89 PE Act), including orders to stop development; prosecutions for offences under the PE Act brought in the Magistrates' Court (section 127 PE Act); and declarations by VCAT under the PE Act (sections 149A and 149B PE Act).

1.4 Enforcement under the Health Act 1958

Part III of the Health Act applies to occurrences that may be considered a 'nuisance', and are, or are liable to be, dangerous to health or offensive. For example, odour emanating from a property can be a nuisance.

The Health Act enables those affected by a nuisance to complain to their local council. If the council fails investigate, or declines to take any action, it empowers you to seek an order from the Magistrates' Court that the nuisance stop.

1.5 Enforcement under the Environment Protection Act 1970

The EP Act makes it an offence to pollute various elements of the environment, such as the air, water and land, and creates a system of authorised emissions. The Environment Protection Authority (**EPA**) is responsible for enforcing and prosecuting offences under the EP Act, except in relation to noise pollution, where the police and municipal authorities also have responsibilities.

In almost all circumstances, a member of the public has no standing to prosecute for offences under the EP Act (section 59(2) EP Act). However, section 48A(9) provides that a proceeding may be brought by a person who claims to be affected by 'unreasonable noise' emanating from a residential premises.

The EDO and other environmental bodies have made submissions to the Victorian Government in relation to the introduction of legislative changes to

allow for members of the public to have enforcement rights, through open standing and third party enforcement provisions under the EP Act. It is hoped that such changes will be introduced in the near future.

1.6 *Is there anything I can do if someone is breaching the EP Act?*

Conditions attached to a licence or works approval issued by the EPA may also form conditions to a planning permit. If those conditions are breached, you may be able to take action under the PE Act.

Otherwise, you can complain to the EPA or your local council.

2.0 Enforcement Orders under the PE Act

2.1 What is an EO?

EOs can:

- **Stop** existing unlawful planning activities;
- **Prevent** threatened unlawful planning activities; and
- **Achieve rectification** in respect of the unlawful planning activities.

An application for an EO is made to VCAT under section 114 of the PE Act. In urgent cases, an application may also be made for an interim enforcement order (**IEO**) under section 120 of the PE Act.

The purpose of an enforcement order is to rectify non-compliance with a planning scheme or a planning permit. Although this may require a person to undertake works or to cease certain activities, an enforcement order is not intended to be a form of punishment of the person against whom the order is made.

2.2 Can I apply for an EO?

Any person, including the council, may apply to VCAT for an EO (section 114(1) PE Act).

It is not necessary to identify a personal interest in the matter nor to establish that your personal interests are affected by the matter (*Jefferies v Kielor (1996) 7 AATR 134*).

Tip

Before making an application as a member of the public, ask the Responsible Authority (usually the local council) to take action.

You should also write a letter to the owner and occupier of the land demanding that the use or development of the land be brought into compliance with the relevant part of the planning scheme, permit condition or section 173 agreement within an achievable timeframe (unless of course the matter is so urgent that this is not appropriate).

Any communication with the Council or the landowner which relates to a breach and is made prior to filing an application for an EO should be in writing and you should keep records.

2.3 Why would I seek an EO?

If the Responsible Authority is unwilling to take action and the occupier (or owner) of the land refuses to address the problem, you might consider bringing an application for an EO where a use or development of land contravenes, has contravened, or will contravene:

- a planning scheme;
- any condition of a permit; or
- a section 173 agreement (an agreement between the responsible authority and the owner of the land)

(section 114(1) PE Act).

2.4 Against whom can I seek an EO?

An EO may be sought against one or more of the following people:

- the owner of the land;
- the occupier of the land;
- any other person with an interest in the land; and/or
- any other person by whom or on whose behalf the use or development was, is being, or is to be carried out, e.g. a developer or construction company.

(section 114(3) PE Act).

2.5 How do I apply for an EO?

To apply for an EO:

Lodge the recommended application form with the Tribunal (available on the VCAT website).

If making an IEO application, it must be made at the same time as an EO application. (See [Section 3.0](#) below)

Lodge a title search with the application. The title search must be no more than 14 days old.

For details obtaining a title search see [Section 11.2](#) below.

Pay the fee set out in the application form.

If you wish to apply to have the fee waived, you must:

- be the holder of a current Government benefit card (and provide a copy); and
- provide a statement that sets out the your net income and how paying the fee will result in financial hardship (Practice Note, Planning and Environment List (No 4)).

Pay an additional fee, if an IEO is also being made.

Give notice by sending copies of the EO application to the relevant parties within 7 days of lodging the application with VCAT (section 115 PE Act).

Keep copies of all the correspondence you send to VCAT and the other parties.

Provide evidence to VCAT that such notice has been given by filing a statement of service (see [Section 2.9](#) below).

Further details are set out below.

2.6 What information do I need to include?

Among other things, you should:

- provide a description of the grounds on which the application is made;
- specify the provisions which are being or may be contravened;
- list any other person who may be affected by the alleged contravention; and
- state the orders which you wish VCAT to make.

2.7 To whom do I give notice?

You must give notice of an EO application to:

- the Responsible Authority (usually the relevant local council);
- any person against whom the EO is sought;
- the owner of the land;
- the occupier of the land; and
- any other person whom VCAT considers may be adversely affected by the EO. This may include any referral authorities (such as the EPA), mortgagees of the subject land or objectors to the original planning application. (section 115 PE Act)

2.8 How do I give notice of the application?

Give each party a copy of your application, any covering letter and any other documentation received from VCAT within **7 days** of lodging the application.

This is called 'serving' your application (Rule 4.06, *Victorian Civil and Administrative Rules 1998 (Rules)*).

Methods of service include personal service (i.e. personal delivery), or service by post, document exchange, facsimile or email (section 140, of the *Victorian Civil and Administrative Tribunal 1998 (VCAT Act)*).

2.9 How do I prove I have given notice of the application?

You must keep:

- a copy of all documents served on the parties;
- a record of the date and method of service and where and to whom the documents were sent.

Then you must file a Statement of Service (available from the VCAT website) with VCAT setting out each party you have served and how they were served, attaching copies of the documents you served.

2.10 How are objections to the EO application made?

A person who objects to an EO application must lodge with VCAT and serve on the other parties a **written statement of the grounds** on which that person intends to rely at the hearing of the proceeding.

They may object to the making of the EO on any ground she or he thinks appropriate (Clause 56, Schedule 1, VCAT Act). They can deny the allegations made or assert that they have complied with the relevant permit or agreement.

2.11 What happens if no objections are received?

If VCAT receives no objections, it may within 14 days, without a hearing, either:

- make any EO it thinks fit; or
- reject the EO application.

(Section 116 PE Act)

However, the applicant must still satisfy VCAT that an EO is appropriate. VCAT may require the applicant to file an affidavit setting out all of the relevant facts as proof of the alleged breach.

Alternatively, VCAT may conduct a hearing at which the applicant will need to tender evidence and make submissions.

2.12 What happens if objections are received?

VCAT must conduct a hearing at which the following persons give evidence or make submissions:

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

(Section 117(1) PE Act)

Where VCAT decides that a hearing is necessary, a time and a place will be fixed and you will be notified in accordance with VCAT's listing procedures (Practice Note Planning and Environment (No 4)).

After giving such an opportunity and considering any submissions, VCAT either makes or rejects the EO application (section 117(2) PE Act).

2.13 What standard of proof must I meet to show the need for an EO?

You must prove your case on the 'balance of probabilities', which means that you must prove that your version of events is more probable than not. As an EO can have serious effects on existing rights, VCAT, in making its decision, will take into account the serious nature of the proceedings.

Evidence is normally given on oath or affirmation rather than by just through submissions. Evidence can be in the form of an affidavit, or be given orally.

Even where no objections are received, you must still satisfy VCAT that an EO is appropriate (Clause 8.1, Practice Note, Planning and Environment List (No4)). (See [Section 2.11](#) above)

Tips

Before making an application to VCAT, you should gather all the evidence required to prove the contravention. This might include writing to the person who is using or developing the land illegally; obtaining copies of any development plans, permit applications and any supporting material; keeping a regular diary; taking photographs or video; taking statements from neighbours or other eyewitnesses; ordering aerial photography; conducting surveys; or looking for older photographs of the land.

It is important that you obtain a copy of any relevant permit, any plans endorsed under the permit, and any section 173 agreements or planning scheme extract in force at the time of the contravention(s).

Organise your evidence into chronological order and keep it in a dedicated folder, separate from correspondence files.

Once you have collected all the evidence you think you need, we advise you to seek legal advice from a lawyer with expertise in Planning and Environmental law regarding your options and the possibility of liability for legal costs, should your application be unsuccessful.

2.14 What orders can VCAT make?

VCAT can make an EO which directs the respondent(s) to:

- stop the use or development within a specified time;
- not start the use or development;
- maintain a building in accordance with the EO;
- carry out specified activities to restore the land, as nearly as practicable, to its condition immediately before the use or development started, or to a condition specified in the EO; or
- carry out specified activities to otherwise ensure compliance with the PE Act, planning scheme, permit condition or section 173 agreements.

(Section 119(b) PE Act)

2.15 Who pays the costs of an EO application?

The general rule in proceedings before VCAT is that each party bears its own costs of the proceeding (section 109(1) VCAT Act).

However, VCAT does have the power to order the payment of costs where it is satisfied that it is fair to do so (section 109 VCAT Act).

In doing so, VCAT will consider:

- whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding;
- whether a party has been responsible for unreasonably delaying the proceeding;
- the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

- the nature or complexity of the proceedings; and
- any other matter that VCAT considers relevant, e.g. the bringing of an unjustified EO application or the persistent and unjustified failure to comply with planning laws in the face of requests and warnings.

(Section 109(3) VCAT Act)

It is more common for costs to be awarded in EO applications than in normal planning applications for review.

3.0 Interim Enforcement Orders

3.1 *What is an IEO?*

Interim Enforcement Orders are EOs made in urgent cases, such as where vegetation is about to be cleared or a building demolished contrary to a planning scheme or planning permit. They are similar to an interim injunction and similar rules of principle apply. The purpose of an IEO is to **preserve existing circumstances** pending the hearing of the ordinary EO application.

3.2 *Who can apply for an IEO?*

An application for an IEO can only be made by a person who has already applied for an EO under section 114 of the PE Act (section 120 PE Act). The application for IEO can be made at the same time as the EO application.

3.3 *What if the matter is very urgent?*

An IEO can be made without giving notice to the parties against whom it is sought (section 120(2) PE Act). Such an application is called an '*ex parte* application' and no other party will appear at the application.

3.4 *How do I make an IEO application?*

An IEO application should be made as follows:

Lodge the recommended application form with VCAT at the same time or after the application for an EO. The EO application form includes an application form for an IEO.

The application must set out why the case is urgent and must describe the harm that will occur if an order is not made. The Tribunal will require that you indicate if you are prepared to provide an undertaking to pay damages in the event that the enforcement order application is ultimately unsuccessful.

File an affidavit swearing to the truth of the contents of the application and to the truth of any other facts you think support the making such an order. This must be lodged with the application (Clause 4.3, *Practice Note Planning and Environment List (No 4)*).

Note: Sworn oral evidence may be relied upon if circumstances are so urgent that an affidavit is not able to be prepared.

Pay any additional application fee.

3.5 *How do I make an ex parte IEO application?*

An *ex parte* IEO application should be made as follows:

Telephone VCAT on the emergency number (03) 9628 9777. (Clause 5.2, *Practice Note Planning List (No4)*)

If the application is made **outside normal office hours**, the caller will be provided with a further telephone number on which a VCAT officer can be contacted. (Clause 5.3, *Practice Note Planning List (No4)*)

Provide the VCAT officer with:

- details of the application;
- reasons why the application warrants such urgent attention;
- a return telephone number or other means of contact.

If appropriate, the VCAT officer will **contact a VCAT member**. The further conduct of the application will then proceed in accordance with the directions of the member. This may result in an urgent *ex parte* hearing (i.e. without other parties attending).

Provide to VCAT any documents, including a draft of the orders sought in duplicate, relating to the application before or during such urgent hearing, if not already provided (Clauses 5.2 and 5.3, *Practice Note Planning and Environment List (No 4)*).

3.6 What happens at the hearing of ex parte IEO application?

VCAT may make an *ex parte* IEO at the *ex parte* hearing. When considering the application, VCAT will take into account the following:

- whether the matter is so urgent that it cannot wait to be dealt with until after the service of documents on the other affected parties;
- the effect of not making the *ex parte* IEO;
- whether irreparable damage would be caused to the property or to the applicant or other persons if the order is not made;
- the effect of making the *ex parte* IEO upon any person who is the subject of the order or affected by the order;
- whether the applicant has made out a case on the facts provided, i.e. it is probable that an EO would be granted;
- whether, even if a case has been made out, other considerations would make it unjust to grant an IEO;
- whether the applicant would be required to give any undertaking as to damages (to compensate the other party for any loss suffered as a result of the IEO) in the event that an EO is not made; and
- whether VCAT should hear any other person before an IEO is made.

(Clause 5.4, *Practice Note Planning and Environment List (No 4)*)

3.7 How long does an ex parte IEO last?

An *ex parte* IEO can operate for no more than **7 days** (section 120(9) PE Act). VCAT must conduct a hearing at which any person affected will have a reasonable opportunity to be heard.

VCAT will normally fix a time and place for such a hearing and give directions the applicant to notify and serve documents on affected parties.

At the hearing, VCAT will determine whether the *ex parte* IEO should be continued pending the hearing of the EO application; varied; or cancelled.

3.8 What happens at the hearing of an IEO application?

All parties have an opportunity to make submissions at the hearing of an IEO application. VCAT will have regard to the same considerations as in the case of an *ex parte* IEO (see [Section 3.6](#) above).

If an IEO is made, VCAT may also give directions in relation to the future conduct of the matter (Clause 6.1, *Practice Note Planning and Environment List (No 4)*).

3.9 What is an undertaking as to damages?

If you apply for an IEO, VCAT will generally require you to give an undertaking as to damages. This is a formal promise to VCAT to pay damages to the person who suffers loss because of the IEO if it is ultimately decided that an EO should not be made.

3.10 Do I have to provide an undertaking to pay damages?

Before making an application for an IEO, you should be aware that generally a person seeking an IEO must provide an undertaking to compensate the affected party if the application fails: see, for example, the decision of Charles J in *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318.

VCAT appears to accept that a member of the public is in a different position to that of a Responsible Authority, given that a Responsible Authority is under a statutory duty to enforce the planning scheme: see *Stonnington CC v Blue Emporium Pty Ltd* [2003] VCAT 1954.

While the provision of an undertaking to pay damages will make it easier to obtain an IEO, you may be able to convince the Tribunal that no undertaking should be provided if you have a strong case with good evidence, where irreplaceable values are at stake.

Consider whether the matter is genuinely urgent. If it is, ask yourself what damage might be suffered by the person who is to be restrained if you ultimately lose the case. For VCAT, this is a question of balancing the risk of injustice. You will need to mount persuasive arguments as to why the risk of injustice is lower if the IEO is made without an undertaking to pay damages being provided.

3.11 What orders can VCAT make?

VCAT can make an IEO, which directs a person:

- to stop the use or development immediately or within the period specified in the IEO;
- not to start the use or development; or
- to do specified things to ensure compliance with the PE Act, planning scheme, permit condition or section 173 agreement.

(Section 120(4) PE Act)

3.12 How long does an IEO last?

An IEO can only operate for a limited time, generally until the determination of the EO application (section 120(6)(a) PE Act).

However, an IEO may also:

- cease on a specific date or on the happening of an event specified in the IEO (section 120(6)(b) PE Act); or
- otherwise be cancelled or amended by VCAT (section 121 PE Act).

4.0 Enforcement of an EO or IEO

4.1 *What if an EO or IEO is contravened?*

If the person against whom the EO and IEO is made does not comply with the Order, any of the following actions may be taken:

- A municipal council (or, with VCAT's consent, any other person) may carry out the work required by an EO or IEO, which has not been done within the specified time (section 123 PE Act); or
- A municipal council may prosecute on the grounds that contravention or non-compliance with an EO or IEO is an offence (section 133 VCAT Act).
- The person who contravenes the order may be fined. The maximum penalties for contravention of an EO or IEO are:
 - imprisonment until the order is complied with or for 3 months, whichever is the sooner; and/or
 - a fine of \$2,000 and \$500 for each day the contravention continues after making the order (section 133 VCAT Act).
- Any person (including a municipal council) may apply to the Supreme Court, County Court or Magistrates' Court (depending on the amount of money involved) for an injunction restraining any person from contravening an EO or IEO (section 125 PE Act) (see [Section 8.0](#)). A breach of an injunction will result in a charge of contempt of court.
- Any person may file a 'certified' EO or IEO (one which has been endorsed by VCAT as being a true copy of the order) in the Supreme Court in order to have it enforced as though it were a Supreme Court order (section 122 VCAT Act), provided it has been personally served on the person against whom it was made.

Means of enforcement include committal of the person or a representative of a corporation for contempt of court or the seizure of the person or corporation's property. (See Supreme Court (General Civil Procedure) Rules 2005, Order 66 under 'Practice and Procedure' at www.supremecourt.vic.gov.au.)

5.0 Cancellation or amendment of a permit

5.1 *When can a permit be cancelled or amended?*

VCAT may cancel or amend permits where there has been a substantial failure to comply with the conditions of the permit, regardless of whether the permit was issued at the direction of VCAT, or was issued without an application for review being made to VCAT.

There are also grounds which do not relate to compliance such as where there has been:

- a material mis-statement or concealment of fact in relation to the permit application;
- any material mistake in relation to the grant of the permit;
- any material change of circumstances since the grant of the permit;
- any failure to give notice in accordance with section 52; or
- any failure to comply with certain sections of the PE Act:
 - section 55 (referral of permit applications to referral authorities);
 - section 61(2) (refusal to grant a permit if the referral authority objects to the grant of the permit); or
 - section 62 (inclusion of conditions required by the planning scheme or the responsible authority or non-inclusion of conditions that conflict with such conditions);

(sections 87(1) and 91 PE Act).

VCAT may also amend a planning permit if a building permit cannot be obtained for the development under the Building Act 1993 because the permit issued does not comply with those regulations (section 87(2) PE Act).

The rules which govern VCAT proceedings for cancellation/amendments to permits are contained in *Practice Note, Planning and Environment List (No 3)*.

5.2 *Can I request cancellation or amendment of a permit?*

Potential objectors (other than adjoining owners and occupiers of the land concerned) can only request cancellation or amendment of a permit if they objected or would have been entitled to object to the grant of the permit and believe that:

- there was a failure to give proper notice of the permit application; or
- they have been adversely affected by:
 - a material mis-statement or concealment of fact in relation to the permit;
 - any substantial failure to comply with the conditions of the permit; or
 - any material mistake in relation to the grant of the permit.

(section 89(1) PE Act)

Otherwise, a request for cancellation or amendment may be made by:

- the Responsible Authority;
- a referral authority; and
- the owner or occupier of the land to which the permit relates.

(Section 87(3) PE Act)

5.3 What time limits apply?

You must act promptly in seeking the cancellation or amendment of a planning permit. VCAT may refuse to consider a request unless it is satisfied that you made the request as soon as practicable after you discovered the relevant circumstances (section 89(3) PE Act).

5.4 When can VCAT exercise its powers to amend or cancel a permit?

VCAT may only exercise its powers to amend or cancel a permit in the following circumstances:

- in the case of 'development':
 - before completion, if the permit relates to the construction of buildings or the carrying out of other works; and
 - before being substantially carried out, if the permit relates to other development such as subdivision; or
- where the permit relates to the use of land, at any time.

(Section 88 PE Act)

5.5 How do I stop work continuing?

Pending the hearing of a request for cancellation or amendment of a permit, you may apply for a 'stop order'. This is an order that no development other than that specified in the order can be carried out or continued on the land (section 93 PE Act).

In very urgent cases, VCAT may make such an order *ex parte*. This means that the person against whom it is made has no notice of the request and no opportunity to be heard in relation to it.

In applying for a stop order, you should follow the steps for applying for an IEO (see [Section 3.4](#)).

5.6 Stop orders – undertaking as to damages

If you apply for a stop order, VCAT will normally require that you order give an undertaking as to damages (Clause 6.2, *Practice Note Planning and Environment List (No 3)*) (see [Section 3.9](#)).

This means that if the permit is not ultimately cancelled or amended, you will be liable to pay compensation to the owner, occupier and/or developer of the land for any loss or damages they have suffered due to the development being stopped (section 94 PE Act).

5.7 How do I apply for the cancellation or amendment of a permit?

A request for cancellation or amendment should be made as follows:

Lodge the recommended application form with VCAT. The application must include details of the parties, the permit, the subject land and reasons for lodging the request.

Lodge copies of the permit, a title search of the subject land and, if the owner or occupier is a company, a company search. The title and company searches should not be more than 14 days old. See [Section 11.2](#) about conducting a title search.

Pay the prescribed fee. An additional fee is payable, if a stop order is also sought. See VCAT's website or call VCAT for up to date details of fees payable.

VCAT may then give directions to the applicant as to:

- giving notice of the request to other parties pursuant to section 90 PE Act; and
- providing evidence to VCAT of giving such notice.

Serve a copy of the request on:

- the Responsible Authority;
- the owner and occupier of the land concerned;
- the Minister for Planning;
- any relevant referral authority; and
- any other person who appears to have a material interest in the outcome of the request.

Provide VCAT with a Statement of Service (see [Section 2.9](#)).

(Clause 5.4, *Practice Note Planning and Environment List (No 3)*)

5.8 How can an application to cancel or amend a permit be opposed?

A person wanting to oppose a request to cancel or amend a permit must lodge with VCAT and serve on the other parties a written notice of the grounds on which that person intends to rely at the hearing of the request (Clause 56, Schedule 1 VCAT Act).

5.9 When will a hearing be held?

VCAT will fix a time for hearing and notify the parties in accordance with its usual listing procedures.

5.10 What happens at the hearing?

A request to cancel or amend a permit or an application for a stop order is not the same as a normal planning application for review.

VCAT may require that evidence be given on oath or affirmation rather than by submissions. Evidence may be given orally or by affidavit. (Clause 7.1, *Practice Note Planning and Environment List (No 3)*)

All parties will be given a reasonable opportunity to be heard, give evidence or to present written submissions. (Clause 5.6, *Practice Note Planning and Environment List (No 3)*)

At the hearing of an application for an order to stop development, standing to be heard or make a submission will also be given to any person who wishes to contest the request. (Clause 6.5, *Practice Note Planning and Environment List (No 3)*)

VCAT will treat the application for an order to stop development in a similar manner to an application for an IEO. (Clause 7.2, *Practice Note Planning and Environment List (No3)*) (See [Section 3.8](#))

5.11 Who pays the costs of the application?

The general rule in proceedings before VCAT is that each party bears its own costs (section 109(1) VCAT Act).

However, VCAT does have the power to order payment of another party's costs where it is satisfied that it is fair to do so (section 109(2) and (3) VCAT Act). (See [Section 2.15](#))

For example, an unjustified application to cancel or amend a permit or to stop development; or the persistent and unjustified failure to comply with planning laws despite requests and warnings may result in orders for costs. (Clause 8.1, *Practice Note Planning and Environment List (No 3)*)

Costs orders are more common in these cases than in normal planning applications.

6.0 Planning Infringement Notices

- 6.1 What is a PIN?** A planning infringement notice (**PIN**) is an 'on the spot' penalty for minor infringements of the PE Act and is issued by a responsible authority.
- 6.2 When is a PIN served?** A responsible authority may serve a PIN if it has reason to believe that a person has committed an offence under section 126 by contravening the planning scheme, a planning permit or a section 173 agreement.
- (Section 130(1) PE Act)
- 6.3 How is a PIN served?** A PIN will be served by either the Responsible Authority or planning authority, usually the local council. It may be served on the owner or occupier of land either personally or by prepaid letter addressed to the owner or occupier at his or her usual or last-known place of residence or business.
- (Section 145 PE Act)
- 6.4 What penalties apply?** PINs may impose a fine limited to 5 penalty units for natural persons and 10 penalty units for a body corporate or require steps to be taken to rectify an offence without going to a Court or VCAT
- (Section 130 PE Act)
- 6.5 What is a penalty unit?** The value of penalty units is fixed by notification in the Victorian Government Gazette each financial year.
- See [Section 11.1](#) below.
- 6.6 What actions can a PIN require?** The PIN must set out (amongst other things) the additional steps required (if any) to rectify the offence. Such additional steps may include, but are not limited to:
- stopping the offending development or use of land;
 - modifying the offending development or use of land;
 - removing the offending development;
 - acting to prevent or minimise any adverse impact of the offending development or use of land;
 - entering into an agreement under section 173 of the PE Act; or
 - doing or omitting to do anything in order to remedy a contravention of a planning scheme, permit or section 173 agreement.
- (Section 130(2) and (4) PE Act)
- 6.7 What happens if a PIN is contravened?** If a person contravenes a PIN by not paying the fee or taking any specified steps as set out in Section 6.6 above, the Responsible Authority may prosecute for the offence for which the PIN was served.
- (Section 132(4) PE Act)

7.0 Prosecution under the PE Act

- 7.1 What is a prosecution?** Prosecution is a way of punishing a person for a contravention of a planning control.
- It can be distinguished from an EO, which seeks rectification of breaches.
- 7.2 When can a prosecution be brought?** Prosecutions may be brought against someone for:
- contravening or failing to comply with a planning scheme, permit or a section 173 agreement (section 126 PE Act);
 - contravening or failing to comply with an EO or IEO (section 133 PE Act); or
 - obstructing, without lawful excuse, an authorised person or member of the police force who is taking action authorised under sections 133 to 138 (powers of entry and investigation) of the PE Act (section 137 PE Act).
- 7.3 Who can bring a prosecution?** A prosecution may be brought under the PE Act by:
- a Responsible Authority; or
 - a member of the public.
- 7.4 Where are prosecutions brought?** Prosecutions are brought in the Magistrates' Court of Victoria and are governed by the *Magistrates' Court Act 1989*.
- 7.5 What time limits apply?** A prosecution must be brought within 12 months after the date on which the offence was committed (section 26(4) *Magistrates' Court Act 1989*).
- For an offence of a continuing nature, the time limit does not start to run until the commission of the offence has ceased.
- 7.6 How do I bring a prosecution?** To commence a prosecution, a charge sheet describing the offence must be signed by you and filed with the Registrar of the Magistrates' Court.
- At the same time as filing the charge sheet, you should apply for a summons setting the matter down for mention and requiring the accused to appear. A copy of the Charge Sheet must be given to the person charged together with a copy of any summons at least 14 days before any mention date.
- See generally sections 24 to 35 of the *Magistrates' Court Act 1989* (www.magistratescourt.vic.gov.au under Practice and Procedure, Legislation).
- 7.7 What penalties apply?** Where no penalty is prescribed for certain offences the maximum penalty is:
- 1200 penalty units (section 127(a) PE Act); and/or
 - 60 penalty units for every day during which the contravention or failure continues after conviction (section 127(b) PE Act).
- See [Section 6.5](#).

If the Responsible Authority has brought the prosecution and succeeds, the penalty will be paid to it (section 129 PE Act).

If a member of the public brings proceedings and succeeds, the penalty will be paid into the Consolidated Revenue of the State of Victoria, rather than to the individual or the Responsible Authority.

7.8 Should I bring a prosecution?

If you have a genuine concern that an offence has been committed, you should first raise it with the Responsible Authority.

If the Responsible Authority does not take the action you consider appropriate, you may wish to bring your own prosecution. If you do so, you will be required to prove beyond reasonable doubt that the relevant offence has been committed.

If you do not succeed in the prosecution, you may be ordered to pay the costs of the defendant (section 131, *Magistrates' Court Act 1989*).

It is strongly recommended that you obtain legal advice on the merits of such a prosecution before you proceed.

8.0 Injunctions

8.1 *What is an injunction?*

An injunction is an order restraining a person or entity from engaging in particular conduct or requiring them to engage in certain conduct. There are 3 general types of injunctions:

Interim injunction: an order made in very urgent circumstances, often without the other party attending court or being given notice (*ex parte*). Only be in force for a short time until the hearing for an interlocutory injunction.

Interlocutory injunction: a temporary order, which lasts until the final hearing of a dispute.

Permanent injunction: an order by the court after a full hearing has been conducted and the parties have tendered all relevant evidence. May last indefinitely or until a specific date or a certain event occurs.

8.2 *What types of injunctions are available in planning matters?*

The following injunctions are available:

- an injunction may be sought from a court under section 125 of the PE Act to restrain any person from contravening an EO or IEO (**section 125 injunction**);
- VCAT may grant an injunction, including an interim injunction, in any proceeding if it is just and convenient to do so, under section 123 of the VCAT Act;
- a common law injunction is also available from a court, although use of this type of injunction is less common due to the availability of less expensive enforcement procedures.

8.3 *Section 125 injunctions – who may apply?*

Any person (including a Responsible Authority) may apply for a section 125 injunction (section 125 PE Act).

8.4 *Section 125 injunctions – in what circumstances?*

A section 125 injunction is available:

- where there is a contravention or threatened contravention of an EO or IEO;
- whether or not proceedings are brought for an offence against the PE Act;

A section 125 injunction is not available:

- to prevent a contravention or threatened contravention of the PE Act or planning controls;
- if the defendant gives an undertaking not to do certain things in contravention of the EO or IEO.

**8.5 Section 125
injunctions – which
court?**

The value of a dispute normally determines the court to which an application for an injunction should be made as follows:

Magistrates' Court: disputes up to \$100,000

County Court: disputes over \$100,000 and up to \$200,000

Supreme Court: disputes over \$200,000

In working out the value of a dispute about planning controls, you should take into account the value of the relevant property. The Supreme Court is the most likely venue for these types of disputes.

8.6 General

If you apply for an injunction and do not succeed, the relevant court may order you to pay the costs of the other party.

You should seek legal advice before applying for an injunction.

9.0 Declarations

9.1 *What is a declaration?* A declaration is effectively a statement by a court setting out the parties' rights and obligations in certain circumstances.

9.2 *Why would I want a declaration?* Declarations are useful when there is doubt about:

- the legality of a use or development under the planning scheme; or
- the legality of a planning permit or about how a use should be classified under the Tables of Uses in the planning scheme (where it is inappropriate to resolve the matter by making an application for a planning permit).

For example, a business may have commenced selling goods in an area where a permit is required to sell some or all of the goods or in which some of the goods are thought to be prohibited. A commercial competitor may ask the Council to enforce the planning scheme. Prior to seeking enforcement orders, the competitor, the Council or the occupier of the land may seek a declaration to clarify the legality of the use, and which goods may legally be sold on the premises.

For another example, a declaration may be sought as to whether an exemption is available from the requirement to obtain a permit to remove native vegetation. Rather than risk being prosecuted, a landowner may ask for a declaration that the removal of certain vegetation for certain purposes is exempt from the requirement for a permit.

9.3 *Section 149B Declaration* Under section 149B PE Act, **any person** may apply to VCAT for a declaration concerning a planning matter or anything done by a Responsible Authority.

9.4 *Section 149A Declaration* Under section 149A PE Act, only 'specified persons' may apply to VCAT for a determination of a matter if it relates to:

- the interpretations of the planning scheme or a permit in relation to land, or use or development of land;
- whether section 6(3) of the PE Act (relating to existing uses and developments of land) applies to a use or development of land; or
- a provision of a planning scheme or amendment permitted the continuation of a use that was lawful before the commencement of the planning scheme or amendment.

'Specified persons' include the owner, user or developer of land directly affected by the matter, a Minister, Responsible Authority, referral authority, municipal authority, public authority, or, if the matter affects Crown land, the occupier of the Crown land (section 148 PE Act).

10.0 Nuisance and Enforcement under Part III of the Health Act

10.1 What is a nuisance? A nuisance is an interference with the public's right to health, safety, peace and comfort.

10.2 When does the Health Act apply? Part III of the Health Act applies to nuisances that are, or are liable to be, dangerous to health or offensive.

'Offensive' means noxious, annoying or injurious to personal comfort (section 40 Health Act).

In particular, the Health Act applies to nuisances from:

- any building or structure;
- any land, water or land covered by water; or
- any animal, bird or pest animal (within the meaning of section 108A);

and includes:

- any refuse;
- any noise or emission;
- any state, condition or activity; or
- any other matter or thing;

that is, or is liable to be, dangerous to health or offensive (section 39A Health Act).

10.3 What is an offence under the Health Act? It is an offence to cause a nuisance or to knowingly allow or suffer a nuisance to exist on or emanate from any land owned or occupied by or in the charge of that person.

The maximum penalty for this offence is 100 penalty units (see [Section 6.5](#)) (section 42 Health Act).

10.4 When is a nuisance dangerous to health or offensive? In determining whether a state, condition or activity is a nuisance that is, or is liable to be, dangerous to health or offensive:

- regard may be had to the degree of offensiveness of the state, condition or activity; but
- regard **must not be had** to the number of persons affected or that may be affected by the state, condition or activity.

(Section 40 Health Act)

10.5 Who do I notify of a nuisance? If you believe that a nuisance exists, you should notify the relevant council (section 43 Health Act).

10.6 What is Council's duty?

The council **must** investigate any notice of a nuisance.

If, upon investigation, a nuisance is found to exist, the council **must**:

- take action to abate the nuisance; or
- if council is of the opinion that the matter is better settled privately, advise you of any available methods for doing so.

(Section 43 Health Act)

10.7 What action can council take?

The council may serve a nuisance abatement notice on the person causing the nuisance (or, if that person cannot be found, the owner or occupier of the relevant land). The notice may specify:

- steps to be taken to prevent the recurrence of the nuisance; and
- the time within which these steps are to be taken.

(Section 44 Health Act)

10.8 What happens if an abatement notice is contravened?

If a person fails to comply with an abatement notice or, if the nuisance, although removed, is likely to recur, council may commence proceedings in the Magistrates' Court by filing a complaint (section 44(3) Health Act).

If the Court is satisfied that the nuisance exists or is likely to recur, the Court must make an abatement order that the person comply with the notice or carry out works to prevent the recurrence of the nuisance.

The Court may also impose a maximum penalty of 100 penalty units (see [Section 6.5](#)) (section 44(4) Health Act).

10.9 What can I do if Council fails to act?

Where a council fails to investigate a complaint of nuisance within a reasonable time, the person who complained to the council may commence proceedings in the Magistrates' Court for an abatement order.

If the Court is satisfied that the person seeking an abatement order has reasonable grounds for doing so, the Court may order the council to pay any costs and expenses incurred by the person.

However, if the Court is satisfied that such a complaint is vexatious or frivolous, it may order the person who made the complaint to pay the costs and expenses incurred by the person against whom the complaint was made.

(Section 45 Health Act)

10.10 What other options might I have?

Where noise is the issue, and the noise is emanating from residential premises, you may take action under section 48A of the EP Act. You should ask the Council, the local police, or the EPA to take action first. If none of these is willing to take action and the noise remains unbearable, contact a solicitor before commencing any proceedings.

11.0 Useful information

11.1 Glossary

EP Act	<i>Environment Protection Act 1970</i>
EPA	Environment Protection Authority
<i>ex parte</i> application	Where an application is made against a person who has no notice of the application and no opportunity at first instance to be heard in relation to it.
PE Act	<i>Planning and Environment Act 1987</i> (Vic)
Penalty unit	The value of penalty units is fixed by notification in the Victorian Government Gazette each financial year. As from 1 July 2008, a penalty unit is \$113.42 (S 66, 14 March 2008)
Responsible Authority	A body designated to administer planning schemes, including municipal or local council and the Minister for Planning.
VCAT	Victorian Civil and Administrative Tribunal

11.2 Title Search

A title search shows the owner of the land and anybody else who has an interest in the land, such as a mortgagee or caveator.

A title search can be obtained by:

- visiting the Land Information Centre at Level 10, 570 Bourke Street, Melbourne. (phone (03) 8636 2831));
- retaining a professional title searcher;
- retaining a conveyancer or solicitor; or
- searching online at www.landata.vic.gov.au. You will need a credit card for online searching.

11.3 Company Search

A company search shows all administrative information about a company, such as the address of its registered office, the names of directors and shareholders and its current status.

A company search can be obtained by:

- visiting the Australian Securities and Investments Commission at Level 17, CGU Tower, 485 La Trobe Street, Melbourne (phone (03) 9280 3500))
- retaining an ASIC information broker, which can be located at www.asic.gov.au; or
- retaining a solicitor.

11.4 Further information

For further details regarding enforcement applications and VCAT procedure see:

- *Practice Note Planning and Environment List 1 – General procedures;*
- *Practice Note Planning and Environment 2 – Responsible Authority Information;*
- *Practice Note Planning and Environment 3 – Cancellation and amendment of permits and stop orders; and*
- *Practice Note Planning and Environment 4 – Enforcement orders and interim enforcement orders.*

Copies of all practice notes and application forms are available from the VCAT website (below).

11.5 Contact list

VCAT (Planning List)
55 King Street, Melbourne 3000
Ph: (03) 9628 9777

www.vcat.vic.gov.au

Melbourne Magistrates' Court
233 William Street, Melbourne 3000
Ph: (03) 9628 7777

www.magistratescourt.vic.gov.au

Environment Protection Authority
40 City Road, Southbank 3006
Ph: (03) 9695 2700

www.epa.vic.gov.au

Supreme Court of Victoria
210 William Street, Melbourne 3000
Phone: (03) 9603 6111

www.supremecourt.vic.gov.au

11.6 Legal advice

LEGAL ADVICE SHOULD BE SOUGHT IN SPECIFIC CASES

While all care has been taken in the preparation of this publication, it is not a substitute for legal advice in individual cases. For any specific questions you should seek legal advice.