

7. Enforcement

7.1 Enforcement and the planning system

7.1.1 Why is enforcement important?

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

PEA s. 14(a)

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

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

The objectives of enforcement are to:

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

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

7.1.2 When is enforcement action appropriate?

PEA s. 126

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

Enforcement should occur when there is a clear breach of the Act, a planning scheme, permit condition or section 173 agreement and the breach warrants enforcement, especially if it causes detriment to the community. The main emphasis of enforcement should be on obtaining compliance rather than on prosecuting offenders. The various enforcement options should be viewed with this in mind.

7.1.3 What enforcement options are available?

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

- negotiate informally with the alleged offender. This type of positive conciliation may avoid the need for formal action and should usually be the first step taken.
- serve an official warning
- serve a planning infringement notice - usually for less serious breaches or matters
- apply to the Victorian Civil and Administrative Tribunal (VCAT) for an enforcement order to achieve compliance
- apply to VCAT for an interim enforcement order where there is a need for immediate action
- start prosecution proceedings in the Magistrates' Court. This must be commenced within 12 months of the alleged offence. This time limit means that a responsible authority should not continue negotiation to secure compliance if there is a risk that the opportunity to prosecute will become unavailable. Prosecution in the Magistrates' Court may be needed to follow up non-compliance with either an infringement notice or an enforcement order
- using section 125 of the Act, seek an injunction from the Court (Supreme, County or Magistrates Court) to restrain a person from contravening an enforcement order or interim enforcement order. Legal advice should generally be sought before commencing action and in preparing the required Court documents
- seek an injunction from the Court without the aid of section 125 of the Act. This is done under the general common law to restrain a person from contravening a law ie, planning controls. In most cases the action must be taken in the name of the Attorney-General or with the Attorney-General's knowledge and consent
- request VCAT to cancel or amend a permit - for example for a substantial failure to comply with the conditions of a permit
- carry out work to secure compliance with an enforcement order or interim enforcement order and recover the cost of doing so.

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

Enforcement Order proceedings are designed to prevent or stop existing or unlawful planning activities and to achieve reinstatement. They are not designed to punish. Only a section 126 prosecution will do that.

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

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

IA 2006 s. 8

PEA s. 130

PEA s. 114

PEA s. 120

MCA 1989 ss. 26, 27

PEA s. 125

PEA ss. 87, 88, 89

PEA s. 123

PEA s. 126

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

7.1.4 How can a responsible authority monitor compliance or contraventions?

PEA s. 133

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

- any authorised person of the Department of Planning and Community Development
- any authorised officer of the responsible authority
- any other person whom the Minister authorises to assist an authorised officer of the Ministry or authority.

Regular checks and inspections should be carried out by an authorised officer of a responsible authority to ensure that the use or development of land does not contravene a planning scheme, section 173 agreement or permit.

PEA ss. 133, 134

Evidence can be obtained by a variety of means including entering the property in question for detailed observations including:

PEA s. 135

- taking photographs or measurements
- making sketches or recordings
- taking and removing samples

PEA ss. 134 – 136

Entering the property requires:

- that the responsible authority has a reasonable suspicion that the Act, the regulations, a planning scheme, a permit condition, an enforcement order or an agreement under section 173 has been contravened;
- that the responsible authority has an authorised officer for the purpose of enforcement; and
- either the occupier's consent or the giving of two days prior notice if the premise is not a brothel (special entry provisions in the *Prostitution Control Act 1994* apply to brothels). If an authorised officer requires assistance in gaining entry to a site, the police are required to assist if requested; or
- that a warrant has been obtained from the Magistrates' Court (contact the court registrar in the first instance) if it is necessary to enter the property without giving two days notice and the occupier refuses consent. Reasons must be given as to why such a warrant is sought. A warrant may authorise a person to enter the land without notice to the occupier

MCA ss. 75 – 78; PEA s. 134(2)

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

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

LCA s. 224

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

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

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

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

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

A person who occupies premises which an authorised officer wishes to inspect should always insist on seeing the officer's authorisation. The person may cooperate with the officer and allow immediate entry to the property, but can insist on being given two clear days' notice unless the officer has a warrant or the officer believes on reasonable grounds the premises is being used for the purposes of the operation of a brothel. Any warrant or notice should be carefully inspected. It is an offence to obstruct an authorised officer (or a member of the police assisting an authorised officer) and a person who does so could be subject to a penalty of 60 penalty units (The value of a penalty unit is set each year in accordance with section 6 of the *Monetary Units Act 2004*. For the Financial Year for 2007-2008, the value is \$110.12).

7.1.7 What administrative arrangements should a responsible authority make?

To make its enforcement action effective, a responsible authority should consider training an officer in enforcement methods and skills and ensure that appropriate delegations and authorisations are in place to enable officers to take the necessary action, including:

PEA ss. 133, 134

- authorisation to enter properties to carry out and enforce the Act, regulations, planning scheme, permits, enforcement orders or agreements made under section 173

PEA ss. 139 – 147

- putting forward information for prosecution purposes and presenting a case on behalf of the responsible authority at any court or at any enforcement order, interim enforcement order or cancellation or amendment proceedings

PEA s. 130

- issuing planning infringement notices

PEA ss. 114, 120

- applying for enforcement orders and interim enforcement orders

PEA s. 87

- applying for cancellation or amendment of permits

PCA

- taking action against premises suspected of being a brothel without a permit.

Negotiating compliance

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

- the nature of the breach / complaint
- the findings of the investigation
- what needs to be done to achieve compliance
- specific timeframes to achieve compliance
- details of the enforcement options available to the responsible authority should compliance not be achieved and associated penalty provisions.

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

At the end of the period specified for the achievement of compliance the enforcement officer should conduct a second inspection. (This may be carried out at an earlier date where the respondent has contacted Council advising that necessary actions have been taken to obtain compliance).

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

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

Where compliance is still not achieved and all attempts to negotiate compliance have failed it may be necessary employ other enforcement options depending on the nature of the breach.

Official warnings

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

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

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

IA s. 10

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

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

IA s. 11

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

An official warning may be withdrawn at any time within 6 months of the serving of the official warning.

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

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

7.2 Planning infringement notices

7.2.1 When is a planning infringement notice appropriate?

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

PEA s. 130

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

7.2.2 What must an infringement notice include?

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

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

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

PEA s. 130(2A)

In addition to these requirements the details of the additional steps (if any) required to expiate the offence must be included in an infringement notice.

Any form of infringement notice can be used as long as it includes the prescribed information.

7.2.3 What can an infringement notice require?

PEA s. 130(4)

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

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

7.2.4 What happens if an infringement notice is served?

A person served with an infringement notice can either:

IA s. 16

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

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

- apply to have the decision to serve the infringement notice internally reviewed by the responsible authority (the requirements for internal reviews is contained in Division 3 of the *Infringements Act 2006*)
- ignore the infringement notice

PEA s. 130 (5), (6)

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

IA s. 32

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

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

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

For more information on the infringement notice process refer to the *Infringements Act 2006*, the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006* and the Victorian Department of Justice website: www.justice.vic.gov.au. It should be noted that, at the time of writing, a planning infringement offence is not a lodgeable infringement offence under the *Infringements Act 2006*.

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

- Serving an infringement notice gives an alleged offender the opportunity to expiate an offence by paying the penalty and carrying out the other requirements. Anybody receiving an infringement notice can choose to ignore it, although this action could result in prosecution by the responsible authority and the incurring of further costs.
- Unless the notice is withdrawn, the responsible authority must be ready to prosecute an offender through the Magistrates' Court every time a penalty is not paid or the required additional steps are not carried out. Failure to prosecute will render infringement notices an empty threat. An infringement notice should not be served unless there is enough evidence about the offence to take the case to court as the offender is entitled to have the matter of the infringement offence heard and determined in the Magistrates' Court.
- If a prosecution follows an infringement notice, the court cannot force the offender to carry out the required additional steps. If the responsible authority wants to try and directly achieve the carrying out of these additional steps, it needs to apply for an enforcement order at VCAT.
- A prosecution in the Magistrates' Court is for a section 126 offence which was the subject of the infringement notice. It is not a prosecution for non-compliance with the notice.
- The 12 month period allowed for commencing a prosecution relating to the subject matter of an infringement notice is calculated from the time of the offence, rather than when the notice was not complied with.

The effect of any prosecution arising out of the notice (irrespective of whether the penalty was paid), or payment of an infringement notice, is that it is not regarded as a prior conviction if there is a later non-compliance.

7.2.5 Can an infringement notice be withdrawn?

IA s. 18

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

7.2.6 When might withdrawal be appropriate?

IA s. 18(4)

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

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

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

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

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

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

7.2.7 Internal Reviews

The review will be by an officer not involved with issuing the infringement. Usually this is a more senior person in the agency. Reviews must be completed within 90 days after the agency receives the application, though this can increase by a further 21 days if the agency seeks additional information.

Once the decision is made, the agency should give it to you in writing within 21 days.

There is more information about agency reviews in the Attorney-General's Guidelines to the *Infringements Act 2006* and on the Fines: Fairer and Firmer website.

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

7.2.8 Paying penalties

Penalties are to be paid to the responsible authority (usually either by post or at the office of the responsible authority, although a responsible authority may accept other forms of payment).

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

7.3 Enforcement orders

7.3.1 What is an enforcement order?

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

A responsible authority is able to seek an enforcement order through VCAT at the same time as they prosecute a planning offence (and seek an appropriate fine.

If the person against whom the order is sought believes there is no contravention or an order ought not be made in the circumstances, they can object to VCAT.

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

PEA s. 114

The fact that the system allows any person to apply for an enforcement order or an interim enforcement order can be important if the responsible authority is reluctant to take action in any particular case, or where the responsible authority is itself acting in contravention of planning laws. This provides a form of sanction against an authority which is not properly enforcing the planning scheme. It also provides protection to the authority from unwarranted demands that it take enforcement action, which may not be in the public interest or appropriate. An individual can take the matter directly to VCAT.

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

7.3.2 How is an enforcement order made?

PEA s. 114

A person seeking an enforcement order may apply to VCAT for the order. A person can seek that an order be made against the user/developer, owner, occupier or any other person who has an interest in the subject land. *The Practice Note 4 Planning and Environment List – PNPEA – Enforcement Orders and Interim Enforcement Orders*, issued by VCAT, contains a recommended form for applying for an order and what needs to be included in the application.

PEA s. 115

When a person applies for an enforcement order, they should give notice of their application to the responsible authority, the person against whom the order is sought, the owner and the occupier of the land, and anyone else if VCAT directs them to.

VCATA Sch. 1 Cl. 56

Relevant interested or affected parties may object to the order. An objection must be in writing and must set out the grounds for making the objection.

PEA s. 116

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

PEA s. 117(1)

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

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

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

- PEA s. 117(2) After hearing any person and considering any written submissions, VCAT may:
- reject the application, or
- PEA s. 119
- make any enforcement order it thinks fit in accordance with section 119 in respect of the land to:
 - direct a person to stop a use or development within a specified time
 - direct a person not to start a use or development
 - require that a building be maintained in accordance with the order
 - direct that other specified things be done within a specified period to restore land as nearly as practicable to its condition before the contravention occurred; or to some other condition specified; or to some other condition acceptable to a specified person, or
 - otherwise ensure compliance with the Act, scheme, condition of permit or section 173 agreement.

VCATA s. 116(2) A copy of the order must be served on all relevant persons. This is done by VCAT or by a party specified by VCAT.

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

VCATA s. 109 Although enforcement proceedings warrant a different approach to costs than that taken in normal planning appeals, the successful applicant is not entitled as a matter of course to a costs-order. Each case must be viewed on its merits, but with section 109 of the VCAT Act still having application to these types of proceedings.

7.3.3 Interim enforcement orders

PEA s. 120(1) Where circumstances require more immediate action, a responsible authority or person who has applied to VCAT for an enforcement order under section 114, may also apply for an interim enforcement order against the person or persons in relation to whom the application under section 114 was made. The application form, available from VCAT, allows for an application to be made for an interim order at the same time as the enforcement order applied for. An application may be faxed to VCAT (fax number (03) 9628 9789), but it is not deemed to be lodged until the fee is paid or is waived.

VCATA s. 68(3) Interim enforcement orders are similar to interlocutory injunctions which are made by courts. The purpose of these proceedings is to preserve the status quo until the hearing of the main action.

PEA s. 120(2) The important distinguishing feature of an interim enforcement order application is that it may be considered by VCAT without notice to any person. Hence these applications can ensure prompt response.

VCAT can be contacted by telephoning (03) 9628 9777.

PEA s. 120(3) Before making an Interim enforcement order, VCAT must consider:

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

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

PEA s. 120(9)	If VCAT makes an interim enforcement order without notice to a person, it must give any affected person an opportunity to be heard within seven days after making the order.
PEA s. 120(4)	The service of an interim enforcement order and the types of remedial measures it may require are similar to those of an enforcement order, and may include stopping or preventing commencement of a use or development.
PEA s. 120(10), 121	VCAT has the power to cancel or amend an enforcement order or interim enforcement order at any time.
PEA s. 150(4) VCATA ss. 75(2), 78(1)	The Acts make specific provision for payment of compensation for loss or damage as a result of proceedings which have been brought vexatiously or frivolously, or in order to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings. This should be considered before seeking an interim enforcement order which may cause significant loss to affected parties.

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

PEA s. 14	A responsible authority has a statutory duty to enforce any enforcement order or interim enforcement order.
PEA s. 122(5) VCATA s. 133	If a person has not complied with an order they can be prosecuted in the Magistrates' Court for this offence. In such a prosecution it is not necessary to prove the scheme and controls or the breach of them, only that the order was properly made and had not been complied with. To assist in obtaining compliance, the penalties for failure to comply with an enforcement order or interim enforcement order are substantial. They involve both imprisonment (which is not an available penalty for prosecution under section 126 of the Act) and fines.
PEA s. 123	<p>Furthermore, the responsible authority can carry out any work required by an enforcement order or interim enforcement order that was not carried out within the specified period. With the consent of VCAT, any other person may also carry out these works. The cost of carrying out these works is then recoverable as a debt from the person in default.</p> <p>Any responsible authority or other person contemplating taking such direct action should proceed with great caution and only on the basis of well-informed legal advice.</p>

7.4 Prosecution for a breach of the Act

7.4.1 The role of prosecution in planning enforcement

PEA ss. 126, 127	<p>The statutory planning system ultimately relies on the fact that planning schemes are part of the law of Victoria and that any person who uses or develops land in contravention of, or fails to comply with a planning scheme, permit or section 173 agreement, or either type of enforcement order, is guilty of an offence. Penalties apply and are referred to in more detail below.</p> <p>Prosecution for a breach under section 126 of the Act, or a breach of an enforcement or interim enforcement order under section 133 of the VCAT Act, takes place in the Magistrates' Court. It is a form of criminal proceeding and offences must be proved on the same standard as any other criminal proceeding - that is, beyond reasonable doubt.</p>
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7.4.2 When is it appropriate to prosecute for an offence?

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

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

PEA s. 127

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

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

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

PEA ss. 122(5)

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

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

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

7.4.3 Procedure in prosecution

MCA ss. 26, 27

Prosecution normally takes place in the Magistrates' Court.

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

PEA s. 128

If any of the persons to whom section 126 relates is a corporation, then any person who is involved in the management of the corporation can also be charged with the offence. The person is liable to be found guilty unless they are able to prove that that the act or omission constituting the offence took place without that person's knowledge or consent.

PEA s. 129, SA 1991 s. 59

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

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

VCATA s. 98(1)

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

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

7.5 Injunctions

7.5.1 Types of injunction proceedings

There are two ways an injunction can be obtained from a court to restrain non-complying activities.

The Act only mentions one of these. Section 125 allows an application to a court for an injunction where an enforcement or interim enforcement order is being breached.

The other is the general common law injunction. Section 125 is not in substitution for the general common law right to apply for an injunction, but is an additional right or power.

SCA 1986 ss. 31, 33, 37
Country Court Act 1958 s. 37
MCA s. 100

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

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

A prima facie case must be made out for an interlocutory injunction and the court may require an undertaking as to damages from the person seeking the injunction.

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

Each of these two types of injunction is discussed in more detail below.

7.5.2 Section 125 injunctions

PEA s. 125

Section 125 injunctions are directed towards restraining people from contravening an enforcement or interim enforcement order.

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

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

7.5.3 General common law injunctions

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

Injunction proceedings under the general common law to restrain a breach of the law (in this case, a breach of the planning controls) must, in most cases, be taken either by the Attorney-General personally or by a person authorised to act for the Attorney-General.

A responsible authority has usually been regarded as having a sufficient public interest not to require the Attorney-General's fiat, (consent to act on his or her behalf) but a decision about this needs to be made on a case-by-case basis.

7.6 Cancellation and amendments of permits

7.6.1 Can a permit be cancelled or amended?

PEA s. 87

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

VCAT may only do this when there has been:

- material mis-statement or concealment of facts in the original permit application; or
- a substantial failure to comply with the conditions of the permit, or
- a material mistake in the granting of the permit, or
- a material change of circumstances since the permit was granted, or
- a failure to give notice as required by the Act.

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

7.6.2 Who may apply for cancellation or amendment?

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

The responsible authority or certain specified persons can apply to VCAT for an order cancelling or amending a permit. Refer to section 87(3) of the Act for more details.

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

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

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

There is no prescribed form of application, but VCAT has recommended one in *Practice Note Planning List (No. 3) – Cancellation and Amendment of Permits and Stop Orders*.

PEA s.93

There is provision for an interim stop order to be made pending the final hearing of the application. This is like an interim enforcement order and usually attracts an undertaking as to damages. See “Compensation obligations” below for more details.

7.6.3 Hearing and order

VCATA Sch 1 Cl 56

A person seeking to oppose an application for cancellation or amendment must file a ‘statement of grounds’ with VCAT.

PEA s. 90A

The Act specifies what VCAT must take into account in coming to its decision.

Even if an applicant seeks cancellation of a permit, VCAT can merely amend it instead.

The approach to costs in these types of cancellation and amendment proceedings is much the same as that in enforcement order proceedings.

PEA s. 92; PE Regs r. 36, 37

If an order is made cancelling or amending a permit, the responsible authority must serve notice of that on the persons specified by the legislation.

7.6.4 Compensation obligations

PEA s. 94(1), (4)

Care needs to be taken before using this as an enforcement mechanism.

If an interim stop order is made but after the application is heard in full VCAT doesn’t cancel or amend the permit, the applicant is liable to compensate the permit holder for any loss or damage suffered as a result of the stop order.

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

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

7.7 Evidence

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

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

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

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

7.7.1 Proof of formal matters

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

PEA ss. 139 – 146;
LGA s. 242

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

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

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

MCA s. 130

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

7.7.2 Evidence of other matters

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

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

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

PEA ss. 135

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

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

7.8 Brothels

PCA s. 3	A 'brothel' means any premises made available for the purpose of prostitution by a person carrying on the business of providing prostitution services as the business's premises.
PCA ss. 21A, 75	The <i>Prostitution Control Act 1994</i> creates numerous offences in relation to the operation of brothels. Only some of these strictly relate to planning laws.
PCA ss. 80 – 85	In addition to the normal enforcement mechanisms generally available, the <i>Prostitution Control Act 1994</i> has some special mechanisms for brothels. These include the power for a Magistrates' Court to declare premises to be a proscribed brothel, thus 'quarantining the premises' from occupation or use. Breach of the declaration is an offence.
PCA s. 80(1)	The declaration application is made by a member of the police force or an authorised officer of the responsible authority, depending on what ground is relied on to support the application.
PCA ss. 80(3A), 83, 85, 89	Other provisions of the <i>Prostitution Control Act 1994</i> facilitate enforcement by providing procedural aids not found in, or more flexible than those contained in the <i>Planning and Environment Act 1987</i> .

7.9 Using other legislation

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

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

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

7.10 Other information sources

Further reading and assistance can be found in the VCAT Practice Notes, Planning List, especially (refer www.vcat.vic.gov.au):

- *Practice Note Planning List (No. 3) – Cancellation and Amendment of Permits and Stop Orders.*
- *Practice Note Planning List (No. 4) – Enforcement Orders and Interim Enforcement Orders.*

A useful source of other information is Butterworths *Planning and Environment – Victoria*, especially the annotations to sections 114-147 *Planning and Environment Act 1987* and Chapter 10 ‘Enforcement’ in the Planning Commentary.

7.11 Enforcement checklist

Delegation and authorisation

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

Nature of offence

- Have the nature and effect(s) of the alleged contravention been clarified e.g. activity, person responsible, identity of the land etc?

Appropriate method of enforcement

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

Others may be needed subsequently.

Entering a property

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

Evidence

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

Compliance

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

Payment of penalty

- Has the appropriate penalty payment been received?