

# 5. Reviews

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## 5.1 Opportunities for review of planning decisions

### 5.1.1 Introduction

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

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

PEA s. 4(2)(i)

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

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

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

### 5.1.2 Summary of the review process

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

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

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

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

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

VCATA ss. 116, 117

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

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

VCATA s. 109

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

### **5.1.2 Legislative provisions**

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

- the *Planning and Environment Act 1987* (the Act)
- the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act)
- the *Tribunals and Licensing (Miscellaneous Amendments) Act 1998*.

The accompanying rules and regulations including:

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

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

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

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

<b>Section of PEA</b>	<b>Type of application for review</b>	<b>Who can make the review</b>	<b>Time limit for making the application for review</b>	<b>Fee at Jan 1 2000</b>
PEA s. 39	Failure by the Minister, a planning authority or a panel to comply with procedures related to an amendment which has not been approved (Divisions 1, 2 or 3 of Part 3; or Part 8 of the Act)	A person who is substantially or materially affected by the failure	Not later than one month after becoming aware of the failure	\$23
PEA s. 77	Refusal to grant a permit	Applicant for permit	Within 60 days of notice of decision being given	\$170
PEA s. 78(a)	Requirement to give notice of an application under s. 52(1)(d) of the Act	Applicant for permit	Within 30 days of requirement	\$170
PEA s. 78(b)	Requirement for more information about a permit application under s. 54 of the Act	Applicant for permit	Within 60 days after the responsible authority requested the information	\$170
PEA s. 79; PE Regs r. 30	Failure to grant a permit within the prescribed time	Applicant for permit	After 60 days from date application was lodged (excluding time that the clock stops)	\$23
PEA s. 80	Condition(s) in a permit	Applicant for permit	Within 60 days of permit being issued or the responsible authority giving notice of decision to grant under s. 64 of the Act	\$170
PEA s. 81(a)	Refusal to extend time to commence development or use or to complete development	An affected person	Within 60 days after decision	\$170
PEA s. 81(aa)	Refusal to extend time for a subdivision plan to be certified in circumstances mentioned in s. 6A(2) of the Act	An affected person	No time prescribed	\$170
PEA s. 81(b)	Failure to extend time within one month of request to extend time	An affected person	After one month from making request, and within 60 days from that time	\$23
PEA s. 82(1)	Decision to grant a permit	An objector who lodged an objection in writing to the grant of a permit, unless the application is exempt from the right to review under s. 82(1) of the Act	Within 21 days of the notice of decision to grant a permit	\$170
PEA s. 82B	Request to VCAT for leave to make an application for review of a decision to grant a permit in any application in which a written objection to the grant of a permit was received by the responsible authority.  The section does not apply if the permit has been issued or the decision on the application for permit is exempt from review	A person affected by the decision but who did not object to the grant of a permit	Within 21 days after the responsible authority has given notice of its decision	\$170

Section of PEA	Type of application for review	Who can make the review	Time limit for making the application for review	Fee at Jan 1 2000
PEA ss. 87(3), 88, 89(1)	Application to VCAT to cancel or amend a permit	The responsible authority; a referral authority; the owner or occupier of the land or any person under s. 89 of the Act (persons who objected or would have been entitled to object if they should have been given notice of the application, or they have been adversely affected by a material misstatement or concealment of fact in relation to the application, or a substantial failure to comply with the conditions of the permit or any material mistake in relation to the grant of a permit)	No prescribed time, but VCAT must be satisfied that the request was made as soon as practicable and that the limits on the power to cancel or amend a permit in s. 88 of the Act are satisfied	\$23
PEA s. 97P	Review of a decision to refuse to issue a certificate of compliance or failure to issue a certificate of compliance within the prescribed time	The applicant for a certificate of compliance	After 30 days from the date of the application for a certificate	\$170
PEA s. 97Q	Request to VCAT to cancel or amend a certificate of compliance	A person who believes they have been adversely affected by a material misstatement or concealment of fact or a material mistake	No time prescribed	\$170
PEA s. 114	Application to VCAT to make an enforcement order	The responsible authority or any person	No time prescribed	\$23
PEA s. 120	Application to VCAT to make an interim enforcement order	The responsible authority or any person who has applied for an enforcement order under s. 114 of the Act	No time prescribed	\$23
PEA ss. 148, 149	A specified person may make an application to review a decision: <ul style="list-style-type: none"> <li>▪ if a planning scheme specifies or a permit contains a condition that the matter must be done to the satisfaction, or must not be done without the consent or approval of the specified body</li> <li>▪ if an agreement under s.173 of the Act provides that the matter must be done to the satisfaction of the specified body</li> <li>▪ if an enforcement order in relation to a matter requires that it must be done to the satisfaction of a specified body</li> <li>▪ the specified body fails to make the decision within a reasonable time (if there is no prescribed time for the decision)</li> </ul>	The specified person is the owner, user or developer of the land directly affected; or a specified body or the occupier of Crown land The specified body is a Minister, responsible authority, public authority, or referral authority	Within 30 days of the decision	\$23

<b>Section of PEA</b>	<b>Type of application for review</b>	<b>Who can make the review</b>	<b>Time limit for making the application for review</b>	<b>Fee at Jan 1 2000</b>
PEA ss. 148, 149A	<p>A specified person may make an application to VCAT for a determination/declaration if a matter relates to:</p> <ul style="list-style-type: none"> <li>▪ the interpretation of the planning scheme or a permit in relation to land or a particular use or development of land</li> <li>▪ whether or not s. 6(3) of the Act applies to a particular use or development</li> <li>▪ the continuation of a lawful use, or permitting the use of buildings or works for a lawful purpose before the coming into operation of the planning scheme or amendment</li> </ul>	<p>The owner, user or developer of the land directly affected; a specified body or the occupier of Crown land</p> <p>The responsible authority is a party to any proceedings</p>	No time prescribed	\$23
PEA s. 149B	Application to VCAT for a declaration concerning any matter which is the subject of an application to VCAT under the Act; or anything done by a responsible authority under the Act	Any person	None specified	\$23
PEA s. 184(1)	Application to VCAT for an amendment to a proposed agreement under s. 173 of the Act if the use or development of the land is conditional upon the agreement being entered into and the owner objects to any provision of the agreement	The owner of land	Within 60 days of being given a copy of the proposed agreement	
PEA s. 184(3)	Application to VCAT for an amendment to an agreement to remove land from the application of the agreement, if the parties to the agreement cannot agree that the agreement should be amended	The purchaser of land who is party to an agreement, or an owner of the land	None specified	

### **5.1.4 Establishing the scope of an application for review**

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

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

### **5.1.5 Exemption from decision review rights in planning schemes for specified types of permit applications**

Some zones in the planning scheme exempt particular types of permit applications from review as outlined in section 82(1) of the Act. This section provides for an objector to apply to VCAT for review of a decision by the responsible authority to grant a permit. Where this exemption applies, an objector does not have a right of review of the decision made by the responsible authority.

For example, this exemption applies in the Residential 1 Zone to permit applications which seek to subdivide land into lots each containing an existing dwelling or car parking space.

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

## **5.2 Making an application for review**

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

#### **Lodge the application for review within the prescribed time**

An application for review must be made to VCAT within the prescribed time. The prescribed time varies for different types of applications for review. Table 5.1 provides information about the prescribed time for making applications for review.

An application for review by an objector to the grant of a permit must be made no later than 21 days after the responsible authority has given notice of its decision. Where the permit has been refused or the applicant wishes to have the conditions reviewed, an application for review must be made no later than 60 days after the responsible authority's decision.

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

### **Standard notice form, statement of grounds and prescribed fee**

The standard 'Application for Review' form is available from VCAT and must be completed by the applicant for review.

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

A fee must be paid when the application is lodged. Information about fees and the waiving of fees is printed on the back of the application for review form.

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

### **Notice to other parties by the applicant for review**

VCATA s. 72

The applicant for review must give a copy of the application for review to the responsible authority, any referral authorities, and all the other parties involved in the application for permit. This will include the applicant for permit (if the application for review is made by an objector) and the objectors (if the application for review is lodged by the applicant for permit).

After an application for review is made, VCAT instructs the applicant for review to serve a copy of the application on all other parties within seven days of lodging the application.

### **Statement of grounds by other parties**

VCATA Sch. 1 Cl. 56

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

If a person fails to provide a statement of grounds within 14 days, the Tribunal cannot allow them to be heard as a party to the review unless it has considered the views of the applicant for review and the responsible authority. Requests to be heard in these circumstances are usually made and decided on at the commencement of the hearing.

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

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

### **Administrative arrangements**

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

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

VCATA s. 82

VCAT may direct the consolidation of applications for review into one proceeding or a combined hearing. It is common practice for applications for review relating to the same land to be heard together. For example, a review of the conditions in a permit and a review of the decision to grant a permit in the same application will usually be combined and heard together. The Registrar of VCAT keeps a register of all applications for review. These can be inspected during office hours.

In summary, an application for review must:

- identify the nature of the application for review and the applicable section of the Act
- state the grounds upon which the review is based
- be made in accordance with the prescribed form
- be accompanied by the prescribed fee
- be lodged within the prescribed time
- be served on the responsible authority and other parties within the prescribed time.

## **5.2.2 Who are the parties to an application for review?**

### **Applicant for review**

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

### **Objector**

PEA ss. 83A, 83(2)

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

### **Responsible authority**

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

### **Referral authority**

PEA s. 83

A referral authority is a party if its interests are affected by the application for review, for example, because the review is of a permit condition required to be included in the permit by the referral authority. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

### **Affected persons**

VCATA ss. 59, 60

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

VCATA s. 61

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

### 5.2.3 Arrangements for the hearing

VCAT Practice Note  
Planning List (No. 2)

#### Responsible authority to supply information

The responsible authority must provide prescribed information to VCAT's Registrar within 10 days of receiving a copy of the application for review. The required information depends on the type of application for review. The information to be provided is found in *Practice Note Planning List (No. 2) - Information to be provided by a Responsible Authority*, issued by VCAT. The hearing date will not be set until the prescribed information has been received. The information required may include:

- a full copy of the application for permit, including plans and accompanying documents
- name of the planning scheme and relevant policies and provisions
- the officer's report on the application for permit
- the responsible authority's decision
- names and addresses of all objectors and other parties to the application for permit.

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

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

#### Setting the hearing date

VCATA s. 99

The Registrar sets the date of the hearing as soon as practicable after the required information is received from the responsible authority. At least three to four weeks notice is given so that parties can prepare for the hearing.

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

Most hearings are held at VCAT, at 55 King Street, Melbourne. Hearings are also held in regional centres as part of regular country circuits. They may also be specifically arranged when required.

#### Giving notice of an application for review

PEA s. 52

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

PEA s. 83B

If notice of an application for permit was not given, or the notice was not adequate, the President of VCAT can direct that notice of the application for review is given.

PEA s. 83(2)

If the applicant for review fails to comply with the direction for notice, the application for review lapses.

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

#### **5.2.4 Can an application for review be withdrawn?**

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

An application for review cannot be withdrawn after it has been listed for hearing, unless all parties agree to the withdrawal. The Registrar of VCAT must be advised in writing that the parties have been notified and did not object to the withdrawal.

#### **Can the hearing date be adjourned?**

If a party wishes to adjourn the hearing once a hearing date is set and the parties have been advised, a written request for an adjournment must be made to the Registrar giving detailed reasons for the request. *Practice Note Planning List (No. 1) – General Procedures* sets out the procedure for any party to apply for an adjournment of the hearing date. It is unlikely that an adjournment will be granted unless the applicant for the permit agrees. Any request for an adjournment should be made well before the hearing date to avoid successful claims for costs.

Applications for adjournments are sometimes made on the day of the hearing. However, a successful application for costs is more likely in these circumstances.

Further information is available from the VCAT's Adjournment Officer - telephone (03) 9628 9777.

#### **Can amended plans be considered at the hearing?**

Under Schedule 1 Part 16 Clause 64 of the VCAT Act, the Tribunal can make any amendment to the application for permit.

The permit applicant may request VCAT to agree to amend the permit application.

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

VCAT must be satisfied that the amended plans merely modify the original permit application and could not reasonably be considered a transformation so different from the original to require a new permit application.

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

The VCAT *Practice Note Planning List (No. 1) - General Procedures* sets out the steps that must be followed if a permit applicant seeks to amend plans in a permit application. At least 20 business days before the hearing date, a permit applicant must file the following documents with the Tribunal:

- a completed Notice of Application to Amend Plans form
- a clearly readable, scaled copy of the amended plans
- a written statement describing the changes from the previous plans.

At the same time, the permit applicant must give copies of these documents to all other parties to the hearing. The permit applicant must also give any objector to or person notified of the permit application who is not a party to the hearing copies of the following documents:

- a completed Notice of Application to Amend Plans form
- an Application to be Joined as a Party and Statement of Grounds form with the relevant details completed
- a written statement describing the changes from the previous plans.

If an objector to or person notified of the permit application requests a copy of the amended plans, the permit applicant must supply this within 7 days of the request being made.

Within 10 business days of notice of a plans amendment application being received, a person may:

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

A copy of the objection, application or request must be delivered or posted to the permit applicant before it is lodged with VCAT.

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

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

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

## 5.3 What happens at the hearing?

### 5.3.1 Who hears an application for review?

VCATA s. 64, Sch. 1  
pt 16 Cl.52

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

### 5.3.2 Attendance by the parties

VCATA s. 62

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

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

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

VCATA s. 99(2)

If the applicant for review fails to attend a hearing, VCAT can dismiss the application for review or, if appropriate, hear and determine the application in the absence of the applicant. Costs may be awarded against the applicant. If another party fails to attend the hearing and VCAT is satisfied that adequate notice of the hearing was given, the matter can still be heard and determined.

VCATA s. 120

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

### 5.3.3 Procedure at hearings

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

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

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

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

Section 1.12 of *Practice Note Planning List (No. 1) – General Procedures* sets out the usual order of presentation of submissions to VCAT. The usual procedure is for the parties or their representatives to speak in the following order:

- the responsible authority
- the council if it is not the responsible authority
- the referral authority or relevant statutory authorities
- the objector(s)
- any other person or body who is not a party, such as an unincorporated association
- the permit applicant.

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

VCATA s. 102

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

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

VCAT's usual hearing procedure gives a party only one opportunity to present a submission, and in the usual order of appearance. A party does not have the right of reply to another party's submission without VCAT's permission. Permission is unlikely to be granted unless, for example, a new matter which was not foreseen, is raised after a party has made its submission. It is therefore important to address the other parties' statements of grounds when presenting a submission. In lengthy cases that run over several days, the Tribunal may allow each party to make a short summary statement at the end of the hearing, but this is not always the case.

VCATA s. 129

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

#### **5.3.4 Submissions**

VCATA s. 102

VCAT has published guidelines on submissions in the Planning List (May 1999) to help parties make an effective submission. Copies of the guidelines are available from VCAT. The guidelines contain advice about the structure and content of submissions, as well as general procedures followed at a hearing.

VCAT will only take into account information relevant to the decision being reviewed. Therefore, a submission should directly address the decision or planning matter that is the subject of the review. For example, the impact of overshadowing is not relevant if the application for review concerns the decision to grant a permit to reduce the required number of car parking spaces for a restaurant.

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

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

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

Submissions may be presented orally or in writing, or both. Most parties prepare a written submission in advance of the hearing. Written submissions are not compulsory, but they are recommended as an effective way of putting a case.

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

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

### **5.3.5 Expert evidence**

VCATA ss. 97, 98

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

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

VCAT Practice Note  
Planning List (No. 2)

VCAT's *Practice Note Planning List (No. 2) – Expert Evidence* contains guidelines for presenting expert evidence before the Tribunal. The practice note reminds parties that an expert witness is not an advocate for a party to a proceeding and has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise. The guidelines contain requirements for the content and form of the expert's report. Circulation of the expert's written report to all parties and the Tribunal is required at least 10 working days before the hearing.

### **5.3.6 Questioning an expert witness**

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

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

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

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

PEA s. 84B

The Act includes a complete list of the matters that VCAT must take into account in determining an application for review. Clearly, not all the matters will be relevant in all cases; but where they are relevant, they must be considered. The matters that are likely to be relevant in most cases include:

- the planning scheme
- the objectives of planning in Victoria found in section 4 of the Act
- any relevant state environment protection policy declared in any Order made by the Governor in Council under section 16 of the *Environment Protection Act 1970*
- any amendment to a planning scheme which has been adopted by the planning authority, but not, as of the date on which the application for review is determined, approved by the Minister
- any agreement made pursuant to section 173 of the Act affecting land that is the subject of an application for review.

These matters are *in addition to* any other matters that the decision maker could properly take account of, or have regard to, in making the decision that is subject to the application for review.

PEA s. 60(1)

In addition to these matters, the responsible authority *must* consider the following matters before deciding on an application:

- objections
- comments from any referral authority
- any significant effects on the environment
- any significant social and economic effects (if required)
- policy statements
- guidelines
- amendments that have been adopted by a planning authority.

Some or all of these matters may be relevant in a particular case and must be taken into account by the Tribunal.

### **5.3.8 The decision**

#### **The form the decision takes**

VCATA s. 116; PEA s. 85

VCAT's decision or 'order' is in writing and will contain the reasons for the decision or record that oral reasons were given. All parties involved in the application for review receive a copy of VCAT's decision. The decision is signed by the member(s) who heard the application for review and it is stamped with the Tribunal's seal.

A decision is not final until it is issued in writing.

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

VCATA s. 117

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

#### **Acting on a decision of the Tribunal**

PEA s. 86

If VCAT directs the responsible authority to issue a permit, the permit must be issued:

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

If VCAT directs that the application for review be allowed in the case where the responsible authority has issued a notice of decision, then no further action is required by the responsible authority on the matter.

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

### **5.3.9 Costs**

PEA s. 150(4); VCATA sch. 1 pt 16 cl. 63

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

VCATA ss. 109, 111

However, VCAT has the power to make an order for costs if it is fair to do so in circumstances where a party has acted unreasonably to the disadvantage of other parties. In determining whether or not to make an order for costs, the Tribunal considers whether the proceeding was brought primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceeding.

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

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

## 5.4 Other types of applications for review

### 5.4.1 Introduction

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

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

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

### 5.4.2 Procedural defects in the planning scheme amendment process

PEA s. 39

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

VCAT can make a declaration and a direction in relation to the procedural defect. The direction may be that the planning authority must not adopt the amendment until it has complied with VCAT's direction.

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

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

#### Giving notice about an application for permit

PEA s. 78(a)

The applicant for a permit can apply to VCAT for a review of a requirement by the responsible authority to give notice of an application under section 52(1)(d) of the Act. This section provides for notice to be given to 'any other persons if the responsible authority considers that the grant of a permit may cause material detriment to them'. The applicant may consider that the responsible authority's notice requirements are excessive or irrelevant in relation to the use or development proposed in the permit application.

PEA s. 52

There is no right of review by VCAT in relation to notice requirements under section 52(1) (a), (b) and (c). Therefore, an application for review can relate *only* to a requirement under section 52(1)(d). It cannot relate to giving notice to owners and occupiers of adjoining land, to a council, or to any person to whom the planning scheme requires notice be given under section 52(1)(a), (b) and (c).

PEA s. 85(1)(c)

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

#### **Request for more information**

PEA s. 78(b)

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

PEA s. 85(1)(d)

After hearing the application for review, VCAT can direct the responsible authority to consider the application for permit as made, or confirm or change the requirement made by the responsible authority.

#### **5.4.4 Failure to grant a permit within the prescribed time**

PEA ss. 58, 79, 84

The responsible authority must consider every application for permit. The Act sets down timeframes and procedures for assessment and decisions about planning permit applications.

PE Regs r. 30

If a permit application has not been decided within the prescribed time, the applicant for permit can make an application for review of the responsible authority's failure to decide the application. The 60 day prescribed time must be carefully calculated in accordance with regulation 30 of the Regulations.

If the responsible authority did not request further information, the 60 days is calculated from the date the application was lodged excluding the time between the responsible authority's direction to give notice about the application and the giving of the last required notice.

ILA s. 44

In calculating the 60 days, the first day (that is, the date of lodging the application) is excluded and the last day is included. Weekends and public holidays are included in the 60 days. However, if the last day falls on a weekend or public holiday, the 60 days expires on the next working day.

If the responsible authority did request further information, the 60 days is calculated from the date on which the information is provided excluding the time between the responsible authority's direction to give notice about the application and the giving of the last required notice.

A different calculation of the 60 days may arise where the application has been required to be referred to a referral authority. If you are considering an application against the responsible authority's failure to decide an application for permit, it is essential to check the relevant dates against the Regulations.

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

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

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

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

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

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

#### **5.4.5 Extensions of time for permits**

PEA s. 81

An affected person can apply for review of the following:

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

PEA s. 85(1)(f)

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

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

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

PEA s. 82B

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

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

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

VCAT may grant the leave if it believes it would be just and fair in the circumstances to do so.

A person who is not an objector and who seeks leave to make an application for review, must make the application within 21 days after the responsible authority has decided to grant the permit. Leave to make an application for review cannot be granted if a permit has been issued.

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

#### **5.4.7 Cancellation and amendment of planning permits**

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

- a material misstatement or concealment of fact in relation to the application for the permit
- any substantial failure to comply with the conditions of the permit
- any material mistake in relation to the grant of the permit
- any material change of circumstances which has occurred since the grant of the permit
- any failure to give notice in accordance with section 52
- any failure to comply with the referral authority requirements contained in sections 55, 61(2) or 62(1).

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

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

VCAT has issued *Practice Note Planning List (No. 3) – Cancellation and Amendment of Permits and Stop Orders* which sets out the procedures to be followed in applications for review to amend or cancel a permit under sections 87 and 89 of the Act.

An information sheet called *Submissions in Planning Applications - Permit Amendment and Cancellation Supplement* is available from VCAT.

VCAT will need to be satisfied that the application was made as soon as practicable and before the construction of buildings or the carrying out of works or before the development is substantially carried out or completed. It is important to note that section 88 of the Act provides limits on VCAT's power to cancel or amend a permit. If the development or construction is completed, the Tribunal cannot amend or cancel the permit under section 87 of the Act.

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

#### **5.4.8 Enforcement orders and interim enforcement orders**

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

*Practice Note Planning List (No. 4) - Enforcement Orders and Interim Enforcement Orders* issued by VCAT provides advice to responsible authorities and other parties making an application for an enforcement order. The practice note provides guidance on the procedures to be followed and also contains some principles which are generally applied in such applications.

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

The conduct of a hearing for an enforcement order application is not the same as other application hearings. Evidence is normally given on oath or affirmation, because the making of enforcement orders can have serious consequences and therefore the facts in issue need to be established on the balance of probabilities.

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

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

#### **5.4.9 Review provisions under sections 149, 149A and 149B of the *Planning and Environment Act 1987***

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

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

VCAT Practice Note  
Planning List (No. 4)

PEA ss. 149, 149A,  
149B

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

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

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

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

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

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

#### **5.4.10 Amendments to agreements**

PEA s. 184

The Act provides for parties who are affected by a proposed agreement or an existing agreement made under section 173 of the Act to make an application to VCAT to amend the agreement. Section 184 provides this opportunity. The particular provisions are summarised in Table 5.1.

Changes to existing agreements are limited to removing land from the application of the agreement as distinct from making changes to the terms of the agreement.

## **5.5 Procedures**

### **5.5.1 Directions hearing**

There are many circumstances when a directions hearing in advance of the full hearing of the proceeding will enable a preliminary matter to be addressed that might otherwise delay the hearing. For example, a directions hearing can clarify procedures to be followed in complex cases. It can also establish that there are adequate grounds for review; decide who are, or who should be made parties to the application for review; or who should have notice of the application for review. Following the directions hearing an order is issued in writing to all parties.

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

A party to an application for review can request a directions hearing. Written requests are made to the Registrar and must set out the nature of the directions sought and the reason for the request. A copy of the request for a directions hearing must be given to all the other parties to the proceeding. All parties are advised when a directions hearing is arranged. Parties are invited to attend and address the Tribunal on the matters to be considered.

### **5.5.2 The commercial list**

VCAT has set up a 'commercial list' within the Planning Division to deal with major commercial or residential projects (generally having a value of \$5 million or more) or projects which have government input or community benefit (such as road projects, hospitals and sewerage plants).

A party wishing to have its case included in the list must make application in writing and the application is usually considered at a directions hearing. Entry into the commercial list is solely within the discretion of the Tribunal.

For matters admitted to the commercial list:

- the matter is usually given a speedy hearing and is case managed
- the applicant must certify that there will be no changes to the permit application plans
- any expert reports or statements of evidence must usually be filed with VCAT and served on other parties 10 days before the scheduled hearing date.

### **5.5.3 Compulsory conference**

VCATA s. 83

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

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

A compulsory conference is used to:

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

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

### **5.5.4 Mediation**

VCATA s. 88

VCAT can initiate mediation between the parties to try to reconcile differences and settle a dispute without the need for a full hearing of the proceeding. Mediation under section 88 of the VCAT Act is arranged at the discretion of the Registrar. Consent of the parties is not required and attendance is compulsory.

A limited number of applications for review in the Planning List are selected for mediation. Selection is made on the basis that the material on VCAT's file suggests that there is a reasonable chance of the dispute being resolved through mediation.

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

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

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

### 5.5.5 A question of law

PEA s. 184

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

VCAT Practice Note  
Planning List (No. 1)

Any party who becomes aware of a question of law to be decided in a forthcoming hearing must advise the Registrar immediately so that VCAT can be constituted with a legal practitioner. All the other parties to the proceeding should also be notified.

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

VCAT Practice Note  
Planning List (No. 2)

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

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

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

VCATA Sch. 1 Pt. 16  
Cl. 66

Sometimes a question of law is not evident until the full hearing has commenced. If the Tribunal is constituted without a legal practitioner and any party does not agree to the question of law being decided by the presiding member, the parties must notify the presiding member. In this circumstance, the question of law will be decided by a judicial member or a member who is a legal practitioner nominated by the President.

VCATA s. 148

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

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

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

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

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

### **5.5.6 Intervention by a Minister**

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

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

VCATA Sch. 1 Pt. 16  
Cl. 58

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

VCATA Sch. 1 Pt. 16  
Cl. 58

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

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

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

VCATA Sch.1 Pt. 16  
Cl. 61

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

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

## **5.6 Further information**

General information about the processes and procedures in applications for review, as well as the role of VCAT and the procedures and time limits in accordance with the Act, the VCAT Act and the Regulations, is available from the council's planning department or from a VCAT customer service officer on telephone (03) 9628 9777.

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

VCAT's public information counter is on Level 7, 55 King Street, Melbourne. Copies of the VCAT publications and the notice forms referred to in this chapter are available from the counter or from a customer service officer. The information includes:

- Guidelines for Applicants brochure
- Submissions in the Planning List information sheet
- Guidelines for Waiving Application Fees
- Permit Amendment and Cancellation Supplement.

Copies of the VCAT Practice Note Planning series are also available from the counter. The Practice Note series are numbered for reference and include:

- *Practice Note Planning List (No. 1) - General Procedures.* This practice note governs most of the procedures relating to the Planning List, including:
  - adjournments
  - withdrawal of an application
  - expert evidence
  - request for directions hearing
  - urgent hearings.
- *Practice Note Planning List (No. 2) – Information to be provided by a Responsible Authority.*
- *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.*
- *Practice Note Planning List (No. 5) – Representation of parties.*

Copies of the standard forms used by VCAT are available from the counter or a customer service officer. A standard form is used to make an application for review, an application for enforcement order and an application to cancel or to amend a planning permit.

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

VCAT's web site address is [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). (The site provides general information about the Tribunal and its operations.)

All significant decisions since October 1996 can be accessed on the Internet through the Australian Legal Information Institute (Austlii) web site. New decisions are added monthly. The address of the Austlii site is [www.austlii.edu.au](http://www.austlii.edu.au)

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

- *Victorian Planning Reports* published by AAT Reports (Vic) Pty Ltd (subscription enquiries can be made to the publisher on (03) 9561 2780)
- *Local Government & Planning Law Guide* published in Sydney by LBC Information Services
- *Planning and Environment Service (Victoria)* published by Butterworths (telephone enquiries to 1800 648 825).

Commentary on significant VCAT decisions can also be found in 'Planning News' the newsletter published by the Royal Australian Planning Institute Victorian Division and the Local Planners Association (for subscription enquiries telephone (03) 9819 0930).

Academic text books such as *Statutory Planning in Victoria*, second edition, the Federation Press 1999 by Eccles D & Bryant T, provide further advice about VCAT and the application review process.