



A GUIDE TO

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# PLANNING ENFORCEMENT

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IN VICTORIA



### **What is a planning enforcement officer?**

A Planning Enforcement Officer is a person, generally employed by a local Council, to investigate breaches of the Planning Scheme or Planning Permits.

A Planning Enforcement Officer may also be known as a Planning Compliance Officer, Planning Investigations Officer or Planning Liaison Officer.

### **What is the planning enforcement officers association?**

The Planning Enforcement Officers Association Inc. is the professional body to which Planning Enforcement Officers can belong. It is an

Association consisting of no other profession or persons other than those persons directly involved, or responsible for, the enforcement of the Planning and Environment Act and the various Planning Schemes of Councils throughout Victoria.

### **Why have an association?**

To allow Enforcement Officers to communicate their ideas, problems, solutions and general information within the field of planning enforcement, either directly, via our email system, or at our regular meetings.

The expertise that abounds within the Association enables us to advise and assist other officers to find solutions that meet their specialist individual requirements.

### **How do I join?**

If you are currently working as a Planning Enforcement Officer or supervising such duties, you can visit us on our web site at:

<http://www.planning-enforcement.com> and click on Contact Us

or send us an email at [mail@planning-enforcement.com](mailto:mail@planning-enforcement.com)

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- Municipal Association of Victoria



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## PREFACE

This document has been prepared as a guide for Victorian Councils to assist with taking enforcement action in relation to breaches of their planning scheme, permits or agreements made under section 173 of the Planning and Environment Act 1987 (the Act). The guide will be particularly relevant to officers directly involved in planning enforcement or officers with linked responsibilities such as town planners.

Under the Act a Council has a duty to enforce their planning scheme. It is an offence for a person to use or develop land in contravention of a planning scheme, or a permit, or a section 173 agreement. Penalties can be applied to these offences. It is important for responsible authorities and their enforcement officers to understanding the legal framework within which they operate.

The role of an enforcement officer is largely an investigative one. An investigation, in essence, is a search for the truth and is just as likely to implicate the guilty as it is to exonerate the innocent. It is for this reason that enforcement officers should be sufficiently skilled in conducting an investigation and maintain an open mind about the investigation at all times.

At the conclusion of any investigation there may be a need to bring a proceeding against a person in either the Victorian Civil and Administrative Tribunal (VCAT) or the Magistrates' Court. Therefore, any investigation must be thorough and withstand the rigours of Court.

This guide will assist enforcement officers with their investigation and enforcement functions.

This guide is not intended to be a definitive statement of the law. It is intended to be a general guide only and should be seen as such. Accordingly, you should not rely on it as you would legal advice and should always seek independent legal advice from experience practitioners when necessary.

Part 1 of this guide provides advice on the type of systems and procedures a responsible authority should have in place to both proactively monitor planning compliance and also respond to complaints from the public when non-compliance is identified.

Part 2 this guide provides an overview of the steps of conducting an investigation including the law governing entering land and gathering evidence.

Part 3 of this guide details the enforcement options that are available in Victoria.

Examples of forms most commonly used in planning enforcement and which include the information prescribed under legislation are attached to this Guide.

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**Attachment 5 - Planning Infringement Notice and Application for Review**

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## **PART 1 – Enforcement Policies and Procedures**

### **1.1 Introduction**

PEA s. 14(a)

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.

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 Act.

### **1.2 When is enforcement action appropriate?**

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.

PEA s. 126

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.

### **1.3 Culture to enforce**

Councils can vary considerably in their commitment, resources and skills in undertaking the enforcement of their planning schemes. There are also varying organisational models as to how the enforcement function can be fulfilled.

Some Councils' combine all enforcement activity (building, planning, environmental health and local laws) into one unit. Others combine planning enforcement with their statutory planning unit. Smaller, often rural, Councils include the enforcement role in the job description of the planning officer.

Whatever the model used by a Council, there must be a willingness to pursue enforcement or the desired outcomes of the planning scheme will not be achieved.

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Part of a commitment to enforcement is a process of follow up compliance checks and random auditing. This action needs to be followed up by an increased awareness of Council action and a subsequent willingness to pursue enforcement action if there are breaches of the planning scheme or permit. In order to achieve this, adequate resources and training are required.

## **1.4 Compliance auditing & monitoring**

### **Auditing**

Subject to resources responsible authorities should consider proactively auditing both new and existing use and development to assess compliance with the planning scheme, conditions of planning permits and the requirements of 173 agreements.

A well designed auditing system should be efficient and transparent and should include documented procedures with supporting systems, including databases and record keeping. An effective auditing program may provide reductions in reactive planning enforcement as it may identify a potential non-compliance before it is too late to be rectified. A consistent auditing program will enable performance information to be recorded and used to monitor both the audit program as well as compliance within the municipality.

Where there are resource constraints a responsible authority could consider targeted auditing in an particular area of non-compliance, for example established uses that have a record of non-compliance, or activities which have a potential to create the greatest impact.

### **Monitoring planning permits**

Monitoring the requirements of planning permits is also an important aspect of planning enforcement.

Planning permits will often include conditions that require that further information and reports be submitted for endorsement prior to the commencement of the use and/or development.

Under the Act a planning permit for use and/or development expires if the use and/or development does not start or is not completed (in the case of development) within the time specified in the planning permit. If no time is specified on the permit the Act sets the time for commencement and completion. Before the permit expires or within three months afterwards, the owner or the occupier of the land to which the permit applies may ask the responsible authority for an extension to these times.

A responsible authority should have a reliable system in place to monitor compliance with permit conditions requiring further information and the expiry of planning permits. Ideally such a system should be automated and be built into the responsible authority's existing administrative systems.

Other actions that a responsible could take include:

- drawing attention to permit conditions requiring further information in a covering letter sent to the applicant when the permit is granted
- sending reminder letters at appropriate times to the applicant advising the submission of the further information is still outstanding

- undertaking site visits to ensure the use and/or development has not commenced until the additional information has been provided
- undertaking site visits at least 3 months prior to when the use and/or development is required to have commenced and/or been completed
- if the use and/or development has not yet commenced writing to the owner and/or occupier advising of the relevant times, that the permit may expire unless action is taken and that they can seek an extension of time

Further information about conducting investigations is provided below.

## **1.5 Complaints from the community**

### **Written complaints**

Most investigations will commence with the receipt of a complaint alleging a breach of the planning scheme or planning permit conditions.

The written complaint should provide details of the complainant and clearly outline all details of the alleged breach. A complaint submitted by email providing the relevant details should also be considered to constitute a written complaint.

Council should consider developing a complaints pro-forma which prompts the complainant to provide all the required information for council to initiate an investigation. The pro-forma should also include information about the council's investigation procedures, how and when the council will keep the complainant informed of the status of the investigation and specify that a complaint made anonymously may not be investigated.

The details of the complainant should not be divulged to the public and the alleged perpetrator of the breach.

Anonymous complaints should generally not be investigated. Exceptions to this may be made in instances where a serious immediate breach is alleged, such as the demolition of a protected building, or the felling of a protected tree.

### **Acknowledgment of complainant**

An acknowledgment letter should be forwarded to the complainant as soon as possible following the receipt of the complaint, advising them that the council is in receipt of their letter, that the matter raised is under investigation, and that they will be advised further in writing of the actions taken by the council in addressing the matter.

### **Receipt of verbal complaints**

Sometimes complainants will contact the council by telephone alleging a breach has occurred. The officer taking the call should identify themselves by their full name and position within council.

Details of the complainant must be recorded as well as a clear description of the complaint and accurate details of the address of the subject site.

The officer should at all times be courteous and explain the courses of action potentially available. A commitment should be made to investigate the matter and the complainant encouraged to put the complaint in writing. The complainant's identity should not be divulged without their consent.

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If a complaint is not received in writing, provided sufficient details are of the complaint have been received verbally and the complainant identified, the matter should be investigated and feedback provided to the complainant the same as if it were a written complaint. However, this may not be possible if the complainant seeks to remain anonymous.

### **Keeping the complainant informed of the investigation**

Responsible authorities should seek to ensure that complainants are kept informed of the progress of an investigation.

Complainants should be kept informed in writing wherever possible or via telephone as appropriate. All discussions should be recorded and a note of the conversation kept on the investigation file.

## **1.6 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 (further information on authorised officers is provided in Part 2).

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.

The Planning Enforcement Officers Association recommends that Enforcement Officers complete a Certificate IV in Local Government – Statutory Investigation and Enforcement, or have relevant experience in an investigation field.

The PLANET Professional Development Program run by the Department of Sustainability and Environment (DSE) offers a range of courses which would be appropriate for enforcement officers. For more information visit the DSE website at [www.dse.vic.gov.au](http://www.dse.vic.gov.au)

### **Collaboration**

A key to effective enforcement is quite often the use and sharing of information between a network of other enforcement agencies. Such agencies may include police, Environment Protection Authority and Liquor Licensing Commission. This allows the most efficient use of resources for all agencies and access to unique skills.

The same also applies to resource sharing across Councils. For rural Councils this may include sharing of an enforcement officer or information sharing at the very least. Council's should investigate joint working relationships with adjoining Councils and other enforcement agencies.

## **PART 2 - Conducting an Investigation**

Most planning enforcement investigations are instigated by the receipt of a complaint from a member of the public. A complaint will generally not specify how the scheme or planning is being breached but may typically raise general issues such as:

- amenity concerns arising from noise or other emissions, etc Amenity concerns arising from activities at unacceptable hours
- an activity which appears inappropriate to the area (i.e. motor repairs in a residential area)
- works that may have commenced in the absence of any approvals
- works that do not appear to accord with permits or plans viewed by complainant

An investigation can also be initiated as part of a responsible authority's ongoing program of auditing and monitoring compliance.

### **2.1 Investigating the offence**

The investigation of an offence will involve the gathering of evidence both from witnesses, the offender and from the land.

#### **Background research**

After receiving a complaint or initiating an investigation an enforcement officer should first undertake a desk-top audit and make an initial assessment of the issues (prior to conducting an inspection) based on the following:

- the zoning of the land and the provisions of the scheme relating to the use and development of the land
- the occupancy and use history of the land
- the planning history of the subject land, including planning permits, endorsed plans or Section 173 Agreements
- consultation with the planning officer who provided any advice or assessed any applications related to the subject land
- other relevant information that may be available from the responsible authority's databases ie. food premises registered under the Food Act 1984
- ownership details of the subject property should also be confirmed at this stage with a view to inform the owner of the enforcement action where the owner is not the occupier of the site. This may initially be limited to the provision of information and advice, including detailing the owners' responsibility to ensure that the use and development of the site complies with the Act.

In circumstances where it is determined that the owner is to become involved the council should advise the owner may be included as a party to any enforcement action that may follow from the investigation.

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Following the desk top audit the enforcement officer may be able to form an initial view as to the nature of any breach that may have occurred based on the complaint received and the research conducted. For example is it a:

- breach of the planning scheme
- breach of a planning permit (including endorsed plans)
- breach of a Section 173 agreement
- no breach

#### **Broader issues associated with a breach**

The complainant and initial research may also raise issues that are required to be forwarded to other departments within the responsible authority for investigation and action. This may include those parts of the organisation responsible for the building, health, local laws and infrastructure.

The complainant may also raise matters that require referral to external authorities or agencies, which may include:

- Victoria Police
- Environment Protection Authority
- water authorities
- Work Cover Authority
- Department of Immigration
- service providers

#### **Initial site inspection**

Following an initial assessment of the matter first hand evidence should be obtained by conducting a site inspection.

Depending on the nature of the breach the inspection may be conducted either overtly or covertly.

Discretion should be exercised as to whether the land should be attended alone.

Some investigations may only require external surveillance of the land.

#### **The Importance of File Notes**

Every investigation should be undertaken with a view to the possibility of the matter proceeding to formal enforcement proceedings. In such circumstances a record of all actions undertaken by the council becomes increasingly important. File Notes should therefore be generated for all conversations with all parties.

## **2.2 Can an enforcement officer enter the land?**

An enforcement officer does not have unlimited powers in relation to the investigation of offences. The ability to enter land is limited by the Act.

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 Sustainability and Environment
- any authorised officer of the responsible authority
- any other person whom the Minister authorises to assist an authorised officer of the Ministry or authority.

### 2.3 What is the role of the Local Government Act 1989?

LGA 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.

### 2.4 What is required to enter the land?

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)

The giving of consent by the occupier should always be documented. If notice of entry is being given it is important to ensure that service has been affected and the land is appropriately identified.

Caution must be exercised when entering some construction sites as there may be a requirement for a red card to be held by an officer prior to entering the land. Any site office or foreman's office should be attended first to inform the relevant party of the pending inspection and to obtain the necessary personal protective equipment ie. hard hat, safety boots etc.

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

PEA ss. 134, 135,  
137  
MUA s.6  
PCA 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).

## 2.6 What can be done on the land?

PEA ss. 133, 134

If the property has been entered as outline above 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

The Act also allows an authorised officer to 'take any action necessary'. This appears to be quite wide and caution should be exercised if an enforcement officer is considering doing anything other than what is specified.

In addition the enforcement officer should make note of:

- address of land and the matters being investigated
- time and date of the inspection
- persons in attendance
- details of activities or development noted at time of the inspection
- names of any persons interviewed
- details of any interviews

Brief hand written notes should be made at the time of the inspection and produce a more detailed record of the inspection upon returning to the office of the responsible authority. A hard copy of the record should be permanently on file.

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.

Regular inspections of a site may be required to monitor activities. Each inspection should be recorded and a hard copy of the record placed on the property file.

In the case of ongoing activities which are creating amenity impacts it may also be appropriate to ask the complainant to maintain a log of activity to supplement the evidence collected by Council.

More guidance on gathering evidence, including conducting interviews, are provided below.

## **2.7 Deciding on a course of action**

At this stage the enforcement officer should decide on a course of enforcement action to take to achieve compliance. Part 3 of this guide outlines all the enforcement options available in Victoria.

## **2.8 Investigating compliance**

### **Follow-up Inspections**

Any enforcement action that requires the offender to either stop the offending activity and/or take additional steps to achieve compliance needs to be followed up by the enforcement officer to assess whether compliance has been achieved.

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 been achieved the responsible authority should provide written advice to the offender and complainant (where relevant). The investigation can now be closed.

The actions which may be taken where non-compliance is observed are detailed in Part 3.

### **Closure of an investigation**

An investigation is closed when compliance is obtained and/or where the matter has been brought to a logical conclusion, such as a successful prosecution of the matter.

Where an investigation is concluded the council should notify the relevant parties in writing

## **2.9 What evidence is required to take enforcement action?**

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. 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.

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As is detailed in Part 3 the standard of proof necessary at VCAT (ie. enforcement orders) is a civil standard (balance of probabilities) which is less than the criminal standard (beyond a reasonable doubt) which applies in the Magistrates' Court (prosecutions, injunctions).

If a Planning Infringement Notice is issued the alleged offender has the option of having the matter heard in the Magistrates' Court. Before deciding to issue a Planning Infringement Notice the enforcement officer should ensure they have sufficient evidence to successfully prosecute the offence. Evidence and the issues that need to be considered in prosecuting the offence are addressed below.

If you are unsure that the evidence reaches the required standard you should seek legal advice. Proceeding with an insufficient case could lead to substantial costs against the Council.

## **2.10 What are the essential elements of the offence?**

Every offence has a number of elements that must be proved (in the case of a Magistrates' Court proceeding; beyond reasonable doubt). Offences may involve an 'act' that will be the substance of the offence and others will involve an "omission" (to do something).

To conduct a successful investigation it is necessary to understand the offence and the essential elements that constitute the offence. These elements should be seen as a guide to assist the enforcement officer in the course of the investigation.

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.

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

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

The elements of an offence are contained in the various sections of the legislation that is sought to be enforced. For example, under section 126 (1) of the Act it is an offence for any person to use or develop land in contravention of or fail to comply with a planning scheme or a permit or an agreement under section 173.

The elements of the offence that are required to be proved are as follows:

- identity - who is the person who has committed the offence?
- date and place - what date (or date range) did the offence occur and where?
- use and/or development – what constitutes the use and/or the development?
- land - what is the land and how is it identified?
- contravention of or failure to comply with a planning scheme, permit or section 173 agreement – what is the requirement that has been contravened or has been a failure to comply?

The identity of the offender, date and place of the offence are all elements that must be proved in all offences. These elements are critical and special care must be taken to ensure that they can be proved. Many cases have turned on whether the person before the Court is the person who committed the offence or whether the offence was committed on the date that is alleged or not.

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.

### **Identity**

As noted above, it is of paramount importance that an enforcement officer can prove that the offender who is before the Court committed the offence. Even if all the other elements to the offence can be proved the proceeding will fail if identity of the offender can not be proved.

LGA s. 242

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.

### **Date and place**

MCA s. 26(4)

Proceedings brought before the VCAT do not have a limitation period. However, proceedings in the Magistrates' Court must be commenced within 12 months of the date on which the offence is alleged to have been committed.

One of the matters that an enforcement officer should try to establish at the outset of an investigation is the date of the offence. If the contravention investigated occurred more than 12 months previously, proceedings cannot be brought in the Magistrates' Court. However, proceedings may still be brought at VCAT.

Determining when the date of the offence occurred is not always straight forward. There is a difference between offences that are continuing and those that have been committed and are now complete. Offences that are continuing are generally those involving the use of land that is in contravention of the planning scheme. Offences that are complete (once committed) are generally those where the land has been developed. However, the distinction is not always clear and it is best to get legal advice.

A further difficulty that may arise with the limitation period is when an enforcement officer attempts to negotiate an outcome with the offender. Negotiations may take many months and finally break down with no resolution. In this case it is extremely important to understand when the 'cut off' date is, so that proceedings can still be brought in the Magistrate's Court if necessary. This date should be diarised so that there is sufficient time to bring proceedings.

A final point to note is that a prosecutor must prove that the Court has jurisdiction (ie. offence was committed less than 12 months previously) to hear a charge. If a Magistrate hears a charge that is statute barred (older than 12 months), the Magistrate commits jurisdictional error and the sentence of the Magistrate can be appealed.

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In relation to the requirement of the location of the offence it is important to correctly identify the address of the land on which the offence occurred. There are a number of cases which have been lost because the place has been incorrect and an amendment to the charge could not be made.

### **Other considerations**

Often planning permit conditions are drafted without the consideration of whether proceedings may be brought before a Magistrates' Court. Therefore, it is important to consider the permit condition that is alleged to have been breached and consider whether the condition actually imposes a requirement on a person. If a requirement is imposed, consider who that requirement is imposed on. Sometimes the requirement is imposed on other persons entering the land or similar. Finally, consider what actions are necessary to establish a contravention of that permit condition. Do you have enough evidence to establish the contravention?

The planning scheme is a complex document; consider whether you require legal advice on the interpretation of a particular provision of the planning scheme. Sometimes you may consider that words mean one thing yet the words have been interpreted by the Courts to mean something else. If in doubt you should always seek legal advice.

## **2.11 Are There Any Defences Available?**

An enforcement officer should also be conscious of any defences that may be available to an offender.

As well as the general defences to crimes offences the two defences that enforcement officers are most likely to encounter are; the defence of honest and reasonable mistake of fact and the "Norcock" defence (an act of god or a stranger).

These defences can be quite complicated and difficult to apply. If an enforcement officer considers that an offender may have a valid defence legal advice should be obtained to advise the officer of the most appropriate course of action in the circumstances.

## **2.12 Gathering of Evidence**

Remembering that it is the role of the enforcement officer to exonerate the innocent as well as to establish a case against the guilty it is necessary to gather all evidence (even the evidence that does not help your case).

Evidence must be relevant, admissible and reliable. Evidence that is not relevant is inadmissible. Evidence that is inadmissible will not be allowed to be relied upon and evidence that is not reliable will be given little if any weight.

In general, evidence may be obtained by the following ways:

- inspecting the relevant land
- obtaining witness statements
- admissions from the offender
- the relevant formal proofs (ie section 242 Local Government Act 1989 statements).

Evidence can be (amongst others) observations, outcomes of enquiries made, documents or admissions and confessions made by the offender.

The collection of evidence can take the form of a statement of observations and enquiries made. Evidence can also be given in other forms. A discussion of gathering evidence in its various forms follows.

### **Inspecting the land upon which the offence occurred**

Undoubtedly the best evidence is to inspect the land and observe the offender in the course of committing the offence. The strength of the evidence against an offender in these circumstances is more than likely to result in an early plea.

It is extremely important that at the time of the inspection a thorough and comprehensive examination of the land takes place and detailed notes taken of the inspection. The recording of the offence and results of the inspection may also be formalised by photographs.

It is often advisable to draw up a site plan showing where the photos are taken from, the location of any breach on the land, approximate distances from streets, roads or other land features, neighbouring properties etc.

### **Use of photographs**

Photographs are an important form of giving evidence. Photographs must be relevant and clearly show the contraventions. Photographs can only be admitted into evidence if the person who took the photographs gives oral evidence to the Court of the taking of the photographs.

The use of digital cameras with a date stamp or other labelling assists with the smooth presentation of evidence.

It is often useful (and highly recommended) to have a site plan to plot the location and direction from which photos are taken. This will assist the Court in understanding your case by giving them a visual tour of the land or other structure the subject of the proceeding.

### **Survey or other plan**

A copy of a survey or other plan may be the best evidence of the features and dimensions of the site. It will also be useful to show the precise location of the illegal work on the site.

Plans showing features (eg windows and balconies) are valuable for showing where sensitive issues such as privacy, overlooking, or obstruction of views are involved. The plans should be to scale or otherwise indicate relevant distances. Often these plans are available on the planning file and if they have been endorsed, they form a valuable part of your investigation.

### **Complaints and location plans of complainants**

The role of complainants is frequently underestimated. Persons who have lodged complaints may be a witness or provide valuable information for further investigation.

A plan should be prepared showing the location of the offending property and also the location of any complainant or other person who may be adversely affected by the works or use being carried out.

It is useful when preparing this plan to also indicate on it where any photographs may have been taken so the photos can be seen in perspective.

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## **Company and business name searches**

A company is a legal entity and as a result, proceedings can be taken against it, and notices or orders can be given to it, in its corporate name. By comparison a business (or firm) conducted by a sole trader or partnership has no legal standing in its own right and proceedings can only be taken against, or notices or orders served upon, the proprietor(s) of that firm. In some cases a business may be conducted under a business name registered with the Consumer Affairs Victoria. This is not a legal entity and proceedings cannot be brought against this entity.

It is therefore critical to ascertain the true legal standing of what, at first sight, might appear to be a company. For example, the name "XY Construction" may appear to be a company, but it is more likely to be a firm. The true status of the particular organisation must be ascertained before any notices or orders are served upon it, or proceedings are instituted against it.

This confirmation can be done by conducting a search of the Australian Securities and Investments Commission (for registered companies), or Consumer Affairs (which registers business names and incorporated associations). The following information should be obtained:

For a company:

- its full name;
- its Australian Company Number
- its registered office
- the full names and addresses of its secretary, directors and public officer.

For a business:

- its full name
- its registered place of business;
- the full names and addresses of the registered proprietors of the business.

## **Title Searches**

The owner of land can be ascertained from the certificate of title.

Evidence that a person is rated in respect of the land is considered sufficient evidence that the person is the owner until the contrary is proved, for the purpose of the Act.

With regard to actions involving Strata Title property, careful identification should be made of the owner of the premises in question e.g. is it the owner of the Strata Lot, or the holders of the Common Property? ie. Body Corporate.

## **Taking Notes**

The golden rule of investigations is 'if it is worth remembering it is worth making a note'.

An enforcement officer may investigate a matter over one day or over many months. Over the course of the investigation, an enforcement officer may inspect the land many times or witness many contraventions. Admissions or confessions may also be made by the offender to the enforcement officer.

At the conclusion of the investigation, the enforcement officer will be required to make a detailed statement of the investigation that sets out the evidence the enforcement officer is going to give. This will also include any conversations with the offender.

It is unfortunately the fact that proceedings come on before the Magistrates' Court many months after the investigation is complete. However, if the enforcement officer can prove that the notes they had taken were taken as soon as possible after the incident then they may be relied upon to 'refresh' the memory.

Without reference to any notes an enforcement officer may not recall all the evidence they wish to give including any admissions.

Magistrates will also be called upon to determine credibility; if an enforcement officer can produce notes taken at the time (or shortly thereafter) this will assist the credibility of the enforcement officer.

### **Taking witness statements**

The interview of a witness requires the enforcement officer to draw out and record admissible evidence from that witness. 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.

As a general rule an enforcement officer should listen to the witness tell their story in full and then ask them to repeat the story and write it down, in their own words. Along the way, clarifying and asking questions to expand or understand what it is that the witness is saying.

An enforcement officer should be aware that a witness cannot give evidence of what another person said or saw. An exception to this is what the suspect said to the witness (or another person) or did.

For example John said to Jane that he saw the suspect cutting down trees. Witness Jane could not give evidence of what witness John had seen.

Evidence must also be relevant to the facts that are in dispute. If the evidence that is being led is irrelevant it is inadmissible.

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.

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.

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.

### **Interviewing offenders**

An enforcement officer has a legitimate role to investigate contraventions of the Act.

As part of this role it is necessary (as part of an investigation) to question the offender.

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As discussed above, the purpose of an interview is to eliminate the innocent, obtain admissions and/or confessions.

It is up to the prosecution to prove that any admissions or confessions made by an offender are voluntary and that it will not be subject to being excluded by the Court's discretion. The use of a corroborator is advisable when interviewing an offender to ensure that any attack on the admissibility of the admission or confession can be met.

An enforcement officer should always interview an offender. A good interview will obtain sufficient admissions and confessions in relation to the contravention so that the prosecution will know exactly what the offender will say at any later Court hearing. Admissions and confessions will also prompt the offender to plead guilty at an early stage of any Court proceeding.

Finally, if an enforcement officer fails to interview a suspect and that suspect is successful in any Court proceeding, it is more likely than not that Council will be liable to the offender's costs (see *Latoudis v Casey*).

Prior to an interview, the enforcement officer should review the available evidence and consider what charges are relevant. The charges should be reviewed so that the elements of the offence are identified.

Reference to the definitions (land use terms and other terms) will assist in interviewing the suspect.

Notes should be made of the elements, the offences and other matters that should be put to the suspect. Consideration of the framing of questions to be put to the suspect in relation to each of the elements of the offence can also be done.

Prepare a checklist of questions to be asked. The checklist (of questions) should be sufficient to cover all elements of the offence. They should not be rigid but a guide for exploring all elements. Open ended questions should be asked rather than closed questions which require a 'yes' or 'no' answer.

For example, open-ended questions include:

- Who owns the land?
- When were the trees cut down?
- Who cut the trees down?
- How were the trees cut down?
- What happened to the trees once they were cut down?

Sometimes an enforcement officer will not have sufficient admissible evidence to prove a necessary element of an offence. An enforcement officer should consider how to frame questions to obtain admissions as to the elements of the offence required.

An enforcement officer may conduct an interview at the Council offices or at the land where the contravention occurred or any other place.

Prior to interviewing an offender, an enforcement officer must introduce himself (or herself) to the offender and produce to the offender his or her authority (identification card).

The purpose of the discussion should also be stated.

For example:

*'My name is John Smith from Wyong Shire Council and I wish to interview you in relation to the oil spillage that occurred yesterday.'*

An enforcement officer should develop their own preamble that includes a caution and use the preamble every time an offender is interviewed. A caution should be given after the offender has given their name and address.

For example:

*'My name is John Smith. I am an authorised officer from Wyong Shire Council and I wish to interview you in relation to the oil spillage that occurred yesterday.'*

*What is your full name and address?*

*Prior to asking you further questions I need to inform you that you are not obliged to say or do anything but anything you say or do will be given in evidence. Do you understand this?'*

If the suspect does not understand this it will need to be explained in other words what it means.

If a caution was not given to an offender prior to the interview commencing a Court may hold that the failure to give a caution is unfair to the offender and exclude any admissions or confessions made by that person.

An enforcement officer should not force an offender to answer questions. Where a suspect offers a 'no comment' record of interview, the enforcement officer should put all allegations to the suspect and conclude the interview. There should be a balance between putting the allegations to the suspect and badgering the suspect. Where a failure to allow a suspect the right to silence, the Court has discretion to exclude the evidence of an admission or confession.

If an offender wants to communicate with a friend or legal practitioner an enforcement officer should allow the suspect to speak to a friend or legal practitioner. Failing to allow this to occur may result in the Court excluding the evidence of an admission or confession.

A re-enactment is admissible and can be considered if the contravention sufficiently warrants clarification by a re-enactment.

Where the offender is a company, an enforcement officer should consider who can speak on behalf of the company. An admission will only be admissible against a company if it is made by its officers or by a person who has actual or apparent authority to make the statements which will bind the corporation.

An enforcement officer should, at the outset of the interview, ask the following questions:

- What is your full name?
- What is your position in the company?
- What functions does that position involve?
- Does your position authorise you to make statements on behalf of the company?

If the answer to the last question is no, you should ask to speak to a person who does have the authority to make statements on behalf of the company.

File notes of all interviews and actions taken should be made immediately or as soon as possible after an interview is conducted. The corroborator should read the notes and sign if they are an accurate reflection of an interview.

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## PART 3 - Enforcement Options

### 3.1 What enforcement options are available?

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

- IA s. 8
  - PEA s. 130
  - PEA s. 114
  - PEA s. 120
  - MCA ss. 26, 27
  - PEA s. 125
  - PEA ss. 87, 88, 89
  - PEA s. 123
- 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.

PEA s. 126

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.

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.

### **3.2 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.

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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.

Where compliance has been achieved the council shall provide written advice to the respondent and complainant. The investigation should now be closed.

### 3.3 Official warnings

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

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

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

The prescribed format of an official warning does not provide for any scope to direct an offender to rectify a breach, to cease a non-compliant use and/or development or show-cause why the responsible authority 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 who 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.

### 3.4 Planning infringement notices

#### 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.

### **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.

### **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.

### **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 (see below)
- elect to have the matter of the infringement offence heard and determined in the Magistrates' Court
- apply to have the decision to serve the infringement notice internally reviewed by the responsible authority (see below)
- ignore the infringement notice

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

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.

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](http://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 Infringement Acts 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.

### **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.

### **When might withdrawal be appropriate?**

IA s. 18(4)

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

Other circumstances under which withdrawal of an infringement notice may be appropriate include:

- Following an internal review (internal reviews are discussed below).
- 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.
- If the responsible authority realises, after serving it, that the notice was an inappropriate action in the circumstances. The authority may decide that it wants positive action to fix the problem and should have sought an enforcement order. It may realise that the evidence available could not lead to a finding of guilt by the court.

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

IA Act s. 19

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

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

### **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)

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## **Paying penalties**

PEA ss. 129 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).

IA s. 29 The responsible authority should be ready to take further action promptly (such as serving a penalty reminder notice, prosecution or seeking an enforcement order), if a penalty is not paid or required additional steps are not taken by the date specified.

## **3.5 Enforcement orders**

### **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).

PEA s. 116 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.

PEA s. 124 Any enforcement order or interim enforcement order is binding on every subsequent owner and occupier to the same extent as if the order had been served on them, so there is no need to serve new notices.

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).

### **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 - PNPE4 - 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 order 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 1998 still having application to these types of proceedings.

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### **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

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

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

## **3.6 Interim enforcement orders**

### **What is an interim enforcement order?**

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

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

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 ss. 120(10), 121	VCAT has the power to cancel or amend an enforcement order or interim enforcement order at any time.
PEA s. 150(4) VCATA ss. 75(2), 78(1)	The Acts make specific provision for payment of compensation for loss or damage as a result of proceedings which have been brought vexatiously or frivolously, or in order to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings. This should be considered before seeking an interim enforcement order which may cause significant loss to affected parties.

### **3.7 Prosecution for a breach of the Act**

#### **The role of prosecution in planning enforcement**

PEA ss. 126, 127

The statutory planning system ultimately relies on the fact that planning schemes are part of the law of Victoria and that any person who uses or develops land in contravention of, or fails to comply with a planning scheme, 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.

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 1998, 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.

#### **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 s. 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.

### **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 the act or omission constituting the offence took place without that person's knowledge or consent.

PEA s. 129  
SA 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.

## 3.8 Injunctions

### 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  
CCA 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.

### 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.

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### **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.

## **3.9 Cancellation and amendments of permits**

### **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.

### **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.

### 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.

### 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: <ul style="list-style-type: none"> <li>▪ substantial non-compliance with a permit condition; or</li> <li>▪ material mis-statement or concealment of facts in the original permit application; or</li> <li>▪ a material mistake in the granting of the permit, the mistake arose because of the permit applicant's conduct.</li> </ul>
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## 3.10 Planning Enforcement and 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 Prostitution Control Act 1994 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 Prostitution Control Act 1994 has some special mechanisms for brothels. These include the power for a Magistrates' Court to declare premises to be a proscribed brothel, thus 'quarantining the premises' from occupation or use. Breach of the declaration is an offence.
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 Prostitution Control Act 1994 facilitate enforcement by providing procedural aids not found in, or more flexible than those contained in the Planning and Environment Act 1987.

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### 3.11 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.

## LEGISLATION GLOSSARY

CCA	County Court Act 1958
I(RPD&F) Regs	Infringements (Reporting and Prescribed Details and Forms) Regulations 2006
IA	Infringements Act 2006
LGA	Local Government Act 1989
MCA	Magistrates' Court Act 1999
MUA	Monetary Units Act 2004
PCA	Prostitution Control Act 1994
PEA	Planning and Environment Act 1987
PE Regs	Planning and Environment Regulations 2005
SA	Sentencing Act 1991
SCA	Supreme Court Act 1986
VCATA	Victorian Civil and Administrative Tribunal Act 1998

## ENFORCEMENT CHECKLIST

### Delegation and authorisation (refer to page 7)

- 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 (refer to page 13)

- 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 (refer to page 21)

- What method of enforcement is appropriate in the first instance for a particular offence:
  - negotiation and/or official warning
  - planning infringement notice
  - enforcement order
  - interim enforcement order
  - injunction
  - prosecution
  - cancellation or amendment of a permitOthers may be needed subsequently.

### Entering a property (refer to page 10)

- 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 (refer to page 21)

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

### Compliance (refer to page 12)

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

### Payment of penalty (refer to page 26)

- Has the appropriate penalty payment been received?



# PLANNING INVESTIGATION REPORT

Investigation Report Number:	Page	of
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## Nature of Offence

Who is responsible for the offence?

<input type="checkbox"/> Owner	<input type="checkbox"/> Occupier	<input type="checkbox"/> Other
--------------------------------	-----------------------------------	--------------------------------

Offence:

<input type="checkbox"/> Land used or developed in contravention of :	<input type="checkbox"/> Planning permit	<input type="checkbox"/> Section 173 Agreement
<input type="checkbox"/> Planning Scheme		

<input type="checkbox"/> Failure to comply with:	<input type="checkbox"/> Planning permit	<input type="checkbox"/> Section 173 Agreement
<input type="checkbox"/> Planning Scheme		

Proposed enforcement:

<input type="checkbox"/> Negotiation	<input type="checkbox"/> Planning Infringement Notice	<input type="checkbox"/> Enforcement Order	<input type="checkbox"/> Interim Enforcement Order
<input type="checkbox"/> Injunction	<input type="checkbox"/> Prosecution	<input type="checkbox"/> Cancellation or amendment of permit	

## Subject Site Details

Property address:	Property number:

Owners contact details:

Work:	Home:	Mobile:
-------	-------	---------

Owners name:  
\_\_\_\_\_

Owners address:  
\_\_\_\_\_

Occupiers name:  
\_\_\_\_\_

Occupiers contact details:

Work:	Home:	Mobile:
-------	-------	---------

## Complainant Details

Summary of complaint:  
\_\_\_\_\_

Complainant/s:  
\_\_\_\_\_

Complainants address:  
\_\_\_\_\_

Complainants contact details:

Work:	Home:	Mobile:	Email:
-------	-------	---------	--------

## Received / Allocation / Referral Detail:

Summary of complaint:

<input type="checkbox"/> Telephone	<input type="checkbox"/> Letter	<input type="checkbox"/> In Person	<input type="checkbox"/> Other
------------------------------------	---------------------------------	------------------------------------	--------------------------------

Received by:	Date:
Allocated to:	Date:
Referred to:	Date:

## Planning Information:

Zone:	Overlay/s:

Permits issued:	Date issued:

**Notes**

**Name:**

**Signature:**

**Date:**

**Site overview**

- |   |  |   |   |
|---|--|---|---|
| <input type="checkbox"/> Planning scheme maps | <input type="checkbox"/> Aerial photo      | <input type="checkbox"/> Title search                   | <input type="checkbox"/> Company search |
| <input type="checkbox"/> Zone ordinance       | <input type="checkbox"/> Overlay ordinance | <input type="checkbox"/> Particular Provision ordinance | <input type="checkbox"/> Rates records  |

**External inspection**

**Date first inspected:**

- |  |                                       |  |
|--|---------------------------------------|--|
|  | <input type="checkbox"/> Photos taken | <input type="checkbox"/> Samples taken |
|--|---------------------------------------|--|

**Description of the way the land is used and developed**

**Investigation detail and observations**

**Name:**

**Signature:**

**Date:**

**Internal inspection**

Date first inspected:

	<input type="checkbox"/> Photos taken	<input type="checkbox"/> Samples taken
<input type="checkbox"/> Consent given for entry	<input type="checkbox"/> Consent of occupier	<input type="checkbox"/> Two days notice
		<input type="checkbox"/> Warrant

**Investigation detail and observations**

<b>Name:</b>	<b>Signature:</b>	<b>Date:</b>
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**Site Plan**

**KEY:**  
Description of photos provided on following page.



Name:

Signature:

Date:

**Photographs**

<b>Type of film used:</b>	<b>Make and model of camera</b>

**Type of photo:**

<input type="checkbox"/> Colour	<input type="checkbox"/> Black and white	<input type="checkbox"/> IR	<input type="checkbox"/> Digital	<input type="checkbox"/> Video
---------------------------------	--	-----------------------------	----------------------------------	--------------------------------

Photo No.	Details	Date taken
1		
2		
3		
4		
5		
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11		
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40		

<b>Name:</b>	<b>Signature:</b>	<b>Date:</b>
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**Interviews**

Name	Time	Date	Detail

<b>Name:</b>	<b>Signature:</b>	<b>Date:</b>
--------------	-------------------	--------------

**Samples**

Sample No.	Item	Location
1		
2		
3		
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<b>Name:</b>	<b>Signature:</b>	<b>Date:</b>
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# NOTICE OF INTENTION TO ENTER LAND

<b>Enforcement Agency –</b> <b>Planning and Environment Act 1987</b> <b>Sect. 133 - 138</b>	<b>Enquiries</b> 	<b>Date of Notice</b> / /
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Family Name of person served with notice (or company name)

Given names of person

Address of person or registered address of company

State

p/c

Address of to which this notice applies

State

p/c

Name of Issuing Officer

Signature of Issuing Officer

Location of Issuing Officer

You are hereby provided with a minimum two clear days notice under Section 134 of the Planning and Environment Act 1987, for the purpose of an authorised officer of Council entering onto the above land.

**The inspection will take place at or about**      **on**      /      /      .

Under section 135 of the Planning and Environment Act 1987, any authorised officer of Council may take any relevant action that is necessary to find out if any person has contravened the Planning and Environment Act 1987, Planning and Environment Regulations 1988, and the      Planning Scheme.

This action includes the following:

- Taking photographs or measurements.
- Making sketches or recordings.
- Taking and removing samples.

**Please Note:** Any person who without lawful excuse obstructs an authorised officer in taking any action as stated above is guilty of an offence under section 137 of the Planning and Environment Act 1987 and can be fined the sum of      , being 60 penalty units.

Further information is available by attending personally at Council's offices located at      or by post to:

Additional information may be found at



# OFFICIAL WARNING

<b>Enforcement Agency – Infringements Act 2006</b> <b>Official Warning Number:</b>	<b>Enquiries</b> 	<b>Date of Official Warning</b> / /
---	---	--

Family name of person served with Official Warning (or company name)

Given names of person

Address of person or registered address of company

<input type="text"/>		
<input type="text"/>	State	<input type="text"/> p/c <input type="text"/>

Name of Issuing Officer

Signature of Issuing Officer

<input type="text"/>	<input type="text"/>
----------------------	----------------------

Location of Issuing Officer

Act or instrument creating offence

Section 126 of the Planning And Environment Act 1987

**BRIEF DESCRIPTION OF INFRINGEMENT OFFENCE ALLEGED TO HAVE BEEN COMMITTED**



---



Approx. time of offence

Address of the place where the infringement offence was committed

Date of offence

Council is of the opinion that the actions alleged above constitute an offence pursuant to Section 126 of the Planning and Environment Act 1987 for which enforcement options are available. Enforcement options include:

- Issue an Official Warning
- Issue a Planning Infringement Notice (penalty)
- Make application to the Victorian Civil and Administrative Tribunal for the cancellation of any applicable permit.
- Prosecute the matter in the Magistrates' Court.

In this instance Council has elected to issue an Official Warning. You should note that if Council is required to seek further enforcement options that Council will also make application to recover all legal costs incurred in pursuit of this matter.

Further information is available by attending personally at Council's offices located at \_\_\_\_\_ or by post to:

Additional information may be found at \_\_\_\_\_



# WITHDRAWAL OF OFFICIAL WARNING

<b>Enforcement Agency – Infringements Act 2006 Official Warning Number:</b>	<b>Enquiries</b> 	<b>Date of Withdrawal</b> / /
---	---	----------------------------------

**Family name of person served with Official Warning (or company name)**

**Given names of person**

**Address of person or registered address of company**

<input type="text"/>			State	<input type="text"/>	p/c	<input type="text"/>
----------------------	--	--	-------	----------------------	-----	----------------------

**Act or instrument creating offence**

Section 126 of the Planning And Environment Act 1987

**BRIEF DESCRIPTION OF INFRINGEMENT OFFENCE ALLEGED TO HAVE BEEN COMMITTED**



---



**Approx. time of offence**

**Address of the place where the infringement offence occurred**

**Date of offence**

Council has considered the circumstances relevant to the decision to issue the Official Warning referred to above and has determined to withdraw the Official Warning in this instance.

Council will not be taking any further enforcement action in relation to this matter.

Council will be taking further enforcement action in relation to this matter.

Further information is available by attending personally at Council's offices located at \_\_\_\_\_ or by post to:

Additional information may be found at \_\_\_\_\_



# PLANNING INFRINGEMENT NOTICE

Enforcement Agency – Infringements Act 2006 Planning Infringement Notice Number:	Penalty Enquiries 	Date of Notice / /
--	--	-----------------------

Family name of person served with Infringement Notice (or company name)

Given names of person

Address of person or registered address of company

			State		p/c	
--	--	--	-------	--	-----	--

Name of Issuing Officer

Signature of Issuing Officer

--	--

Location of Issuing Officer

Act or instrument creating offence

Section 126 of the Planning And Environment Act 1987

BRIEF DESCRIPTION OF INFRINGEMENT OFFENCE ALLEGED TO HAVE BEEN COMMITTED	INFRINGEMENT PENALTY	DUE DATE
	\$	/ /

Approx. time of offence

Address of the place where the infringement offence was committed

Date of offence

IN ADDITION TO THE ABOVE PENALTY YOU MUST TAKE THE FOLLOWING STEPS TO EXPIATE THE OFFENCE	STEPS MUST BE COMPLETE BY:
	/ /

NOTE: IF YOU ARE REQUIRED TO CARRY OUT ANY ADDITIONAL STEPS TO EXPIATE THIS OFFENCE YOU SHOULD INFORM THE RESPONSIBLE AUTHORITY WHEN THE STEPS HAVE BEEN CARRIED OUT.

## MANNER IN WHICH INFRINGEMENT PENALTY MAY BE PAID

NOTE: FAILURE TO PAY THE INFRINGEMENT PENALTY BY THE SPECIFIED DUE DATE MAY RESULT IN FURTHER ENFORCEMENT ACTION BEING TAKEN AND THE INCURRING OF FURTHER COSTS.

You must do one of the following by the due date:

- Pay in full** by using one of the payment methods available or, if you are eligible, apply for a payment plan\* and make the first payment within the time required under that plan; **OR**
- Have the matter dealt with in a Court or, in the case of a child, in the Children's Court, by completing the Application for Action by a Court on the back of this Infringement Notice; **OR**
- You, or a person acting on your behalf, may apply to have the decision to serve this Infringement Notice internally reviewed.\*

\*You may be eligible for a payment plan. Further information relating to eligibility for payment plans and applying for an internal review can be obtained by contacting

Additional information may be found at

 **In Person:**

 **Mail:**

This notice must accompany payment as unidentified payments cannot be processed.

Please note: In line with common practice, a receipt will not be issued for payments received through the mail.

## PLANNING INFRINGEMENT NOTICE

Enforcement Agency –  
Infringements Act 2006  
Infringement Notice Number:

### IF YOU DON'T PAY ON TIME

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

If the matter is referred to the Magistrates' Court you are entitled to defend any such proceedings.

The Issuing Officer may withdraw this notice within 28 days of it being issued. However, this happens only rarely. If it happens in this case, the Issuing Officer will write to you and your payment will be refunded.

### APPLICATION FOR ACTION BY A COURT

I, \_\_\_\_\_  
(Full name)

decline to be dealt with under the Infringement Notice Enforcement provisions, and want to have the matter dealt with by a court. I understand I may receive a summons for this offence.

Signed: \_\_\_\_\_

Address for the  
service of documents: \_\_\_\_\_ Postcode: \_\_\_\_\_

### APPLICATION TO HAVE THE INFRINGEMENT NOTICE INTERNALLY REVIEWED<sup>#</sup>

I, \_\_\_\_\_  
(Full name)

believe the decision to issue this Infringement Notice (strike through non-applicable):

- i. was contrary to law; OR
- ii. involved a mistake of identity; OR
- iii. that special circumstances<sup>^</sup> apply in my case: OR
- iv. my conduct for which the infringement notice was served should be excused having regard to my exceptional circumstances.

**I have enclosed an accompanying statement to support my application.**

Signed: \_\_\_\_\_

Address\* for the  
service of documents: \_\_\_\_\_ Postcode: \_\_\_\_\_

\*Section 22(2)(ii)(d) in the Infringements Act 2006 requires you to provide your current address.

<sup>#</sup>Your application must be in writing and needs to be accompanied by a statement and any evidence such as medical, psychological, or case worker reports.

<sup>^</sup>'Special Circumstances' are defined by the Infringements Act 2006 and relate to a person with a mental or intellectual disability, disorder, disease or illness or a serious addiction to drugs or alcohol which results in a person being unable to understand the offending conduct or unable to control the conduct. Special circumstances also extend to the homeless, where homelessness results in the person being unable to control the offending conduct.

If you have been served with more than one infringement notice, an application for internal review will need to be completed and submitted for **each infringement notice** that you wish to have reviewed. Only one application for internal review can be made regarding any one infringement offence.

As part of the internal review process you may be asked for additional information and, if this occurs, you must provide that information within 14 days.

The person conducting the internal review may decide, in all the circumstances, to:

- withdraw the infringement notice and refer the matter for prosecution in court; OR
- confirm the decision to issue the infringement notice; OR
- withdraw the infringement notice and serve an official warning in its place; OR
- withdraw the infringement notice; OR
- waive all or any prescribed costs; OR
- approve a payment plan; OR
- any combination of these actions.

Further information and information relating to eligibility for payment plans and applying for internal review can be obtained by telephoning \_\_\_\_\_ on:

Send correspondence relating to this infringement notice to:

# WITHDRAWAL OF PLANNING INFRINGEMENT NOTICE

<b>Enforcement Agency – Infringements Act 2006</b> <b>Planning Infringement Notice Number:</b> <b>Date of Planning Infringement Notice:</b> /        /	<b>Enquiries</b> 	<b>Date of Withdrawal</b> /        /
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**Family name of person served with Planning Infringement Notice (or company name)**

**Given names of person**

**Address of person or registered address of company**

	State		p/c	
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<b>Name of Issuing Officer</b>	<b>Signature of Issuing Officer</b>
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**Location of Issuing Officer**

**Act or instrument creating offence**

Section 126 of the Planning And Environment Act 1987

**BRIEF DESCRIPTION OF INFRINGEMENT OFFENCE ALLEGED TO HAVE BEEN COMMITTED**

<b>Approx. time of offence</b>	<b>Address of the place where the infringement offence was committed</b>
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**Date of offence**

Council has considered the circumstances relevant to the decision to serve the Planning Infringement Notice referred to above and had determined to issue a withdrawal in this instance. In addition to the decision to withdraw the infringement it is Council's intention to:

- Continuing proceedings and issue a summons.
- Issue an Official Warning.
- Take no further action.
- Other

The amount of any infringement penalty and any prescribed costs that have been paid will be refunded unless the person has an ongoing payment plan in which case Part 3 of the Infringement Act 2006 applies.

Further information is available by attending personally at Council's offices located at                    or by post to:

Additional information may be found at



# PENALTY REMINDER NOTICE

Enforcement Agency – Infringements Act 2006 Penalty Reminder Notice Number:	Penalty Enquiries 	Date of Notice / /
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Family name of person served with Infringement Notice (or company name)

Given names of person

Address of person or registered address of company

<input type="text"/>			State	<input type="text"/>	p/c	<input type="text"/>
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Name of Issuing Officer

Signature of Issuing Officer

<input type="text"/>	<input type="text"/>
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Location of Issuing Officer

INFRINGEMENT PENALTY AND PRESCRIBED COSTS OWING	DUE DATE
\$ <input type="text"/>	/ /

Approx. time of offence

Address of the place where the infringement offence was committed



Date of offence

## MANNER IN WHICH INFRINGEMENT PENALTY MAY BE PAID

NOTE: FAILURE TO PAY THE INFRINGEMENT PENALTY AND PRESCRIBED COSTS OWING BY THE SPECIFIED DUE DATE MAY RESULT IN FURTHER ENFORCEMENT ACTION BEING TAKEN AND THE FURTHER COSTS BEING INCURRED UNDER THE ACT.

You must do one of the following by the due date:

- Pay in full** by using one of the payment methods available or, if you are eligible, apply for a payment plan\* and make the first payment within the time required under that plan; **OR**
- Have the matter dealt with in a Court or, in the case of a child, in the Children's Court, by completing the Application for Action by a Court on the back of this Infringement Notice; **OR**
- You, or a person acting on your behalf, may apply to have the decision to serve this Infringement Notice internally reviewed.\*

\*You may be eligible for a payment plan. Further information relating to eligibility for payment plans and applying for an internal review can be obtained by contacting

Additional information may be found at

**If you do not understand this notice, you should seek advice from the registrar of the Court or Children's Court, as the case requires, a lawyer or Victoria Legal Aid.**

 **In Person:**

**Mail:**

This notice must accompany payment as unidentified payments cannot be processed.

Please note: In line with common practice, a receipt will not be issued for payments received through the mail.

## PENALTY REMINDER NOTICE

Enforcement Agency –  
Infringements Act 2006  
Penalty Reminder Notice Number:

### IF YOU DON'T PAY ON TIME

Failure to pay the infringement penalty and any prescribed costs by the specified due date may result in further enforcement action being taken and further costs being incurred under the Act.

If the matter is referred to the Magistrates' Court you are entitled to defend any such proceedings.

The Issuing Officer may withdraw this notice within 28 days of it being issued. However, this happens only rarely. If it happens in this case, the Issuing Officer will write to you and your payment will be refunded.

### APPLICATION FOR ACTION BY A COURT

I, \_\_\_\_\_  
(Full name)

decline to be dealt with under the Infringement Notice Enforcement provisions, and want to have the matter dealt with by a court. I understand I may receive a summons for this offence.

Signed: \_\_\_\_\_

Address for the  
service of documents: \_\_\_\_\_ Postcode: \_\_\_\_\_

### APPLICATION TO HAVE THE INFRINGEMENT NOTICE INTERNALLY REVIEWED<sup>#</sup>

I, \_\_\_\_\_  
(Full name)

believe the decision to issue this Infringement Notice (strike through non-applicable):

- i. was contrary to law; OR
- ii. involved a mistake of identity; OR
- iii. that special circumstances<sup>^</sup> apply in my case: OR
- iv. my conduct for which the infringement notice was served should be excused having regard to my exceptional circumstances.

**I have enclosed an accompanying statement to support my application.**

Signed: \_\_\_\_\_

Address\* for the  
service of documents: \_\_\_\_\_ Postcode: \_\_\_\_\_

\*Section 22(2)(ii)(d) in the Infringements Act 2006 requires you to provide your current address.

<sup>#</sup>Your application must be in writing and needs to be accompanied by a statement and any evidence such as medical, psychological, or case worker reports.

<sup>^</sup>'Special Circumstances' are defined by the Infringements Act 2006 and relate to a person with a mental or intellectual disability, disorder, disease or illness or a serious addiction to drugs or alcohol which results in a person being unable to understand the offending conduct or unable to control the conduct. Special circumstances also extend to the homeless, where homelessness results in the person being unable to control the offending conduct.

If you have been served with more than one infringement notice, an application for internal review will need to be completed and submitted for **each infringement notice** that you wish to have reviewed. Only one application for internal review can be made regarding any one infringement offence.

As part of the internal review process you may be asked for additional information and, if this occurs, you must provide that information within 14 days.

The person conducting the internal review may decide, in all the circumstances, to:

- withdraw the infringement notice and refer the matter for prosecution in court; OR
- confirm the decision to issue the infringement notice; OR
- withdraw the infringement notice and serve an official warning in its place; OR
- withdraw the infringement notice; OR
- waive all or any prescribed costs; OR
- approve a payment plan; OR
- any combination of these actions.

Further information and information relating to eligibility for payment plans and applying for internal review can be obtained by telephoning \_\_\_\_\_ on:

Send correspondence relating to this infringement notice to:

**SEARCH WARRANT**  
**MAGISTRATES' COURT GENERAL REGULATIONS 2000**  
**FORM 15**

Court Ref.

**Name and/or description of person or article, thing or material**

**Place where search will be conducted for article, thing or material**  
Number and name of street  
Suburb

**Reason for search/Suspected offence**

**This Warrant authorises**

<b>Name, Rank, No.</b>	<input type="text"/>
<b>Agency and Address</b>	<input type="text"/>

Or all members of the police force:

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Search for a person  
to break, enter and search any place where the person named or described in this warrant is suspected to be;  
and  
to arrest the person named or described in this warrant.

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Search for any article, thing or material of any kind  
to break, enter and search any place named or described in this warrant for any article, thing or material of any kind named or described in this warrant;  
and  
to bring the article, thing or material before the Court so that the matter may be dealt with according to law;  
and  
to arrest any person apparently having possession, custody or control of the article, thing or material.

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This warrant is authorised by section 134 of the Planning and Environment Act 1987

Issued at        am/pm on        /        /        by        Magistrate