

## **PLANNING ENFORCEMENT OFFICER'S ASSOCIATION**

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### **OVERVIEW OF VCAT**

At the outset, it is worth giving a brief snapshot of VCAT because it is a very large organisation of which the Planning and Environment List is only part.

A Supreme Court Judge heads VCAT as President. Until his recent resignation, this position was occupied by Justice Morris. County Court judges serve as Vice Presidents and currently Judge John Bowman of the County Court is acting president. Eight Deputy Presidents head the various Lists. In addition to the presidential members there are approximately 180 members: 38 of these are full time members and the balance are sessional members. The Planning and Environment List has the greatest number of full time members – 15 including two presidential members – and 26 sessional members.

VCAT is structured into three divisions – Civil Division, Administrative Division and Human Rights Division. Each of those divisions is structured into Lists: for example, the Anti Discrimination List and Guardianship List are within the Human Rights Division; the Civil Claims List, Domestic Building List, Real Property List, Retail Tenancies List, Residential Tenancies List are within the Civil Division; with the General List, Taxation List, Land Valuation List, Occupational and Business Regulation List and Planning and Environment List within the Administrative Division.

The Planning and Environment List is not the biggest List within the Tribunal but it is one of the most controversial. In the year 2005 – 06, some 89,000 applications were lodged with the Tribunal. Over 66,000 of these were in the Residential Tenancies List. 3,500 applications were lodged in the Planning and Environment List. So far this year, the number of applications lodged has fallen by 9% compared to the same time last year.

### **ENFORCEMENT ORDERS – PLANNING AND ENVIRONMENT LIST**

The Tribunal has both a review jurisdiction and an original jurisdiction. In the Planning and Environment List, by far the greatest number of applications are in the Tribunal's review jurisdiction and concern applications for planning permits. Applications for enforcement orders are part of the Tribunal's original jurisdiction. They constitute about 4% of applications made in the Planning and Environment List. Whilst not a large percentage, they nevertheless constitute an important aspect of the Tribunal's work. They are the ultimate sanction if a

person breaches a planning permit or section 173 agreement, planning scheme or the Act itself.

Anybody may apply for an enforcement order, not just the responsible authority. Applications vary in scale from matters concerned with breach of permit conditions relating to tree protection during construction to the breach of an amenity condition in a permit for a gas fired power station where excessive noise resulted in a recent interim enforcement order requiring the power station to shut down during office hours.

Enforcement orders are powerful tools in the planning armoury and as planning enforcement officers you have a very important role to play in maintaining compliance with both the Act, planning schemes, especially where use or development was carried out without a permit, and in enforcing the conditions under which use or development is permitted.

## **PRACTICE DAYS**

A recent innovation in the way in which enforcement orders are dealt with by the Tribunal is the initial referral of all enforcement order applications to a practice day hearing, which are conducted every Friday.

Once an application is received together with all supporting material, the practice note material is supplied, statement of service filed and the period for lodging objections has expired, the application is automatically listed for a practice day hearing. The notice of hearing indicates that the Tribunal has two options:

- If the application is one that has limited issues and can be considered within 60 minutes, VCAT may proceed to hear the merits of the application. Parties are advised that they should be prepared for this eventuality.
- If the application has a number of issues or more complex issues, then the hearing is conducted as a directions hearing. VCAT may give directions in relation to the future conduct of the matter, the exchange of witness statements and/or expert reports. It is also determined whether the matter is suitable for mediation or whether it should be listed for hearing.

Parties are requested to attend the hearing with the following:

- Advice as to any related applications;
- All evidence and documentation in the eventuality that the application is heard on the day;
- If any party is seeking directions copy, a copy of the orders or directions sought;
- Provide a draft of terms of settlement if the matter is likely to be settled by consent on the day.

We have found that practice day hearings are most successful in promoting action on the part of the respondents. For example many enforcement order applications are issued when use or development has occurred without a planning

permit. Respondents have often been advised of the need to apply for a planning permit but have failed to do so. It is remarkable how often the service of an enforcement order application.

Often parties will seek consent orders at the practice day hearing. They may be consent orders which govern the future conduct of the proceeding; they may defer the proceeding to an administrative mention whilst a planning permit application is pursued with the council; or they may result in an enforcement order itself being made.

If the matter is simple and straightforward, and the parties are all present and ready to proceed, the member conducting the practice day may either hear from the parties and decide the matter personally or may refer the matter to another planning member on the day to be heard and determined. This depends largely on the volume of business before the Tribunal on the particular day.

Practice days are a good opportunity for the Tribunal to identify any deficiencies in the application itself; for example, in terms of the relief sought or the level of detail provided about the alleged breach or non-compliance. The Tribunal can join parties or give directions in cases where service of the application is proving difficult. In a recent case, a co-owner of land had disappeared and all endeavours to find her or an address for service had failed. The Tribunal was able to make an order pursuant to section 72(3) of the *Victorian Civil and Administrative Tribunal Act 1998* that it was satisfied that the applicant had made all reasonable attempts to serve a copy of the application for enforcement order on the particular respondent, but had been unsuccessful, and to dispense of the need for service of the application on the co-respondent. Section 72(3) of the *Victorian Civil and Administrative Tribunal Act 1998* is a particularly useful section to bear in mind in circumstances where you are having difficulties locating a person who must be served with an application.

## **MEDIATION**

In an increasing number of cases, the Tribunal is referring enforcement order applications to mediation. We are finding that mediation can be especially successful in cases where there is alleged breach of a planning permit. There are a number of reasons why mediation may be beneficial.

Often, making an enforcement order application is the culmination of a long running dispute. This is often the case where the applicant is not the council but a third party such as a neighbour. In these sorts of neighbourhood disputes, the council is often the “meat in the sandwich”. An applicant may sometimes apply for their own enforcement order when they feel the council has failed to act. In our experience, a mediation allows all the underlying issues associated with the dispute to be ventilated and possible options explored in a way that the more structured and formal process of a hearing may not. A mediation can also be very cost effective. A bitterly fought enforcement order application where evidence must be given on oath or affirmation and subject to cross examination may run on for many days and involve expensive legal fees. A mediation may be

able to produce an agreed outcome in a day or less with savings in financial and emotional terms to all concerned.

Importantly, if an outcome is agreed by the parties, there is a far greater likelihood of it being implemented and adhered to than if it is imposed by the Tribunal.

## **ENFORCEMENT OF ENFORCEMENT ORDERS**

This leads me to the subject of the enforcement of enforcement orders. It is not the Tribunal's role, nor does it have the power or resources, to enforce its own enforcement orders.

The primary onus to comply with an enforcement order is of course on the person or persons against whom the order is made. Under section 123 of the *Planning and Environment Act 1987*, the responsible authority, or with the consent of the Tribunal any other person, may carry out any work which an enforcement order or interim enforcement order required to be carried out which has not been carried out within the period specified in the order; and recover the costs of the work from the person in default. The responsible authority or other person carrying out the work may sell any building, equipment or other material salvaged in carrying out the work and apply the proceeds of the sale toward payment of the expenses incurred in carrying out the work.

I do not know how often councils take action pursuant to section 123, not often I suspect. In my view, it is important for councils to consider the likelihood of compliance with an enforcement order when proceedings are commenced. Occasionally, you come across people suffering from mental health problems or with very fixed, extreme views about their "freedom" to use or develop land without the need for a permit, where it is evident from the outset that it is extremely unlikely that they will ever comply with an enforcement order or pay costs awarded against them. Sometimes some "social work" may be more effective than an enforcement order application. In other situations, council may decide to apply for an enforcement order knowing that an enforcement order or interim enforcement order served on an owner or occupier of land is binding on every subsequent owner or occupier to the same extent as the original. Under section 124 of the Act. The council may decide to get its order and play a waiting game.

Section 125 of the Act provides that whether or not proceedings are instituted for an offence against the Act, the responsible authority or any other person may apply to a court of competent jurisdiction for an injunction restraining any person from contravening an enforcement order or interim enforcement order. Injunctions, though, are usually only effective where you wish to restrain someone from doing something; for example, using land in a particular way or continuing with a development.

Under the *Victorian Civil and Administrative Tribunal Act 1998*, a person who fails to comply with an order of the Tribunal may be guilty of contempt of the Tribunal. Under section 137 of the Act, this may open them to arrest,

imprisonment or fine. A recent contempt case before Justice Morris involving non-compliance with an enforcement order directing the removal of tyres from a property was the case of *Melton SC v Shabani*<sup>1</sup>. It was a case where ultimately the council withdrew the contempt proceeding because the Environment Protection Authority stepped in and served a cleanup notice on the respondents. But the respondents were ordered to pay the council's costs of some \$13,000.

Section 122 of the *Victorian Civil and Administrative Tribunal Act 1998* deals with the enforcement of non-monetary orders. A person may enforce a non-monetary order by filing the order in the Supreme Court upon which the order must be taken to be an order of the Supreme Court, and may be enforced accordingly.

Section 133 of the *Victorian Civil and Administrative Tribunal Act* provides that a person who does not comply with an order of the Tribunal, other than a monetary order, is guilty of an offence. The penalty is imprisonment until the person complies with the order or for three months, whichever is sooner, or a fine of 20 penalty units and 5 penalty units for each day the non-compliance continues after the making of the order, up to a maximum total fine of 50 penalty units, or both imprisonment and fine.

Section 139 of the Act provides, though, that if a person commits an act or omission which constitutes both an offence and contempt of the Tribunal, they may be charged either with the offence or the contempt or both but cannot be punished more than once for the same act or omission.

It is worth noting in connection with this whole issue of how to enforce an enforcement order that under section 122(5) of the *Planning and Environment Act*, in any proceedings or contravention of an enforcement order or interim enforcement order, it is not relevant whether or not the use or development affected by the order contravened or may have contravened the Act, a planning scheme, a permit condition or an agreement under section 173. What this means is that it is only necessary to prove the breach once. This is done in the context of the enforcement order proceeding. Once you have an enforcement order made by the Tribunal, it may then be enforced or proceedings brought for its contravention without a respondent being able to attack the basis upon which the enforcement order was made.

However, these options for enforcing enforcement orders are at the extreme end of the scale. For the most part, enforcing enforcement orders will depend upon close and persistent monitoring by planning enforcement officers such as yourselves. This presupposes that you have been successful in obtaining an appropriate enforcement order. At this stage, it is therefore appropriate to make a few observations about the actual application for an enforcement order.

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<sup>1</sup> [2007] VCAT 382

## **FORM OF APPLICATION**

In completing an application for enforcement order it is important to identify the correct people against whom you want an order to be made. They should fall into one or more of the categories set out in section 114(3) of the *Planning and Environment Act 1987*.

It is important to give adequate information about the alleged breach and enough information to enable respondents to understand what is alleged and what relief is sought. Thus it is not enough to simply say the respondent has breached condition A of permit XYZ. The application should include a copy of the permit and you should say how they have breached the condition. It is better to provide an appropriate level of information and an outline of the evidence to be relied upon in the application they have to respond to requests for further and better particulars of the alleged breaches.

Remember that the onus will rest on the applicant to prove the case on the balance of probabilities. The degree of proof required to establish the case needs to be commensurate with the gravity of the fact to be proved.

An enforcement order application must identify the relevant provision of the planning scheme, planning permit, section 173 agreement or the Act itself that the applicant alleges is being breached. One mistake which is commonly made in this respect is to include a breach of section 126 of the Act.

Section 126 makes it an offence to contravene a planning scheme, a permit or agreement. However, Division 2 of Part 6 of the Act deals with offences whereas Division 1 deals with enforcement orders. They are quite different. Division 2 is concerned with punishment whereas Division 1 is concerned with enforcement and rectification. Its purpose is to stop contraventions of the Act, planning scheme, permit condition or agreement.

An offence under section 126 of the Act is punishable by the issue of a planning infringement notice (PIN) which may be ultimately judiciable in the Magistrates Court. Proceedings under Division 2 involve different forums, different procedures and different standards of proof. It is possible for a planning infringement notice to be issued as well as making application for an enforcement order at VCAT. However, the Tribunal cannot order the council to withdraw a planning infringement notice or otherwise make any directions about actions a responsible authority may take under Division 2 of Part 6. Thus it makes no sense to make any reference to section 126 in an application for an enforcement order when detailing what provisions of the Act, scheme, permit or agreement have been breached.

## **WHAT ORDERS CAN BE MADE**

It is also important to frame the orders being sought carefully. It is pointless, inappropriate and confusing to seek enforcement orders in terms that go beyond the powers of the Tribunal under section 119(b).

For example, the Tribunal cannot make an enforcement order requiring a respondent to make an application for a planning permit. That is not an action that falls within the ambit of section 119(b). Equally, it is not appropriate for an enforcement order to be made requiring land to be restored or landscaping or revegetation in accordance with a plan to be prepared to the satisfaction of the responsible authority or some other body. If such a plan is to be prepared, the Tribunal may give directions that one be prepared and may adjourn a proceeding until that occurs. But an enforcement order needs to be specific and needs to identify the works to be carried out by reference to an identifiable plan. Authority for this proposition is to be found in *Cardinia SC v Cooke*<sup>2</sup>.

More recently this issue was addressed by Member Rickards in *Whittlesea CC v Ozimek*<sup>3</sup>.

The *Ozimek* case was concerned with removal of native vegetation without a permit. The council applied for an enforcement order requiring the provision of native vegetation offsets to occur on land other than land which was the subject of the enforcement application. The Tribunal held that it was:

[24] ... unable to conclude that an order that specifies that an offset is to be provided within a specified time ensures compliance with the planning scheme under [section 119(b)(v)(B)]. Requiring that an offset is provided, although a matter of discretion and strongly supported in various circumstances, relates to the granting of a permit under clause 52.17 and the Framework it does not result in compliance with the planning scheme when the vegetation is removed without a permit. In such circumstances there can be no order that would ensure compliance with the planning scheme.

[25] The provisions of Part 6 Division 1 PE Act confine the Tribunal to consideration of the land on which a contravention has or is likely to occur. In particular section 119 PE Act confines the powers of the Tribunal to making an order only in relation to such land. The Tribunal cannot therefore make an order under the enforcement provisions requiring offsets to occur on other land.

Removing native vegetation without a permit is a common reason for enforcement proceedings to be undertaken. In these circumstances, any rectification must be undertaken on the subject land not on alternative land. If a responsible authority is satisfied with this provision of an off-site offset as an option and the respondent consents, it may be the subject of an agreement between the parties. But it does not appear as though the Tribunal could make an enforcement order to this effect.

In my view, the DSE should possibly give some consideration as to whether the provisions of section 119(b) should be amended to enable enforcement orders to be made requiring the provision of native vegetation offsets elsewhere. It is not

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<sup>2</sup> [2001] VCAT 1651

<sup>3</sup> [2006] VCAT 2283. See also *Whittlesea CC v Plenty Living Pty Ltd* [2006] VCAT 2602

unknown for a landowner to decide to go ahead and remove native vegetation illegally and simply wear the costs of any fine as part of the development cost. Once vegetation is removed, it is very difficult to satisfactorily restore the land to its previous condition. The Tribunal can, of course, require the vegetation to be replanted, and this may preclude the land from being used in the way the respondent may have wished to use it on clearing the vegetation. But sometimes the preferable outcome might be to require offsets to be provided elsewhere. This is something that the government needs to give consideration to.

### **LANDSCAPING CONDITIONS**

Vegetation is a particularly vexed issue for planning enforcement officers and for councils generally. There are lots of issues associated with the removal of vegetation without a permit. Equally, there are problems associated with requiring new vegetation pursuant to landscaping conditions in planning permits.

The Tribunal regards landscaping conditions as extremely important. Landscaping has a major impact on ameliorating the appearance of new development and contributing to amenity and neighbourhood character.

It is most important that their satisfactory implementation is followed up and that landscaping is maintained over time.

### **CONCLUSION**

Whilst I could say more about the detail of other provisions in the Act, it is possibly more helpful now to respond to any specific questions you may have.