Construction, the Community and Neighbours LAWS90040—Panel Discussion

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OVERVIEW OF STATUTORY CONTROLS ON DEVELOPMENT IN VICTORIA

The principal Victorian legislation is the *Planning and Environment Act* 1987

1. The principal legislation for determining issues of land use and development in Victoria is the *Planning and Environment Act* 1987 (**Act**). Other statutes that work in tandem with the Act include:

    a) *Victorian Civil and Administrative Tribunal* 1998;

    b) *Environment Protection Act* 1970;

    c) *Subdivision Act* 1988;

    d) *Liquor Control Reform Act* 1998;

    e) *Land Acquisition and Compensation Act* 1986;

    f) *Local Government Act 1989; and*

    g) *Public Health and Wellbeing Act* 2008.

The Act regulates the use and development of land

2. The purpose of the Act is to establish a framework for the use, development and protection of land in Victoria:

> **1 Purpose**
>
> The purpose of this Act is to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians.

3. Use is defined in section 3 of the Act as follows:

> ... in relation to land includes use or proposed use for the purpose for which the land has been or is being or may be developed;[1]

4. Development is also defined to include:

> (a) the construction or exterior alteration or exterior decoration of a building; and
>
> (b) the demolition or removal of a building or works; and
>
> (c) the construction or carrying out of works; and
>
> (d) the subdivision or consolidation of land, including buildings or airspace; and
>
> (e) the placing or relocation of a building or works on land; and
>
> (f) the construction or putting up for display of signs or hoardings;[2]

[1] Section 3

[2] Section 3

The objectives of planning in Victoria are broad

5. The objectives of planning in Victoria are broad-based but essentially aim to facilitate development in a sustainable way:

> **4 Objectives**
>
> (1) The objectives of planning in Victoria are—
>
> (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
>
> (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
>
> (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
>
> (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
>
> (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;
>
> (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);
>
> (g) to balance the present and future interests of all Victorians.

6. Applying these objectives, if the Minister wished to reject a planning panel recommendation on the basis that the proposed boat ramp posed a risk to surfers, would this be a lawful exercise of power?[3]

Planning authorities determine the content of planning schemes, responsible authorities administer planning schemes

7. There is an important distinction in the *Planning and Environment Act* 1987 between planning and responsible authorities, although municipal councils can take on both roles.

8. In broad terms, planning authorities *determine the contents* of a planning scheme:

> **12 What are the duties and powers of planning authorities?**
>
> (1) A planning authority must—
>
> (a) implement the objectives of planning in Victoria;
>
> (b) provide sound, strategic and co-ordinated planning of the use and development of land in its area;
>
> (c) review regularly the provisions of the planning scheme for which it is a planning authority;

[3] *Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change* [2010] VSC 222

(d) prepare amendments to a planning scheme for which it is a planning authority;

(e) prepare an explanatory report in respect of any proposed amendment to a planning scheme;

(f) provide information and reports as required by the Minister.

9. Responsible authorities *administer* the various planning schemes:

> **14 What are the duties of a responsible authority?**
>
> (1) The duties of a responsible authority are—
>
> (a) to efficiently administer and enforce the planning scheme; and
>
> (aa) to enforce any enforcement order or interim enforcement order relating to land covered by a planning scheme for which it is the responsible authority; and
>
> (b) to implement the objectives of the planning scheme; and
>
> (c) to comply with this Act and the planning scheme; and
>
> (d) to provide information and reports as required by the Minister.

10. This is an important distinction, particularly in the context of review proceedings at VCAT for the Tribunal will almost certainly be limited to exercising the powers of a Responsible Authority. In other words, it has no power to determine what the planning scheme *should* contain—it must take the scheme as it finds it.

11. Hearings administered by Planning Panels Victoria assist in the assessment of proposed amendments to planning schemes through panel hearings and advisory committees.

12. These two areas of practice occupy the lion's share of appearance work for planning and environment lawyers.

Notice is to be given to those who may suffer material detriment

13. The Responsible Authority is obliged to give notice of permit applications to a specified variety of persons, in particular, those who may suffer material detriment:

> **52 Notice of application**
>
> (1) Unless the responsible authority requires the applicant to give notice, the responsible authority must give notice of an application in a prescribed form—
>
> …
>
> (d) to any other persons, if the responsible authority considers that the grant of the permit may cause material detriment to them.

14. Responsible Authorities have learned to adopt the adage "when in doubt, advertise".[4]

[4] *Cooper v Surfcoast Shire Council* [2000] VCAT 2180; *The Secretary to the Department of Health and Human Services and Melbourne Health v Melbourne CC (Red Dot)* [2016] VCAT 2051

Applications are referred to relevant statutory authorities

15. In a somewhat similar but distinct process, applications are also provided to relevant statutory authorities for their comments and conditions:

> **55 Application to go to referral authorities**
>
> (1) A responsible authority must give a copy of an application, together with the prescribed information, to every person or body that the planning scheme specifies as a referral authority for applications of that kind without delay unless the applicant satisfies the responsible authority that the referral authority has—
>
> (a) considered the proposal for which the application is made within the past three months; and
>
> (b) stated in writing that it does not object to the granting of the permit for the proposal.
>
> (2) The referral authority must tell the responsible authority in writing within the prescribed time after getting the application if it needs any more information.
>
> (3) The referral authority must give to the applicant, without delay, a copy of any request that it makes to the responsible authority under subsection (2) in respect of the application.
>
> (4) A planning scheme may specify that a referral authority is—
>
> (a) a determining referral authority; or
>
> (b) a recommending referral authority.

Objections and submissions may be made by third parties

16. The Act provides that *any person who may be affected* by the grant of the permit may object to the grant of a permit:

> **57 Objections to applications for permits**
>
> (1) Any person who may be affected by the grant of the permit may object to the grant of a permit.

17. This is a broad test of standing that is rarely tested in practice.

The comments of third parties and referral authorities must be taken into account

18. The responsible authority is obliged to consider:

a) all objections and other submissions which it has received and which have not been withdrawn; and

b) any decision and comments of a referral authority which it has received—

amongst other things:

> **60 What matters must a responsible authority consider?**
>
> (1) Before deciding on an application, the responsible authority must consider—

(a) the relevant planning scheme; and

(b) the objectives of planning in Victoria; and

(c) all objections and other submissions which it has received and which have not been withdrawn; and

(d) any decision and comments of a referral authority which it has received; and

(e) any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development; and

(f) any significant social effects and economic effects which the responsible authority considers the use or development may have.

(1A) Before deciding on an application, the responsible authority, if the circumstances appear to so require, may consider—

(b) the approved regional strategy plan under Part 3A; and

(c) any amendment to the approved regional strategy plan under Part 3A adopted under this Act but not, as at the date on which the application is considered, approved by the Minister; and

(d) the approved strategy plan under Part 3C; and

(e) any amendment to the approved strategy plan under Part 3C adopted under this Act but not, as at the date on which the application is considered, approved by the Minister; and

(ea) the approved strategy plan under Part 3D; and

(eb) any amendment to the approved strategy plan under Part 3D adopted under this Act but not, as at the date on which the application is considered, approved by the Minister; and

(f) any relevant State environment protection policy declared in any Order made by the Governor in Council under section 16 of the Environment Protection Act 1970; and

(g) any other strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council; and

(h) any amendment to the planning scheme which has been adopted by a planning authority but not, as at the date on which the application is considered, approved by the Minister or a planning authority; and

(i) any agreement made pursuant to section 173 affecting the land the subject of the application; and

(j) any other relevant matter.

Standing for third parties in planning disputes is broad

19. *Any person who is affected* may apply to the Tribunal for leave to apply for review of a decision of the responsible authority to grant the permit:

82B Affected person may seek leave to apply for review

(1) Any person who is affected may apply to the Tribunal for leave to apply for review of a decision of the responsible authority to grant the permit in any case in which a written objection to the grant of the permit was received by the responsible authority.

20. Once again, standing for persons claiming to be affected is rarely tested given the Tribunal's default approach of allowing people to be heard.

21. Standing for third parties in enforcement proceedings is expressed in even broader terms:

114 Application for enforcement order

(1) A responsible authority or *any person* may apply to the Tribunal for an enforcement order against any person specified in subsection (3) if a use or development of land contravenes or has contravened, or, unless prevented by the enforcement order, will contravene this Act, a planning scheme, a condition of a permit or an agreement under section 173.

22. Similarly, under section 82 of the *Planning and Environment Act 1987*, any person who lodged an objection to the grant of a planning permit can apply to VCAT for merits review of a decision:

82 Applications for review where objectors

(1) An objector may apply to the Tribunal for review of a decision of the responsible authority to grant a permit.

23. Planning schemes may exempt classes of applications for permits, such as development applications for dwellings in the city, or where planning controls have already been subject to a public process of assessment, for example following the adoption of a development plan overlay:

(2) A planning scheme may set out classes of applications for permits the decisions on which are exempted from subsection (1).

(3) If a planning scheme exempts a decision of an application for a permit from subsection (1), an application for review cannot be made under that subsection in respect of that decision.

"Existing use rights" serve to protect accrued rights from changes in planning controls

Existing use rights arise under s6(3) of the Act

24. The grant of a permit can establish an accrued right and will normally receive the protection by 6(3) of the Act. Examples include a hotel in a residential area[5] or an advertising sign that predated mandatory expiry provisions.[6]

25. Section 6(3) of the *Planning and Environment Act* 1987 provides:

[5] *Stonnington CC v Abgol Pty Ltd* [2005] VCAT 2346

[6] *APN Outdoor (Trading) Pty Ltd v Melbourne City Council* [2012] VSC 8

(3) Subject to subsections (4) and (4A), nothing in any planning scheme or amendment shall-

(a) prevent the continuance of the use of any land upon which no buildings or works are erected for the purposes for which it was being lawfully used before the coming into operation of the scheme or amendment (as the case may be); or

(b) prevent the use of any building which was erected before that coming into operation for any purpose for which it was lawfully being used immediately before that coming into operation; or

(d) prevent the use of any building or work for any purpose for which it was being lawfully erected or carried out immediately before that coming into operation;

Existing use rights may be proved by establishing fifteen years of continuous use

26. To avoid land users having to prove long periods of continuing lawful use, the fifteen year rule was introduced with the advent of the new format planning schemes in or about 2000:

63.11 Proof of continuous use

If, in relation to an application or proceeding under the Act or this scheme, including an application for a certificate of compliance under Section 97N of the Act, the extent of any existing use right for a period in excess of 15 years is in question, *it is sufficient proof of the establishment of the existing use right if the use has been carried out continuously for 15 years prior to the date of the application or proceeding*.

An existing use right may be established under this clause even if the use did not comply with the scheme immediately prior to or during the 15 year period, unless either:

- At any time before or after commencement of the 15 year period the use has been held to be unlawful by a decision of a court or tribunal.
- During the 15 year period, the responsible authority has clearly and unambiguously given a written direction for the use to cease by reason of its non-compliance with the scheme.[7]

***Public Health and Wellbeing Act* 2008**

27. Section 58 of the *Public Health and Wellbeing Act* 2008 defines nuisance in broad and subjective terms:

Division 1—Nuisances

58 Application of Division

(1) This Division applies to nuisances which are, or are liable to be, dangerous to health or offensive.

(2) Without limiting the generality of subsection (1), this Division applies in particular to nuisances arising from or constituted by any—

[7] Emphasis added.

(a) premises; or

(b) water; or

(c) animal, including a bird or insect, capable of carrying a disease transmissible to human beings; or

(d) refuse; or

(e) noise or emission; or

(f) state, condition or activity; or

(g) *other matter or thing*—

which is, or is liable to be, dangerous to health or offensive.

(3) For the purpose of determining whether a nuisance arising from or constituted by any matter or thing referred to in subsection (2) is, or is liable to be, dangerous to health or offensive—

(a) regard must not be had to the number of persons affected or that may be affected; and

(b) regard may be had to the degree of offensiveness.

(4) In this section, *offensive means noxious or injurious to personal comfort.*

28. Section 61 of the *Public Health and Wellbeing Act* 2008 sets out the offence of causing a nuisance:

Offence of causing a nuisance

(1) A person must not—

(a) cause a nuisance; or

(b) knowingly allow or suffer a nuisance to exist on, or emanate from, any land owned or occupied by that person.

Penalty: In the case of a natural person, 120 penalty units;

In the case of a body corporate, 600 penalty units.

(2) A person is not guilty of an offence under subsection (1)(b) if the person had a lawful excuse for knowingly allowing or suffering a nuisance to exist on, or emanate from, any land owned or occupied by that person.

29. Councils have a statutory duty to investigate allegations of nuisance within their municipality. This is an under-utilised provision. A letter seeking an investigation pursuant to this Act might take the following form:

I am writing to you pursuant to s62 of the *Public Health and Wellbeing Act* 1998 (Act) to request Council investigate the ongoing nuisance arising from the operation of the … Feedlot and/or composting operations at ….

This nuisance arises principally from three matters; odour, dust and truck movements, the particulars of which are set out in the Correspondence.

You will be aware that the Shire has a statutory duty under s60 of the Act "to remedy as far as is reasonably possible all nuisances existing in its municipal district." However, we

have drawn your attention to the nuisance in the Correspondence but to date, insufficient if any enforcement action has been taken on the Shire's part. We now request that Council issue an improvement or prohibition notice under the Act as a matter of urgency.

Please seek legal advice to ensure that any improvement and/or prohibition notice is legally effective and keep us informed as to Council's actions in response to this request.

Planning permits can no longer be granted where they conflict with restrictive covenants

30. Historically, the public-law planning system was unconcerned by the granting of permits that were at odds with the private-law constraints of restrictive covenants. That practice ended after residents in Ivanhoe were forced to seek an injunction to prevent a developer from building three houses on a block, for which it enjoyed planning permission, but which was in breach of a restrictive covenant.[8]

31. Soon after this case, the Victorian Parliament enacted the *Planning and Environment (Restrictive Covenants) Act* 2000, which provided, in part:

> (4) If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.

32. Since then, applicants have had to declare that applications do not breach restrictive covenants, transferring, as one government lawyer has lamented, the primary regulatory burden for interpreting and enforcing restrictive covenants onto local councils.

33. For what might be described as "deadwood" covenants, an application may be made for a planning permit to remove or modify a covenant pursuant to clause 52.05 of a planning scheme. However, the operation of s60(5) of the Act means that where there is a real prospect of genuine opposition, this avenue is to be avoided. S60(5) provides:

> The responsible authority must not grant a permit which allows the removal or variation of a restriction … unless it is satisfied that—
>
> (a) the owner of any land benefited by the restriction … will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction;

34. As described by VCAT in *Hill v Campaspe SC*[9] this is "a high barrier that prevents a large proportion of proposals." For covenants created on or after 25 June 1991, a less restrictive test applies.[10]

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[8] *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258

[9] [2011] VCAT 949

[10] *PEA* S60(2): … must not grant a permit which allows the removal or variation of a restriction unless … the owner of any land benefited by the restriction … will be unlikely to suffer "a) financial loss; or b) loss of amenity; or c) loss arising from change to the character of the neighbourhood; or d) any other material detriment—as a consequence of the removal or variation of the restriction."

35. A further disincentive to rely on this provision is the need to notify all, rather than the closest beneficiaries of the application.[11]

PROCEEDINGS AT VCAT

VCAT has a broad jurisdiction

36. Appeals to VCAT can be made in a number of circumstances, including applications for review:

    a) where there are objectors;[12]

    b) of refusals to grant permits;[13]

    c) of failures to grant permits;[14] and

    d) of conditions on permits.[15]

37. In *Zumpano v Banyule CC* [2015] VCAT 1572 the Tribunal explained, in the context of repeat appeals, that the Tribunal considers applications anew, on their merits:

> 10 While the Tribunal is not bound by precedent and must consider each application de novo, there are long established principles regarding repeat appeals that are relevant to this review. These principles are very well expressed by Member Sibonis in *Zinc Melbourne v Banyule CC* and I repeat his summary so there is no confusion:[16]
>
> > In the seminal case of *Amoco Australia Limited v City of Berwick*[2], the Planning Appeals Board (a predecessor of the Tribunal) had stated:
> >
> > > Although the Board believes that it should deal with this appeal on its merits it also holds that, in determining the appeal, it should pay regard to the previous decision of the Board and give great weight to that decision. Public policy demands that there be some end to litigation. If applicants were to repeatedly come before the Board, perhaps seeking to exhaust the patience of the Board or even in an attempt to pick and choose a suitable division of the Board to hear the appeal, then it would be to the detriment of the appeals system. Moreover repeated appeals would impose unnecessary costs on respondent parties including, in some cases, psychological costs. One can imagine a case where a developer wears down both a Responsible Authority and objectors by repeatedly making fresh applications. This ought to be discouraged.

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[11] *PEA* s52(1)(cb)

[12] Section 82

[13] Section 77

[14] Section 79

[15] Section 80

[16] *Zinc Melbourne Pty Ltd v Banyule CC* [2013] VCAT 2111 paras 5 and 6

and later:

> ... the Board believes that an applicant can make repeated applications for a permit and repeated appeals to this Board. However in determining any subsequent appeal the Board should take the earlier determination into account and give it great weight. Generally speaking the earlier decision should not be reversed unless the applicant can show a change in circumstances which warrant a different view.

VCAT is an expert Tribunal

38. In *ISPT Pty Ltd v Melbourne City Council* [2007] VCAT 652, the Supreme Court observed that Tribunal members are chosen for their expertise. To a degree, this allows the Tribunal to depart from the evidence presented to it:

> In vesting power in the Tribunal to review a valuation the Parliament should be taken to understand the structure and the nature of the Tribunal. In particular, it should be taken to understand that the Tribunal is an expert tribunal where the practice is to assign cases for lists where the members hearing a case have knowledge or experience of matters likely to arise in the list. Furthermore, the Parliament should be taken to have contemplated that the review of a matter would involve a complete reassessment, and the exercise of a judgment, in respect of the matter; and not just the acceptance of one side or another. Hence, subject to natural justice considerations, there was clearly some role for the Tribunal to use its expert knowledge and skill in the review of a valuation.

VCAT is bound by the rules of natural justice

39. The Tribunal is bound by the rules of natural justice. However, it is to determine proceedings with speed and efficiency:

> **98 General procedure**
>
> (1) The Tribunal—
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself on any matter as it sees fit;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

40. Thus, while aspiring to be informal, proceedings can be expensive and complex to run. For instance, in *The Secretary to the Department of Health and Human Services and Melbourne Health v Melbourne CC* [2016] VCAT 2051, the Department sought to have three storeys of a building removed from a permitted development on the grounds that it would interfere with the flight path of helicopters from the Royal Melbourne Hospital.

The hearing extended over 12 days between March and June 2016, and the Tribunal heard from 16 witnesses.

Compulsory conferences can be a useful for resolving disputes

41. Compulsory conferences can be useful for settling planning and environmental disputes if parties are close on the merits, or if the issues in dispute can be narrowed. They are rarely useful if one party is implacably opposed to settling.

The order the of the hearing may vary

42. The Responsible Authority will generally present its case first, followed by referral authorities, followed by the objectors and then the permit applicant. A short reply responding to new issues is typically allowed.

43. The role of the Responsible Authority is two-fold:

    a) to objectively inform the Tribunal of the relevant controls and policies; and separately

    b) to articulate its case.

44. Expert evidence is circulated ten business days in advance of the hearing, unless otherwise directed by the Tribunal. Refer to the practice note for expert evidence: Practice Note – PNVCAT2 Expert Evidence

45. The primary duty of an expert witness is to the Tribunal.

ENFORCEMENT

Enforcement orders are concerned with rectification

46. Section 114 of the *Planning and Environment Act 1987* provides for enforcement applications which are concerned with rectification or reinstatement rather than punishment:

> **114 Application for enforcement order**
>
> (1) A responsible authority or any person may apply to the Tribunal for an enforcement order against any person specified in subsection (3) if a use or development of land contravenes or has contravened, or, unless prevented by the enforcement order, will contravene this Act, a planning scheme, a condition of a permit or an agreement under section 173.
>
> (3) An enforcement order may be made against one or more of the following persons—

(a) the owner of the land;

(b) the occupier of the land;

(c) any other person who has an interest in the land;

(d) any other person by whom or on whose behalf the use or development was, is being, or is to be carried out.

Interim enforcement order and injunctions[17]

47. The Tribunal also has the power to issue interim enforcement proceedings and injunctions. However, these are rarely sought for they typically require an undertaking as to damages—not simply costs.

48. An exception to this was seen in *Metroll Victoria Pty Ltd v Wyndham CC* [2007] VCAT 748. Metroll had applied for an enforcement order against Snowy Hydro Ltd to restrain it from operating a gas fired power station on the subject land. Metroll said that excessive noise and vibration from the power station was causing its staff headaches, earaches, nausea and other adverse health effects. It alleged that Snowy Hydro was operating the power station in breach of its planning permit in a way that adversely affected the amenity of the locality. Deputy President Gibson stated that:

> 120 It is a situation though where the potential quantum of the undertaking which might be called upon is so uncertain, but potentially massive, that to require an undertaking as to damages would put interim relief out of the reach of anyone other than possibly the State of Victoria or an applicant with very deep pockets. In my view, it is unrealistic to expect that a company should risk possibly putting itself out of business in order to protect the health and well-being of its employees. It is also unrealistic to expect that, when faced with a clear cut, prima facie breach of a permit, a person should be required to give an undertaking that it would not have the capacity to deliver on in the event that it was called upon.
>
> 121 A statement which has been oft-quoted is that, "The remedy of injunction should be available whenever required by justice."
>
> 122 As I noted earlier, it is relevant that the adverse effects are not being experienced by Metroll as a corporate entity but by individuals who work for Metroll and who have no option but to continue attending work each day if they wish to continue their employment. I do not consider it is just that their health or wellbeing should be discounted because Metroll, as their employer, is not prepared to given an undertaking as to damages.
>
> 123 In these circumstances, which I regard as exceptional, where there is a manifest breach of the permit now occurring that is causing serious harm, I consider the public interest will best be served by making an interim enforcement order even though there is no undertaking as to damages. Therefore I hold that an undertaking as to damages is not required.

[17] See section 125 of the *Planning and Environment Act 1987*

Penalty infringement notices are an administrative form of punishment

49. Penalty Infringement Notices are typically expiation notices that have no criminal consequences if they are paid:

> A planning infringement notice offers a quick and straightforward method for dealing with minor offences against section 126 of the *Planning and Environment Act* 1987 (the Act). These minor offences can relate to using or developing land in contravention of, or otherwise failing to comply with, a planning scheme, planning permit or agreement under section 173 of the Act.
>
> The infringement system also provides the owner or occupier of land who has committed the offence a means of expiating (making amends for) the offence without a conviction.
>
> Under section 130 of the Act, if an authorised officer of a responsible authority has reason to believe that a person has committed an offence, the authorised officer may serve an infringement notice on that person.[18]

50. In addition to payment of the penalty, the notice may also require steps such as:

a) stopping the development or use of land that constituted the offence;

b) modifying the development or use of land that constituted the offence;

c) removing the development that constituted the offence;

d) preventing or minimising any adverse impacts of the use or development of land that constitutes the offence;

e) entering into an agreement under section 173 of the Act; and

f) doing or omitting to do anything else in order to remedy the contravention.

Prosecution is more serious for breaches of permits and the planning scheme

51. Breaches of the planning scheme can also be prosecuted under s 126(3) of the *Planning and Environment Act* 1987. An example of a charge might be:

Details of the charge against you		Licence No.	State
What is the Charge? **(Description of offence)**	On 7 August 2017 you, being the occupier of land at 500 Flinders Street, Melbourne, being the rooftop, did display a major promotional sign namely a "Domain AUSTRALIA'S #1 PROPERTY APP SIGN" in contravention of the Melbourne Planning Scheme specifically clause 52.05 in the absence of a planning permit or existing use rights.		
Under what law?	Planning and Environment Act 1987 (45 of 1987)	Section 126(3)	

[18] 'Planning infringement notices', Department of Environment, Land, Water and Planning: https://www.planning.vic.gov.au/legislation-and-regulations/penalties/planning-infringement-notices

Cancellation or amendment of permits

52. Permits can also be cancelled or amended, pursuant to section 87 of the *Planning and Environment Act 1987*, on a variety of grounds:

> **87 What are the grounds for cancellation or amendment of permits?**
>
> (1) The Tribunal may cancel or amend any permit if it considers that there has been—
>
> (a) a material mis-statement or concealment of fact in relation to the application for the permit; or
>
> (b) any substantial failure to comply with the conditions of the permit; or
>
> (c) any material mistake in relation to the grant of the permit; or
>
> (d) any material change of circumstances which has occurred since the grant of the permit; or
>
> (e) any failure to give notice in accordance with this Act; or
>
> (f) any failure to comply with section 55, 61(2) or 62(1).

53. However, given that permits are accrued rights, the Tribunal is cautious about exercising these powers.

54. In *The Secretary to the Department of Health and Human Services and Melbourne Health v Melbourne CC* [2016] VCAT 2051, the Tribunal commented on the criteria that must be satisfied for a request under section 87 and that, even if these are satisfied, the Tribunal may ultimately choose not to exercise that discretion on the basis of it not being fair and just to do so:

> 64 Division 3 of Part 4 of the *Planning and Environment Act* 1987 sets out a statutory scheme for the cancellation and amendment of permits. The opportunity to make a request under section 87 of the Act is open to certain categories of third persons but they must first establish that they have standing and meet other criteria. They must then establish that there are grounds under the Act for cancelling or amending the permit. Then they must satisfy the Tribunal that they have acted promptly in making the request. Even if all these criteria are satisfied, the Tribunal may still be precluded from exercising its discretion to cancel or amend if things that the permit authorises (or an amendment may authorise) fall into certain categories.
>
> 65 The provisions of the Act are complex and each hurdle must be separately surmounted if a request is to succeed. It is also important to recognise that the power to cancel or amend a permit is discretionary and that in all cases the Tribunal must be satisfied that it is just and fair in the circumstances to cancel or amend the permit.

THE STARTING PRESUMPTION IS THAT PARTIES WILL BEAR THEIR OWN COSTS

55. Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the starting position is that each party is responsible for its own costs:

> **109 Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.
>
> (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
>
> (5) Before making an order under subsection (4), the Tribunal must give the representative a reasonable opportunity to be heard.
>
> (6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.
>
> (7) A power of the Tribunal under this section is exercisable by any member.

56. However, costs are more normally awarded when the Tribunal exercises its original jurisdiction:[19]

> 19 What can be said is this. It is more likely that the nature and complexity of a proceeding will make it fair to make an order as to costs if:
>
> - the proceeding was in the tribunal's original jurisdiction, not its review jurisdiction;
> - the proceeding involved a large number of issues, or a small number of particularly complex issues;
> - the proceeding involved a large sum of money or a major issue affecting the welfare of a party or the community;
> - the proceeding succeeded and was a type which was required to be brought, either by reason of a statutory duty or by reason of some unlawful or improper conduct by another party which warranted redress;
> - the proceeding failed and was a type where a party has asserted a right which it knew, or ought to have known, was tenuous;
> - a practice has developed that costs are routinely awarded in a particular type of proceeding, thus making an award of costs more predictable for the proceeding in question.

57. The decision in *Stonnington CC v Blue Emporium Pty Ltd* [2004] VCAT 1441 suggests that s109 is principally concerned with the parties' conduct during the proceedings rather than having regard to the substance of the dispute:

> 9 Section 109 of the *Victorian Civil and Administrative Tribunal Act* provides that, as a general rule, each party is to bear their own costs in a proceeding. However the tribunal does have the power to order that a party pay costs if it is satisfied that it is fair to do so. In this respect the tribunal is directed to a number of specific criteria. The first of those criteria is whether a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the proceeding. Examples are failing to comply with directions, failing to comply with provisions of Acts, asking for unnecessary adjournments, being vexatious and the like. Apart from the fact that the respondent, Blue Emporium Pty Ltd, was failing to comply with the *Planning and Environment Act* by not complying with the planning permit, there is no other evidence that persuades me that Blue Emporium Pty Ltd was conducting the proceeding in a way that unnecessarily disadvantaged the council. It might be said that it did not agree to give the undertaking that was sought, but it had a legitimate argument as to why that undertaking should not be given, namely that, as a matter of discretion, interim relief should not be given because there was pending a section 87 application to amend the permit which had reasonable prospects of success.
>
> 10 Other matters which the tribunal is directed to are things such as prolonging the proceeding, the relative strength of the claims made, the nature and complexity of the proceeding and so on. Looked at overall I would regard the conduct of Blue

[19] *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000

Emporium Pty Ltd in relation to matters before the tribunal, as opposed to conduct before the matter came to the tribunal, as reasonable.

APPEALS TO THE SUPREME COURT ARE AVAILABLE ON POINTS OF LAW

58. Appeals from VCAT are typically made pursuant to section 148 of the *Victorian Civil and Administrative Tribunal Act 1998*:

> **Appeals from the Tribunal**
>
> (1) A party to a proceeding may appeal on a question of law from an order of the Tribunal in the proceeding—
>
> (a) if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others, to the Court of Appeal with leave of the Court of Appeal; or
>
> (b) in any other case, to the Trial Division of the Supreme Court with leave of the Trial Division.
>
> (2) An application for leave to appeal must be made—
>
> (a) no later than 28 days after the day of the order of the Tribunal; and
>
> (b) in accordance with the rules of the Supreme Court.
>
> (3) If leave to appeal to the Trial Division of the Supreme Court is granted, the appeal must be instituted—
>
> (a) no later than 14 days after the day on which leave is granted; and
>
> (b) in accordance with the rules of the Supreme Court.
>
> (4) If the Tribunal gives oral reasons for making an order and a party then requests it to give written reasons under section 117, the day on which the written reasons are given to the party is deemed to be the day of the order for the purposes of subsection (2).

59. To succeed on appeal, the appellant must establish a vitiating error of law. The relevant test was stated by Smith J (with whom Adam J concurred) in *Portland Properties Pty Ltd v Melbourne & Metropolitan Board of Works*:[20]

> ... the appellant, in order to succeed in this case, has to demonstrate to the satisfaction of this Court that the Town Planning Appeals Tribunal went wrong in law in arriving at its decision. It would not be enough for the appellant to show that the Tribunal's reasons for its decision are so expressed as to suggest the possibility that the Tribunal proceeded upon a wrong view of the law. This Court is not entitled to interfere with the decision unless it is satisfied that there was, in fact, a vitiating error of law.

60. If acting for an applicant, a more efficient solution may be to amend the application and reapply.

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[20] (1971) 38 LGRA 6

61. If acting for an objector, be aware of the risk that a similar decision on the merits might be reached even if an appeal is successful, albeit according to law.

COMMUNITY RESOURCES

On-line resources

62. Most planning and environmental resources are available on-line, free of charge. Responsible Authorities are obliged to provide copies of permits and plans, but sometimes charge a fee for this information.

63. Worthwhile resources include:

a) http://services.land.vic.gov.au/maps/pmo.jsp

b) http://planningschemes.dpcd.vic.gov.au/

c) http://planning-schemes.delwp.vic.gov.au/updates-and-amendments

d) http://classic.austlii.edu.au/forms/search1.html

e) http://caseview.com.au/

f) https://restrictive-covenants-victoria.com/

g) http://envirojustice.org.au/

h) https://www.justiceconnect.org.au/

The Victorian Bar – Pro Bono Scheme

64. The Victorian Bar recognises pro bono as a means of ensuring access to justice:

> Not all members of our community have the means, the knowledge or the strength to fight for their rights. And the Victorian Bar recognises that.
>
> We have a long history of giving legal assistance to people in need. It is one of the defining characteristics of our Bar. Our Pro Bono Scheme was established in 2000 to formalise the process and further the reach and access to the pro bono work carried out by our barristers.
>
> Around 1000 members of the Victorian Bar participate in the Scheme, which is supervised by the Pro Bono Committee and administered by Justice Connect.[21]

65. The eligibility criteria includes:

[21] 'Pro Bono Scheme', The Victoria Bar: https://www.vicbar.com.au/public/community/pro-bono-scheme

a) having a legal problem requiring the assistance of a barrister;

b) the case having legal merit;

c) the objector not having the financial means to obtain legal assistance from a barrister on a full fee-paying basis;

d) the objector being unable to obtain appropriate legal assistance from any other source (including other legal assistance schemes); and

e) the objector having made an application for legal aid (unless it is obvious to the administrators that you are ineligible for legal aid), and either that application has been refused or no decision has been made in relation to the application.

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12 October 2017

ANNEXURE—DRAFT OUTLINE OF SUBMISSIONS

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. [INSERT]

PARTY ONE

Applicant

PARTY TWO

Responsible Authority

SUBMISSION ON BEHALF OF PARTY ONE

USE AND/OR DEVELOPMENT

66. [General description from application and plans.]

THE PROPOSAL

67. [Provide a short overview of what the proposal is.] (the "Proposal").

THE SUBJECT LAND

68. The subject land is the land known as ... (the "Subject Land").

69. [Location. Address. Melways Reference. Crown description. Dimensions. Location by reference to major features and by reference to objectors' locations.]

HISTORY OF APPLICATION

70. [If acting for the Responsible Authority, set out:

a) the date the application was lodged with the Responsible Authority;

b) details of requirements as to advertisement of the application;

c) objections received/not received;

d) date and decision on the application by the Responsible Authority; and

e) details of lodgement of appeal.]

GROUNDS OF REFUSAL

71. [Set these out if applicable.]

GROUNDS OF OBJECTION

72. [Set these out if applicable.]

GROUNDS OF APPEAL

73. [Set these out if applicable.]

APPLICANT/APPELLANT'S RESPONSE TO GROUNDS OF REFUSAL

74. [Set these out if applicable.]

ZONING

75. The Subject Land is zoned ... in the ... Planning Scheme (**Planning Scheme**).

76. The purposes of the zone are:

77. The decision guidelines for the zone are:

OVERLAYS

... Overlay

78. The Subject Land is subject to the ... Overlay.

79. The purposes of the ... Overlay are:

    a) ...

80. The decision guidelines for the ... Overlay are:

    a) ...

STATE PLANNING POLICY FRAMEWORK

81. Clause ...: "..."

82. [Set out in full and produce extracts of the planning scheme, any proposed amendments and any codes, strategic plans, policy statements or guidelines which may apply. Refer, if applicable, to any previous or existing permits which once applied or which now apply to the land.]

83. [Does the planning scheme require certain matters to be taken into account by the responsible authority when considering a particular use or development? If yes, state these. Present arguments on whether or not the responsible authority has complied with these provisions.]

LOCAL PLANNING POLICY FRAMEWORK

Municipal Strategic Statement

84. The MSS provides relevantly:

...

Other local policies

85. Clause ...: "..."

OTHER MATTERS TO BE TAKEN INTO ACCOUNT BY THE TRIBUNAL

86. [Describe here other matters to be taken into account by the Tribunal including State Environment Protection Policies, Codes of Practice etc.]

MATTERS OF LAW

87. [When possible, prior notice should be given to other parties when legal arguments are to be raised.]

PLANNING SUBMISSION RELATING TO THE EFFECT OF THE PROPOSAL

88. [Arguments as to environmental, visual, social, economic, noise, smell and traffic impacts etc.]

CONCLUSION

89. In conclusion, [summarise arguments here.]

ORDERS SOUGHT

90. For these reasons, it is respectfully requested that the Tribunal direct that a permit issue/be refused.

Name

Date

Instructed by ???
Lawyers

COMMENTS ON THE WITHOUT PREJUDICE CONDITIONS

91. [These are normally circulated in advance of the hearing. If you are acting for objectors you would be well advised to study these carefully.]