

PLANNING
SCHEMES

AMENDMENTS

PLANNING
PERMITS

OTHER
PROCEDURES

REVIEWS

ACQUISITION &
COMPENSATION

ENFORCEMENT

AGREEMENTS

PLAIN ENGLISH

USING VICTORIA'S PLANNING SYSTEM

A technical guide to interpretation and administrative procedures under the *Planning and Environment Act 1987* and the Planning and Environment Regulations 2005 and their interaction with other related legislation and planning schemes

CONTENTS



INTRODUCTION TO VICTORIA'S PLANNING SYSTEM **I**

Objectives of planning.....	1
The <i>Victoria Planning Provisions</i> and planning schemes	1
Principles of planning schemes	2
Accessing the VPP and planning schemes.....	3
Planning practice notes.....	3

PLANNING SCHEMES **1**

1.1 What is a planning scheme?	3
1.2 What are the <i>Victoria Planning Provisions</i>	3
1.3 What is a zone?.....	4
1.4 What is an overlay?.....	4
1.5 What do 'use' and 'development' mean?.....	5
1.6 Who and what is affected by a planning scheme?.....	5
1.7 What is the Ministerial Direction on the form and content of planning scheme?.....	8
1.8 What are the components of a planning scheme?	9

AMENDMENTS **2**

2.1 Amending a planning scheme.....	3
2.2 Requesting a planning scheme amendment.....	4
2.3 Applying for authorisation to prepare an amendment.....	8
2.4 Timelines for preparing and processing an amendment	10
2.5 Preparing a planning scheme amendment.....	10
2.6 The public exhibition stage	14
2.7 The panel stage.....	25
2.8 The amendment adoption stage.....	31
2.9 The amendment approval stage	33
2.10 Defects in procedures	36
2.11 Revocation of an amendment.....	37
2.12 Ratification of amendments.....	37
2.13 Amendments in special circumstances	38
2.14 The combined amendment and permit process.....	41
2.15 Amendments to the <i>Victoria Planning Provisions</i>	47
2.16 Advisory committees	49

PLANNING PERMITS **3**

3.1 Overview.....	3
3.2 The application	6
3.3 Considering an application – procedural steps	13
3.4 Making a decision on an application.....	30
3.5 Implementing the responsible authority's decision.....	37
3.6 After a permit is issued	39
3.7 Cancellation or amendment of a permit.....	46
3.8 Applications in special circumstances.....	49

OTHER PROCEDURES **4**

4.1 Certificates of compliance	3
4.2 Planning certificates.....	5
4.3 Building permit applications for demolition of buildings.....	6

REVIEWS 5

5.1 Opportunities for review of planning decisions3
5.2 Making an application for review11
5.3 What happens at the hearing?17
5.4 Other types of applications for review.....24
5.5 Procedures30
5.6 Further information about reviews.....34

ACQUISITION & COMPENSATION 6

6.1 Public land acquisition3
6.2 Public Acquisition Overlay8
6.3 Planning compensation9
6.4 Planning compensation checklist.....13

ENFORCEMENT 7

7.1 Enforcement and the planning system3
7.2 Planning infringement notices10
7.3 Enforcement orders13
7.4 Prosecution for a breach of the Act17
7.5 Injunctions19
7.6 Cancellation and amendments of permits.....20
7.7 Evidence.....22
7.8 Brothels.....23
7.9 Using other legislation for enforcement24
7.10 Other information sources.....24
7.11 Enforcement checklist.....25

AGREEMENTS 8

8.1 What is a section 173 agreement?3
8.2 Parties to an agreement.....3
8.3 When should an agreement be used?4
8.4 Procedure for making and amending an agreement6
8.5 The form of an agreement7
8.6 Procedure for recording an agreement.....10
8.7 Amending or ending an agreement11
8.8 Reviews and enforcement in relation to agreements14
8.9 Other agreements.....15

PLAIN ENGLISH 9

9.1 Before you write3
9.2 Effective language9
9.3 The right words14
9.4 Punctuation.....17
9.5 Maps and graphics22
9.6 Planning schemes24
9.7 A guide to grammatical terms.....28

GLOSSARY G

INTRODUCTION TO VICTORIA'S PLANNING SYSTEM



Objectives of planning

PEA s. 4

The objectives of planning in Victoria are set out in the *Planning and Environment Act 1987* (the Act). They 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 coordination 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.

The purpose of the 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.

The *Victoria Planning Provisions* and planning schemes

PEA s. 4(2)(b)

The Act provides for a single instrument of planning control for each municipality, the planning scheme, which sets out the way land may be used or developed. The planning scheme is a legal document, prepared and approved under the Act. It contains state and local planning policies, zones and overlays and other provisions that affect how land can be used and developed.

The Act also provides for the *Victoria Planning Provisions* (VPP) - a template document of standard state provisions for all planning schemes to be derived from. It is not a planning scheme and does not apply to any land.

The Act sets out procedures for preparing and amending the VPP and planning schemes, obtaining a permit under a planning scheme, settling disputes, enforcing compliance with planning schemes, and other administrative procedures.

Principles of planning schemes

Underpinning the focus and structure of planning schemes are a set of principles based on a strategic and policy foundation. The principles are:

Planning schemes have a policy focus

- Planning schemes clearly and concisely express a strategic vision and policy basis.
- There is a logical progression from policy basis and requirements to the exercise of discretion in decision making.

Planning schemes facilitate appropriate development

- Local provisions assist in exercising discretion.
- Discretion must be wide rather than narrow.
- The use of provisions which promote performance is encouraged.

Planning schemes are useable

- The requirements of planning schemes must be clear to users and easily identified from the planning scheme map.
- Statewide provisions apply across Victoria.
- Planning schemes should minimise site-specific provisions.
- Overlays should identify specific local issues and associated requirements.

Provisions are consistent across the state

- A standard set of provisions apply across the state.
- The permit is the principal instrument of development approval.
- Local variations cannot be made to the state-standard provisions.
- Local provisions must not conflict with the state provisions.
- Local requirements are expressed in a schedule following the relevant state-standard provision.

These principles are achieved through the VPP under the *Planning and Environment (Planning Schemes) Act 1996*.

All Victorian planning schemes include a Municipal Strategic Statement, local planning policies and a strategically allocated selection of zones and overlays, including maps.

The planning scheme maps show how land is zoned and whether it is affected by an overlay. The ordinance sets out the zone and overlay requirements. Each planning scheme also includes other state-standard provisions and definitions.

A planning scheme is not a static document and will change over time. An amendment to a planning scheme must be formally approved and gazetted.

Accessing the VPP and planning schemes

The VPP and all planning schemes, including the associated maps are available via Planning Schemes Online on the department's website at planningschemes.dpcd.vic.gov.au

Each council must also keep a copy of the VPP and its planning scheme available for inspection during office hours, free of charge.

Planning practice notes

The department has developed a series of planning practice notes and advisory notes to assist users of the planning system. Some of these have been referred to in this document from time to time as a source of additional information about a specific aspect of the planning system.

These notes can be viewed on the department's website.

PLANNING SCHEMES

Contents

1.1	What is a planning scheme?	3
1.2	What are the <i>Victoria Planning Provisions</i>?	3
1.3	What is a zone?	4
1.4	What is an overlay?	4
1.5	What do ‘use’ and ‘development’ mean?	5
1.6	Who and what is affected by a planning scheme?	5
1.6.1	Existing uses.....	6
1.6.2	Who administers the planning scheme?	7
1.6.3	Where must a planning scheme be available for inspection?	7
1.6.4	When must a planning scheme be reviewed?	7
1.6.5	What must the review evaluate?.....	8
1.7	What is the Ministerial Direction on the form and content of planning schemes?	8
1.8	What are the components of a planning scheme?	9
1.8.1	State Planning Policy Framework.....	10
1.8.2	Local Planning Policy Framework.....	10
1.8.3	Zones	11
1.8.4	Overlays	11
1.8.5	Particular provisions	11
1.8.6	General provisions	11
1.8.7	Schedules.....	11
1.8.8	Definitions	12
1.8.9	Incorporated documents	12
1.8.10	VicSmart	12
1.8.11	List of amendments	12
1.8.12	Summary of the zones	13
1.8.13	Summary of the overlays	18

PLANNING SCHEMES

1.1 What is a planning scheme?

A planning scheme is a statutory document which sets out objectives, policies and provisions relating to the use, development, protection and conservation of land in the area to which it applies. A planning scheme regulates the use and development of land through planning provisions to achieve those objectives and policies.

PEA ss. 4A(2),
6(1), 6(2)

Matters that a planning scheme may provide for are described in section 6 of the *Planning and Environment Act 1987* (the Act).

PEA s. 6(1)

The Act requires that a planning scheme:

- must seek to further the objectives of planning in Victoria within the area covered by the scheme
- must contain a Municipal Strategic Statement (MSS), if the scheme applies to the whole or part of a municipality
- may make any provision which relates to the use, development, protection or conservation of any land in the area (section 3 of the Act defines the meaning of these terms).

1.2 What are the *Victoria Planning Provisions*?

The Act distinguishes between the *Victoria Planning Provisions* (VPP) and a planning scheme. The VPP is a document containing a comprehensive set of planning provisions for Victoria. It is not a planning scheme and does not apply to any land. It is a statewide reference used, as required, to construct a planning scheme. It is a statutory device to ensure that consistent provisions for various matters are maintained across Victoria and that the construction and layout of planning schemes is always the same.

In preparing and maintaining the planning scheme, a council draws from the VPP in two essential ways:

1. It must include provisions which are mandatory in all planning schemes in Victoria. These include the State Planning Policy Framework (SPPF), the 'particular provisions' applying to specified categories of use and development (such as car parking and advertising signs), the 'general provisions' and the 'definitions'.
2. It may include provisions which are relevant to or give effect to its MSS and local planning policies (LPPs). These provisions will include the relevant state standard zones and overlays to be applied in the scheme. Some of these zones and overlays include local provisions as schedules to the zone or overlay.

In the simplest terms, a planning scheme is constructed by taking the VPP as a basic template. Into this is inserted the local vision and policy framework (the MSS and LPPs). The zones and overlays needed to implement these are then selected and appropriate local provisions are written to support the zones and overlays (the schedules).

1.3 What is a zone?

The planning scheme zones land for particular uses, for example, residential, industrial, business or other. The zones are listed in the planning scheme and each zone has a purpose and set of requirements. This information describes if a planning permit is required, and the matters that the council must consider before deciding to grant a permit. A zone may also specify information that must be submitted with a planning permit application. The zone also contains information relating to land uses, subdivision of land, construction of new buildings and other changes to the land.

A zone sets out land use controls in three sections:

- Section 1: Land uses that do not require a planning permit.
- Section 2: Land uses that require a planning permit.
- Section 3: Prohibited uses. Some uses are not allowed on land in a zone because they may conflict with other uses; for example, industry is prohibited in the General Residential Zone.

1.4 What is an overlay?

The planning scheme map may show that a piece of land has an overlay as well as a zone affecting it. Not all land has an overlay. Some land may be affected by more than one overlay. If an overlay applies, the land will have some special feature such as a heritage building, significant vegetation or flood risk. The Heritage Overlay, for example, applies to heritage places of natural or cultural significance and describes the requirements that apply.

The overlay information will indicate if a planning permit is required for the construction of a building or other changes to the land. For example, if a Heritage Overlay applies, a planning permit is required to demolish an existing building. The Heritage Overlay requires council to consider, before it grants the permit, whether the demolition of the building will lessen the significance of the heritage place. An overlay may specify information which must be submitted with an application for a planning permit.

1.5 What do 'use' and 'development' mean?

Use of land refers to using land for a particular purpose (such as a dwelling or a shop) and may not involve building anything.

Development includes the construction, alteration or demolition of a building or works and the subdivision or consolidation of land.

In some zones, the development of land and the proposed new use both require a permit. For example, in the Mixed Use Zone, a permit is required to construct a building and to use a building for industry. In other zones, the use may not require a permit, but a permit may be required to construct the building (the development) for the use. In this situation, council can only consider the effects of the new building (such as height, visual bulk and so on) and not the change in the use of the land.

1.6 Who and what is affected by a planning scheme?

PEA s. 16

Planning schemes may apply to all private and public land in Victoria. A planning scheme is binding on all members of the public, on every Victorian minister, government department, public authority and council.

The land to which a planning scheme may apply includes land covered by water (such as lakes and some coastal waters) and areas above or below ground (such as air rights and excavations).

Exemptions may be provided by a Governor in Council Order published in the *Government Gazette*.

Current exemptions under section 16 of the Act apply to a number of ministers. Exemptions also apply to specific sites and projects, such as parts of Albert Park.

Where they have been exempted from any legal need to comply with planning scheme requirements, as a matter of practice the ministers concerned should consult from an early stage with relevant planning authorities on proposed works. This consultation fosters cooperative involvement of local government in state planning and development matters. Consultation needs to be effective and therefore should be more than the mere circulation of proposals.

Under section 52(i) of the Commonwealth Constitution and the *Commonwealth Places (Administration of Laws) Act 1970* (Vic) and subject to the *Commonwealth Places (Application of Laws) Act 1970* (Cth), the Commonwealth has exclusive legislative power in relation to places acquired by the Commonwealth for a public purpose. Therefore a planning scheme does not apply to a 'Commonwealth place'. Whether a particular Commonwealth agency is considered the Commonwealth may depend on its governing legislation, funding and level of control. For example, bodies such as the Telstra Corporation, Australia Postal Commission and Australian Broadcasting Corporation are subject to a planning scheme.

Any requirement in a planning scheme seeking to regulate the use or development of Commonwealth land is inoperative. Land disposed of by the Commonwealth can only be subject to planning controls if an amendment is prepared and approved after disposal. Commonwealth land is identified as CA on planning scheme maps.

1.6.1 Existing uses

PEA s. 6(3), (4)

A planning scheme cannot prevent the continuation of a lawfully existing use under the Act if the existing use was established before the planning scheme came into operation.

Planning scheme
Cl. 63

Clause 63 of the planning scheme provides that an existing use right is established if any of the following apply:

- the use was lawfully carried out immediately before the approval date
- a permit for the use had been granted immediately before the approval date and the use commences before the permit expires
- a permit for the use had been granted for an alternative use, which does comply with the scheme, and the use commences before the permit expires
- proof of continuous use for 15 years is established
- the use is a lawful continuation by a utility service provider or other private body of a use previously carried on by a minister, government department or public authority, even where the continuation of the use is no longer for a public purpose.

This does not apply to a lawful use of land:

- which has stopped for a continuous period of two years
- which has stopped for two or more periods, which together total two years in any period of three years, or
- in the case of a seasonal use, which does not take place for two years in succession.

For existing use rights established through a use having been lawfully carried out immediately before the approval date, the relevant ‘approval date’ is:

- the date when the planning scheme commenced operation; or
- the date when an amendment to the planning scheme commenced operation which would have had the effect of restricting or prohibiting the use.

Planning scheme
Cl. 63.11

It is sometimes necessary to trace an existing use back through prior planning schemes or provisions over many years to determine its lawfulness. However, to avoid cumbersome investigations, planning schemes deem an existing use to have been lawfully established if proof of continuous use for 15 years is established in accordance with Clause 63.11 of the planning scheme.

Existing use rights apply to land, not to the owners or others with an interest in the land. It is also important to note that these rights apply only to the use of land, not development. What is allowed to continue is the use that was lawfully carried out immediately prior to the approval date of the amendment or scheme that prohibited the use. In this situation, the use is confined to the same specific use, not by the land use definitions set out in the planning scheme.

The principles of establishing the use to which existing use rights apply are based on those appearing in cases such as *Shire of Perth v O’Keefe (1964) 10 LGRA 147* and *City of Nunawading v Harrington [1985] VR 641*.

PEA s. (6), (4A)

The Act allows planning schemes to require that existing uses comply with a code of practice which has been approved by Parliament. For example, planning schemes currently require the use of land for timber production to comply with the *Code of Practice for Timber Production*.

1.6.2 Who administers the planning scheme?

PEA ss. 13, 14

The administration and enforcement of a planning scheme is the duty of a responsible authority. In most cases this will be a council but it can be the minister administering the Act or any other person whom the planning scheme specifies as a responsible authority for that purpose. For example, in the Melbourne Planning Scheme, the Minister for Planning is the responsible authority for land in a number of areas including the Melbourne Casino Area, Melbourne Docklands Area, Flemington Racecourse and the Royal Melbourne Showgrounds.

A council will usually act as both planning authority and responsible authority.

PEA s. 201A

If the responsible authority for particular land or particular matters changes at any time (for whatever reason), the 'old' responsible authority immediately loses its powers and matters of a continuing nature can be decided (without any need to start again) by the 'new' responsible authority. Relevant documents must be transferred to assist the 'new' responsible authority.

PEA ss. 201A, 201B

If the change is due to an alteration in administrative boundaries, a planning scheme amendment will eventually be needed to transfer the control over affected land to another planning scheme.

1.6.3 Where must a planning scheme be available for inspection?

PEA ss. 40, 42

The Act requires the council and the responsible authority to maintain an up-to-date copy of the planning scheme, incorporating all amendments to it and all documents lodged with those amendments. (In most cases the council is also the responsible authority for the scheme). The planning scheme must be made available free of charge for public inspection during office hours. A similar but more extensive requirement applies to the minister administering the Act, who must make available updated copies of all operative schemes in Victoria. These documents are available online at planningschemes.dpcd.vic.gov.au and (for all schemes that apply in the region) at the department's relevant regional office.

PEA s. 60(1A)(g);
PE Regs r. 25

Regulation 25 requires that before deciding on a permit application the responsible authority must make available for inspection free of charge at its offices a copy of any document which it considers under section 60(1A)(g) of the Act. If the responsible authority is not the council for the municipal district in which the land is located, the responsible authority must give a copy of the document to the council for the purpose of making the document available for inspection free of charge at the council's offices.

Under section 60(1A)(g) of the Act a responsible authority may consider any strategic plan, policy statement, code or guideline which has been adopted by a minister, government department, public authority or council before deciding on an application.

In any case where there is some doubt whether a document comes within the scope of this requirement, the responsible authority should make sure it is available.

1.6.4 When must a planning scheme be reviewed?

PEA s. 12B(1);
12B(2)

A planning authority which is a municipal council must review its planning scheme no later than one year after each date by which it is required to approve a Council Plan under section 125 of the *Local Government Act 1989*; or within such longer period as is determined by the Minister for Planning.

PEA s. 12B(3)

The objective of the review is to enhance the effectiveness and efficiency of the planning scheme in achieving:

- the objectives of planning in Victoria, and
- the objectives of the planning framework established by the Act.

1.6.5 What must the review evaluate?

PEA s. 12B(4)

The review must evaluate the planning scheme to ensure that it:

- is consistent in form and content with the directions or guidelines issued by the Minister under section 7 (see Section 1.7)
- sets out effectively the policy objectives for use and development of land
- makes effective use of state provisions and local provisions to give effect to state and local policy objectives.

PEA s. 12B(5)

When the review is completed, the planning authority must report its findings to the minister without delay.

1.7 What is the Ministerial Direction on the form and content of planning schemes?

PEA s. 7(5)

Under section 7(5) of the Act, the form and content of all planning schemes prepared under Part 3 of the *Planning and Environment (Planning Schemes) Act 1996* and any amendment to a planning scheme must comply with the Ministerial Direction on the Form and Content of Planning Schemes.

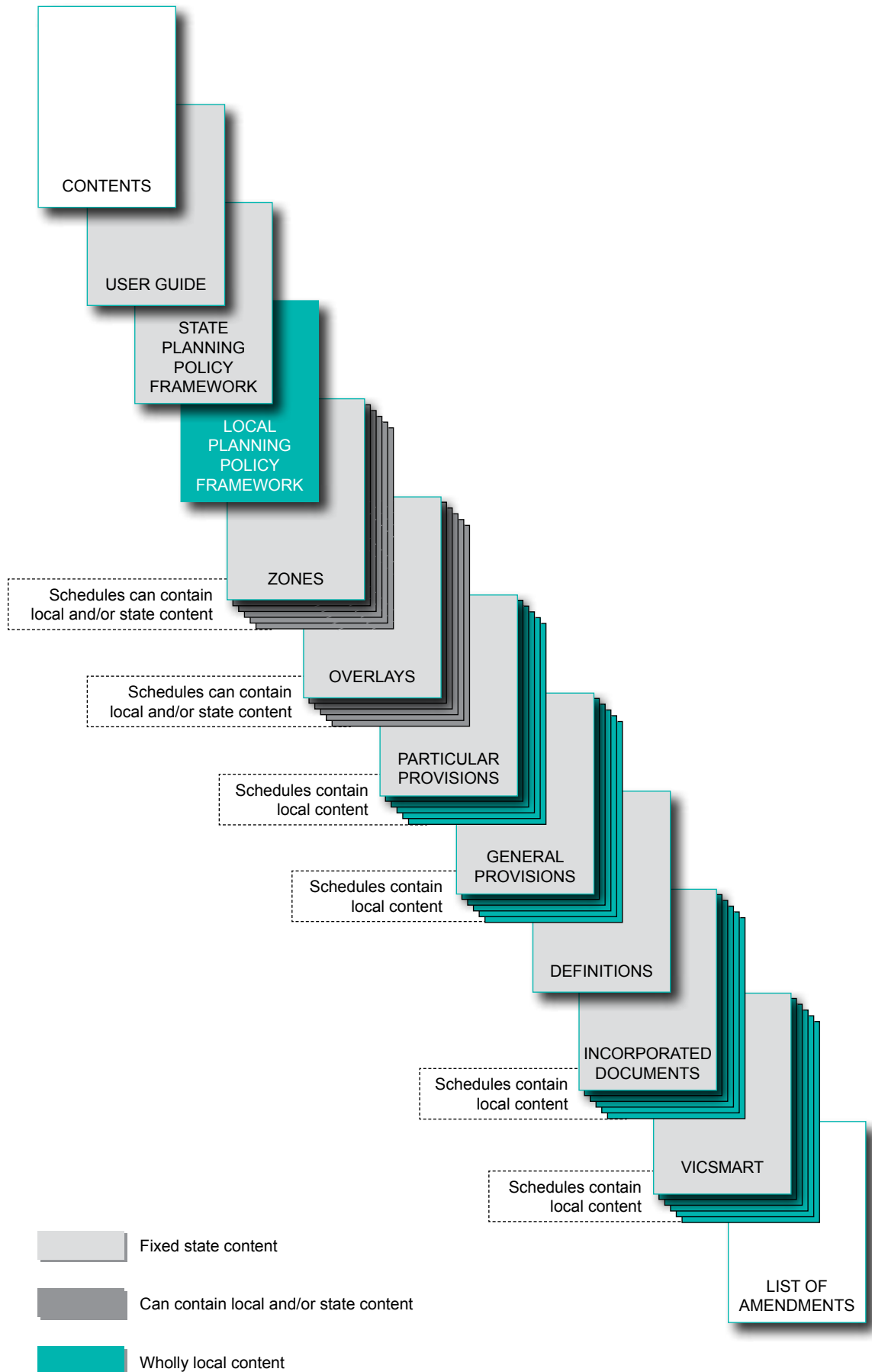
The Ministerial Direction on the Form and Content of Planning Schemes requires that a planning scheme must include the following parts of the VPP in the same order:

- Objectives of planning in Victoria.
- Purposes of this planning scheme.
- User guide.
- SPPF – Clauses 11-19 (inclusive).
- Operation of zones – Clause 31 (if a planning scheme includes a zone clause).
- Operation of overlays – Clause 41 (if a planning scheme includes an overlay clause).
- Particular provisions – Clauses 51-52, 54-57 (inclusive).
- General provisions – Clauses 61-67 (inclusive).
- Definitions – Clauses 71-74 (inclusive).
- Incorporated documents – Clause 81.
- VicSmart – Clauses 90-95 (inclusive).

The Ministerial Direction on the Form and Content of Planning Schemes states that a planning scheme must not include any zone or overlay clause other than a zone or overlay clause selected from the VPP.

1.8 What are the components of a planning scheme?

Figure 1.1: Components of a planning scheme



The strategic foundation of each scheme is made up of two components, the SPPF and the Local Planning Policy Framework (LPPF). The application of zones, overlays and local provisions must have a readily discernible basis in both the state and local planning policy frameworks.

1.8.1 State Planning Policy Framework

Every planning scheme includes the SPPF. The framework comprises general principles for land use and development in Victoria and specific policies dealing with settlement, environment, housing, economic development, infrastructure, and particular uses and development. To ensure integrated decision making, planning authorities and responsible authorities must take account of and give effect to the general principles and the specific policies contained in the SPPF.

1.8.2 Local Planning Policy Framework

The LPPF sets a local and regional strategic policy context for a municipality. It comprises the MSS and specific local planning policies.

The LPPF must be consistent with the SPPF and should, where possible, demonstrate how broader state planning policies will be achieved or implemented in a local context.

If there is an inconsistency between the SPPF and the LPPF, the SPPF prevails.

PEA s. 7(4)

Municipal Strategic Statement

An MSS is a part of the LPPF and is a statement of the key strategic planning, land use and development objectives for the municipality and the strategies and actions for achieving those objectives. It promotes the objectives of planning in Victoria to the extent that the SPPF is applicable to the municipality and local issues. The MSS establishes the strategic planning framework for the municipality and encapsulates significant planning directions. The SPPF and MSS provide the strategic basis for the application of the zones, overlays and particular provisions in the planning scheme and decision making by the responsible authority.

PEA s. 12A(4)

The MSS provides an opportunity for an integrated approach to planning across all areas of a council's operations and should clearly express links to the council's corporate plan. The MSS is dynamic and enables community involvement in its ongoing review. The MSS should be continually refined as the responsible and planning authority develops and revises its strategic directions in response to the changing needs of the community.

The MSS must be taken into account when preparing amendments to a planning scheme or making decisions under the scheme.

Local Planning Policy

An LPP sets out the guiding principles of the planning scheme and is one of the tools available for implementing objectives and strategies in the MSS.

An LPP is a policy statement of intent or expectation. It states what the responsible authority will do in specified circumstances, or the responsible authority's expectation of what should happen. An LPP gives a planning authority an opportunity to state its view of a planning issue and its intentions for an area. LPPs provide guidance to decision making on a day-to-day basis where this is not achievable in the VPP zones and overlays.

An LPP helps the community to understand how a proposal will be considered and what will influence decision making. Over time, the consistent application of policy should achieve the desired outcome.

LPPs must be taken into account when preparing amendments or making decisions.

1.8.3 Zones

Standard zones for statewide application are included in the VPP. These zones are used in all planning schemes, as required. An important feature of the zones, which is reflected in the first purpose of each zone, is that they are to be administered to implement the SPPF and LPPF, including the MSS and LPPs.

Each planning scheme includes only those zones required to implement its strategy. There is no ability to vary the zones or to introduce local zones. Additional zones can only be introduced by an amendment to the VPP. Some zones have schedules that provide for local circumstances, such as the Mixed Use Zone, the Rural Living Zone and the Public Conservation and Resource Zone. Refer to Section 1.8.12 for a short summary of each zone.

1.8.4 Overlays

In addition to the requirements of the zone, further planning provisions may apply to a site or area through the application of an overlay. Both are equally important. As with the zones, standard overlays for statewide application are included in the VPP. Each planning scheme includes only those overlays required to implement the strategy for that municipality. Generally, overlays apply to a single issue or related set of issues (such as heritage, an environmental concern or flooding). Where more than one issue applies to land, multiple overlays can be used. Overlays must have a strategic justification. Many overlays have schedules to specify local objectives and requirements. Most overlays make requirements about development rather than land use. Overlays do not change the intent of the zone. Refer to Section 1.8.13 for a short summary of each overlay.

1.8.5 Particular provisions

Particular provisions are specific prerequisites or planning provisions for a range of particular uses and developments, such as advertising signs and car parking. They apply consistently across the state and there is no ability to include in planning schemes particular provisions which are not in the VPP. Unless specified otherwise, the particular provisions apply in addition to the requirements of a zone or overlay. Some particular provisions have schedules for local requirements.

1.8.6 General provisions

General provisions are operational requirements which are consistent across the state. The general provisions include matters such as existing use rights, administrative provisions, ancillary activities and referral of planning permit applications. Some general provisions have schedules for local requirements.

1.8.7 Schedules

Schedules are used to identify the needs, circumstances and requirements of individual municipalities in specific circumstances. Together with the LPPF, schedules are the means of including local content in planning schemes. They can be used to supplement or 'fine-tune' the basic provisions of a state-standard clause, zone or overlay in a planning scheme, adapting it to local circumstances and locally defined objectives. This means that schedules are a key tool for implementing objectives and strategies in the MSS.

Schedules can only be included in a planning scheme where allowed by the VPP. They must use the format shown in the Ministerial Direction on the Form and Content of Planning Schemes.

For more information on schedules refer to the *Planning Practice Note 10 – Writing Schedules* and other relevant Planning Practice Notes.

1.8.8 Definitions

A set of definitions is included in the VPP and applies in all planning schemes. Defined terms are separated into general terms, outdoor advertising terms and land use terms.

Local provisions should not create specific local definitions. When writing planning scheme provisions, care should be taken to ensure that the terms used are consistent with their meaning in the Act, the *Interpretation of Legislation Act 1984* and the definitions section of the planning scheme. In situations where a term is not defined in these documents, it will be considered to have its ordinary or common meaning having regard to general principles of legal or statutory interpretation.

Section 3 of the Act also specifies definitions for the function of the planning system.

1.8.9 Incorporated documents

PEA s. 6(2)(j)

Planning schemes may apply, adopt or incorporate any document that relates to the use, development or protection of land. This allows a link between the planning scheme and external documents that may inform the planning scheme, guide decision making or affect the operation of the scheme. This includes a range of codes, strategies, guidelines, plans or similar documents.

An external document that is incorporated into a planning scheme is included in the list of incorporated documents in Clause 81 of the planning scheme. The document then carries the same weight as other parts of the scheme and can only be changed by a planning scheme amendment.

At the local level, planning authorities may wish to incorporate their own documents using the schedule to Clause 81.01. Development guidelines, incorporated plans or restructure plans are common types of incorporated documents.

If an external document is mentioned in a planning scheme, but has not been formally incorporated, it is only regarded as a reference document and carries less weight than if it forms part of the planning scheme.

For further information on incorporated documents refer to *Planning Practice Note 13 – Incorporated and Reference Documents*.

1.8.10 VicSmart

Clauses 90-95 of the scheme comprise the planning assessment provisions for VicSmart – the short permit process designed for simple low-impact planning applications.

The provisions set out the process for and the classes of application that are VicSmart, including state and local VicSmart applications.

1.8.11 List of amendments

The list of amendments at the back of the planning scheme includes all state and local amendments to the planning scheme and includes a brief description of the amendment. It is not a formal part of the planning scheme.

1.8.12 Summary of the zones

The following is a short summary of each of the zones.

RESIDENTIAL ZONES

Planning Practice Note 78 – Applying the Residential Zones explains the purposes and features of each of the residential zones and how to apply them and their schedules.

Low Density Residential Zone (Clause 32.03 and schedule)

This zone is intended for land on the fringe of urban areas and townships where sewerage may not be available. It is applied to areas that are shown to be appropriate for subdivision into lots which are both large enough (in the absence of reticulated sewerage) to contain all wastewater on site and small enough to be maintained without the need for agricultural techniques or equipment. The zone provides a minimum lot size of 0.4 hectare for a lot not connected to reticulated sewerage or 0.2 hectares for a lot connected to reticulated sewerage unless an alternative is specified in a schedule to the zone. The creation of smaller lots is prohibited unless the subdivision is the re-subdivision of existing lots or the creation of a small lot for a utility installation.

Mixed Use Zone (Clause 32.04 and schedule)

This zone provides for a range of residential, commercial, industrial and other uses and is suitable for areas with a mixed use character. A schedule to the zone may specify maximum building heights and local requirements for specified Clause 54 and Clause 55 dwelling standards.

Township Zone (Clause 32.05 and schedule)

This zone is intended to apply to small towns, to provide for residential development and a range of commercial, industrial and other uses. A schedule to the zone can be used to change the permit requirement for a dwelling, based on lot size, and to change certain siting requirements. The schedule can also specify maximum building heights for dwellings or residential buildings and local requirements for specified Clause 54 and Clause 55 dwelling standards.

Residential Growth Zone (Clause 32.07 and schedule)

This zone is intended to be used in locations near activity centres, train stations and other areas suitable for increased housing. The zone encourages medium density residential development to make optimum use of available services and facilities.

A discretionary building height of 13.5 metres applies to a dwelling or residential building and aims to provide a transition between areas of more intensive use and development and areas of restricted housing growth.

A schedule to the zone can be used to specify an alternative maximum building height and local requirements for specified Clause 54 and Clause 55 dwelling standards. A permit cannot be granted to exceed a maximum building height specified in the schedule.

General Residential Zone (Clause 32.07 and schedule)

This is usually the main zone to be applied in new or established residential areas where there are minimal constraints to residential development. It provides for moderate growth and diversity of housing.

Up to 9 metres building height is allowed in this zone for dwellings and residential buildings, unless a schedule to the zone specifies an alternative maximum building height. A permit cannot be granted to exceed any maximum building height if specified in a schedule. Local requirements for specified Clause 54 and Clause 55 dwelling standards can also be set out in the schedule.

Neighbourhood Residential Zone (Clause 32.07 and schedule)

This zone is intended for areas where single dwellings prevail and change is not proposed, such as areas of recognised neighbourhood character or environmental or landscape significance. Up to 8 metres building height is allowed, unless a schedule to the zone specifies an alternative maximum building height. A permit cannot be granted to exceed the maximum building height specified in either the zone or the schedule.

INDUSTRIAL ZONES

Industrial 1 Zone (Clause 33.01 and schedule)

This is the main zone to be applied in most industrial areas. It includes additional requirements for land in proximity to residential areas. A schedule to the zone allows the maximum floor space to be limited for office use.

Industrial 2 Zone (Clause 33.02 and schedule)

This zone is for large industrial areas which have a core more than 1500 metres from residential areas and are of state significance. Note that special requirements apply to the 'core' area of this zone (the area more than 1500 metres from a residential zone) as this area is a resource intended to be reserved for uses which require that degree of separation from residential and similar areas. Each industry in the core area will be considered on its merits depending upon its effect on neighbouring industries and communities. Generally, uses that do not depend on such a location are discouraged in this zone.

A schedule to the zone allows the maximum floor space to be limited for office use.

Industrial 3 Zone (Clause 33.03 and schedule)

This zone is designed to be applied as a buffer between the Industrial 1 Zone or Industrial 2 Zone and residential areas, if necessary. It may also be applied to industrial areas where special consideration is required because of industrial traffic using residential roads, unusual noise or other emission impacts, or to avoid inter-industry conflict. A schedule to the zone allows the maximum floor space to be limited for office use.

The zone provides for some retailing, including convenience shops, small scale supermarkets and associated shops in appropriate locations.

COMMERCIAL ZONES

Commercial 1 Zone (Clause 34.01 and schedule)

This zone is applied in mixed use commercial centres for retail, office, business, residential, entertainment and community uses. It allows a wide range of commercial and accommodation activities without a permit, including a supermarket or shop.

A schedule to the zone allows a maximum leasable floor space to be specified for office or shop only in rural planning schemes (not in metropolitan Melbourne).

Commercial 2 Zone (Clause 34.02 and schedule)

This zone encourages offices and associated business and commercial services together with appropriate industry and retailing. A small scale supermarket (up to 1800 square metres) is allowed without a permit on land located within the City of Greater Geelong or within an urban growth boundary in metropolitan Melbourne. Any supermarket in a rural area requires a permit to ensure the protection of established centres in regional towns. A supermarket and any associated shops must adjoin or have access to a main road.

RURAL ZONES

Planning Practice Note 42 – Applying the Rural Zones explains the purposes and features of the rural zones and how to apply them and their schedules.

Rural Living Zone (Clause 35.03 and schedule)

This zone provides for predominantly residential use in a rural environment provided appropriate land management is exercised. This zone should only be used where this type of use exists, or where such a use can be strategically justified. The zone also allows agricultural activities, provided that the amenity of residential living is protected. A schedule to the zone allows the lot size and a number of other matters to be specified.

Green Wedge Zone (Clause 35.04 and schedule)

The purpose of this zone is to recognise and protect non-urban land outside the Urban Growth Boundary in the Melbourne metropolitan area for its agricultural, environmental, historic, landscape or recreational values, or mineral and stone resources. The zone provides a minimum lot size of 40 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Green Wedge A Zone (Clause 35.05 and schedule)

This zone provides opportunity for most agricultural uses and limits non-rural uses to those that support agriculture or tourism provided that the amenity of residential living is protected. It seeks to protect and enhance the biodiversity, natural resources, scenic landscapes and heritage values and to promote sustainable land management. It also provides opportunity for limited residential development subject to a permit. The zone provides a minimum lot size of 8 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Rural Conservation Zone (Clause 35.06 and schedule)

This zone is designed to protect and enhance the natural environment for its historic, archaeological, scientific, landscape, faunal habitat and cultural values. Agriculture is allowed, provided it is consistent with the environmental and landscapes values of the area. This zone could also be applied to rural areas degraded by environmental factors such as salinity or erosion. A schedule requires specific conservation values to be stipulated. The zone provides a minimum lot size of 40 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Farming Zone (Clause 35.07 and schedule)

This zone encourages the retention of productive agricultural land and encourages the retention of employment and population to support rural communities. The zone provides a minimum lot size of 40 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Rural Activity Zone (Clause 35.08 and schedule)

This zone is designed to be applied to areas where agricultural activities and other land uses can co-exist. A wider range of tourism, commercial and retail uses may be considered in the zone. Agriculture has primacy, but other uses may be established if they are compatible with the agricultural, environmental and landscape qualities of the area. A minimum lot size must be specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

PUBLIC LAND ZONES

Planning Practice Note 2 – Public Land Zones provides guidance about the appropriate use of the public land zones.

Public Use Zone (Clause 36.01 and schedule)

This zone recognises the use of land for a public purpose and prescribes a number of categories of public use which can be shown on the planning scheme map. This is the main zone for public land used for utility or community service provision. A schedule allows specified uses or managers of public land to be exempted from specified requirements. Alternative advertising sign categories may be specified if required.

Public Park and Recreation Zone (Clause 36.02 and schedule)

This is the main zone for public open space and public recreation areas. A schedule allows specified uses or managers of public land to be exempted from specified requirements. It also allows an exemption for buildings and works specified in an Incorporated Plan. Alternative advertising sign categories may be specified if required.

Public Conservation and Resource Zone (Clause 36.03 and schedule)

This zone provides for places where the primary intention is to conserve and protect the natural environment or resources. It also allows associated educational activities and resource-based uses. A schedule allows specified uses or managers of public land to be exempted from specified requirements. It also allows an exemption for buildings and works specified in an Incorporated plan. Alternative advertising sign categories may be specified if required.

Road Zone (Clause 36.04)

This zone enables declared roads and other important roads or proposed roads to be designated on the planning scheme map. A road designated as a declared road under the *Road Management Act 2004* must be included in a Road Zone – Category 1. Other roads (or proposed roads where the land has been acquired) may be included as Category 1 or Category 2 roads if appropriate. Certain uses, such as car wash and convenience restaurant, may only be permitted if the site abuts a Road Zone. This should be considered when deciding whether or not to include a road in the zone. VicRoads can provide information about declared roads in each municipality.

SPECIAL PURPOSE ZONES

Special Use Zone (Clause 37.01 and schedule)

This zone provides for the use of land for specific purposes. The purposes and the land use requirements are specified in a schedule to the zone. This allows detailed land use requirements to be prescribed for a particular site. Development conditions (where they are necessary) are still set out in a permit rather than the planning scheme. Exemptions from notification and review can be provided in the zone if desired. The Ministerial Direction on the Form and Content of Planning Schemes includes some specific requirements for this zone. *Planning Practice Note 3 – Applying the Special Use Zone* explains the operation of this zone in more detail.

Comprehensive Development Zone (Clause 37.02 and schedule)

This zone is similar to the Special Use Zone but is designed to allow more complex developments in accordance with a comprehensive development plan incorporated in the planning scheme. Generally, only large or complex developments would warrant the use of this zone.

Urban Floodway Zone (Clause 37.03 and schedule)

This zone is applied to urban land where the primary function of the land is to carry or store floodwater. It applies to high hazard areas with high flow velocities, where impediment of flood water can cause significant changes in flood flows and adversely affect flooding in other areas. Where land is subject only to inundation and low velocities, the Land Subject to Inundation Overlay can be used. The views and flooding information of the relevant floodplain management authority must be considered when applying this zone.

Capital City Zone (Clause 37.04 and schedule)

This zone provides for the use and development of land in Melbourne's central city area, recognising its role as the capital of Victoria and as an area of national and international importance. It operates in a similar manner to the Special Use Zone. Detailed requirements are prescribed for a particular site or area through the schedule to the zone. The zone does not specify an advertising category, but requires a permit for all signs unless a schedule specifies otherwise. Exemptions from notice and review can be given if desired.

Docklands Zone (Clause 37.05 and schedule)

This zone provides for the use and development of land in Melbourne's Docklands area, in a manner consistent with the development strategy adopted by the Docklands Authority. It operates in a similar manner to the Special Use Zone. Detailed requirements are prescribed for a particular site or area in the schedule to the zone. The schedule specifies car parking requirements. Exemptions from notice and review can be specified if desired.

Priority Development Zone (Clause 37.06 and schedule)

This is a specialised zone designed to implement approved strategies and developments of state or regional significance at specific locations. The zone facilitates the approval and management of complex projects where agreement on the desired form of development has been reached between the responsible authority and the developer. The detailed provisions of the zone are linked to agreed development plans. The zone exempts development that conforms with an agreed incorporated plan from third party reviews unless a right to review is specifically included in the schedule.

Urban Growth Zone (Clause 37.07 and schedule)

This zone sets out the requirements for the development of new residential and employment precincts on previously undeveloped land. It requires the establishment of a precinct structure plan before a growth area can be developed and subdivided. The zone includes provisions to ensure that any new use and development does not prejudice the future urban use and development of the land where a precinct structure plan is yet to be applied.

Where a precinct structure plan is in place, the zone provides for specific zone provisions to be applied by way of a schedule.

Planning Practice Note 47 – Urban Growth Zone explains the operation of the zone and the role and function of precinct structure plans.

Activity Centre Zone (Clause 37.08 and schedule)

The Activity Centre Zone is the preferred tool to guide and facilitate the use and development of land in activity centres. The zone encourages a mix of uses and intensive development including higher density housing. The zone allows for a schedule to specify or vary the land use provisions together with other provisions in the zone. See *Planning Practice Note 56 – Activity Centre Zone* for detailed guidance on the zone.

Port Zone

This zone seeks to ensure that land use and development recognises the significant transport, logistics and prime maritime gateway roles of Victoria’s commercial trading ports. It supports shipping, road and railway access to those ports and uses which derive direct benefit from co-establishing with them. While it provides for the ongoing use and development of Victoria’s commercial trading ports, the zone also seeks to protect uses in adjacent residential zones, the Capital City Zone or the Docklands Zone and any land used for or proposed to be acquired for a hospital or an education centre. An application is exempt from the notice and review provisions of the Act except within 30 metres of such land.

1.8.13 Summary of the overlays

The following is a short summary of each of the overlays in the VPP.

ENVIRONMENT AND LANDSCAPE OVERLAYS

Environmental Significance Overlay (Clause 42.01 and schedule)

This overlay seeks to address areas where the development of land may be affected by environmental constraints such as effects from noise or industrial buffer areas, as well as issues related to the natural environment. The schedule to the zone must clearly set out the environmental significance of the area and the resultant objective of the overlay.

Vegetation Protection Overlay (Clause 42.02 and schedule)

This overlay focuses on the protection of significant vegetation, including native and introduced vegetation. It can be applied to individual trees, stands of trees or areas of significant vegetation. The significance of identifying the vegetation must be stated, together with the intended outcomes of the imposed requirements. *Planning Practice Note 7 – Vegetation Protection in Urban Areas* explains the function of this overlay and other relevant vegetation provisions in more detail.

Significant Landscape Overlay (Clause 42.03 and schedule)

The function of this overlay is to identify, conserve and enhance the character of significant landscapes. The schedule to the zone must explain the significance of the landscape, together with the intended outcomes of imposed requirements. *Planning Practice Note 7 – Vegetation Protection in Urban Areas* explains the function of this overlay and other relevant landscape provisions in more detail.

HERITAGE AND BUILT FORM OVERLAYS

Heritage Overlay (Clause 43.01 and schedule)

Any heritage place with a recognised citation should be included in the schedule to this overlay. In addition, any heritage place identified in local heritage studies can also be included.

A heritage place can have a wide definition and may include a single object or an area.

There should be a rigorous heritage assessment process leading to the identification of the place. The documentation for each place should include a Statement of Significance which establishes the importance of the place. For guidance on applying heritage provisions see *Planning Practice Note 1 – Applying the Heritage Overlay* and the Victorian Heritage Register Criteria and Threshold Guidelines 2012.

Design and Development Overlay (Clause 43.02 and schedule)

This overlay is principally intended to implement requirements based on a demonstrated need to control built form and the built environment. The intended built form outcome must be clearly stated, as must the way in which the imposed requirements will bring this about. Where possible, performance-based requirements should be used rather than prescriptive requirements.

Incorporated Plan Overlay (Clause 43.03 and schedule)

This overlay is used to:

- prescribe a plan for an area to coordinate proposed use or development before a permit can be granted under the zone
- exempt from notice and review any permit applications that are in conformity with the plan.

A plan established by the Incorporated Plan Overlay is incorporated in the planning scheme. It can only be introduced or changed by a planning scheme amendment and will normally be publicly exhibited as part of that process, making it appropriate where a plan is likely to affect third-party interests.

Planning Practice Note 23 – Applying the Incorporated Plan and Development Plan Overlay provides advice on the operation of this overlay.

Development Plan Overlay (Clause 43.04 and schedule)

This overlay is used where the form of development is appropriately controlled by a plan that satisfies the responsible authority as there is no public approval process for the plan.

A planning scheme amendment is not required to amend a plan established by a Development Plan Overlay.

For more information on the operation of this overlay see *Planning Practice Note 23 – Applying the Incorporated Plan and Development Plan Overlay*.

Neighbourhood Character Overlay (Clause 43.05 and schedule)

This overlay identifies areas of existing or preferred neighbourhood character. It requires a planning permit for buildings and works and the demolition or removal of a building or tree if specified in a schedule to the overlay. A schedule to the overlay can be used to modify certain standards of Clause 54 or Clause 55 of the planning scheme.

LAND MANAGEMENT OVERLAYS

Erosion Management Overlay (Clause 44.01 and schedule)

This overlay identifies land subject to significant erosion. There should be appropriate technical justification to support the application of this overlay.

Salinity Management Overlay (Clause 44.02 and schedule)

This overlay identifies land subject to significant salinity. It requires a planning permit for buildings and works, subdivision and the removal of vegetation in areas affected by salinity. All applications are referred to the relevant state environment department. There should be appropriate technical justification to support the application of this overlay.

Floodway Overlay (Clause 44.03 and schedule)

This overlay is applied to urban and rural land identified as part of an active floodway, or to a high hazard area with high flow velocities, where impediment of flood water can cause significant changes in flood flows and adversely affect other areas. The identification of these areas should be established in consultation with the relevant floodplain management authority. *Planning Practice Note 12 – Applying the flood provisions in planning schemes* explains the function of this overlay and other relevant flood provisions in more detail.

Land Subject to Inundation Overlay (Clause 44.04 and schedule)

This overlay applies to land in either rural or urban areas that is subject to inundation, but is not part of the primary floodway. The identification of these areas should be established in consultation with the relevant floodplain management authority. *Planning Practice Note 12 – Applying the flood provisions in planning schemes* explains this overlay and other relevant flood provisions in more detail.

Special Building Overlay (Clause 44.05 and schedule)

This overlay applies to urban land that is subject to overland flow resulting from stormwater flooding where the capacity of the drainage system is exceeded during heavy rainfall. This land is not part of a primary floodway from a river or stream. *Planning Practice Note 12 – Applying the flood provisions in planning schemes* explains the operation of this overlay and other relevant flood provisions in more detail.

Bushfire Management Overlay (Clause 44.06 and schedule)

This overlay is applied to areas identified as having high bushfire hazard. Together with the planning requirements for bushfire protection in Clause 52.47, this overlay controls development in order to mitigate risk to life, property and community infrastructure. *Planning Practice Note 64 – Local Planning for Bushfire Protection* explains the use of this overlay in more detail.

State Resource Overlay (Clause 44.07 and schedule)

This overlay is applied to protect areas of mineral, stone and other resources, identified as being of state significance, from development that would prejudice the current or future productive use of the resource.

OTHER OVERLAYS

Public Acquisition Overlay (Clause 45.01 and schedule)

This overlay identifies land that is proposed to be acquired for a public purpose. It has the effect of reserving the land under the *Land Acquisition and Compensation Act 1986*. The authority acquiring the land and the purpose of the acquisition must be set out in the schedule. Once land is acquired by a public authority, it should be rezoned to an appropriate zone.

Airport Environs Overlay (Clause 45.02 and schedules)

This overlay is applied to land that is subject to high levels of aircraft noise and sets out requirements to respond to those noise conditions. The *Australian Noise Exposure Forecast (ANEF)* defines areas of high aircraft noise levels. Where ANEF contours do not exist, Australian Standard AS2021 – 2000, *Acoustics – Aircraft Noise Intrusion – Building Siting and Construction*, gives guidance for determining an appropriate boundary.

Schedule 1 identifies uses which are prohibited, uses for which a permit required and associated application referral requirements. It is based on the 25 ANEF contour.

Schedule 2 identifies noise sensitive uses which require a permit and associated application referral requirements. It is based on the 20 ANEF contour.

Environmental Audit Overlay (Clause 45.03)

This overlay is applied to land identified, known or reasonably suspected of being contaminated for which certain obligations under the *Environment Protection Act 1970* have not been met. Refer to *Ministerial Direction No 1 – Potentially Contaminated Land* for further direction on how the overlay is applied.

Planning Practice Note 30 – Potentially Contaminated Land provides further direction on addressing contamination and applying the Environmental Audit Overlay.

Road Closure Overlay (Clause 45.04)

This overlay is used to identify a road that is closed by an amendment to a planning scheme.

Restructure Overlay (Clause 45.05 and schedule)

This overlay applies a restructure plan to old and inappropriate subdivisions as a condition of development approval. The restructure plan should be an incorporated document, because it controls whether or not a permit can be considered.

Development Contributions Plan Overlay (Clause 45.06 and schedule)

This overlay identifies areas where a development contributions plan is in place. The schedule to the overlay summarises the development contributions required. A more detailed incorporated document and local planning policy will usually be associated with the overlay.

City Link Project Overlay (Clause 45.07)

This overlay exempts specified use and development associated with certain projects from any requirement of the planning scheme. The overlay includes permit exemptions and requirements for certain advertising signs.

Melbourne Airport Environs Overlay (Clause 45.08 and schedules)

This overlay seeks to ensure that land use and development in the vicinity of Melbourne Airport is compatible with the operation of the airport and that exposure of new dwellings and other noise-sensitive buildings to aircraft noise is minimised through appropriate noise attenuation measures.

The overlay controls restrict development or require special consideration to be given to particular uses that may be sensitive to noise in areas that are forecast to be affected by moderate to high levels of aircraft noise.

Schedule 1 identifies area that will be subject to high levels of aircraft noise and is based on the 25 ANEF contour.

Schedule 2 identifies areas that will be subject to moderate levels of aircraft noise and is based on the 20 ANEF contour.

Parking Overlay (Clause 45.09 and schedule)

This overlay is used to manage car parking in a precinct where local parking issues are identified and a common strategy can be adopted to respond to the issues. *Planning Practice Note 57 – The Parking Overlay* provides guidance on the preparation and application of the overlay.

AMENDMENTS

2

Contents

2.1	Amending a planning scheme	3
2.1.1	Who can amend a planning scheme?.....	3
2.1.2	Why a planning scheme amendment may be required.....	3
2.2	Requesting a planning scheme amendment	4
2.2.1	How is a planning scheme amendment requested?.....	4
2.2.2	Discuss with the council first	4
2.2.3	Justification for the proposal	4
2.2.4	Fees/costs	7
2.2.5	Right of review.....	7
2.3	Applying for authorisation to prepare an amendment	8
2.3.1	Purpose of authorisation	8
2.3.2	Discuss with the department first	8
2.3.3	Preparing an application for authorisation.....	8
2.3.4	Submitting an application for authorisation.....	9
2.3.5	Outcome of making an application.....	9
2.4	Timelines for preparing and processing an amendment	10
2.5	Preparing a planning scheme amendment	10
2.5.1	The importance of following statutory procedures	10
2.5.2	Planning the preparation of an amendment	11
2.5.3	Drafting an amendment	11
2.5.4	The amendment documentation.....	12
2.5.5	Identifying amendments	13
2.6	The public exhibition stage	14
2.6.1	Who must receive copies of an amendment?	14
2.6.2	Where must copies be available for inspection?	14
2.6.3	Requirement to give notice	14
2.6.4	How is notice of an amendment given?	16
2.6.5	Exemption from giving notice.....	17
2.6.6	Making a submission	22
2.6.7	Late submissions.....	23
2.6.8	Considering a submission	23

2.7	The panel stage.....	25
2.7.1	Appointment of a panel.....	25
2.7.2	Directions panel.....	26
2.7.3	Regulation of panel proceedings	27
2.7.4	Panel hearing procedures.....	27
2.7.5	Submissions to a panel	28
2.7.6	What issues does a panel need to consider?.....	29
2.7.7	Panel reports	30
2.7.8	Abandonment or lapsing of an amendment.....	31
2.8	The amendment adoption stage	31
2.9	The amendment approval stage	33
2.9.1	Amendments to be submitted to the Minister for approval	33
2.9.2	The Minister’s consideration of an amendment.....	34
2.9.3	Approving an amendment.....	34
2.9.4	Refusing an amendment.....	34
2.9.5	Additional notice of an amendment.....	34
2.9.6	Notification of an approved amendment	34
2.9.7	Who keeps a copy?.....	36
2.10	Defects in procedure	36
2.11	Revocation of an amendment.....	37
2.12	Ratification of amendments.....	37
2.12.1	Ratification of an amendment.....	37
2.12.2	Procedure for ratification	37
2.12.3	Ratification of a combined amendment and permit	37
2.12.4	When does a ratified amendment commence?	37
2.12.5	When does an amendment lapse?	38
2.13	Amendments in special circumstances	38
2.13.1	Amendments to reserve land for public purposes	38
2.13.2	Rezoning of potentially contaminated land.....	38
2.13.3	Amendments relating to notice requirements	39
2.13.4	Amendments to vary or remove a restriction on title	40
2.13.5	Amendments to control demolition	40
2.14	The combined amendment and permit process.....	41
2.14.1	Overview of the combined amendment and permit application process	41
2.14.2	Considering submissions	44
2.14.3	Panel hearing.....	45
2.14.4	Decision by the planning authority.....	45
2.14.5	Decision by the Minister.....	46
2.15	Amendments to the <i>Victoria Planning Provisions</i>.....	47
2.15.1	Preparing an amendment	48
2.15.2	Approving an amendment.....	48
2.15.3	Amendment of planning schemes by the <i>Victoria Planning Provisions</i>	48
2.16	Advisory committees.....	49

2.1 Amending a planning scheme

2.1.1 Who can amend a planning scheme?

PEA ss. 8, 8A, 8B, 9

The Minister for Planning (the Minister) may prepare amendments to any provision of a planning scheme (s. 8). The Minister may also authorise the preparation of an amendment by:

- another Minister (s. 9)
- a public authority (s. 9)
- a municipal council (ss. 8A and 8B).

PEA s. 201C

The Act also makes special provision for the Minister to amend a planning scheme following the restructuring of municipal boundaries.

PEA s. 10(3)

Only the Minister can prepare an amendment to exempt a class of land use or development from planning scheme requirements where the land is owned or controlled by a responsible authority.

Municipal council

PEA ss. 8A, 8B

A council is a planning authority for any planning scheme in force in its municipal district and for an area adjoining its municipal district for which it is authorised by the Minister to prepare an amendment.

A council cannot prepare an amendment unless it has been authorised to do so by the Minister under section 8A or 8B.

2.1.2 Why a planning scheme amendment may be required

There are many reasons why a planning scheme may need to be amended. Some of the more common reasons are:

- to enhance or implement the strategic vision of a scheme
- to implement new state, regional or local policy
- to update the scheme
- to correct mistakes
- to allow some use or development currently prohibited to take place
- to restrict use or development in a sensitive location
- to set aside land for acquisition for a public purpose or to remove such a reservation when it is no longer needed in the scheme

- to authorise the removal or variation of a restriction on title (for example, a registered restrictive covenant)
- to incorporate changes made to the *Victoria Planning Provisions* (VPP).

A planning scheme amendment cannot amend the terms of the VPP.

2.2 Requesting a planning scheme amendment

2.2.1 How is a planning scheme amendment requested?

It is a well-established practice that any person or body can request that the planning authority (usually a council) prepare an amendment. The Act does not include a procedure for making a request to a council for an amendment. If the council agrees to the request, it must apply to the Minister for authorisation to prepare the amendment.

2.2.2 Discuss with the council first

Before a formal request is made, the proponent should discuss the proposal with the council to determine:

- whether the amendment is necessary or if there are other ways of achieving the desired outcome
- whether the amendment will help to implement the objectives of the Act, the State Planning Policy Framework (SPPF) and the Local Planning Policy Framework (LPPF)
- the information the council requires to enable it to evaluate the request
- the appropriate form of amendment to achieve the objectives sought
- the documentation requirements for the amendment
- the likelihood of the amendment being supported.

2.2.3 Justification for the proposal

An amendment requires a council to begin a process to change the law, which is different to making a decision on a permit application in accordance with the existing planning scheme. In recognition of this, the Act requires a council to have regard to certain matters in preparing an amendment.

A proponent should provide sufficient information demonstrating how matters to be considered by the council have been addressed.

Key matters to consider include:

- *Planning Practice Note 46 – Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments*
- the VPP and any relevant planning practice notes on using and applying the VPP
- any relevant ministerial direction
- the Municipal Strategic Statement (MSS) and any strategic plan, code or guideline that forms part of the scheme
- the potential environmental, social and economic effects of the proposal
- the public benefits of the amendment.

Figure 2.1: Outline of the planning scheme amendment process

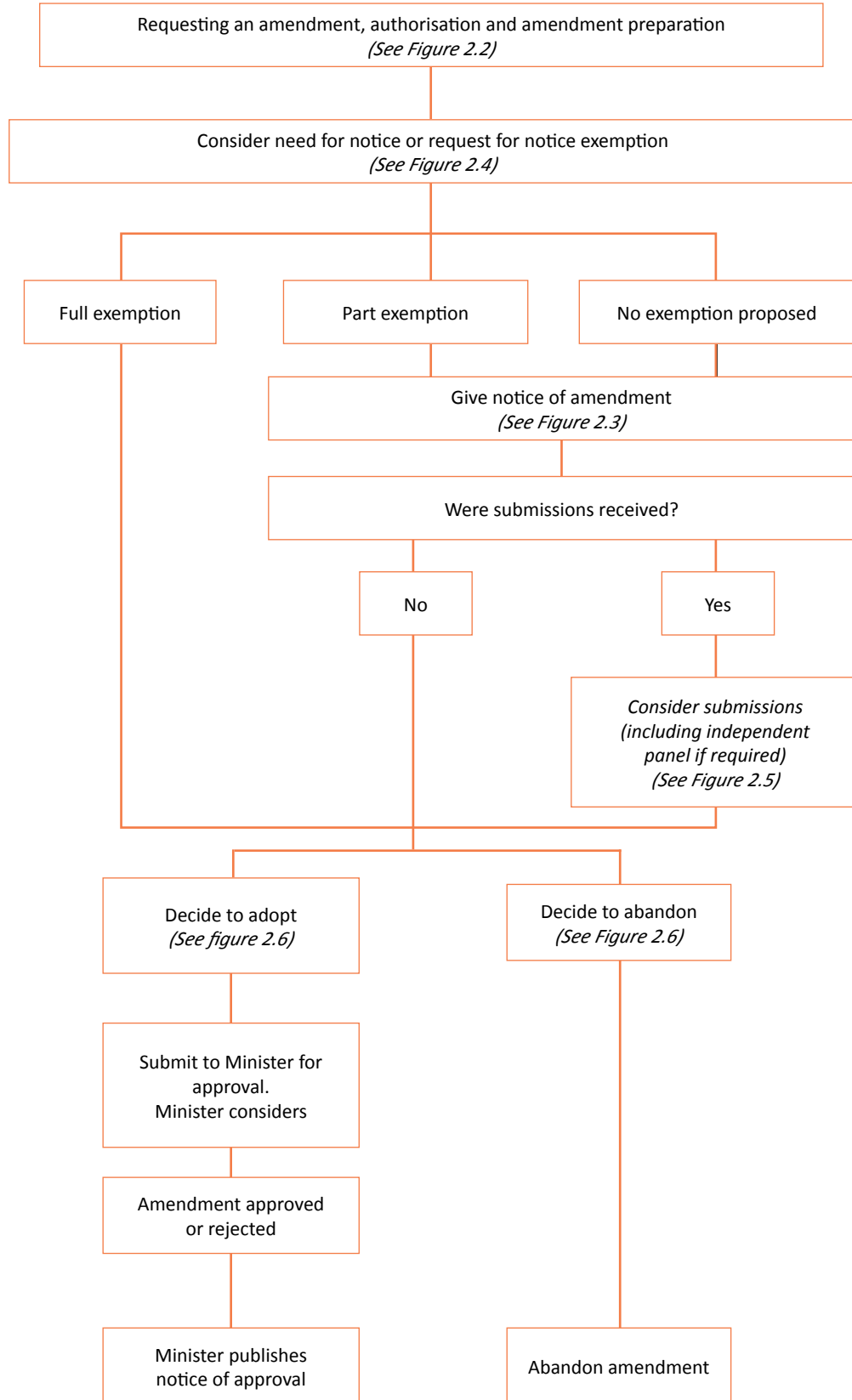
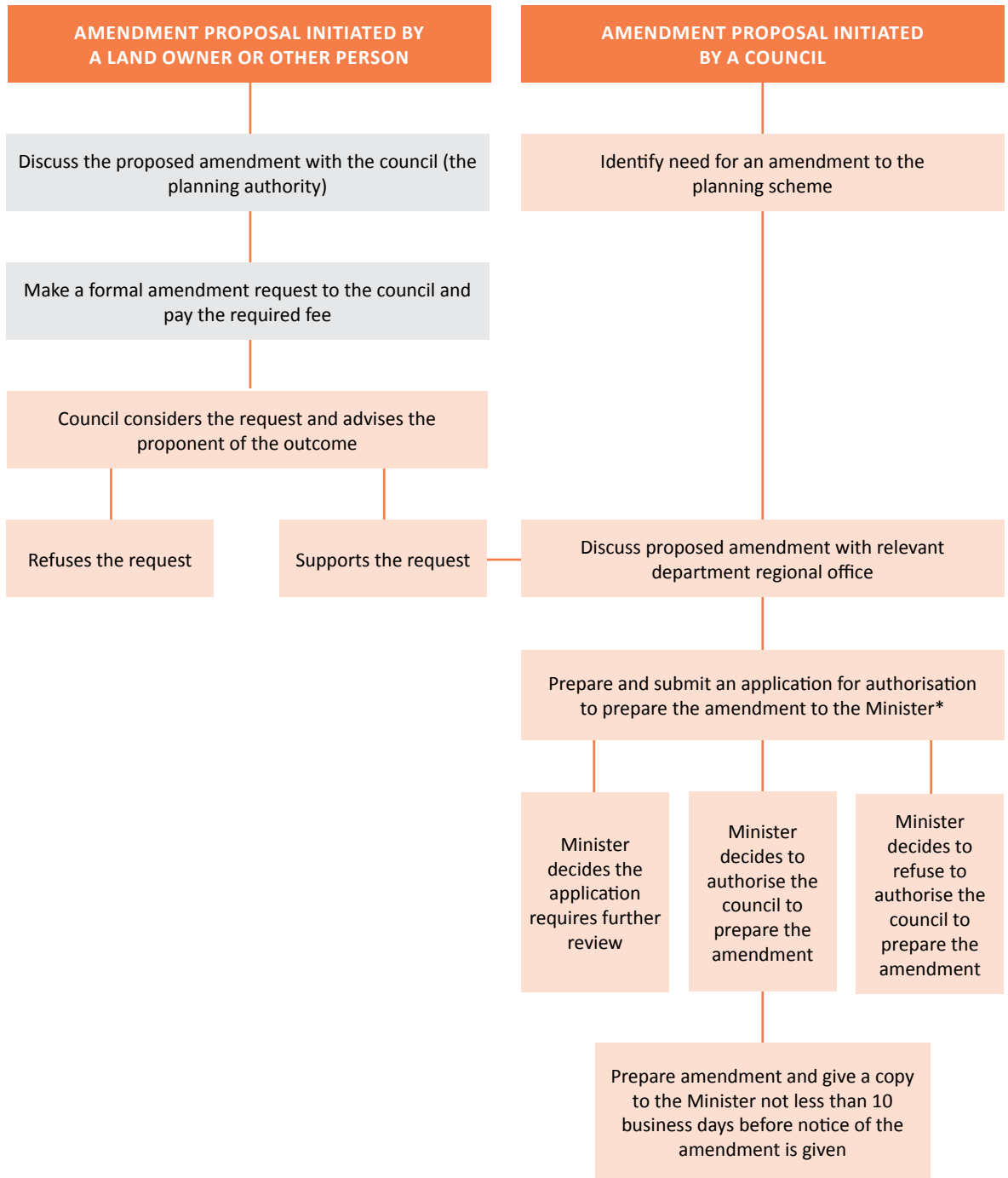


Figure 2.2: Requesting an amendment, authorisation and amendment preparation



■ Proponent
 ■ Planning Authority

*If the Minister does not notify the council of his or her decision within 10 business days, the council may prepare the amendment without authorisation.

2.2.4 Fees/costs

PEA ss.156,
203(1)(c); PE
(Fees) Regs r. 6

A fee for considering a request for an amendment applies. The fee is to be paid to the council by the proponent at the time the request is made. If a request is agreed to, fees are payable for later stages in the amendment process, including fees for the appointment of a panel.

A council can either require the proponent of an amendment to prepare the amendment documentation or it can prepare them in-house (possibly at the proponent's cost). This is a specialised area and the costs could be quite significant, especially if complex maps are required.

2.2.5 Right of review

There is no right of review of a council's decision not to support the preparation of an amendment.

If the council declines a request, the proponent may ask the Minister to amend the scheme. This is a separate action, not an appeal. A request to the Minister must be in writing and must identify the basis on which the Minister should be the planning authority for the amendment, addressing the criteria set out in *Planning Practice Note 29 – Ministerial Powers of Intervention in Planning and Heritage Matters*.

2.3 Applying for authorisation to prepare an amendment

2.3.1 Purpose of authorisation

PEA ss. 8A, 8B

A council must apply to the Minister for authorisation to prepare an amendment. The purpose of authorisation is to identify whether a proposed amendment is consistent with state policy or interests and to ensure it makes appropriate use of the VPP.

2.3.2 Discuss with the department first

To ensure timely consideration of an authorisation request, early consultation with the department's relevant regional office is desirable. This enables queries about the content and format of the amendment to be resolved and may avoid the need to make changes to the amendment at a later stage.

2.3.3 Preparing an application for authorisation

When preparing an application for authorisation, a council should have regard to:

Relevant Minister's directions

Any direction relating to the subject matter of the amendment or the form and content of the planning scheme should be followed. Failure to comply with a direction could result in the Minister's refusal to authorise the preparation of an amendment.

Ministerial Direction No. 11 – Strategic Assessment of Amendments and the Ministerial Direction on the Form and Content of Planning Schemes apply to most amendments and should be used to assess the appropriateness of the amendment.

The VPP

The amendment should use the appropriate VPP tools to achieve the intended outcome. For example, is an appropriate zone or overlay used? A number of the department's planning practice notes provide best practice guidance about using and applying particular VPP tools.

Planning scheme policies, codes and guidelines

An amendment should not seek to change the planning scheme in a manner that conflicts with the SPPF. An amendment should support or give effect to the SPPF.

There should always be a clear link between the objectives and policies set out in the LPPF and the planning scheme. An amendment should not be in conflict with the LPPF. If the amendment does not seek to implement the LPPF in some way, the council should consider whether the LPPF needs to be changed and the impact of doing so. Is there a strategic basis for the change?

Environmental, social and economic effects

Planning Practice Note 46 – Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments should be used in evaluating the environmental, social and economic effects of a proposal.

Strategic Assessment Guidelines

Ministerial Direction No. 11 – Strategic Assessment of Amendments requires a council to evaluate and discuss how an amendment addresses a number of strategic considerations. *Planning Practice Note 46 – Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments* explains what should be considered as part of the Direction.

Under Direction No. 11, not all amendments require an assessment against the strategic considerations. The Strategic Assessment Guidelines outline how some minor amendments only require a brief assessment against the strategic considerations.

Effect on registered restrictive covenants

A council should consider whether the amendment might authorise anything that would result in the breach of a registered restrictive covenant. If it will, the council may wish to consider whether the amendment should provide for the removal or variation of the covenant. Otherwise, a planning permit application that is made as a result of the planning scheme being amended may have to be refused under section 61(4) of the Act.

2.3.4 Submitting an application for authorisation

PEA ss. 8A(3),
8B(4)

An application must be made in writing and contain the information required by the Minister. Councils must use the department's authorisation application form and provide a draft explanatory report. *Ministerial Direction No. 11 – Strategic Assessment of Amendments* sets out the strategic matters that must be covered in an explanatory report.

For more complex proposals, the department may require additional information to be submitted to enable it to properly assess the application.

The *Preparing Planning Scheme Amendment Documentation* guidelines set out more information about the requirements for preparing and submitting an application for authorisation.

2.3.5 Outcome of making an application

PEA s. 8A(4)

Once the Minister has received an application, the Minister may:

PEA s. 8A(4)(a)

- authorise the preparation of the amendment

PEA s. 8A(6)

- authorise the preparation of the amendment subject to conditions, including conditions relating to notice

PEA s. 8A(4)(b)

- require further review

PEA s. 8A(4)(c)

- refuse authorisation for preparation of an amendment.

PEA s. 8A(5)

The Minister must notify the council in writing of his or her decision within 10 business days of receiving the application.

PEA s. 8A(7)

If 10 business days elapse and the council has not been notified of the Minister's decision, the council may proceed to prepare the amendment without the Minister's authorisation.

If the amendment is inconsistent with state policy or interests, the Minister will not authorise the preparation of an amendment.

PEA s. 8A(7)

If the application requires further review, the council may be asked to provide additional information. The Minister may later decide to authorise the council or refuse the request.

The authorisation of the preparation of an amendment is not an indication of whether or not the amendment will ultimately be approved by the Minister.

2.4 Timelines for preparing and processing an amendment

Ministerial Direction No. 15 – The planning scheme amendment process sets times for completing key steps in the amendment process. It applies to the Minister, the Secretary of the department, a panel appointed under Part 8 of the Act and all planning authorities.

The Direction sets times for:

- preparing and giving notice of an amendment – 40 business days after authorisation
- considering submissions and requesting the appointment of a panel – 40 business days after the closing date for submissions
- commencement of the panel's functions – 20 business days after its appointment
- a panel to submit its report to the planning authority – 20 business days for a one person panel; 30 business days for a two person panel; and 40 business days if the panel consists of three or more members
- the planning authority to decide on the amendment – within 60 business days of the closing date for submissions or, if there is a panel, 40 business days after the date the planning authority receives the panel report
- the planning authority to submit an adopted amendment – 10 business days after adoption
- the Minister to decide on the amendment – within 40 business days of receiving the adopted amendment.

In circumstances where more time is required to complete one or more steps in the process, the Minister may exempt an amendment from the need to comply with one or more requirements of the Direction. An exemption may be granted subject to conditions.

An exemption may be sought at any time. *Planning Advisory Note 48: Ministerial Direction No. 15 – The planning scheme amendment process* provides more information about the Direction and the circumstances when an exemption may be granted.

2.5 Preparing a planning scheme amendment

2.5.1 The importance of following statutory procedures

Once a planning authority decides to proceed with a proposed amendment to the stage of public exhibition, detailed procedural requirements of the Act come into play. These requirements are designed to ensure that any person who may be affected by a proposed amendment (either as the owner or occupier of land which is to be the subject of changed planning scheme provisions) or who may be affected by changes on other land, is aware of the proposal and has the opportunity to make a submission about the proposal.

PEA s. 39

It is important that the requirements of the Act and the Planning and Environment Regulations 2015 (the Regulations) are followed carefully. *Ministerial Direction No. 15 – The planning scheme amendment process* also sets times for completing steps in the amendment process. Failure to do so may lead to challenges at VCAT by those seeking to protect rights or to otherwise oppose proposals. Such challenges will inevitably lead to delays in considering the merits of an amendment and add to the authority's costs. It is much better to take extra care in ensuring that the procedural requirements of the Act are correctly followed the first time, than risk such challenges and the possibility of being directed to repeat steps which were not followed correctly.

2.5.2 Planning the preparation of an amendment

If a council is authorised to prepare an amendment, it can proceed to finalise the amendment in readiness for commencing the formal steps in Part 3 of the Act. In some cases, the council may have already prepared a draft amendment to assist it in making an application to the Minister for authorisation.

PEA s. 12(2)

The Act sets out matters that must be considered by a planning authority in preparing an amendment. These issues should have already been addressed in the information required by the Minister as part of the request for authorisation.

If the Minister has authorised the amendment subject to conditions, the council should ensure the amendment is prepared in accordance with those conditions.

2.5.3 Drafting an amendment

When drafting an amendment the following principles should be considered.

The amendment should not duplicate other provisions in the scheme

When drafting an amendment, the other provisions (zones, overlays, particular provisions and general provisions) applying to the issue or area should be considered. If they contain controls that already meet the planning authority's objectives for the issue or area, the amendment should not duplicate these.

The amendment should avoid introducing site-specific provisions

Detailed and complex site-specific provisions are discouraged. If a planning authority's objectives can be achieved by applying a combination of the standard zones and overlays, with appropriate support from the MSS and local planning policies (LPPs), this should be done instead.

Using site-specific provisions to avoid the need for a planning permit is also not appropriate. The planning permit is the preferred form of development approval. If a planning authority believes that there would be benefit in expediting the exhibition and consideration of a use or development, it can agree to combine the planning scheme amendment and permit process (see Section 2.10 of this chapter for further details).

The amendment should be clear and accurate

The planning scheme is subordinate legislation, which affects property rights and care should be taken when drafting amendment documentation. The planning authority must ensure the amendment documentation gives effect to the purpose of the amendment.

The amendment documentation should be clear and accurate and be drafted using plain English principles (refer to Chapter 9 – Plain English). Particular care is required that the words and terms defined in the planning scheme or legislation are used as intended. Words and terms that are not defined by the planning scheme or legislation take their ordinary meanings. Always check that the dictionary meaning matches what is intended to be achieved.

Imprecise drafting or incorrect use of provisions can lead to the purpose of the amendment being misunderstood or misinterpreted. This can cause delay during the consideration of submissions, and lead to further action before the Victorian Civil and Administrative Tribunal (VCAT) and courts.

For specific guidance on how LPP and schedules should be written, refer to *Planning Practice Note 8: Writing a Local Planning Policy* and *Planning Practice Note 10: Writing Schedules*.

2.5.4 The amendment documentation

The *Preparing Planning Scheme Amendment Documentation* guidelines provide detailed guidance on:

- preparing and drafting amendment documents
- documents to be submitted with an amendment
- submitting documents to the department
- making an application to the Minister for authorisation, an exemption from notice and approval of an adopted amendment.

The guidelines also contain checklists, helpful hints and links to other documents relevant to each stage of the amendment process.

The guidelines, together with the relevant template documents, can be accessed on the department's website.

A planning authority must prepare:

- an Explanatory Report
- an Amendment Instruction Sheet
- any new or replacement clauses and schedules (if applicable)
- any amendment map sheets (if applicable)
- any incorporated documents (if applicable)
- any supporting documentation.

The Explanatory Report

The Act requires an Explanatory Report to be prepared for every amendment. The Explanatory Report must explain the purpose, effect and strategic basis for the amendment and address the matters set out in *Ministerial Direction No. 11 – Strategic Assessment of Amendments*. More details about the purpose and content of the Explanatory Report can be found on the department's website.

The amendment clauses and schedules may be required in 'track change' format and should be attached to the Explanatory Report to enable all text changes to be easily identified and understood.

PEA s. 12(1)(e)

The Amendment Instruction Sheet

The amendment Instruction Sheet is the front page of an amendment and sets out the instructions for amending the planning scheme. The Instruction Sheet and the attached maps and documents that it refers to, constitute the amendment and therefore must clearly state the instructions for executing the amendment. It is essential that these are drafted carefully and accurately. The Instruction Sheet must:

- identify the planning scheme being amended and the amendment number
- state the name of the planning authority
- list all planning scheme maps being amended, inserted or deleted. Any zoning maps should be listed first, followed by any overlay maps
- list all planning scheme clauses and schedules being amended, inserted or deleted. These should be listed in ascending numerical order.

Amendment clauses and schedules

The amendment clauses and schedules are documents that form attachments to the Instruction Sheet and should always be presented in a final form.

The format of all attached documents must comply with the *Ministerial Direction on the Form and Content of Planning Schemes*, which outlines the format for all schedules including the font, paragraph, bullets, numbering and layout.

Amendment map sheets

The amendment map sheets form attachments to the Instruction Sheet. The map sheets (usually A4 size) show the part of the overall planning scheme map being changed. If areas of a zone or an overlay are being removed, a deletion map needs to be prepared.

The Department's Mapping Services Team provides free assistance to planning authorities in the preparation of map sheets.

2.5.5 Identifying amendments

There are four types of amendment:

- a 'V' amendment – an amendment to the VPP only
- a 'VC' amendment – an amendment to the VPP and one or more planning schemes
- a 'C' amendment – an amendment to one planning scheme only
- a 'GC' amendment – an amendment to more than one planning scheme.

Each amendment must have an amendment number. 'V', 'VC' and 'GC' amendments are prepared by the Minister and the numbering is allocated by the department. The numbering for 'C' amendments is allocated by the relevant council.

2.6 The public exhibition stage

2.6.1 Who must receive copies of an amendment?

PEA s. 17(1)

When an amendment is prepared, the planning authority must give copies to:

- a council where the amendment applies to its municipal district
- the Minister
- anyone else specified by the Minister.

PEA s. 17(3)

The copy to the Minister must be given at least 10 business days before the planning authority first gives notice of the amendment under section 19 (unless the planning authority is not required to give notice under section 19 or the Minister is the planning authority for the amendment). The copy should be sent electronically to the department in accordance with the *Preparing the Documentation for a Planning Scheme Amendment* guidelines.

The copies given to other persons should be sent before notice is given under section 19 so the documents are available for public inspection when the exhibition period starts.

PEA s. 20(4)

The Minister may exempt himself or herself from the requirement to provide copies of an amendment. A planning authority cannot be exempted from this requirement.

2.6.2 Where must copies be available for inspection?

PEA s. 18

The planning authority, the council and the Minister must make an amendment (together with its accompanying documents) available for public inspection until it is approved or lapses. Information about the progress of an amendment can be found on the department's website.

If sections 17 and 19 require a copy and notice to go to the same authority, it may be convenient for these to be sent simultaneously.

2.6.3 Requirement to give notice

PEA s. 19

A planning authority must give notice that it has prepared an amendment unless it has been exempted from this requirement.

The notice requirements are summarised in Figure 2.3.

Ministerial Direction No. 15 – The planning scheme amendment process requires a planning authority to give notice of an amendment within 40 business days of receiving authorisation to prepare an amendment. If the planning authority prepares the amendment without authorisation, notice of the amendment must be given within 40 business days of when the 10 business day period referred to in section 8A(7) lapses.

Before notice of an amendment is given, the planning authority must also, with the agreement of Planning Panels Victoria, set a date for a Directions hearing and a Panel hearing to consider any submissions that must be referred to a Panel under section 23(1)(b).

Who is given notice?

Notice of preparation of an amendment must be given to:

- Every minister, public authority and municipal council that may be materially affected by the amendment. This might include local bodies such as water and sewerage boards, the Environment Protection Authority and, in many cases, adjoining municipalities.
- The owners and occupiers of land that may be materially affected by the amendment. This includes anyone whose land is subject to changed controls under the amendment and might include owners and occupiers of adjoining or nearby land.
- Any Minister, public authority, municipal council or person prescribed. Regulation 6 requires that the following bodies be notified:
 - any council if it is not the planning authority and the amendment affects land within the municipality
 - any minister, public authority or municipal council that the amendment designates as an acquiring authority
 - the Minister administering the *Conservation, Forests and Lands Act 1987*
 - the Minister administering the *Catchment and Land Protection Act 1994*
 - the Minister administering the *Sustainable Forests (Timber) Act 2004*
 - the Minister administering the *Mineral Resources (Sustainable Development) Act 1990*
 - the Minister administering the *Pipelines Act 2005*.
- The owners and occupiers of land benefited by a registered restrictive covenant being removed or varied by the amendment.
- The Minister administering the *Land Act 1958* if the amendment provides for the closure of a road wholly or partly on Crown land.

Under section 19(1) and (b), a planning authority must form an opinion as to whether or not the proposed amendment materially affects a specified person or body, and what notice should be given. This should be carefully recorded and included in documentation required to accompany the submission of an adopted amendment for the Minister's approval.

The administrative arrangements for the responsibility of Acts of Parliament change from time to time. The standing Order of the Governor in Council setting out the current administrative arrangements should be checked to determine the prescribed Ministers.

Traditional owner groups

For the purposes of Part 3 of the Act, the owner of Crown land includes, if the land is agreement land within the meaning of the *Traditional Owner Settlement Act 2010*, the traditional owner group entity (as defined in the *Traditional Owner Settlement Act 2010*). This means that a traditional owner group is entitled to notice of preparation of an amendment under section 19(1)(b) of the Act where the planning authority forms an opinion that the amendment may materially affect the owner of the land.

To determine whether notice must be given to a traditional owner group, the planning authority must establish whether the land is agreement land. Agreement land is identified in a Land Use Activity Agreement (LUAA) entered into under the *Traditional Owner Settlement Act 2010*. Each LUAA is published on the Register of Land Use Activity Agreements, which is available on the Department of Justice website.

2.6.4 How is notice of an amendment given?

PEA s.19 Notice must be given in writing to the individuals and organisations specified in section 19 of the Act. Templates for notices to individuals and ministers are provided on the department's website.

PEA s. 19(2) A planning authority must publish a notice of any amendment it prepares in a newspaper generally circulating in the area to which the amendment applies. If an amendment affects a region or the whole state, an appropriate regional or statewide newspaper should be used.

PEA s. 19(2A) A planning authority must cause a notice to be placed on the land which is the subject of an amendment that seeks to vary or remove a registered restrictive covenant on that land.

PEA s. 19(3) The planning authority must publish a notice of the preparation of an amendment in the *Victoria Government Gazette*. This can be on the same day, or after, the last of the notices has been provided and needs to be arranged in advance to allow enough time for the notice to be published on the chosen date.

PEA s. 19(7) A planning authority may take any other steps to provide notice. For example, additional newspaper notices, use of other media, displays in public places, notices on the land and public meetings. The extent of the notice will depend on how important or wide-ranging the effect of the amendment is likely to be.

A planning authority must make an individual decision for each amendment.

PEA s. 32 The Minister may, in any case, require additional notification to be given after an amendment has been adopted. Early consultation with the department's relevant regional office on the extent of notice for a particular amendment should reduce the likelihood that this has to be done.

What information is provided in the notice?

PEA s. 19(4); PE
Regs r. 7

The notice must:

- state the name of the planning scheme proposed to be amended
- state the planning scheme amendment number
- include a description (which may be by map) to identify the land affected by the amendment
- briefly describe the effect of the amendment
- state that the amendment, any documents that support the amendment, and the explanatory report about the amendment, may be inspected at the office of the planning authority during office hours free of charge
- state the name of the planning authority and the address or addresses where the amendment and other documents may be inspected
- state that any person may make a submission to the planning authority about the amendment

- state the closing date for submissions and the address of the planning authority to which submissions may be sent
- state that the planning authority must make a copy of every submission available at its office for any person to inspect during office hours free of charge until the end of two months after the amendment comes into operation or lapses
- be signed on behalf of the planning authority.

PEA s. 19(4)(b)

The closing date for submissions must be not less than one calendar month after the date the notice is published in the Government Gazette. For example, if a notice is published in the Government Gazette on 4 September, the closing date for submissions must not be before 4 October or, if this day falls on a weekend, the following business day. This period of public exhibition is intended to enable interested or affected parties to consider changes to existing controls and to prepare and lodge submissions.

2.6.5 Exemption from giving notice

There are three situations in which a planning authority may be exempted from all or part of the normal notice requirements for an amendment:

PEA s. 19(1A)

- if the number of owners or occupiers affected makes it impractical for the planning authority to notify them individually

PEA s. 20(1),
(2), (3)

- if the Minister exempts a planning authority from part of the notice requirements

PEA ss. 20(4) and
20A

- if the Minister, as the planning authority for the amendment, exempts himself or herself from all or part of the notice requirements.

Processes related to an exemption from notice for certain amendments are set out in Figure 2.4.

Notice to large numbers of owners or occupiers

PEA ss. 19(1)(b),
(1A) and (1B)

A planning authority is not required to give notice of an amendment to the owners and occupiers of affected land that it believes may be materially affected by an amendment if the number of owners or occupiers makes it impractical to notify them all individually. In this situation, the planning authority must take reasonable steps to ensure public knowledge of the amendment. Such steps might include extra display notices in local newspapers, news items or a sign on the site proposed for development.

PEA ss. 19(1C)
and 19(2A)

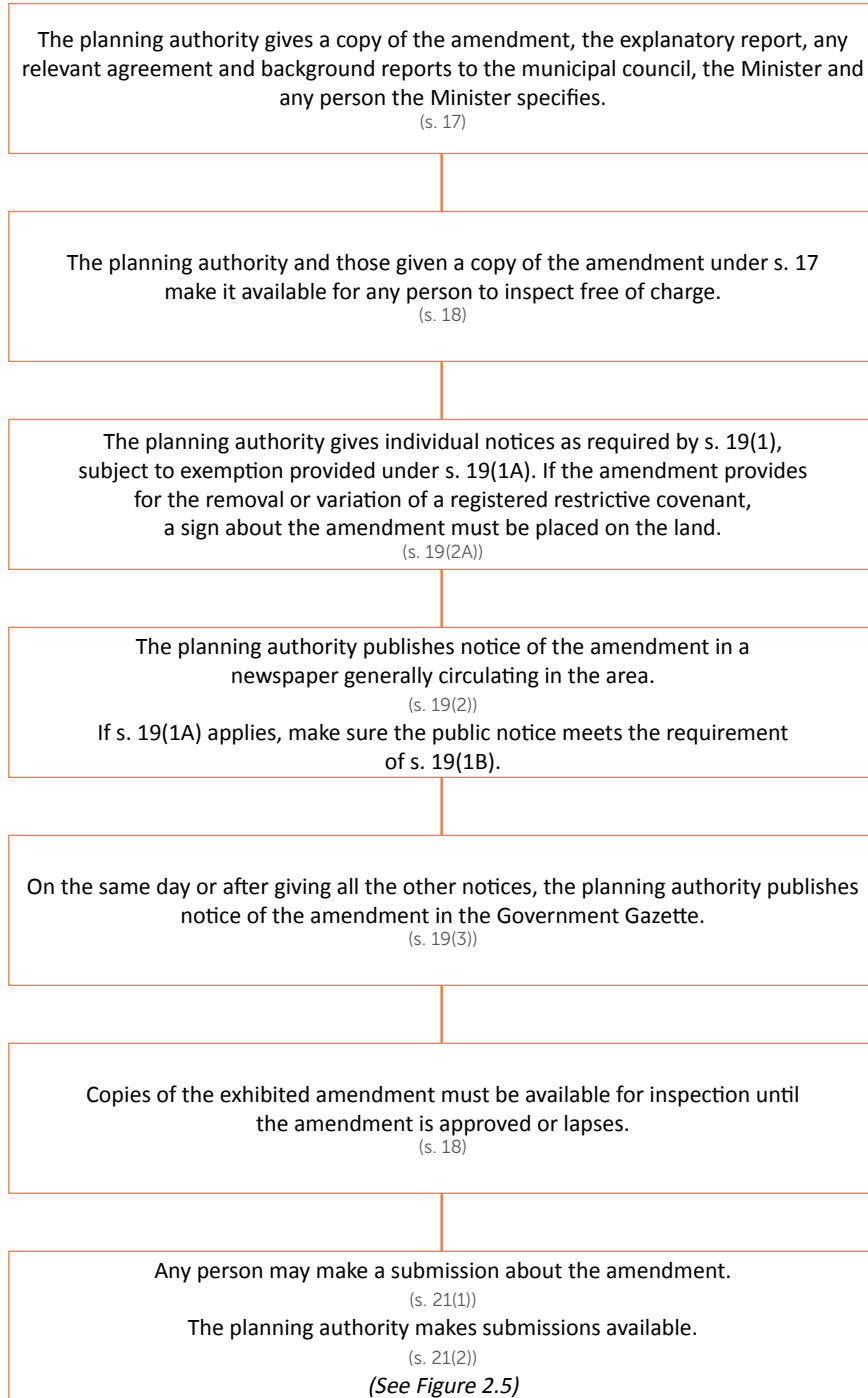
This exemption does not apply to the giving of notice to a landowner of an amendment that provides for any of the following:

- the reservation of that land for a public purpose
- the proposed closure of a road which gives access to that land
- the removal or variation of a registered restrictive covenant on the land.

PEA ss. 31(2)
and 32

A planning authority does not need approval from the Minister before deciding to use section 19(1A). However, in submitting the amendment for approval, it must tell the Minister and give details of the steps taken to ensure knowledge of the amendment. If at this stage the Minister thinks the notice was in any way inadequate, the Minister can require that more notice be given. To avoid the inevitable cost and delay ensuing from this, the planning authority should confer with the department's relevant regional office if it proposes to use this procedure.

Figure 2.3: Giving notice of an amendment



Notice exemption where the Minister is not the planning authority

- PEA s. 20(2) The Minister may exempt a planning authority from the requirements relating to notice of an amendment if the Minister considers that compliance with any of those requirements is not warranted or that the interests of Victoria, or any part of Victoria, make such an exemption appropriate.
- PEA s. 20(1) A planning authority must apply to the Minister to be exempted from the requirements of section 19 of the Act or from the Regulations. The request should be accompanied by a completed *Application Form – Request for an exemption under section 20(2) of the Act* and address the criteria set out in *Planning Practice Note 29 – Ministerial Powers of Intervention in Planning and Heritage Matters*. To avoid unnecessary delays in the amendment process, an exemption request should be made at the time authorisation is sought.
- A template of the application form can be found on the department’s website.
- PEA s. 20(3) The Minister cannot exempt a planning authority from the requirement to give notice:
- PEA s. 20(3)(a) • to the owner of land proposed to be reserved for acquisition for a public purpose or affected by the closure of a road which gives access to that land
- PEA s. 20(3)(b) • to any minister prescribed in the Regulations
- PEA s. 20(3)(ba) • if the amendment proposes a change to provisions relating to land set aside or reserved as public open space
- PEA s.20(3)(c) • to the minister administering the *Land Act 1958* if the amendment provides for the closure of a road wholly or partly on Crown land.
- PEA s. 20(5) The Minister can consult the responsible authority or any other person before giving an exemption and may grant the exemption outright or with conditions, for instance, that some other form of notice be given.

The Minister must decide on the exemption request before any notice is given under section 19 of the Act.

Notice exemption where the Minister is the planning authority

- PEA s. 20(4) The Minister may exempt himself or herself from any of the requirements of sections 17, 18 and 19 of the Act, and the Regulations. The Minister must be the planning authority for the amendment and must consider that compliance with any of those requirements is not warranted or that the interests of Victoria, or a part of Victoria, make such an exemption appropriate.
- If a person, planning authority or responsible authority (other than the Minister) seeks the use of this power, they must apply to the Minister. The request should be accompanied by a completed *Application Form – Request for an exemption under section 20(4) of the Act* and address the criteria set out in *Planning Practice Note 29 Ministerial Powers of Intervention in Planning and Heritage Matters*.
- A template of the application form can be found on the department’s website.
- PEA s. 20(5) The Minister may consult the responsible authority or any other person before giving himself or herself an exemption.

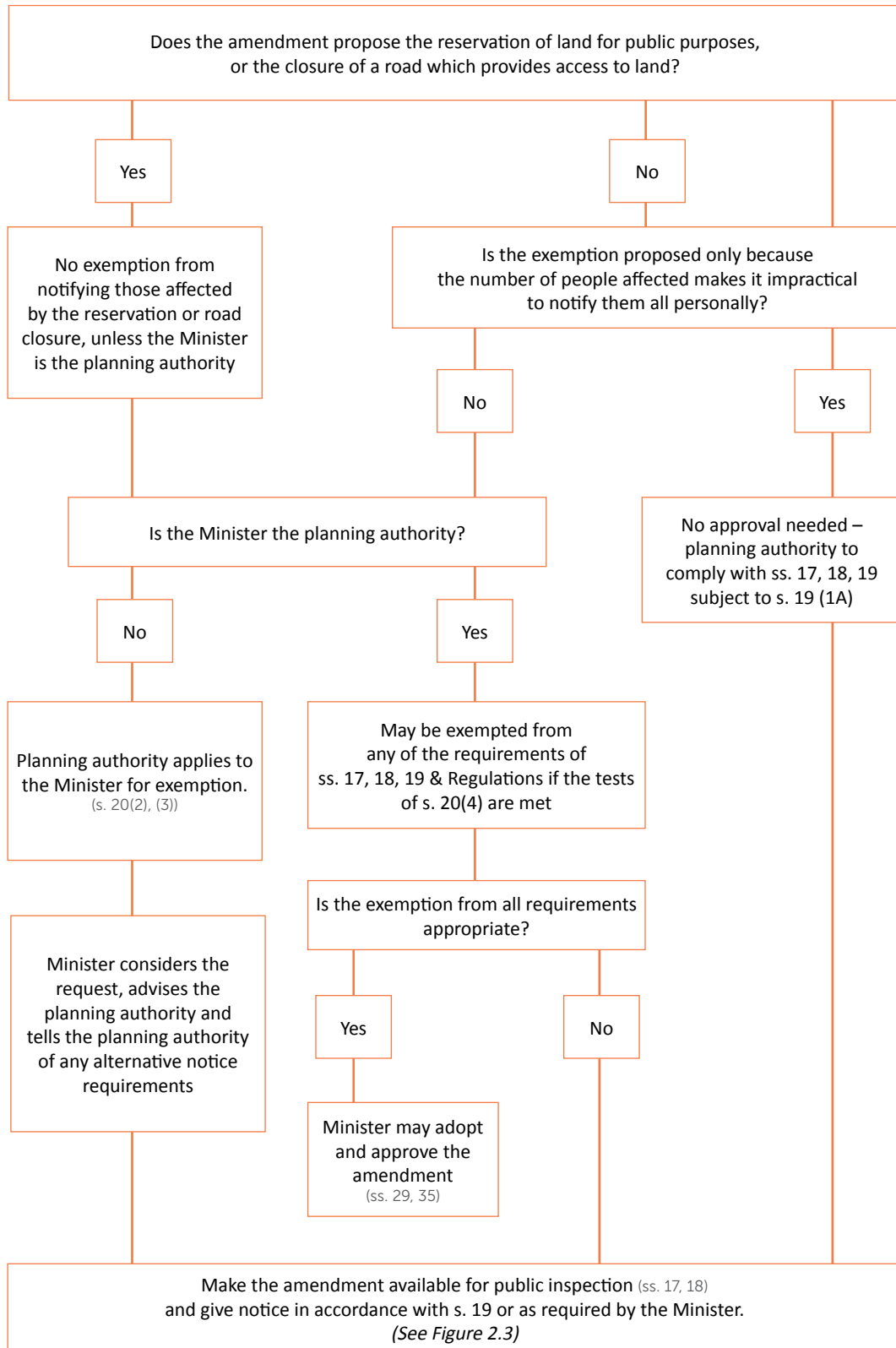
Notice exemption for prescribed classes of amendment

The Minister may determine to prepare an amendment in accordance with section 20A of the Act if the amendment is in a prescribed class. The prescribed classes are set out in Regulation 9A(1), including:

- an amendment to correct an obvious or technical error in the VPP or a planning scheme
- an amendment to delete an expired clause in the VPP or a planning scheme
- an amendment to clarify or improve the language or grammatical form of a clause in the VPP or a planning scheme, if the intended effect of that clause or any other clause in the VPP or a planning scheme is not changed by that amendment
- an amendment to remove a clause that duplicates another clause in the VPP or a planning scheme
- an amendment to the VPP or a planning scheme to insert or update a heading
- an amendment to the VPP or a planning scheme to update a reference to a clause in the Victoria Planning Provisions or a planning scheme
- an amendment to delete a reference to an incorporated document or a reference document in the VPP or a planning scheme if that document has expired or the reference is redundant
- an amendment to the schedule to the Heritage Overlay in a planning scheme to delete a reference to a heritage place being included on the Victorian Heritage Register under the *Heritage Act 1995* if the heritage place is not on that Register
- an amendment to a planning scheme to include land in the Road Zone if that land has been declared a freeway or an arterial road under the *Road Management Act 2004*
- an amendment to a planning scheme to delete a Road Closure Overlay from land
- an amendment to a planning scheme to delete a Public Acquisition Overlay from land if the person or body designated in the planning scheme as the acquiring authority for that land has acquired the land
- an amendment to a planning scheme to delete an Environmental Audit Overlay from land if a certificate of environmental audit has been issued for that land in accordance with Part IXD of the *Environment Protection Act 1970*
- an amendment to extend the expiry of a clause in the VPP or a planning scheme for a period of 12 months or less, beginning on the day the amendment takes effect, if notice has been published in accordance with section 19(3) of the Act of the preparation of an amendment to introduce a clause that is similar or substantially the same
- any combination of the above classes.

An amendment prepared by the Minister under section 20A is exempt from the requirements of sections 17, 18 and 19 of the Act.

Figure 2.4: Exemption from notice



PEA s. 20A(4)

The Minister must consult with the municipal council for the relevant planning scheme unless the council has requested the amendment or the amendment is exempted from this requirement by the Regulations. Regulation 8(2) exempts two classes of amendment from this consultation requirement:

- an amendment to the VPP
- an amendment to a planning scheme that is of a class prescribed in Regulation 9A(1) and that is made as a result of an amendment to the VPP prepared under section 20A.

Any person may ask the Minister to prepare an amendment in a prescribed class under section 20A. The request should be accompanied by a completed *Application Form – Request for an exemption under section 20A of the Act* and clearly identify the applicable prescribed class or classes.

An amendment prepared by the Minister under section 20A may be for one or more matters provided each matter falls within a prescribed class.

If a proposed amendment is not within a prescribed class, it cannot be dealt with under section 20A. However, depending on the particular circumstances, it may be appropriate for the amendment to be exempted from notice under section 20 of the Act.

To determine whether an exemption under section 20 or 20A may be appropriate, early consultation with the department's relevant regional office is desirable.

2.6.6 Making a submission

PEA s. 21

Any person may make a submission to the planning authority about an amendment if notice of that amendment has been given. A submission may support, oppose or seek changes to an amendment. A submission must not request a change to the terms of any state standard provision to be included in a planning scheme by the amendment. A submission can, however, request that a state standard provision be included in or deleted from the scheme.

There are no specific requirements about the form a submission must take, but it should do the following:

- clearly identify the amendment it refers to, by citing the amendment number
- set out the submitter's views on the amendment (for example why the submitter supports or opposes the amendment and how the amendment will materially affect the submitter)
- where appropriate, the submission should respond to the specific strategic planning basis for the amendment or clearly set out the relevant planning considerations upon which the submitter's view is based
- set out what the submitter would like the planning authority to do (for example abandon the proposal completely, exclude certain land from its effect, include additional conditions on a proposed use or approve the amendment as exhibited)
- give the submitter's name and address and contact details during office hours.

A person making a submission should ensure that it is received by the planning authority before the advertised closing date for submissions.

PEA s. 21(2) The planning authority must make a copy of every submission available at its office for any person to inspect for two months after the amendment comes into operation or lapses. *Planning Practice Note 74 – Availability of Planning Documents* gives further advice about making copies of planning documents, including submissions, available. *Victoria’s Information Privacy Act 2000* also sets standards for the collection and handling of personal information. More information can be obtained from the Privacy Victoria website.

PEA s. 21A Two or more people may make one submission to a planning authority. In the case of a submission made jointly by a number of people, the submission should nominate one person as the group’s representative for notices and representation at a panel hearing. In the case of joint submissions, the Act allows for notices to be sent to one of the signatories on a petition.

2.6.7 Late submissions

PEA s. 22(2) It is important that submissions be lodged within the public exhibition period, however a planning authority may consider a submission received after the period stated in the notice. A planning authority should consider a late submission if there are good reasons for it being late, and must do so if directed by the Minister. If the authority has not advanced very far in its considerations and a submission is received shortly after the closing date, the submission should normally be considered. A request for consideration of a late submission should be made in a letter to the planning authority or to the Minister if the person is seeking a direction from the Minister that a submission be considered. Any request must clearly identify the amendment referred to and, in the case of a request to the Minister, the planning authority for the amendment.

Generally a direction will be given only when there is reasonable time for the planning authority to consider the submission before a panel hearing. A direction is likely to be given in the following circumstances:

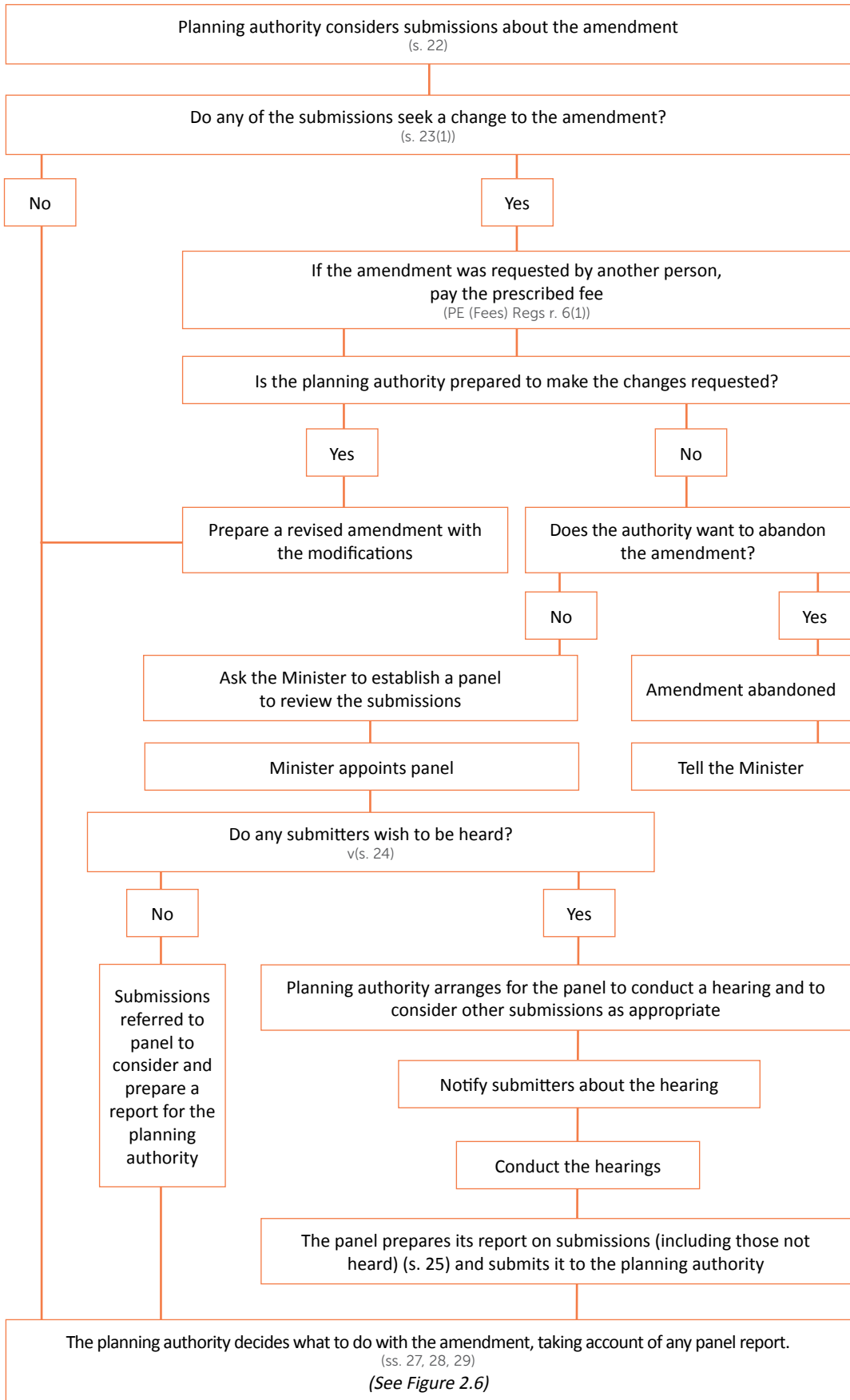
- if reasons are given for the late submission
- the submission raises a major issue of policy
- the submission is received less than a week after the closing of the exhibition period
- the request for consideration of a late submission was made before the planning authority had begun its deliberations
- if there is to be a panel hearing, that there is enough time before the hearing begins for the planning authority to consider the submission and form an opinion
- the submission was late owing to postal delays or exceptional circumstances beyond the control of the person lodging it.

2.6.8 Considering a submission

PEA ss. 22 and 23

A planning authority must consider each submission but must not consider a submission which requests a change to the terms of a state standard provision. It can, however, consider a submission which requests that a state standard provision be included in or deleted from the scheme.

Figure 2.5: Considering submissions about an amendment



PEA ss. 191 and 194	A planning authority may nominate a committee to hear any person to clarify a submission and make recommendations to the authority. A committee hearing is a more informal process than the panel process.
PEA s. 23(1)	After considering a submission which requests a change to an amendment, the planning authority must: <ul style="list-style-type: none"> • change the amendment in the manner requested; or • refer the submission to a panel; or • abandon the amendment or part of the amendment.
PEA s. 23(3)	This does not apply to a submission which requests a change to the terms of a state standard provision to be included in the scheme by the amendment.
PEA s. 23(2)	A planning authority may also refer submissions that do not require a change to the amendment to a panel.

2.7 The panel stage

PEA ss. 23(1)(b), 153 and 154	Submissions which seek a change to the amendment and are not accepted by the planning authority must be referred to an independent panel appointed by the Minister. A panel may consist of one or more persons. In most instances, although the Minister is responsible for appointing a panel, the panel members are chosen independently by Planning Panels Victoria. It is important to remember that the basic role of a panel is to: <ul style="list-style-type: none"> • Give submitters the opportunity to be heard in an independent forum, in an informal, non-judicial manner. A panel is not a court of law. • Give independent advice to the planning authority and the Minister about an amendment and the submissions referred to it. A panel makes a recommendation to the planning authority. It does not formally decide whether the amendment is to be approved.
PEA ss. 22 and 23	A panel will not be required if all submissions requesting changes are accepted, and the amendment is changed accordingly, or the amendment is abandoned. Otherwise, a panel will be required.
PEA ss. 151 and 152	In some cases, a panel may also be established as an advisory committee under section 151 of the Act to consider and report on additional planning matters relating to the amendment. If a panel is also appointed as an advisory committee, and it conducts a hearing in its capacity as an advisory committee, certain procedural requirements in Part 8 of the Act apply. The applicable requirements are set out in section 152 of the Act.

2.7.1 Appointment of a panel

The planning authority must make a written request to the Minister to appoint a panel. A request is usually made to Planning Panels Victoria, which has delegated authority from the Minister to appoint a panel. The information that should accompany a request is set out in *Planning Panel Victoria's Guide for Planning and Responsible Authorities*, which is available on the department's website.

The request should:

- summarise the nature of the proposal
- identify the applicant or proponent if not the council
- state the total number of submissions
- identify who the submissions are from
- identify the key issues raised in the submissions
- indicate how many days may be required for the panel hearing.

If the amendment has been prepared at the request of another person, an additional fee is payable to the planning authority for considering submissions which seek a change to the amendment and where necessary referring submissions to a panel. The current Fees Regulations should be checked to determine the fees payable.

Ministerial Direction No. 15 – The planning scheme amendment process requires a panel to commence carrying out its functions (that is, either conduct a directions hearing or, if no directions hearing is required, commence the panel hearing) within 20 business days of its appointment.

PEA s. 158

The planning authority must give a panel secretarial and other assistance before, during and after a hearing.

As soon as a panel is appointed, the planning authority should give each member of the panel the following documents:

- a copy of the exhibited amendment, explanatory report and any supporting documents. A note of any changes the planning authority has agreed to make to the amendment since it was exhibited. a copy of all submissions referred to the panel (including late submissions)
- a copy of all other submissions
- a copy of any reports that may assist the panel.

2.7.2 Directions panel

PEA s. 159

A panel can hold a 'directions hearing' before any submissions are heard so that preliminary matters can be decided. A panel may give directions about the time and place of a hearing, any preliminary hearing matters and the conduct of hearings.

PEA ss. 155 to 159

Alternatively, the Minister may appoint a directions panel in respect of hearings to be conducted by a panel, Members of the directions panel do not need to be members of the appointed panel. A directions panel may give any directions in relation to a hearing that a panel may give under section 159. The procedural requirements for a panel relating to the chairperson, costs and expenses, panels with more than one member and the assistance required from planning authorities will also apply to a directions panel.

The benefit of a directions panel is that it can provide directions in preliminary hearing matters and the conduct of hearings, allowing councils, parties and their advocates to better prepare for the panel process and ensure that panel hearings start without unnecessary delays.

Any person who fails to comply with the directions of a panel or directions panel can be refused their opportunity to be heard.

2.7.3 Regulation of panel proceedings

PEA ss. 160(1),
(2) and 169

A panel must conduct its hearings in public unless a person requests that their submission be made in private and the panel is satisfied that the submission is of a confidential nature. A panel may exclude a person from a panel hearing who is misbehaving. This can include insulting panel members or other people, repeatedly interrupting, or disobeying a direction of the panel.

PEA ss. 161 and
167

A panel can regulate its own proceedings. A hearing is not required to be conducted in a formal manner.

However, in hearing submissions a panel must act according to equity and good conscience without regard to technicalities or legal forms. A panel is bound by the rules of natural justice but not by the laws of evidence. A panel may inform itself in any way it thinks fit without notice to any person who has made a submission.

PEA s. 161(3)
and (4)

A panel may hear evidence and submissions from any person whom this Act requires it to hear. If a submitter wants to have a witness inform the panel, the panel can decide if there should be any cross-examination of that witness. Submitters are not cross-examined but may be asked questions by the panel to clarify their submission.

2.7.4 Panel hearing procedures

The panel will prepare a draft hearing timetable. The timetable should include the expected time for presentation of submissions. The order of submitters may be based on items within the amendment or on topics of the submissions. A copy of the timetable should be given to each submitter who wishes to be heard. Submitters should be invited to attend all presentations.

Usually the procedure for a hearing is:

- the chairperson commences the hearing, describes the amendment and introduces the members of the panel
- an officer of the planning authority outlines the background to and purpose of the amendment, what changes (if any) are proposed to the amendment as a result of considering submissions, and the planning authority's attitude to the referred submissions
- if the council or the responsible authority is not the planning authority, a representative of the council or responsible authority outlines its view of the amendment
- if someone asked the planning authority to prepare the amendment (the proponent), that person presents a submission (and usually evidence) to support the request
- submitters are heard in the order set out in the timetable or decided by the chairperson.

Typically, the panel will give the planning authority and the proponent a right of reply on matters raised by submitters.

PEA ss. 161(2)
and 165

The panel may require a planning authority or other body or person to produce documents relating to a matter being considered by the panel. The panel can adjourn the hearing to other dates if it considers this necessary and may inspect relevant sites.

PEA s. 166

A failure to give proper notice of an amendment, or to comply with any other requirement of the Act in relation to preparing the amendment, does not prevent a panel from hearing and considering any submissions referred to it and making its report and recommendations. On these occasions the panel report may include a recommendation that certain things be done, or that further notice be given.

Costs and expenses

PEA s. 156

The Minister directs planning authorities to pay fees and allowances on a case by case basis. It is normal practice for a direction to be given. If a planning authority believes there is good reason why a direction to pay the costs should not be given, it should ask that no direction be given, or that a direction to meet only some of the costs be given.

If a planning authority has been directed to pay the panel fees and allowances, it can ask any person who has requested the amendment to contribute to the cost. A refusal to contribute could lead to the abandonment of the amendment by the planning authority.

2.7.5 Submissions to a panel

PEA s. 161(5)

Submissions and evidence may be given to the panel orally or in writing or both.

PEA s. 24

A panel must consider all submissions referred to it and give a reasonable opportunity to be heard to:

- any person who has made a submission referred to the panel
- the planning authority
- any responsible authority or municipal council concerned
- any person who asked the planning authority to prepare the amendment
- any person whom the Minister or the planning authority directs the panel to hear. This could be someone who supports the amendment (without change).

Even if a person does not wish to present their submission at the hearing, the panel must still consider their written submission.

Submitters should usually be given at least three weeks notice of the hearing date so that oral and written submissions can be prepared.

Presentation of submissions to the panel

PEA s. 162

People are encouraged to represent themselves at a panel hearing however they may be represented by any other person. If a submitter is to be represented by another person, that person must have written authority to do so. People not wishing to present a submission at the hearing are still welcome to attend.

Submitters should:

- refer to the main arguments in their oral submission and make it as brief as possible, particularly if the matters have been covered in their written submission
- avoid repeating points made by previous speakers
- ensure that the submission relates to the matters under discussion and is based on fact
- provide the panel at the hearing with copies of documents referred to in the submission

- if possible, use visual aids such as photographs and plans to highlight the main points.

Planning Panel Victoria's *Guide to the Public Hearing* provides more information about making submissions at a hearing. It is available on the department's website.

2.7.6 What issues does a panel need to consider?

PEA ss. 161 and 168

The key function of a panel is to consider the issues raised in submissions. However a panel may inform itself on any matter as it sees fit and without notice to anyone making a submission. A panel may take into account any matter it thinks relevant in making its report and recommendation.

When considering an amendment a panel will address:

- the merits of the amendment
- the issues raised in submissions
- the strategic context and implications of the amendment
- the matters identified in *Planning Practice Note 46 – Strategic Assessment Guidelines for Planning Scheme Amendments*
- any other relevant matters.

To assist the panel in considering these issues, the following matters should be specifically addressed by the planning authority in its submission to the panel.

Description

- What does the amendment propose to do?
- If land is affected by the amendment, where is it located? What does it look like? Who owns it?
- Is the land affected by any specific locational, architectural, environmental, topographic, servicing, social or other features, or constraints which require a special planning response?
- What existing planning provisions apply to the land or the proposal?
- If the amendment has been modified since exhibition, what are the modifications?

Strategic justification

- What aspects (if any) of the SPPF are relevant?
- How does the amendment support or give effect to the SPPF? Is it consistent?
- How does the amendment support or implement the LPPF and, specifically, the MSS?
- Does the amendment seek to change the objectives or strategies of the MSS?
- What effect will any change to the MSS have on the rest of the MSS, either in its own right or cumulatively with other changes that may have been made to the MSS or other amendments?
- What LPPs will the amendment affect or be affected by?

Statutory justification

- Is the form of the amendment appropriate? Will it achieve the desired result?
- Is the form and content of any LPP consistent with the advice given in *Planning Practice Note 8 – Writing a Local Planning Policy*?
- Does the amendment comply with the requirements of the *Ministerial Direction on the Form and Content of Planning Schemes*?
- Do any other Minister’s directions apply to the amendment and, if so, have these been complied with?
- What notice was given of the amendment?
- How many submissions were received and from whom? What issues do they raise?

If any of the matters are not relevant, this should be stated and the reasons why, rather than the matter simply being ignored.

2.7.7 Panel reports

PEA s. 25

The panel must report its findings to the planning authority and, except as noted below, can make any recommendations it thinks fit.

PEA ss. 25(3), (4) and 25A

A panel must not recommend that an amendment be adopted that includes changes to the terms of any state standard provision. A panel may, however, recommend to the Minister that an amendment be prepared to the VPP, where the Minister is not the planning authority for the amendment. A panel may also recommend that an amendment provide for a state standard provision to be included in or removed from the planning scheme.

Ministerial Direction No. 15 – The planning scheme amendment process sets times for preparing panel reports. Once a hearing is completed and all supplementary submissions to the panel have been received, a panel must submit its report to the planning authority as follows:

- within 20 business days – for a one-person panel
- within 30 business days – for a two-person panel
- within 40 business days – for a panel with three or more persons.

PEA s. 27

The planning authority must consider the report, decide what alterations should be made to the amendment and whether to adopt or abandon it. The Minister can exempt an authority from the need to consider a report from a panel, if the panel has not reported within six months from its appointment or within three months from the completion of its hearings.

PEA s. 26

The panel’s report must be made public 28 days after receipt by the planning authority or earlier if the planning authority has made a decision about the amendment. A planning authority may also make the report available before this if it wishes.

PEA s. 31; PE Regs r. 9(e)

If a planning authority decides not to accept a panel’s recommendation, it must give its reasons for this when it submits the adopted amendment to the Minister under section 31 of the Act.

2.7.8 Abandonment or lapsing of an amendment

PEA ss. 30(1)(a) and (b)

Amendments automatically lapse if they have not been adopted by the planning authority within two years from the date the notice of exhibition was published in the Government Gazette. The two-year period may be extended by the Minister. Requests for an extension should be made at least one month before the lapse date. An extension cannot be granted after the amendment has lapsed. The amendment will lapse if the amendment is not adopted within the extended period. In this case, the Minister must publish a notice in the Government Gazette setting out the date on which the amendment (or part) lapsed.

PEA ss. 28, 30(1)(c), 30(2) and 188(2)

The planning authority must tell the Minister in writing if it decides to abandon an amendment or part of an amendment. Abandonment of an amendment must be by resolution of the planning authority and recorded in its minutes or reports. An amendment will lapse once the Minister has been notified that the amendment or part of an amendment has been abandoned. The Minister must publish a notice in the Government Gazette setting out the date on which the amendment (or part) lapsed.

PEA s. 30(1)(d) and (2)

An amendment or part of an amendment will also lapse if the Minister refuses to approve it. The Minister must publish a notice in the Government Gazette setting out the date on which the amendment (or part) lapsed.

2.8 The amendment adoption stage

PEA s. 29

A planning authority can adopt an amendment, or part of it, with or without changes. Changes may be made as a result of the authority's initial consideration of submissions, the panel's recommendations or for other reasons considered relevant.

Ministerial Direction No. 15 – The planning scheme amendment process sets times within which a planning authority must decide to either adopt or abandon an amendment. If no submissions have been referred to a panel, the planning authority must make a decision within 60 business days of the closing date for submissions. If a panel was appointed, the planning authority must decide within 40 business days of receiving the panel's report.

If an amendment is adopted in part, with other parts to be resolved later, the amendment should be split and each part (Parts 1, 2, 3 and so on) progressively adopted as outstanding issues are resolved.

PEA s. 188(2)(a)

Adoption of an amendment cannot be delegated to officers. It must be by resolution of the planning authority and recorded in its minutes or reports. A copy of the resolution, or evidence of it, should be attached to the adopted amendment.

PE (Fees) Regs r. 6(3)

If the amendment was requested by another person, the planning authority can charge a fee for adopting it and submitting it for approval. Refer to the current Fees Regulations to check the fee payable.

Figure 2.6: Adopting or abandoning an amendment



2.9 The amendment approval stage

Once the planning authority has adopted the amendment, it must be submitted to the Minister for Planning for approval.

2.9.1 Amendments to be submitted to the Minister for approval

PEA s. 31

Ministerial Direction No. 15 – The planning scheme amendment process requires an amendment to be submitted to the Minister within 10 business days of when the amendment was adopted.

PE Regs r. 9 PE
(Fees) Regs
r. 6(4)

The adopted amendment must be submitted with:

- the following prescribed information:
 - the reasons for the amendment
 - a list of the notices given under section 19(1) of the Act
 - a summary of action taken under section 19(1B) (if applicable), 19(2), 19(2A), 19(3) and 19(7) of the Act
 - copies of submissions or reports received on the amendment
 - the reasons why any recommendations of a panel appointed under Part 8 of the Act were not adopted
 - a report on submissions not referred to a panel
 - a description of and the reasons for any changes made to the amendment before adoption
- a completed application form for requesting the approval of the amendment. A template of this form is available on the department’s website
- a copy of the planning authority resolution to adopt the amendment
- the prescribed fee.

A planning authority may submit other supporting information with the application form if it thinks that this will help to explain the amendment. The amendment and accompanying information should be sent electronically in accordance with the *Preparing Planning Scheme Amendment Documentation* guidelines.

If the planning authority decided in accordance with section 19(1A) of the Act not to give notice to all owners and occupiers, the planning authority must inform the Minister of this and provide details of steps that were taken to ensure people were aware of the proposal.

Any other supporting information (letters, reports, plans, photos and so on) may be provided to further amplify ‘why’, ‘where’ and ‘how’ changes are being proposed. Department officers will examine all this information and report the amendment to the Minister. Inadequate information will cause delays in the processing of a proposed amendment.

PEA s. 19(5)

A partial failure to give notice does not prevent a planning authority from adopting and submitting an amendment, but this will be considered by the Minister who can require further notice to be given.

PEA s. 60(1A)(h)

An amendment which has been adopted by the planning authority but not yet approved by the Minister should be considered by a responsible authority before it makes a decision about a permit application, if the circumstances make it appropriate to do so.

2.9.2 The Minister's consideration of an amendment

Ministerial Direction No. 15 – The planning scheme amendment process requires the Minister to make a decision on an adopted amendment within 40 business days of receiving it from the planning authority.

Figure 2.7 summarises the Minister's consideration of an amendment submitted by a planning authority.

2.9.3 Approving an amendment

PEA s. 35(1)

The Minister can approve an amendment, or a part of it, with or without changes and subject to conditions.

PEA s. 35(4)(a),
(b); PE Regs r. 10

If an amendment unreasonably prejudices the objectives or operations of a prescribed government department or public authority, the Minister may need to consult with the relevant Minister and obtain his or her consent before approving an amendment. The Minister must consult with the Minister administering the *Road Management Act 2004* if the amendment provides for the closure of a freeway or an arterial road.

2.9.4 Refusing an amendment

PEA ss. 30(1)(d),
30(2)

When the Minister refuses to approve an amendment, the amendment lapses and the Minister must publish a notice in the Government Gazette setting out the date on which the amendment lapsed.

2.9.5 Additional notice of an amendment

PEA s. 32

If the Minister thinks the initial notice given of an amendment was inadequate, the Minister can defer making a final decision on the amendment and direct the planning authority to give additional notice and go through the process of considering submissions, appointing a panel, adoption and submission again.

PEA ss. 33, 34

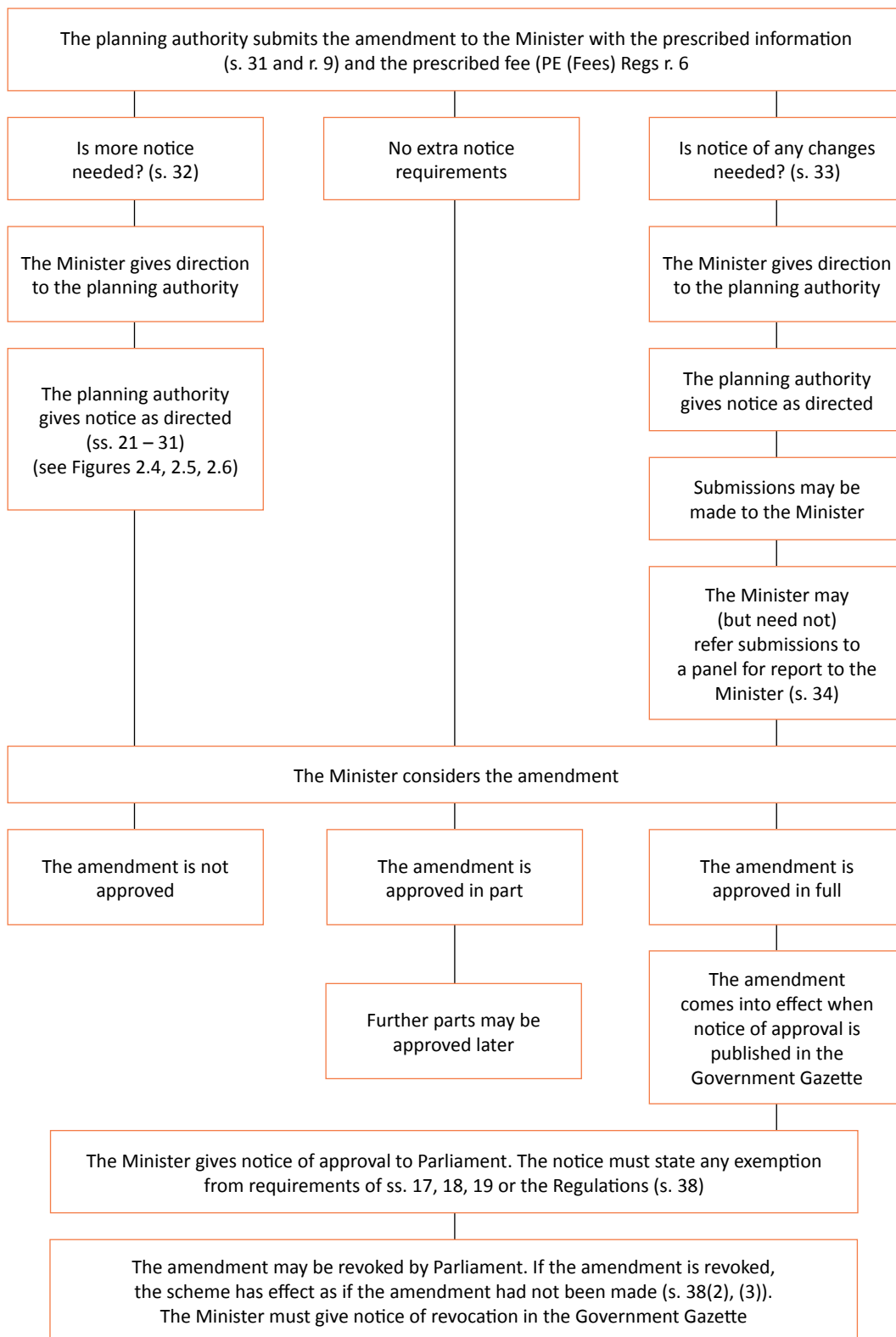
The Minister can also direct a planning authority to give notice of any changes it has made to the amendment after exhibition and of any changes the Minister proposes to make. The Minister can specify what form that notice will take and can refer submissions to a panel (which the Minister appoints) before making a final decision.

2.9.6 Notification of an approved amendment

PEA s. 36

The Minister publishes notice of approval of an amendment in the Government Gazette. The Minister may also require the planning authority to give notice of the amendment's approval. This is usually the publication of a notice in a local newspaper. The planning authority should promptly advise the Minister that the required notice has been given.

Figure 2.7: Approving an amendment



PEA s. 40(1), (3);
PE Regs r. 12

Lodging of amendments

If the Minister approves an amendment, the Minister, or if the Minister directs, the planning authority, must lodge the prescribed documents and a copy of the approved amendment with:

- the responsible authority
- the council to which the planning scheme applies if the council is not the responsible authority
- any other person specified by the Minister.

The prescribed documents are:

- an explanatory report relating to the approved amendment
- any document applied, adopted or incorporated in the planning scheme or the VPP by the amendment
- any section 173 agreement that comes into operation when the amendment comes into operation.

PEA s. 40(2)

The lodging process must be completed before the notice of approval is published in the Government Gazette. If a planning authority is required to carry out the lodging process, it should promptly advise the Minister in writing when this has been done.

The amendment comes into effect when notice of approval is published in the Government Gazette.

2.9.7 Who keeps a copy?

PEA ss. 41, 42

A copy of an approved amendment and an up-to-date copy of the affected planning scheme must be kept by the Minister, the responsible authority and the council (if it is not the responsible authority). A copy of an approved amendment must also be kept by the planning authority. If the planning authority is also the responsible authority, only one copy of the approved amendment and updated planning scheme needs to be kept. Any person can inspect these documents during office hours free of charge for two months after the amendment comes into operation and after that time, on payment of the prescribed fee.

2.10 Defects in procedure

PEA s. 39

A person who is substantially or materially disadvantaged by a failure of the Minister, a planning authority or a panel to comply with the procedural requirements for an amendment can refer the matter to VCAT by lodging a notice with the Registrar.

This must be done before an amendment is approved and within one month of the person taking such action becoming aware of the failure.

Although VCAT cannot change or substitute a decision if it finds the procedures have not been properly followed, it can require that remedial action take place before the amendment can be adopted or approved.

2.11 Revocation of an amendment

PEA s. 38(1), (2);
PE Regs r. 11

All or part of an approved amendment may be revoked by either House of Parliament within 10 sitting days after notice of the approval of the amendment has been laid before that House.

PEA s. 38(3), (4)

If an amendment is revoked, the scheme has effect as if the amendment had not been made. Notice of the revocation of part or all of an amendment must be published in the Government Gazette.

2.12 Ratification of amendments

2.12.1 Ratification of an amendment

PEA s. 46AF

Under section 46AF of the Act, the following amendments to a metropolitan planning scheme require ratification after they are approved by the Minister:

- an amendment to or the insertion of an urban growth boundary; or
- an amendment that has the effect of altering or removing the controls over the subdivision of any green wedge land to allow for the land to be subdivided into more lots or into smaller lots than allowed for in the scheme.

PEA ss. 46AA
and 46AC

The terms ‘metropolitan fringe planning scheme’, ‘urban growth boundary’ and ‘green wedge’ are defined in Part 3AA of the Act. The provisions were included in the Act in 2003 to safeguard Melbourne’s green wedges and protect rural areas from inappropriate development.

2.12.2 Procedure for ratification

PEA s. 46AH(1)

After the Minister has approved the amendment, the Minister must cause the amendment to be laid before each House of Parliament. This must be done within seven sitting days after the amendment is approved.

PEA s. 46AG

The amendment does not take effect unless ratified by each House of Parliament within 10 sitting days after it is laid before that House.

2.12.3 Ratification of a combined amendment and permit

PEA s. 46AH(2)

If a permit has been granted under section 96I in respect of an amendment that requires ratification, the Minister must cause a notice of the grant of the permit to be laid before each House of Parliament. This must be done at the same time that the amendment is laid before that House.

2.12.4 When does a ratified amendment commence?

PEA ss. 40, 46AI,
46AJ

After an amendment is ratified, the Minister must publish a notice of the ratification in the Government Gazette and lodge the amendment with the relevant authorities as required by section 40 of the Act. The amendment comes into operation on the date the notice is published in the Gazette or any later date specified in the notice.

2.12.5 When does an amendment lapse?

PEA s. 46AK

An amendment that has not been ratified by Parliament within the specified time lapses on the day immediately after the last day on which it could have been ratified. The Minister must publish a notice in the Government Gazette setting out the date on which the amendment lapsed. This Gazette notice is conclusive proof of the date on which the amendment lapsed.

2.13 Amendments in special circumstances

2.13.1 Amendments to reserve land for public purposes

PEA s. 3

In the VPP, the Public Acquisition Overlay (PAO) is the tool used to reserve land for a public purpose either immediately or in the future. The use of land for a public purpose is defined by the Act as any purpose for which land may be compulsorily acquired under any Act to which the *Land Acquisition and Compensation Act 1986* applies.

It is necessary to ensure that changes to the use and development of the land do not prejudice the purpose for which it is to be acquired. In preparing an amendment to apply the PAO, a planning authority should keep several important points in mind:

Planning schemes
Cl. 45.01-6

- In administering the *Land Acquisition and Compensation Act 1986* or any Act or regulation dealing with land acquisition or compensation, any land included in a PAO is reserved for a public purpose.

PEA ss. 19, 20

- Reserving land is a serious step towards depriving the present owners and occupiers of that land. It is important that owners and occupiers of land to be reserved are fully informed at all stages.

PEA ss. 19(1C),
20(3)

- The planning authority must give individual notice to the owners and occupiers of affected land under section 19(1A) the Act. Exemptions to individual notice under section 19(1A) do not apply to the reservation of land for a public purpose.

PEA s. 19(1)(c);
PE Regs r. 6

- The planning authority must give notice to any Minister, public authority or municipal council that the amendment designates as an acquiring authority.

PEA s. 20(3)

- The Minister cannot exempt a planning authority (other than the Minister) from the requirement to give notice to the owner of land to be reserved.

PEA s. 19(6)

- Failure to give the necessary notice to an owner is fatal to the amendment.

PEA ss. 98(1),
109

- The schedule to the PAO requires that the acquiring authority and the reason for acquiring the land be specified. Before giving notice of an amendment to include land in a PAO, the planning authority should ensure that the acquiring authority (which may or may not be the planning authority) is prepared to meet any compensation claims that may arise.

2.13.2 Rezoning of potentially contaminated land

Ministerial Direction No. 1 – Potentially Contaminated Land seeks to ‘ensure that potentially contaminated land is suitable for a use which is proposed to be allowed under an amendment to a planning scheme and which could be significantly adversely affected by any contamination’.

In preparing an amendment which would have the effect of allowing (whether or not subject to the grant of a permit) potentially contaminated land to be used for a sensitive use, agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of that land are or will be suitable for that use. Before preparing an amendment, the planning authority should seek advice from the department if there is doubt about how a particular situation should be addressed.

Consult *Ministerial Direction No. 1 – Potentially Contaminated Land* for the specific requirements of the Direction.

Planning Practice Note 30 – Potentially Contaminated Land provides guidance about how to identify potentially contaminated land, the appropriate level of assessment of contamination for an amendment or planning permit and the application of the Environmental Audit Overlay.

2.13.3 Amendments relating to notice requirements

PEA s. 6(2)(kc),
(kd)

A planning scheme can set out classes of applications for permits exempted wholly or in part from section 52(1) of the Act (requirement to give notice of an application) and set out notice requirements, if any, to apply in place of those requirements. The scheme can also set out classes of applications the decisions on which are exempted from section 64(1), (2) and (3) (notice of decision to be given to objectors), and section 82(1) (objector may apply for a review to VCAT against a decision to grant a permit).

PEA s. 4(2)(i), (j)

There are no particular requirements about the types of applications that can be exempted. A planning authority should note the objectives of the planning framework 'to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice' and 'to provide an accessible process for just and timely review of decisions without unnecessary formality'.

Exemption provisions can apply to a class of use or development generally (wherever it occurs) or to a class in a particular zone or overlay. An exemption class could also be related to a specific set of planning controls (such as development which is in accordance with a detailed plan incorporated in the scheme). Classes can be defined in whatever way is appropriate to the outcome being sought.

In planning schemes, exemption provisions typically apply to a class of use or development and can either be a state standard provision or a local provision inserted in a schedule to a zone or overlay. If the exemption provision is a state standard provision it can only be amended by amending the VPP. If the exemption provision is a local provision to be inserted in a schedule, care must be taken when drafting the exemption to ensure that it only exempts classes of applications defined by its 'parent provision'. For example, the schedule to the Design and Development Overlay cannot be used to exempt an application for use from the notice, decision and review requirements of the Act, because its 'parent provisions' only control buildings and works. The Special Use Zone however, contains 'parent provisions' that enable its schedule to regulate use and development. The key to drafting exemptions is to read the 'parent provision' carefully to identify those parts of it which define the scope of the exemption and to ensure that the schedule responds to those requirements.

An exemption relates only to the clause in which it is included. If some other part of the planning scheme also requires a planning permit to be obtained, the exemption will not apply to that.

2.13.4 Amendments to vary or remove a restriction on title

PEA ss. 6(2)(g),
(ga), (gb) and 6A

A planning scheme can regulate or provide for the creation, variation or removal of easements or restrictions under section 23 of the *Subdivision Act 1988* and related matters.

An amendment may authorise a plan to be certified and lodged at the Land Titles Office to vary or remove the specified restriction. It is important that the amendment to authorise this be in a legally effective form.

The appropriate location in a planning scheme to insert provisions relating to easements, restrictions and reserves is the schedule to Clause 52.02.

PEA s. 19(1)(ca),
(2A)

If the effect of an amendment would be to remove or vary a registered restrictive covenant, notice of the amendment must be given to the owners and occupiers of land benefited by the covenant and a sign about the amendment must be placed on the land.

PEA s. 19(1A)

Giving notice of an amendment in alternative ways if the 'number of owners and occupiers affected makes it impractical to notify them all individually' does not apply to an amendment to remove or vary a registered restrictive covenant.

2.13.5 Amendments to control demolition

Section 29A of the *Building Act 1993* requires that certain building applications involving demolition be referred to the responsible authority for report and consent. The requirements for a responsible authority in responding to such referrals are set out in the section on building permit applications for demolition of buildings.

If a planning permit is not required for the demolition, and the responsible authority considers that a planning permit should be required for the proposed demolition, the planning authority can:

- prepare an amendment which in effect directs that a permit is required to carry out the demolition, and ask the Minister for an exemption from certain notice requirements, in accordance with section 20(1) of the Act; or
- make a request to the Minister to prepare an amendment to the effect that a permit is required to carry out the demolition, and for the Minister to exempt himself or herself from certain requirements in preparing that amendment, in accordance with section 20(4) of the Act.

If such a request is made within the prescribed time, which is 15 working days starting from the day the application for demolition is received, the responsible authority must give notice to the building surveyor to suspend consideration of the building permit application.

Either request should be submitted to the Minister through the regional office of the Department. The request should include a draft of the amendment proposed and be quite clear whether it is a request by the planning authority for exemption from notice, or a request to the Minister to make the amendment.

A request to the Minister to prepare an amendment should take account of the Planning Practice Note *Ministerial Powers of Intervention in Planning and Heritage Matters*. It should also be accompanied by the prescribed fee for requesting a planning authority to make an amendment. These requirements do not apply to a planning authority seeking exemption from giving notice of an amendment. Nevertheless, the reasons why such exemption should be given will need to be clearly set out in the request.

2.14 The combined amendment and permit process

- PEA s. 96A(1), (2) To avoid the necessity for a two-stage process where a planning proposal requires both an amendment to a planning scheme and a planning permit, Division 5 in Part 4 of the Act makes provision for a combined amendment and permit process. This process allows a planning authority, if requested to do so by a person, to simultaneously prepare and give notice of a proposed amendment to a scheme and notice of an application for a permit.
- PEA s. 96A(5) The combined amendment and permit process must not be used after notice of the proposed scheme amendment has been given under section 19 of the Act. However, in certain circumstances, a panel or the planning authority can still recommend that a permit be granted as part of an amendment process even if the permit was not applied for at the time of exhibition of the amendment.
- The combined process should not be used for proposals for which a planning permit application can be made under the current provisions of the planning scheme.
- PEA s. 96A(3) Under the combined process, a permit application can be for any purpose for which the planning scheme, as amended, will require a permit to be obtained. This includes a use, development or any other purpose which may be prohibited under the existing scheme.
- PEA s. 96M Where the combined process is used, the component of the process relating to the permit application is dealt with in similar fashion to the amendment, and is quite different to the normal permit process under Divisions 1 and 2 in Part 4 of the Act. In particular:
- there are no formal referral requirements
 - the requirements for giving notice of the application are different
 - the Minister makes the final decision about whether a permit is granted, with no further right of review.

2.14.1 Overview of the combined amendment and permit application process

- PEA ss. 96A(1), (2), (6), 96G The planning authority is the authority responsible for preparing an amendment and considering an application under the combined amendment and permit process. It is responsible for accepting and registering the application, amending it (if necessary), exhibiting the amendment and proposed permit (if applicable) and complying with all other requirements of the Act leading up to and including making a recommendation to the Minister about whether the amendment should be adopted and a permit granted.

PEA s. 96I(1) The Minister is responsible for deciding whether or not a permit should be granted, with or without changes, and subject to conditions.

PEA s. 96N If a permit is granted, the responsible authority under the planning scheme becomes the responsible authority for the permit.

Making a request

PEA s. 96A(4);
PE Regs r. 40 The application for the permit must be made in writing to the planning authority in accordance with regulation 40 and accompanied by the prescribed fee, together with any information required by the planning scheme. It must be completed and signed in accordance with the requirements of section 48 of the Act.

PEA s. 96A(4)(c) If the permit application affects land subject to a registered restrictive covenant, a copy of the covenant must accompany the application. If the application is for a permit to allow the removal or variation of a registered restrictive covenant or if the grant of the permit would allow anything which would breach a registered restrictive covenant, the application must also be accompanied by:

- information clearly identifying each lot benefited by the registered restrictive covenant; and
- any information required by the regulations.

PE (Fees) Regs.
r. 6(1) The amendment request must also be accompanied by the prescribed fee.

Considering a request to combine the amendment and permit process

The procedure for considering a request to combine the amendment and permit process under Division 5, is the same as for an amendment under Part 3 of the Act, which is set out in Section 2.2 of this chapter.

There is no right of review of a planning authority's decision not to combine the preparation of an amendment with the consideration of a permit application. It is therefore important for the applicant/proponent to discuss any issues with the planning authority before making a formal request.

PEA s. 96A(6) If a planning authority agrees to combine the amendment and permit process, the requirements of sections 49, 50 and 50A in relation to registering and making changes to the permit application apply.

Public exhibition

PEA s. 96C(10) Notice of a combined permit application and amendment must be given in accordance with the requirements of section 96C, and not section 19. Under section 96C notice must include:

PEA s. 96C(1)(a) • Notice to every Minister, public authority and council that the planning authority believes could be materially affected by the amendment or application.

PEA s. 96C(1)(b) • Notice to the owners and occupiers of land that the planning authority believes could be materially affected by the amendment or application.

PEA s. 96C(1)(c);
PE Regs r. 42 • Notice to any Minister, public authority, council and person prescribed by the regulations.

PEA s. 96C(1)(d) • Notice to the Minister administering the *Land Act 1958* if the amendment provides for the closure of a road wholly or partly on Crown land.

PEA s. 96C(1)(e) • Notice to the responsible authority, if it is not the planning authority.

PEA s. 96C(1)(f)	<ul style="list-style-type: none"> • Notice to the owners and occupiers of land adjoining the site to which the permit application applies unless the planning authority is satisfied that the grant of a permit would not cause material detriment to any person.
PEA s. 96C(1)(g)	<ul style="list-style-type: none"> • Notice to the owners and occupiers of land benefited by a registered restrictive covenant if the amendment or the permit would allow the variation or removal of the covenant, or anything allowed by the permit would be in breach of the covenant. An owner for this purpose excludes an owner to be registered as a proprietor of an estate in fee simple.
PEA s. 96C(2)	<ul style="list-style-type: none"> • A notice in a newspaper circulating in the affected area.
PEA s. 96C(2A), (2B)	<ul style="list-style-type: none"> • If the amendment would allow the variation or removal of a registered restrictive covenant, a sign on the land which is the subject of the amendment. The sign must state where a copy of the proposed permit may be inspected.
PEA s. 96C(3)	<ul style="list-style-type: none"> • A notice published in the Government Gazette, which can be on the same day as the last of the other notices.
PEA s. 96A(6)(b)	<p>Apart from this, all other requirements for the exhibition, consideration of public submissions, adoption and approval of an amendment prepared under Part 3 of the Act apply to the combined amendment and permit process as if the permit application were a planning scheme amendment. These requirements are described in Section 2.6 of this chapter.</p>
PEA s. 96C(4); PE Regs r. 41(1)	<p>The notice of a combined permit application and amendment must include the prescribed information and include the last date for submissions – which must not be less than one month after the date that the notice is published in the Government Gazette.</p>
PEA s. 96C(8); PE Regs r. 41(2)	<p>The notice must be accompanied by a copy of an explanatory report about the amendment, a copy of the application and a copy of the proposed permit.</p>
PEA s. 96M	<p>Any specific requirements for notice or referral of a particular type or class of application set out in a planning scheme do not apply to an application made under the combined amendment and permit process. However, when deciding what notice should be given under section 96C, a planning authority should consider whether the interests of any individual or body that would normally receive notice of (or be a referral authority for) a permit application under Part 3 of the Act could be affected.</p> <p>In each case, the planning authority should take care in forming an opinion about what notice should be given and to whom and ensure that this is carefully recorded.</p> <p>The fact that the matter is controversial should not be taken as a conclusive test that a person may be materially affected. Careful judgement of the situation by the planning authority is necessary.</p>
PEA s. 96C(9)	<p>The applicant for a permit under this Division must pay the cost of any notice of the amendment and permit application.</p>
	<p>Can a combined amendment and permit application be exempted from notice?</p>
PEA s. 96B(1)	<p>Under section 96C of the Act, a planning authority cannot exempt itself from the requirement to give individual notice of an amendment where the number of owners and occupiers affected makes it impractical to do so. However, the Minister may grant an exemption from this, or any other requirement relating to notice, if the Minister</p>

considers that an exemption is warranted. The steps that a planning authority should follow if it wishes to be exempted from notification are described in Section 2.6.6 of this chapter.

PEA ss. 20(3) and 96B(1)

The Minister cannot grant an exemption from giving individual notice to the owner of land which is either proposed to be reserved for acquisition for a public purpose or affected by the proposed closure of a road which gives access to that land.

PEA s. 96C(6)

Failure to give notice to a land owner affected by a proposed reservation or a road closure will mean that the amendment cannot be adopted and a permit cannot be issued.

When does the proposed permit need to be prepared?

PEA s. 96C(8)

A copy of the proposed permit must be given to all persons and individuals who receive a notice of amendment and the application.

PEA s. 96C(8A);
PE Regs r. 43

The proposed permit must be in the prescribed form and the planning authority must make a copy of it available for public inspection until the amendment is approved or lapses.

While it is not a requirement of the Act, where a planning authority has formed an opinion about whether it is likely to grant a permit and what the conditions of the permit should be, it should make a copy of the proposed permit available at the same time the amendment and application are exhibited.

Giving a copy of the proposed permit to the relevant persons and individuals at the same time the notice of amendment and application is given, enables affected people to make submissions about the general change to the scheme, the specific application and the draft permit and conditions.

If a planning authority has any doubts about what should be included in the permit and the extent to which it can be easily understood and enforced, consultation with the responsible authority (if it is not the planning authority) should occur.

Under the combined permit application and amendment process, there are no referral authorities to whom a copy of the application must be given. However, if a planning authority considers that an individual or body who would normally be a referral authority under Division 1 of Part 4 of the Act could be affected by the proposal, or if it considers that specific conditions may need to be included on the proposed permit to address their particular interests, it should consider consulting with and giving notice to that individual or body.

The proposed permit should contain any conditions that the planning scheme requires that it include.

2.14.2 Considering submissions

PEA s. 96B

The process for making and considering submissions to a combined amendment and application under Division 5 is the same as for an amendment prepared under Part 3 of the Act.

PEA s. 96B(1)
(a)(iii)

If a planning authority receives a submission which seeks a change to a proposed permit, it must make a decision about the submission as if it were seeking a change to the amendment.

The Act does not specify what matters can be taken into account by the planning authority in deciding whether a person or body could be materially affected by an

amendment and application under this Division. Each proposal must be considered on its merits. As a basic rule, it should be possible to link the effect to specific matters such as restriction of access, visual intrusion, unreasonable noise or overshadowing. General terms such as ‘amenity’ and ‘nuisance’ are not specific enough.

The process for making and considering submissions is described in Sections 2.6.6 to 2.6.8.

2.14.3 Panel hearing

PEA s. 96D	If a panel is appointed to consider submissions, it must give the applicant and any other person specified in section 24 of the Act an opportunity to be heard.
PEA s. 96E	If a panel recommends that an amendment or part of an amendment be adopted, with or without changes, it can also recommend that a permit be granted for any purpose for which the amended planning scheme would require a permit to be obtained (with or without conditions). This applies even if the panel was appointed to consider submissions to amendments prepared under Part 3, and not under the combined permit application and amendment process.
PEA s. 96E(2)	The permit recommended by the panel could be for a purpose which was applied for and for which notice of the proposed permit was given under section 96C (if applicable). It could also be for an entirely new purpose for which no permit application under Division 5 was made.
PEA s. 96F	The planning authority must consider the panel’s report before deciding whether or not to recommend that a permit be granted.

2.14.4 Decision by the planning authority

PEA s. 96G(1)	<p>After complying with the notice requirements and following the submission stages, a planning authority may decide to recommend to the Minister that a permit be granted with or without changes if:</p> <ul style="list-style-type: none"> • the permit application has been made under Division 5 of Part 4 and the relevant sections of that division have been complied with; or • the panel (where appointed) has recommended the grant of the permit; or • the planning authority considers it appropriate that a permit be issued for a purpose, that as a result of changes made to an amendment during the amendment process, a permit is required to be obtained. This applies even if no application has previously been made under section 96A of the Act.
PEA s. 96G(2)	This decision can only be made if the amendment, or the part of the amendment to which the permit applies, has been adopted first.
PEA ss. 31, 96B(1), 96B(6) and 96H(1)	The recommendation and proposed permit must be submitted to the Minister at the same time as the adopted amendment is submitted, with additional copies for lodging after approval. The adopted amendment must be accompanied by the prescribed information and information described in Section 2.9.1 of this chapter.
PEA ss. 28, 96B(1), 96G(4)	The planning authority can decide to abandon the amendment or refuse to recommend that a permit be granted. If so, the proponent/applicant and the Minister must be notified in writing of the decision and the reasons for it.
PEA s. 96G(3)	If an amendment lapses, or the part of the amendment to which the permit application applies lapses, the application also lapses.

2.14.5 Decision by the Minister

Approving a combined amendment and permit

PEA ss. 35,
96B(1)(b),
96I(1),(5),
60(2),(4),(5)

The Minister can approve the amendment, or part of it, and can grant a permit, with or without changes and subject to conditions. However, if the grant of a permit would result in the breach of a registered restrictive covenant, the Minister must refuse to grant the permit unless:

- the amendment to which the permit applies provides for the variation or removal of the covenant; or
- a permit has been issued, or a decision has been made to grant a permit to allow the removal or variation of the covenant.

PEA s. 96I(2)

Even if no permit has been applied for, or even if a panel has not recommended the grant of a permit, the Minister may still grant a permit if the Minister considers it appropriate as a result of any changes made to the amendment during the amendment process. The permit granted can be for a purpose recommended by the planning authority or it can be for an entirely new purpose for which the planning scheme, as amended by the proposed amendment, would require a permit to be obtained.

PEA s. 96I(3), (4)

The permit must be granted at the same time as the amendment to which the permit applies is approved. The permit must state a day that it operates from, which is either the day on or after the day on which the amendment comes into operation.

PEA s. 96I(6)

The conditions included on a permit granted by the Minister can be ones recommended by the planning authority or panel (if applicable), or they can be new conditions that the Minister considers appropriate and necessary. Sections 62(2) to (6) of the Act specify the types of conditions that a permit granted under Division 5 can include.

Registered covenants

PEA s. 96I(1A)

If the grant of a permit would result in the breach of a registered restrictive covenant, the Minister must refuse to grant the permit unless:

- the amendment to which the permit applies provides for the variation or removal of the covenant; or
- a permit has been issued, or a decision has been made to grant a permit, to allow the removal or variation of the covenant.

PEA s. 96I(1B)

If the permit granted would allow anything that would breach a registered restrictive covenant, the permit must be granted subject to a condition that the permit does not come into effect until the covenant is removed or varied.

PEA ss. 60(2),
(4), (5), 96I(5)

The Minister must not grant a permit that allows the removal or variation of a restriction, unless he or she is satisfied that no loss or other material detriment specified will be suffered.

Can additional notice of an amendment and application be required?

PEA ss. 32,
96H(2), (3)

If the Minister thinks that the initial notice given of the amendment or permit application is inadequate, the Minister may direct a planning authority to give additional notice and go through the process of considering submissions, panel, appointing a panel, adoption and submission again.

Adopting and approving an amendment

PEA s. 96M(5)

The process for adopting and approving an amendment prepared under Division 5 is generally the same as that described in Section 2.9 of this chapter. The main difference is that the notice of approval of the amendment published in the Government Gazette and given to Parliament must also specify if a permit has been granted under this Division.

Issuing a permit

PEA s. 96J(1), (2), (4)

A permit is issued by the responsible authority at the direction of the Minister. The permit must be in the prescribed form (PE Reg r 43; PE Regs Form 9) and:

- be issued to the applicant or, if there was no application, to the owner of the land (section 96J(4));
- be issued by the responsible authority within seven days after the direction by the Minister (section 96J(2));
- must state the date the permit is issued by the responsible authority, and
- must state a date the permit comes into operation. If no date is specified, the permit comes into operation on the same day as the associated amendment.

Where a permit issues as a result of the combined process, there is no opportunity for review by VCAT under Division 2 of Part 4 of the Act. It is important, therefore, that conditions on the proposed permit are carefully drafted, the ordinary referral requirements of other authorities are included, and that any other potentially affected parties clearly indicate their grounds of objection in any submission.

Refusing a combined amendment and permit application

PEA ss. 96I(1)(c), 96K; PE Regs r. 44 Form 10

The Minister can refuse to approve a permit and, if so, can direct the responsible authority to give notice of the refusal of the permit.

The direction given by the Minister and the notice by the responsible authority must set out the specific grounds on which the permit is refused.

PEA s. 96M

The applicant may not apply to VCAT for a review of this decision.

Administering a permit

PEA s. 96N

Once a permit is granted the responsible authority under the planning scheme becomes the responsible authority for the permit.

PEA s. 96M(1),(2)

The provisions of the Act apply in relation to permit expiry, extension of time, availability, mistakes, amendments and review of decisions to refuse or extend a permit.

2.15 Amendments to the *Victoria Planning Provisions*

PEA s. 4A(2)

The VPP are state standard planning provisions that were approved by the Minister on 9 July 1998. The VPP can provide for any matter that a planning scheme can provide for.

PEA s. 4B(1)

The Minister can prepare an amendment to the VPP at any time. VPP amendments may be a small change to one provision, or major changes or additions.

PEA s. 4B(2) Section 4B of the Act enables the Minister to give consent or authorisation for a public authority, another Minister or a municipal council to prepare an amendment to the VPP. This power would only be used in unusual circumstances.

The process for preparing an amendment to the VPP is the same as that for a scheme amendment, except for making and considering submissions which request a change to the terms of a state standard provision. Unlike a planning scheme amendment, an amendment to the VPP will always involve making changes to the terms of a state standard provision.

The Act includes special provisions for making an amendment to one or more planning schemes at the same time an amendment to the VPP comes into operation. These provisions are discussed in Section 2.15.3 of this chapter.

PEA ss. 4H, 4I The Minister, each responsible authority and any person the Minister specifies, must keep an up-to-date copy of the VPP (incorporating all its amendments and any documents lodged with those amendments) and make it available for public inspection during office hours.

2.15.1 Preparing an amendment

PEA s. 4B(3), (4) Unlike a planning scheme amendment, if notice of an amendment to the VPP is given, the Minister or the body or person authorised to prepare the amendment can receive and consider submissions which seek a change to the terms of a state standard provision. The change may be made as requested or the submissions may be referred to a panel for consideration. The panel can recommend that an amendment be adopted with changes to the terms of the VPP.

PEA s. 4B(3) Apart from these differences, the requirements for the exhibition, consideration of submissions (if any), adoption and approval of a VPP amendment are generally the same as for a planning scheme amendment.

2.15.2 Approving an amendment

PEA s. 4C(1) The Minister may approve an amendment to the VPP (or part of it) with or without changes and subject to conditions. The Minister may also refuse to approve an amendment or part of it.

PEA ss. 4D, 4E If an amendment is approved, notice of the approval must be published in the Government Gazette. The amendment comes into operation when the notice is published in the Gazette, or on any later day or days specified in the notice.

PEA s. 4G A copy of every approved amendment to the VPP must be lodged with each responsible authority, each council and any other person or persons nominated by the Minister. An amendment must be lodged before notice of approval of the amendment is published in the Government Gazette.

2.15.3 Amendment of planning schemes by the *Victoria Planning Provisions*

PEA s. 4J An amendment to provisions of the VPP can also amend specified planning schemes that include those provisions. When the amendment to the VPP is approved, the amendment to the planning scheme is also approved under Part 3 of the Act. An amendment to a planning scheme comes into operation when the amendment to the VPP comes into operation, or on any later date specified in the notice of approval of the amendment to the VPP.

2.16 Advisory committees

Before making a decision about a proposal or policy or before preparing an amendment or permit application, it is sometimes necessary to evaluate all of the options to be sure about what is to be achieved and to determine the best way of achieving it.

PEA s. 151(1), (2)

One method by which this can be done is through the establishment of an advisory committee. Advisory committees are established by the Minister to consider any matter which the Minister refers to them. An advisory committee may consist of one or more persons.

The Act does not include a procedure for making a request to the Minister for the establishment of an advisory committee. However, it is an established practice that planning authorities do make such requests where the proposal raises a major issue of policy, or where it may have a substantial effect on the achievement of the objectives of planning in Victoria as set out in section 4 of the Act.

Advisory committees may invite submissions on the options being considered and it may conduct a hearing into a matter. If a hearing is held, certain sections in Part 8 of the Act apply.

PEA ss. 152(2)
(a), 159

An advisory committee may give directions about the times and places of hearings, matters preliminary to hearings and the conduct of hearings. The advisory committee may refuse to hear any person who fails to comply with a direction.

PEA s. 152(2)(b),
(c), 161(1), (2),
(3), (5)

Most of the general procedures which apply to a panel appointed under Part 8 of the Act, will also apply to an advisory committee. The advisory committee:

- must act according to equity and good conscience without regard to technicalities or legal forms
- is bound by the rules of natural justice
- is not required to conduct the hearing in a formal manner
- is not bound by the rules of evidence but may inform itself on any matter in any way it thinks fit and without notice to any person who has made a submission
- may require a planning authority or other body or person to produce any documents relating to any matter being considered
- may prohibit or regulate cross-examination in any hearing,

PEA ss. 152(2)
(d), 162 to 165,
169

Procedures relating to adjournments, submissions (including who may appear before a panel, the effect of failure to attend a hearing) and offences will also apply.

The advisory committee usually prepares a report to the Minister outlining its response to the matters referred to it.

PEA s. 151(8),
VCATA Sch. 1,
Cl. 58

If a matter in a proceeding before VCAT is referred to the Governor in Council for determination, the Minister may decide to establish an advisory committee to provide advice about the matter.

PEA s. 189(1)

The Minister can delegate to an advisory committee any of his or her powers or functions under a planning scheme in relation to applications for permits for which the Minister is the responsible authority or a referral authority.

PLANNING PERMITS

3

Contents

3.1	Overview	3
3.1.1	What is a planning permit?.....	3
3.1.2	The regular permit process.....	3
3.1.3	The VicSmart permit process.....	4
3.2	The application	6
3.2.1	For the applicant – preparing an application.....	6
3.2.2	For the responsible authority – preliminary steps for an application.....	9
3.2.3	Application fees	10
3.2.4	The register of applications	11
3.2.5	Planning scheme check.....	11
3.2.6	Verification of information	11
3.2.7	Amending an application – before notice is given	12
3.2.8	Who can inspect an application?.....	13
3.3	Considering an application – procedural steps	13
3.3.1	Referring an application under section 55.....	13
3.3.2	Further information requirement.....	20
3.3.3	Notice of an application – ‘advertising’	23
3.3.4	Objections.....	28
3.3.5	Amending an application – after notice is given.....	29
3.4	Making a decision on an application	30
3.4.1	Can an application be refused without giving notice?.....	30
3.4.2	Can a responsible authority reject or ignore an objection?	30
3.4.3	When may the responsible authority decide the application?.....	31
3.4.4	When must a decision be made?	33
3.4.5	What must the responsible authority consider?	33
3.4.6	Inappropriate applications.....	35
3.4.7	Drafting a permit	35
3.5	Implementing the responsible authority’s decision	37
3.5.1	Grant of a permit	37
3.5.2	Refusal to grant a permit.....	38
3.5.3	Review of a decision to grant or refuse a permit.....	39
3.6	After a permit is issued	39
3.6.1	When does a permit begin?	39
3.6.2	When does a permit expire and how is the time extended?.....	39
3.6.3	Correcting mistakes in a permit.....	42
3.6.4	Amending a permit.....	42

3.7	Cancellation or amendment of a permit by VCAT	46
3.7.1	Under what circumstances can a permit be cancelled or amended?.....	46
3.7.2	Making a request to cancel or amend a permit.....	46
3.7.3	Hearing a request to cancel or amend a permit	47
3.7.4	VCAT’s decision	48
3.7.5	Order to stop development	48
3.7.6	Compensation for permit cancellation or amendment	48
3.8	Applications in special circumstances.....	49
3.8.1	Subdividing land	49
3.8.2	Applications for licensed premises	50
3.8.3	Restrictive covenants.....	52
3.8.4	Earth and energy resources industry	53
3.8.5	Pipelines	54
3.8.6	Applications that could have a significant effect on the environment	54
3.8.7	Applications that require an EPA works approval or licence.....	56
3.8.8	Applications relating to coastal Crown land	57
3.8.9	Registered heritage places.....	60
3.8.10	Brothels	60
3.8.11	Applications called in by the Minister.....	60
3.8.12	Applications on land owned or controlled by a responsible authority.....	61
3.8.13	Applications by a Minister or government department	62
3.8.14	Permits issued under the <i>Town and Country Planning Act 1961</i>	62
3.8.15	VicSmart permit process.....	63

PLANNING PERMITS

3

3.1 Overview

3.1.1 What is a planning permit?

PEA ss. 6, 62, 68

Planning schemes regulate the use and development of land. One way they do this is by requiring that certain types of use or development can only be carried out if a planning permit is granted.

A planning permit is a legal document that allows a certain use or development to proceed on a specified parcel of land. The benefit of the permit generally attaches to the land for which it has been granted although a permit is sometimes made specific to a nominated owner or operator. A permit is always subject to a time limit and will expire under specified circumstances. The responsible authority will impose conditions when granting a permit and endorsed plans will also usually form part of the permit. The proposal must satisfy all the conditions on a planning permit.

Planning schemes Cl. 31

The planning permit is the preferred form of development approval in the Victorian planning system. Planning schemes allow a wide range of uses to be considered in each zone through the permit process.

A permit is not always required to use or develop land. Planning schemes allow some changes in land use without the need for a permit, provided conditions are met. Some uses or development may be prohibited.

BA s. 24(1)(c), (d)

A planning permit should not be confused with a building permit. A building permit is issued under the Building Regulations 2006 and generally relates only to the construction aspects of a particular building or development. If a planning permit is required, a permit under the *Building Act 1993* cannot be granted unless the Building Surveyor is satisfied that any relevant planning permit has been obtained and the building permit will be consistent with that planning permit or other prescribed approval.

Any building permit issued must be consistent with the requirements of the planning permit, including conditions and endorsed plans.

3.1.2 The regular permit process

PEA s. 13

The authority in charge of administering the planning scheme, including granting permits, is the responsible authority. In most cases the council is the responsible authority. The responsible authority may also be the Minister administering the *Planning and Environment Act 1987* (the Act), or some other person or authority specified in the planning scheme. The council is the normal first point of contact for permit applications.

PEA ss. 47 – 86

The procedure a responsible authority must follow in deciding whether or not to issue a permit is shown in Figure 3.1. The procedure formally begins when a completed application form is lodged with the responsible authority, accompanied by a complete

description of the proposal (which may include plans, supporting information and copy of title) and the prescribed fee. In practice, the applicant will benefit from discussing the proposal in detail with the responsible authority before lodging the formal application. Many problems can be avoided in this way.

With many proposals the views of other agencies will be required before the responsible authority can make a decision. These agencies will be prescribed in the planning scheme based on the proposal, the location and other factors. The responsible authority will send a copy of the application to these agencies for their comment.

In some instances the responsible authority will give notice or require notice to be given to adjoining owners and occupiers, unless it concludes that material detriment will not be caused to any person, or the planning scheme specifically provides for an exemption from the notice requirements. There are several standard procedures for giving notice of an application.

The responsible authority may also ask for more information to be provided before it makes a decision.

Once notice (if required) has been given and the relevant time has elapsed for submission of objections or comments by any referral authority, the responsible authority can decide the application.

Depending on its view and whether or not objections have been received, the responsible authority will issue a permit, a notice of decision to grant a permit or a notice of refusal to grant a permit.

An application can also be made to the responsible authority to amend an existing permit. The application is processed in the same way as an application for a permit with the responsible authority ultimately issuing an amended permit, a notice of decision to grant an amendment to a permit or a notice of decision to refuse to grant an amendment to a permit.

An applicant and in many cases an objector may have the decision reviewed by the Victorian Civil and Administrative Tribunal (VCAT) in particular circumstances.

3.1.3 The VicSmart permit process

PEA s. 6(2)(hb)

The *Planning and Environment Act 1987* (the Act) enables the planning scheme to set out different procedures for particular classes of applications for permits.

Planning schemes
Cl. 90-95

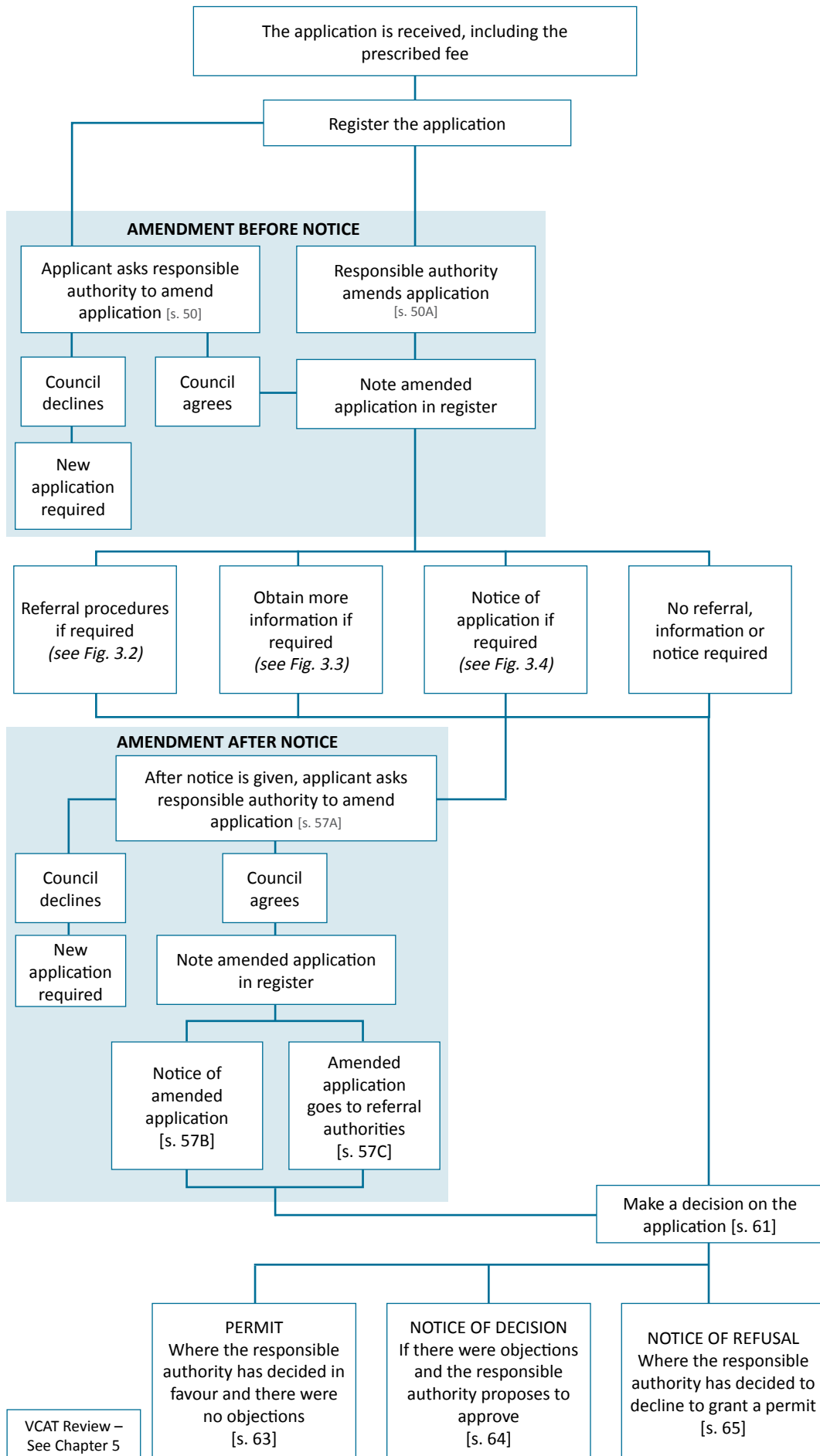
The VicSmart permit process is a specific procedure for assessing straightforward applications that are consistent with the policy objectives for the area and the zoning of the land. The VicSmart process has fewer steps than the regular permit process, it involves a more tightly focused planning assessment and shorter statutory timeframes apply.

The Chief Executive Officer of the council is the responsible authority for deciding a VicSmart permit application.

Clauses 90-95 of the planning scheme set out the specific provisions that apply to VicSmart applications. These provisions contain information requirements and decision guidelines for each class of VicSmart application, and exempt VicSmart applications from certain requirements of the Act.

More information about the VicSmart process is provided in Section 3.8.15 of this chapter.

Figure 3.1: Planning permits – an overview



3.2 The application

3.2.1 For the applicant – preparing an application

Is a permit required?

The starting point is to find out from the responsible authority if a planning permit is required.

PEA s. 47(1)

There is no point in making an application for a use or development for which a permit cannot be granted (because it is prohibited) or is unnecessary (because it is allowed ‘as-of-right’ by the scheme). An application is appropriate only if a planning scheme requires a permit to be obtained.

Just because a person is able to apply for a permit, does not imply that a permit should or will be granted. The responsible authority has to decide whether the proposal will produce acceptable outcomes in terms of the State Planning Policy Framework (SPPF), the Local Planning Policy Framework (LPPF), the purpose and decision guidelines of the planning scheme requirements and any other decision guidelines in Clause 65 of the scheme.

Planning scheme controls can relate to the use of the site, to all development on the site or to some aspect of the proposed development.

Clause 61.05 of planning schemes provides that if the scheme allows a particular use of land, it may be developed for that use provided all the requirements of the scheme are met. In some cases a permit to use the land may be all that is required, while in others, the use may not require a permit at all, although construction of buildings and works may.

PEA ss. 60(1),
47(1)(c)

Applicants can help themselves and the responsible authority by making sure that the application is related strictly to those aspects of the proposal which require a permit.

Preliminary discussion with the council’s planning officer

It is advisable to discuss a proposed application with planning officers of the responsible authority before the application is finalised and submitted. This can avoid both cost and delay.

Planning officers can provide advice on:

- whether a permit is required and why
- whether the application is a VicSmart application
- the nature and amount of supporting information to submit with an application
- any state and local planning policies (including the Municipal Strategic Statement) that should be addressed as part of the application
- any relevant guidelines, requirements, particular provisions or VicSmart provisions that may apply
- any referral authorities relevant to the application that must be notified.

Pre-application discussions with neighbours

Permit applicants are encouraged to discuss their initial plans with neighbours so they can ascertain their neighbours’ concerns and attempt to address these before the proposal is fully developed and finalised.

Applicants are not required to do this, but these discussions may avoid an objection at the application stage. Most people appreciate the opportunity to discuss plans before the formal notice process commences, although it will not always be possible to make changes that satisfy everybody.

Information required as part of the application for permit including an application to amend a permit

The nature and amount of information that should form part of an application will depend on the proposal and its location. Applicants should make sure that the application:

- adequately identifies the land affected and fully describes the proposal, including plans, reports and photographs and that sketches and plans supplied can be readily understood by all interested parties
- clearly identifies the permit to be amended and the amendment to be made to that permit, if the application is to amend a permit
- states clearly the use, development or other matter for which the permit is required, or if the application is to amend a permit, states clearly the amendment applied for
- describes the existing use of the land
- states the estimated cost of any development for which a permit may be required
- clearly states whether the land is affected by any registered restrictive covenant and if so is accompanied by a copy of that covenant
- contains the specific information required by the VicSmart provisions, if the application is a VicSmart application
- contains any specific information required by a relevant planning scheme provision.

The department's website provides standard checklists for the following common application types:

- VicSmart applications
- dwelling
- industry
- business
- advertising sign
- car parking waiver
- subdivision.

These checklists can be used as a guide for the information to submit with an application, but it is important to check with the council on their specific requirements, and if the council has any local planning policies in their planning scheme that may require specific information to be submitted as part of the application.

Some planning practice notes also provide guidance for particular categories of application. Planning practice notes can be accessed through the department's website.

The application should include all the information needed for the responsible authority to adequately consider it, including:

- any potential environmental, social and economic impacts associated with the proposal
- a description of how the proposal is consistent with the relevant state planning policies, the Municipal Strategic Statement and any relevant local planning policies
- a description of how the application responds or is consistent with the purpose and particular requirements of the zone and overlay provisions, or other particular provisions which may apply to the application
- a response to any relevant decision guidelines set out in the planning scheme which the responsible authority must consider in deciding the application
- the written consent of the public land manager if the application relates to land in a public land zone.

Planning schemes
Cl. 93, 95

If the application is a VicSmart application, it should include all the information listed in Clause 93 or in the schedule to Clause 95 of the planning scheme that is applicable to that class of application. (See Section 3.8.16 of this chapter for more information about preparing a VicSmart application.)

Pre-lodgement certification

Some councils offer a pre-lodgement certification process to help achieve faster processing and decision times.

The pre-lodgement certification process involves an applicant employing a council accredited certifier to quality check their application before it is lodged with council. The process may also include a pre-application meeting with the council planners and immediate neighbours to the subject land. The certifier will advise the applicant on measures to ensure that the application contains all the required information and is of an adequate standard.

The service helps prevent delays often associated with incomplete applications. Some councils also offer guarantees on maximum decision timeframes as part of the service.

How to apply for a permit

An application must be made to the responsible authority in accordance with the Planning and Environment Regulations 2015 (the Regulations) and be accompanied by the prescribed fee and information required by the planning scheme.

Applicants should use the *Application for Planning Permit form* or *Application to Amend a Permit* form supplied by the responsible authority or available online via the department's website. Guidelines on how to complete the application forms are also available at council or on the department's website. The responsible authority may also have a specific *Application for VicSmart Planning Permit* form for VicSmart applications.

The application must be signed by the owner of the land or accompanied by a declaration that the applicant has notified the owner about the application.

An applicant who is not the owner of the land for which the permit is being sought should be aware that although an application may have been signed by the owner, it does not necessarily carry the owner's permission to use the land as proposed.

PEA ss. 47, 48;
PE (Fees) Regs
r. 7; PE Regs
r. 13, r. 14

In the particular case of Crown land, consent by the Crown land manager to the application being made must not be taken as agreement to the use or development of the land as proposed. This must be negotiated through the appropriate lease or licence agreements.

The nature of the application will affect the fee to be paid to the responsible authority and the authority's consideration of it. Therefore it is important to take great care in analysing the requirements of the scheme and preparing an application. Care at this stage can avoid misunderstanding, cost and delay later.

It is also helpful when preparing the application to consider how it will be interpreted if notice of the application is to be given. The application should use plain English terms to accurately describe what is proposed in addition to any relevant land use term such as 'Place of assembly'. If this part of the application is not clear, giving notice (and the consideration of the application) may be delayed if the responsible authority needs to negotiate modifications to the application before notice can be given.

How to apply for an amendment to a permit

An application to amend a permit follows the same procedure as an application for a permit (sections 47 to 62 of the Act). Further information on amending a permit is found in Section 3.6.4 of this chapter.

PEA s. 73

3.2.2 For the responsible authority – preliminary steps for an application

Pre-application meetings

Reduce inconvenience and delay in processing an application by discussing the details of the application and information to be submitted with the applicant before the application is lodged. This is particularly important for VicSmart applications as the prescribed time for assessing these applications is short. Pre-application meetings will reduce the likelihood of further information having to be sought.

Guidelines for applicants

It is helpful if the responsible authority provides guidelines for applicants indicating the type of information required for common types of applications. These should draw attention to any guidelines or codes that need to be considered or complied with, as well as to procedural requirements such as the number of copies of plans required.

Checking an application

Every application must be made in accordance with the Regulations. The application must include sufficient supporting information (such as plans, reports and photographs) to fully describe the proposal.

When the application is submitted check that:

- it is accompanied by any information required by the planning scheme
- an accurate description of the land has been given
- the proposal has been described satisfactorily
- it includes a copy of any registered restrictive covenant affecting the land
- the application addresses the SPPF and LPPF (Municipal Strategic Statement and Local Planning Policy), if applicable

PEA s. 47(1)(a);
PE Regs r. 13,
r. 14

- the application addresses the relevant planning scheme provisions including zones, overlays and any relevant particular provisions, general provisions or VicSmart provisions
- the application fee has been paid
- the applicant is the owner of the land or has notified the owner of the land about the application.

These matters can often be checked at the counter when the application is lodged.

3.2.3 Application fees

PE (Fees) Regs
r.7 and 8

In most cases a fee must be paid when an application is made. The amount is prescribed in the Planning and Environment (Fees) Interim Regulations 2014 (the Fees Regulations). The fee is paid to the responsible authority to consider an application. It is not a permit fee and is not refunded if the application is refused.

If an application relates to a combination of use, development (other than subdivision), subdivision and varying or removal of easements, restrictions or covenants, the total amount payable is the sum of the highest fee plus 50 per cent of the others.

The Fees Regulations prescribe fees for different classes of applications. The class of application – and therefore the fee – will depend on the planning scheme and why a permit is needed. In this regard, the following points should be noted:

- in some instances a permit may be needed to either use or develop land, but not both. In those cases the application and the fee should be confined to the items for which a permit is needed
- in some instances a permit for development may only be required for part of the project – for example, construction of access to a main road. In those cases the application and the fee should be confined to the items for which a permit is needed
- the application fees for the development or use and development of a single dwelling, or development ancillary to the use of land for a single dwelling, are separate to other development and fall within classes 2 and 3 of the Fees Regulations
- in the Fees Regulations, unless specified to the contrary, words in the singular include the plural.

If a permit is needed for development, the fee applicable depends on the cost of the proposed development as stated on the application form.

An applicant must make a realistic estimate of the cost and the responsible authority may ask for information to support this. The cost (for calculating the fee) is the estimate (or contract) cost of undertaking the work. Any increase in property or land values resulting from the development is not relevant to calculating the cost.

PE (Fees) Regs
r. 16

Regulation 16 sets out circumstances under which the responsible authority may waive or rebate fees. Rebating is a form of discounting, so responsible authorities have the discretion to reduce fees, rather than waiving them completely. Responsible authorities will develop their own policies and procedures for this.

Further information about planning fees is available on the department's website.

3.2.4 The register of applications

PEA s. 49

The responsible authority must keep a register of all applications received and specified information about those applications. The register must be made available to the public during office hours without charge.

PE Regs r. 15

The register must contain the information prescribed in the Regulations. The register must also specify whether an application is a VicSmart application. A responsible authority may decide on the format of its register but the register must contain all of the information required by the Regulations. The information can also be stored electronically with a printed version available for public inspection. The register could also record additional information useful to the responsible authority or the public.

3.2.5 Planning scheme check

The application should be checked against the planning scheme provisions at an early stage and the applicant advised quickly if no permit is required or the proposal is prohibited. Pre-application discussion with applicants should largely avoid such applications being lodged.

Where an invalid application is made, the responsible authority should explain the situation and give the applicant the opportunity to withdraw the application and have the fee refunded.

The planning scheme should also be checked to determine whether the application is a VicSmart application because specific provisions and procedural requirements apply to these applications.

If a land owner or occupier wants formal verification that a use or development does not require a planning permit they may wish to apply for a Certificate of Compliance in accordance with Part 4A of the Act. (See Chapter 4, Section 4.1 on Certificates of compliance.)

3.2.6 Verification of information

PE Regs r. 21

Regulation 21 allows a responsible authority to verify information either included in an application or supplied as more information under section 54.

PEA ss. 48(2),
87(1)(a)

Section 48(2) of the Act provides a penalty for attempting to obtain a permit by making false representations.

Section 87(1)(a) allows an application to VCAT to be made for cancellation or amendment of a permit if there has been a material misstatement or concealment of fact in relation to the application. In accordance with section 94(4)(b), no compensation for cancellation or amendment is payable in these circumstances.

A responsible authority may consider it important in some special circumstances to verify information by asking the applicant to make a statutory declaration of certain facts. This may be appropriate if that information is critical to the application and is not otherwise readily verifiable. A false statutory declaration constitutes perjury.

Responsible authorities should note that this provision relates to information contained in the application or supplied under section 54 (more information). It does not cover procedural matters such as a statement by an applicant that notice has been given. Anyone who makes a false statement about giving notice of an application risks cancellation or amendment of any permit issued.

3.2.7 Amending an application – before notice is given

PEA ss. 50, 50A, 57A

An applicant or a responsible authority with the agreement of the applicant may amend an application before notice is first given under section 52 of the Act. An applicant may also ask the responsible authority to amend an application after notice has been given (see Section 3.3.5 of this chapter).

PEA s. 50 (1), (2)

Amendment of application at the request of the applicant – before notice is given

An applicant may ask the responsible authority to amend an application before notice is given under section 52. An amendment to an application may include an amendment to:

- the use or development mentioned in the application
- the description of the land to which the application applies
- any plans and other documents forming part of or accompanying the application.

PEA s. 50(3)

A request for amendment must:

- be accompanied by the prescribed fee (if any)
- be accompanied by any required information in relation to the planning scheme or a restrictive covenant that was not provided with the original application
- if the applicant is not the owner, be signed by the owner or include a declaration that the applicant has notified the owner of the request.

PEA s. 50(4), (5)

The responsible authority must amend the application in accordance with the request. However it may refuse to amend the application if it considers that the amendment is so substantial that a new application for a permit should be made.

PEA s. 50(6), (7)

The responsible authority must make a note in the register of the amendment to the application.

The amended application is taken to be the application for the purposes of the Act and to have been received on the day that the responsible authority received the request for the amendment.

PEA s. 50A(1), (2)

Amendment of application by the responsible authority – before notice is given

A responsible authority may make any amendment to an application that it thinks necessary before notice is given. The amendment must be made with the agreement of the applicant and after giving notice to the owner. As with an amendment initiated by the applicant, an amendment to an application initiated by the responsible authority may include:

- the use or development mentioned in the application
- the description of the land to which the application applies
- any plans and other documents forming part of or accompanying the application.

PEA s. 50A(3)

The responsible authority may require the applicant to notify the owner and to make a declaration that notice to the owner has been given.

PEA s. 50A(4), (5)

The responsible authority must make a note in the register of the amendment to the application.

PEA ss. 50(7),
50A(5)

What happens to timeframes?

The amended application is taken to be the application for the purposes of the Act and to have been received on the day that the request for amendment was received by the responsible authority or (in the case of an amendment to an application by the responsible authority) the day that the applicant agreed to the amendment.

This means that the statutory clock begins upon receipt of the amended application.

3.2.8 Who can inspect an application?

PEA ss. 51, 57(5),
70

Anyone can inspect the application and accompanying plans and documents free of charge during office hours. Some councils also provide an online resource via their website that allows applicants, objectors and interested parties to lodge and view application documents and track planning applications online. The relevant council website should be consulted to establish if an online service is available.

PEA s. 51

An application can be inspected free of charge from the time it is made:

- until the end of the last application for review period in relation to the application, or
- if an application for a review is made, until that application is determined by VCAT or withdrawn.

PEA s. 70

Accessing an application file after this period may incur a file search fee, but council must make a copy of every permit that it issues, including any plans forming part of that permit, available at its office for inspection by any person during office hours free of charge.

Council is not obliged to give copies of an application, although it can if it wishes. As long as the planning documents are used for the purpose of the public planning process, including relevant community consultation, no breach of copyright will occur. Administrative charges can, if necessary, be made for copying.

Planning Practice Note 74 – Availability of Planning Documents gives further advice about making copies of plans and other material relating to planning applications available.

Victoria's Information Privacy Act 2000 sets standards for the collection and handling of personal information. More information can be obtained from the Privacy Victoria website at www.privacy.vic.gov.au.

3.3 Considering an application – procedural steps

3.3.1 Referring an application under section 55

PEA ss. 55, 62(1)

Section 55 of the Act provides for applications to be referred to authorities specified in the scheme as referral authorities. A referral authority can be any person, group, agency, public authority or other body specified in the planning scheme or the Act whose interests may be particularly affected by the grant of a permit for a use or development.

The key objective of the referrals process is to provide authorities whose interest may be affected by the grant of a permit with the opportunity to ensure that a permit is not granted which will adversely affect that authority's responsibilities or assets.

Referral requirements under section 55 are listed in Clause 66 of the planning scheme.

Figure 3.2 sets out referral requirements and procedures.

Two types of referral authority

A planning scheme will identify a referral authority as:

- a determining referral authority; or
- a recommending referral authority.

PEA s. 56(1)

Both types of referral authority can object to the grant of a permit, decide not to object or specify conditions to be included on a permit. However, the effect of that advice on the final outcome of an application is different for each type of referral authority.

If a determining referral authority objects, the responsible authority must refuse the application, and if it specifies conditions, those conditions must be included in any permit granted.

In contrast, a responsible authority must consider a recommending referral authority's advice but is not obliged to refuse the application or to include any recommended conditions. A recommending referral authority can seek a review at VCAT if it objects to the granting of a permit or it recommends conditions that are not included in the permit by the responsible authority.

The process for referring an application is the same for both types of referral authority. Each:

- must be given a copy of the application (s. 55(1))
- may ask for more information (s. 55(2))
- must consider every application it receives (s. 56(1))
- must keep a register of applications it receives (s. 56A)
- must give to the applicant without delay:
 - a copy of any request it makes to the responsible authority for more information (s. 55(3))
 - a copy of any decision and comments it gives to the responsible authority (s. 56(3A))
- may object to an application or request that conditions be included on a permit (s. 56(1))
- may give comments on the application (s. 56(3)).

Figure 3.2 sets out referral requirements and procedures.

PEA s. 55(1); PE
Regs r. 19

What must a responsible authority do?

A responsible authority must send the application and prescribed information, without delay, to every referral authority specified in Clause 66 of the planning scheme for that type of application. The responsible authority is exempt from this requirement:

- where the referral authority has already considered the proposal within the past three months and stated, in writing, that it does not object to the granting of a permit; or
- if in its opinion, the proposal satisfies requirements or conditions previously agreed in writing between the responsible authority and the referral authority.

A copy of the application together with the information prescribed in the Regulations must be given to the referral authority. The prescribed information is:

- the application reference number
- the date the responsible authority received the application
- a description of why a permit is required (using the same words that appear in the permit requirement(s) in the planning scheme)
- a list of clauses in the planning scheme that require the application to be referred to that referral authority
- the description in Clause 66 of the kind of application required to be referred to that referral authority
- whether the referral authority is a determining referral authority or a recommending referral authority for the application.

PEA s. 59(2), (3);
PE Regs r. 24

A responsible authority must not decide on an application that has been referred until the prescribed period of 28 days has elapsed. However, if within 21 days of being given a copy of the application, the referral authority tells the responsible authority that it needs further information, the prescribed period is 28 days from the day on which the responsible authority gives that information.

The prescribed time can also be extended by the Minister. Other factors in the application process will also affect when a responsible authority may make a decision, such as the public notice period under section 52 of the Act. In these instances, a decision must not be made until the 14 day notice period has elapsed.

PEA s. 60(1)(d)

Before deciding on an application, the responsible authority must consider any decision or comments it has received from a referral authority.

Action in response to *determining* referral authority advice

PEA ss. 61(2),
62(1)(a)

In response to a determining referral authority's decision, the responsible authority must:

- refuse to grant a permit if the authority objected to the grant of the permit
- include any conditions on the permit required by the authority.

PEA s. 62(1)(b)

A responsible authority must not include additional conditions that may conflict with any condition that a determining referral authority specifies.

PEA ss. 65(2),
66(5)

If a responsible authority decides to refuse to grant a permit, the notice of decision must state whether the grounds of refusal were those of the responsible authority or a determining referral authority.

PEA ss. 61(2A),
62(2)(ab)

Action in response to *recommending* referral authority advice

In response to a recommending referral authority's decision, the responsible authority may:

- refuse to grant a permit if the authority objected to the grant of the permit
- include a condition on the permit recommended by the authority.

PEA s. 66

The responsible authority must give a copy of any decision to each determining referral authority and if it did not object or recommend a condition, a copy to each recommending referral authority. A notice of the decision is given to a recommending referral authority when it has objected or if any recommended condition of the authority is not imposed on the permit.

Grant of permit where notice of decision has been issued

The responsible authority must not issue the permit to the applicant:

- until after the 21 day 'review period' (the period within which a recommending referral authority may apply to VCAT for a review of a decision to grant a permit where the authority either objected to the application or sought the inclusion of a permit condition that was not included); or
- if an application for review is made within that 21 day period, until the application is determined by VCAT or withdrawn.

PEA ss. 64A,
82AAA; PE Regs
r. 35, r. 36

Application for amendment of permit

The responsible authority is subject to equivalent referral obligations when processing an application to amend a permit under Division 1A of the Act.

PEA ss. 72-76A

What must a referral authority do?

When a referral authority receives an application from a responsible authority it should first consider whether it needs more information to assist its assessment. A referral authority has 21 days from receipt of the application to tell the responsible authority in writing that it needs more information.

PEA ss. 54(1),
54(2), 55(2),
55(3); PE Regs
r. 20

The referral authority must also, without delay, give the applicant a copy of any such request. The responsible authority may then follow with a request to the applicant to provide the required information. (See Section 3.3.2 of this chapter – Further information requirement).

PEA s. 56(1),
56(3)

A referral authority must consider every application referred to it and tell the responsible authority in writing if it:

- does not object to the granting of a permit
- does not object to the granting of a permit providing that certain conditions are included on the permit, or that certain matters are done to its satisfaction
- objects to the granting of a permit on specified grounds.

The referral authority may, in addition to giving directions to the council, provide any other advice which it believes is relevant to the application and may assist the council in reaching its decision. Such advice should be clearly distinguished from any directions.

PEA s. 61(2)

While a determining referral authority can direct refusal of a permit by objecting to the grant of the permit, it cannot direct that a permit be issued.

PEA ss. 59(2),
197; PE Regs
r. 24

A referral authority must act promptly and in accordance with the times prescribed in the Regulations to avoid unreasonable and unnecessary delay.

There is no time within which a referral authority must give its advice or comments, however, the responsible authority may proceed to make a decision without the referral authority's advice after:

- 28 days from the day on which the referral authority is given a copy of the application; or
- if within 21 days of being given a copy of the application the referral authority tells the responsible authority it needs further information, 28 days from the day on which the responsible authority gives that information.

PEA s. 56(4)

If a referral authority requires more time to consider an application (for example, an application for a major or complex proposal) it may apply to the Minister for more time, indicating how much time it considers is necessary. If the Minister agrees, both the referral authority and the council will be notified of the extra time allowed. It is good practice however, for a referral authority to discuss its needs with the council first, with an aim to establish a mutually agreed extended timeframe before making a formal request to the Minister.

Record keeping duties for a referral authority

PEA s. 56A; PE
Regs r.23

A referral authority is required to keep a register of all permit applications, including amended applications, referred to it. The register must be made available during office hours for any person to inspect free of charge.

Basic administrative details are required to be kept such as the application number, address of the land and dates of receipt and decision. The decision or recommendation of the referral authority is also required to be kept on the register.

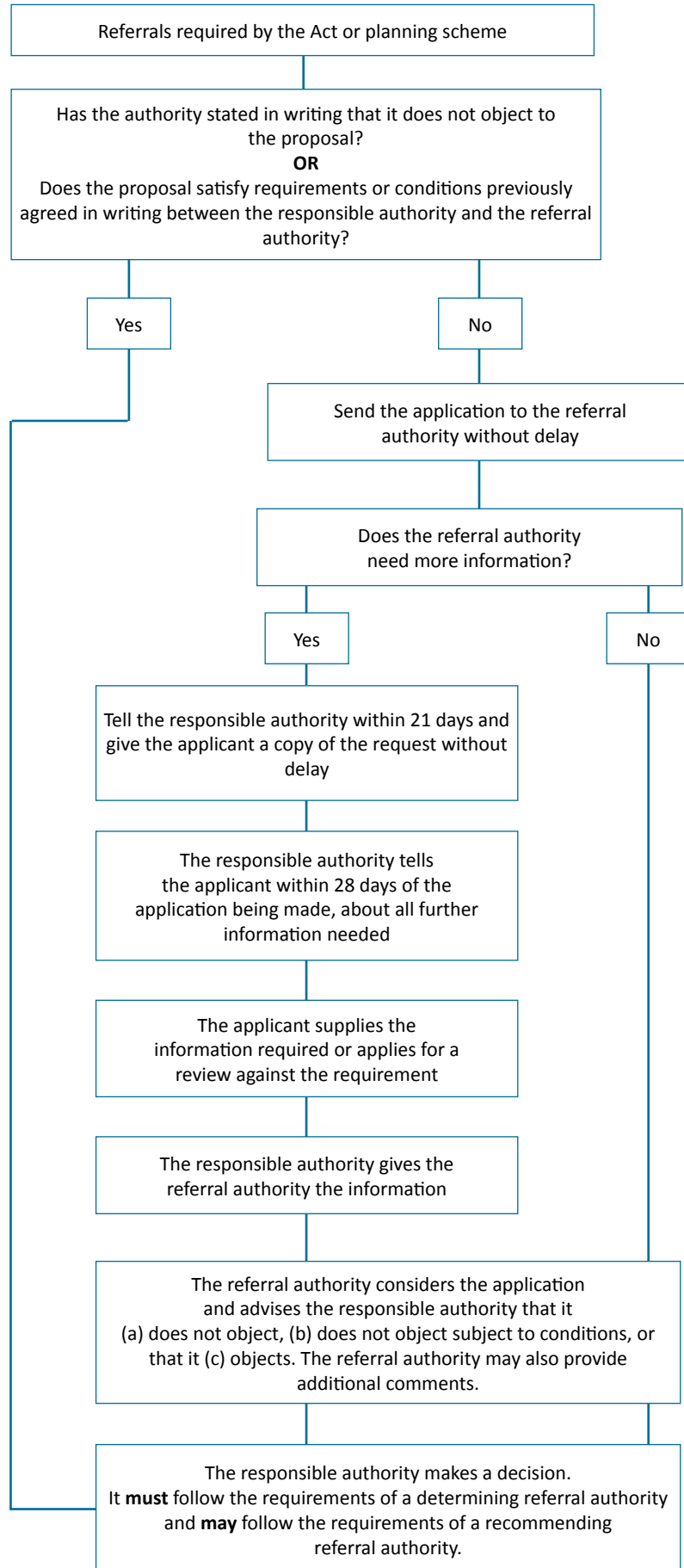
VCAT reviews and referral authorities

PEA s. 82AAA

A recommending referral authority may apply to VCAT for review of the responsible authority's decision:

- to grant a permit, where the authority objected to the grant of the permit; or
- to not include a condition on the permit that the authority recommended.

Figure 3.2: Referral requirements and procedures



A referral authority is a party to a proceeding for a VCAT review of a decision of the responsible authority in the following circumstances:

<p>Determining referral authority</p>	<ul style="list-style-type: none"> • A proceeding for review of a refusal to grant a permit where: <ul style="list-style-type: none"> • the authority had objected to the granting of the permit; or • it was refused because a condition the authority required conflicted with a condition of another referral authority. • A proceeding for review of a permit condition that the authority had required to be included on the permit.
<p>Recommending referral authority</p>	<p>A proceeding for review where the authority is given notice of an application for review as required under the Act – including a review of a refusal to grant a permit if it objected to the grant of the permit or a review of a permit condition if it had recommended the subject condition.</p>

Making the referral system efficient and effective

Responsible and referral authorities should have processes in place to minimise delays and to facilitate effective decision making. Advice on good practice is provided in *Planning Practice Note 54 – Managing Referrals and Notice Requirements*.

Notice to an authority under section 52

A planning scheme or the Act may require that other authorities be given notice of certain applications in accordance with section 52(1)(c) of the Act, or that the views of other authorities be considered.

There is a clear distinction between section 55 referrals and section 52 notice provisions, particularly in the case of a determining referral authority’s ability to veto an application. A responsible authority should specify to the authority whether comments are being sought under section 52 or 55 of the Act, or whether non-statutory advice is being sought.

If an objection is lodged by the authority, the objection must be taken into consideration under the normal provisions of the Act. The authority has the same review rights as any other objector.

A responsible authority is not bound to refuse to grant a permit if there is an objection, or include any specified conditions. If no objections or comments are received within the specified time, consideration of the application need not be delayed. This process also relieves the authority from having to respond to the application if it has nothing to say.

Seeking advice and comments

A responsible authority may seek the views of any other person, authority or body which it believes can provide a useful contribution to its decision-making process (such as expert knowledge or resources). There are no procedures laid down for providing such expert advice.

3.3.2 Further information requirement

PEA s. 54(1)

The responsible authority can require the applicant to provide more information about a proposal, either for itself or on behalf of a referral authority.

Processes for obtaining more information are summarised in Figure 3.3.

PEA s. 54(1A),
(1B), (1C)

The request for further information must be in writing setting out the information to be provided. If the request for further information is made within the prescribed time, the request must also specify a date by which the information must be received.

The prescribed time for a VicSmart application is five business days after the responsible authority received the application. For all other applications, the prescribed time is 28 days after the responsible authority received the application.

An application lapses if the requested information is not provided by the date specified by the responsible authority. The lapse date must not be less than 30 days after the date of the notice requesting the information. An application that has lapsed cannot be recommenced. It is important that applicants are made aware of the consequences of allowing an application to lapse. One mechanism is that a council might put a note about the meaning of the lapse date in its letter requesting information.

A responsible authority should not routinely specify this minimum time of 30 days. The date specified by the responsible authority must be reasonable in relation to the nature of the application and the type of information requested. A responsible authority should also be specific about the information requested rather than asking for an opinion or generalised comments.

PEA ss. 54, 79;
PE Regs r. 30

A request for more information within the prescribed period means that the 'clock' is stopped. (Note: the 'clock' counts the number of days until the applicant may apply for a review of the failure of the responsible authority to determine the application. The 'clock' starts again from zero when a satisfactory response to the responsible authority's request is received).

PEA ss. 54, 76(b)

Information can be requested after the prescribed period, but if this information is not provided, the responsible authority is not protected from an application for review of its failure to decide the application. It is important therefore to ensure that the initial request is comprehensive as an applicant can apply for a review against a requirement for more information.

The time limits for responsible and referral authorities mean that requirements for more information must be determined quickly. The responsible authority, in particular, needs to liaise with referral authorities so that the applicant is presented with a coordinated request clearly setting out what information is required, who requires it and to whom it should be sent. The applicant can send information required by a referral authority (particularly technical information specific to it) directly to that authority. A copy should be sent at the same time to the responsible authority.

Authorities are encouraged to maximise use of electronic data transfer to expedite decision making.

Applicants can minimise the likelihood of requirements for more information and inevitable delay in considering the application by:

- having prior discussion with the responsible authority to determine what information is required
- seeking agreement from referral authorities before making an application
- considering in advance the matters which the responsible authority must take into account when considering the application (such as the decision guidelines in zones and overlays)
- considering the information which all affected authorities may require to make a decision on the application.

Extending the time to provide further information

PEA s. 54A(1), (2)

An applicant can apply to the responsible authority to extend the date specified to provide further information. The request to extend the date must be made before the lapse date.

PEA s. 54A(3), (4), (5)

The responsible authority may decide to extend the time to provide the requested information or refuse to extend the time. It must give its decision to the applicant in writing. If the responsible authority decides to extend the time, it must give a new lapse date for the application.

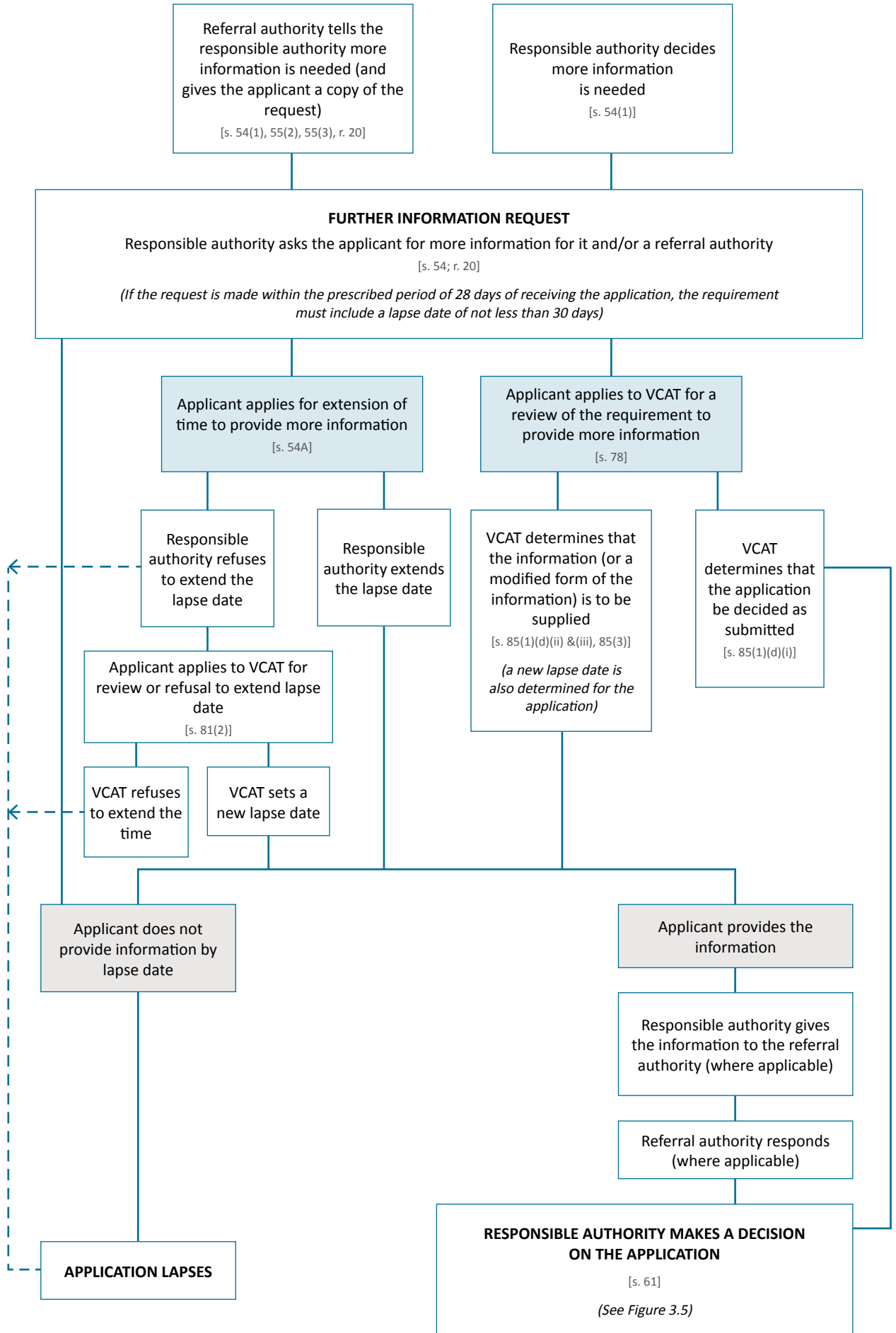
PEA s. 54A(6)

If a request to extend the time is refused by the responsible authority, the applicant will have 14 days from that refusal to supply the information.

PEA s. 81(2); PE
Regs r. 34(2)

An applicant has the right of review to VCAT if the responsible authority refuses to extend the time for providing the required information. An application for review must be made before the lapse date.

Figure 3.3: Requirement for more information about an application



3.3.3 Notice of an application – ‘advertising’

Is notice required?

PEA s. 52

The requirements for giving notice of an application are set out in section 52(1) of the Act. A planning scheme can also specify particular requirements for giving notice.

If a planning scheme sets out specific notice requirements about a particular type of application, those requirements must be followed. Otherwise the responsible authority must directly consider the likely effect of the use or development proposed.

PEA s. 52(4)

A planning scheme may exempt any class or classes of application from some or all of the notice requirements that may otherwise apply under section 52(1) of the Act. In these cases, there is no opportunity for other people to make submissions or objections in relation to the application. The application must still be referred to any referral authority and the responsible authority must still take into account all relevant planning considerations in deciding the application.

An exemption from the notice requirements must be included in the planning scheme.

There are many examples of exemptions from notice requirements in planning schemes. The exemptions most commonly arise where the application is a VicSmart application, a permit is unlikely to have a significant planning impact or where the use or development generally complies with a policy or plan that has been previously subject to public scrutiny as part of its approval process.

The processes for giving notice of an application are summarised in Figure 3.4.

PEA s. 52(1), (4)

- The Act places the onus on the responsible authority to give notice (or to require the applicant to give notice) of an application. Notice of the application must be given to the owners and occupiers of land adjoining the subject land to which the application applies, unless the responsible authority is satisfied that the grant of a permit would not cause material detriment to any person or the planning scheme contains a specific exemption from the notice requirements.
- If the responsible authority forms an opinion that material detriment may be caused to one or more adjoining owners or occupiers, notice must be given to all adjoining owners and occupiers.
- Notice to all adjoining owners and occupiers must be given unless the responsible authority in each case forms an opinion that material detriment will not be caused. This should be carefully recorded and a report on the application should contain clear reasons why the responsible authority is satisfied on this point.
- The Act does not specify what matters may be taken into account by the responsible authority in deciding whether or not material detriment may be caused. Each application must be considered on its merits. As a basic rule however, it should be possible to link detriment to specific matters such as restriction of access, visual intrusion, unreasonable noise, overshadowing or some other specific reason. General terms such as ‘amenity’ and ‘nuisance’ are not specific enough, nor is the fact that the matter is controversial a conclusive test that a person may suffer material detriment. Conversely, agreement to the proposal by the owners and occupiers of adjoining land is not conclusive, although it may help the responsible authority form an opinion. Careful judgement of the situation by the responsible authority is necessary.
- Notice must be given to any persons specified in the planning scheme.

- Notice must also be given to the council if the application applies to or may materially affect land within the municipal district. This is particularly important if the council is not the responsible authority. It is also significant in the case of a proposal in one municipality that may have an effect in another municipality.
- Notice must be given to owners and occupiers of land benefited by a registered restrictive covenant if the application applies for anything that would result in breach of a restrictive covenant or if the application is to remove or vary the covenant.
- The responsible authority must also consider whether any other persons would be caused material detriment by the proposal and if so, notice must be given to them also. In that case, the responsible authority will need to consider how that notice should be given.
- The definition of person in the *Interpretation of Legislation Act 1984* includes a body politic or corporate as well as an individual. Therefore, consideration of who may be affected should be comprehensive as companies, incorporated associations and public bodies may need to be notified.

ILA s. 38

More information on the notice provisions is provided in *Planning Practice Note 54 – Managing Referrals and Notice Requirements*.

PEA s. 89(1)(a)

A responsible authority will not help an applicant by narrowly interpreting the notice requirements. This is because a person who believes they should have received notice but did not, can seek cancellation or amendment of the permit. (See Section 3.7 of this chapter – Cancellation or amendment of permits.)

PEA s. 78(a)

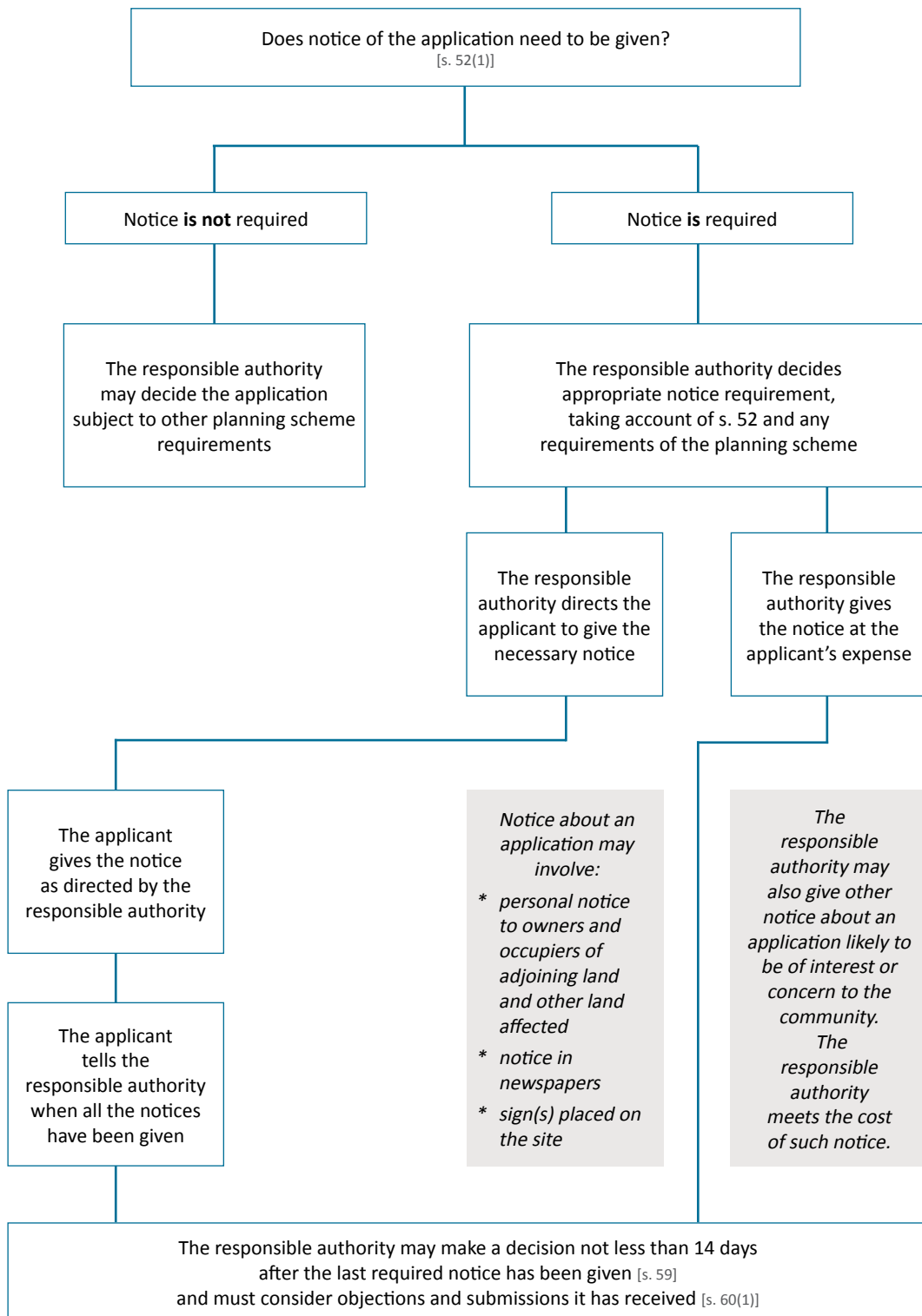
Conversely, the responsible authority must carefully consider the reasonableness of extensive notice requirements as the applicant can apply for a review of an unreasonable requirement.

In deciding who to notify, particularly under section 52(1)(d), the responsible authority should keep in mind the objectives of planning in Victoria, as well as any specific objectives stated in the scheme.

PEA s. 96C

For applications made through the combined permit and amendment process under Division 5 of the Act, separate notification requirements apply.

Figure 3.4: Giving notice of an application



How is notice of an application given?

The methods for giving notice of an application are set out in section 52, which recognises the three most commonly used methods:

- written notice to specified persons
- a sign or signs on the land
- a notice in a newspaper circulating in the area.

It also allows other methods of giving notice where appropriate.

PEA s. 51

The responsible authority provides a copy of the application available for inspection free of charge during office hours until the application is finalised. Refer to Section 3.2.8 of this chapter for more information about public access to application material.

PEA s. 52(1); PE
Regs r.16, r.17
Forms 2 and 3

The notice must be in the prescribed Forms 2 and 3.

PEA ss. 52(1),
53(3)

Notice is to be given by the responsible authority, unless the authority requires the applicant to give the notice. In either case, the applicant pays the costs involved.

PEA s. 139

A council's rates records can be used as evidence that a person is an owner or occupier of land.

PEA ss. 3, 145

In relation to public land, the owner or occupier to whom notice should be given will usually be the Minister or public authority that manages or controls the land. The council can usually assist in identifying the relevant public land manager.

PEA ss. 145, 147;
ILA s. 49

Because of the difficulty in identifying some owners or occupiers, the Act also allows for a notice to simply be sent by post to 'the owner' or 'the occupier' at an address.

It is important that all addresses are covered (including each separate unit and, where relevant, a body corporate for apartments or multiple dwellings) and that both owners and occupiers are covered (so that for leased premises both the landowner and tenant will receive notice). Unless proved otherwise, the notice is considered to have been given when the letter would have been delivered in the ordinary course of post.

It is not essential that individual notices be sent by post. Personal delivery by the applicant may be appropriate. However, should there be a query about notification procedures, the applicant will need to be able to demonstrate to the responsible authority, and possibly to VCAT, that the required notices were given on a particular date. Careful records should therefore be kept of the notification procedures.

PEA s. 52(3)

If a responsible authority considers that a proposal is likely to be of interest or concern to the broader community, it may itself give notice it considers appropriate. This would be in addition to any further notice given by an applicant or the responsible authority in accordance with section 52(2). It could include publicity in the media, public meetings, newspaper articles, letterbox drops or any other appropriate method. These actions would be at the expense of the responsible authority.

PE Regs r.16, r.17
Forms 2 and 3

When preparing the notice of application for a permit, care should be taken to ensure that the notice clearly communicates to people what is proposed and where it is proposed. Adequate attention to preparing a notice can avoid any misunderstandings or undue anxiety and opposition to a proposal. A well prepared notice will assist the applicant, the responsible authority and the public.

The description of the use should be both technically accurate and clearly explained.

The notice must be consistent with the actual application. If the application uses land use terms like 'Place of assembly', the responsible authority may wish to discuss the precise nature of the use with the applicant and include this description in the notice, so the proposal can be clearly understood.

In many cases, it may assist in the understanding of a proposal to enclose a plan with any notices, or to display a plan with an on-site notice. This may be a reduced-scale version of plans or an outline sketch prepared for the purpose. The actual form of such plans will need to be considered in each case, taking account of the complexity of the plans, the cost to the applicant of preparing copies and the physical conditions under which an on-site notice must be displayed. In any case, it will be important to ensure that they accurately represent the proposal in order that those affected are not misled either by a false sense of security or by unnecessary alarm.

Similarly, property descriptions should allow the reader to clearly identify the extent and location of the land concerned. Descriptions such as 'the north-east corner of First and Second Streets...' should be used where possible.

The instructions to the person carrying out the notice should also be very specific. Thought needs to be given in every case to:

- the number, size and location of notices on the land
- the properties or persons to be notified (a list of names and addresses and/or a plan should normally be provided)
- length of time any notice must be maintained on a site.

Try to avoid holiday periods if possible.

Whether the applicant or the responsible authority gives the notice, it is desirable to coordinate the timing of different forms of notice. This avoids unnecessary delay and potential confusion about when a decision may be made on the application. Be aware of the closing time for inserting notices in a newspaper. Missing this time will cause delay and result in individual or site notices indicating that a decision could be made earlier than is the case.

The responsible authority should consider preparing guidelines and a checklist for applicants, setting out the procedure for giving notice and enclose these with every direction to give notice.

If the applicant is required to give the notice, the responsible authority needs to be satisfied that this has been done. The responsibility for ensuring that the notice is correctly given rests with the applicant. The applicant should be able to verify that correct notice was given in case of subsequent action on the grounds that a person should have been given notice but was not. Such a person could take action to cancel the permit and, if the applicant falsely claimed to have given the notices required, no claim for compensation could be made by the applicant for any permit that was subsequently cancelled.

There is no closing date for objections. The responsible authority must consider any objection it receives up until the time it makes a decision. The responsible authority may make a decision after 14 days from when the last required notice was given. The responsible authority must specify in the notice a date before which it will not make a decision. This cannot be less than 14 days after the date of the notice, but it can be a longer period.

PEA ss. 53(2),
89(1), 94(4)(b)

PEA s. 59(3)

What if the responsible authority is slow in giving directions about notice?

PEA s. 52(42A)

The applicant may proceed to give a standard form of notice sufficient for the purposes of the Act if it has not been told by the responsible authority about the notice requirements within 10 business days of receiving the application.

PEA s. 52(2A),
(2B)

An applicant faced with a delay about the notice requirements should confer with the responsible authority before proceeding to give notice.

If the responsible authority requires that further information be submitted, or the application be modified, the whole process may need to be started again with consequent extra cost.

A responsible authority can minimise delay by delegating decisions about giving notice to appropriate council officers.

3.3.4 Objections

PEA s. 57(1), (2)

Anyone who may be affected by the grant of a permit may submit an objection to the responsible authority.

An objection must:

- be in writing
- state reasons for the objection
- state how the objector would be affected by the grant of a permit.

Most councils have a standard objection form, but it is not essential that it be used as long as the objection is:

- typed or clearly written
- addressed to the council and is clearly marked as an objection
- includes the permit application reference number and the address of the land
- includes the objector's name and current contact details
- is signed and dated
- lodged within the 14 day notice period.

Some councils also offer an electronic lodgement process for objections via their website.

PEA s. 57(2A)

An objection will carry more weight if it is rational, specifically addresses the proposal and clearly describes how the objector will be affected. Constructive suggestions on how any impacts could be reduced (or even eliminated) by possible changes to the plans are also useful. Most applicants will try to address reasonable concerns.

The responsible authority may reject an objection it considers to have been made primarily to secure or maintain a direct or indirect commercial advantage for the objector.

PEA s. 5(3)

A group of people may make one objection. They should nominate one contact person. If no person is named, the responsible authority will normally send a notice only to the first named individual who signed the objection.

The responsible authority may find it useful to keep a running sheet of the names and addresses of objectors as objections are received. This way, the number received at any time is known to assist in enquiries and a mailing list can easily be produced for notices which will ultimately be required.

Supporting submissions

There is no specific provision for making or considering submissions in support of an application. However, there is no reason why supporters should not tell the responsible authority about their support for a proposal and for the authority to consider this in making its decision. Letters in support of a proposal need not be treated as objections, but good practice suggests that an authority should tell any supporters about its decision on an application.

Public viewing of objections

PEA s. 57(5)

The responsible authority must make available for inspection a copy of every objection (or the original, if convenient) free of charge during office hours until the period for lodging objections has expired. It is not obliged to give copies, although it can if it wishes.

Planning Practice Note 74 – Availability of Planning Documents gives further advice about making available copies of plans and other material relating to a planning application.

3.3.5 Amending an application – after notice is given

PEA s. 57A (1), (2)

An applicant may ask the responsible authority to amend an application after notice is given under section 52. An amendment to an application may include:

- an amendment to the use or development mentioned in the application
- an amendment to the description of the land to which the application applies
- an amendment to any plans and other documents forming part of or accompanying the application.

PEA s. 57A(3)

A request for amendment must:

- be accompanied by the prescribed fee (if any)
- be accompanied by any required information in relation to the planning scheme or a registered restrictive covenant that was not provided with the original application
- if the applicant is not the owner, be signed by the owner or include a declaration that the applicant has notified the owner of the request.

PEA s. 57A(4), (5)

The responsible authority must amend the application in accordance with the request. However it may refuse to amend the application if it considers that the amendment is so substantial that a new application for a permit should be made.

PEA s. 57A(6), (7)

The responsible authority must make a note in the register of the amendment to the application.

All objections to the original application are to be taken as objections to the amended application.

PEA s. 57B

Notice of amended application

If an application is amended under section 57A, the responsible authority must determine if further notice should be given of the amended application, taking into account whether, as a result of the amendment, the grant of a permit would cause material detriment to any person.

PEA ss. 57A(7)
(b), 57B(2)

It is not necessary to re-notify those persons originally notified unless the changes to the application may cause those persons material detriment.

The responsible authority must consider the objections and submissions made to the original application and any new objections or submissions in making a decision on the application. All parties who make an objection or submission will continue to have a right to ask VCAT to review a decision to grant a permit.

PEA s. 57C

The responsible authority must give a copy of the amended application to every referral authority unless it considers that the amendment to the application would not adversely affect the interests of the referral authority.

What happens to timeframes?

PEA ss. 57A(7)
(a), 59(2), (3)

The amended application is taken to be the application for the purposes of the Act and to have been received on the day that the responsible authority received the request for the amendment. This means that the statutory clock will begin upon receipt of the amended application.

Because of this, if the responsible authority decides that notification of the amended application is necessary, it must not make a decision in less than 14 days from the giving of the last notice.

If the responsible authority decides that referral of the amended application is necessary, it must not make a decision less than 28 days from giving the amended application to the referral authorities or after receiving all the replies from referral authorities.

3.4 Making a decision on an application

The process of making a decision about an application is summarised in Figure 3.5.

3.4.1 Can an application be refused without giving notice?

PEA ss. 52(1A),
83B

A responsible authority may decide to refuse an application without giving notice. In this case, if the applicant applies for review, VCAT may direct the applicant or the responsible authority to give notice.

3.4.2 Can a responsible authority reject or ignore an objection?

PEA s. 60(1)(c)

In most cases an authority must consider any objection or other submission it receives before it makes a decision on the application, even if it thinks the objection is misguided, ill-informed or obstructive.

However, there are two situations in which a responsible authority can reject or disregard an objection:

PEA s. 57(2A),
(2B)

- if the responsible authority considers an objection has been made primarily to secure or maintain a direct or indirect commercial advantage for the objector, the Act applies as if the objection had not been made

PEA s. 60(3)

- if no notice is required to be given under section 52(1) or 57B of the Act or the planning scheme, the responsible authority is not required to consider any objection or submission it receives.

Responsible authorities are advised to take a cautious approach to rejecting or ignoring an objection. A person who made the objection may initiate action at VCAT to have the permit cancelled or amended on the ground that a material mistake was made in granting the permit. This involves the possibility of the responsible authority being required to pay compensation if the permit is cancelled or amended.

3.4.3 When may the responsible authority decide the application?

PEA s. 59

The responsible authority may decide an application as soon as:

- 14 days have elapsed after the last of any notices of application for permit have been given; and
- all replies from referral authorities have been received or the prescribed period for replies (28 days or any extension by the Minister) has elapsed.

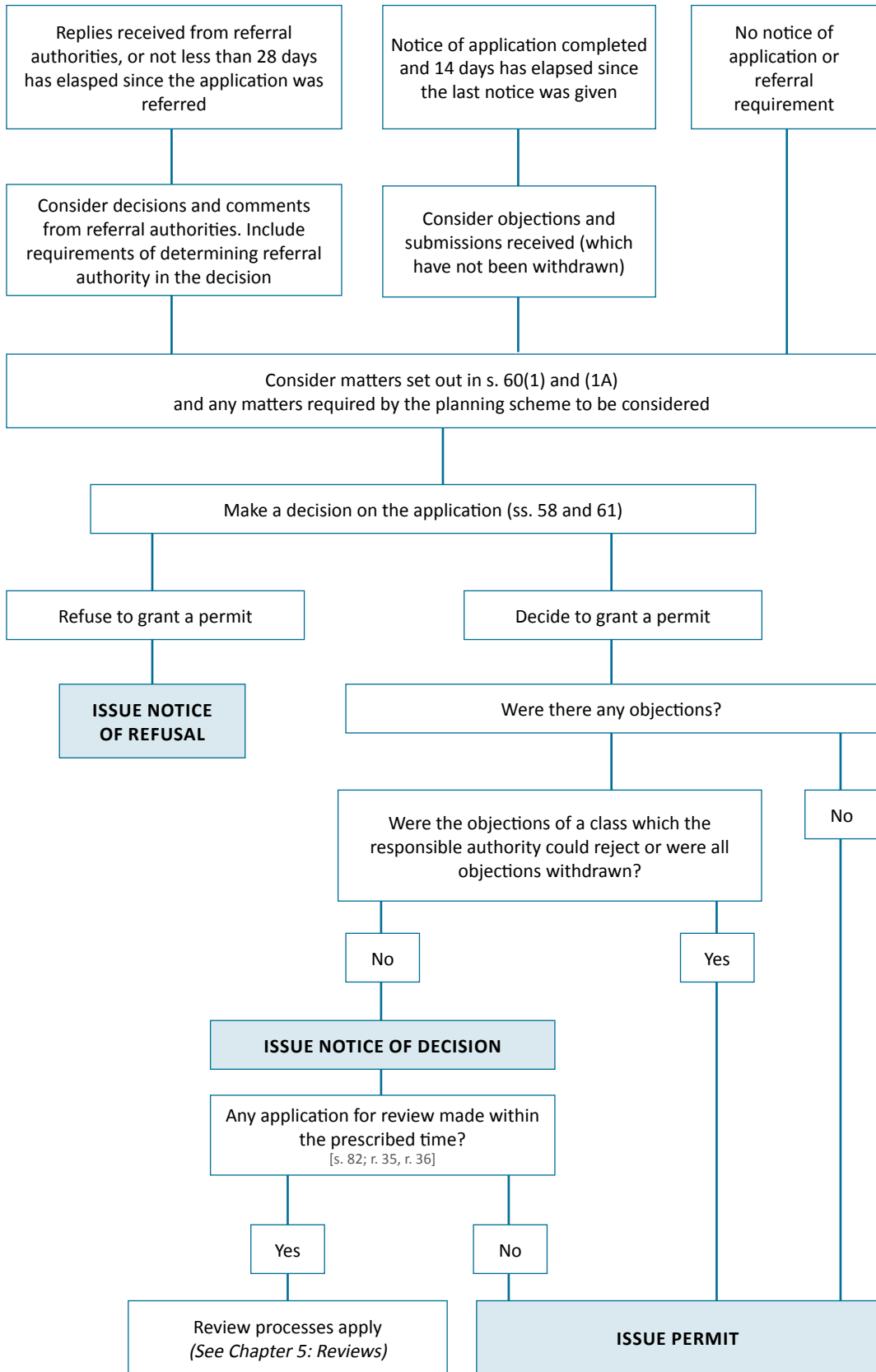
ILA s. 49(1)

These times must be measured from when the notices were given, not from when they were dated, or put in the post. A notice sent by post is deemed to have been given at the time the letter would have been received through normal postal delivery. As a rule of thumb, this is usually considered to be 2 days for mail within Australia and 8 days for overseas mail.

PEA s. 59(1)

If notice of the application was not given, and it did not need to be sent to any referral authority, the responsible authority may decide the application without delay.

Figure 3.5: Making a decision about an application



3.4.4 When must a decision be made?

PEA s. 79

If the responsible authority does not make a decision within the prescribed time, an applicant may apply to VCAT for a review of a failure to grant the permit within the prescribed time.

PEA s. 3; ILA s. 44(1); PE Regs r. 32

There are important rules about when the prescribed time starts and when it stops. The prescribed time is:

- **VicSmart applications:** 10 business days. A business day means a day other than a Saturday, Sunday or a day appointed under the *Public Holidays Act 1993* as a public holiday or public half-holiday. In calculating the 10 business days for a VicSmart application, the first business day (that is, the day the application is received) is excluded and the last business day is included.
- **All other applications:** 60 days. In calculating the 60 days for any other application, the first day (that is, the day the application is received) is excluded and the last day is included. Weekends and public holidays are included in the 60 days. However, if the last day falls on a weekend or public holiday, the 60 days expires on the next business day.

The prescribed time starts from the date the responsible authority receives the application (or amended application) unless:

- Further information has been sought within the prescribed time under section 54 of the Act. The prescribed time starts from the day on which the information is given.
- The applicant has applied for a review of a requirement to give further information and VCAT has confirmed or changed the requirement. The prescribed time starts from the day on which the information is given.

The prescribed time does not run (the clock stops but does not go back to zero):

- if the responsible authority requires the applicant to give notice under section 52(1) or 52(1AA), for the time between the making of that requirement and the giving of the last required notice; and
- for any extension of time granted by the Minister to a referral authority. The prescribed time does not include the time between the responsible authority being advised by the Minister and the time at which the extension ends.

3.4.5 What must the responsible authority consider?

Before making a decision on an application, the responsible authority must consider a number of matters specified in the Act and in various places in the planning scheme.

PEA ss. 6(2)(kcb), 60(3A)

A planning scheme may exempt a class or classes of application from some or all of the requirements of sections 60(1)(b) to (f) and (1A). VicSmart applications are exempt from some of these requirements.

Planning and Environment Act 1987

PEA s. 60(1)

The Act specifies that the responsible authority, when deciding an application, must consider:

- the relevant planning scheme
- the objectives of planning in Victoria
- all objections or submissions that have been received up to the time of making a decision
- any decision or comment of a referral authority
- any significant effects that the proposal may have on the environment, or the environment may have on the proposal
- any significant social or economic effects that the proposal may have.

It should be clear from both the report to the responsible authority on the application and the statement of the responsible authority's decision that these matters have been considered.

PEA s. 60(1A)

In addition, where relevant, the responsible authority may consider any:

- approved strategy plan or adopted amendment under:
 - Part 3A of the Act – *Upper Yarra Valley and Dandenong Ranges Strategy Plan*
 - Part 3C of the Act – *Melbourne Airport Environs Strategy Plan*
 - Part 3D of the Act – *Williamstown Shipyard Strategy Plan*
- relevant state environment protection policy
- strategic plan, policy statement, code or guideline adopted by a Minister, government department, public authority or council
- amendment to the planning scheme which has been adopted by the planning authority but is not yet in force
- section 173 agreement affecting the land
- other relevant matter.

PEA s. 61(4)

If the grant of a permit would authorise anything that would result in the 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.

Planning scheme provisions

Although the Act does not specifically state that the responsible authority must consider a planning scheme, section 14 sets out a general duty to efficiently administer and enforce a scheme, so it must take into account the relevant provisions.

The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the following:

- the SPPF – which sets out the state planning policies applying to all land in Victoria
- the LPPF – which sets out the local planning policies focusing on specific areas and issues in a municipality

- the purpose and decision guidelines of the relevant planning scheme provisions and any other decision guidelines in Clause 65 of the scheme
- any other matter set out in the planning scheme that must be taken into account, either generally or in particular circumstances.

Referral authority comments

PEA ss. 60(1)(d),
61(2), 62(1)

Although the requirement of section 60(1)(d) is to ‘consider’ any decisions and comments of a referral authority, the following extra requirements need to be noted:

- the responsible authority must refuse to grant the permit if a determining referral authority objects to the grant of the permit
- in deciding to grant a permit, the responsible authority must include any conditions which a determining referral authority requires to be included and it must not include any additional conditions which conflict with those required by a determining referral authority.

Deciding VicSmart applications

Planning
schemes cl 91

When deciding a VicSmart application, the responsible authority is exempted from considering sections 60(1)(b), (c), (e) and (f) and 60(1A)(b) to (h) and (j) of the Act. However, the responsible authority must consider the relevant planning scheme and may consider any agreement made under section 173 of the Act affecting the subject land.

Planning schemes
cls 93, 95

Clauses 93 and 95 of the VicSmart planning provisions set out the specific decision guidelines for each class of VicSmart application that the responsible authority must consider.

3.4.6 Inappropriate applications

If an application is made for a permit which cannot be granted, either because the use or development is prohibited, or is allowed as-of-right, the responsible authority should suggest that it be withdrawn.

In the case of an application for a use or development allowed in accordance with the scheme, the applicant may instead wish to apply for a Certificate of Compliance in accordance with Part 4A of the Act for documented verification of the proposal’s compliance. (See Chapter 4, Section 4.1 on Certificates of compliance.)

If the applicant insists on the application for a prohibited use or development being considered, the responsible authority must do so. The only decision the authority can validly make in such a case where the use or development is prohibited is to refuse to grant a permit. This provides the applicant with an opportunity to test the authority’s interpretation of the scheme quickly by applying for a review to VCAT. An exception to this is an application made under the combined amendment and permit process. (See Chapter 2, Section 2.10.)

3.4.7 Drafting a permit

PEA s. 61; PE
Regs r.22, Form 4

The form of a permit (other than a permit granted under Division 5 or Division 6 of the Act) is Form 4 in Schedule 1 of the Regulations. The information to be included in the permit is set out in Form 4. The *Writing Planning Permits* manual, prepared by DSE and the Municipal Association of Victoria (2007), provides guidance on preparing planning permits. (For amendments to permits, see Section 3.6.4 of this chapter.)

The preamble – what the permit allows

A permit should be given for a specific use and/or development and the description of what the permit allows should include all aspects of the proposal that require approval.

When specifying what a permit allows first check exactly what was applied for. Ensure that the permit covers the whole proposal and gives approval for those aspects of the proposal that require approval under the planning scheme. For example, if the application is only to carry out works, while the proposed use of the land is as-of-right, the permit does not need to specify the use.

It is important to be clear about what the permit will allow, for example:

- use of land only
- development of land only
- use and development of land
- any other matter (such as the variation or removal of an easement or restriction).

When specifying what a permit allows, the responsible authority must be careful not to use a broad land use term that may encapsulate specific land uses which are not intended to be approved. For example, a permit for 'Food and drink premises' includes, among other things, a hotel, convenience restaurant and tavern. If all that is intended is restaurant, then the permit should say so. The permit preamble should refer to the use or development at the lowest level of the nesting diagram in the planning scheme (Clause 75), or simply use a plain English term which clearly describes what is being approved.

Permit conditions

A permit must include conditions required by:

- the planning scheme
- a determining referral authority
- VCAT

The permit can also include any other condition that the responsible authority considers appropriate, including a condition:

- that plans, drawings or other documents be submitted for approval before the use or development starts
- requiring the land owner to enter into an agreement with the responsible authority under section 173 within a specified time
- put forward by a recommending referral authority.

The responsible authority must not include a condition that:

- conflicts with any condition required by the planning scheme or a determining referral authority
- is inconsistent with the *Building Act 1993*, and regulations under that Act or a relevant determination of the Building Appeals Board under the Act.
- requires a person to pay an amount for or provide works, services or facilities except in accordance with section 62(6).

PEA ss. 61(1)(b),
62, 85(1)(b)(ii)

PEA ss. 62(1)(b),
(4), 62(6)

PEA s. 80; PE
Regs r. 33

The Act lists various types of conditions under section 62 that may be included. The list is not exhaustive.

An applicant can apply to VCAT for review of any condition imposed except for a condition included under section 62(1)(aa) regarding registered restrictive covenants.

Some basic principles have been established about the validity of conditions. Each condition must:

- be reasonable
- relate to the planning permission being granted
- fulfil a planning purpose
- accurately convey its intended effect and avoid uncertainty and vagueness.

A permit must be written so that the applicant and anyone else will easily understand it. The, *Writing Planning Permits (2007) manual* provides guidance on writing conditions.

Section 24(1) of the *Building Act 1993* requires the building surveyor to ensure any building permit issued is consistent with the planning permit, including the endorsed plans. For more information on ensuring consistency between building permits and planning permits (see *Practice Note 44 – Building Permit and Planning Permit Consistency* (July 2014) issued by the Victorian Building Authority).

3.5 Implementing the responsible authority's decision

3.5.1 Grant of a permit

Grant of permit where no objections have been received

The responsible authority can issue the permit immediately if:

- no objections have been received (including from a recommending referral authority); or
- the only objection(s) received have been rejected by the responsible authority under section 57(2A) of the Act; or
- no notice was required to be given under section 52(1) or 57B of the Act or the planning scheme; and
- any conditions specified by a recommending referral authority have been included on the permit.

A copy of the permit must be sent to any referral authority that was given the application under section 55 of the Act. This does not apply where a recommending referral authority objected or sought a condition that was not imposed on the permit. In that case, the authority will have received a notice of refusal or a notice of decision to grant a permit.

PEA ss. 63, 66,
64A; PE Regs r.
22, Form 4

PEA ss. 64, 66;
PE Regs r. 26

Grant of permit where objections have been received

If objections have been received, the responsible authority must issue a notice of decision to grant a permit (also known as an 'NOD').

The responsible authority must give a notice of decision to the applicant, any referral authority (as prescribed in sections 64A and 66 of the Act) and each objector. The notice should be dated on the day it was actually sent out. The notice sets out conditions the responsible authority intends to apply to the permit.

A notice of decision is also issued when no objections have been lodged but a condition proposed by a recommending referral authority is not included on the permit.

Once a notice of decision has been given, the responsible authority cannot issue the permit:

- until the end of the 21 day 'review period' – the period within which an objector or a recommending referral authority may lodge an application for review of the decision to VCAT); or
- if an application for review is made within that period, until VCAT directs that a permit be issued.

An application for review must be made to VCAT within the prescribed period by or on behalf of the person seeking a review of the decision. If an application for review is not made within the prescribed time, the responsible authority may issue the permit. See Chapter 5 Reviews, Table 5.1.

ILA s. 49(1)

A responsible authority must take care in calculating the time after which a permit can be issued. Under section 64 of the Act, the time begins from when the responsible authority gave notice which if the notice was sent by post, is the time the notice would have been received, not the date it was sent.

The responsible authority should set in place an administrative system to ensure that an application for review is not overlooked and a permit mistakenly issued. This could happen if, for example, a person addresses an application for review to the Chief Executive Officer of a council, while the planning office, not having seen it, issues a permit.

3.5.2 Refusal to grant a permit

PEA s. 65; PE
Regs r. 28

A notice of refusal must be set out as in Form 7 in Schedule 1 of the Regulations.

PEA ss. 65(2),
66(5)

The notice must state the grounds on which the application was refused and indicate whether the grounds were those of the responsible authority or a determining referral authority.

The Act states that the notice must set out specific grounds. Therefore, broad generalisations such as loss of amenity should be avoided or at least made reasonably specific as to how 'loss of amenity' is expected to come about. The grounds of refusal may be tested at a review hearing.

PEA ss. 65, 66

A notice of refusal must be given to the applicant and all objectors. The responsible authority must also give a recommending referral authority a notice of refusal if it:

- objected to the grant of the permit; or
- recommended a condition be included on the permit.

Anyone who made a submission, rather than an objection, can be advised of the decision by letter.

PEA ss. 61(2),
61(2A)

The responsible authority must refuse to grant a permit if a determining referral authority objected to the proposal, but is not obliged to refuse the grant of the permit if a recommending referral authority objected to the proposal.

If a refusal is issued because the use or development proposed is prohibited by the scheme, the notice should make this clear.

3.5.3 Review of a decision to grant or refuse a permit

PEA ss. 77, 80,
82, 82AAA; PE
Regs r. 35, 36

An application for review must be made to VCAT within the prescribed time and a copy of the application for review must be given to the responsible authority. In the case of an objector's review against a decision to grant a permit, an application for review must be lodged within 21 days from when the notice of decision was given.

A recommending referral authority also has 21 days to lodge an application for review of a decision to grant a permit, a refusal or a decision not to include a condition recommended by the authority.

An applicant has 60 days to apply for review of a decision to refuse to grant a permit or for a review of any condition in a permit.

Refer to Chapter 5 for more information about other types of decisions that can be reviewed by VCAT and the relevant procedures for VCAT reviews.

3.6 After a permit is issued

3.6.1 When does a permit begin?

PEA s. 67

A permit operates from:

- the date specified on the permit; or
- the date of VCAT's decision if no date is specified and the permit was issued at the direction of VCAT (in this case it will need to be backdated to the Tribunal decision date); or
- the date on which it was issued (where no date is specified).

3.6.2 When does a permit expire and how is the time extended?

A permit can expire in three ways:

- if the permit is not acted upon; or
- if the use is discontinued as set out in section 68 of the Act; or
- if a permit condition provides that a use may only be conducted until a certain time or that works must be removed after a certain time.

PEA s. 68

Permits not acted upon

The Act specifies the conditions under which a permit will expire. These vary depending on the type of permit (for example use, subdivision, other forms of development, or a combination of these). In general, the Act allows two years for the commencement of a use or completion of the development, unless the planning scheme specifies otherwise. In the case of subdivision, two years is allowed for the certification of the plan under the *Subdivision Act 1988*, with expiry occurring five years after certification.

The responsible authority may specify a different time (either shorter or longer) for commencement, and in relation to a permit for development other than subdivision, a different time for completion as appropriate to the particular case. These alternative times must be stated in the permit.

If a permit expiry is specified on a permit, this should be done as a statement in accordance with section 68 of the Act. It is not a condition of the permit.

A responsible authority should avoid setting unnecessarily short expiry times that are likely to lead to requests for extensions. Each case should be considered on its merits.

There can be exceptions to the normal two-year period, for example staged subdivisions. Where there is a longer-term commitment, time limits of six to eight years may be appropriate. A person who has been granted a permit should recognise that development rights do not necessarily run forever. Site circumstances and policy context can change. Specifying an expiry date gives the responsible authority the opportunity to review the situation when considering an application for extension of time.

Extension of time

PEA s. 69(1), (1A)

The owner or the occupier of land to which a permit applies may ask the responsible authority for an extension of time for a permit where:

- a use or development allowed by the permit has not yet started and the application is made either before the permit expires or within six months of the expiry date; or
- development allowed by the permit has lawfully started and the application is made within 12 months after the permit expires.

More than one extension of time can be granted for a permit. In deciding whether to grant an extension, a responsible authority should reassess the proposal in the present context, taking into account the following considerations:

- whether there have been any changes to relevant planning controls or planning policy
- the likelihood of a permit being granted if a fresh application was made for the proposal
- the total elapsed time, taking into account whether the originally imposed time limit was adequate
- whether the landowner is seeking to 'warehouse' the permit (that is, store the permit without intending to act upon it)

- intervening circumstances, including:
 - action taken by the applicant in the context of any legislative and policy uncertainties, including under other jurisdictions
 - whether conditions on adjoining land may have changed in a way that would affect the proposal
- the economic burden imposed on the landowner by the permit, including whether the cost of having to comply with the permit conditions was so onerous that the time available for compliance was inadequate.

PEA s. 69(2), (3)

The responsible authority may extend the time within which a use is to be started or the development or any stage of it must be started or completed.

Where the decision to extend the time is not made until after the permit has expired, the extension operates from the day the permit expired so that there is no break in its validity.

The responsible authority should consider whether or not the views of a referral authority should be sought regarding the extension and seek those views before deciding whether the extension should be granted.

The responsible authority should notify both the applicant and the owner of the land of its decision and send a copy of the decision to any relevant referral authority.

PEA s. 81(1), (3)

Any person affected may apply to VCAT for review of a decision to refuse an extension of time or failure to make a decision within one month. The responsible authority and VCAT have no power to consider an extension of time if the request is made after the timeframes set out in section 69(1) and (1A).

Use discontinued for two years

PEA s. 68(3)(d)

The Act also provides that a permit to use land expires if the use is discontinued for two years. The permit may be extended in the same way as a permit which has not been acted upon, provided the request for an extension is made within six months of the permit expiry.

It may be difficult to determine when the right to apply for an extension actually expires as there may be no set date to indicate when the use ceased. The responsible authority may need to rely on evidence from the landowner or occupier and other inquiries in a similar way to deciding when established use rights cease in accordance with section 6(4).

Permit ceases at a given time

If it is intended that a proposal be permitted only:

- until a particular event occurs; or
- for a fixed period of time; or
- for a period of time specified by the responsible authority (who may wish to review the operation of the proposal afterwards)

then the permit should include a condition that the use must cease (and that any development permitted be removed) at that time.

This time cannot be ‘extended’ using the procedures under the Act for extension of time. In these circumstances the responsible authority could consider amending the permit. Alternatively, the provisions of section 87 may be applicable and VCAT could amend the permit. Otherwise a new application is necessary.

3.6.3 Correcting mistakes in a permit

PEA s. 71

The Act allows the responsible authority to correct a permit (including a permit issued at the direction of the Tribunal) where it contains a clerical mistake or omission, a miscalculation of figures or a mistake in any description of a person, thing or property.

A copy of the corrected permit should be prepared with the original date of issue. A note should be included at the end of the permit indicating the nature and date of the correction.

If possible, copies of the original incorrect permit should be recovered and marked superseded. Then the corrected permit can simply be substituted. A copy of the corrected permit should be sent to the owner, the applicant and any relevant referral authority. The correction must be noted in the register of permits held by the responsible authority.

3.6.4 Amending a permit

The Victorian planning system recognises that a permit holder’s intentions may change over time. Rather than requiring a new permit application to be made every time a change is proposed, two alternative processes are available:

- application to amend a planning permit
- secondary consent.

An applicant should discuss their revised proposal with the council planner before submitting their application to determine the best course of action.

Application to amend a permit

PEA ss. 72(1),
72(3), 73(1), Regs
r. 14

An application to amend a permit, including any plans, drawings or other documents approved under a permit, follows the same process as an application for a permit (under sections 47 to 62 of the Act). It has the same requirements for giving notice and referral. However, the assessment for an application to amend a permit focuses only on the amendment itself and avoids reopening all the issues associated with the approved use or development. It also avoids the proliferation over time of permits for different aspects of the use and development of a parcel of land.

There is no limit to the number of times an applicant can request an amendment.

A correction of a mistake is not required to undergo the same process. (See Section 3.6.3 of this chapter – Correcting mistakes in a permit.)

PEA ss. 72(2),
85(1A)

A permit issued at the direction of VCAT cannot be amended under this process if VCAT has specifically directed that the permit (or a part of the permit) must not be amended by the responsible authority. Instead, an application will need to be made to VCAT under section 87 or 87A of the Act.

PEA s. 72(2)(b)

Any permit issued by the Minister under Part 4 – Division 6 of the Act cannot be amended by the responsible authority. Only the Minister can amend this type of permit.

Who may request an amendment to a permit?

PEA ss. 72(1),
48(1)

A person who is entitled to use or develop land in accordance with a permit may apply to the responsible authority for an amendment to a permit. The permit 'runs' with the land, not an individual person.

If the applicant is not the owner, section 48(1) provides for the application either to be signed by the owner or for a declaration by the applicant that the applicant has notified the owner about the application.

What is the procedure for an application to amend a permit?

PEA s. 73; PE
Regs r.17, Form 3

Because an amendment to a permit is considered in the same way as an application for a permit, the responsible authority must consider whether:

- more information is required under section 54
- notification of the application is required under section 52
- referral is required under section 55.

The same statutory timeframes apply. This includes timeframes relating to notification, referral and review.

Consideration of the application to amend a permit, including notification and referral, should be based only on the changes proposed by the applicant.

Amended permit

PEA ss. 73(2) and
(3), 74

If the responsible authority has decided to amend a permit, it must issue an amended permit to the applicant if:

- notice was required to be given under section 52(1) or 57B of the Act and:
 - no objections have been received; or
 - the only objection(s) received have been rejected by the responsible authority under section 57(2A) of the Act
- a recommending referral authority has not objected to the grant of the amendment to the permit
- all conditions recommended by a recommending referral authority have been included on the amended permit.

The conditions on the permit must relate to the amendments and these form part of the permit when it is issued.

PE Regs r. 22,
Form 4

An amended permit must include a table indicating the date and nature of the amendment. This is prescribed in the Regulations.

Notice of decision to amend a permit

PEA ss. 75, 75A,
76A(2); PE Regs
r.27, Form 6

If there are objections to the amendment (including an objection from a recommending referral authority) and the responsible authority has decided in favour of the application, then a notice of decision to grant the amendment to the permit must be issued. The notice must set out any conditions to which the amendment to the permit will be subject. The form for the notice of decision is prescribed in the Regulations.

If a condition specified by a recommending referral authority is not included on the amended permit, a notice of decision to grant the amended permit must also first be issued before the final decision.

PEA s. 76; PE
Regs r.28, Form 7

Refusal of amendment

If the responsible authority decides to refuse to grant an amendment to the permit, a notice of refusal to grant an amendment to a permit must be issued. The notice must set out the grounds on which the application is refused and whether the grounds are those of the responsible authority or a determining referral authority. The form for the notice of refusal is prescribed in the Regulations.

PEA ss. 76A, 76C

Notice to referral authority

The responsible authority must give each determining referral authority a copy of the amended permit if it decides to grant a permit, or a copy of any notice of decision to grant a permit or notice of refusal. Similarly, a recommending referral authority must be given a copy of notice if it did not object to the grant of the amended permit or did not specify conditions for the amended permit.

Where a recommending referral authority objected to the grant of the amended permit or specified conditions that were not included, a notice must be given to the authority. The notice gives the authority a right of review against the responsible authority's decision.

PEA ss. 69, 76B

When does an amended permit begin and expire?

An amended permit replaces the original permit.

Once a permit has been amended, the original form of the permit is superseded, and can no longer be acted on. Amending a permit does not change its expiry date, although the person seeking an amendment may at the same time ask for an extension of time under section 69 if the person is the owner or occupier.

It is good practice to include the specific date the permit expires on the planning permit. A permit should always show both the original issue date (a mandatory requirement) and the date on which the permit expires.

PEA s. 49

The register of permit applications should record the latest version of the permit. There is no need to cancel previous versions of the permit. However it would be useful for applicants and the responsible authority to denote file copies appropriately (for example, by marking the original permit as 'superseded').

PEA s. 76C

Review of decision on amendment

Because an amendment to a permit is considered in the same way as an application for a permit the same rights of review exist.

If the responsible authority determines not to issue an amended permit, the applicant has a right of review to VCAT. The applicant also has a right of review against any conditions placed on the amended permit.

Relevant third parties will have a right of review against the decision to grant an amendment to a permit. A recommending referral authority may also seek review of a responsible authority's decision to not include a permit condition that it specified.

More information about reviews is included in Chapter 5.

Secondary consent

A permit condition may provide that some future or further changes be carried out 'to the satisfaction of the responsible authority' or not be carried out 'except with the further consent of the responsible authority'. For example a condition may limit the operation of a use to particular hours but may also provide for the hours to be altered with the consent of the responsible authority. This is known as a 'secondary consent'.

A primary consent relates to the planning scheme requirement for a permit, whereas a secondary consent is a less formal planning approval commonly available under permit conditions. The distinction between the two is described in the VCAT decision *Art Quest Pty Ltd v City of Whittlesea* (1990), Appeal No. P89/2322, noted at 5 AATR 4.

The most common type of secondary consent provision included on a permit relates to compliance with endorsed plans. The usual words are:

'The (use and) development as shown on the endorsed plans must not be altered without the written consent of the responsible authority.'

A secondary consent given under a permit condition does not substitute for any new permission required by the planning scheme. For example, where an existing building is to be extended, in addition to obtaining secondary consent to vary the plans of the original permit, it may be necessary to obtain a new permission, because a new planning provision has been introduced since the permit was granted.

This principle (that secondary consent cannot substitute for primary consent and must be consistent with the planning scheme) is established in a number of VCAT decisions including *Kitsone Pty Ltd v Doncaster and Templestowe City Council* (1993) 10 AATR 135, and *Westpoint Corporation v Moreland City Council* [2005] VCAT 1049 (31 May 2005). The Westpoint decision sets out criteria for assessing whether a proposal may be altered by secondary consent and *Oz Property Group (Flemington) Pty Ltd v Moonee Valley City Council* [2014] VCAT 397 sets out considerations relevant to the application of the Westpoint criteria. In the decision of *Cope v Hobsons Bay City Council* [2004] VCAT 2487, the Tribunal departed from an otherwise consistent VCAT approach to this issue.

The permit holder may lodge an application for review with VCAT in relation to a secondary consent clause contained in a permit. Third parties have no formal right of objection and no review rights in relation to a secondary consent.

A permit condition may also provide for a secondary consent to be exercised by a Minister, public authority or referral authority.

The secondary consent process can only be used where changes are proposed to the plans or conditions.

Where a secondary consent is not appropriate, a new permit application or an application to amend a permit should instead be made.

3.7 Cancellation or amendment of a permit by VCAT

3.7.1 Under what circumstances can a permit be cancelled or amended?

PEA s. 87(1)

VCAT can cancel or amend any permit if it considers that there has been:

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

PEA s. 87A

VCAT can cancel or amend a permit that has been issued at its direction if it considers it appropriate to do so. A cancellation or amendment under section 87A can only be undertaken at the request of the owner or occupier or any person who is entitled to use or develop the land concerned.

PEA s. 87(2)

VCAT can amend any permit to comply with the Building Regulations 2006. It can do this if a building permit cannot be obtained under the *Building Act 1993* (for the development for which the permit was issued) because the development does not comply with those regulations.

PEA s. 87(5),
(6), (7)

VCAT can cancel or amend a permit it has granted. However, it cannot cancel or amend permits required by Ministers or government departments granted by the Governor in Council under section 95 of the Act. To prevent repetitious reviews, a permit cannot be cancelled or amended on grounds related to misstatement or concealment of fact, a mistake in granting the permit, or failure to comply with referral requirements if these matters have been previously raised in a review about the permit.

PEA s. 88

There is no limitation on the time when a permit can be cancelled or amended if it relates to the use of land. However, if it relates to either the development of land or construction of buildings or works, it can only be cancelled or amended before the development has been substantially completed.

3.7.2 Making a request to cancel or amend a permit

PEA s. 87(3)

A request to amend or cancel a planning permit can be made by:

- the responsible authority (usually the local council)
- a referral authority
- the owner or occupier of the land
- any person who is entitled to use or develop the land

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

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

Before making a request, careful consideration should be given to which ground or grounds as specified in section 87 will be relied upon. It will be necessary at the hearing of the request to produce evidence to satisfy VCAT that one of these grounds existed. Consideration should also be given to whether or not to seek an order to stop development. (See Section 3.7.5 of this chapter.)

Any request must be in writing. Forms containing notes and guidance for a person requesting cancellation or amendment of a permit, or seeking an order to stop development are available from VCAT.

PEA s. 89(3)

VCAT may refuse to consider a request if it is not satisfied that the request was made as soon as practicable after the facts became known to the person or authority making the request.

3.7.3 Hearing a request to cancel or amend a permit

PEA s. 90

VCAT must give the following parties the opportunity to be heard:

- the responsible authority
- the owner and occupier of the land
- the person who asked for the cancellation or amendment of the permit
- the Minister
- a relevant referral authority.

VCAT has discretion to give any other person who appears to have a material interest in the outcome an opportunity to be heard.

PEA s. 91(3)

If the request was made by an objector or person who would be entitled to object, VCAT must be satisfied before it makes a direction to amend or cancel a permit that:

- there would be substantial disadvantage to the person making the request
- the person did not receive notice of the application and therefore could not have become aware of the application in time to lodge an objection
- it would be fair and just to amend or cancel a permit.

3.7.4 VCAT's decision

PEA s. 91 VCAT may direct the responsible authority to cancel or amend a planning permit and to take any other actions as required.

PEA s. 92 The responsible authority must comply with VCAT's direction without delay and forward a copy of the notice of cancellation or amendment to any person entitled to be heard by the Tribunal in accordance with the Regulations.

PE Regs r. 38, r. 39 A notice of cancellation or amendment of a permit under section 92 of the Act must be given within seven days of the responsible authority receiving the Tribunal's decision and must give:

- sufficient information to identify the permit
- details of the amendment or amendments made to the permit or a statement that the permit has been cancelled
- the ground or grounds for each amendment or for cancellation.

A notice must contain advice that there may be a right to compensation under the Act.

3.7.5 Order to stop development

PEA s. 93 If the circumstances warrant, VCAT may immediately make an order to direct that all or part of a development cease until the outcome of a hearing. It may further direct the responsible authority to give notice of the order, without delay, to a specified person in a specified manner.

PEA s. 94(1) The responsible authority or other party may be liable for compensation if the planning permit is not subsequently cancelled or amended.

PEA s. 93(1A) Before making an order, VCAT must consider whether the person making the request should give any undertaking as to damages.

PEA s. 93(3) It is an offence for a person to fail to comply with an order to stop development.

3.7.6 Compensation for permit cancellation or amendment

PEA s. 94 If a permit is cancelled or amended, the responsible authority may be liable to pay compensation to any person who has incurred expenditure or is liable for expenditure as a result of the issue of a permit.

This applies particularly where expenditure is wasted because a permit is cancelled or amended or when additional land must be bought to develop in the required manner.

PEA s. 94(2A) A referral authority is liable to pay this compensation instead of the responsible authority, if the permit is cancelled or amended because of a material mistake in relation to the issue of the permit that arose from an act or omission of the referral authority.

PEA s. 94(4) Compensation is not payable if the permit is cancelled or amended in the following circumstances:

- if there has been a failure to satisfy permit conditions
- the permit was granted following an application in which there was a material misstatement or concealment of facts

- if the cancellation is on the ground of a material mistake in relation to the grant of the permit, and if VCAT considers that the mistake in the grant of a permit was due to an action or omission by or on behalf of the applicant
- if the permit must be amended to enable the development to comply with regulations made under the *Building Act 1993*.

PEA s. 94(5)

It should be noted that provisions of the *Land Acquisition and Compensation Act 1986*, parts 10 and 11 and section 37 (regarding the determination of disputes and claims where no offers have been made) would apply as necessary where compensation has to be determined.

PEA s. 150(4), (5)

Section 150(4) of the Act provides for compensation to be paid by a person if VCAT is satisfied that person has brought proceedings vexatiously, frivolously or primarily to secure or maintain a direct or indirect commercial advantage. If VCAT determines that the circumstances set out in section 150(4) have occurred, it may order the person who brought the proceedings (or another person that sponsored the bringing of the proceedings) to pay compensation as well as costs.

3.8 Applications in special circumstances

3.8.1 Subdividing land

PEA s. 3; Planning scheme Cl. 61.05

The subdivision of land involves three main stages:

- planning permit application
- certification
- statement of compliance

Either a planning permit is required for subdivision or the planning scheme provisions relating to a parcel of land must specifically allow for subdivision.

The *Subdivision Act 1988* sets out the procedures to be followed by councils in certifying plans and issuing statements of compliance.

Planning permit application

The approval process for a planning permit application to subdivide land is the same as for any other type of planning permit application.

It is essential that councils and referral authorities give proper consideration to subdivision at the planning stage as it will not be possible to place additional requirements on a subdivision once a planning permit is issued.

Conditions on permits should cover the full range of matters that both the council and referral authorities require to be addressed.

An application for subdivision can run in parallel with the certification process under the *Subdivision Act 1988*. A plan cannot, however, be certified before a planning permit is issued. If planning and certification applications are processed concurrently, the prescribed time under the PE Act applies.

SA s. 6(1)(a)

Certification

A plan must be certified by council when the planning permit or planning scheme requirements have been met or arrangements have been made to meet those requirements, along with any other matter set out in section 6(1) of the *Subdivision Act 1988*.

A plan certified under the *Subdivision Act 1988* has a life of five years. The plan lapses if it is not registered at the Titles Office within that time.

Each council must keep a register of plans and decisions made.

Statement of compliance

The statement of compliance is the main tool councils use to seek compliance with the requirements placed on subdivisions through the planning system or under the Subdivision Act.

A statement of compliance cannot be issued before a plan is certified and it must be obtained before a plan can be registered at the Titles Office.

SA s. 21

Before a statement of compliance can be issued, written advice from a licensed surveyor must be provided to the council in a prescribed form. This should be to the effect that the subdivision (including all lots, roads, common property and reserves) has been marked out or defined.

Council must issue a statement of compliance as soon as the applicant has provided all the prescribed information and has satisfied all requirements under the planning system and the *Subdivision Act 1988*.

For more information about subdivision procedures, refer to the *Subdivision Act User Guide* (November 2012).

3.8.2 Applications for licensed premises

Planning scheme
Cls 52.27, 66.03,
66.04

In addition to other requirements of the planning scheme, a permit is required under Clause 52.27 if it is proposed to issue or vary a licence to sell or consume liquor.

A permit is required to use land to sell or consume liquor if any of the following apply:

- a licence is required under the *Liquor Control Reform Act 1998*
- a different licence or class of licence is required from that which is in force
- the hours of trading allowed under any licence are to be extended
- the number of patrons allowed under a licence is to be increased
- the area that liquor is allowed to be consumed or supplied under a licence is to be increased.

Clause 52.27 sets out some exceptions to this permit requirement, such as a variation that reduces the number of patrons allowed under a licence. The schedule to Clause 52.27 may also specify that a permit cannot be granted to use land to sell or consume liquor under a particular type of licence.

If a planning permit is required for modifications to a licensed premises, such as an extension of the building area, a permit will also be needed under this clause where a change to the liquor licence is required. The application must make it clear that it is an application for approval under Clause 52.27, in addition to any other use or development approval required.

This means that even if a licensed premises has long-standing existing use rights, a permit is still needed if the licence is to be changed.

An application under Clause 52.27 associated with a hotel, tavern or nightclub that will operate after 1.00 am must be referred to the Victorian Commission for Gambling and Liquor Regulation (VCGLR). Notice of the same application must also be given to the Chief Commissioner of Victoria Police under section 52(1)(c) of the Act.

Cumulative impact

In assessing an application for a licensed premises, a responsible authority has to consider the possible impacts of that premises in relation to any existing cluster of licensed premises in the locality – the ‘cumulative impact’. *Planning Practice Note 61 – Licensed Premises: Assessing Cumulative Impact* provides a guide on assessing the cumulative impacts of packaged liquor outlets.

The role of local government in the issuing of a liquor licence under the *Liquor Control Reform Act 1998*

LCR Regs r.10(1)

Appropriate planning permission, or evidence that an application for such permission has been made, must be lodged with a new licence application and certain licence variation applications to the VCGLR.

It is important to note the following:

- a licence will not be granted or varied until the VCGLR is satisfied that there is planning approval
- liquor trading hours approved on a liquor licence will not exceed trading hours specified in the planning approval
- licensees are required, as a condition of their liquor licence, to comply with planning permit conditions.

LCRA ss. 33(2),
40

A copy of an application for a licence under the *Liquor Control Reform Act 1998* must be given to the council. The council may object against the licence on the grounds that granting the licence would detract from, or be detrimental to, the amenity of the area in which the premises are situated. In addition, a council may object to a proposal relating to a packaged liquor licence on the ground that the grant, variation or relocation would be conducive to or encourage the misuse or abuse of alcohol.

LCRA s. 91(1)
(b)(iii)

A council may also initiate disciplinary proceedings through the VCGLR against a licensee on the grounds that the licensee has conducted the business in a manner that is detrimental to the amenity of the area or other relevant concern. The council must set out the reasons in its request to the Commission.

The VCGLR provides a comprehensive range of fact sheets of interest to both the industry and consumers. These fact sheets and other resources about liquor licensing are available on the VCGLR website at www.vcglr.vic.gov.au.

3.8.3 Restrictive covenants

PEA s. 47(1)(d)

If a registered restrictive covenant applies to the land, the applicant must submit a copy of the covenant with the permit application affecting the land. As a registered restrictive covenant is defined as a restriction under the *Subdivision Act 1988*, the applicant will need to check both the plan of subdivision (if the land is a lot on a plan) for restrictions, and Register Search Statement for restrictive covenants registered or recorded on the title. A title Register Search Statement can be obtained from Land Victoria's Land Information Centre, 570 Bourke Street, Melbourne or on the department's website, following the '*Property and titles*' link.

PEA s. 47(1)(e)

If the permit authorises anything that would result in a breach of a registered restrictive covenant, the applicant must provide information clearly identifying each allotment or lot benefited by the covenant and any information that is required by the Regulations.

The applicant is encouraged to ask a qualified person to obtain this information, because determining which land is benefited by the covenant may not be straightforward.

If an applicant does not submit details of land benefited by a restrictive covenant because he or she considers there would be no breach and if the responsible authority disagrees and considers a breach would result, the responsible authority should inform the applicant without delay.

If there is disagreement between the responsible authority and the applicant about whether there is a breach or what land is affected, the matter may need to be referred to VCAT for determination.

PEA s. 52(1)(ca),
(cb), 52(1AA)

If a permit would authorise anything that would result in breach of a restrictive covenant or if the application is to remove or vary a restrictive covenant, the responsible authority must, in addition to complying with existing notice provisions of the Act:

- give notice (or require the applicant to give notice) to owners and occupiers of land benefited by the restrictive covenant;
- place (or require the applicant to place) a sign on the land; and
- publish a notice (or require the applicant to publish a notice) in a newspaper circulating in the area.

PEA s. 57(1A)

If the permit would allow the removal or variation of a registered restrictive covenant or if anything authorised by the permit would result in a breach of the covenant, an owner or occupier of land affected by the covenant is deemed to be a person affected by the grant of a permit. Therefore, no objection can be disregarded on the basis that the owner or occupier is not affected.

PEA s. 61(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, except where a permit has been issued, or a decision has been made to grant a permit, to allow the removal or variation of the covenant.

If a responsible authority considers it must refuse an application because the proposal would result in a breach of a registered restrictive covenant, it should discuss the following options with the applicant to avoid a refusal:

1. Apply for a separate permit to remove or vary the covenant. If a permit is first granted to remove or vary the covenant, the responsible authority could then issue the original permit. The responsible authority could consider both applications together. As long as it issues a permit to remove or vary the covenant, it can issue the original permit. If that permit is granted, it must include a condition that the permit is not to come into effect until the covenant is removed or varied.
2. Apply to the Supreme Court for an order to remove or vary the covenant. If the Court orders the removal or variation and if the necessary steps to actually remove or vary the covenant are completed, the responsible authority can then grant or decide to grant the permit.
3. Ask the council, as planning authority, to prepare an amendment to the planning scheme to remove or vary the covenant. If the amendment is prepared and approved, and if the necessary steps to actually remove or vary the covenant are completed, the responsible authority can then grant or decide to grant the permit.
4. Ask the council, as planning authority, to prepare an amendment to the planning scheme to remove or vary the covenant and, at the same time, consider a permit application which would otherwise authorise something that would result in breach of the covenant. If the amendment is prepared and approved to remove or vary the covenant, a permit can be simultaneously granted to authorise something that would otherwise result in breach of the covenant. The permit must include a condition that it does not come into effect until the covenant is removed or varied.

PEA s. 62(1)(aa)

If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must include a condition that the permit is not to come into effect until the covenant is removed or varied.

In effect, this permit can only be granted in the circumstances described in section 61(4) that is, if a permit is granted or a decision has been made to grant a permit to remove or vary a covenant. This ensures that an owner takes the necessary steps under the *Subdivision Act 1988* to actually remove or vary the restrictive covenant. It also means that failure to do so is an offence. A responsible authority can prosecute or apply for an enforcement order against the offence.

3.8.4 Earth and energy resources industry

Planning scheme
Cl. 52.08

The VPP seeks to encourage land to be used and developed for exploration and extraction of earth and energy resources in accordance with acceptable environmental standards.

The mining and stone extraction industries are regulated by the *Mineral Resources (Sustainable Development) Act (1990)* (MR(SD) Act). Other earth and energy resources industries are regulated by the *Geological Sequestration Act (2008)*, the *Geothermal Energy Resources Act (2005)*, and the *Petroleum Act (1998)*.

In general, a planning permit is not required to use and develop land for earth and energy resources industry where it complies with the relevant legislation governing these land uses. It is important that planning controls are consistent with this legislation.

Planning scheme
Cl. 52.09

Stone extraction

The VPP specifically recognises the importance of sand and stone resources and the need to ensure that land used for stone extraction does not adversely affect the environment or amenity of an area.

The statutory approval process for stone extraction takes three steps:

- statutory endorsement of a work plan
- issue of a planning permit (if required), and
- grant of a work authority.

The MR(SD) Act regulates the work plan and work authority processes, addressing the operational aspects of the industry. The *Planning and Environment Act 1987* regulates the planning permit process.

Planning scheme
Cl.52.08-1, s. 77T
MR(SD) Act

The use and development of land for stone extraction will not require a planning permit where it complies with the provisions of the MR(SD) Act regarding the preparation of an Environment Effects Statement.

Planning scheme
Cl. 52.09-3 & Cl.
52.09-4

If a planning permit is required, most applications will need to be accompanied by a copy of a work plan that has been statutorily endorsed in accordance with section 77TD of the MR(SD) Act. The submission of the statutorily endorsed work plan with a planning permit application means that the usual referral requirements will not apply (with the exception of the Roads Corporation referral requirements).

Before preparing an application for a work plan or a planning permit it is important to meet with the relevant authorities to discuss the proposal.

Environment Effects Statement (EES)

The EES process provides an alternative mechanism to the planning permit assessment process for the use of land for stone and mineral extraction. Matters that are normally addressed in a planning permit assessment process are addressed in the EES process.

The *Ministerial Guidelines for Assessment of Environmental Effects* and further information about the EES process can be viewed on the department's website.

3.8.5 Pipelines

Pipelines Act
s. 85

If a licence is issued under the *Pipelines Act 2005* to construct and operate a pipeline, a planning permit is not required for the use or development of land, including the removal, destruction and lopping of native vegetation, or the doing or carrying out of any matter or thing for the purpose of the pipeline.

3.8.6 Applications that could have a significant effect on the environment

PEA s. 60(1)(e)

The Act requires a responsible authority to take account of any significant effects a use or development may have on the environment or that the environment may have on the use or development. Under section 54 of the *Planning and Environment Act 1987*, a responsible authority can ask the applicant for more information on the possible environmental effects of a use or development.

A proposal can be referred to the Minister for Planning under the *Environment Effects Act 1978* to decide whether an EES will be required by:

- a proponent directly seeking the advice of the Minister
- another Minister or an authority that grants permits, licences or approvals, referring a proposal to the Minister

- any person or group requesting the Minister to decide whether the proposal should be subject to an EES.

The *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* (June 2006) provide guidance on referrals and what could be considered to be a potentially significant environmental effect. The Minister for Planning may also direct that a referral be made.

EEA s. 3(1), 8B(7)

The Environment Effects Act 1978 can apply to any works (public or private). When the Minister gives notice under the Act that an EES is required, it determines the Act applies to the works. The Act can also apply to declared public works by Order of the Minister published in the Government Gazette.

EEA s. 8

Section 8 of the *Environment Effects Act 1978* provides for proponents and relevant decision makers to refer proposals to the Minister to determine whether an EES is required.

EEA s. 8A

The Minister may notify decision makers to put decisions about projects on hold until the Minister has advised whether an EES should be prepared.

Section 8C of the *Environment Effects Act 1978* requires that no decision be made about a project until the EES has been prepared and the Minister's assessment of the project has been considered by the relevant decision maker. This includes any decision made under the *Planning and Environment Act 1987* to grant or refuse a permit.

PEA s. 97B(1)(c)

As a general practice, when an EES is required, the Minister for Planning will consider calling in a planning application prior to the responsible authority making a decision.

EEA ss. 4, 8B

The Act allows the Minister for Planning to make one of three decisions on the referred proposal:

- an EES is not required; or
- an EES is not required if certain conditions are met; or
- an EES is required to be prepared by the proponent.

An EES process provides for the analysis of a proposal's potential effects on the environment and identifies means of avoiding and minimising those effects, including through refinement of the proposal, feasible alternatives and appropriate environmental management measures.

In considering whether an EES will be required for a proposal, the Minister considers the extent to which the project is capable of having a significant effect on the environment, taking into account the project's consistency with applicable policy frameworks, uncertainties and complexities of potential effects, any suitable alternative statutory assessment processes, feasible alternatives and the level of public interest.

For more information about the EES process, refer to the *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* available via the department's EES webpage.

Impacts on matters of national environmental significance

Where a proposal may have a potentially significant impact on a matter of national environmental significance (NES), a separate assessment may also be required under the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999*. Further information on the operation of this legislation is available from the relevant Commonwealth Environment Department.

It is possible for Victoria to assess proposals that the Commonwealth has determined as ‘controlled actions’ that are likely to have a significant impact on matters of national environmental significance. The accredited State processes are set out in the Bilateral Agreement on environmental assessment between the Australian Government and Victoria (refer: www.delwp.vic.gov.au/environmental-assessment).

3.8.7 Applications that require an EPA works approval or licence

Planning scheme
Cl. 66.02

Clause 66.02-1 of planning schemes establishes the Environment Protection Authority (EPA) as a referral authority for any application that requires a permit under the planning scheme, where a works approval, licence to discharge or emit waste, or a licence amendment is required under the *Environment Protection Act 1970*.

As the planning scheme requires referral of applications to the EPA for a use or development needing works approval or licence, the two processes can be undertaken either concurrently or separately.

An applicant can apply for a planning permit first, in which case the responsible authority will have the benefit of the EPA advice on the potential environmental effects of the proposal. The EPA, as referral authority, can require incorporation of conditions or refusal of a permit.

The planning permit can then set out the main conditions that should apply to the project before the more detailed documentation needed for works approval is prepared.

Applications can also be made simultaneously and the cross-referral provisions enable consideration and notice by the responsible authority and the EPA to be coordinated.

In the event of objections, assuming that the responsible authority and the EPA approved the project:

- the responsible authority would decide to grant a permit in accordance with section 64 of the Act; and
- the EPA would grant works approval or a licence under section 19B(7) or section 20(8)(f) respectively of the *Environment Protection Act 1970*, indicating that it does not take effect until endorsed by the responsible authority that a permit has been issued.

Alternatively, a refusal could be issued by both bodies and the applicant could apply for a review against these refusals or against any conditions. Applications for review to VCAT would then be combined and heard together.

EPA s. 19B(3),
20(8)

If an application is made to the EPA for a works approval, a licence to discharge or deposit waste to the atmosphere, land or water or for a licence amendment, the EPA will refer the application to the responsible authority. The EPA must also refer the application to the Secretary to the Department of Health and Human Services, any protection agency the EPA considers may be directly affected and, if it relates to exploration for minerals or mining, to the Minister administering the *Mineral Resources (Sustainable Development) Act 1990*. Notice must be given in a newspaper circulating throughout Victoria.

EPA s. 19B(3A),
20(8)

The responsible authority must make a copy of the application and accompanying documents available at its office for public inspection.

EPA s. 19B(4A)	The responsible authority must advise the EPA in writing on the planning status of the proposal within 21 days of the day on which the application was sent. Within 45 days the responsible authority must indicate its support, non-objection, or objection. The responsible authority may ask the EPA to include specified conditions in the works approval (if it is issued).
EPA s 19B(4B), 20(8)	The responsible authority must give the EPA a copy of any planning permit issued for the works.
EPA s. 19B(5), 20(8)	If the works are prohibited by the planning scheme the EPA must refuse to issue a works approval.
EPA s. 19B(7A), 20(8)	Where a works approval or licence is issued before a planning permit is obtained, the works approval or licence must be issued subject to a condition that it does not take effect until a planning permit is issued by the responsible authority.

3.8.8 Applications relating to coastal Crown land

CMA s. 37 Before coastal Crown land is used or developed, the written consent of the Minister responsible for the *Coastal Management Act 1995* needs to be obtained. This consent is in addition to any requirement for a planning permit under the planning scheme affecting the land.

Under the *Coastal Management Act 1995*, coastal Crown land means:

- a) any land reserved under the *Crown Land (Reserves) Act 1978* for the protection of the coastline; and
- b) any Crown land within 200 metres of the high water mark of:
 - i the coastal waters of Victoria; or
 - ii any sea within the limits of Victoria; and
- c) the sea-bed of the coastal waters of Victoria; and
- d) the sea-bed of any sea within the limits of Victoria; and
- e) any Crown land which is declared by the Governor in Council under sub-section (2) to be coastal Crown land.

The Governor in Council may also declare land not to be coastal Crown land.

While coastal Crown land extends to the limit of any sea in Victoria (three nautical miles or approximately 5.5 kilometres offshore), the limit of planning schemes varies between coastal municipalities ranging from the low water mark (the municipal boundary) to 600 metres offshore.

The *Coastal Management Act 1995* provides a consent process for the use and development of coastal Crown land. Consent can be obtained by applying directly to the Department of Environment, Land, Water and Planning or if a planning permit is required, as part of the planning permit process. The approval process is illustrated in Figure 3.6.

To streamline the approval process prior consent has been granted to some 'low impact' uses and developments (subject to some conditions and limitations). Low impact uses and developments generally comprise day to day maintenance, repairs and safety works. They do not include new works, works that increase the height or footprint of structures or excavation of land. Further information on prior consents can be obtained from the department.

If a council is unsure about whether consent is required under the *Coastal Management Act 1995*, it can either require the applicant to provide more information about this or it can contact the department to seek confirmation about whether consent is required.

CMA s. 38

If a planning permit application is referred to the relevant State environment minister and an application for consent has not been made, the referred application is deemed to be an application for consent under the *Coastal Management Act 1995*.

CMA ss. 39, 40

Upon receiving a copy of the application for consent, the Minister has 28 days to:

- request additional information or
- consent to the use or development with or without conditions or
- refuse to consent to the use or development.

If the Minister fails to make a decision within 28 days, the Minister is deemed to have refused to consent to the use or development.

There is no right of review of a decision to refuse consent under the *Coastal Management Act 1995*.

PEA s. 61(3)(a)(b)

The responsible authority must not decide to grant a permit to use or develop coastal Crown land unless consent, or consent with conditions has been granted by the Minister under the *Coastal Management Act 1995*. If the Minister has refused consent, the planning permit must be refused.

PEA s. 82AA

There is no right to apply to VCAT for a review of a decision by the responsible authority to refuse to grant a permit where Coastal Management Act consent has been denied.

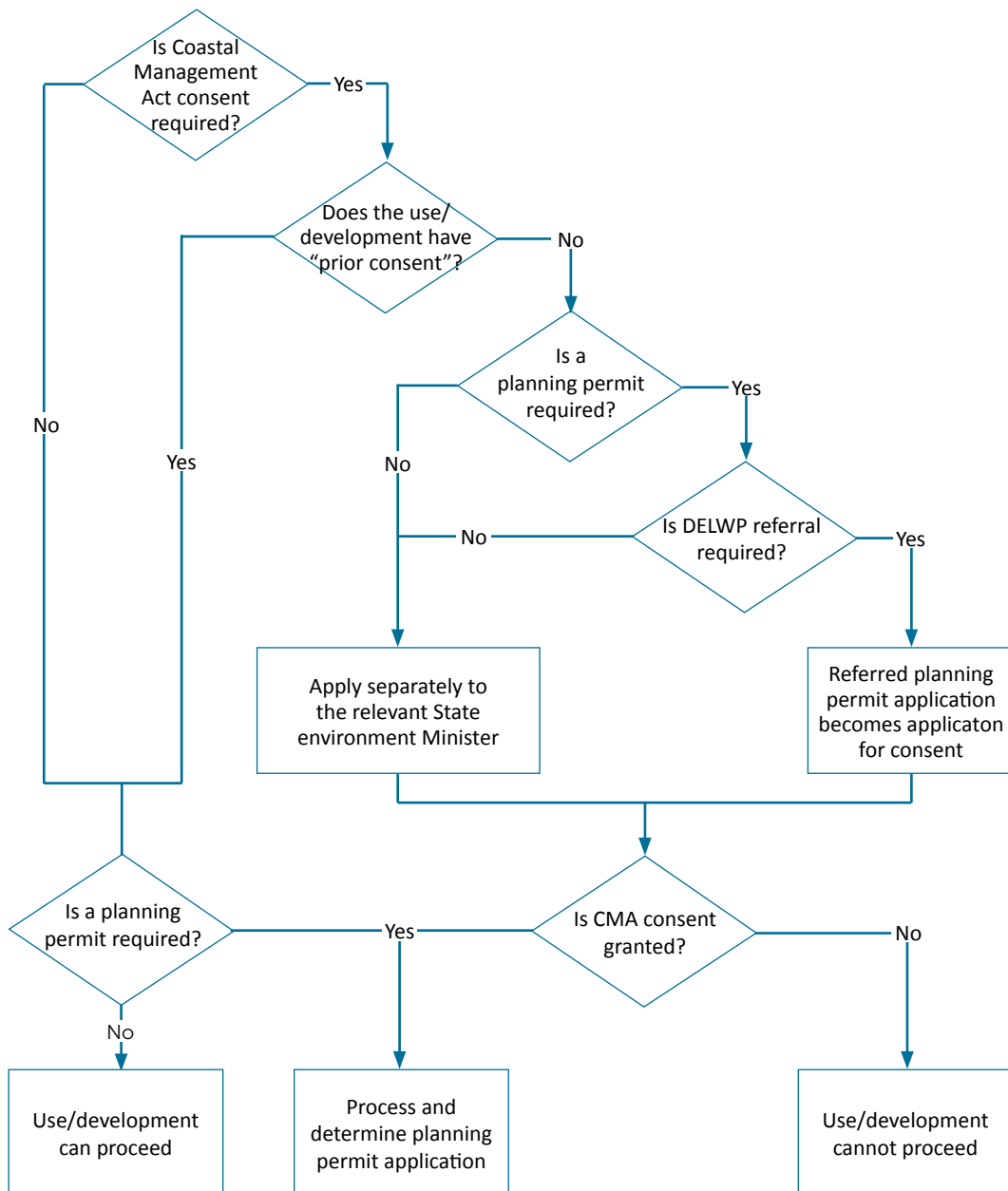
When assessing planning permit applications on coastal Crown land, consider:

- the coastal areas policy in the SPPF and other relevant provisions in the planning scheme
- the *Victorian Coastal Strategy*. A copy of the *Victorian Coastal Strategy* is available at www.vcc.vic.gov.au
- any relevant Coastal Action Plans (CAP), available on the Central Coastal Board's website, www.ccb.vic.gov.au
- native title. Native title may exist over any coastal Crown land. The department will consider all planning permit applications for native title implications
- design advice.

For design advice refer to:

- *Siting and Design Guidelines for Structures on the Victorian Coast* (May 1998). A copy is available at www.vcc.vic.gov.au
- *Landscape Setting Types for the Victorian Coast* (May 1998). A copy is also available at www.vcc.vic.gov.au

Figure 3.6: Approval process under the Coastal Management Act 1995



3.8.9 Registered heritage places

Although places registered in the Victorian Heritage Register are listed in the schedule to the Heritage Overlay, these places are subject to the requirements of the *Heritage Act 1995* not the planning scheme. In other words, if a permit for development has been granted under the *Heritage Act 1995* (or the development is exempt under section 66 of that Act), a planning permit is not required under the Heritage Overlay. However, other planning provisions may still apply to the use or development.

Planning Practice Note 1 – Applying the Heritage Overlay provides further advice on the use of this overlay.

3.8.10 Brothels

Part 4 of the *Sex Work Act 1994* includes planning controls on brothels that apply in addition to the provisions of the VPP. These controls place restrictions on who may apply for a permit for a brothel and where brothels may be located, and require certain matters to be considered by the responsible authority before deciding on a permit application for a brothel.

SWA s. 72 Only certain persons may make an application for a permit to use or develop land for the purposes of a brothel. These requirements are set out in section 72 of the *Sex Work Act 1994*.

SWA s. 73 Section 73 of the *Sex Work Act 1994* sets out a range of specific matters which the responsible authority must consider before deciding on a permit application to use or develop land for the purposes of a brothel. These apply in addition to the matters in section 60 of the *Planning and Environment Act 1987*, and they aim to minimise the impact of a brothel on the community and particularly children.

SWA s. 74 Strict controls apply to the location of brothels. Under section 74 of the *Sex Work Act 1994*, the responsible authority must refuse to grant a permit to use or develop land for the purposes of a brothel if land is within specified areas or located within certain distances of specified land uses.

3.8.11 Applications called in by the Minister

PEA Part 4 Div. 6 Part 4, Division 6 of the Act sets out the procedure to be followed if the Minister calls in a planning permit application that has not been decided by a responsible authority.

PEA s. 97B The Minister may call-in an application being considered by a responsible authority if it appears that:

- the application raises a major issue of policy and the determination of the application may have a substantial effect on the achievement or development of planning objectives
- the decision on the application has been unreasonably delayed to the disadvantage of the applicant; or
- the use or development to which the application relates is also required to be considered by the Minister under another Act or regulation, and that consideration would be facilitated by the referral of the application to the Minister.

VCATA Sch. 1 Cl. 58 The first of these criteria is the same as that for the Minister in calling in a review under the *Victorian Civil and Administrative Tribunal Act 1998*.

The responsible authority may request the Minister to call in an application. The above criteria do not necessarily apply if the responsible authority makes the request.

The circumstances in which a Minister may exercise this power are addressed in *Planning Practice Note 29 – Ministerial Powers of Intervention in Planning and Heritage Matters*.

In the first instance, the planning permit application is always made to the responsible authority, to whom the prescribed fee must be paid. There is no provision for an application to be made directly to the Minister (unless the Minister is the responsible authority under the planning scheme or the Act, in which case the application would not be called in).

If an application is called in by the Minister, the responsible authority must give the Minister any documents relating to the application. Any actions taken by the responsible authority (such as giving notice of the application) are taken to have been done by the Minister. All further steps until the decision is made are to be taken by the Minister. The responsible authority may make a formal submission about the application.

PEA ss 97E –
97G

The process for considering an application by the Minister includes referring submissions to a panel which advises the Minister about the application. Details are set out in sections 97E to 97G of the Act. The responsible authority is (subject to section 97H) responsible for the administration and enforcement of the Act in relation to any permit issued by the Minister, and for entering details of decisions in the Register.

3.8.12 Applications on land owned or controlled by a responsible authority

PEA s. 96

The Act provides that if the responsible authority, or some other person, proposes to use land that is managed, occupied or owned by the responsible authority and a permit is required, a permit must be obtained from the Minister, unless the planning scheme gives an exemption from this requirement.

PEA s. 6(2)(ka);
Planning scheme
Cl. 67

Clause 67 of planning schemes has the effect of exempting specified classes of use or development from this requirement. Effectively, all applications are exempt.

Notice of an application must be given to the owners and occupiers of adjoining land. The responsible authority does not have the option to avoid this notice on the basis that the grant of a permit would not cause material detriment to any person. Notice must also be given to the National Trust of Australia (Victoria) if the application relates to land on which there is a building classified by the Trust.

The notice requirements do not apply to an application:

- for a sign or advertisement; or
- to remove, destroy or lop native vegetation under Clause 52.17 of the planning scheme; or
- where a permit is only required under particular overlays listed in Clause 67.02.

An application to remove, destroy or lop native vegetation under Clause 52.17 of the scheme, does however require notice to be given under section 52(1) of the Act (refer also Clause 66.05 of the scheme) to the Secretary to the Department administering the *Flora and Fauna Guarantee Act 1988*.

In addition, Clause 62.02-1 exempts a council from any requirement in the planning scheme relating to buildings or works with an estimated cost of \$1,000,000 or less, carried out by or on behalf of the municipality.

3.8.13 Applications by a Minister or government department

Section 16 exemption

PEA s. 16A

A planning scheme is binding on all members of the public, on every Minister, government department, public authority and council.

PEA s. 16

Exemptions may be provided by a Governor in Council Order published in the Government Gazette.

Current exemptions under section 16 of the Act apply to the Minister administering the *Conservation, Forests and Lands Act 1987*, the Minister for Health and the Minister for Education. Exemptions have also been made for specific sites and projects.

However, even where they have been exempted from any legal need to comply with planning scheme requirements, the ministers concerned should, as a matter of practice, consult from an early stage with relevant planning authorities on proposed works. This consultation fosters cooperative involvement of local government in state planning and development matters. Consultation needs to be effective and therefore should be more than the mere circulation of proposals.

Orders under section 95

PEA s. 95

Section 95 of the Act provides for:

- the Governor in Council to publish an Order in the Government Gazette requiring that specified applications by Ministers or government departments must be referred to the Minister administering the Act; and
- the Minister to direct the responsible authority to refer an application to the Minister if conditions in the Act are met.

There is no review against a determination by the Governor in Council.

Unless either of these actions are taken, applications to which section 95 of the Act could apply are dealt with in the usual way by the responsible authority.

3.8.14 Permits issued under the *Town and Country Planning Act 1961*

PEA s. 208

Any permit issued under the *Town and Country Planning Act 1961* which was in force immediately before the Act came into effect, continues in force and is treated as though it were issued under that Act.

Note that section 208(2) of the Act provides for the expiry of such permits under certain circumstances. This means that some older permits that previously may have had an indefinite life will now have expired.

3.8.15 VicSmart permit process

PEA s. 6(2)(hb)

The Act enables planning schemes to set out different procedures for particular classes of applications for permits. The VicSmart permit process is a specific procedure for straightforward, low-impact applications.

Key features of the VicSmart permit process include:

- the responsible authority is expected to assess an application within 10 business days of receiving the application
- the classes of application to which the process applies are set out in the planning scheme
- applications are exempt from the notice requirements in section 52 of the Act
- applications are exempt from certain decision-making considerations in sections 60 and 84B of the Act
- the application is only assessed against specific decision guidelines set out in the planning scheme
- the Chief Executive Officer (CEO) of the council is the responsible authority for the application.

There are two types of VicSmart application: state VicSmart applications and local VicSmart applications.

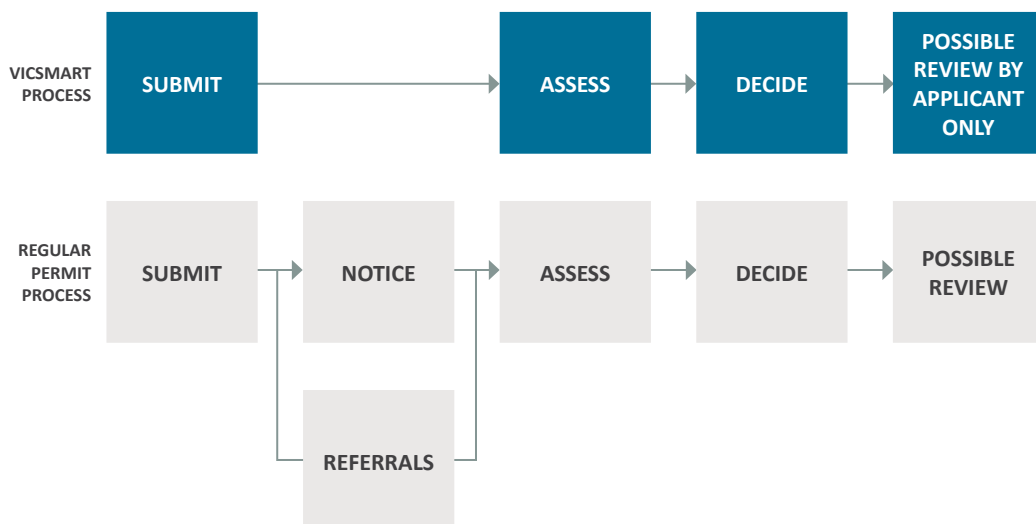
State VicSmart applications are established by the Minister and apply in all planning schemes. Local VicSmart applications are put in place by the council for its planning scheme and may be different in each scheme.

Differences between VicSmart and the regular permit process

The two processes differ in some important respects. The VicSmart process has fewer steps than the regular permit process; it involves a more tightly focused planning assessment; and different statutory times for requesting further information and deciding an application apply. Also, the council CEO is the responsible authority for VicSmart applications whereas the council is typically the responsible authority for regular applications.

The VicSmart and regular permit processes are illustrated in Figure 3.7.

Figure 3.7: The two permit processes



The VicSmart planning provisions

Specific provisions in Clauses 90-95 of the planning scheme apply to VicSmart applications. These provisions set out:

- the operational requirements for assessing VicSmart applications, including the criteria for when an application is a VicSmart application and exemptions from certain procedural requirements of the Act (cl 91)
- the classes of state VicSmart application (cl 92)
- information requirements and decision guidelines for each class of state VicSmart application (cl 93)
- the classes of local VicSmart application (schedule to cl 94)
- information requirements and decision guidelines for each class of local VicSmart application (schedule to cl 95).

More information about the VicSmart planning provisions can be found in the *VicSmart Planner and Practitioner Guide* on the department's website.

Responsible authority for VicSmart applications

Section 13 of the Act enables a planning scheme to specify a person other than the municipal council or the Minister as the responsible authority for a class or classes of applications.

The responsible authority for considering and deciding VicSmart applications is the CEO of the council. This is specified in Clause 61 of the planning scheme.

PEA s. 13;
Planning schemes
cl. 61

PEA s. 188

Under section 188 of the Act the CEO may delegate responsibility for administering and deciding VicSmart applications to other officers of the council.

PEA s. 61A; LGA
s. 80B

Section 80B of the *Local Government Act 1989* applies to the CEO and any other council officer that may exercise a power, duty or function as a responsible authority. Section 80B requires a council officer to refrain from exercising that power, duty or function if he or she has a conflict of interest. Under section 61A of the *Planning and Environment Act 1987*, the officer must delegate the power to another council officer.

Identifying a VicSmart application

An application is a VicSmart application if:

- the application is for a permit under a provision that is listed in Clause 92 or the schedule to Clause 94 of the scheme
- all the permit triggers for the application are listed in Clause 92 or the schedule to Clause 94 of the scheme
- nothing authorised by the grant of a permit would result in a breach of a registered restrictive covenant
- if the application requires referral to a referral authority, the application has been considered by the referral authority within the three months prior to the application being made, and the referral authority has stated in writing that it does not object to the proposal.

Planning scheme
cl. 91

If an application does not meet all of these requirements, it is not a VicSmart application and the regular permit process applies.

Preparing and submitting a VicSmart application

Before lodging an application, the applicant should discuss the proposal with the council to confirm that it is a VicSmart application, identify the applicable information requirements and decision guidelines, and obtain any checklists that will assist in preparing the application.

Checklists for each class of state VicSmart application are available on the department's website.

PEA s 47; PE
Regs r. 13, r. 14

A VicSmart application must be made in accordance with the Regulations and be accompanied by the information required by the Act and the planning scheme.

The information requirements for state VicSmart applications are set out in Clause 93 of the planning scheme while the information requirements for local VicSmart applications are listed in the schedule to Clause 95.

PE (Fees) Regs r.
7, r. 8

In most cases a fee must be paid when a VicSmart application is made. The Fees Regulations prescribe fees for different classes of application and are based on why a permit is needed. There is not a specific prescribed fee for VicSmart applications.

Amending a VicSmart application

PEA ss. 50, 50A,
57A

A VicSmart application may be amended in the same way that amendments to a regular application may be made. The requirements for amending an application are explained in Section 3.2.7 of this chapter.

The responsible authority should check any amendment carefully to determine whether the application may continue to be processed in the VicSmart permit process. For example, if an application is amended to seek permission under a planning scheme provision that is not listed in Clause 92 or the schedule to Clause 94, the application ceases to be a VicSmart application and the regular permit process applies.

Referral

PEA s. 55;
Planning schemes
cls. 66, 91

An application may require referral to a referral authority specified in Clause 66 of the planning scheme. The application may be dealt with under the VicSmart permit process if the applicant satisfies the responsible authority that:

- the referral authority has considered the proposal within the past three months of when the application was made to the responsible authority;
- the referral authority has stated in writing that it does not object to the granting of a permit; and
- the written statement and plans endorsed by the referral authority are submitted with the application.

Further information

PEA s. 54(1)

The responsible authority can require an applicant to provide further information about a VicSmart application. If the request for further information is made within the prescribed time of five business days of receiving the application, the request must also specify a date by which the information must be received. An application lapses if the requested information is not provided by the specified date. Refer to Section 3.3.2 of this chapter for more details about an application lapsing.

A request for further information within the prescribed time of five business days means that the 'clock' is stopped. (Note: the 'clock' counts the 10 business days until the applicant may apply for a review of the failure of the responsible authority to determine the application. The 'clock' starts again from zero when a satisfactory response to the responsible authority's request is received.)

Advertising

PEA s. 52;
Planning schemes
cl. 91

VicSmart applications are exempt from the notice requirements of section 52(1)(a), (b), (c) and (d) of the Act under Clause 91 of the planning scheme.

Making a decision on a VicSmart application

PEA ss. 60, 79

There is no time limit for a responsible authority to make a decision on a VicSmart application. However, if the responsible authority does not make a decision within the prescribed time, an applicant may apply to VCAT for review of a failure to grant the permit within the prescribed time.

PE Regs r. 32

The prescribed time is 10 business days. The time starts from the date on which the responsible authority receives the application unless:

- further information has been sought within the prescribed time of five business days under section 54 of the Act. The 10 business days starts from the day on which the information is given.
- the applicant has applied for a review of a requirement to give further information and VCAT confirmed or changed the requirement. The 10 business days starts from the day on which the information is given.

Refer to Section 3.4.4 of this chapter for more information about calculating the prescribed time.

PEA s. 60;
Planning schemes
cl. 91.

Before making a decision on an application, the responsible authority must consider particular matters specified in the Act and particular decision guidelines specified in the planning scheme.

In relation to the Act, the responsible authority must consider the planning scheme, any decision or comments received from a referral authority and any section 173 agreement affecting the land. However, the responsible authority is not required to consider the other matters specified in section 60 of the Act because VicSmart applications are exempted from those matters, as set out in Clause 91 of the planning scheme.

Planning schemes
Cl. 93, sch to
Cl. 95

The VicSmart planning provisions set out specific decision guidelines for each class of VicSmart application. In some cases, the decision guidelines enable the responsible authority to consider a relevant local planning policy in the planning scheme or the decision guidelines of a zone, overlay or particular provision. A responsible authority cannot consider the decision guidelines in Clause 65 of the scheme.

VCAT review of VicSmart applications

PEA ss.

Refer to Chapter 5, Section 5.3.10 for more information about the VCAT review procedure for VicSmart applications.

OTHER PROCEDURES

4

Contents

4.1	Certificates of compliance	3
4.1.1	What is a certificate of compliance?.....	3
4.1.2	How is a certificate of compliance obtained?.....	3
4.1.3	What must the responsible authority do?.....	3
4.1.4	What does it mean if a certificate is refused?	4
4.1.5	Reviews about certificates	4
4.2	Planning certificates	5
4.2.1	What is a planning certificate?	5
4.2.2	Obtaining a planning certificate.....	5
4.3	Building permit applications for demolition of buildings	6
4.3.1	When is a report and consent required for building demolition?	6
4.3.2	How long does a responsible authority have to provide a report and consent?	6
4.3.3	Failure of responsible authority to respond within 15 days	6
4.3.4	Request to Minister to introduce a planning scheme amendment	7
4.3.5	Approval of planning scheme amendment.....	7

OTHER PROCEDURES

4

4.1 Certificates of compliance

4.1.1 What is a certificate of compliance?

PEA s. 97N(1)

A certificate of compliance is a document issued by a responsible authority in accordance with Part 4A of the *Planning and Environment Act 1987* (the Act). A certificate of compliance verifies that:

- an existing use or development complies with the requirements of the planning scheme, or
- a proposed use or development would comply with the requirements of the planning scheme.

In either case, the certificate states the facts at the date the certificate was issued.

PEA s. 97N, PE
Regs r. 48, Forms
14, 15

The Act requires that a certificate be in the prescribed form and include prescribed information. Different forms are prescribed. The appropriate form depends on whether the certificate relates to an established use (section 97N(1)(a), Form 14) or a proposed use or development (section 97N(1)(b), Form 15).

A certificate is not a form of development approval. If a use or development complies with the planning scheme, there is no need to apply for a certificate before proceeding. However, a certificate gives some certainty in interpreting a scheme, or in establishing the extent of existing use rights that predate the scheme. It may also be useful to a person other than the developer who needs to rely on it, for example a financial institution lending on the security of the land.

A certificate of compliance issued under Part 4A is not to be confused with either a planning certificate issued under section 199 (which states the provisions of a planning scheme applying to a particular parcel of land) or certification of a plan under Part 2 of the *Subdivision Act 1988*.

4.1.2 How is a certificate of compliance obtained?

An application for a certificate of compliance is made to the responsible authority administering the relevant planning scheme. The Act provides for an application to be accompanied by a prescribed fee.

4.1.3 What must the responsible authority do?

PEA s. 97O

On receiving an application for a certificate, the responsible authority must either issue or refuse to issue the certificate, in accordance with the Act. In the case of a certificate relating to a proposed use or development, the certificate may specify any part of the proposal which would require a permit, or is prohibited.

The responsible authority does not have discretion whether or not to issue a certificate based on whether it supports the proposed use or development, or whether the proposal would have a material effect on the locality. Nor is there any requirement or power to give notice about the application. The certificate must be issued or refused on the basis of the provisions of the planning scheme.

The certificate must be refused if:

PEA s. 97O(4)

- **existing use or development:** any part of the use or development would require a permit or is prohibited. It is helpful to ask the question *'Could what is on the land be established without the need for a permit today if the land was currently vacant and had no existing use rights?'* If the answer is yes, a certificate should be issued.

PEA s. 97O(5)

- **proposed use or development:** the whole of the use or development would require a permit or is prohibited.

If some aspects of a proposal are allowed by the scheme 'as-of-right', while others require a permit or are prohibited, the certificate may specify those parts that are not 'as-of-right'.

A certificate cannot be issued subject to conditions. However, it may need to state the conditions which a proposed use or development would need to conform to in order to comply with the scheme.

4.1.4 What does it mean if a certificate is refused?

If a person's application for a certificate for an existing use or development is refused, they must understand that this does not mean there is anything unlawful about the use of the land. It simply means that if the person wanted to establish that use and development now, a permit would be needed for some aspect of the project or that some aspect of it could not be permitted.

Similarly, if a person's application for a certificate about a proposed use or development is refused, they should not automatically infer that the responsible authority is opposed to the proposal. The responsible authority may be prepared to grant a permit if an application was made.

A certificate indicating parts of the proposal which require a permit will assist a person to make an appropriately targeted application.

4.1.5 Reviews about certificates

A review about a certificate is not about the merits of a proposal. It is essentially to settle the appropriate interpretation of the planning scheme in relation to the existing or proposed use.

PEA s. 97P, PE
Regs r. 49

The applicant for a certificate can ask the Victorian Civil and Administrative Tribunal (VCAT) to review a decision by the responsible authority to refuse a certificate, or its failure to issue a certificate within the prescribed time of 30 days.

VCAT may direct that a certificate must not be issued, or may direct the responsible authority to issue the certificate.

PEA s. 97Q

Any person may request VCAT to cancel or amend a certificate if they believe they have been adversely affected by either a material misstatement or concealment of fact in the application for the certificate, or a material mistake in relation to the issue of the certificate.

After hearing from the person who made the request for cancellation or amendment, as well as the responsible authority, the Minister and the owner and occupier of the land concerned, VCAT can direct the responsible authority to cancel or amend the certificate if it is satisfied that:

- there was a material misstatement or mistake
- the person who made the request was substantially disadvantaged by this
- it would be just and fair to do so.

4.2 Planning certificates

4.2.1 What is a planning certificate?

PEA s. 199

A planning certificate is an official statement of the planning controls that apply to a property. It will set out the zoning details of the land and any relevant overlay controls and exhibited amendments to the planning scheme that affect the land.

PEA ss. 199(2),
200

A planning certificate must contain the prescribed information about the effect of the relevant planning scheme on the land at the date of the certificate in accordance with the Act. A planning certificate will not provide the details of all planning scheme provisions that might apply to the land.

PEA s. 200

A certificate is conclusive proof of the facts set out. Any person acting on the basis of a certificate who suffers financial loss because of an error in the certificate may recover damages.

4.2.2 Obtaining a planning certificate

Any person can apply for a certificate. The application must be made to the responsible authority for issuing certificates.

The planning scheme states at Clause 61.01 who is responsible for issuing a planning certificate.

PE (Fees) Regs
r. 11

Where the Minister for Planning is responsible for issuing a planning certificate an application for a certificate can be made online via www.landata.vic.gov.au and following the Titles, and Property Certificates links. You will need to supply:

- either your contact details, or your login identification (if you are a registered user)
- information about the property or properties in question
- your credit card details for the purchase of the certificate or certificates.

4.3 Building permit applications for demolition of buildings

Sections 29A and 29B of the *Building Act 1993* (and related provisions of Schedule 2 of that Act):

- require a report and consent of the relevant responsible authority in relation to certain applications for a building permit for demolition, and
- enable the suspension of certain applications for a building permit for demolition, pending amendment of planning schemes.

A 'report and consent' is the process under the *Building Act 1993* for consulting with and obtaining the approval of a specified authority for certain building works. It is required for a range of building related matters including for proposals to build over an easement, build in a flood-prone area and for certain demolitions.

4.3.1 When is a report and consent required for building demolition?

In relation to the planning system, demolition (amongst other matters) requires report and consent under the building system.

BA s. 29A

The report and consent of the relevant responsible authority (usually the relevant council) will be required for an application for a building permit for demolition, if:

- the proposed demolition, together with any other demolition completed or permitted within three years immediately preceding the date of the application, amounts to the demolition of more than half the volume of the building as it existed at the date the first building permit was issued within the demolition period for any part of the building; or
- the demolition is of any part of a building's facade facing the street.

Parts of a building that are covered by a roof should be included in calculating the volume, and unroofed areas should not be included. Internal demolition not reducing the volume of a building should not be included in calculating the volume.

The Victorian Building Authority's practice note *PN-57-2014 – Report and Consent* provides more detailed information about the report and consent process.

4.3.2 How long does a responsible authority have to provide a report and consent?

A responsible authority is required under Building Regulation 307 to provide the report and consent within 15 business days. The 15 days start when the responsible authority receives a copy of the application from either the relevant building surveyor or the applicant. The day the request is lodged is not included in the 15 business days.

4.3.3 Failure of responsible authority to respond within 15 days

In accordance with Clause 6A of Schedule 2 to the *Building Act 1993*, the building surveyor may proceed to decide an application without a report from the responsible authority if one is not supplied within the prescribed time of 15 business days.

After this time, a reporting authority is deemed to have consented to the application, except in the circumstances of section 29A(2) of the *Building Act 1993*, where a planning permit is required for the demolition but has not been obtained. In that case, the reporting authority is deemed to have refused its consent.

It is essential for a building surveyor to establish whether a planning permit is required for the demolition and, if so, whether it has been issued. In the case of a responsible authority not responding within the prescribed time, the application can be determined using the decision on the planning application as the deemed response.

4.3.4 Request to Minister to introduce a planning scheme amendment

BA s. 29B

If during the prescribed time for report and consent:

- the relevant planning authority applies to the Minister for Planning for an exemption from the requirement to give notice (section 20(1) of the Act) about an amendment to the planning scheme (this amendment would be to the effect that the relevant building may not be demolished or externally altered, except in accordance with a permit under the planning scheme), or
- the Minister for Planning is asked to make an amendment to the effect that the relevant building may not be demolished or externally altered, except in accordance with a permit under the planning scheme

the responsible authority must notify the relevant building surveyor accordingly within the 15 business day period.

The building surveyor must then suspend the application for a demolition permit, effectively freezing the time in which the application must be decided until after the planning scheme amendment is resolved.

4.3.5 Approval of planning scheme amendment

If the Minister:

- agrees to exempt a planning authority from the notice requirements of the Act in accordance with these provisions, or
- agrees to amend the planning scheme as requested

the Minister will advise the relevant planning authority or responsible authority of this decision.

BA s.29B

The relevant building surveyor will also be advised that the Minister has agreed to the proposed planning scheme amendment and the suspension of the application for a building permit for demolition will continue until the planning scheme is amended.

The application for a building permit for demolition cannot be approved unless a planning permit is granted.

The responsible authority must advise the relevant building surveyor if any of the following occur:

- withdrawal of the request by the planning authority for exemption from notice, or the application by the responsible authority to the Minister for an amendment
- refusal by the Minister of the request by the planning authority for exemption or the Minister's refusal of an application for an amendment to the planning scheme

- an amendment to the planning scheme coming into operation and having the effect of requiring that a permit be obtained to demolish or alter the building
- lapsing of an application for an amendment to the planning scheme.

BA s. 29A(2)

If the planning scheme is amended that gives the effect of requiring a planning permit for demolition of a building, the responsible authority must refuse consent to any application under section 29A of the *Building Act 1993* until a planning permit is obtained.

REVIEWS

5

Contents

5.1	Opportunities for review of planning decisions	3
5.1.1	Introduction.....	3
5.1.2	Summary of the review process	3
5.1.3	Legislative provisions	4
5.1.4	Establishing the scope of an application for review	10
5.1.5	Exemption from objectors' review rights for specified types of permit applications.....	10
5.2	Making an application for review	11
5.2.1	What must the person making the application for review do?	11
5.2.2	Who are the parties to an application for review?	13
5.2.3	Arrangements for the hearing	13
5.2.4	Can an application for review be withdrawn?	14
5.3	What happens at the hearing?.....	17
5.3.1	Who hears an application for review?.....	17
5.3.2	Attendance by the parties	17
5.3.3	Procedure at hearings.....	18
5.3.4	Submissions	19
5.3.5	Expert evidence	20
5.3.6	Questioning an expert witness	20
5.3.7	What factors must be taken into account in deciding an application for review?.	20
5.3.8	The decision.....	21
5.3.9	Costs	22
5.3.10	Reviews relating to VicSmart permit applications	22
5.3.11	Major Cases List.....	23
5.4	Other types of applications for review	24
5.4.1	Introduction.....	24
5.4.2	Procedural defects in the planning scheme amendment process.....	24
5.4.3	Application to review notice and more information requests by a responsible authority.....	24
5.4.4	Failure to grant a permit within the prescribed time	25
5.4.5	Applications relating to extensions of time	27
5.4.6	Affected persons may seek leave to apply for a review of a decision to grant a permit	27
5.4.7	Cancellation and amendment of planning permits	28
5.4.8	Enforcement orders and interim enforcement orders.....	29
5.4.9	Applications under sections 149, 149A and 149B of the <i>Planning and Environment Act 1987</i>	29
5.4.10	Amendments to agreements.....	30

5.5	Procedures	30
5.5.1	Directions hearing.....	30
5.5.2	Urgent hearing.....	31
5.5.3	Practice days	31
5.5.4	Compulsory conference.....	31
5.5.5	Mediation	32
5.5.6	A question of law	32
5.5.7	Intervention by a Minister	33
5.6	Further information about reviews	34
5.6.1	VCAT Practice Notes.....	34
5.6.2	VCAT Forms.....	34
5.6.3	VCAT Decisions.....	34
5.6.4	Guideline decisions.....	35
5.6.5	General Information	35

5.1 Opportunities for review of planning decisions

5.1.1 Introduction

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

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

PEA s. 4(2)(j)

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

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

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

5.1.2 Summary of the review process

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

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

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

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

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

VCATA ss. 116,
117

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

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

VCATA s. 109

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

5.1.3 Legislative provisions

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

- *Planning and Environment Act 1987* (the Act)
- *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act)

The accompanying rules and regulations are set out in the:

- *Planning and Environment Regulations 2015* (the Regulations)
- *Victorian Civil and Administrative Tribunal Rules 1998*.

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

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

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

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
s. 39	Failure by the Minister, a planning authority or a panel to comply with procedures relating to a planning scheme amendment which has not been approved (Divisions 1, 2 or 3 of Part 3; or Part 8 of the Act)	A person who is substantially or materially affected by the failure	Not later than one month of becoming aware of the failure	PEA s. 39(1)
s. 77	Refusal to grant a permit	Applicant for permit	Within 60 days after the responsible authority gave notice of refusal to grant a permit under section 65	PER r. 29
s. 78(a)	Requirement to give notice of an application under ss. 52(1)(d) or 57B of the Act	Applicant for permit	s. 52(1)(d) – Within 30 days of requirement to give notice s. 57B – No time prescribed	PER r. 30(1) N/A
s. 78(b)	Requirement for more information about a permit application under s. 54(1) of the Act	Applicant for permit	Within 60 days after the responsible authority requested the information	PER r. 30(2)
s. 79	Failure to grant a permit within the prescribed time: <ul style="list-style-type: none"> • for a VicSmart permit application 	Applicant for permit	After 10 business days from: <ul style="list-style-type: none"> • the day the responsible authority received the application; or • if more information was required, from when the information was provided taking account of the periods that the time does not run	PER r. 31

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
	<ul style="list-style-type: none"> for any other permit application 		After 60 days from: <ul style="list-style-type: none"> the day the responsible authority received the application; or if more information was required, from when the information was provided taking account of the periods that the time does not run	
s. 80	Condition(s) in a permit	Applicant for permit	Within 60 days after the responsible authority gave notice of decision to grant a permit under s. 64 of the Act, or, if no notice was given, within 60 days after the date the permit issued	PER r. 32
s. 81(a)	Refusal to extend time to commence development or use or to complete development An application for review cannot be made under s 81(a) if the request for the extension to the responsible authority was not made within the time specified in s 69(1)	An affected person	Within 60 days of the decision	PER r. 33(1) (a)
s. 81(aa)	Refusal to extend time for a subdivision plan to be certified in circumstances mentioned in s. 6A(2) of the Act An application for review cannot be made under s 81(aa) if the request for the extension to the responsible authority was not made within the time specified in s 69(1)	An affected person	Within 60 days of the decision	PER r. 33(1) (a)
s. 81(b)	Failure to extend time within one month of request to extend time	An affected person	After one month from making the request, and within 60 days from that time	PER r. 33(1) (b)
s. 81(2)	Refusal to extend time within which information must be given by the applicant	Applicant for permit	Before the final lapse date for the permit application	PER r. 33(2)

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
s. 82	Decision to grant a permit	An objector who lodged an objection in writing to the grant of a permit, unless the application is exempt from the right to review under s. 82(1) of the Act	Within 21 days of the notice of decision to grant a permit	PER r. 34
s. 82AAA(a)	Decision to grant a permit	A recommending referral authority who objected to the grant of a permit	Within 21 days of the notice of decision to grant a permit	PER r. 34A
s. 82AAA(b)	Decision not to include a condition on a permit	A recommending referral authority who recommended that the condition be included on a permit	Within 21 days of the notice of decision to grant a permit	PER r. 34A
s. 82B	Request to VCAT for leave to make an application for review of a decision to grant a permit for an application in which a written objection was received	A person affected by the decision but who did not object to the grant of a permit, unless the application is exempt from the right to review under s. 82(1) of the Act	Does not apply if a permit has been issued	PEA s. 82B(6)
ss. 87(3), 88, 89(1)	Application to VCAT to cancel or amend a permit	The responsible authority; a referral authority; the owner or occupier of the land; any person who is entitled to use or develop the land concerned; or any person under s. 89 of the Act (persons who objected or would have been entitled to object if they should have been given notice of the application, or they have been adversely affected by a material misstatement or concealment of fact in relation to the application, or a substantial failure to comply with the conditions of the permit or any material mistake in relation to the grant of a permit)	No prescribed time, but VCAT must be satisfied that the request was made as soon as practicable and that the limits on the power to cancel or amend a permit in s. 88 of the Act are satisfied	N/A
s. 97P(1)(a)	Refusal to issue a certificate of compliance	The applicant for a certificate of compliance	Within 60 days of the decision	PER r. 46
s. 97P(1)(b)	Failure to issue a certificate of compliance within the prescribed time	The applicant for a certificate of compliance	After 30 days from the date of the application for a certificate	PER r. 47
s. 97Q	Request to VCAT to cancel or amend a certificate of compliance	A person who believes they have been adversely affected by a material misstatement or concealment of fact or a material mistake	No time prescribed	N/A
s. 114	Application to VCAT to make an enforcement order	The responsible authority or any person	No time prescribed	N/A
s. 120	Application to VCAT to make an interim enforcement order	The responsible authority or any person who has applied for an enforcement order under s. 114 of the Act	No time prescribed	N/A

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
ss. 149(1)(a), 149(1)(b), 149(1)(c)	<p>Review of a decision in relation to a matter if:</p> <ul style="list-style-type: none"> • (1)(a) a planning scheme; • (1)(a) a permit condition; • (1)(b) an agreement under s.173; or • (1)(c) an enforcement order; <p>requires that the matter:</p> <ul style="list-style-type: none"> • must be done to the satisfaction of the specified body / person [(a),(b),(c)]; • must not be done without the consent or approval of the specified body [(a) and (b)]; or • makes no provision for settling disputes in relation to the matter (b) 	A specified person (as prescribed under s. 148 of the Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	Within 30 days of the decision	PER r. 53
s. 149(1)(d)	Review of a decision if the specified body fails to make the decision in relation to 149(1) (a), (b) or (c), within a reasonable time (if there is no prescribed time for the decision)	A specified person (as prescribed under s. 148 of the Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	No time prescribed	N/A
s. 149A	<p>Application for a determination / declaration if a matter relates to:</p> <ul style="list-style-type: none"> • the interpretation of the planning scheme or a permit in relation to land or a particular use or development of land • whether or not s. 6(3) of the Act applies to a particular use or development • the continuation of a lawful use, or permitting the use of buildings or works for a lawful purpose before the coming into operation of the planning scheme or amendment 	A specified person (as prescribed under s. 148 of the Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	No time prescribed	N/A
s. 149B	Application for a declaration concerning any matter which may be the subject of an application to VCAT under the Act; or anything done by a responsible authority under the Act	Any person	No time prescribed	N/A

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
s. 184(1)	Application for an amendment to a proposed agreement under s. 173 of the Act if the use or development of the land is conditional upon the agreement being entered into and the owner objects to any provision of the agreement	The owner of the land	Within 60 days of being given a copy of the proposed agreement	PER r. 56(1)
s. 184A(1)(a) and (b)	Review of a decision to: <ul style="list-style-type: none"> • amend the agreement in a different manner to the proposal • end the agreement in a different manner to the proposal 	The person who applied to amend or end the agreement	Within 21 days after the responsible authority gave notice of its decision	PER r. 56A(1)
s. 184B	Review of a decision to amend or end an agreement	A party to the agreement (other than the person who applied to amend or end the agreement)	<ul style="list-style-type: none"> • If the party must be given notice of the responsible authority's decision to amend or end the agreement under s 178E(30) (a) or (b), within 21 days after the responsible authority gave notice • If no notice must be given, no prescribed time 	PER r. 56B
s. 184C	Review of a decision to amend or end an agreement	An objector	Within 21 days after the responsible authority gave notice of its decision	PER r. 56C
s. 184D	Review of a decision to amend or end an agreement	Any person entitled to object to a proposal but did not object because the person was not given notice of the proposal under s 178C	No prescribed time	N/A

- PEA – *Planning and Environment Act 1987*
- PER – *Planning and Environment Regulations 2015*

5.1.4 Establishing the scope of an application for review

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

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

VCAT has established a specific procedure for applications for review that relate to VicSmart permit applications. More information about this procedure is provided in Section 5.3.10 of this chapter.

5.1.5 Exemption from objectors' review rights for specified types of permit applications

PEA s. 82

Some provisions in the planning scheme exempt particular types of permit applications from review by objectors under section 82(1) of the Act. This section enables an objector to apply to VCAT for the review of a decision by the responsible authority to grant a permit. If an application is exempt from section 82, an objector does not have a right of review of the decision made by the responsible authority.

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

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

PEA ss.83A, 83(2)

In some instances councils give notice of an application that is not required by the Act, resulting in an objection being lodged. Such objections may not lead to rights to seek a review of a decision.

While planning schemes only expressly specify the review rights of section 82(1) when exempting a class of application from notice and review, objectors who received such a notice are also excluded from participation in other review types. These other review types include appeals against refusal, failure and conditions. The reasons for this are set out by the Tribunal in *West Valentine Pty Ltd v Stonnington City Council* [2005] VCAT 224 (9 February 2005).

5.2 Making an application for review

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

Lodge the application for review within the prescribed time

An application for review must be made to VCAT within the prescribed time. The prescribed time varies for different types of applications for review. Table 5.1 provides information about the prescribed time for making applications for review. The time limits for making an application for review are prescribed by the Act and the Regulations.

An application for review by an objector to the grant of a permit must be made no later than 21 days after the responsible authority gave notice to the objector of its decision to grant a permit. The time runs from when notice was given, not from when it was received.

Where the permit has been refused or the applicant wishes to have the conditions reviewed, an application for review must be made no later than 60 days after the responsible authority gave notice of its decision.

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

Requirements for an application for review

Specific application for review forms are available from VCAT and must be completed by the applicant for review. The relevant form for the type of review being applied for must be used.

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

A fee must be paid when the application is lodged. Information about fees and the waiving of fees can be found on the relevant application for review form. The forms can be obtained on VCAT's website www.vcat.vic.gov.au

In summary, an application for review must:

- be made in accordance with the prescribed form
- identify the nature of the application for review and the applicable section of the Act
- provide details of the land and the permit application or permit
- state the grounds upon which the review is based
- be accompanied by the prescribed fee
- be lodged within the prescribed time.

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

VCATA s. 68

VCATA Sch. 1
Cl. 56

Notice to other parties by the applicant for review

After an application for review is made, VCAT instructs the applicant for review to serve a copy of the application on all other parties. These instructions must be complied with or the application may be struck out.

Statement of grounds by other parties

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

If a person fails to provide a statement of grounds within 14 days, the Tribunal cannot allow them to be heard as a party to the review unless it has considered the views of the applicant for review and the responsible authority. Requests to be heard in these circumstances are usually made and decided on at the commencement of the hearing or at an earlier directions hearing. (Refer to chapter 5.5.1 for more information about directions hearings.)

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

VCATA s. 84A

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

Administrative arrangements

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

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

VCATA s. 82

VCAT may direct the consolidation of applications for review into one proceeding (in the case of multiple applications for review by objectors) or a combined hearing. It is common practice for applications for review relating to the same land to be heard together. For example, a review of the conditions in a permit and a review of the decision to grant a permit concerning the same permit application will usually be combined and heard together.

The Registrar of VCAT keeps a register of all applications for review. These can be inspected during office hours.

5.2.2 Who are the parties to an application for review?

Applicant for review

VCATA s. 59(1)
(b)(i)

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

Objector

PEA s. 83(2)

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

Responsible authority

VCATA s. 59(1)
(b)(ii)

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

Referral authority

PEA s. 83(1)

A determining referral authority is a party to a proceeding for refusal to grant a permit if it had objected to the grant of a permit or the permit application was refused because a condition required by the referral authority conflicted with a condition required by another referral authority. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

PEA s. 83(3)

A recommending referral authority is a party to a proceeding for review if the authority is given notice of the application for review. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

Affected persons

VCATA ss. 59, 60

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

VCATA s. 61

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

5.2.3 Arrangements for the hearing

Responsible authority to supply information

VCAT Practice Note – PNPE2 Information from Decision Makers sets out the information to be provided by a responsible authority or other decision making body on receiving notice that an application for review has been made.

The responsible authority must provide VCAT's Registrar with the documents and information in writing set out in Practice Note – PNPE2 within 10 business days of receiving notice of an application for review. The required information depends on the type of application for review. The information required may include:

- a full copy of the application for permit, including plans and accompanying documents
- a copy of the responsible authority's decision

- the name of the planning scheme, zone, and any overlay or other control applying to the subject land
- the planning scheme provision under which a permit was required
- details of public notice required to be given
- the officer's report on the application for permit
- names and addresses of all objectors and other parties to the application for permit.

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

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

Setting the hearing date

The Registrar sets the date of the hearing. Any request to change the date of a hearing must be made following the procedures in *VCAT Practice Note PNVCAT1 – Common Procedures*.

VCATA s. 99

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

Most hearings are held at VCAT, 55 King Street, Melbourne. Hearings may be held in regional centres which must be specifically arranged and depend on a suitable venue being available.

Giving notice of an application for review

PEA s. 52

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

PEA s. 83B

If notice of an application for permit was not given, or the notice was not adequate, the President of VCAT can direct notice of the application for review is given. If the applicant for review fails to comply with the direction for notice, the application for review lapses.

PEA s. 83(2)

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

5.2.4 Can an application for review be withdrawn?

VCATA s. 74

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

Where leave is granted by the Tribunal for the withdrawal of an application, the usual course is for the Tribunal to also make the following orders for the different review types:

- Section 77 – Refusal to grant a permit: that no permit be issued, if parties have agreed that no permit is to issue.
- Section 79 – Failure to grant a permit: that no permit be issued, if the applicant has agreed not to pursue the permit application.
- Section 80 – Conditions on a permit: that the contested conditions remain unchanged from the condition included on a permit or notice of decision, if parties have reached agreement on that basis.
- Section 82 – Objector review: that a permit be issued in accordance with the notice of decision issued by the council, if all parties have agreed that a permit is to issue based on the same plans and with the same conditions specified in the notice of decision.

If agreement has been reached with the council and other parties to vary the plans or conditions, then a consent order should be sought from the Tribunal.

Procedures for withdrawing an application or seeking a consent order are set out in *VCAT Practice Note PNVCAT1 – Common Procedures*.

Can the hearing date be adjourned?

If a party wishes to seek an adjournment, a written request for an adjournment must be made to the Registrar giving detailed reasons for the request. *VCAT Practice Note PNVCAT1 – Common Procedures* sets out the procedure for any party to apply for an adjournment. In the Planning and Environment List, the consent of other parties will usually be required for an adjournment. The Tribunal may refuse an adjournment, even if all parties consent, and the parties must work on the basis that the hearing is proceeding unless or until they are notified that the Tribunal has granted the adjournment.

Any request for an adjournment should be made well before the hearing date to avoid successful claims for costs.

Can amended plans be considered at the hearing?

The Tribunal can make any amendment to the application for permit. The permit applicant may request VCAT to agree to amend the permit application.

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

As a guiding principle, amendments should not be used to materially increase the scale or intensity of a proposal or to introduce significant new aspects that have not been considered by the responsible authority or primary decision maker based on the original application.

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

VCAT Practice Note – PNPE9 Amendment of Plans and Applications sets out the steps that must be followed if a permit applicant seeks to amend plans in a permit application or an application to amend a permit. At least 30 business days before the hearing date, a permit applicant must file with the Tribunal and give all parties to the proceeding, the following documents:

- a completed *PNPE9 Form A: Notice of Amendment of an Application*
- a written statement describing the changes from the previous plans or other changes made to the application and:
 - setting out why the changes are applied for
 - demonstrating how the changes will improve the proposal or respond to issues that have been raised in the course of the decision-making process
- a clearly readable, scaled copy (with dimensions) of the amended plans, highlighting where changes have been made
- details of any other amendment to the application and supporting material.

The permit applicant must also give any objector to or person notified of the permit application who is not a party to the hearing copies of the following documents:

- a completed *PNPE9 Form A: Notice of Amendment of an Application*
- a written statement describing the changes from the previous plans or other changes made to the application and:
 - setting out why the changes are applied for
 - demonstrating how the changes will improve the proposal or respond to issues that have been raised in the course of the decision-making process
- a *PNPE9 Form B: Statement of Grounds*.

The completed Notice of Amendment of an Application must include a date by which a statement of grounds must be lodged with VCAT. That date must be at least 17 business days from the day the notice is posted.

The permit applicant must also give notice to persons of how to access copies of amended plans. Documents can either be inspected at the main office of the responsible authority or a request can be made to the permit applicant for copies.

A person that receives notice of an amended application may:

- if already a party to the hearing, amend their Statement of Grounds at any time before the hearing; or
- if not a party to the hearing, lodge with VCAT:
 - a written application to be joined as a party to the hearing
 - complete a *PNPE9 Form B: Statement of Grounds*
 - a written objection setting out the reasons for the objection; or
- lodge a written request for an adjournment of the hearing in order to have sufficient time to consider the changes to the plans; or
- lodge a written application for directions in relation to the amendment application including directions that further notice of the permit application be given.

A copy of these documents must be delivered or posted to the permit applicant and the responsible authority.

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

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

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

5.3 What happens at the hearing?

5.3.1 Who hears an application for review?

VCATA s. 64, sch.
1 pt 16 cl.52

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

5.3.2 Attendance by the parties

VCATA s. 62;
PNVCAT1,
PNPE1

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

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

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

VCATA ss. 51(5),
99(2)

If the applicant for review fails to attend a hearing (personally or by representative) VCAT must confirm the decision of the responsible authority. Costs may be awarded against the applicant.

If another party fails to attend the hearing and VCAT is satisfied that adequate notice of the hearing was given, the matter can still be heard and determined in the absence of the party.

VCATA s. 120

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

5.3.3 Procedure at hearings

VCATA ss. 97, 98

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

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

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

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

VCAT Practice Note PNPE1 – General Procedures sets out the usual order of presentation of submissions to VCAT. The usual procedure is for the parties or their representatives to speak in the following order:

- the responsible authority
- the council if it is not the responsible authority
- the referral authority or relevant statutory authorities
- the objector(s)
- any other person or body who is not a party
- the permit applicant
- a right of reply to parties other than the permit applicant.

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

VCATA s. 102

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

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

Each party may have a reasonable opportunity to respond to the case put by the other parties by way of right of reply. A right of reply is not to be used as an opportunity to simply repeat submissions which a party has already made; rather it should be confined to matters arising from the submissions of the other party(s), which have not already been addressed by the replying party.

VCATA s. 129

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

5.3.4 Submissions

VCATA s. 102

The VCAT website contains information and guidelines to help parties make an effective submission to the Tribunal. The guidelines contain advice about the structure and content of submissions, as well as the general procedures followed at a hearing.

VCAT will only consider issues relevant to the decision being reviewed. Therefore, a submission should directly address the decision or planning matter that is the subject of the review. For example, building height is not relevant if the application for review concerns the decision to grant a permit to reduce a car parking requirement.

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

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

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

Submissions may be presented orally or in writing, or both. Most parties prepare a written submission in advance of the hearing. Written submissions are not compulsory, but they are the most common and the preferred form of presentation to the Tribunal.

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

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

Projection facilities are available in some hearing rooms. If a party wishes to use these facilities, a request should be made to the Tribunal registry ahead of the scheduled hearing.

5.3.5 Expert evidence

VCATA ss. 97, 98

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

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

VCAT Practice Note PNVCAT2 – Expert Evidence sets out the obligations of an expert witness and requirements for presenting expert evidence to the Tribunal. The practice note clearly states that an expert witness's duty is to assist the Tribunal on relevant matters. An expert witness is not an advocate for the party retaining the expert. The guidelines contain requirements for the content and form of the expert's report. Circulation of the expert's written report to all parties and the Tribunal is required at least 10 working days before the hearing.

5.3.6 Questioning an expert witness

VCATA s. 102

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

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

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

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

PEA s. 60(1)

Before deciding on an application the responsible authority must consider a range of matters, as specified in section 60(1) of the Act. Section 60(1A) of the Act also lists matters that the responsible authority may consider, if the circumstances appear to so require.

PEA s. 84B

In addition to setting out the matters that the responsible authority must consider in assessing an application, the Act includes a complete list of the matters that VCAT must take into account in determining an application for review.

The Tribunal must firstly take into account of and have regard to the matters that the original decision-maker:

- took into account and had regard to; or
- was required to take into account and have regard to.

Not all the matters listed in section 84B of the Act will be relevant in all cases; but where they are relevant, they must be considered. The matters likely to be relevant in most cases include:

- the planning scheme
- the objectives of planning in Victoria
- any relevant state environment protection policy
- the extent of participation of persons residing or owning land in the vicinity of the subject land in application procedures required to be followed before the responsible authority could make a decision
- any amendment to a planning scheme which has been adopted by the planning authority, but not, as of the date on which the application for review is determined, approved by the Minister or planning authority
- any agreement made pursuant to section 173 of the Act affecting the subject land.

Planning schemes cl 91

VicSmart permit applications are exempt from some decision-making considerations in sections 60 and 84B(2) of the Act. The responsible authority and Tribunal must not have regard to these 'exempted' considerations.

PEA s. 84AB

The Tribunal may confine a review to particular matters in dispute if all the parties agree. If a review is so confined, the matters that must be considered under section 84B are also confined to the particular issues in dispute.

5.3.8 The decision

The form the decision takes

VCATA s. 116;
PEA s. 85

VCAT's decision or 'order' must be in writing and will contain the reasons for the decision or record that oral reasons were given. All parties involved in the application for review receive a copy of VCAT's decision.

A decision is not final until it is issued in writing and authenticated by being stamped with the Tribunal's seal.

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

VCATA s. 117

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

Acting on a decision of the Tribunal

PEA s. 86

If VCAT directs the responsible authority to issue a permit, the permit must be issued within three business days after:

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

PEA s. 52(1), (4)

No further action is required by the responsible authority when a notice of decision to grant a permit has been issued and VCAT directs that the application for review be allowed in favour of the objector(s), (that is, a refusal notice is not required to be issued).

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

5.3.9 Costs

VCATA ss. 109,
111 PEA s. 150(4);
VCATA sch. 1 pt
16 cl. 63

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

However, VCAT has the power to make an order for costs if it is fair to do so in circumstances where a party has acted unreasonably to the disadvantage of other parties.

In determining whether or not to make an order for costs, the Tribunal may also consider whether the proceeding was brought primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceeding.

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

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

5.3.10 Reviews relating to VicSmart permit applications

Applications for review relating to VicSmart permit applications are heard and determined in the VCAT Short Cases List (see Chapter 3.8.16 for more information about VicSmart applications).

The Short Cases List is a sub-list of the Planning and Environment List and handles short and less complex disputes that allow parties to have their matter heard and determined within a short timeframe. Tribunal members hearing cases in this list are encouraged to provide oral decisions at the conclusion of the hearing. Site inspections are unlikely to be taken.

The applicant for review of a VicSmart matter must complete VCAT's VicSmart application form and submit the following information with the application:

- a copy of the responsible authority's decision (unless the review relates to a failure of the responsible authority to make a decision within the prescribed time)
- all application documents and plans
- if the land is affected by a registered restrictive covenant, a copy of the covenant
- where the application required referral under clause 66 of the planning scheme, a copy of any written response from the referral authority
- a copy of the council officer's report (if available)
- where the review relates to a failure of the responsible authority to decide within the prescribed time, a calculation of elapsed days from when the permit application was received by the responsible authority.

The application form can be obtained from VCAT's website www.vcat.vic.gov.au.

For more information about the VCAT review process for VicSmart, its operation, and preparing submissions, refer to the information sheet *VCAT Review Process for VicSmart (June 2014)* on the department's website.

5.3.11 Major Cases List

The VCAT Major Cases List is a sub-list of the Planning and Environment List and handles certain applications for review involving larger developments.

A permit applicant or permit holder may elect to have an application for review dealt with in the Major Cases List if the following criteria are met:

1. The application is one of the following types:
 - An application for review by a permit applicant under section 77 or 79 of the Act.
 - An application for review by a permit applicant or permit holder under section 80 of the Act.
 - An application for review by an objector under section 82 or 82B of the Act.
 - An application by a permit holder, owner or occupier of the subject land under section 87A of the Act.
2. The development meets any of the following requirements:
 - The development does not include a 'dwelling' as defined in the *Victoria Planning Provisions*.
 - The development is within the Residential Growth Zone within the meaning of the *Victoria Planning Provisions*.
 - The estimated cost of the development is \$10 million or more.

Other applications in the Planning and Environment List (that is, applications other than under sections 77, 79, 80, 82, 82B or 87A of the Act) are not eligible for inclusion in the Major Cases List even if the estimated cost of development meets the eligibility criteria. However, the Tribunal may fix a related application for hearing together with an application already included in the Major Cases List if satisfied that it is appropriate to do so.

The applicant for review must elect at the time of commencement of the application if the proceeding is to be included in the Major Cases List, by:

- lodging the relevant application for review on the Major Cases List form with the Tribunal; and
- paying the prescribed application fee.

The Major Cases List application forms can be found on the VCAT website. A different (higher) application fee applies where the applicant elects to have the proceeding included in the Major Cases List.

If an applicant does not choose to have an eligible proceeding included in the Major Cases List, it will be processed and heard in accordance with the usual procedures and timeframes that apply in the Planning and Environment List for applications of that type.

VCAT Practice Note PNPE8 – Major Cases List provides information about the Major Cases List, its operation, eligibility for inclusion in the List, application procedures and timelines.

5.4 Other types of applications for review

5.4.1 Introduction

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

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

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

5.4.2 Procedural defects in the planning scheme amendment process

PEA s. 39

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

VCAT can make a declaration and a direction in relation to the procedural defect. The direction may be that the planning authority must not adopt or approve the amendment until the Minister, planning authority or a panel takes action specified by VCAT.

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

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

Giving notice about an application for permit and amended applications

PEA s. 78(a)

The applicant for a permit can apply to VCAT for a review of a requirement by the responsible authority to give notice of an application under sections 52(1)(d) or 57B of the Act. These sections set out the considerations to be given by the responsible authority regarding notice of an application for permit or an amended application. The applicant may consider that the responsible authority's notice requirements are excessive or irrelevant in relation to the use or development proposed in the permit application.

PEA s. 52

There is no right of review by VCAT in relation to notice requirements under section 52(1) (a), (b) and (c), which relate to giving notice to owners and occupiers of adjoining land, to a council, or to any person to whom the planning scheme requires notice be given. The application for review can relate only to a requirement under section 52(1) (d) or 57B.

PEA s. 85(1)(c)

VCAT may decide to confirm or change the requirement for the giving of notice in accordance with section 52(1)(d) or 57B.

Request for more information

PEA s. 78(b) The applicant for a permit can apply to VCAT for review of a request for more information made under section 54 of the Act. This includes a requirement made by the responsible authority because a referral authority made a requirement under section 55(2). Such an application for review might be made if the applicant for permit considered the requirement to be unreasonable or unnecessary in relation to the use or development proposed.

PEA s. 85(1)(d) After hearing the application for review of a requirement for more information under section 54, VCAT can direct the responsible authority to consider the application for permit as made, or confirm or change the requirement made by the responsible authority.

Extension of time for giving information

PEA s. 85(1)(da) VCAT can also decide on the time within which information is to be given under section 54 in the case of applications for review of the refusal or failure of the responsible authority to extend the time under section 54A.

5.4.4 Failure to grant a permit within the prescribed time

PEA s. 58, 79 The responsible authority must consider every application for a permit. There is no time limit for a responsible authority to make a decision on an application. However, if the responsible authority does not make a decision within the prescribed time, the permit applicant may make an application for review of the responsible authority's failure to decide the application.

Calculating the prescribed time

ILA s. 44; PEA s. 3(1); PE Regs r. 32

There are important rules set out in the Regulations about when the prescribed time starts and when it stops.

The prescribed time starts from the date the responsible authority receives the application (or amended application) unless either of the following apply:

- Further information has been sought within the prescribed time under section 54 of the Act. The prescribed time starts from the day on which the information is given.
- The applicant has applied for a review of a requirement to give further information and VCAT has confirmed or changed the requirement. The prescribed time starts from the day on which the information is given.

The prescribed time is calculated as follows:

- **VicSmart applications:** 10 business days. A business day means a day other than a Saturday, Sunday or a day appointed under the *Public Holidays Act 1993* as a public holiday or public half-holiday. In calculating the 10 business days for a VicSmart application, the first business day (that is, the day the application is received) is excluded and the last business day is included.
- **All other applications:** 60 days. Weekends and public holidays are included in the 60 days. If the last day falls on a weekend or a public holiday, the 60 days expires on the next business day. In calculating the 60 days for any other application, the first day (that is, the day the application is received) is excluded and the last day is included. Weekends and public holidays are included in the 60 days. However, if the last day falls on a weekend or public holiday, the 60 days expires on the next business day.

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

The VCAT website contains a table *Calculating Elapsed Days in Failure Applications*, which is useful for calculating the number of elapsed days in relation to an application for review under section 79 of the Act.

Determining an application after a failure review is lodged

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

PEA s. 84

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

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

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

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

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

Reimbursement of VCAT application fee

An applicant to the Tribunal under section 79 of the Act is entitled to have the responsible authority reimburse the whole of any fees paid by the applicant in the review proceeding (this includes the fee for making the application for review and daily hearing fees). However, this does not apply if the responsible authority satisfies the Tribunal that there was reasonable justification for the responsible authority to fail to grant the permit having regard to:

- the nature and complexity of the permit application
- the conduct of the applicant in relation to the permit application
- any other matter beyond the reasonable control of the responsible authority.

5.4.5 Applications relating to extensions of time

An affected person can apply for review of the following:

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

However, an application for review of a decision to refuse to extend the life of a permit or a failure of the responsible authority to extend the life of a permit cannot be made if the initial request to the responsible authority for the extension of time was not made within the time specified under section 69(1) or (1A) of the Act.

An application cannot be made directly to VCAT if there has been no request made first to the responsible authority.

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

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

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

The Act allows any person to apply to VCAT for permission to make an application for review of the decision to grant a permit under section 64 of the Act, if they are affected by any application in which a written objection to the grant of the permit was received by the responsible authority. This provision applies to affected parties who were not objectors to the grant of a permit.

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

PEA s. 82B(2), (3)

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

VCAT may grant the leave if it believes it would be just and fair in the circumstances to do so. Leave to make an application for review cannot be granted if a permit has been issued.

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

5.4.7 Cancellation and amendment of planning permits

PEA s. 87(1)

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

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

PEA s. 89(1)

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

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

PEA s. 87A

In addition to the powers under section 87, VCAT has the power to cancel or amend a permit that has been issued at its direction if it considers it appropriate to do so. The request under this section must be made by the owner or occupier of the land concerned or any person who is entitled to use or develop the land concerned.

VCAT Practice Note PNPE3 – Cancellation and Amendment of Permits and Stop Orders sets out the procedures to be followed in applications for review to amend or cancel a permit under sections 87, 87A and 89 of the Act and applications for orders to stop development under section 93 of the Act.

PEA s. 88

It is important to note that section 88 of the Act provides limits on VCAT's power to cancel or amend a permit under section 87. VCAT will need to be satisfied that the application was made as soon as practicable and before the construction of buildings or the carrying out of works or before the development is substantially carried out

or completed. If the development or construction is completed, the Tribunal cannot amend or cancel the permit under section 87 of the Act. These limits do not apply to a cancellation or amendment of a permit under section 87A.

Supplementary guidance on making an application to cancel or amend a permit is also available in the VCAT Planning and Environment List *Guidelines for Cancellation and Amendment of Permits Under Sections 87 and 89 of the Planning and Environment Act 1987*.

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

5.4.8 Enforcement orders and interim enforcement orders

PEA ss. 114, 120

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

VCAT Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders issued by VCAT provides guidance on making an application for an enforcement order or interim enforcement order, including advice on the procedures to be followed.

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

The conduct of a hearing for an enforcement order application is not the same as other application hearings. Evidence is normally given on oath or affirmation, rather than by assertion or written submission. Enforcement orders can have serious effects on existing rights. This can mean that facts which are in issue need to be established on the balance of probabilities, bearing in mind the serious nature of the proceedings and consequences.

PEA s. 116

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

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

5.4.9 Applications under sections 149, 149A and 149B of the *Planning and Environment Act 1987*

PEA ss. 149, 149A, 149B

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

An application to VCAT for a determination under section 149A is used if the matter relates to the interpretation of the planning scheme or a permit, lawful continuing use rights or an agreement made under section 173.

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

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

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

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

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

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

5.4.10 Amendments to agreements

PEA s. 184

Section 184 of the Act provides for an owner of land who is affected by a proposed agreement under section 173 of the Act to make an application to VCAT to amend the agreement. The particular provisions are summarised in Table 5.1.

5.5 Procedures

5.5.1 Directions hearing

There are many circumstances when a directions hearing in advance of the full hearing of the proceeding will enable a preliminary matter to be addressed that might otherwise delay the hearing. *VCAT Practice Note PNVCAT5 – Directions Hearings and Urgent Hearings* sets out the usual practice for these types of hearings.

A directions hearing can clarify procedures to be followed in complex cases. It can also establish that there are adequate grounds for review; decide who are, or who should be made parties to the application for review; or who should have notice of the application for review. Following the directions hearing an order is issued in writing to all parties.

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

A party to an application for review can request a directions hearing. In the Planning and Environment List an application should be made using the *PNPE6 – Practice Day Request Form* available on the VCAT website. Written requests are made to the Registrar and must set out the nature of the directions sought and the reason for the request. A copy of the request must be given to all the other parties to the proceeding. All parties are advised when a directions hearing is arranged. Parties are invited to attend and address the Tribunal on the matters to be considered.

5.5.2 Urgent hearing

There are certain pressing matters that require prompt attention from the Tribunal, such as to prevent or stop existing unlawful planning activities through an interim enforcement order or an application to stop development pending hearing of an application to cancel or amend a permit.

For such cases the Tribunal offers an urgent hearing procedure. The procedure is set out in *VCAT Practice Note PNVCAT5 – Directions Hearings and Urgent Hearings*.

5.5.3 Practice days

PNVCAT5

In the Planning and Environment List, directions hearings are held on a practice day, conducted each Friday commencing at 10am or otherwise as specified in a notice given by VCAT. The hearing schedule can be checked using the Tribunal hearing listings on the VCAT website or in the Law List in *The Age* newspaper.

A practice day hearing may also be held to consider an urgent application. An urgent hearing may also be held at other times, as specified in a notice given by VCAT.

5.5.4 Compulsory conference

VCATA s. 83

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

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

A compulsory conference is used to:

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

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

5.5.5 Mediation

VCATA s. 88

VCAT can initiate mediation between the parties to try to reconcile differences and settle a dispute without the need for a full hearing of the proceeding. Mediation under section 88 of the VCAT Act is arranged at the discretion of the Principal Registrar. Consent of the parties is not required and attendance is compulsory. If a party does not attend mediation they may be struck out as a party.

Selection for mediation is made on the basis that the material on VCAT's file suggests that there is a reasonable chance of the dispute being resolved through mediation.

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

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

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

5.5.6 A question of law

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

PNPE1

Any party who becomes aware of a question of law to be decided in a forthcoming hearing must advise the Registrar immediately so that VCAT can be constituted with a legal practitioner. All the other parties to the proceeding should also be notified immediately and, preferably, no later than 10 business days before the hearing date.

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

PNPE2

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

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

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

VCATA Sch. 1 Pt. 16 Cl. 66

Sometimes a question of law is not evident until the full hearing has commenced. If the Tribunal is constituted without a legal practitioner a question of law can be decided by that member if all parties agree to the matter being decided by the presiding member. The question of law will otherwise be decided by a judicial member or a member who is a legal practitioner nominated by the President. The member may also elect to refer a question of law to a judicial member or a member who is a nominated legal practitioner.

VCATA s. 148

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

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

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

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

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

5.5.7 Intervention by a Minister

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

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

VCATA Sch. 1 Pt. 16 Cl. 58

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

VCATA Sch. 1 Pt. 16 Cl. 58

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

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

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

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

From time to time, the Minister for Planning releases guidelines on the use of the 'call-in' powers under the VCAT Act. Further information about the Minister's intervention powers and details about procedures and guidelines for requests is provided in *Planning Practice Note 29: Ministerial Powers of Intervention in Planning and Heritage Matters*.

5.6 Further information about reviews

5.6.1 VCAT Practice Notes

Copies of the VCAT Practice Notes are available from VCAT's public information counter or on-line at www.vcat.vic.gov.au. The practice note series are numbered for reference and include:

- *PNPE1 – Planning and Environment List General Procedures*
- *PNPE2 – Information from Decision Makers*
- *PNPE3 – Cancellation and Amendment of Permits*
- *PNPE4 – Enforcement Orders and Interim Enforcement Orders*
- *PNPE6 – Practice Day Request Form*
- *PNPE9 – Amendment of Plans and Applications*
- *PNVCAT1 – Common Procedures*
- *PNVCAT5 – Directions Hearings and Urgent Hearings.*

5.6.2 VCAT Forms

Copies of the standard VCAT forms are available from VCAT's public information counter or online at www.vcat.vic.gov.au.

A standard form is used to make an application for review, an application for enforcement order and an application to cancel or to amend a planning permit.

5.6.3 VCAT Decisions

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

All significant decisions since October 1996 can be accessed using the Australian Legal Information Institute (AustLii) website at www.austlii.edu.au. New decisions are added monthly.

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

- Victorian Planning Reports – Guide to Planning Appeals and Planning Panels: www.vprs.com.au
- LexisNexis – Planning and Environment Victoria: www.lexisnexis.com.au.

Commentary on significant VCAT decisions can also be found in Planning News, the newsletter published by the Planning Institute of Australia – Victorian Division (for subscription enquiries telephone (03) 9654 3777).

5.6.4 Guideline decisions

A ‘guideline decisions’ practice has been established in the Planning and Environment List of VCAT, in order to identify decisions which contain principles that can be followed or applied in planning decision making.

Guideline decisions articulate principles that can be followed or applied in other decision making. They may be principles concerning:

- planning and environment law;
- practice or procedure at VCAT;
- interpretation of planning or environmental legislation;
- interpretation of planning scheme provisions; or
- interpretation or application of policy.

Guideline decisions may set out new principles or clarify established principles, especially when there has been debate or uncertainty about their application or if they are applied in new or important circumstances.

Guideline decisions are identified on the VCAT web site and are available to view or print using the AustLii website.

5.6.5 General Information

General information about the operation of VCAT, including review procedures and requirements in accordance with the relevant acts and regulations, is available from VCAT:

- Website: www.vcat.vic.gov.au
- Telephone: (03) 9628 9777
- Address: 55 King Street, Melbourne 3000.

Council planning departments can also be contacted for information about VCAT reviews.

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

Copies of the VCAT publications and forms referred to in this chapter are available from VCAT’s website, public information counter or by calling a customer service officer.

Academic text books such as Statutory Planning in Victoria, fourth edition, the Federation Press 2011 by Eccles D & Bryant T, provide further advice about VCAT and the application review process.

ACQUISITION & COMPENSATION

6

Contents

6.1	Public land acquisition	3
6.1.1	Who may compulsorily acquire land?	3
6.1.2	Can the Minister for Planning or a responsible authority compulsorily acquire land?	3
6.1.3	Government policy on land acquisition	4
6.1.4	How is land acquired?	4
6.2	Public Acquisition Overlay	8
6.2.1	What is reserved land?	8
6.2.2	Why is land included in a Public Acquisition Overlay?	8
6.2.3	Is a Public Acquisition Overlay always required?	9
6.3	Planning compensation	9
6.3.1	What is planning compensation?	9
6.3.2	Compensation for financial loss	10
6.3.3	Who is responsible for the payment of compensation?	11
6.3.4	How is planning compensation assessed?	11
6.3.5	What if agreement cannot be reached as to the amounts of compensation payable?	12
6.3.6	Can compensation be recovered?	13
6.4	Planning compensation checklist	13

ACQUISITION & COMPENSATION

6

6.1 Public land acquisition

6.1.1 Who may compulsorily acquire land?

LACA s. 3

An authority may obtain title to land either by purchasing it or by formal statutory acquisition. Many authorities have the power to compulsorily acquire land for a public purpose. These include a range of ministers, government departments, public authorities, utility service providers and municipal councils. A body given the power to compulsorily acquire land is known as an 'acquiring authority' under the *Planning and Environment Act 1987*.

An acquiring authority may acquire the whole of a piece of land or several pieces of land (for example, for a school or parkland), or part of the land (for example, for a road widening). An authority may also acquire only an interest in the land (for example, an easement across a piece of land to allow for a pipeline or utility service).

'Compulsory' acquisition means that the land can be acquired despite the fact that the landowner may not consent to the acquisition. The power to compulsorily acquire land is therefore strictly regulated. An authority can only compulsorily acquire land if the power to do so is set out in its governing legislation, which is deemed for such purpose to be a 'special Act'. In some cases, the special Act requires that the acquiring authority can only compulsorily acquire land with the consent of a relevant minister or the Governor in Council.

LACA s. 4

Where an authority is given the power under a special Act to compulsorily acquire land, the authority must follow the process for acquisition set out in the *Land Acquisition and Compensation Act 1986* (the LAC Act). The authority must therefore either:

- acquire the land or obtain an interest in the land by compulsory process; or
- acquire the land by agreement with the landowner in accordance with the Act.

If an authority does not have the power of compulsory acquisition, the compensation provisions of the LAC Act do not apply. The transaction will be like any other private sale between a vendor and a purchaser and both parties will be free to negotiate a sale price, subject to any government audit or tendering requirements.

6.1.2 Can the Minister for Planning or a responsible authority compulsorily acquire land?

PEA s. 172

The Minister for Planning and responsible authorities are given a special power to compulsorily acquire land. This power extends to:

- any land which is required for the purposes of a planning scheme

- any land which is vacant, unoccupied or used for any purpose not conforming with the planning scheme (if the minister or the responsible authority believe it is desirable that the non-conforming use should be discontinued, or that the land should be put to appropriate use in order to achieve proper development in the area)
- any land subject to a declaration by the Governor in Council to facilitate the better use, development or planning of an area.

6.1.3 Government policy on land acquisition

All transactions involving the purchase or acquisition of land by state government agencies, authorities and representatives must take place in accordance with the *Government of Victoria's Policy and Instructions on the Purchase, Compulsory Acquisition and Sale of Land* (August 2000). The Victorian Government Land Monitor (VGLM) is responsible for ensuring accountability and integrity in land transactions, and is available to provide guidance on the requirements (tel (03) 9452 5227). Alternatively, the policy can be accessed online at www.delwp.vic.gov.au.

6.1.4 How is land acquired?

The LAC Act places strict obligations on an acquiring authority in relation to the process for acquisition. This includes the timing of the service of notices, when and how offers must be made and when and how possession may be taken. Particular care needs to be taken by all parties in this regard, as failure to comply with the legislation can result in penalties against the acquiring authority or an acquisition process having to be abandoned or recommenced.

Below is a brief outline of the main procedures which apply. This outline should not be used as a substitute for the LAC Act, which should be read carefully before any acquisition procedure begins.

Land to be reserved under the planning scheme

Before the commencement of the acquisition process, the land must first be reserved under a planning scheme. Generally, this will involve a planning scheme amendment to apply a Public Acquisition Overlay to the land. There are a number of exceptions to this requirement.

The process for reserving land and the exceptions to this requirement are set out in Chapter 6.2 - Public Acquisition Overlay.

Service of Notice of Intention to Acquire

A Notice of Intention to Acquire must be served on each person with an interest in the land, except in cases where section 7 of the LAC Act specifies that a notice is not required.

In the case of a proposed acquisition of a rented house on which there is a mortgage, the authority must serve the registered owner, mortgagee and tenant with a Notice of Intention to Acquire, as persons with an interest in the land.

The notice must be in the prescribed form (Form 1) and be accompanied by a prescribed statement. This statement (Form 4) is clearly set out and is a helpful document to both acquiring authorities and those whose land may be acquired or affected by the acquisition.

LACA s. 5

LACA ss. 6, 7, 8;
LAC Regs r. 7, 10,
Schedule 2 forms
1, 4

The Notice of Intention to Acquire has three major functions:

- it is the first formal notification of the authority's intention to acquire an interest in the land (after the reservation in the planning scheme, if applicable)
- it prevents carrying out of improvements on the land without consent of the authority
- it provides an opportunity for the authority to elicit information from the person served about the land and other interested parties.

LACA ss. 9, 10

A copy of the Notice of Intention to Acquire must also be served on the responsible authority under the planning scheme in which the land is situated, as well as the council (where these differ). A notice must also be lodged with the Registrar of Titles in accordance with a prescribed form under the *Transfer of Land Act 1958*.

LACA ss. 11, 14, 15, 18

The Notice of Intention to Acquire does not constitute an offer or a binding agreement. It may be amended or cancelled at any time before publication of the Notice of Acquisition. It does not bind the authority to proceed with the compulsory acquisition. At any time before the lapsing or cancellation of the Notice of Intention to Acquire, or the publication of the Notice of Acquisition, the authority may acquire an interest by agreement with the owner.

LACA s. 16

The Notice of Intention to Acquire lapses six months after the service of that notice if the authority has not acquired an interest, or an extension to the period of its operation has not been mutually agreed.

LACA s. 9(2);
LAC Regs r. 12

The acquiring authority can ask the council or responsible authority for certain information. For example, it may seek information on the zoning or possible use or development of the land in order to assist with the assessment of compensation.

Publication of Notice of Acquisition

LACA ss. 19, 20, 106; LAC Regs r. 16, Schedule 2, form 7

An authority formally acquires the land by publishing a notice in the Government Gazette. Unless agreed in writing between the parties, or unless time is varied under section 106 of the LAC Act, the authority must not acquire the land until two months after service of the Notice of Intention to Acquire. Given that a Notice of Intention to Acquire expires after six months, this generally means that an acquiring authority has a period of two to six months in which to complete its acquisition following the Notice of Intention to Acquire.

The map, which forms part of the Notice of Acquisition, must be survey-accurate (unless the whole of a title is being acquired) and must describe precisely what is being acquired. The notice must be in the prescribed form.

LACA s. 31(2)(a)

An initial offer of compensation must be made within fourteen days of publishing a Notice of Acquisition. Therefore, the acquiring authority should ensure that it is ready to make an offer of compensation before it publishes the Notice of Acquisition.

Effect of Notice of Acquisition

LACA s. 24

When a Notice of Acquisition is published in the Government Gazette, the interest in the land described in the notice frees the authority of all mortgages, encumbrances, licences and charges. Public utility easement rights are preserved unless specifically acquired. This means that, from the date of publication, the acquiring authority owns the land, even if compensation has not by then been assessed or paid.

LACA s. 22; LAC
Regs r. 16, 17.
Schedule 2, forms
7, 8

A copy of the Notice of Acquisition in the prescribed form and a statement of rights and obligations must be served within fourteen days of the date of acquisition. This applies to everyone who received the Notice of Intention to Acquire and, where there was no Notice of Intention to Acquire, on each person having an interest immediately before the date of acquisition.

LACA s. 23

A copy of the Notice of Acquisition must also be published in the prescribed form in a newspaper generally circulating in the area in which the land is situated.

Subdivision and title arrangements for acquired land

SA s. 35

If part of a lot is acquired, a plan of subdivision must be submitted to the council after the land is acquired. The plan will serve to re-describe the land acquired and any remaining land, as well as to make any required alterations to easements. A special process is laid down in the *Subdivision Act 1988* for certification of these plans.

Entry into possession

LACA s. 26

The authority cannot take possession of land used as a principal place of residence or business until three months after the date of acquisition, except with Governor in Council's certification or by agreement with the claimant and the consent of the minister administering the special Act. The authority may enter the land after giving seven days written notice of its intention to take possession to the person in occupation of that land.

Compensation for acquisition

LACA s. 30

A person whose interest in land has been divested or diminished through a Notice of Acquisition, has a right to claim for compensation. A person who makes or is entitled to make a claim for compensation is known as a claimant.

The first offer of compensation

LACA s. 31

The authority must make an offer of compensation to every claimant within fourteen days of the date of acquisition or within a further period approved by the minister administering the special Act or with the agreement of the claimant.

LAC Regs r. 19,
Schedule 2, form
10

The offer is to be a fair and reasonable estimate of the compensation payable and be accompanied by a certificate of valuation used by the authority in making its offer. The authority is to have regard to a valuation of the Valuer General or registered valuer. The offer is to be accompanied by statements explaining any difference between the sum offered and the valuation and setting out the claimant's rights and obligations.

LACA s. 37

If no offer is made to a person entitled to compensation, that person may make a claim within two years after the date of acquisition. The LAC Act sets out the procedures to be followed in these circumstances.

Response by claimant

LACA ss 33-35,
80; LAC Regs r.
20, 21, Schedule
2, form 11

A claimant is to respond with a Notice of Acceptance or a Notice of Claim, in the prescribed form, within three months of the offer being served. If the claimant fails to serve a notice on the authority, the claim becomes a disputed claim and can be referred to the Land Valuation Division of the Victorian Civil and Administrative Tribunal (VCAT) or the Supreme Court. If the amount of compensation offered is not disputed by the claimant, the amount offered is binding on the authority, unless the authority can demonstrate that information contained in the offer, and relied upon by the authority, was incorrect.

LACA s. 36;
LAC Regs r. 24,
Schedule 2, form
13

Authority's reply to claim

The authority must reply to a Notice of Claim within three months of receiving it. This is done through a statement in writing (Form 13). The authority may admit a claim in whole or part, propose to vary a previous offer, or reject the claim and repeat its offer.

If the authority fails to reply to the Notice of Claim within three months, it is deemed to have rejected the claim and to have repeated its offer. The claim then becomes a disputed claim.

If the authority offers to increase or vary its first offer, the claimant must accept or reject the revised offer within two months of receiving it. If the authority rejects the claim by the claimant, the claim becomes a disputed claim.

Time

LACA ss. 106,
107

In certain circumstances the LAC Act allows for an extension or shortening of the periods for response and replies. It also provides that certain time limits applying to claimants do not expire until seven days after the authority has advised the person in writing of the effect of that expiration.

How is compensation assessed?

LACA ss. 41 – 45

The principles for measuring the compensation payable on the acquisition of an interest in land are set out in the LAC Act. The compensation paid generally takes into account the following:

- the market value of the land acquired
- any losses attributable to severance or as a result of disturbance
- any enhancement or depreciation in value of the interest of the claimant and in other land adjoining or severed from the acquired land
- legal, valuation or other professional expenses incurred
- any special value to the claimant
- any previous payment for loss on sale compensation or other forms of financial loss compensation payments
- the use to which the property was put at the date it was compulsorily acquired
- the payment of compensation for any intangible and non-pecuniary disadvantages resulting from the acquisition, known as 'solatium'.

LACA s. 53

The assessment of the precise amounts to be paid is made on the basis of independent valuation advice combined with a practical evaluation of other losses occasioned by the acquisition, together with fees and expenses. It is important to note that the LAC Act provides for the payment of interest on compensation agreed upon by the parties or awarded by the Court.

What happens if planning compensation has been previously paid?

LACA s. 41(5), (7)

If an authority is acquiring an interest in a property for which planning compensation under Part 5 of the *Planning and Environment Act 1987* has already been paid, the amount of compensation for the compulsory acquisition is reduced by a 'prescribed amount'. This amount is calculated in accordance with a formula set out in the LAC Act, which takes account of the timing and payment of the prior compensation.

Advance of compensation

When an offer of compensation of \$5,000 or more is served on a claimant, the claimant may require the authority to advance an amount equal to the amount of compensation offered in respect of the claimant's interest.

The Authority must make the advance within one month of receiving the notice requiring the advance.

Dispute

LACA s. 80

Either the acquiring authority or claimant may apply to VCAT for determination of a disputed claim, or refer a disputed claim to the Supreme Court of Victoria for determination.

6.2 Public Acquisition Overlay

6.2.1 What is reserved land?

PEA s. 6(2)(c)

A planning scheme may designate land as being reserved for a public purpose. Land reserved for future compulsory acquisition is identified by including the land in a Public Acquisition Overlay.

The objectives of the Public Acquisition Overlay include 'to reserve land for a public purpose and to ensure that changes to the use and development of land do not prejudice the purpose for which the land is to be acquired'. The Public Acquisition Overlay indicates that, for the purpose of the LAC Act, any land included in the Overlay is reserved for a public purpose. This satisfies the requirement in section 5 of that Act that an authority cannot commence to acquire the land 'unless the land has been first reserved by or under a planning instrument for a public purpose'.

CLRA s. 4; SA s. 24(2)

This use of the term 'reserved' in this context is quite separate from its use in other legislation, such as the *Crown Land (Reserves) Act 1978* (where provision is made for Crown land to be reserved for certain purposes, and for its management) or the *Subdivision Act 1988*, which refers to land being set aside as a reserve.

6.2.2 Why is land included in a Public Acquisition Overlay?

LACA s. 5(1)

If land is to be compulsorily acquired, it must in most cases be 'reserved' under the planning scheme through its inclusion in a Public Acquisition Overlay before the acquisition process can commence.

Land may be included in a Public Acquisition Overlay well in advance of its proposed acquisition. There is often a period of many years between the recognition that an area will be needed for a public purpose and the actual acquisition of that land. For example, the Public Acquisition Overlay is often applied to land designated for future roads or freeways. While the relevant road authority may not wish to formally acquire the land until the final road alignment has been approved and project funding is available, the identification of the land at an early stage assists the affected landowners and others in the vicinity to make informed decisions about the use and development of their land.

Early reservation enables control of the use and development of land that will eventually be acquired, so that the acquiring authority is not faced with the need to compensate owners of buildings and works constructed on that land once the need for its acquisition has been recognised. Where land is subject to a Public Acquisition Overlay, all further use, development or subdivision of the land will generally require a planning permit. Permit applications must be referred to the acquiring authority.

PEA ss. 98, 99, 106

Owners of land can also plan in the knowledge that the land is proposed for eventual acquisition and can, in some cases, be compensated for subsequent loss. Compensation is payable only when a loss occurs (for example, the refusal of a planning permit on the ground that the land is required for a public purpose).

6.2.3 Is a Public Acquisition Overlay always required?

There are a number of exemptions to the requirement that land to be compulsorily acquired must first be 'reserved' under a planning scheme through its inclusion in a Public Acquisition Overlay. These exemptions apply in the following instances:

LACA s. 5(2),
LAC Regs r. 6(a)

- if the interest to be acquired is for a minor widening or deviation of a road; and
 - the total value of interests to be acquired is less than 10 per cent of the value of the unencumbered freehold interest in the allotment; and
 - less than 10 per cent of the area of an allotment is to be acquired

LACA s. 5(2),
LAC Regs r. 6(b)

- if an easement is to be acquired and the acquisition of that easement does not reduce the value of the unencumbered freehold interest by more than 10 per cent

LACA s. 5(3)

- if the Governor in Council has certified that reservation is unnecessary, undesirable or contrary to the public interest

LACA s. 5(4), 7

- if the authority is not required to serve a Notice of Intention to Acquire because of section 7(1)(a) or (b) of the LAC Act – for example, an ordinary market purchase

LACA s. 5(4A)

- if a declaration is in force under section 172(2) of the Act

LACA s. 5(4B)

- If the land has been declared special project land under section 201I of the Act.

6.3 Planning compensation

6.3.1 What is planning compensation?

PEA s. 98

Apart from compensation payable as a result of the actual acquisition of land, Part 5 of the Act creates a right to interim compensation (known as 'planning compensation'). This occurs in certain limited circumstances stemming from the proposed future use of the land for public purposes.

These circumstances arise where the owner or occupier of land has suffered financial loss as the natural, direct and reasonable consequence of:

PEA s. 98(1)(a)

- the land being reserved for a public purpose under a planning scheme (it has been included in a Public Acquisition Overlay)

PEA s. 98(1)(b)

- a proposed amendment to a planning scheme to include the land in a Public Acquisition Overlay

- PEA s. 98(1)
 - a declaration by the minister that the land is proposed to be reserved for a public purpose
- PEA s. 98(1)(d)
 - the access to the land being restricted by the closure of a road by a planning scheme, or
- PEA s. 98(2)
 - a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose.

The most common form of compensation arises where land is designated for future acquisition well in advance of it actually being acquired, and where affected landowners are unable to use or develop the land fully during the intervening period because of the 'blight' which the Public Acquisition Overlay places over the land.

- PEA s. 107(1) A claim for compensation also arises if an owner of land has suffered financial loss as the natural, direct and reasonable consequence of:
- the amendment of a planning scheme to remove any reservation over the land (that is, to remove a Public Acquisition Overlay);
 - the lapsing of an amendment which proposed to include the land in a Public Acquisition Overlay; or
 - the cancellation of a declaration by the minister which had indicated that the land was proposed to be reserved for a public purpose.

- PEA s. 99 The time at which the right to claim compensation arises is set out in the Act. In general terms, the right to compensation arises at the time a loss is suffered – for example, when the land is sold at a lower price than would have been expected had the land not been included in a Public Acquisition Overlay.

- PEA s. 98(3), 103, 108 A person cannot claim compensation if the planning authority has already bought or compulsorily acquired the land, or a condition on a permit provides that compensation is not payable. A compensation claim may also be rejected if the financial loss is of a minor nature. Generally, a person does not have a right to claim compensation if the person was not the owner or occupier of the land at the time the right to compensation arose.

6.3.2 Compensation for financial loss

- PEA s. 98, 106, 108(2) Compensation is payable if it can be shown that land has sold at a lower price than would reasonably have been expected if the land had not been affected by its inclusion, or proposed inclusion, in a Public Acquisition Overlay. With a few exceptions, to be eligible to claim 'loss on sale' compensation, the owner must give the planning authority 60 days notice in writing of their intention to sell the land and must have been the owner of the property at the time the Public Acquisition Overlay (or prior reservation) first came into effect.

Compensation arising from a permit refusal

The right to claim compensation for loss or damage arising from the refusal of an application for a permit is established in the following circumstances:

- PEA s. 99
- when the permit is refused by either the responsible authority or VCAT on the basis that the land is required for a public purpose

PEA s. 98(2),
99(a)

- when the permit is refused on the basis that the land may be required for a public purpose, that is, it is not yet included in a Public Acquisition Overlay but there is reasonable evidence that the land will need to be acquired for public purpose in the future

PEA s. 99(a)

- when the responsible authority:
 - fails to grant a permit within the period prescribed (for the purposes of section 79 of the Act), or
 - grants a permit subject to any condition which is not acceptable to the applicant, and
 - VCAT disallows an application for review of either the failure or condition on the ground that the land is, or may be, required for a public purpose.

Compensation for closure of a road

PEA ss. 98(1)
(d), 99

Compensation for financial loss suffered as the natural, direct and reasonable consequence of access to land being restricted by the closure of a road by a planning scheme can become payable once the relevant provision of the planning scheme comes into operation.

Compensation for removal or amendment of a Public Acquisition Overlay

PEA s. 107

An authority may become liable for compensation arising from an amendment of a planning scheme to remove a Public Acquisition Overlay. An authority could also be liable for compensation due to the lapsing of an amendment for a proposed overlay, or the cancellation of a Ministerial declaration indicating that the land was required for a public purpose. However, in such instances, it may be much more difficult for an affected owner to substantiate direct financial loss.

6.3.3 Who is responsible for the payment of compensation?

PEA ss. 98(1),
(2), 109

The claim for compensation is made against the planning authority where land has been reserved for a public purpose under a planning scheme; where land is shown as reserved for a public purpose in a notice of amendment; or where the Minister has made a declaration under section 113. The claim is made against the responsible authority in the case of a claim relating to a refusal by the responsible authority to grant a permit on the ground that the land is, or will be, needed for a public purpose.

However, another authority may become responsible for the compensation. Usually, this is the authority responsible for having the Public Acquisition Overlay placed over the land and which will ultimately acquire it. For example, the Roads Corporation may require the responsible authority to refuse to grant a permit in an area covered by a Public Acquisition Overlay for a future freeway. The Roads Corporation would then take responsibility for any consequential compensation.

6.3.4 How is planning compensation assessed?

PEA s.105

The Act refers to section 37 and parts 10 and 11 of the LAC Act in relation to the determination of compensation. The authority has three months to respond to a claim which it can reject or admit in part.

PEA s.104

Generally, the compensation is assessed on a 'before and after' basis. This means the

difference between:

- the land value at the date on which the liability to pay compensation first arose if it had not been affected; and
- the actual value of the land at the date on which the liability to pay compensation first arose.

For 'loss on sale' compensation, this means obtaining valuation advice at the date of the sale. The valuer should consider the worth of the property as though the Public Acquisition Overlay did not exist, as compared with its value when encumbered by the overlay. Often the encumbered value will equal the sale price actually achieved, provided that every effort was made to obtain the best price on the open market.

PEA s.101; PEA s.100

In addition to compensation assessed on the difference between the value of the property unencumbered and encumbered by the Public Acquisition Overlay, the authority may also be liable for the claimant's legal, valuation and other costs reasonably incurred in establishing the claim. Further, if a residence is affected, compensation may be payable for any intangible and non-financial disadvantages (being a consolation payment similar to the payment of solatium in a compulsory acquisition matter). This amount must be no more than 10 per cent of the compensation otherwise payable.

PEA s.100; PEA s.101

Claims for financial loss arising from the refusal of a permit should be assessed at the date the right to compensation arises, that is the date of refusal of the permit or the date of the Tribunal's decision – whichever is applicable. Assessments of the encumbered and unencumbered value of the property should be made as at that date. As with loss on sale compensation, additional amounts may be payable for costs incurred by the claimant and any intangible and non-financial disadvantages arising when a residence is involved.

6.3.5 What if agreement cannot be reached as to the amounts of compensation payable?

VCAT will determine claims where the amount in dispute is not more than \$50,000. (The 'amount in dispute' is the difference between the authority's offer and the amount claimed, rather than the overall amount of the claim). If the amount in dispute is more than \$50,000, the claimant may choose either the Supreme Court or the Tribunal. If the claimant does not exercise this option within one month of being asked to do so, the authority may choose the forum.

If the Supreme Court is satisfied, on the application of either party, that a claim raises questions of unusual difficulty or of general importance, it determines a disputed claim.

LACA s. 91

The LAC Act provides that the Supreme Court or the Tribunal may award costs as it thinks proper, taking into account a comparison between the amount of compensation awarded and that offered by the authority; the conduct of the parties, the failure of the claimant to give adequate particulars of his or her claim or to provide supporting material when requested, or excessive claim or an unduly low offer.

6.3.6 Can compensation be recovered?

The Act specifies when and how the authority can recover from the owner compensation that the authority has previously paid. For example, previously paid compensation may be recovered from the current owner in the event that the overlay is removed or the proposed overlay lapses or the Attorney-General's declaration is cancelled.

Where land over which planning compensation has been paid is subsequently acquired, the acquiring authority reduces the compensation payable on the acquisition to take into account the interim planning compensation already paid. This avoids any gap or overlap in the compensation. The formula for varying the compensation on this basis is set out in the Act.

Any compensation that is repayable becomes a charge on the land.

Compensation must be registered on the title. The authority must use Form 16 under the Planning and Environment Regulations 2015 to notify the Registrar of Titles of the amount of compensation paid.

6.4 Planning compensation checklist

To check the eligibility of a claim

- What person or authority is liable to pay compensation? (*Planning and Environment Act 1987*, s. 109.)
- Has the claim been made within the specified times? (*Planning and Environment Act 1987*, s. 107.)
- Has the claim been received after any of the events specified in s. 99 of the *Planning and Environment Act 1987*?
- Was the claimant the owner or occupier of the land at the time the right to claim compensation first arose? (*Planning and Environment Act 1987*, s. 108)
- Does a permit provide that no compensation is payable?

Processing a claim

- Is the size of the claim such that it may be rejected under s. 103 of the *Planning and Environment Act 1987*?
- Has compensation previously been paid? (*Planning and Environment Act 1987*, s. 102)
- Is there a residence and are there non-financial disadvantages which will affect the amount of compensation payable? (*Planning and Environment Act 1987*, s. 100)
- Has the compensation been determined according to the procedures under s. 37 of the *Land Acquisition and Compensation Act 1986*?
- Is the amount of compensation in accordance with the limits prescribed in s. 104 of the *Planning and Environment Act 1987*?
- Has the statement of compensation paid been lodged with the Registrar of Titles? (*Planning and Environment Act 1987*, s. 110)
- An authority which had previously paid compensation under the *Planning and Environment Act 1987* may recover that payment from another authority that has subsequently compulsorily acquired the land. (*Planning and Environment Act 1987*, s. 110).

ENFORCEMENT

7

Contents

7.1	Enforcement and the planning system	3
7.1.1	Why is enforcement important?.....	3
7.1.2	When is enforcement action appropriate?.....	3
7.1.3	What enforcement options are available?	4
7.1.4	What administrative arrangements should a responsible authority make?.....	5
7.1.5	What is the role of the <i>Local Government Act 1989</i> ?.....	5
7.1.6	Monitoring compliance and responding to contraventions	6
7.1.7	Site Inspections.....	7
7.1.8	Negotiating compliance.....	8
7.1.9	Official warnings.....	9
7.2	Planning infringement notices	10
7.2.1	When is a planning infringement notice appropriate?.....	10
7.2.2	What must an infringement notice include?	10
7.2.3	What can an infringement notice require?.....	10
7.2.4	What happens if an infringement notice is served?.....	10
7.2.5	Can an infringement notice be withdrawn?	12
7.2.6	When might withdrawal of a notice be appropriate?.....	12
7.2.7	Internal Reviews	12
7.2.8	Paying penalties.....	13
7.3	Enforcement orders.....	13
7.3.1	What is an enforcement order?.....	13
7.3.2	How is an enforcement order made?	14
7.3.3	Options for the respondent to an enforcement order.....	14
7.3.4	Objections to an application for an enforcement order	14
7.3.5	Awarding costs.....	15
7.3.6	Interim enforcement orders	16
7.3.7	What happens if an enforcement order is not complied with?.....	16
7.4	Prosecution for a breach of the Act	17
7.4.1	The role of prosecution in planning enforcement	17
7.4.2	When is it appropriate to prosecute for an offence?.....	17
7.4.3	Procedure in prosecution	18
7.5	Injunctions	19
7.5.1	Types of injunction proceedings	19
7.5.2	Section 125 injunctions	20
7.5.3	General common law injunctions	20

7.6	Cancellation and amendments of permits.....	20
7.6.1	Can a permit be cancelled or amended?	20
7.6.2	Who may apply for cancellation or amendment?	21
7.6.3	Hearing and order.....	21
7.6.4	Compensation obligations	22
7.7	Evidence.....	22
7.7.1	Proof of formal matters	22
7.7.2	Evidence of other matters	23
7.8	Brothels.....	23
7.9	Using other legislation for enforcement.....	24
7.10	Other information sources	24
7.11	Enforcement checklist	25

ENFORCEMENT

7

7.1 Enforcement and the planning system

7.1.1 Why is enforcement important?

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

PEA s. 14(a)

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

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

The objectives of enforcement are to:

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

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

7.1.2 When is enforcement action appropriate?

PEA s. 126

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

Enforcement should occur when there is a clear breach of the Act, a planning scheme, permit condition or section 173 agreement and the breach warrants enforcement, especially if it causes detriment to the community. The main emphasis of enforcement should be on obtaining compliance rather than on prosecuting offenders. Adopting a conciliatory approach through a process of education, communication and negotiation will more often provide a positive outcome. The various enforcement options should be viewed with this in mind.

7.1.3 What enforcement options are available?

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

- IA 2006 s. 8

 - **Preliminary negotiation:** Negotiate informally with the alleged offender. The role of enforcement often includes educating an alleged offender who may not be conversant with planning considerations and laws. This type of positive conciliation may avoid the need for formal action and should usually be the first step taken.
- PEA s. 130

 - **Official warning:** Issue an official warning pursuant to the *Infringements Act 2006* where an infringement notice is considered excessive under the circumstances.
- PEA s. 114

 - **Planning infringement notice:** Issue a planning infringement notice, which provides a monetary penalty and provides the responsible authority with the option to require remedial action. This is usually for less serious breaches.
- PEA s. 120

 - **Enforcement order:** Make an application to the Victorian Civil and Administrative Tribunal (VCAT) for an enforcement order to achieve compliance.
- PEA s. 120

 - **Interim enforcement order:** Make an application to VCAT for an interim enforcement order where there is a need for immediate action.
- MCA 1989 s. 25,
CPA s.7

 - **Prosecution:** Commence 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.
- PEA s. 125

 - **Court injunction:** Seek an injunction from a court of competent jurisdiction (Supreme, County or Magistrates' Court) to restrain a person from contravening an enforcement order or interim enforcement order.
 - **Common law injunction:** Seek a common law injunction from a court of competent jurisdiction to restrain a person from contravening a law.
- PEA ss. 87, 88,
89

 - **Cancel or amend a permit:** Make an application to VCAT to cancel or amend a permit – for example for a substantial failure to comply with the conditions of a permit.
- PEA s. 123

 - **Carry out work:** Undertake work to secure compliance with an enforcement order or interim enforcement order and recover the cost of doing so.

THE ENFORCEMENT SYSTEM - Corrective Action versus Prosecution

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 prosecutions).

Enforcement order proceedings are designed to prevent or stop existing unlawful planning activities and to achieve compliance, reinstatement or remedial works. They are not designed to punish. Only a section 126 prosecution under the *Planning and Environment Act 1987* will do that.

A section 126 prosecution is designed to punish for what has occurred and provide a deterrent against a recurrence. It cannot directly achieve a cessation of the act complained of (or rectification or 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 a 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 on the balance of probabilities.

7.1.4 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. Appropriate delegations and authorisations should also be in place to enable the officer to take any necessary action, including:

- PEA ss. 133, 134 • entry to properties to carry out and enforce the Act, regulations, planning scheme, planning permits, enforcement orders or agreements made under section 173
- PEA s. 130 • issuing planning infringement notices
- PEA ss. 114, 120 • applying for enforcement orders and interim enforcement orders
- PEA s. 87 • applying for the cancellation or amendment of planning permits
- LGA ss.224, 232 • instituting proceedings on behalf of the council under any Act, regulation or local law.

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

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

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

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

7.1.6 Monitoring compliance and responding to contraventions

Regular checks and inspections can be carried out by an authorised officer of a responsible authority to ensure that the use or development of land does not contravene a planning scheme, section 173 agreement or planning permit. However, due to the extent of use and development activity that goes on across a municipality, most responsible authorities rely on a complaint alleging a planning breach to trigger an investigation. A lesser number of investigations are carried out as routine inspections to monitor planning scheme compliance.

The complaint may raise matters that require referral to other council branches, such as health, building or local laws or it may fall under the jurisdiction of other authorities or agencies, including:

- Victoria Police (for example, wilful damage)
- Department of Justice (for example, prostitution and liquor licensing)
- Environment Protection Authority (for example, major industrial noise/odour, contaminated land)
- Service authorities and providers (for example, infrastructure damage)
- Work Cover Authority (unsafe working environment)
- Department of Immigration (suspected illegal immigrant workers).

In some circumstances it may be appropriate for a joint site inspection to be conducted. This would be particularly relevant where the cause of complaint falls across more than one jurisdiction.

Where the owner of the land is not the occupier, the investigating officer may consider advising the owner of the matter at this preliminary stage. This gives the owner the opportunity to undertake measures to resolve the issue and may result in a more timely resolution.

Assembling Information

In each case, the investigating officer should start with a desk top audit and an initial assessment to assemble relevant facts, including (as relevant):

- zone and overlays applicable to the land and relevant provisions of the planning scheme
- occupancy and use history (particularly where existing use rights may be a consideration)
- planning and building history, including planning permits, endorsed plans or section 173 agreements relevant to the land
- consultation with the planner who provided any advice or assessed any applications relevant to the land (where possible)
- aerial and street photography (both current and historic).

The desk top audit will assist the investigating officer to form an initial view on the nature of the suspected breach, based on information from the initial complaint and the research conducted.

Eye witness accounts can establish when an offence was committed. In the absence of a witness, aerial photography, physical evidence on the ground and receipts or other documents may provide proof that something happened on a day, or between dates.

7.1.7 Site Inspections

Following a desk top audit, an initial inspection of the land will help obtain first hand evidence of a contravention. An officer must be authorised to enter the land.

PEA s. 133

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

- an authorised person of the Department of Environment, Land, Water and Planning
- an authorised officer of the responsible authority
- any other person whom the Minister authorises to assist an authorised officer of the Ministry or authority.

PEA ss. 134(1)

Prior to entering a property for enforcement purposes an authorised officer is required to either:

- obtain the occupier's consent, or
- provide two days prior notice if the land is not a brothel (special entry provisions in the *Sex Work Act 1994* apply to brothels) or
- obtain a warrant.

PEA s. 136

An authorised officer may request the assistance of the Victoria Police to gain entry to land where an occupier refuses to allow entry following the provision of two days notice.

MCA s. 75

The option to take out a warrant may be necessary where entry to a property is required without giving two days notice and the occupier refuses consent. A warrant is obtained from the Magistrates' Court.

Caution should be exercised when entering all construction sites. The officer should seek out any site office or on-site constructions manager in the first instance to advise of the reason for the inspection, to obtain consent, and to obtain a hard hat and vest if necessary.

All evidence compiled should be assembled and recorded 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.

PEA s. 135

On entering land, the Act provides for evidence to be obtained through a variety of means. The inspection record should detail the address of the land and the matters being investigated, together with:

- time and date of the inspection
- persons in attendance
- details of activities or development noted at the time of the inspection
- names of any persons interviewed

- details of any interviews
- photographs, measurements, sketches, recordings and samples, as required.

In some instances, regular inspections of a site may be required to monitor activities or changes. Each inspection is to be recorded.

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

If the breach or elements of the breach are not clearly apparent from outside the land, the investigating officer should request consent to enter the land from the occupier. The officer should identify himself or herself by name as an officer of the council and explain the reason for the inspection. It is good practice for the officer to provide a business card. Formal identification, such as proof of authorisation, a warrant or notice, should be made available if requested.

A person in attendance at a premises under investigation may choose to cooperate with the investigating 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 a brothel.

It is an offence to obstruct an authorised officer from taking action in accordance with the Act, including obtaining entry to land to conduct an inspection. A penalty of 60 penalty units applies to such an offence.

PENALTY UNITS

Penalty units are used to define the amount payable for fines in relation to offences under Victorian Acts and Regulations. 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 of 2014-2015, the value is \$147.61.

The rate for a penalty unit is indexed each financial year so that it is raised in line with inflation. Any change to the value of a penalty unit occurs on 1 July each year and is published in the Victoria Government Gazette.

7.1.8 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 explain:

- the nature of the breach / complaint
- the findings of the investigation
- what needs to be done to achieve compliance
- specific timeframes to achieve compliance
- if any referrals have been made to other departments or external agencies
- 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

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

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 achieved at the time of the second inspection, the following actions may be taken:

- where appropriate, discuss the non-compliance with the alleged offender and:
 - negotiate an extended timeframe for the achievement of compliance
 - reaffirm other enforcement consequences if compliance is not achieved.
- provide further correspondence to the alleged 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 timeframe for compliance to be achieved.

Where compliance is still not achieved and all attempts to negotiate compliance have failed, it may be necessary to employ other enforcement options.

7.1.9 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 should not take further action. These types of directions should be specified in a covering letter accompanying the official warning.

IA s. 10

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

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

IA s. 11

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

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

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

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

7.2 Planning infringement notices

7.2.1 When is a planning infringement notice appropriate?

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

PEA s. 130

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

7.2.2 What must an infringement notice include?

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

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

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

PEA s. 130(2A)

In addition to these requirements, the details of the additional steps (if any) required to expiate the offence must be included in an infringement notice. Any form of infringement notice can be used as long as it includes the prescribed information.

7.2.3 What can an infringement notice require?

PEA s. 130(4)

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

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

7.2.4 What happens if an infringement notice is served?

A person served with an infringement notice can either:

IA s. 16

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

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

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

- ignore the infringement notice.

PEA s. 130 (5), (6)

If a planning infringement notice requires additional steps to be taken to expiate an offence and before the end of the specified remedy period, the person served with the notice informs the responsible authority that those steps have been taken, an authorised officer 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 confirming whether or not the required steps have been taken.

IA s. 32

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

If the person believes that they have not committed an offence, it is advisable that they 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.

A responsible authority proposing to use planning 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. However, unlike other infringement offences, a planning infringement offence is not a 'lodgeable' infringement offence under the *Infringements Act 2006*.

This means that any failure to comply with a planning infringement notice cannot be referred to the Perin court system for resolution. It must instead be heard at the Magistrates' Court by prosecuting the original offence (for a breach of section 126 of the Act) that gave rise to the issue of the planning infringement notice. It is not a prosecution of any failure to comply with the planning infringement notice itself. An unsatisfied planning infringement notice does not generate a new offence, so it cannot be prosecuted.

- Unless the notice is withdrawn, the responsible authority must be prepared 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 set out in the notice. 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.

CPA s.7

- 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 from the discovery of the offence or the deadline for a contravened planning infringement notice.

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.

7.2.5 Can an infringement notice be withdrawn?

IA s. 18, CPA s.7

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 'statute of limitations' for offences under the Act and therefore the time permitted for bringing a proceeding in the Magistrates' Court.

7.2.6 When might withdrawal of a notice be appropriate?

IA s. 18(4)

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

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

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

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

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 and Environment Act 1987* i.e. commencing proceedings in the Magistrates' Court or applying for an enforcement order at VCAT.

7.2.7 Internal Reviews

IA Act s. 22

An alleged offender or their representative may apply to the responsible authority for review of the decision to serve the infringement notice.

IA Act s. 24;
I(RPD&F) Regs
r.10

The review must be undertaken by an officer not involved in the issuing of the infringement notice. Usually this is a more senior person in the agency. Reviews must be completed within 90 days after the agency receives the application. However, this can be extended if the agency seeks additional information to consider the matter.

Once the decision is made, the agency must provide the applicant with written confirmation of the decision within 21 days.

You can find more information about internal reviews in the Attorney-General's Guidelines to the *Infringements Act 2006* available on the Department of Justice website, www.justice.vic.gov.au.

7.2.8 Paying penalties

PEA ss. 129

Penalties are to be paid directly to the responsible authority. Most councils provide for payments online, over the phone, by post or in person. Contact the relevant council to determine their payment method options.

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 any required additional steps are not taken by the date specified.

7.3 Enforcement orders

7.3.1 What is an enforcement order?

An enforcement order is intended to prevent or stop unlawful planning activity and to achieve reinstatement. Enforcement order proceedings are not designed to punish by way of a financial penalty. Part 6 - Division 2 of the Act addresses prosecution which is discussed below in Section 7.4 of this chapter.

PEA s. 114

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

It is important that the system allows any person to apply for an enforcement order, as it provides:

- a form of sanction against an authority that is not properly enforcing the planning scheme, (such as if a responsible authority is reluctant to take action on a particular case or where it is itself acting in contravention of planning laws)
- protection to an authority from unwarranted demands that it take enforcement action, (that may not be appropriate or in the public interest).

An individual can take the matter directly to VCAT rather than relying on the responsible authority.

A responsible authority is able to seek an enforcement order through VCAT at the same time as it prosecutes a planning offence in the Magistrates' Court (and seek an appropriate penalty).

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.

7.3.2 How is an enforcement order made?

PEA s. 114

A person seeking an enforcement order may apply to VCAT for the order. An enforcement order can be issued against an owner, occupier or any other person who has an interest in the subject land, such as a developer.

An application for an enforcement order is made to VCAT using the Application for Enforcement Order and Interim Enforcement Order Form. A fee is payable and VCAT provides various lodgement options. The form and VCAT's *Practice Note PNPE4 – Enforcement Orders and Interim Enforcement Orders* which provides guidance on the procedure to be followed in relation to enforcement orders, are available on VCAT's website, www.vcat.vic.gov.au.

PEA s. 115

When a person applies for an enforcement order, VCAT will direct they 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 any other persons that may be affected by the grant of the enforcement order.

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.

7.3.3 Options for the respondent to an enforcement order

On being served with an application, a person against whom an order is sought ('the respondent') has two options:

PEA s. 117

1. **Contest the application:** This is done by lodging an objection with VCAT under schedule 1, clause 56 of the *Victorian Civil and Administrative Act 1998*. VCAT must then give specified persons a reasonable opportunity to be heard or to make written submissions in respect of the application.

PEA s. 116

2. **Take no action:** If no other objections are lodged from other relevant parties, VCAT may directly make an order under section 116 or may reject the application. The order may be in the terms set out in the application or in different terms if the Tribunal thinks fit.

7.3.4 Objections to an application for an enforcement order

VCATA Sch. 1
Cl. 56

Relevant interested or affected parties may object to the grant of an enforcement order by lodging a statement with VCAT within 14 days from the date of service of the application. This includes a person against whom an order is sought (for situations where they may believe there is no contravention or an order ought not to have been made in the circumstances).

An objection must be in writing and must set out the grounds for making the objection using VCAT's *Form B - Statement of Grounds*. This Form will be included with the copy of any application for enforcement order that is served on relevant parties. A copy of any objection must also be served on the applicant and the responsible authority (if not the applicant) within the 14 day period.

PEA s. 116

If VCAT does not receive any objections to an application for an enforcement order, it can make any order it thinks fit (in accordance with section 119 of the Act – 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 will typically schedule a hearing to consider the matter. All relevant parties will be sent a notice of the hearing. If the applicant, respondent or any other affected person does not attend the hearing VCAT may make orders in that person's absence.

PEA s. 117(2),
PEA s. 119

Following the consideration of all relevant matters VCAT may reject the application, or issue an enforcement order in accordance with section 119 of the Act 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 things be done within a specified period to restore the land:
 - as closely as possible to its condition before the contravention occurred; or
 - to some other specified condition; or
 - to some other condition acceptable to the responsible authority or a specified agency, or
 - otherwise ensure compliance with the Act, scheme, condition of planning 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.

7.3.5 Awarding costs

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

VCATA s. 109

Although enforcement proceedings warrant a different approach to costs than that taken in normal planning reviews, the successful party is not entitled as a matter of course to being awarded costs. Each case must be viewed on its merits.

7.3.6 Interim enforcement orders

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.

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. Refer above to Section 7.3.2 of this chapter for information about the form and procedures.

Interim enforcement orders are similar to interlocutory injunctions made by courts. The purpose of these proceedings is to preserve the status quo until the hearing and subsequent determination of the case.

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 a prompt response.

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.

7.3.7 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 under the *Victorian Civil and Administrative Tribunal Act 1998* (which is not a penalty available for prosecution under section 126 of the Act) and fines.

VCATA s.122

An enforcement order that has been contravened can be filed in the Supreme Court. The enforcement order effectively becomes an order of the Supreme Court and can be prosecuted accordingly.

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.

7.4 Prosecution for a breach of the Act

7.4.1 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, planning permit or section 173 agreement, or an 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 take place in the Magistrates' Court. Prosecution for a breach of an enforcement order or interim enforcement order under section 133 of the VCAT Act, takes place in the Supreme 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 a reasonable doubt.

7.4.2 When is it appropriate to prosecute for an offence?

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

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

PEA s. 127

If the responsible authority is concerned about continuing unlawful use of land, prosecution for the offence may be the most appropriate remedy. A penalty of up to 1200 penalty units is provided. If the offence does not stop when a person is convicted, a further penalty of up to 60 penalty units per day, for as long as the offence continues, may be applied. The continuing penalty will most often make the offender cease the offending use. (See Section 7.1.6 of this chapter for information about penalty units).

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

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

PEA ss. 122(5)

Even if the offence relates to an alleged unauthorised use, it may still be preferable to seek an enforcement order to direct that the use cease, especially if there is room for some dispute as to whether the use in fact breaches the planning scheme. The standard of proof necessary at VCAT is a civil standard (balance of probabilities) which is less than the criminal standard (beyond a reasonable doubt) which applies in the Magistrates' Court. Additionally, VCAT may be better placed than the Magistrates' Court to consider technical interpretation matters. There is the added consideration that, if VCAT makes an enforcement order, 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 (powers of entry). 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.

(See Section 7.1.7 of this chapter for information about penalty units.)

7.4.3 Procedure in prosecution

MCA s. 25

Prosecution normally takes place in the Magistrates' Court which holds jurisdiction to hear and determine (amongst other things) all summary offences. An offence under the *Planning and Environment Act 1987* is a *summary* offence - an offence that can be heard by a magistrate sitting alone, rather than a judge and jury.

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 a body corporate (also known as a corporation) commits an offence against a specified provision of the Act, an officer of the body corporate also commits an offence against the provision if the officer failed to exercise due diligence to prevent the commission of the offence by the body corporate. The specified provisions are sections 48(2), 93(3), 126(1), 126(2), 126(3) and 137. Section 128(3) of the Act sets out the matters a court may have regard to in determining whether an officer of a body corporate failed to exercise due diligence. An officer of a body corporate may:

- rely on a defence that would be available to the body corporate if it is charged with the same offence, and in doing so, bears the same burden of proof as the body corporate
- commit an offence whether or not the body corporate has been prosecuted for, or found guilty of, that offence.

PEA s. 129

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

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

VCATA s. 98(1)

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

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

7.5 Injunctions

7.5.1 Types of injunction proceedings

An injunction is a court order that requires a party to do or refrain from doing a specific act. A party that fails to comply with an injunction faces penalties and may have to pay damages or accept sanctions.

In planning, 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 or the Tribunal for an injunction restraining any person from contravening an enforcement or interim enforcement order. The other option is a general common law injunction.

SCA ss. 31, 33, 37; CCA 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.

VCATA s. 123

The Tribunal also has the power to grant an injunction applied for under section 125.

In addition to a section 125 injunction, a responsible authority has the option to seek a general common law injunction. The two types of injunction are discussed in more detail below.

7.5.2 Section 125 injunctions

PEA s. 125

A section 125 injunction is used to restrain a person from contravening an enforcement order or interim enforcement order.

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

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

7.5.3 General common law injunctions

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 a final or permanent injunction is made after a full hearing of the case.

A prima facie case (in common law, evidence that would be sufficient to prove a particular proposition or fact, unless rebutted) must be made out for an interlocutory injunction and the court may require an undertaking as to damages from the person seeking the injunction.

Legal advice should generally be sought before commencing such action and in preparing the required court documents.

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

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

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

7.6 Cancellation and amendments of permits

7.6.1 Can a permit be cancelled or amended?

PEA s. 87

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

VCAT may only do this when there has been:

- material mis-statement or concealment of facts in the original permit application; or
- a substantial failure to comply with the conditions of the permit, or

- a material mistake in the granting of the permit, or
- a material change of circumstances since the permit was granted, or
- a failure to give notice as required by the Act.

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

7.6.2 Who may apply for cancellation or amendment?

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

The responsible authority or specified persons can apply to VCAT for an order cancelling or amending a permit.

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 its *Practice Note PNPE3 - Cancellation and Amendment of Permits and Stop Orders*. The practice note gives guidance as to the procedure to be followed in relation to applications for the cancellation and amendment of planning permits. The form is available on VCAT's forms and guides webpage at www.vcat.vic.gov.au.

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 Section 7.6.4 of this chapter for more details.

7.6.3 Hearing and order

VCATA Sch 1
Cl 56

A person seeking to oppose an application for cancellation or amendment must file a 'statement of grounds' with VCAT. VCAT's *Form B - Statement of Grounds* should be used when filing a statement.

PEA s. 90A

The Act specifies what VCAT must take into account in coming to its decision. These are set out in section 84B(2).

The approach to costs in these types of proceedings is much the same as that in enforcement order proceedings. See Section 7.3.5 of this chapter.

PEA s. 92; PE
Regs r. 38, 39

If an order is made cancelling or amending a permit, the responsible authority must serve notice of that within 7 days of receiving VCAT's decision. The notice must be given to:

- the responsible authority
- the owner and the occupier of the land concerned
- any person who asked for the cancellation or amendment of the permit
- any relevant referral authority
- any other person who VCAT considers may have a material interest in the outcome.

7.6.4 Compensation obligations

PEA s. 93, 94(1),
(4)

Where a stop order is made, pending a hearing of a request to cancel or amend a permit and VCAT ultimately decides not to cancel or amend the permit, an 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 extensive compensation to the (former) permit holder, unless the reason for cancellation or amendment was due to:

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

7.7 Evidence

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

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

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

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

VCAT requires a more stringent standard of evidence in enforcement proceedings and in permit cancellation and amendment proceedings than in other types of reviews. 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.

The standard of evidence required at VCAT is a civil standard - 'on the balance of probabilities' which is less than the criminal standard - 'beyond a reasonable doubt' which applies in the Magistrates' Court (relevant in planning prosecutions).

7.7.1 Proof of formal matters

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

PEA ss. 139 – 146; LGA s. 242

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

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

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

CPA s. 72

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

7.7.2 Evidence of other matters

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

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

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

PEA ss. 135

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

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

7.8 Brothels

SWA s. 3

A ‘brothel’ means any premises made available for the purpose of sex work by a person carrying on the business of providing sex work services at the business’s premises.

SWA ss. 21A, 75

The *Sex Work Act 1994* creates numerous offences in relation to the operation of brothels. Only some of these strictly relate to planning laws.

SWA ss. 80 – 85

In addition to the normal enforcement mechanisms generally available, the *Sex Work 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.

SWA 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. Authorisation of a council officer is not provided under the *Sex Work Act 1994*. In such circumstances council would rely upon the overarching authorisation set out in section 232 of the *Local Government Act 1989*.

SWA ss. 80(3A),
83, 85, 89

Other provisions of the *Sex Work Act 1994* facilitate enforcement by providing procedural aids not found in, or more flexible than those contained in, the *Planning and Environment Act 1987*.

7.9 Using other legislation for enforcement

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 relevant state health department 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 *Sex Work Act 1994* (for illegal brothels) – contact the council or the Victoria Police Force.

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

7.10 Other information sources

Further reading and assistance can be found on the VCAT website. The Planning and Environment List practice notes are especially helpful (Refer: www.vcat.vic.gov.au). In particular:

- VCAT Practice Note PNPE3 - *Cancellation and Amendment of Permits and Stop Orders*.
- VCAT Practice Note PNPE4 - *Enforcement Orders and Interim Enforcement Orders*.

Another useful source of other information is LexisNexis’ guide to planning and environment law in Victoria.

7.11 Enforcement checklist

Delegation and authorisation

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

Nature of offence

- Have the nature and effect(s) of the alleged contravention been clarified for example, activity, person responsible, identity of the land?

Appropriate method of enforcement

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

Others may be needed subsequently.

Entering a property

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

Evidence

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

Compliance

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

Payment of penalty

- Has the appropriate penalty payment been received?

AGREEMENTS

8

Contents

8.1. What is a section 173 agreement?	3
8.2 Parties to an agreement	3
8.3 When should an agreement be used?	4
8.3.1 Advantages of agreements	4
8.3.2 When not to use an agreement.....	5
8.3.3 What can an agreement cover?.....	5
8.4 Procedure for making and amending an agreement	6
8.4.1 Negotiating an agreement.....	6
8.4.2 Content of an agreement	6
8.4.3 Availability of agreement.....	7
8.5 The form of an agreement	7
8.5.1 Date and parties to agreement.....	8
8.5.2 Recitals	8
8.5.3 The Agreement.....	8
8.6 Procedure for recording an agreement	10
8.7 Amending or ending an agreement	11
8.7.1 Step 1 – Responsible authority’s in principle support	12
8.7.2 Step 2 – Notice of the proposal - ‘Advertising’	12
8.7.3 Step 3 – Responsible authority’s decision	12
8.7.4 Step 4 – Notice of decision	13
8.7.5 Step 5 – Implementing the decision	13
8.8 Reviews and enforcement in relation to agreements	14
8.8.1 Application to VCAT for an amendment to a proposed agreement.....	14
8.8.2 Reviews in relation to ending or amending of agreements.....	14
8.8.3 Application to VCAT for an interpretation of an agreement.....	15
8.9 Other agreements	15

8.1. What is a section 173 agreement?

PEA s. 173

The responsible authority can negotiate an agreement with an owner of land to set out conditions or restrictions on the use or development of the land, or to achieve other planning objectives in relation to the land.

These agreements are commonly known as section 173 agreements. The power to enter into the agreement arises under section 173 of the *Planning and Environment Act 1987* (the Act).

Like other agreements, a section 173 agreement is a legal contract. However, the benefit of a section 173 agreement is that it can be recorded on the title to the land so that the owner's obligations under the agreement bind future owners and occupiers of the land. A section 173 agreement can also be enforced in the same way as a permit condition or planning scheme.

The purpose of an agreement is to make it easier to achieve planning objectives for an area or particular parcel of land than is possible when relying on other statutory mechanisms.

8.2 Parties to an agreement

PEA s. 173

The Act provides that a section 173 agreement can be entered into between a responsible authority and an owner of land (normally the registered proprietor) or a purchaser of land in anticipation of that person becoming the owner.

Where the agreement is entered into with a prospective owner, it does not bind the existing owner unless the existing owner agrees. Normally, an agreement with the prospective owner will specify that the agreement does not commence operation until that person becomes the owner of the land.

Provided the responsible authority and owner (or prospective owner) are parties to a section 173 agreement, other persons or bodies may be additional parties to the agreement and become bound by the terms of the agreement. This may include, for example:

- a planning authority or referral authority where it is useful for that body to coordinate its powers or functions in relation to the land; or
- a developer or occupier with an interest in the development or use of the land.

PEA s. 182A

It is not possible for a section 173 agreement to be entered into with a developer or occupier of land without the owner or prospective owner also being a party. This is because the owner must agree to the obligations under the agreement being recorded on the title to the land.

After an agreement has been entered into, parts of the land which are subject to the agreement may pass into separate ownership through subdivision or by sale of separate lots.

If such land is transferred to another person, the new owner becomes an additional party to that agreement. This means that obligations under an agreement are assigned to subsequent owners of separate holdings.

8.3 When should an agreement be used?

Before deciding to use a section 173 agreement, a responsible authority should carefully consider other mechanisms available to achieve its desired planning objective.

Section 173 agreements can be complex and costly to administer and are difficult to amend or end, particularly after the affected land is subdivided.

8.3.1 Advantages of agreements

The advantages of a section 173 agreement include:

- it can be recorded on the title to land and become binding upon future owners
- unlike a planning scheme provision or permit condition, which allows something to be done, a section 173 agreement can expressly require something to be done. This is particularly useful where a responsible authority wants to guarantee certain outcomes prior to, or as part of, the granting of a planning permit for a specific use or development
- an agreement can set out a level of detail or site-specific information which is difficult to include in a permit condition or other form of planning provision
- unlike restrictive covenants, a section 173 agreement can include positive covenants and thus include performance criteria or more innovative arrangements for the use or development of land
- an agreement can create positive obligations on a responsible authority or other parties and thus achieve broader planning objectives than a permit
- an agreement can continue to operate and impose restrictions on land even if the need for a permit ceases and the need to operate under that permit no longer exists.

8.3.2 When not to use an agreement

An agreement cannot and should not be used as a basis for trying to extend an authority's powers under the Act. A section 173 agreement cannot authorise any use or development contrary to the planning scheme or a permit. This means that an agreement cannot provide for less restrictive provisions than those in a planning scheme or permit, such as allowing a use or development which is otherwise prohibited. However, an agreement could provide for more restrictive provisions than those in the planning scheme or a permit, such as prohibiting or placing greater restrictions on a use or development which is otherwise allowed.

An agreement is not a substitute for planning provisions and should not be used if an objective can be met through a permit condition. Before requiring a section 173 agreement, the responsible authority must ensure that the issue involved really requires an agreement rather than a clearly worded permit condition.

For example, an agreement should not simply provide for certain works to be done to the satisfaction of the responsible authority, when a similar condition could just as easily have been included in a permit.

An agreement is a contract and should not be entered into without prior legal advice. If an agreement is not carefully drafted, there may be difficulties in enforcing or amending it.

8.3.3 What can an agreement cover?

The Act allows the section 173 agreement to provide for:

- the prohibition, restriction or regulation of the use or development of land
- conditions subject to which the land may be used or developed for specified purposes
- any matter intended to achieve or advance the objectives for planning in Victoria under the planning scheme or an amendment.

This provides a wide scope for agreements. However, there should generally be a connection between the agreement and the specific planning outcomes sought to be achieved in relation to the land over which the agreement will be recorded.

Section 173 agreements have been used in a wide variety of matters. Some examples are:

- coordination of development with adjoining landowners or other regulatory authorities
- to provide for staged developments
- rehabilitation of property, repair of the environment, heritage protection or vegetation protection
- provision of community infrastructure or specific development infrastructure – such as open space or facilities on the land or nearby land
- securing developer contributions
- restrictions on change of use, or abandoning existing use rights

- limits on future development, including neighbourhood agreements to protect neighbourhood character
- planning ‘trade-offs’, such as a planning concession on one property based on a commitment to do something on another property.

8.4 Procedure for making and amending an agreement

8.4.1 Negotiating an agreement

Negotiating agreements can be involved and time-consuming. Therefore the objectives must be clear and must relate to the planning approval process. The most successful agreement is one in which both parties actively consider and negotiate conditions, without viewing it as a technique for restricting development by the responsible authority. The focus of all parties should be joint problem-solving and achieving a performance-oriented planning outcome for the land.

While agreements are generally negotiated, a section 173 agreement can sometimes be required by a planning scheme or a permit condition prior to the commencement of a specific use or development. To avoid any perception that the responsible authority has an undue negotiating ‘advantage’, an authority should be careful not to act unreasonably in seeking planning concessions or other covenants in the agreement beyond those necessary to achieve its proper planning objectives for the land.

PEA s. 188

To avoid delays in negotiations, it is useful for the responsible authority to delegate negotiating powers to officers who can liaise with the relevant parties and report to the authority as required.

8.4.2 Content of an agreement

PEA s. 174

The Act details the matters an agreement can address. An agreement can be more positive and specific than a permit condition. In this way it can be used as an effective means of ensuring performance of obligations and, if there is a need, attaching the obligations in the agreement to the land.

PEA s. 174(1)

An agreement must bind the owner of the land to the covenants specified in the agreement. This means that the primary purpose of the agreement is to set out the owner’s obligations in a manner which can be clearly enforced against the owner or future owners of the land.

Care must be taken by a responsible authority when defining its own obligations (if any) under an agreement. The responsible authority has no power to enter into an agreement which obliges it to exercise a statutory discretion in a particular manner in the future. For example, if an owner is prepared to enter into an agreement which is conditional upon the approval of a planning scheme amendment, then the agreement should specify that it does not commence until the amendment is approved. If the amendment is not approved, the owner will not be bound by the agreement. The agreement should not attempt to bind the responsible authority to the future approval of the amendment or the grant of a permit, as this would fetter the future exercise of its statutory discretion and be beyond its power, and therefore be subject to legal challenge.

- PEA s. 180 An agreement must not require or allow anything to be done which would breach a planning scheme or a permit. An agreement can become unnecessarily complicated by including an array of matters between the responsible authority and the owner, or between the owner and other parties to the agreement, with different or unspecified end times. Any obligation set out in a section 173 agreement should only be put in place with the intention that it would run with the land as a covenant and be enforced under the Act.
- PEA s. 175 Bonds and guarantees may form part of an agreement, with provision for forfeiture of money if the owner fails to carry out the agreement to the satisfaction of the responsible authority. This does not apply if the responsible authority is entering into an agreement with a Minister. An agreement must not require a Minister to provide a bond or guarantee to the responsible authority.
- PEA ss. 176, 177 An agreement will usually begin immediately after it is executed (by way of signature of all parties to it in the presence of at least one adult witness who is not a party to the agreement). However, the Act allows a date to be specified or for the commencement to be tied to a specified event, including a planning scheme amendment coming into operation or a permit being granted. This can be useful if the obligations under the agreement are tied to a specific use or development. The same triggers can be used for the ending of an agreement. An agreement can also be ended by agreement between the responsible authority and all persons bound by any covenant in the agreement.

8.4.3 Availability of agreement

- PEA s. 179 The responsible authority must keep a current copy of each agreement at its office and make it available for public inspection free of charge.
- If an agreement is recorded on the title to the land, the copy lodged for record is available for inspection as part of a search of the certificate of title.
- PEA s. 17(2) If the coming into effect of an agreement is conditional on a planning scheme amendment coming into operation, and the agreement is executed prior to exhibition of the amendment, a copy of the agreement must be forwarded to all parties who receive a copy of the amendment.

8.5 The form of an agreement

- An agreement must clearly and precisely set out the obligations and rights of the parties. Generality, vagueness and ambiguity must be avoided.
- PEA s. 174(1) The agreement must be in writing, made under seal and signed by all the parties in the presence of at least one adult witness who is not a party to the agreement. For the responsible authority or any party which is a company, the common seal of the authority or company will need to be affixed in accordance with its legal requirements. Where there is a clear written delegation, an officer of the responsible authority may be able to seal the agreement on the authority's behalf.
- Ensure that sufficient original copies of the agreement are signed and sealed to cover the needs of the Registrar of Titles for recording in accordance with section 181. Copies are also needed for each party and the responsible authority.

The basic elements of an agreement are listed below to give some insight into the sorts of things which need to be considered before seeking legal assistance in drafting the document. This information is not necessarily exhaustive.

8.5.1 Date and parties to agreement

The heading of the agreement should contain the date of the agreement and identify the parties, for example the responsible authority and the individual or company who owns the subject land. The name of the owner of the land should be consistent with what appears on the title. A title search should be undertaken to confirm the owner of the land.

Addresses should be included for all parties. Companies should include an Australian Company Number (ACN). In some cases there will be additional parties to the agreement, such as another government agency, a developer or an occupier. Similar information should be included for these parties.

8.5.2 Recitals

This section gives the background to the agreement so that the operative provisions can be readily understood. It should clearly identify:

- the land to be encumbered, by reference to the certificate(s) of title on which the covenants will be recorded and also by reference to a plan if appropriate (the street address of the land should also be inserted)
- the owner (or prospective owner) of the land
- why the agreement is being entered into
- the municipal jurisdiction and the responsible authority for the administration and enforcement of the related planning scheme - for example, 'the land is within the Gumnut Planning Scheme for which the Gumnut City Council is the responsible authority' (also add zoning information if this is relevant)
- other parties, if any, and the basis on which they are necessary parties.

The responsible authority should conduct a title search to ensure that all the relevant land is referred to in the agreement; otherwise there may be problems with registration or enforcement. This section should also indicate whether a planning permit or an amendment to the planning scheme affects the land and the basis of the agreement.

8.5.3 The Agreement

This section details what each party to the agreement is agreeing to do. Depending on the detail of the agreement it may include the following:

Definitions and interpretation

Important terms should be defined. This helps to prevent potential legal problems. It should be clearly stated that the agreement is made pursuant to section 173 of the Act.

Effect of agreement

This requires the parties to indicate their intention to be bound by the agreement and should indicate that the agreement will run with the land and bind future owners.

It is common practice to include a term requiring the owner to do all things necessary to enable the responsible authority to submit the agreement with the Registrar of Titles so that it can be recorded on title in accordance with section 181 of the Act.

Procedural terms

The linking of the agreement to any planning permit or planning scheme amendment should be set out if necessary.

The commencement or completion times of the agreement should be clearly set out, including whether commencement or completion is tied to a specific event.

Points of agreement

The points of agreement detail what each party is undertaking to do and may include a bond or guarantee by the owner. The covenants should be clearly identified for example, *'the owner of the subject land covenants that...'*. The covenants should be specific and provide sufficient detail of the obligations to enable the covenants to be clearly understood and enforceable.

There are legal difficulties in incorporating personal obligations in a section 173 agreement, intended for a specific person. However, if for some reason personal obligations are being included in an agreement (such as a condition that is relevant only to the initial developer of the land), these must be clearly separated and identified to avoid confusion with any covenants that will run with the land, and bind future owners or other parties.

The responsible authority should try to foresee how the agreement will operate in the future to ensure that the need for any amendments to the agreement are minimised. In particular, if land affected by an agreement is subsequently subdivided, the agreement will ordinarily affect all the new titles unless the agreement specifies otherwise. This may not be what was intended by the parties and may lead to difficulties in amending the agreement or releasing individual allotments. Where possible, the agreement should set out the effect of the agreement in relation to the original parcel of land and on any subsequently subdivided allotments.

Dispute resolution

If an agreement relies heavily on performance criteria, it may be advisable to include a dispute resolution clause. The Victorian Civil and Administrative Tribunal (VCAT) has only limited jurisdiction to resolve disputes where matters require the consent or satisfaction of the responsible authority.

Service of notices

A party to an agreement may be required to advise other parties of certain information (such as when certain works have been completed). In these cases, the agreement should describe the manner in which this notice is to be given (for example, in writing, within a specified time period and to a specified address).

Lapse or termination

Many agreements will also include a time clause (that is, the agreement lapses after a certain period of time or if planning provisions are amended). Agreements can also require subsidiary agreements at a later date and can make provisions conditional upon approval from another authority (for example, the Roads Corporation).

Cost apportionment

Many agreements list which of the parties are to be responsible for any associated costs. This is a matter for negotiation between the parties, although it is common for a responsible authority to require that an owner meet the authority's costs in the preparation of an agreement where the agreement is for the primary benefit of the owner.

8.6 Procedure for recording an agreement

PEA ss. 181, 182;
PE Regs r. 59,
Form 21

The purpose of recording an agreement on title is to ensure that the obligations in the agreement run with the land and therefore bind all future owners of the land.

An application to record an agreement must be made without delay. The responsible authority should lodge a copy of the agreement with the Registrar of Titles using the prescribed Form 18. A fee is payable. Relevant fees are specified on the property and land titles page of the department's website.

The Registrar of Titles cannot record an agreement over Crown Land or common property.

PEA s. 221(4)
& (5)

Agreements entered into before 28 October 2013 are not obliged to be recorded on title. The discretion to record these earlier agreements rests with the responsible authority. A responsible authority must however apply to record an agreement entered into before 28 October 2013, without delay, if it is amended after that date.

PEA s. 179

The responsible authority must keep a copy of each agreement, indicating any amendment made to it, available at its office for any person to inspect during office hours free of charge.

Mortgagee's Consent

The duplicate certificate of title does not need to be produced to the Titles Office to record an agreement. The record is only noted on the original title held at the Titles Office in the same way as caveats and other covenants. This may mean that the custodian of the duplicate title, if not the owner (such as a bank/mortgagee), may be unaware of the making of the agreement and/or the effect of the agreement on its security.

Where this may be an issue, the responsible authority may require the owner to either notify the mortgagee or to obtain the mortgagee's consent before the agreement is established, particularly in situations where the owner's obligations under the agreement could materially affect the mortgagee's interests. It is best to involve the mortgagee early on in the process, as a request for their consent too late in the process could cause considerable delay if the mortgagee then requires changes to the agreement.

Cancellation or alteration of a recording of an agreement

PEA s. 183; PE
Regs r. 60, Forms
22, 23, 24

If an agreement is cancelled or amended, the responsible authority must, using the prescribed form, tell the Registrar of Titles to cancel or amend the record of the agreement.

It is particularly important to monitor agreements that have a termination date or event included as part of the agreement and to ensure that the Registrar is immediately notified of the ending of that agreement. This will avoid unnecessary complications for example, if land is subsequently subdivided and a covenant inadvertently placed on each individual lot because the Registrar was not advised of the ending of the obsolete agreement.

8.7 Amending or ending an agreement

PEA s. 177

An agreement may provide that the agreement ends wholly or in part or as to any part of the land on or after:

- the happening of a specified event
- a specified time
- the ending of the use or the development of the land for a specified purpose.

If the agreement does not specify when it ends, it can be ended by agreement between the responsible authority and all persons who are bound by any covenant in the agreement. An agreement can also be amended in the same way.

PEA ss. 178A-H;
PE Regs r. 55, 56

However, obtaining the agreement of all persons can take considerable time and may be impossible to achieve if there is opposition to the proposal or a large number of parties are involved.

Where the consent of all parties to amend or end an agreement cannot be achieved, a land owner (or a prospective landowner who has entered into an agreement) can apply to the responsible authority to have the proposal assessed.

The proposal can be to end the agreement wholly or in part or to end it in relation to a defined part of the land.

The process is similar to the process for making an application for a planning permit and can be broken down into the following key steps:

1. Responsible authority's in principle support
2. Notice of the proposal - 'Advertising'
3. Responsible authority's decision
4. Notice of decision
5. The decision takes effect

A responsible authority may require the applicant to pay the cost of preparing the amended agreement.

The responsible authority may, on its own initiative, also propose to amend or end an agreement.

8.7.1 Step 1 – Responsible authority’s in principle support

PEA ss. 178A,
178B, PE Regs
r. 55

An application to amend or end an agreement must be made in writing to the responsible authority. It must include the information set out in regulation 53A and it must be accompanied by the prescribed fee. Currently no fee is prescribed in the Planning and Environment (Fees) Interim Regulations 2014.

Section 178B sets out a number of matters that the responsible authority must consider when forming a view about a proposal. The matters required to be considered include the purpose of the agreement and the reasons why the responsible authority entered into the agreement in the first place.

The responsible authority must notify the applicant and owner (if a different person to the applicant) as to whether it agrees ‘in principle’ to the proposal. If the responsible authority does not agree in principle, that is the end of the matter. The applicant cannot apply to VCAT for a review of the responsible authority’s decision.

8.7.2 Step 2 – Notice of the proposal - ‘Advertising’

PEA ss. 178C,
178D, 178H,
184A(2)(a); PE
Regs r. 56, Form
18

If the responsible authority agrees in principle to a proposal (or proposes to end or amend an agreement of its own initiative) it must give notice (also known as ‘advertising’) of the proposal to:

- all parties to the agreement
- any other persons, if the responsible authority considers that the decision to amend or end the agreement may cause material detriment to them.

The notice must include the prescribed information set out in Form 18 in Schedule 1 of the Planning and Environment Regulations 2015 (the Regulations). The responsible authority may require the applicant to pay the costs of giving the notices.

Any person who is given (or ought to have been given) notice of a proposal may object to the proposal, or make any other submission in relation to the proposal.

If the responsible authority does not give notice of the proposal within 21 days of notifying the applicant that it agrees in principle to the proposal, the applicant may apply to VCAT for a review of the failure of the responsible authority to make a decision on the matter. This is discussed further in Section 8.8 of this chapter.

8.7.3 Step 3 – Responsible authority’s decision

PEA s. 178E

The responsible authority must not make a decision on a proposal until at least 14 days after the giving of the last notice.

Before making a decision on the proposal, the responsible authority must consider any objections and submissions together with matters under section 178B that it considered in forming its original view on the proposal.

The responsible authority may then decide to:

- amend or end the agreement in accordance with the proposal
- amend or end the agreement in a manner that is not substantially different to the proposal
- refuse to end or amend the agreement.

If there are objections or other submissions the responsible authority may also propose to amend or end the agreement in a manner that is substantially different to the proposal. If the responsible authority does decide to do this, it must give notice of the revised proposal as if it were a new proposal.

8.7.4 Step 4 – Notice of decision

PEA s. 178F, 184A; PE Regs r. 57, r. 48, Forms 19 and 20

If an objection or submission is lodged, the responsible authority must give notice of its decision to both the applicant and each person that made an objection or a submission. Where no objections or submissions are lodged, notice is given to the applicant.

A notice of a decision to amend or end an agreement must include the information set out in Form 19 in Schedule 1 to the Regulations.

A notice of a decision to refuse to amend or end an agreement must include the information set out in Form 20 in Schedule 1 to the Regulations.

Where a notice of refusal is issued, it must set out the grounds for the refusal.

The Act enables the applicant, a party to the agreement, an objector and any affected person to apply to VCAT for a review of the responsible authority’s decision. This is discussed further in Section 8.8 of this chapter.

8.7.5 Step 5 – Implementing the decision

PEA ss. 178G, 178I, 183; PE Regs r. 60, Forms 22, 23 and 24

If the responsible authority decides to amend or end an agreement it must not proceed to do so:

- until at least 21 days after the giving of any required notice of its decision
- where an application for review is made within the 21 day period, until the matter is determined by VCAT or withdrawn.

If the responsible authority amends the agreement then it must without delay:

- sign the amended agreement
- give a copy of the signed amended agreement to each other party to the agreement.

It is not necessary for the amended agreement to be signed or otherwise agreed to by any other party to the agreement. A party to an agreement is bound by the agreement as amended even though the party did not sign the amended agreement.

The responsible authority must without delay tell the Registrar of Titles of any amendment to an agreement or an ending of an agreement. This must be done in the manner prescribed under the regulations.

An amendment or ending of an agreement comes into effect on the day on which the Registrar of Titles:

- cancels in whole or part the recording of the agreement in the Register under section 183(2)
- makes a recording in the Register of the matters notified under section 183(1).

8.8 Reviews and enforcement in relation to agreements

8.8.1 Application to VCAT for an amendment to a proposed agreement

PEA s. 184; PE
Regs r. 61

A land owner can apply to VCAT for an amendment to a proposed agreement where a planning scheme or a permit makes the use or development of land for specified purposes conditional upon an agreement being entered into and the owner objects to any provision of the agreement.

The application for review must be made within 60 days after the applicant was given a copy of the proposed agreement.

The Tribunal may approve the proposed agreement with or without amendments.

8.8.2 Reviews in relation to ending or amending of agreements

PEA s. 178

If the responsible authority decides that it does not agree in principle to a proposal to amend or end an agreement, the matter does not proceed and the agreement remains in place unchanged. The applicant cannot apply to VCAT for a review of this initial decision.

Reviews of the responsible authority's failure to make a decision

If the responsible authority agrees in principle to a proposal the applicant may apply to VCAT for a review of the responsible authority's failure to make a decision if the responsible authority fails to:

- give notice of the proposal within 21 days of giving notice to the applicant that it agrees in principle; or
- decide on the application within 60 days of giving notice to the applicant that it agrees in principle.

PEA s. 184A;
184F; PE Regs
r. 62

The responsible authority may decide to amend or end the agreement at any time after the application for review is made and must inform VCAT's principal registrar if it does make a decision. However, the responsible authority must not proceed to amend or end the agreement or give notice of the decision except in accordance with the advice of the registrar.

Reviews of the responsible authority's decision

The applicant may apply to VCAT for a review of a decision by the responsible authority to:

- amend or end the agreement in a manner that is different from the proposal (if the applicant received a notice of the responsible authority's decision, the application for review must be made within 21 days after the responsible authority gave the notice); or
- refuse to amend or end the agreement (the application for review must be made within 60 days after the responsible authority gave notice of its decision).

In addition to the applicant, the following people can apply to VCAT for a review of the responsible authority's decision to amend or end an agreement:

- a party to the agreement

PEA s. 184B-E;
PE Regs r. 63, 64

- an objector
- any person who was entitled to object to a proposal to amend or end an agreement but did not object because the person was not given notice.

The application for review must be made within 21 days after the responsible authority gave notice of their decision.

An objector is entitled to notice of an applicant's application to VCAT for review of the responsible authority's decision or failure to make a decision.

VCAT decision on reviews

PEA s. 184G

VCAT may direct the responsible authority to amend or end the agreement, or it may determine that the agreement should not end or be amended. The responsible authority must comply with the direction without delay.

8.8.3 Application to VCAT for an interpretation of an agreement

PEA ss. 148, 149A(1A)

A specified person or a party to an agreement may apply to the VCAT for a determination of a matter relating to the interpretation of a section 173 agreement.

8.9 Other agreements

There are other forms of statutory agreements which affect the use and development of land. Some operate in a similar fashion to section 173 agreements and can be recorded on a title.

Examples of other statutory agreements include an agreement:

- for the preservation of heritage places under section 85 of the *Heritage Act 1995*
- to secure the completion of works or compliance with statutory requirements under section 21 of the *Subdivision Act 1988*. (These agreements can be less formal than section 173 but, if executed under seal, can be recorded as if they were section 173 agreements.)
- relating to exemptions from building regulations under the *Building Act 1993*.

PLAIN ENGLISH

9

Contents

9.1	Before you write	3
9.1.1	Decide your purpose	3
9.1.2	Know your audience	3
9.1.3	Refine your topic.....	4
9.1.4	Develop a sound structure.....	5
9.1.5	Use headings properly	6
9.1.6	Make sure your document is complete	7
9.1.7	Use an editor	7
9.1.8	Develop a house style.....	8
9.2	Effective language	9
9.2.1	Use the active voice	9
9.2.2	Use verbs not nouns`	9
9.2.3	Order ideas logically	10
9.2.4	Make information accessible	10
9.2.5	Use parallel structures	10
9.2.6	Place modifiers carefully.....	11
9.2.7	Ensure all sentence elements agree	11
9.2.8	Keep sentences short.....	12
9.2.9	Write complete paragraphs	13
9.3	The right words	14
9.3.1	Write positively.....	14
9.3.2	Avoid unnecessary words and information	15
9.3.3	Use simple and common words	16
9.3.4	Use reader friendly language.....	16
9.3.5	Use jargon carefully	17
9.4	Punctuation	17
9.4.1	Use a style guide.....	17
9.4.2	Punctuate for meaning	17
9.4.3	Punctuate consistently	21
9.5	Maps and graphics	22
9.5.1	Use diagrams and graphs for complex ideas	22
9.5.2	Make maps clear.....	22
9.5.3	Include all relevant information.....	22
9.5.4	Make information accessible	22
9.5.5	Make the message accurate	23
9.5.6	Check your graph is meaningful	23

9.6	Planning schemes	24
9.6.1	Use accepted forms of expression	24
9.6.2	Keep objectives and strategies separate	25
9.6.3	Make requirements clear	26
9.6.4	Make discretion (or lack of discretion) obvious	26
9.6.5	Using bulleted lists	27
9.6.6	Take care with definitions	27
9.7	A guide to grammatical terms	28

Writing in plain English means writing in a way that is clear to the readers. Plain English is based on communication principles that require you to write with your readers in mind and with a clear message your readers can understand.

The *Ministerial Direction on the Form and Content of Planning Schemes* directs that a planning scheme or planning scheme amendment must be written in plain English.

This Chapter takes you through some principles of plain English that should be useful to statutory planners. It is divided into six parts:

- Before you write
- Effective language
- The right words
- Punctuation
- Maps and graphics
- Planning schemes

This chapter uses examples throughout that illustrate principles of plain English. These are represented as follows:

- ✓ good examples worth following, and
- ✗ bad examples worth avoiding.

9.1 Before you write

9.1.1 Decide your purpose

Think carefully about what you want to say. The purpose of a document determines not only its content but also its format.

9.1.2 Know your audience

Many writers make the mistake of writing about a topic from their own perspective, rather than that of the reader. Before writing, ask yourself the following questions:

- What do my readers already know about this topic? This will give you your starting point.
- What do they need to know for the purposes of this document? This will give you your direction.

By answering a series of questions you can develop a profile of your readers and adjust your writing specifically for them.

- Who reads statutory planning documents?
- Are there different types of readers?
- Will they all read from start to finish?
- What will different readers want from reading the planning scheme?
- How can my writing cater to the needs of all readers?

Knowing your audience helps you to make decisions about what information you should include, how you should arrange that information, and what kind of supporting detail will be required for the reader to understand your document.

You should present material differently for different audiences. Figure 1 shows the same material presented for different audiences:

Figure 1: Considering your audience

Community	Council officers
Gumnut Council announced today that it had acted to limit further subdivision of the Eastern Foothills area.	The Environmental Significance Overlay over the Eastern Foothills area was gazetted on 4 March 2007. The Overlay applies a minimum lot size of 4 ha, which will effectively stop all new subdivision.
Councillor Snuggle said that ‘the community was sick of the local character and environment being destroyed by developments that simply catered for out-of-town commuters.	A recent study by Council concluded that increased development in the area was destroying critical habitat of the endangered Eastern Beakless Parrot and lessening water quality in Little Creek.
This is a big win for the Foothills and the protection of the values of the area.’	
The ban on subdivision will apply immediately.	A further study by Council concluded that there was ample supply of rural residential land elsewhere in the municipality.

How to address your audience

In non-stutory writing, such as a guideline document or letter, address your readers directly as ‘you’, so they know you are referring to them. Refer to yourself as ‘I’ or ‘we’ (if you write on behalf of an organisation or person).

9.1.3 Refine your topic

Planners often try to say too much and, as a result, important information is obscured by unnecessary information. Clearly identify your main ideas and question everything that goes into a document. If it is not important, leave it out or move it to an appendix. Before starting to write, list those things that need to be part of your document and those that do not.

9.1.4 Develop a sound structure

Planning covers a range of different issues. For instance, traffic problems are also environmental problems, whereas urban design issues are also economic development issues. All issues facing a municipality can be categorised in a number of ways.

While planning issues are multi-dimensional, planning reports and planning schemes are one dimensional. There is just one string of text with a beginning, middle and end. The challenge is to fit a multi-dimensional subject into a one dimensional document.

There are many ways that a document can be organised:

- chronologically
- by process
- from general to specific
- from problem to resolution
- by stakeholders
- by infrastructure elements
- geographically
- by land-use types
- thematically
- alphabetically.

Choose a structure that best suits the issues you are dealing with.

It is important that you are consistent in the way you use themes in your document. For example, if you decide to include an explanation of the environmental, social and economic issues for each of the land use elements in your Municipal Strategic Statement (MSS), then repeat these themes consistently. Other themes should not be added at random.

How to assess the structure of your document

How easy is it to understand the structure of the text? Can you explain the structure of your MSS and local planning policies in, for example, three sentences?

After setting out the contents, look at the structure analytically.

- Is there a balance between the various sections or parts of the document?
- Is there a clear heading hierarchy, and has it been applied consistently?
- Read the headings: do they tell a logical story?
- Do the headings give a clear sense of what each chapter contains and accurately describe the text that follows?
- Is anything out of place?

Finding the logical order for your material might not be straightforward. Sometimes it is only after the material has been written and you are reviewing your work that the structure can finally be settled.

But remember that:

- chapters need to be organised within a document
- sections need to be organised within chapters
- paragraphs need to be organised within sections
- sentences need to be organised within paragraphs.

One way to make sense of the organisation of your document is to print out all the headings in your document so you can see the structure of your text. (Most word processors will let you do this automatically – find out how to use the ‘outline’ view in the software you use.)

9.1.5 Use headings properly

Headings provide the skeleton for your document. They help your readers to understand the structure of your document and to navigate through larger and more complex documents.

Each heading needs to be part of a clearly defined hierarchy. Avoid too many heading levels. Three levels should be sufficient for a document; occasionally four may be needed. The levels should relate clearly to each other.

Avoid unfamiliar words, acronyms or abstract images in headings:

- ✗ *The impact of SEPP N1*
- ✓ *Controls over noise from industry*

Avoid vague concepts:

- ✗ *Recommended conceptual development plan*
- ✓ *What do we want to achieve?*

Writing a heading as a question can be a useful technique for assisting readers. Determine what the section is about and then turn it into a question.

Keep formatting simple by:

- using a simple font for main headings
- using numbers only for the first two or three heading levels
- avoiding italics and bold styles together
- making lower level headings more like the body text of your document.

Finally, decide whether headings will be:

- presented in sentence case, or
- in Title Case, Where the Start of Each Main Word is Capitalised.

Whatever you choose, apply it consistently. In planning schemes, sentence case is used in headings.

Use the automatic style function on your word processor to:

- define particular styles for headings
- apply these styles consistently.

9.1.6 Make sure your document is complete

Make sure that your document is complete. It is not unusual to find planning documents that are not dated or have no obvious author or owner.

Does your document need:

- a title?
- page numbers?
- a date?
- an author – people or department?
- a contact address?
- a contents page?
- a list of figures?
- a bibliography?

For statutory planning documents it is important that the status of the document is clear. Is it:

- a draft?
- an exhibited copy?
- a copy revised after submissions?
- a copy for adoption?
- a copy as adopted?

If parts of a document are likely to be used independently, this information should be included as a header or footer on each page.

9.1.7 Use an editor

An editor can help ensure a high quality outcome for your work. An editor may undertake:

- structural editing – looking at the overall organisation of the document and the content
- copy editing – checking grammar, spelling and punctuation; ensuring that a house style has been used correctly and consistently; checking that facts are accurate
- proof correcting — checking a proof of the document for any remaining errors.

A common concern about using editors is that the editor ‘will change the meaning’ of my words. An experienced editor will discuss changes with the author so unintentional changes in meaning are avoided. Using the track changes function in your word processor also helps with monitoring changes made by an editor, allowing you to review their changes. Keep in mind that if a well chosen editor is not able to understand any subtleties in your writing then how can anyone else?

All readers will form their own view about what your text means. An editor’s review or a peer review can help ensure that there is as little scope as possible for the reader to draw the wrong conclusion from your writing. There is no room for ambiguity in planning schemes - a review by another person can help you find and address any ambiguity.

9.1.8 Develop a house style

A house style is a set of standards for written and graphic communication within an organisation. A house style will ensure that all internal and external documents are presented in a consistent style and layout.

In developing a house style there are a number of important points to work through. It is essential that:

- the house style is developed from recognised sources such as the Australian Government Publishing Service’s *Style Manual: For Authors, Editors and Printers*
- it is tested within the organisation
- all users have some introduction to the concept and specifics of a house style
- everybody who needs to apply it has a copy of it
- the house style is presented in an easily accessible format – generally a booklet that is distributed throughout the organisation or via the organisation’s intranet
- the house style document encourages users to make suggestions and comments
- the house style is easily and regularly updated.

A house style is useful only if it is applied consistently in all internal and external documents.

Who is doing what in this sentence? Well, 'the Northern Valley' is the subject of the sentence, so presumably as a user of water it is able to do something. But what? Perhaps 'generating' or 'demanding' something. It will be clearer to the reader if 'generation' and 'transference' are expressed as verbs. For example:

Over the next five years, the Northern Valley is likely to generate substantial demand for water to be transferred from existing allocations from the Big Creek.

Similarly, it is better to express the noun 'transference' as the verb 'transfer'.

9.2.3 Order ideas logically

Order your ideas in a way that makes sense to your readers. What do they need to know first? For example:

✘ *Before you fill in this application for a planning permit, read the instructions.*

✘ *Fill in this application for a planning permit after you read the instructions.*

What is the reader being asked to do and in what order? If you think about this then you would order the sentence quite differently:

✓ *Read the instructions before you fill in this application for a planning permit.*

9.2.4 Make information accessible

A good rule for communicating information is to think of a simple message that can be said in six to seven words and then provide the figures or details to support the fact. For example:

✘ *Some 18 per cent of the population of Southside are over 60 years of age and a further 57 per cent are aged between 20 and 49 years. Only five per cent of the population is under 5 years. The median age is 34 years.*

In this case, the message that the writer tried to communicate was that part of Gumnut has fewer children and young people. By relaying the key message first, followed by the detail, the information may be better communicated. For example:

✓ *Southside has fewer children and young people, but more young adults than the Gumnut average. Only 17 per cent of Southside's population is under 19 years of age compared with 24 per cent for Gumnut.*

This sort of information may be even better presented as a graph.

9.2.5 Use parallel structures

If two or more coordinated elements (words, phrases or clauses) occur together, they should have the same grammatical structure. For example:

✘ *Gumnut Shire is faced with a changing demographic as demonstrated by the ageing of the population, young people can't find work here and smaller household sizes are becoming the norm.*

It would be much easier for readers to work their way through the reasons for Gumnut Shire's changing demographic if the three elements listed had the same grammatical structure. For example:

✓ *Gumnut Shire is faced with a changing demographic. This is demonstrated by its ageing population, its lack of employment for young people and its smaller household size.*

Using parallel structures is very important in lists and outlines, as well as in sentences. If you begin a list with a noun, continue using nouns for the remainder; if you begin with a verb, continue with verbs. For example:

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>✘ <i>Urban design frameworks are:</i></p> <ul style="list-style-type: none">• <i>broad in scale, identifying only the most strategic issues</i>• <i>flexible and not definite</i>• <i>should go beyond just physical issues and take into account other issues such as activities, events, cultural aspects</i>• <i>providing a clear direction to allow development to fill in the detail.</i> | <p>✔ <i>Urban design frameworks:</i></p> <ul style="list-style-type: none">• <i>are broad in scale, identifying only the most strategic issues</i>• <i>are flexible and not definite</i>• <i>go beyond just physical matters, taking into account issues such as activities, events, cultural aspects</i>• <i>provide a clear direction, allowing development to fill in the detail.</i> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Tense also needs to be consistent for the first word of each point in a list.

9.2.6 Place modifiers carefully

A modifier is an optional word or phrase that gives the readers more information about an element in the sentence. Typically the modifier can be removed without affecting the grammar of the sentence. For example:

- ✘ *Walking into the yard the neighbour's illegal extension could be clearly seen.*

Here, whoever was 'walking into the yard' is not mentioned in the sentence, so the modifier (*walking into the yard*) has nothing to modify except '*the neighbour's illegal extension*', which is clearly not the intention as it is not capable of '*walking into the yard*'. '*Clearly*' is the other modifier in the sentence. The sentence needs to be recast so that the modifiers clearly relate to the element they are modifying. For example:

- ✔ *The enforcement officer walking into the yard could clearly see the neighbour's illegal extension.*

Take care where you place modifiers. Sometimes it is not clear which element of the sentence a modifier is intended to modify. In many cases this is not important, but in some cases it can lead to ambiguity. Consider the modifier 'totally' in the following sentence:

- ✘ *The plan he hoped would work totally eluded him.*

Is '*totally*' modifying '*work*' or '*eluded*'? Make sure it is clear which element is being modified. You can do this by placing modifiers as close as possible to the element they modify.

9.2.7 Ensure all sentence elements agree

Agreement helps readers understand the relationships between elements in a sentence. Generally, for example, agreement between a subject and its verb won't cause any problems:

- ✔ *Planners take litter traps very seriously.*

We know that the subject 'planners' is a plural noun and that we use the form of the verb 'take' with it. We wouldn't write the following:

- ✘ *Planners takes litter traps very seriously.*

In this sentence the elements of the subject (planners) and the verb (take) do not agree.

However, the relationship between some elements is not quite so clear – for example, with indefinite pronouns, such as ‘each’:

- ✓ *Each of the overlays addresses a separate issue.*
- ✓ *Each overlay addresses a separate issue.*
- ✗ *Each of the overlays address a separate issue.*

The first two examples are correct because the indefinite pronoun ‘each’ is the subject, is singular and demands a singular verb.

Collective nouns present a similar problem. For example:

- ✓ *The committee advising the council on traffic calming voted to disband itself.*

‘Committee’ is one entity although it is made up of a number of members. It is a singular noun and demands a singular pronoun.

One of the most problematic agreement problems is the use of the third person pronoun ‘he’ as a non-gendered pronoun. It is no longer appropriate to use ‘he’ to refer to both men and women. For example:

- ✗ *A planner is a professional who uses his training together with a degree of discretion when he is assessing planning permit applications.*

The problem with the pronouns ‘his’ and ‘he’ is that there really is no suitable non-gendered replacement, although ‘their’ and ‘they’ are candidates. The problem with ‘they’ is that it is plural and ‘he’ and ‘she’ are singular. The best solution is to use a plural noun:

- ✓ *Planners are professionals who use their training together with a degree of discretion when they are assessing planning permit applications.*

Using a plural noun is often a good solution, although it is not always possible.

9.2.8 Keep sentences short

Writers can sometimes fall into the trap of trying to include too much in one sentence or adding unnecessary qualifying or modifying words to simple ideas. Avoid this by reviewing your writing systematically to:

- aim for an average of 15 to 20 words per sentence
- express only one idea in a sentence
- place the most important part of the idea first
- avoid repetition
- use bulleted lists to break up complex information
- use punctuation to clarify sentence structure
- express qualifications or modifications as separate sentences
- put illustrations or examples into separate sentences.

For example, consider the following objective:

- ✘ *To reinforce and create residential environments that are economically and environmentally sustainable, liveable, have a sense of place and create these environments based on the integration of physical and social infrastructure and characterised by identifiable neighbourhoods, community focal points, a diversity of dwelling types and household mix and energy efficiency.*

This could be better expressed as a series of shorter objectives:

- ✓ *To ensure new residential development creates identifiable neighbourhoods that have a sense of place and clear community focal points.*
- ✓ *To provide a diversity of dwelling types for a range of household types.*
- ✓ *To ensure the integration of physical and social infrastructure.*
- ✓ *To create sustainable and liveable residential environments that reinforce the natural values and bayside character of the municipality.*
- ✓ *To promote energy efficiency in residential development.*

Unpacking a long complicated sentence is really the job of the writer, not the reader. See how separating the ideas into a list helps smooth the path through a long sentence for the reader.

Make sure that your sentences are also clear. Lack of clarity can be a problem, even in a short sentence. For example:

- ✘ *Each precinct contains different allocations for development rights.*

It is certainly short, but not at all clear. A longer sentence is clearer:

- ✓ *The amount of development that is allowed varies from precinct to precinct.*

9.2.9 Write complete paragraphs

Writers should structure paragraphs on the basis of their content and their function. A paragraph can introduce a new idea to the reader, it can illustrate this idea or present a related idea.

A successful paragraph is:

- complete – providing all the information the reader needs
- unified – built around a central idea with a consistent tone and point of view
- ordered – coherent, providing a pattern that makes sense.

You need to make sure that a paragraph gives your readers all the information they need on the topic:

- ✘ *It is recommended that Council adopt point 3 and 6 as set out in the above table in accordance with Council's consultation policy.*
- ✓ *It is recommended that the proposed controls over 42–48 The Boulevard be amended to exclude the stables area from the Heritage Overlay. Council officers are authorised to engage a heritage consultant to give advice on the stables area. This advice should then be provided to the owner of 42-48 The Boulevard for comment.*

Paragraphs need to be unified. They need to stick to the topic, tone and point of view. Decide on a topic for the paragraph and ensure that all the sentences work towards this topic. You also need to maintain a consistent tone within a paragraph, don't move from a formal to an informal tone or change point of view. It is not uncommon, for example, for writers to move from addressing the reader as 'you' to addressing them as 'the reader' – which is confusing.

It is also important that you show the reader how the sentences (and hence the ideas) in the paragraphs are related. These links are the 'invisible glue' within paragraphs. There are a number of ways in which writers show these relationships. Repeating key words is one way of doing this. For example:

- ✓ Costs of paper supplies have increased dramatically this year. As a result, staff have been asked to *restrict* their photocopying to the most important documents. Personal copying is being discouraged. Staff have so far complied with these *restrictions*.

Writers can also use pronouns to refer back to nouns previously used in the paragraph. Similarly, connectors, like the one at the start of this sentence, connect the reader to the previous sentence; this keeps the reader up with the writer. Be sure that your connectors make sense; don't risk misdirecting the reader:

- ✗ Developers are often unsure of council's *policies*. *They* need to be clear about their objectives. *Additionally*, Council officers need to fully understand *them*. It is *also* important that brochures and leaflets are used to explain the policies.
- ✓ *Policies* are often unclear. Make sure *they* express their objectives clearly so that developers and council officers can understand *them*. *Similarly*, make sure brochures and leaflets are easily understood.

9.3 The right words

9.3.1 Write positively

It is easier for readers to think positively than negatively. Double negatives, where negative terms are combined to give a sentence a positive meaning, should ideally be avoided. A reader has to untangle the meaning in a sentence using double negatives. If the same sentence is expressed positively it is easier to understand:

✗ *It is not impossible.*

✓ *It is possible.*

There is one type of double negative that is considered grammatically correct. It is often used to make a statement more subtle. An editor should take care not to lose the meaning when reviewing such a phrase. If somebody writes:

- They are not unwilling to discuss the problem.

He or she may not necessarily mean they **are** willing to discuss the problem. The use of 'not' together with 'unwilling' suggests that they may have some reservations about discussing the problem.

Do not express questions negatively. A question framed using positive language will more likely invite an accurate response because it is easier to find meaning in uncluttered writing. For example:

- ✗ *Is your pool unfenced?* Yes No
- ✓ *Is your pool fenced?* Yes No

Do not use multiple negatives that pile up until the sentence is impossible to decipher:

- ✗ *I do not say that there are no buildings in the relevant policy area that are not being used for purposes which are not ancillary to predominant uses that are discouraged by the policy.*
- ✓ *Some buildings in the policy area are being used for purposes contrary to policy.*

9.3.2 Avoid unnecessary words and information

Avoid repetition and unnecessary words and information. For example:

- ✗ *New buildings, and alterations and additions to existing buildings should be designed in accordance with the relevant requirements of the Gumnut Design Manual.*

In this passage there are many unnecessary words:

- ‘new buildings and alterations and additions to existing buildings’ – using just ‘buildings’ does not narrow the application of the requirement.
 - ‘be designed in accordance with’ – this can be replaced with ‘meet’.
 - ‘relevant’ – either it is obvious what is relevant in the guidelines, or there is a need to specify which requirements apply.
- ✓ *Buildings should meet the requirements of the Gumnut Design Manual.*

Avoid using phrases where one word would do. For example:

- | | |
|-------------------------------------------|------------------|
| ✗ <i>prior to</i> | ✓ <i>before</i> |
| ✗ <i>with the minimum of delay</i> | ✓ <i>quickly</i> |
| ✗ <i>meet at an agreed time and place</i> | ✓ <i>meet</i> |
| ✗ <i>in the majority of instances</i> | ✓ <i>usually</i> |

Avoid using **doublets** and **triplets**. These were popular in legal writing when a French and Latin word was used for the same concept – for example, ‘cease and desist’, ‘grant and demise’. However, doublets and triplets such as the following should not be used:

- ✗ *safe and sound*
- ✗ *pure and simple*
- ✗ *preserve, maintain and care for*
- ✗ *refuse and rubbish*

Avoid **empty phrases** that just hedge around the topic; say what you mean. For example:

- ✗ *This letter is to notify you of ...*

do not add any useful information.

However, do not make the mistake of deleting linking words that help the reader see the connections between sentences or paragraphs. In the following example, 'similarly' makes the relationship between the two sentences clear to the reader:

- ✓ *Retail floor space in Gumnut CAD will increase by 20 per cent from 2000 to 2010. Similarly, the number of car spaces will increase from 1250 to 1500 spaces.*

9.3.3 Use simple and common words

Use familiar, everyday words that readers will understand to express your ideas. For example:

- | | |
|--------------------------------------------------------------|-----------------------------------------------------------------|
| ✗ <i>Pursuant to our agreement...</i> | ✓ <i>As we agreed...</i> |
| ✗ <i>Your permit would normally be deemed to have lapsed</i> | ✓ <i>We would normally consider that your permit has lapsed</i> |
| ✗ <i>shall</i> | ✓ <i>must</i> |
| ✗ <i>as-of-right</i> | ✓ <i>no permit required</i> |
| ✗ <i>owing to the fact that</i> | ✓ <i>because</i> |
| ✗ <i>with the exception of</i> | ✓ <i>except for</i> |
| ✗ <i>administer</i> | ✓ <i>manage</i> |
| ✗ <i>a number of</i> | ✓ <i>several</i> |

Avoid using French and Latin words in your writing. For example:

- | | |
|----------------------|---------------------------------------------------|
| ✗ <i>inter alia</i> | ✓ <i>among other things</i> |
| ✗ <i>per annum</i> | ✓ <i>by the year</i> |
| ✗ <i>prima facie</i> | ✓ <i>at first appearance/before investigation</i> |

Of course, some French and Latin words are widely used in everyday language – 'de facto' and 'rendezvous'. Use them if you can be sure that your readers will understand them.

9.3.4 Use reader friendly language

Don't try to impress your readers with over-blown language. For example:

- ✗ *What are the key result areas for the application of a system of planning? They include housing stock adapted to the needs of the users and providing opportunities for disease management together with a properly designed street network with adequate capacity. Also included are a reduction in the adverse impacts of noises, air emissions, inappropriate signage and other adverse impacts of urbanisation that result from an inadequate system of regulation and/or a lack of engagement of the community. It is considered that economic development is an underpinning goal of urban planning but achievement of this goal must be balanced against the wider goals of public health impacts, infrastructure efficiency and visual amenity.*

When John Burns, author of the 1925 English Town Planning Act, stated the purpose of planning, he did so clearly and forcefully in the context of that time:

- ✓ *What is our modest object? Comfort in the house; health in the home; dignity in our streets; space in our roads; and a lessening of the noises, the smoke, the smells, the advertisements.*

When writing planning documents, it is useful to develop a clear sense of the sort of place you want to create. Try to imagine what that place will look like, what it will feel like to walk or travel in. Then write what elements are actually important about the place. To make the writing user friendly, keep things concrete and realistic. For example, write that the council aims:

✓ *To ensure that new buildings do not block views to the Norfolk Island Pines along Quay Street.*

Your readers, whether they agree or not with the objective, will know what you want to achieve. They will not know this if you write:

✗ *To preserve the valued landscape features and traditional vistas.*

9.3.5 Use jargon carefully

Jargon is specialised vocabulary. It may be appropriate if you are writing for specialists but it should be avoided in documents targeting a broader audience. It might be difficult for an unaccustomed reader to understand. If you must include jargon, keep it to a minimum and explain it. However, if you are writing for planners, you may not use:

✗ *uses that do not require a permit under the planning scheme.*

when you know planners will understand:

✓ *as-of-right uses.*

Always use as few words as possible to create your message and use language your audience will understand.

9.4 Punctuation

9.4.1 Use a style guide

While the extent to which you punctuate is generally a matter of individual style, there are a number of conventions that can enhance the clarity of your writing for the reader. It is worth developing a style based on these as quirky punctuation will trip up the reader just as quirky spelling will. Choose a good style guide and use it to check how and what you should punctuate.

The current edition of the Australian Government Publishing Service's *Style Manual for Authors, Editors and Printers* is a well recognised reference for punctuation conventions and guidance.

9.4.2 Punctuate for meaning

Punctuation affects meaning and emphasis and needs to be placed with care and insight. It also creates pauses for the reader that support clarity. Where it is placed depends on the grammatical structure of the sentence.

Are commas 'breathing marks'?

Perhaps you have been told to use a comma where you would take a breath. This is not good practice and can lead to misuse. Don't worry about the health of your readers; they will breathe without you showing them where.

How can I tell if the commas are in the right place?

Don't place a comma between the subject and verb. For example:

- ✗ *Writers who don't pay careful attention to punctuation, will find themselves making mistakes.*

Don't place a comma where it will break up the main clause of your sentence. Do not place a comma where it will separate subjects and verbs, verbs and objects, prepositions and objects:

✓ *The objectors acting on their own initiative have lodged an appeal against the development.*

Labels: SUBJECT, VERB, OBJECT, PREPOSITION

- ✗ *The objectors acting on their own initiative, have lodged an appeal against the development.*
- ✗ *The objectors acting on their own initiative have lodged, an appeal against the development.*
- ✗ *The objectors acting on their own initiative have lodged an appeal against, the development.*

Do not separate clauses with commas if they are referring to the same subject.

Separating them with a comma breaks up the meaning in the sentence:

- ✓ *The application was refused but it had some merit.*
- ✗ *The application was refused, but it had some merit.*

Do use a comma to separate clauses with different subjects when these clauses are linked in one sentence:

- ✓ *The application was refused, but the invitation was accepted.*

In this example the comma divides the two clauses – this works because they are each meaningful in their own right and they are talking about different things.

Do use commas in sentences to stop the reader misreading the sentence:

- ✗ *If you keep your audience in mind as you write your document should be reader-friendly.*
- ✓ *If you keep your audience in mind as you write, your document should be reader-friendly.*

Can I use commas to fix long sentences?

Don't use commas to try to fix poor sentence structure. Just because a sentence is long does not mean it needs a comma. The problems with the next example need more than a comma to fix:

- ✗ *The proposal to increase the minimum floor area requirement of extensions to dwellings in the Farming Zone to enable farmers with small land holdings to introduce proper environmental practices in line with council's policies was refused.*
- ✓ *The proposal to increase the minimum floor area of extensions to dwellings in the Farming Zone was refused. The proposal was made to enable farmers with small land holdings to introduce proper environmental practices in line with council's policies.*

How do I add essential and additional information?

Use a comma to divide introductory information from the main clause of the sentence. For example:

- ✓ *Following a detailed assessment of overshadowing, the application was refused.*
- ✓ *The application was refused, indicating sound planning practice.*

Use commas to mark off non-defining phrases or clauses but not defining phrases or clauses. For example:

- ✓ *The application, which was poorly documented and presented, was refused.*
- ✓ *The application that was poorly documented and presented was refused.*

When do I use a colon or a semi-colon?

Use the colon to ‘announce’ or ‘introduce’ an explanation, clarification, interpretation, amplification, illustration or quotation. For example:

- ✓ *The Big Creek Catchment Management Authority’s vision for Big Creek is simple: ‘a healthy river’.*
- ✗ *The Big Creek Catchment Management Authority’s vision for the Prescribed Watercourse is simply ‘a healthy river’.*

Take care not to use the colon between a verb and its object. For example:

- ✗ *The main disadvantages in working as a planner are: poor posture, bad eyesight and occasional bruising.*

The semi-colon is used to pull together and contrast two independent clauses – use the ‘;’ where you could use a ‘.’. For example:

- ✓ *Incorrect use of the semi-colon is common. Many writers are at fault.*
- ✓ *Incorrect use of the semi-colon is common; many writers are at fault.*

The semicolon offers the reader a pause that is longer than the comma and shorter than the full stop. It can be used to link two clauses that could be treated as separate sentences but that have a closer logical link than such a separation would imply.

Choosing between ‘which’ and ‘that’

When making an essential qualification use ‘that’; use ‘which’ when providing additional information about something being discussed. The use of ‘which’ and ‘that’ can be difficult to master. In most cases using one in place of the other does not alter meaning but in some cases it will. How do you interpret the following criteria?

- Indigenous trees, which have low water requirements, should be used in landscape areas.
- Indigenous trees that have low water requirements should be used in landscape areas.

A simple test is to imagine the sentence without the element between the commas and see if it still has the same meaning.

How do I punctuate between independent clauses?

Don't use a comma between independent clauses. Clauses that can stand alone as sentences are **independent clauses** – you can't make them into one sentence with a comma. If clauses are not joined by the coordinating conjunctions 'and', 'or', 'but', then they must be separated by a semi-colon or a full stop; a comma will not do. For example:

- ✓ *The application was contrary to every objective. Indeed, the application was refused.*
- ✓ *The application was contrary to every objective; therefore, it was refused.*
- ✗ *The application was contrary to every objective, indeed, it was refused.*
- ✗ *The application was contrary to every objective, it was refused.*

How do I punctuate a list using commas?

In punctuating a list you need to ensure that the items in the list are clearly delineated.

Use a comma to separate items in a list. For example we might conclude that planners need three things to work effectively: (1) background music, (2) a large airy office and (3) a tree outside the window. We can write this as:

- ✓ *Planners need background music, a large airy office and a tree outside the window.*

Don't use commas before or after a list. For example:

- ✓ *Background music, a large airy office and a tree outside the window are rare features in the work place.*

Use a comma to separate adjectives that could be joined by 'and'. If you can write:

- ✗ *Planners are always energetic and positive and happy.*

then you can write:

- ✓ *Planners are always energetic, positive and happy.*

Don't use commas to separate pairs of words or phrases that are joined by coordinating conjunctions. For example:

- ✗ *Planners are characterised by dedication, and enthusiasm.*
- ✓ *Planners are characterised by dedication and enthusiasm.*

When do I use a semi-colon?

Use a semi-colon between items in a list that already have internal punctuation. If you have already separated items in a list with commas and you want to group these items, then semi-colons will make your meaning clear to your readers. For example:

- ✓ *He was sent to the shop to buy apples, oranges and pears; carrots, peas and potatoes; flour, rice and sugar.*

9.4.3 Punctuate consistently

There are a number of punctuation conventions that cover:

- ! exclamation marks
- ? question marks
- hyphens
- en dashes
- em dashes
- ... ellipsis
- ' apostrophes.

Use your style guide and house style to set out accepted uses for these punctuation marks and apply them consistently.

One of the greatest areas for inconsistent punctuation is in bulleted lists. In using bulleted lists decide how to punctuate the ends of the lines in the list. Some writers choose to use open, unpunctuated lists and others use closed, fully punctuated lists. This should probably be spelt out in your organisation's house style. But whatever you choose to do, do it consistently.

Closed punctuation	Open punctuation
In developing a house style you should: <ul style="list-style-type: none">• use recognised references;• consult with colleagues;• trial the style;• request feedback;• ensure everyone uses the style; and• revise the style regularly.	In developing a house style you should: <ul style="list-style-type: none">• use recognised references• consult with colleagues• trial the style• request feedback• ensure everyone uses the style• revise the style regularly.

In planning schemes bulleted lists:

- Are introduced with a colon.
- Start each point with a capital letter.
- Sometimes have more than one sentence in a bulleted point. This is when additional clarification is required.
- Use a sub-dot point, when necessary, that:
 - Is indented further.
 - Uses a smaller dot point.
- Do not usually use 'and' or 'or'.
- End each point with a full stop.

See the style sheet in the *Ministerial Direction on the Form and Content of Planning Schemes* for the requirements for a planning scheme page. Use the templates provided on the department's website when preparing planning scheme pages.

9.5 Maps and graphics

9.5.1 Use diagrams and graphs for complex ideas

Diagrams can synthesise complex processes or assessments and graphs can communicate complex information in a simple fashion.

The test of a good graph or diagram is how well it communicates its message, not how attractive it looks.

9.5.2 Make maps clear

You may need to include a map in a report or as a schedule to a zone or overlay in a planning scheme amendment.

Poor quality drafting and drafting that fails to reproduce properly in black and white are the two most common faults with maps. Overcome some of these problems by using a good quality base map.

Prepare plans in black and white. If in colour, make sure that the map is still readable in black and white. One way to do this is to produce a black and white map and then colour it. With a little experimentation you should be able to produce a colour map that photocopies well in black and white.

9.5.3 Include all relevant information

A map should include:

- a title
- a scale
- a north point
- a legend
- sources and references if appropriate.

North should point to the top of the page. If using a different orientation to fit your details into a page, then make sure that you use a consistent treatment throughout your document.

















A visual scale is better than a written scale because plans can be photocopied, scanned or downloaded at an enlarged or reduced scale.

9.5.4 Make information accessible

Colours or symbols used on maps should be distinct. It should be easy to match the colours on the map to the legend. Figure 2 shows two examples of map legends.

There is a visual logic and consistency in the right hand example in Figure 2. The more densely settled areas are darker on the plan, and the less dense areas are lighter. Different hatching patterns aid interpretation, but the overall message is communicated by how dark areas appear on the plan. Similarly, in the right hand example proposed and existing paths are shown in the same way for bicycle and walking paths.

Figure 2: Make legends meaningful

✘ Example legend	✔ Example legend
<p>People per sq km</p> <p> 7500 or more</p> <p> 1000 – 7500</p> <p> 2000 – 4000</p> <p> Less than 2 000</p> <p>Path network</p> <p> Existing walking path</p> <p> Proposed walking path</p> <p> Existing bicycle path</p> <p> Proposed bicycle path</p>	<p>People per sq km</p> <p> 7 500 or more</p> <p> 1 000 – 7 500</p> <p> 2 000 – 4 000</p> <p> Less than 2 000</p> <p>Path network</p> <p> Existing walking path</p> <p> Proposed walking path</p> <p> Existing bicycle path</p> <p> Proposed bicycle path</p>

9.5.5 Make the message accurate

Information must be accurate. It is easier to mislead your reader using graphs than text, because the overall visual message and the related factual information can be quite different.

Figure 3: Which graph tells the truth?

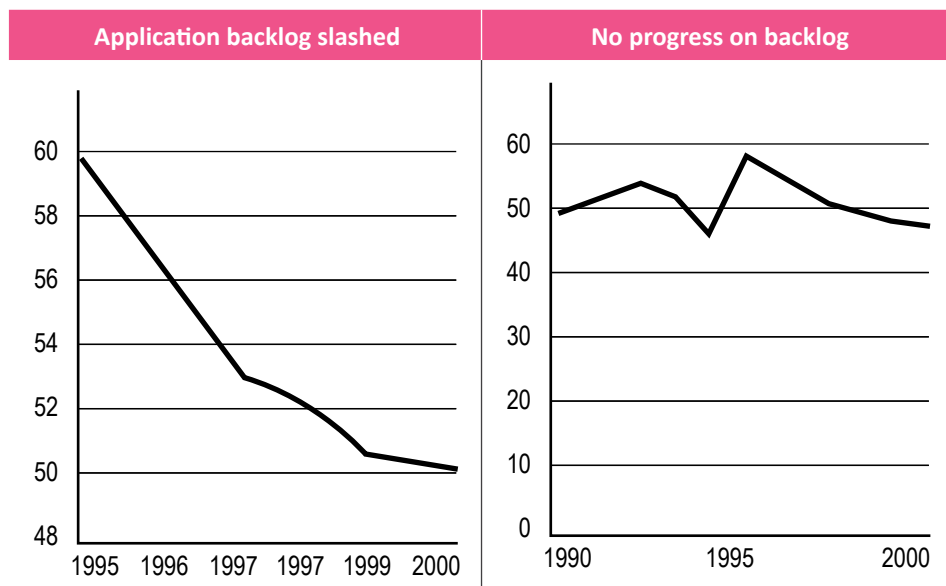


Figure 3 shows two graphs that present the same data in different ways. The graph on the left conveys the information, but it is misleading.

9.5.6 Check your graph is meaningful

Graphs should help simplify complicated information that may be difficult to decipher in written text alone. They should illustrate trends and relationships quickly and easily.

The context in which findings are presented may distort the reader's perception. Graphs that present information in an unexpected order can be difficult to interpret, while those with inconsistent value ranges may present meaningless data.

9.6 Planning schemes

9.6.1 Use accepted forms of expression

The elements of planning schemes – ‘visions’, ‘objectives’, ‘strategies’ – have different forms of expression and serve different roles. An MSS, local planning policy and schedule will use different forms of expression to suit the particular element’s function in the planning scheme. That form of expression should be used consistently.

A **Vision** is a statement or description of the type of place council seeks to create. For example:

✓ *Gumnut’s vision for the Small Hill Nature Reserve is a secluded natural valley.*

An **Objective** is the planning scheme’s aim for development that flows from the vision. For example:

✓ *To preserve and enhance the natural values of the Small Hill Nature Reserve.*

Some purported planning scheme objectives are really the means to some other objective that is not spelt out. For example:

✗ *To control the removal of native vegetation in the Small Hill Nature Reserve*

does not say why vegetation removal is to be controlled. The objective should communicate the broader reasons why council wants to control removal of native vegetation; seeking the control is not an objective in itself.

Some purported objectives are really actions or contain actions – all objectives should allow for a variety of strategies to achieve the objective.

A **Strategy** is a way of achieving the objectives. A Strategy should be able to follow from the statement:

‘The responsible authority will ...’

✓ *Ensure new development does not intrude into the skyline of the Nature Reserve valley.*

An **implementation method** states how the strategy will be achieved. Implementation methods should follow from the statement:

‘These strategies will be implemented by ...’

✓ *Applying a Design and Development Overlay to the land around the Gumnut Nature Reserve.*

Decision guidelines are expressed as a list of ‘things’ that the responsible authority must consider. They are not objectives or requirements. They are nouns or noun phrases. They often start with ‘the’ but this is not always the case:

- ✓ *Before deciding on an application a responsible authority must consider:*
- *the views of the proposed development from Misery Bend*
 - *the effect of the proposal on the habitat of the Striped Legless Lizard.*

Criteria and **standards** provide a basis for judging whether the objectives have been met.

Criteria or standards are expressed using 'should' where they are not mandatory and 'must' where they are. Typical examples are:

- ✓ *A safe, shared path should be provided along the edge of the Small Hill Nature Reserve in urban areas.*
- ✓ *Material used on the sides of buildings facing the Small Hill Nature Reserve must not include reflective materials, illuminated elements, bright colours or signage.*

Criteria and standards should stand alone as complete and properly formed sentences and they should be confined to a single issue.

Design suggestions provide ideas about how the criteria or standard might be met.

They are suggestions rather than requirements and should be written as suggestions. For example:

- ✓ *Avoid blank walls along the edge of the Small Hill Nature Reserve.*

Techniques describe a particular way of achieving criteria and objectives. They can be thought of as a physical description of development that meets the criteria. For example:

- ✓ *Fill batters are less than 1 in 5 for grassed slopes and 1 in 3 for vegetated slopes. If no alternative is available, they are benched with benches no more than 1.2 metres high and at least 2 metres wide with a top setback of 3 metres.*

9.6.2 Keep objectives and strategies separate

It is confusing if objectives in one part of a document are generalised while in another are quite specific. For example the following two objectives do not sit well next to one another. One is quite specific; the other very broad:

- ✗ *To promote innovative industries in Westville.*
- ✓ *To increase school after care services on Fridays.*

One way of moving from broad objectives to specific implementation methods is to repeatedly ask 'how?' For example, you might know what your overall objective is but be unsure what implementation methods are needed. For example:

Objective

- To return Gumnut Lakes to a more natural state.

How?

- By clearing Gumnut Lakes of litter.

How?

- By reducing the amount of litter washed from Gumnut streets into the lake.

How?

- By ensuring litter traps are constructed on all new drains.

To progress from an implementation method to an objective we repeatedly ask 'why?' For example:

Implementation method

- Applying a Design and Development Overlay to Station Street.

Why?

- To limit the height of new development in Station Street to four storeys.

Why?

- To preserve the views from Lovers Leap to Gumnut Lake.

9.6.3 Make requirements clear

Mandatory requirements in planning schemes should use 'must' or 'must not'. For example:

- ✓ *Buildings must be set back 3 metres from the front of the property.*
- ✓ *Building height must not exceed 21 metres.*

'May' is used to confer a discretion for action by the responsible authority or other person. In the following example a permit may be issued but there is no obligation that it **has** to be issued:

- ✓ *A permit may be granted to vary any dimension or requirement of this clause.*

The use of 'must' is not always necessary to communicate clearly, but it has a directness that other forms of expression lack. For example:

- ✓ *Motor vehicles must not be serviced or repaired for gain.*
- ✗ *No motor vehicle may be serviced or repaired for gain.*

'Must' is preferred wherever possible for mandatory requirements for consistency and clarity.

'Should' cannot be used for mandatory requirements in planning schemes. It is used in criteria and in expressing non-mandatory requirements in schedules to some overlays, for example the Design and Development Overlay (DDO). 'Shall' is outdated and should be replaced by 'must'.

'Encourage' and 'discourage' are useful in objectives but should not be used in requirements:

- ✗ *A maximum fence height of 1.2 metres will be encouraged for the street frontage.*
- ✓ *Fences at the frontage of a lot should not exceed 1.2 metres.*

9.6.4 Make discretion (or lack of discretion) obvious

Make mandatory requirements explicit. Do not assume that an applicant or VCAT will understand what you mean:

- ✓ *The following requirements should be met. A permit may be granted to vary these requirements if the responsible authority considers that the proposal will better meet the objectives of the overlay.*
 - *Building height should not exceed 21 metres.*
 - *Filling should not be undertaken.*
- ✓ *The following requirements must be met.*
 - *Building height must not exceed 21 metres.*
 - *Filling is not permitted.*

9.6.5 Using bulleted lists

Lists conveying obligations must be carefully drafted as they can be misinterpreted – particularly where an ‘and’ or an ‘or’ is needed for transparency. In this example, it is not clear if the permit exemption requires compliance with both or just one of the bulleted items:

- ✗ *A permit is not required for an outbuilding if:*
 - *the building area is less than 50 square metres*
 - *the building is set back more than 25 metres from any boundary.*

This problem can be avoided by rewriting the provision to remove any ambiguity. In this instance, a bulleted list is not needed. For example:

- ✓ *A permit is not required for an outbuilding provided the building area is either less than 50 square metres or it is set back more than 25 metres from any boundary.*
- ✓ *A permit is not required for an outbuilding provided the building area is less than 50 square metres and it is set back more than 25 metres from any boundary.*

A bulleted list would however be appropriate where a longer list of items is specified. Bulleted lists in planning schemes must not use ‘and’ or ‘or’ to distinguish obligations. The introduction to the list must make it clear whether all the requirements specified need to be met or just one of them.

9.6.6 Take care with definitions

Use words that have been defined in the planning scheme in strict accordance with their definition.

The following DDO requirement misuses a VPP term (as well as presenting other issues of interpretation):

- ✗ *The maximum building height in this precinct should not exceed 21 metres (6 storeys), including all roof structures, services, lift overruns and excluding architectural features only.*

The VPP defines ‘building height’ as ‘the vertical distance between the ground level and the finished roof height directly above’. The DDO requirement is inconsistent with this definition by expanding the scope of the term. It is also unclear whether a building less than 21 metres but with seven storeys is acceptable. Reference to ‘maximum’ and ‘should not’ makes it unclear if the height limit is mandatory or preferred.

This requirement could be improved. For example:

- ✓ *Building height should not exceed 21 metres or six storeys (not including basements). No structures except architectural features may be constructed above the finished roof.*

Before you include a new definition ask yourself: ‘why is a definition needed?’ The VPPs provide a number of definitions and planning schemes should be consistent with these definitions.

A definition should not introduce a control. For example:

- ✗ *Live work development means a dwelling adapted for use as a home-based office provided the office component is less than 40 square metres and is not publicly accessible out of normal business hours.*

The requirements over the size and hours of operation have no place in a definition.

- ✓ *Live work development means a dwelling adapted for use as a home-based office.*

9.7 A guide to grammatical terms

The following includes many of the grammatical terms mentioned in this chapter.

Term	Meaning
Phrase	A group of related words.
Clause	A group of related words with a subject and a verb. Clauses that can stand alone as sentences are independent clauses. Clauses that can't stand alone are dependent clauses.
Sentence	A group of clauses or phrases related to one idea that must contain at least one independent clause.
Paragraph	A group of sentences related by a common idea or theme.
Noun	A word that names a person, place or thing (<i>Sally, Victoria, table</i>) or an abstract notion (<i>generosity, sorrow</i>). Nouns can be singular or plural.
Verb	A class of words primarily designating an action (<i>bring, read, walk, learn</i>) or state (<i>be exist, stand</i>), showing variation for tense, person and number.
Conjunction	A word that joins words, phrases or clauses (<i>and, but, or, because, if, although, whereas</i>). <ul style="list-style-type: none">• The planner and the carpenter.• It was a long plan but a good plan.
Object	Usually the entity that is acted upon by a subject in an active sentence. <ul style="list-style-type: none">• The planner returned the plans in good condition.
Subject	The person, place, thing, or idea that is doing or being something (usually the doer of the action of the verb) in an active sentence. <ul style="list-style-type: none">• The planner performed a valuable role.

GLOSSARY

G

Delegation

PEA ss. 186-190

The *Planning and Environment Act 1987* provides the Minister, planning authorities and responsible authorities scope to reassign or 'delegate' certain responsibilities under the Act to a specified person. Decisions in relation to planning permits are often delegated by a responsible authority to an officer or a designated committee.

Discretionary uses

Discretionary uses are those uses that require a planning permit under the planning scheme. A responsible authority is required to exercise discretion in determining if a planning permit should be granted or refused.

Exercising discretion

Exercising discretion is acting according to one's own judgement. Responsible and planning authorities have wide discretionary powers under the *Planning and Environment Act 1987*. Discretion is most frequently exercised by responsible authorities in granting and refusing planning permits. State and local planning policies, zones and overlays guide the exercise of discretion over use and development in day-to-day decision making.

Natural justice

Reference:
the Macquarie
Dictionary, Third
Edition

That justice which responds to fundamental logic and absolute fairness rather than to the laws of a particular place and time.

The legal concept of the minimum standard of fairness which has to be applied in the adjudication of disputes, requiring that both parties be granted a fair hearing and that there be no bias on the part of the adjudicator.

Overlays

An overlay is a state-standard provision, forming part of a suite of provisions in the *Victoria Planning Provisions (VPP)*. Each planning scheme includes only those overlays that are required to implement the strategy for its municipal district.

Each overlay addresses a single issue or related set of issues (such as heritage, bushfire or flooding). The planning scheme maps identify land affected by overlays. Not all land is affected by an overlay, but where more than one issue applies to a parcel of land, multiple overlays can be used. Overlays must have a strategic justification and be linked to the Municipal Strategic Statement and local planning policy. Many overlays have schedules to specify local objectives and requirements. Most overlays set out requirements about development, not use. The requirements of an overlay apply in addition to the requirements of the zone. Neither is more important than the other. Overlays do not change the intent of the zone.

PEA ss. 8, 8A,
8B, 9

Planning authority

A planning authority is any person or body given the power to prepare a planning scheme or an amendment to a planning scheme. The Minister is a planning authority and may authorise any other Minister or public authority to prepare an amendment to a planning scheme. The Minister is also the planning authority for land not incorporated into any municipal district, such as land falling under the Alpine Resorts Planning Scheme, Port of Melbourne Planning Scheme, and the French Island and Sandstone Island Planning Scheme.

A council is planning authority for its municipal district and for any area adjoining its municipal district for which the Minister authorises.

Planning permit

A planning permit is a legal document that allows a certain use or development to occur on a particular parcel of land – usually subject to conditions. Council planners can provide advice on whether a planning permit is required and why. A planning permit ensures that:

- land uses are appropriately located
- buildings and land uses do not conflict with each other
- the character of an area is not detrimentally affected
- development will not detrimentally affect the environment
- places of heritage significance are not detrimentally altered or demolished.

A planning permit should not be confused with a building permit. A building permit is certification that a building or alteration to a building meets the minimum standard of construction specified in the Building Regulations 2006.

Planning scheme

A planning scheme controls land use and development within a municipal district. It contains state and local planning policies, zones and overlays and other provisions that affect how land can be used and developed. Each planning scheme consists of maps and an ordinance containing planning provisions. The planning scheme is a statutory document and each municipality in the state is covered by one.

Responsible authority

A responsible authority is the body responsible for the administration or enforcement of a planning scheme or a provision of a scheme. A responsible authority is responsible for considering and determining planning permit applications and for ensuring compliance with the planning scheme, permit conditions and agreements. The responsible authority is usually the municipal council. However, in the Melbourne Planning Scheme for example, the Minister for Planning is the responsible authority for land in a number of areas including the Melbourne Casino Area, Melbourne Docklands Area, Flemington Racecourse and the Royal Melbourne Showgrounds.

Schedules

PEA s. 13

Together with the Local Planning Policy Framework (LPPF), schedules are the means of including local content in planning schemes. They are used to supplement the basic provisions of a state-standard clause, zone or overlay in a planning scheme, adapting it to local circumstances and locally defined objectives. This means that schedules are a key tool for implementing objectives and strategies in the MSS.

A schedule can only be included where the relevant VPP provision provides for it. A schedule must use the format shown in the Ministerial Direction on the Form and Content of Planning Schemes.

For more information on schedules refer to *Planning Practice Note No. 10 - Writing Schedules*.

Statutory planning

The basic instrument for statutory planning is a planning scheme. Statutory planning entails the process of decision making on planning permits for new use and development. It includes the preparation and implementation of planning provisions for the planning scheme.

Strategic planning

Strategic planning is the research and formulation of policies or strategies to implement goals and objectives relating to particular land uses or areas. Strategic planning also involves monitoring and evaluating the implications of the provisions on land use and development.

Zones

A planning scheme uses zones to designate land for particular uses, such as residential, industrial or business. A zone will have its own purpose and set of requirements. It will identify if a planning permit is required and the matters that must be considered before deciding to grant a permit.

Standard zones for statewide application are set out in the VPP. These zones are used in all planning schemes, as required. Each planning scheme includes only those zones required to implement its strategy, as set out in its MSS. There is no ability to vary the zones or to introduce local zones. However, some zones have schedules to provide for local circumstances, such as the Mixed Use Zone and the Rural Living Zone.

Acts and Regulation – Annotated Abbreviations

This document includes annotated references to legislation in order to identify the source of information provided. The lists below provide a glossary of those abbreviated annotations:

ANNOTATED REF.	ACT NAME
BA	<i>Building Act 1993</i>
CCA	<i>County Court Act 1958</i>
CLRA	<i>Crown Land (Reserves) Act 1978</i>
CMA	<i>Coastal Management Act 1995</i>
CPA	<i>Criminal Procedure Act 2009</i>
EEA	<i>Environment Effects Act 1978</i>
EPA	<i>Environment Protection Act 1970</i>
HA	<i>Heritage Act 1995</i>
IA	<i>Infringements Act 2006</i>
ILA	<i>Interpretation of Legislation Act 1984</i>
LACA	<i>Land Acquisition and Compensation Act 1986</i>
LCRA	<i>Liquor Control Reform Act 1998</i>
LGA	<i>Local Government Act 1989</i>
MCA	<i>Magistrates' Court Act 1989</i>
PEA	<i>Planning and Environment Act 1987</i>
SA	<i>Subdivision Act 1988</i>
SCA	<i>Supreme Court Act 1986</i>
SWA	<i>Sex Work Act 1994</i>
VCATA	<i>Victorian Civil And Administrative Tribunal Act 1998</i>

ANNOTATED REF.	REGULATION NAME
I(RPD&F) Regs	Infringements (Reporting and Prescribed Details and Forms) Regulations 2006
LAC Regs	Land Acquisition and Compensation Regulations 2010
LCR Regs	Liquor Control Reform Regulations 2009
PE (Fees) Regs	Planning and Environment (Fees) Interim Regulations 2014
PE Regs	Planning and Environment Regulations 2005