# What to put in your request for orders by consent

**Senior Member S. Cimino:** About 6 to 12 months ago, or in the last 6 to 12 months. I conducted a compulsory conference where the parties worked extremely hard to get to a resolution. I wasn't sure whether they were going to get there, but after two fairly intense sessions, they did. I set the matter down for a third compulsory conference with the parties to come in to finalise their agreement and I must say that I was very happy that before the third compulsory conference I saw an email forwarded to me with a request for orders by consent, and I thought, ‘this is great’.

But my feeling of happiness, I suppose, for the parties started to change when I was looking through the request and saw a number of difficulties. We needed to come back to another I think at least 2, possibly 3 compulsory conferences to sort out what, in fact, the parties really wanted to do. I think that caused the sense of frustration. I think it caused a sense of our anxiety because the parties needed to get ready for a hearing in the event that they couldn't, I suppose, put the dots on the eyes and cross the t's in time.

So, the work was worthwhile, because in the end there were some fairly significant changes to the initial request for orders by consent. and no less than I think it was almost 30 conditions were deleted, and many more were modified.

Some of you out there might be thinking, I think it might be my matter. Unfortunately, it probably isn't, because this happens on many occasions. It's not something which is isolated and what the tribunal thought we could do is perhaps provide some clarity as to the sorts of things that members are looking for when they're looking to give effect to your request for orders by consent. Hopefully this will be constructive and will also assist you in terms of understanding the types of things that we need to consider in giving effect to the agreement that has been reached by the parties.

I want to start by providing some sort of context for today's seminar. With an increase in the referral of matters to what we would call appropriate dispute resolution, we would I anticipate that the number of matters that will settle will increase. This is because we find that even though a matter may not settle at the actual compulsory conference, we get requests for consent orders before the compulsory conference and we also get requests for consent orders after the compulsory conference., but before the hearing. The settlements usually involve a request for some form of consent order.

We also anticipate that there will be an increase in requests for procedural laws that go along with that. And we are finding that there is a growing proportion of requests for consent orders that are essentially unsatisfactory, and we start getting into a backwards and forwards with the parties.

What we would like to achieve through tonight's seminar is, we want to encourage a process whereby the parties have certainty and a process that is efficient. A process that reduces delay, where there are less errors and importantly, less frustration for everybody. Whether it be the responsible authority, the permit applicants, their advocates and the referral authorities and neighbours as well.

I wanted to start with firstly, going through some background, and I would expect that many of you will probably know this, but it sets a context. The orders that are made by consent are made under section 93(1) of the VCAT Act and the Act says that if the parties agree to settle a proceeding or any part of it at any time, the Tribunal, and this is the important word, may make any orders necessary to give effect to a settlement and the orders can be made by various members. Whether you're conducting a CC, a mediation, or indeed a member, any time, and that can include before a compulsory conference, after a compulsory conference, and even during the hearing on occasion, members the parties reach an agreement, and the member can give effect to that agreement.

We need to, I suppose, also highlight in my view, the decision that provides parties with a great deal of guidance and that is Deputy President Dwyer’s decision in AGL Loy Yang v Department Head, DEDJTR.[[1]](#footnote-1) A mouthful, which was a red dot decision from a number of years ago. And it's important to highlight some of the things that Deputy President Dwyer said in his decision:

The first was that the power under section 93 is, in fact, discretionary and hence why it uses the word ‘may’. In exercising that discretion, he suggests that VCAT know more than consider whether the settlement appears to be generally satisfactory and within the range of acceptable outcomes on the material before it.

It doesn't necessarily need to start digging into a great deal of detail. If the parties can present to the Tribunal in a way which demonstrates that at least on face value, there is an acceptable outcome. That is what the Tribunal will be looking for, and in that last line, albeit that in many cases to a relatively personal level. If the settlement is within the broad range of acceptable outcomes, Deputy President Dwyer, said VCAT should not lightly interfere. It's not under any obligation to investigate or consider all the elements of the matter in detail. So, it gives the parties some fair, substantial scope to put a settlement before the tribunal, and to give it effect here.

However, VCAT may exercise a discretion not to make a consent order, or to give effect to a settlement. VCAT is not a rubber stamp. Sometimes the impression is, here are the consent orders we just expect you to give them effect, and that is not the duty of the Tribunal. The Tribunal needs to be satisfied that the orders that are being sought are satisfactory, albeit at a cursory level. Deputy President said the to give effect to a consent order it still needs to be within jurisdiction, in other words, we need that power to make it. It reflects an agreement reached by the parties which hopefully is documented properly, and the outcomes within the broad range of acceptable outcomes on the material before the Tribunal.

Another piece of guidance that parties should be aware of lies within VCAT Practice Note PNVCAT1 which relates to common procedures and there's a whole section on how to seek a consent order. [[2]](#footnote-2) The highlights of that from, my perspective, are that an application for a consent order may seek a procedural order or a final order that ends the proceeding. The parties seeking a consent order should file with the Tribunal, a document clearly setting out the proposed orders sought, if relevant, and there will be occasions where it is appropriate an explanation of why the orders are sought or what they are intended to achieve.

Many of the matters that we get are quite complex and it takes time to work out what's going on and to put it into some sort of context that enables the Tribunal to form the view that it is an acceptable outcome. The other thing that is necessary is the unambiguous consent of each party. We need to be sure that all the parties to the proceeding have agreed, and then we can give it effect.

The next slide relates to how long is a piece of string, and I hope that you will appreciate this. The consent order that is sought should be in as precise terms as possible. Again, within the power of the Tribunal, having regard to the jurisdiction. You need to tell us what you want and in specific terms don't assume that the Tribunal member will think exactly the same way that you are.

If the proposed consent order makes reference to a new document, a copy of that document should be provided, and in the majority of cases it relates to a plan some sort of plan that's either referred to in a condition or is relied on by the parties in order to reach their agreement. We should receive a copy of that plan.

In a recent compulsory conference, I had a discussion with one of the advocates about the VCAT's ability to amend the wording or format of a consent order, and we can do it so that what we are agreeing to or give in effect to accords with our standard orders, is within our power and jurisdictions. But we should not change the intent of what the consent order is seeking to do.

This might seem fairly straightforward, but it's not once we start having to interpret it starts to become difficult. Sometimes the parties they understand what they want, they understand what they're seeking, but it's not necessarily reflected in the documents that are given to us, and hence tribunal members, I think with a degree of caution, will look at a consent order and make changes if they are obvious and they are clear. But once we start getting into having to interpret what was meant. In terms of understanding the dilemmas that tribunal members have. We think that it's appropriate that we identify common problems with the request for consent orders that we receive, and we are wanting to put forward some suggestions or solutions for parties to consider. The first thing that we identify, please be aware of the jurisdiction that you are dealing with. We have matters that are both in what's called original jurisdiction and review jurisdiction. They are different.

The review jurisdiction is one where we are looking at a decision that has already been made by somebody else, usually a responsible authority or a council. In the original jurisdiction, it is an application that is made direct to the tribunal, and we have examples there, such as enforcement orders or applications to amend permits. But what we're finding is that the consent is confused with what is being requested and here are some examples: the consent order requests, the application is allowed in the review jurisdiction - that is not the case. Under section 51 of the VCAT Act, the orders that the Tribunal can make are clearly set out, and there are 4. In review, we either affirm, set aside, vary or remit. They're the 4 options.

Sometimes we find that set aside and varied are interchanged in the orders that are requested. For example, we might have a conditions appeal under Section 80, but the order or the consent order will ask us to set aside the Council's decision. In reality, what we're being asked to do is to vary that decision. So, it's important to understand the jurisdiction and what to use, and again, in original jurisdiction the orders that could be sought generally relate to allowing the application or refusing the application. Orders tell a story – they should flow in a logical sequence and there are orders that should be made before the main body of orders.

and then there are orders that should flow afterwards and it's important that that be understood in presenting a request to the Tribunal.

But we're finding that in some cases there can be the absence of agreed procedural orders which are necessary. These can include whether or not a party should be joined or removed, because that is important, because whether they're a party or not is relevant to whether they sign the consent order. In one case, a party requesting a consent order said we know that there are a party, they haven't participated, and we don't know what to do. Please Tribunal, do something about it. That becomes difficult for the tribunal to do. We need to understand exactly what has been requested in a consent order. The procedural orders also should include things such as amendments to applications, whether it be the permissions sought and the land description. Sometimes the land description can change.

We need to ensure that the correct provisions are being used in seeking amendments. For example, the use of clause 64 in Schedule 1 is appropriate when you are amending a permit application. But it's not appropriate when you are amending the plans in an original jurisdiction, whereby you are making an application direct to the Tribunal under section 87(a). In recent times we have had request for consent orders doing just that – requesting amendments to permit applications when there isn't a permit application, and the matter is an original jurisdiction.

And of course, from time to time there's a need to change the party names. This is again important in terms of understanding who needs to sign the request for the consent orders. We have orders in the main body, which are either inadequate or unclear, and some examples and things that we want to look for, ensure that the correct reference to the decision – Is it being affirmed? Is it being varied? Is it being remitted? Is it being allowed? Is it being refused? We need to have a description of the land that is consistent with what is in the permit application. We need to understand whether it's a new permit or an amended permit, and sometimes it can actually be quite confusing given the documentation which is given to us.

Sometimes we will get a request for consent orders which says the parties agreed by request, permit being granted, subject to the conditions in Appendix A, without telling us what the permission that has been granted is. So, we'll get the conditions, we'll get that there's an agreement, but we won't know what the use and development that has been sought. And we really do need an adequate description of what the permit allows, and whether all the permissions sought and been included. After the main body, we then have subsequent procedural orders such as costs, etc. By and large they seem to be okay, but it's mainly the preceding orders in the main body that we'd like you to direct your attention to

The next topic or area that poses difficulty are permit conditions. The conditions on a new or an amended permit are fundamental because they define the permission that has been granted, they limit it, they describe what can and what can be done, they put in place requirements, things like plans, they tell us, when the use can operate or be open to the public.

But in going down that particular path, we would request that people give some attention to the following. The first is whether or not the conditions are within the ambit of discretion. For example, if we have an application where a permit is only required for heritage purposes, can we impose

conditions that are based around amending considerations. Clearly, that is not what we are able to do in considering the merits, and it's unlikely that those conditions would be appropriate – we need to have conditions that are lawful. They can't be, amongst other things, vague or general, so that they can't be understood. and that's critical in terms of understanding.

For having a lawful condition, we would request conditions that are clear and consistent in their language, and we would also appreciate having conditions put to us which are distinguished from notes, and to be blunt, preferably without notes. We recently had a situation where some consent orders were signed and the conditions were clear, and half a dozen notes were added at the at the end. The member, consistent with the Tribunal's practices, issued the order as agreed by the parties, but did not include the notes. One party wrote to the Tribunal requesting a correction order because the notes had not been included in the Tribunal's order. And that started a chain of events which we would hope can be avoided. But that is an example of why notes should perhaps not be interspersed throughout the permit or the request for consent order and shouldn't even be there at all. By all means, include notes on permits if you are the issuing authority put as many notes as you like, and as long as they're they can't be confused with conditions, you'll be okay.

The next really relates to the issue of conditions that fall out of the ambit of discretion or are not planning-related. Experienced practitioners would know the principles about the National Trust principle and the principles in under the City of Melbourne, which say that a decision should be based on the law as it stands at the time that the decision is made. Both those principles apply to consent order requests.

If there is an amendment to the planning scheme, we need to consider the planning scheme as it is at the time that the Tribunal considers the request. We would suggest that conditions should serve a planning purpose that falls within the ambit of the permission being granted. I've put there on the screen some examples of conditions that have been forwarded to us in request for consent orders.

The first one is, this letter shall be supplied to the applicant in its entirety. Now, it's not a planning purpose, it's a what I'll call the bureaucratic thing, and it also it's unclear as to who it's obligating. Is this an obligation on the council? Can the Council, or anybody else be obligated by the conditions of the permit? Only the permanent applicant can.

The next one is the developers to apply for details relating to servicing requirements and costing for the provision of electrical, water, etc., whatever supply and where applicable services to the proposal would be appreciated. If all communication is between the developer and agent, we'll quote this number. It's polite, it's informative, but is this really a condition?

And the last one is one that we've seen more recently about applicants completing a small business pre-application assessment, and then registering under other relevant legislation. These are all questionable conditions and requests for orders by consent, particularly for complex projects and subdivisions, can be littered with these conditions.

Another issue that we find is that conditions don't use consistent language. Here you'll see, I've said, who are all these people? We have conditions within the same request for consent, orders that talk about the owner, the occupier, the applicant, the developer, the development proponent, the subdivider, and my all-time favourite, the permit holder. We then get references to the responsible

authority as the ‘X’ city council, the city of ‘X’, the council, the city, the responsible authority, and in some cases even references to specific departments. The approach creates confusion, particularly if something imposes an obligation on an applicant that may not be the person that actually gives effect or relies on the permit.

Who is the permit holder? It's unclear. Is it the person that's actually holding the permit? Or is it somebody that's actually using the permit in some way? There is a remedy to this that avoids the problem. We suggest that permit conditions should set out these obligations without reference to nominated people and be consistent in the ways of identifying authorities, such as the responsible authority.

Here is an example: A condition that, says the permit holder, must direct true protection offences around trees 3, 4, and 5, as shown on the indoors plans to the satisfaction of the Council's Parks and Recreation Department. We would suggest that another way of doing it, and the preferred way of doing it, would be to say: ‘tree protection fences must be erected around trees 3, 4, and 5, as shown on those plans, to the satisfaction of the responsible authority’. And essentially that should take the confusion out of things as to who is in effect responsible for it. There are many conditions on permits that don't refer to the owner, the occupier, the permit holder. Well, it's not necessary to refer to these people, and it creates confusion.

There are some assorted issues as well that we’d ask that consideration should be given to. The first is accepting and not questioning conditions drafted by non-planning professions. We see, permit conditions that, and are now being advised during both hearings and compulsory conferences – ‘Oh are our engineer’s conditions’, ‘these are our arborist’s conditions’, ‘these are our ESD officer’s conditions’, ‘these are the conditions of the referral authority’. And therefore, they are just imposed on either permits or the request as though they are set in stone, and more often than not they're not written properly, and they're written by people that don't have the expertise. We should be suggesting that the people with expertise assist their colleagues in identifying how those conditions could be better drafted.

Sometimes we have conditions that don't make sense – we have requests for consent orders where the conditions of referral authorities aren't included, there are mandatory conditions such as time limits for things like signs and other requirements that aren't included, and we've even had instances where conditions are not finished.

Consent orders require an eye to detail, and we would be suggesting that review conditions at an early stage. So, when you get them, have a look at them. And if there needs to be a discussion with either, a referral authority or the internal council areas that that discussion. This responsibility can rest with both the applicants and also the council planners. Suggest changes, help your colleagues, and ensure that the conditions are proofread, and that the grammar and the punctuation is correct. In one case, I remember,

senior counsel engaging in a half hour of debate with the legal secretary over whether a comma should be inserted in in a condition. So sometimes it does get down to that and it's a situation we'd like to avoid. We would ask that you help us so that we can get through this stuff quicker.

In some cases, we get consent orders that aren't accompanied by an explanation. For example, the one that tribunal members find is that sometimes they can have difficulty coming to grips with where a council may have refused something and then it turns to an approval. There can be confusion about consent orders that aren't transparent – they refer to plans that we've neither seen, aren't the application plans, aren't substituted as amended plans, haven't been given notice under PNPE9.[[3]](#footnote-3) There may be instances where referring to those plans may be appropriate, but some form of explanation would be of assistance to the Tribunal.

We receive consent, orders that are not signed by all the parties. I would have thought fairly fundamental, and sometimes they're even signed by parties that do not match those that are on the tribunal's file. Hence, why, the procedural orders at the beginning of the consent order are critical in ensuring that there is a proper match in the name of the parties.

A matter that the members conducting enforcement order matters have asked me to raise is that if I if there is an agreement with an enforcement order. The consent order should cite the contravention and also that any of the orders that are made are in accordance with the requirements of sections 117 and 119 of the Planning Environment Act.

So, what are we asking? We're saying, please provide us with precise and complete requests. We're not talking about nit-picking about whether or not there should be a comma or full stop, and but we do need accuracy. Please set your orders in a logical sequence, provide the information that you need to us, and provide an explanation of what you seek and a copy of your orders in words – and for a few councils, please don't provide them in a table. So now over to you for questions.

1. AGL Loy Yang Pty Ltd v Department Head, Department of Economic Development, Jobs, Transport and Resources (Red Dot) [2016] VCAT 1249. [↑](#footnote-ref-1)
2. Practice Note – PNVCAT1 Common Procedures, 19 August 2019. [↑](#footnote-ref-2)
3. Practice Note – PNPE9 Amendment of Planning Permit Applications and Plans, 1 July 2023. [↑](#footnote-ref-3)