

‘Enforcement orders’ under the *Planning and Environment Act 1987*

Planning and Environment Division FACT SHEET

Version 1.0 – issued 1 July 2020

This fact sheet contains general information and should not be considered as legal advice. Seek professional advice if you are unsure about your rights, and be aware that the law may change.

What is an enforcement order?

An enforcement order is an order made by VCAT that requires a person to do specified things in relation to the use and development of land within a specified time.

This type of application is brought when it is alleged that the use or development of land has resulted in, or is anticipated to result in, a breach of:

- the *Planning and Environment Act 1987*.
- the relevant planning scheme.
- one or more conditions of a planning permit.
- a provision in an agreement made under section 173 of the *Planning and Environment Act 1987*.

An enforcement order is issued at the discretion of VCAT, meaning that even if a breach is found to have occurred, VCAT still needs to be satisfied that it is appropriate in the circumstances for an enforcement order to be made.

What can't we help with?

If the issue that you are concerned about:

- does not involve a breach of one of the four things listed above, or
- does not involve the use and development of land,

then an application for an enforcement order is not the appropriate type of application.

Please refer to the VCAT website to find the correct application form for your dispute.

Who can apply?

Any person may apply under section 114 of the *Planning and Environment Act 1987* to obtain an enforcement order. This person is called the **applicant**.

At the same time, in urgent cases, the applicant may also apply under section 120 of the *Planning and Environment Act 1987* for an **interim enforcement order** requiring certain things to occur pending the final hearing.

Often it is the responsible authority (usually the local council) who brings an application for enforcement order because the responsible authority has a duty under the *Planning and Environment Act 1987* to enforce the planning scheme.

Who may an enforcement order be made against?

An enforcement order may be made against one or more of the following persons:

- the owner of the subject land.
- the occupier of the subject land.
- any other person who has an interest in the subject land.
- any other person by whom or on whose behalf the use or development was, is being, or is to be carried out.

This person is called the **respondent** and will be named in the application for enforcement order. There may be more than one respondent to an application.

If you are named as a respondent, the applicant will serve you with a copy of the application for enforcement order.

You should complete a statement of grounds form and send this to VCAT and the other parties by the date specified in VCAT's order. In this document you will explain your side of the story and what you think VCAT should decide regarding the application for enforcement order.

Can any other person be involved?

The responsible authority is usually a party to an application for enforcement order, even if it has not brought the application itself.

There might also be other people (**affected persons**) who:

- are adversely affected by the making of the enforcement order.
- have been, or may be, adversely affected by the alleged breach.

The application for enforcement order will identify who the applicant thinks are the relevant affected persons regarding the alleged breach.

If you are identified as an affected person, the applicant will serve you with a copy of the application for enforcement order.

If you want to be involved in the proceeding, you will need to complete a statement of grounds form and send this to VCAT and the other parties by the date specified in VCAT's order. You will then need to seek permission (leave) from VCAT to be a party to the proceeding. This usually occurs at a practice day hearing. Not all affected persons become a party to an enforcement proceeding.

What form do I use to apply?

For an enforcement order and an interim enforcement order an applicant must use the Planning and Environment Division

Application for Enforcement Order (Planning) form.

A copy of the application form is available on VCAT's website.

Is there a time limit?

There is no time limit for applying for an enforcement order or an interim enforcement order.

However, VCAT will consider the amount of time between the alleged breach and when the application was brought to VCAT in making its decision about whether to issue an enforcement order.

What does it cost?

A fee is payable to make an application for an enforcement order. Information about application fees and hearing fees is available on VCAT's website.

What should the application include?

❖ *Why has the application been made?*

The application for enforcement order should identify:

- what is or will be breached.
- when the breach occurred.
- why the applicant says that a breach occurred.
- how the respondent is involved in the breach occurring.
- the nature and content of any communication between the applicant and the respondent regarding the alleged breach, before the application was made.
- what the respondent's response has been.
- what actions have been taken leading up to this application being made to prevent the breach from occurring, or to remedy the breach once it was identified.

The application should include copies of relevant correspondence, photographs, plans or other documents that objectively support the applicant's claims.

Some of this information might be provided in a statement, affidavit or statutory declaration that has been made by a person who can attest to the truth of what is being claimed.

This information helps the respondent understand the case that is put against them from the beginning of the proceeding.

❖ **What enforcement orders are sought?**

The application should contain details about:

- the orders that the applicant is asking VCAT to make. If possible, the actual wording being sought should be included along with any dates by which actions should be done.
- why the applicant thinks VCAT should make the enforcement orders sought.

The application should also contain details about whether the applicant is asking the respondent to pay the application fee, the daily hearing fee or other costs related to the application.

❖ **Is an interim enforcement order also sought?**

The applicant completes a particular section of the same application form if they are also seeking an interim enforcement order.

An interim enforcement order maintains existing circumstances pending the final hearing of the application for enforcement order.

An interim enforcement order may require the respondent:

- to stop the use or development immediately or within a specified period.
- not to start the use or development.
- to do specified things to ensure compliance with whatever is allegedly being breached.

An application for an interim enforcement order:

- should normally be accompanied by an undertaking as to damages given by the applicant. If you give an undertaking as to damages and your application for enforcement order is not successful, you may be liable to pay compensation pursuant to the undertaking.
- should identify the harm that is expected to occur if an interim enforcement order is not made and what will be the effect of not making an interim enforcement order.
- should be supported by an affidavit swearing to the truth of the contents of the application and of any other facts on which the application is based.
- should only be made when there is genuine urgency.
- can be heard ex parte (made without notice to any person) if the case is so urgent that there is not sufficient time to give notice to persons.

What will happen at VCAT?

❖ **Practice day hearing**

Most enforcement order applications are listed for a practice day hearing to consider procedural matters relating to the application as well as any specific issues that either the parties or VCAT wish to address at that time.

The practice day hearing will be held after the due date for statements of grounds from the respondents and any affected persons, meaning that all parties and VCAT should, at that time, know what each person's general case involves.

Sometimes final enforcement orders might be made at a practice day hearing. As such, it is important for parties to attend the practice day hearing because their interests might be affected.

❖ **Hearing of interim enforcement order application**

If the applicant has also sought an interim enforcement order, a separate hearing will be scheduled to hear that application.

❖ *Compulsory conference*

Some enforcement order applications are listed for a compulsory conference.

A compulsory conference is a meeting where parties discuss ways to try to reach an agreement to settle the dispute, instead of VCAT deciding the case. The meeting is held in private with the help of a VCAT member.

If the parties reach a consent position, final orders might be made at a compulsory conference. As such, it is important for parties to attend the compulsory conference because their interests might be affected.

A compulsory conference is scheduled at VCAT's discretion. Not all applications for enforcement order are suitable to deal with at a compulsory conference.

❖ *Final hearing*

If the parties are unable to reach a settlement of the dispute, the application for enforcement order will be determined at a hearing.

The VCAT Member will hear from all parties and determine the proceeding based on the facts and the law.

Further information

Proceedings about enforcement orders and interim enforcement orders are often complex, and some of the terms used in the *Planning and Environment Act 1987* have particular meanings given to them in that Act or by the courts.

For further information:

- carefully read the sections of the *Planning and Environment Act 1987* that relate to your particular type of application.
- look at the decisions in other similar cases decided by VCAT. VCAT decisions can be found at the Austlii website. You may need to enter a search term (e.g. the name and section of the *Planning and Environment Act 1987*) to find the most relevant cases.