

# Environment and Resources disputes

## 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 are ‘Environment and Resources’ disputes?

The Environment and Resources List, within the Planning and Environment Division at VCAT, deals with a range of disputes about the environment and natural resources under the following legislation:

- *Catchment and Land Protection Act 1994* (section 48 land management notices or land use conditions).
- *Climate Change Act 2017*.
- *Conservation, Forests and Lands Act 1987* (variations or termination of land management co-operative agreements under section 76).
- *Environment Protection Act 1970*.
- *Flora and Fauna Guarantee Act 1988* (matters about habitat conservation orders sections 33, 36 and 37).
- *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020*.
- *Mineral Resources (Sustainable Development) Act 1990*.
- *Petroleum Act 1998*;
- *Plant Biosecurity Act 2010* (about accreditation and cost matters under sections 48 and section 59); and
- *Water Act 1989* (except section 19, which is dealt with in VCAT’s Building and Property List).

This legislation has a common theme of protecting and/or sustainably managing the use and development of Victoria’s environment and its natural resources.

‘Natural resources’ are materials and substances that occur in the environment and can be managed or used for economic gain. Examples of natural resources are minerals, forests, fertile land and water.

### Why is there an Environment and Resources List?

The Environment and Resources List commences on 1 July 2020. The List has been created to respond to the particular needs of applicants, decision-makers and other people involved in applications to VCAT about the environment and natural resources. The list provides for a specialist approach to disputes in this area, where different forms, processes and hearing arrangements may be appropriate to those used for planning disputes or other disputes at VCAT.

The creation of the Environment and Resources List is also a response to the commencement of the *Environment Protection Act 2017*, due in 2021, and other legislation, such as the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020*.

### What particular applications will the Environment and Resources List deal with?

The types of applications that will be case-managed in the Environment and Resources List fall into two types:

- an application for the review of a decision.
- an application for an order.

### ❖ Application for review

This type of application is made when the legislation allows a person to apply to VCAT for a review of a decision made by an organisation, such as a department or government agency.

Examples include the review of a decision:

- by the Environment Protection Authority about a works approval, licence, permit or notice.
- by a water authority about the use or development of a water resource.
- by the Earth Resources Regulator about an extractive industry application for a work plan or work authority.

Be aware that not all decisions about the environment and natural resources are reviewable at VCAT. When you receive a notice of a decision from an organisation, it will normally include information if you have a right to apply to VCAT to review the decision.

Be aware also that some legislation limits the grounds that a person may rely upon in an application for review. For example, an objector in an application for review under the *Environment Protection Act 1970* can only seek a review on very limited grounds. Objector applicants should refer to the relevant legislation or seek professional advice to see if an application can be made.

### ❖ Application for an order

This type of application is made when the legislation allows a person or organisation to apply to VCAT for an order against another person or organisation.

Examples include:

- an enforcement order - an order directing a person to do something or stop doing something.
- a declaration – an order making a formal and binding statement (or ‘declaration’) that determines a fact or legal issue. This means VCAT could make an order about how a provision in an Act applies in a

particular circumstance, or about the meaning of a condition in a permit or licence.

Be aware that applications for an order can only be made when the enabling legislation gives VCAT that specific power. VCAT’s power to make a declaration currently arises only under the *Environment Protection Act 1970*, the *Water Act 1989* and in the limited circumstances set out in the *Catchment and Land Protection Act 1994*, *Climate Change Act 2017* and *Flora and Fauna Guarantee Act 1998*.

Applicants should refer to the relevant legislation or seek professional advice to see if such an application can be made.

### What is the form of application?

There are two application forms for applications in the Environment and Resources List.

You must use one of these two forms:

- for a review, use only the form: *Application for a Review – Environment and Resources List*.
- for a declaration or request for an order use only the form: *Application for an Order - Environment and Resources List*.

These application forms are available on VCAT’s website for use from 1 July 2020.

Be aware that fees may apply. Information about application fees and hearing fees is available on VCAT’s website.

### Are there time limits?

Time limits apply for applications to VCAT to review a decision. These vary for different decisions under different legislation so you should carefully check the decision notice sent to you, and the legislation, to find out what time limits apply.

VCAT can sometimes extend the time to apply for a review, but only if it is reasonable to do so. VCAT must consider if extending time would disadvantage or cause injustice to

anyone else. VCAT will also hear from the decision-maker and anyone else with an interest in the application before deciding whether to grant an extension of time.

Under some legislation, certain steps have to be taken before a review application or enforcement application can be made to VCAT. You should check the notice of decision from the decision-maker or seek advice about these requirements before making an application to VCAT.

### What happens next?

All applications to VCAT are assessed to see what the dispute is about, whether VCAT can deal with it, and whether it is complex or urgent.

An application may be urgent if there is a risk of harm to the environment or to human health, or having regard to the interests of people affected by the decision or the orders sought.

Whether a matter is complex will depend on:

- the issues in dispute.
- the number of different people or organisations that are or may be involved in the application.
- the time required for the hearing.
- whether expert or lay evidence is going to be relied upon, and the nature of that evidence.

After your application has been processed, VCAT will send an order to the applicant and the relevant decision-maker or other people named in the application. This is known as an 'initiating order'.

An initiating order sets out what the parties need to do, and the timelines, in order to prepare the matter for initial case management and hearings. This may involve asking the decision-maker to send VCAT certain background information, and for the parties to each send VCAT a 'statement of contentions' setting out a concise statement of the issues in dispute.

The initiating order will also usually set out the date of a 'practice day hearing', which will take place about 4 weeks after the order is sent. The initiating order may also set out the date for a compulsory conference.

A practice day hearing is a short hearing that makes decisions about how a case will be managed. This includes clarifying the issues in dispute and who can be part of the case, dealing with procedural matters, and making arrangements for a final hearing. A practice day hearing is also sometimes used to make final orders about short urgent matters such as enforcement, or to dismiss a case that has been wrongly made or is weak.

An outcome of the practice day hearing may be that VCAT will make further orders. These orders may:

- set out a timetable for the exchange of relevant documents and evidence.
- set out the process for a meeting and joint report between expert witnesses (known as a conclave) to identify the areas of agreement and disagreement and to explain the issues where the experts disagree.
- set out the requirements for the preparation of a Tribunal Book or a folder of common materials that contain all the documents and evidence that each party will rely on at the hearing.
- give directions about how a hearing will be conducted, including the order of presenting and the timetabling of evidence, and whether any expert evidence will be heard through a conclave or concurrent process at the hearing.

The practice day hearing may also sometimes result in a direction that other people be notified about the application. This typically occurs where the decision-maker has made a decision (or failed to make a decision) about an activity or development that has involved consultation with other people.

## Will there be a compulsory conference?

In many applications, VCAT will direct the parties to attend a compulsory conference after the practice day hearing.

A compulsory conference is a meeting where parties are encouraged to discuss ways 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. All parties must come to the meeting, or have someone represent them. A compulsory conferences will usually be held 4 weeks after the practice day hearing (i.e. about 8 weeks after the initiating order).

If an agreement is not reached at the compulsory conference, the case will go to a final hearing. Depending on the issues in dispute, and its urgency and/or complexity, the hearing will usually be listed between 12 and 22 weeks after the practice day hearing.

Be aware that urgent matters, such as a stay application or urgent enforcement matter, will be heard more quickly.

## What can VCAT decide?

On an application for review of a decision, VCAT may affirm the decision, vary the decision, or set aside the decision and make a substituted decision.

On an application for a declaration, or anything other than a review, VCAT may make any declaration it deems fit, such as interpreting how the legislation or a permit operates in a particular circumstance. VCAT may also decline to make any declaration.

On an application for an enforcement order, VCAT may make an order directing a person or organisation to do or stop doing specified things or activities, or decline to make any order.

In all applications, VCAT will consider the submissions made by the parties and the evidence that is presented to it.

VCAT's decision is based on the powers available to it under the *Victorian Civil and Administrative Tribunal Act 1998* and the

relevant enabling legislation (such as the *Environment Protection Act 1970* or the *Water Act 1989*), as well as any relevant regulations, policies or guidelines that apply to the matters in dispute.

## When will I get a decision?

VCAT will sometimes give an oral decision at a hearing, particularly if the matter is urgent or straightforward. A written order will still be sent to the parties after the hearing, and a party can request a copy of the oral reasons given.

VCAT will however usually 'reserve' its decision in a dispute about the environment or natural resources, particularly if the matter is complex. A written decision will be provided at a later date, with reasons explaining why the particular decision has been made. The decision will commonly be provided within 6 weeks of the hearing, but the time depends on the complexity and urgency of the issues to be resolved.

In a specialist area such as for disputes about the environment and natural resources, VCAT will be constituted at a final hearing with a member or members with technical or legal expertise and experience relevant to the particular issues raised in the application.

## Further information

Cases about the environment and natural resources are often complex, and some terms used in the legislation have particular meanings given to them in the legislation or by the courts.

For further information:

- for the review of a decision, carefully read the decision letter and other documents sent by the decision-maker and/or visit their website.
- check the relevant sections of the relevant legislation.
- look at the decisions in other similar cases decided by VCAT or the courts. VCAT decisions can be found on the Austlii website. You may need to enter a search term or the name and section of the relevant legislation to find the most relevant cases.