

Amend or Cancel a Permit under section 87 or 89 (and stop orders)

Planning and Environment Division FACT SHEET

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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.

Amending or cancelling a permit

There are two separate ways in which a person may apply to VCAT to amend or cancel a planning permit:

- an application by a person to amend or cancel a permit under sections 87 or 89 of the *Planning and Environment Act 1987*, but only on the limited grounds specified in those provisions.
- an application by a permit holder under section 87A of the *Planning and Environment Act 1987* to amend or cancel a permit issued at VCAT's direction.

Be careful to choose the type of application relevant to your circumstances.

This fact sheet deals only with section 87 and 89 applications. All references to section numbers in this fact sheet are to sections of the *Planning and Environment Act 1987*.

Who can apply to VCAT?

A responsible authority, referral authority, the owner or occupier of the land, or any person entitled to use or development the land, may request VCAT to amend or cancel a permit, but only on the grounds in section 87.

A person who objected or would have been entitled to object to the permit when it was granted may request VCAT to amend or cancel a permit, but only on the grounds in section 89.

What are the grounds for VCAT to cancel or amend a planning permit?

The grounds for an application by an authority, owner, occupier or permit holder under section 87 are limited to the following grounds:

- a material mis-statement 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 *Planning and Environment Act 1987*.
- any failure to comply with section 55, 61(2) or 62(1).

VCAT may also amend a planning permit under section 87 if a building permit cannot be obtained because the development does not comply with the building regulations.

The grounds for an application by an objector under section 89 are limited to the following grounds:

- the person believes that they should have been given notice of the application for the permit and were not given that notice.
- the person believes that the person has been adversely affected by:

- a material mis-statement 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.

What can't VCAT help with?

VCAT can't deal with an application to amend or cancel a permit unless you are a person who can apply under section 87 or 89 and unless the grounds in those sections are met.

VCAT can't cancel or amend a permit if:

- the permitted building or works have already been completed, or the development of land has already been substantially carried out.
- the plan for a permitted subdivision or consolidation has already been registered.
- the permit has already expired.
- the permit was granted by the Governor-in-Council.
- the ground relates to a mis-statement or concealment of fact, or a material mistake, or a failure to comply with sections 55, 61(2) or 62(1), and that same ground has already been raised in a VCAT review when the permit was granted.

Are there time limits?

There are no time limits to apply to VCAT to amend or cancel a permit under section 87 or 89.

However, VCAT may refuse to consider a request under section 87 or 89 unless it is satisfied that the request has been made as soon as practicable after the person making it had notice of the facts relied upon in support of the request.

Reasons for applying

In an application to cancel or amend a planning permit, you should identify:

- which of the grounds in section 87 or 89 you are relying upon.
- the facts supporting these grounds.
- when you became aware of these facts.
- how you are adversely affected or disadvantaged by the permit in its current form.
- how the respondent(s) are involved in what has occurred.
- details of any communication between you and the respondents about your concerns, before the application was made.

If you are seeking that the permit be amended, rather than cancelled, you should identify the specific changes to the permit you are requesting (e.g. to permit conditions or endorsed plans) and why you want these changes.

What is the form of application?

To make an application to VCAT, you must use the correct Planning and Environment Division form. Be aware that there are two separate forms. One is for use by a responsible authority, referral authority or any person (other than the permit holder) that can apply to amend or cancel a permit under section 87 or 89. The other form is for use only by the permit holder or the person entitled to use or develop the land.

Both forms are available on VCAT's website.

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

What can VCAT decide?

VCAT must give the following persons an opportunity to be heard at the hearing:

- the responsible authority.
- any relevant referral authority.
- the owner and the occupier of the land.
- the person who asked for the cancellation or amendment of the permit.

The Tribunal may also give an opportunity to be heard to any other person who appears to have a material interest in the outcome.

VCAT will consider the existing permit, the specified grounds upon which the application for amendment or cancellation has been made and the relevant policies, provisions and decision guidelines in the planning scheme. VCAT must also consider the matters in section 90A.

After a hearing, VCAT may direct a responsible authority to amend or cancel the permit, or to take other action in relation to the permit. VCAT's decision is discretionary. This means that even if a ground of the application has been made out, VCAT still needs to be satisfied that it is appropriate to cancel or amend the planning permit and that it would be just and fair in the circumstances to do so.

What is a stop order?

A person may apply to VCAT under section 93 for an order that the development authorised by a permit be stopped until the hearing of a request to amend or cancel a permit. This is known as a 'stop order' and it works in a similar way to an interim injunction granted by a court.

A stop order is usually intended for urgent cases where it is considered necessary for the existing circumstances to be maintained pending the hearing. You cannot seek a stop order unless you are also applying to amend or cancel the permit.

An application for a stop order should be made at the same time as the application to cancel or amend the permit, using the same application form and filling out the section relevant to a stop order.

VCAT will list the stop order application quickly – usually at a practice day or preliminary hearing. All parties will be notified and given an opportunity to be heard, before any decision is made.

If you apply for a stop order, you will usually be asked whether you are willing to give an '

undertaking as to damages'. This means that if VCAT grants the stop order, but ultimately decides that the permit should not be cancelled or amended, you may be required to compensate the permit holder or land owner for any loss and damage it has suffered. VCAT will assess the amount of any compensation. In many cases, VCAT may be unwilling to make a stop order unless you give this undertaking.

A responsible authority may also in some circumstances become liable for loss or damage to another person if a permit is cancelled or amended as a result of the responsible authority's error.

In deciding whether to grant a stop order, VCAT will consider matters including:

- the strength of the case for amendment or cancellation.
- balancing the interests and risks to the parties if a stop order is or isn't made. This will include considering whether an undertaking as to damages should be given.

Further information

Cases about amending and cancelling a permit are often complex, and some of the terms used in the *Planning and Environment Act 1987* have particular meanings given to them in the Act or by the courts. Costs are also more commonly awarded in cases about amending or cancelling a permit or for stop orders.

For further information:

- carefully read the relevant provisions of the *Planning and Environment Act 1987*.
- if you are not the responsible authority, check with the council for any information about the permit and the process through which it was granted.
- look at the decisions in other similar cases. These can be found on the Austlii website. You may need to enter a search term and/or the name and section of the Act to find the most relevant cases.