

Planning-related disputes under the *Subdivision Act 1988*

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.

Subdivision cases that VCAT can hear as a ‘planning dispute’

The Planning and Environment Division at VCAT deals with a range of planning disputes relating to the development and use of land.

There are four categories of matters that VCAT may determine under the *Subdivision Act 1988* – general disputes, reviews of decisions, declarations, and the removal or acquisition of a right of way or easement. All references to section numbers in this fact sheet are to sections of this Act.

❖ **General Disputes**

What cases can VCAT hear?

VCAT can hear and determine a dispute arising under the *Subdivision Act 1988* or the regulations made under that Act (section 39(1)) except where the Act says that VCAT can’t determine a specified type of dispute.

Note: Disputes under Part 5 of the Subdivision Act 1988 (primarily relating to owners corporations, and alterations to subdivisions or lot entitlement) are dealt with in VCAT’s Owners Corporation List. This fact sheet does not deal with owners corporation matters.

Examples of disputes that VCAT can’t decide under the *Subdivision Act 1988* are:

- a dispute about an acquisition of land by an acquiring authority (section 39(2)(a)) – these are determined by the Minister.
- a dispute relating to specified planning matters - e.g. enforcement, or a section 173 agreement (section 39(2)) - these can still be decided by VCAT, but under the *Planning and Environment Act 1987*.
- an application to stop the registration of a certified plan (section 39(3)) – these are decided by the County Court.

Who can apply?

Only a land owner, an applicant for a subdivision, a municipal council or a referral authority may apply to VCAT to determine a dispute (section 39(1)).

Are there time limits?

An application to determine a dispute must be made within 30 days after the date on which an applicant gives to other parties a notice of intention to apply.

What can VCAT decide?

The *Subdivision Act 1988* does not limit the nature of any orders VCAT may make to determine or resolve a dispute.

❖ **Reviews of a decision**

What cases can VCAT hear?

VCAT can review:

- a decision of a council to refuse to certify or re-certify a plan, to approve an engineering plan or issue a statement of compliance (section 40(1)(a)).

- a decision of a referral authority to refuse to consent to the certification or amendment of a plan or to refuse to approve an engineering plan (section 40(1)(b)).
- a decision of a municipal council or referral authority to require alterations to a plan submitted for certification or to an engineering plan or to require the applicant to enter into an agreement (sections 40(1)(c) and (1)(d)).
- a decision of a council or a referral authority to refuse to make a statement under section 36 to enable an owner of land to compulsorily remove a right of way or acquire or remove an easement (section 40(2)).

Who can apply?

Only an applicant for a subdivision may apply to review a decision referred to in section 40.

Are there time limits?

An application to review a decision must generally be made within 30 days after service of notice of the decision.

An application to review the failure to issue a statement of compliance must be made within 30 days of a date calculated by a specified formula – see regulation 39(2) of the *Subdivision (Procedures) Regulations 2011*.

What can VCAT decide?

On an application for review, VCAT may affirm, vary, or set aside the decision, or set aside the decision and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.

❖ **Declarations**

What cases can VCAT hear?

VCAT can make a declaration concerning any matter that could form the subject of an application to VCAT under the *Subdivision Act*

1988 (section 41). A declaration cannot be sought about a matter under section 39.

A declaration is usually a formal and binding statement that determines a fact or legal issue. This is a special type of case that can only be heard by a presidential member of VCAT.

Who can apply?

Any person may apply for a declaration. However, an applicant will generally need to demonstrate that there is a real and substantial reason for the declaration, and how they are affected. The process cannot be used to generally review the merits of a decision.

Are there time limits?

An application for a declaration does not have a specified time limit, but an application should generally be made as soon as practicable after the person becomes aware of the issue that requires the declaration.

What can VCAT decide?

VCAT may make any declaration that it thinks appropriate.

❖ **Compulsory acquisition or removal of a right of way or easement**

What cases can VCAT hear?

VCAT can grant leave to an owner to proceed to compulsorily remove a right of way or to acquire or remove an easement over other land (section 36).

Who can apply?

Only the owner seeking the compulsory removal or acquisition may apply for leave.

Before seeking leave, the owner must ask a council or referral authority to make a statement (or include a condition on a planning permit) indicating that the compulsory removal or acquisition of the right-of-way or easement is required for the

economical and efficient subdivision or servicing of, or access to, the land. The statement must also indicate that the removal or acquisition will not result in an unreasonable loss of amenity in the area.

A separate right of review arises to VCAT if the council or referral authority refuses to provide the statement (see section on 'Reviews of a decision' in this fact sheet).

Once the owner has the statement, the application for leave can be made.

Are there time limits?

An application for leave must be made within 30 days after the date on which an applicant gives to the owner of the land affected by the proposed compulsory acquisition or removal a notice of intention to apply.

What can VCAT decide?

VCAT may grant leave to remove a right of way or to acquire or remove an easement compulsorily, and may make this leave subject to any conditions it specifies.

Reasons for applying

The *Subdivision Act 1988* does not specify or limit the grounds for reviewing a decision or for determining a dispute. However, an application should generally only be made on relevant grounds that relate to the decision under review or the disputed issue.

What is the form of application?

To make an application for any of the four types of application under the *Subdivision Act 1988*, you must use the Planning and Environment Division 'General form of application'. A copy of the application form is 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 must VCAT consider?

In deciding an application under the *Subdivision Act 1988*, VCAT must consider any relevant planning scheme or proposed amendment to it, any relevant environment protection policy, and any relevant agreement made under section 173 of the *Planning and Environment Act 1987*.

As well, VCAT will consider any matters that are relevant to the particular application. For reviews of a decision, this will include any matter that the council or referral authority was required to consider when making its decision.

Further information

Cases about subdivision are often complex, and some of the terms used in the *Subdivision Act 1988* have particular meanings given to them in the Act or by the courts.

For further information:

- for the review of a decision, carefully read the decision letter and other documents sent to you by the council or referral authority and/or visit their website.
- look at the decisions in other similar cases. These can be found on the Austlii website. You may need to enter a search term (e.g. 'subdivision' and/all or the name and section of the Act) to find the most relevant cases.