

**Practice Note – PNPE4  
Enforcement Orders and Interim Enforcement Orders**

<b>Application</b>	Planning and Environment List
<b>Effective date</b>	13 December 2018
<b>Supersedes Practice Note</b>	PNPE4 issued on 15 March 2012
<b>Special note</b>	Please ensure that you are using an up-to-date version of this practice note. Other practice notes may also apply.
<b>Further information</b>	A complete set of current practice notes are available on the Tribunal website at <a href="http://www.vcat.vic.gov.au">www.vcat.vic.gov.au</a> .

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## Introduction

- 1 The purpose of this practice note is to give guidance as to the procedure to be followed in relation to applications for Enforcement Orders under s 114 of the *Planning and Environment Act 1987*, for interim Enforcement Orders under s 120 of the Act and for the cancellation or amendment of Enforcement Orders or interim Enforcement Orders under s 121 of the Act.
- 2 In any proceeding, the Tribunal may at its discretion vary the operation of a practice note by direction or order.
- 3 This practice note has been issued by the Rules Committee pursuant to s 158 of the *Victorian Civil and Administrative Tribunal Act 1998*.

## Definitions

Word	Definition
Act	<i>Planning and Environment Act 1987</i>
Rules	<i>Victorian Civil and Administrative Tribunal Rules 2018</i>

- 4 A word or term used in this practice note:
  - (a) has the same meaning if defined in the *Victorian Civil and Administrative Tribunal Act 1998* or in the *Interpretation of Legislation Act 1984*; and
  - (b) has the same meaning as defined or used in the Act.

## What application form should I use?

- 5 The Tribunal has issued a recommended form for applications under s 114 for an Enforcement Order and s 120 for an interim Enforcement Order. There is no required form for an application under s 121.
- 6 The form should be completed carefully and fully. The notes and instructions on the form should be observed. This practice note assumes the use of the recommended form and that its requirements and warnings will be carefully observed.

## What pre-hearing steps apply?

- 7 Applications under s 114 of the Act must proceed in accordance with ss 115, 116 and 117 of the Act.
- 8 After an application is lodged with the Tribunal and the prescribed fee has been paid, the Tribunal:

- (a) will seek information from the responsible authority (usually the relevant municipal council);
  - (b) may ask for further information;
  - (c) will give directions to the applicant as to the giving of notice of the application to other parties pursuant to s 115 of the Act; and
  - (d) will give directions as to providing evidence to the Tribunal of the giving of such notice.
- 9 The person making the application must serve a copy of the application in accordance with the directions of the Tribunal on the persons referred to in s 115 of the Act, namely:
- (a) the responsible authority if it is not the applicant;
  - (b) any person against whom the Enforcement Order is sought;
  - (c) the owner of the land;
  - (d) the occupier of the land;
  - (e) any other person whom the Tribunal considers may be adversely affected by the Enforcement Order.
- 10 The person making the application must provide to the Tribunal a written statement of the date and mode of such service.
- 11 A person who wishes to contest an Enforcement Order application must lodge with the Tribunal and serve on the other parties a written statement of the grounds on which that person intends to rely at the hearing of the application. (See Clause 56, Schedule 1, *Victorian Civil and Administrative Tribunal Act 1998*)
- 12 If no written statement of grounds is received by the Tribunal within 14 days of the date of service of the application, the Tribunal may make any Enforcement Order it thinks fit, or alternatively the Tribunal may reject the application. (See s 116 of the Act)
- 13 In all other cases, the Tribunal will give the parties specified in s 115 of the Act (see clause nine above) and any person who wishes to contest the application a reasonable opportunity to be heard or to make a written submission. The Tribunal will fix a time and place for the hearing and notify the parties in accordance with the Tribunal's usual listing procedures.

### **What happens at the practice day hearing?**

- 14 As soon as the Tribunal has received all necessary information and all preliminary steps have been carried out, the Tribunal will usually list the application for a practice day hearing. At this hearing, the Tribunal has two options:

- (a) If the application is one that has limited issues and can be considered within 60 minutes, the Tribunal may proceed to hear the merits of the application. A decision may or may not be made on the day.
  - (b) If the application has a number of issues or more complex issues, the Tribunal may give directions about the future conduct of the proceeding. It may determine whether to refer the matter to mediation or whether it should be scheduled for a hearing.
- 15 The Tribunal's normal practices in relation to requests for directions, practice day hearings, consent orders, adjournments and other matters apply. (These are set out in other practice notes, for example PNVCAT 1 Common Procedures and PNPE 6 Practice Day).

### **How is the hearing conducted?**

- 16 An Enforcement Order application is not the same as a normal planning permit application for review. The conduct of the hearing differs from a hearing of an application for review. Evidence is normally given on oath or affirmation rather than by assertion or written submission. Enforcement orders can have serious effects on existing rights. This can mean that facts which are in issue need to be established on the balance of probabilities bearing in mind the serious nature of the proceedings and consequences.
- 17 At the hearing of an application for an Enforcement Order, all parties will have an opportunity to be heard or to have their written submissions considered by the Tribunal.

### **What is the form of an enforcement order?**

- 18 An Enforcement Order must be made in accordance with the provisions of s 119 of the Act.
- 19 An Enforcement Order must specify the use or development which contravenes or has contravened or will contravene the Act or the planning scheme, permit condition or s 173 agreement.
- 20 An Enforcement Order may only direct the person against whom it is made to do one or more of the things set out in s 119(b) of the Act.

## What is an Interim Enforcement Order and what special procedures apply?

- 21 Interim Enforcement Orders are intended for urgent cases. They enable the maintenance of existing circumstances pending the hearing of the ordinary Enforcement Order application. An application for an interim Enforcement Order can only be made by a person who has applied for an Enforcement Order under s 114 of the Act.
- 22 An interim Enforcement Order can only operate for a limited time. It will normally operate until the determination of the ordinary Enforcement Order application made under s 114 of the Act, but it may cease on a date or the happening of an event specified in the interim Enforcement Order. (See s 120(6) of the Act). An interim Enforcement Order may be cancelled or amended by the Tribunal. (See s 121 of the Act)
- 23 An application for an interim Enforcement Order should be supported by sworn evidence. If circumstances allow, this should be done by means of an affidavit swearing to the truth of the contents of the applications under ss 114 and 120 of the Act as set out in the recommended form and to the truth of any other facts to be relied upon as the basis of making such an order.
- 24 S 120(3)(b) of the Act requires that before making an interim Enforcement Order, the Tribunal must consider whether the person seeking that order should give an undertaking as to damages. The usual form of the undertaking as to damages required by the Tribunal is:
- If the Tribunal ultimately decides that the application for an Enforcement Order should not be granted, and a court or the Tribunal decides that any person has suffered loss or damage as a result of the making of the interim Enforcement Order and further decides that I should compensate that person for the loss and damage suffered, I undertake that I will pay the amount assessed by the court or the Tribunal to that person.*
- 25 The Tribunal will treat an application for an interim Enforcement Order in a similar manner to an application to a court for an interlocutory injunction. Considerations taken into account by the Tribunal will include:
- (a) what the effect of not making the interim Enforcement Order would be;
  - (b) whether irreparable damage would be caused to the property or to the applicant or other persons if the order is not made;

- (c) what the effect of making the interim Enforcement Order would be and, in particular, the effect upon any person(s) being the subject of the order or affected by the order;
  - (d) whether the applicant has made out a prima facie case in the sense that, if the evidence remains as it is, it is probable that an Enforcement Order would be granted;
  - (e) whether, even if a prima facie case has been made out, other considerations would make it unjust to make an interim Enforcement Order;
  - (f) whether the applicant should be required to give any undertaking as to damages in the event of the Tribunal ultimately deciding that no Enforcement Order should be made; and
  - (g) whether the Tribunal should hear any other person before an interim Enforcement Order is made.
- 26 An interim Enforcement Order may direct any person against whom the order is made –
- (a) to stop the use or development immediately or within the period specified in the order; or
  - (b) not to start the use or development; or
  - (c) to do specified things to ensure compliance with the Act or planning scheme, permit condition or agreement under s 173.

### **How do I seek an ex parte interim Enforcement Order?**

- 27 Sometimes a matter is so urgent that an interim Enforcement Order is sought when there is not time to give notice of the application to the persons against whom it is sought. Such an application, made in the absence of those parties, is often called an ex parte application.
- 28 A person making an application for an ex parte interim Enforcement Order should comply with the procedures for seeking an urgent hearing set out in practice note PNVCAT 5 Directions Hearings and Urgent Hearings. For an application for an ex parte interim Enforcement Order, this will include the following steps:
- (a) Telephone the Tribunal Registry – 1300 01 8228.
  - (b) The caller should be ready to provide the officer with details of the application and the reasons why it warrants such urgent attention. The caller should also provide a return telephone number or other means of contact.

- (c) If appropriate, the officer will seek to contact a Member of the Tribunal. The further conduct of the matter will then proceed in accordance with the directions of that Member. This may result in an urgently convened ex parte hearing.
  - (d) If documents relating to the application have not already been lodged with the Tribunal, they must be made available to the Tribunal Member or officer before or during such urgent hearing.
- 29 An application for an ex parte interim Enforcement Order should be accompanied by a draft (in duplicate) of the order sought.
- 30 An ex parte interim Enforcement Order made without notice to the persons affected can operate for no more than seven days. Within that time the Tribunal must give any person affected a reasonable opportunity to be heard. (See s 120(9) of the Act) The Tribunal will normally fix a time and place for such a hearing and give directions to notify and serve documents on affected parties.
- 31 The main purpose of such a hearing is to determine whether the ex parte order should be continued pending the hearing of the ordinary Enforcement Order application under s 114 of the Act, or whether it should be varied or cancelled. The applicant should be ready to proceed with the applicant's case on the merits of these questions.
- 32 The Tribunal may direct the applicant to serve the ex parte interim Enforcement Order and other documents on the other parties affected. At the time fixed for the hearing of those parties the applicant will need to be in a position to prove due service of those documents.

### **How can I amend or cancel an Enforcement Order?**

- 33 To make an application for the cancellation or amendment of any Enforcement Order or any interim Enforcement Order pursuant to s 121 of the Act the party making the application must:
- (a) file a request in writing with the Tribunal;
  - (b) specify in the request the grounds and reasons for the application;
  - (c) pay the required fee; and
  - (d) serve a copy of the request on all other parties.
- 34 The Tribunal may appoint a hearing date or issue directions in writing.

### **Can costs be awarded?**

- 35 Although the normal principle at the Tribunal is that each party must bear its own costs, the Tribunal has power to order the payment of costs where it considers that circumstances justify it in doing so (s 109(3) of the *Victorian Civil and Administrative*

*Tribunal Act 1998*). Costs orders are more commonly made in relation to applications for an Enforcement Order than for applications to review decisions by responsible authorities. For example, the bringing of a quite unjustified application for an Enforcement Order, or a persistent and unjustified failure to comply with planning laws in the face of repeated requests and warnings, may result in orders for costs being made.

**- END OF PRACTICE NOTE -**