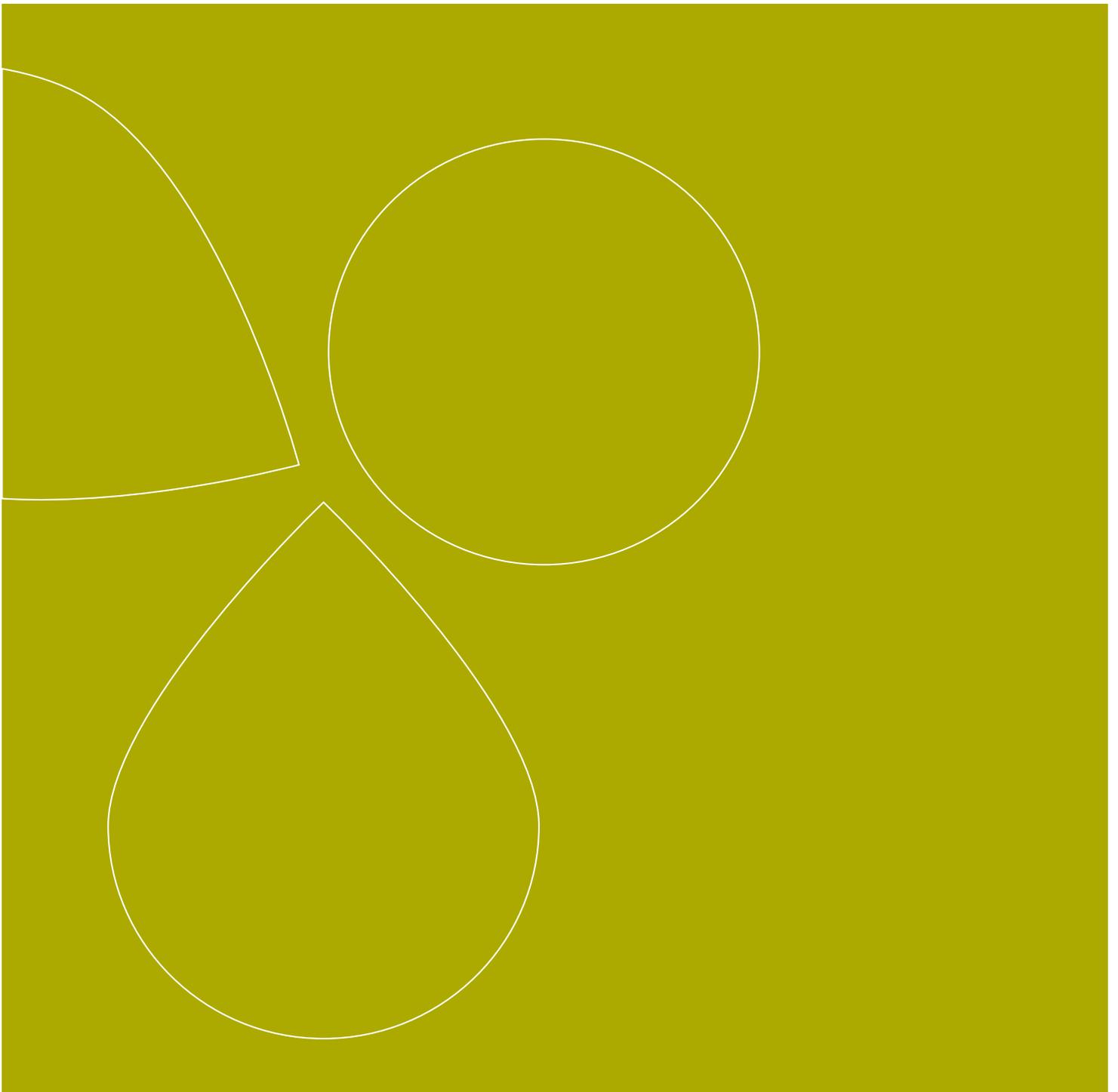




Environmental
Justice Australia

Enforcement Kit



Enforcement Kit

A working guide to seeking enforcement in planning matters and nuisance under the Public Health and Wellbeing Act

About Environmental Justice Australia

Environmental Justice Australia are nature's lawyers. We use the law to protect our environment, and we work to change our laws to make sure they protect the rights of all Australians to clean air, clean water and healthy ecosystems.

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SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice.

Produced & published by Environmental Justice Australia

Publication date: November 2014

ABN 74 052 124 375

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1.0 Background

1.1 Introduction

This booklet is only a working guide for you to seek enforcement of planning and environmental controls in Victoria.

It is not intended as a substitute for legal advice. Environmental Justice Australia recommends this booklet as an educative tool and as a preliminary step to seeking formal legal advice in relation to instigating an enforcement action.

1.2 Overview

Enforcement action in relation to planning and environmental matters may be taken under the *Planning and Environment Act 1987* (Vic) (**PE Act**), the *Public Health and Wellbeing Act 2008* (Vic) (**Public Health and Wellbeing Act**) or the *Environment Protection Act 1970* (Vic) (**EP Act**).

1.3 Enforcement under the Planning and Environment Act 1987

The PE Act is the main piece of legislation regulating planning activity in Victoria. Several enforcement measures exist under the PE Act to require people comply with relevant planning schemes and planning permits.

These include: proceedings for an enforcement order (**EO**) before the Victorian Civil and Administrative Tribunal (**VCAT**). This would be used where use or development of land fails to comply with a planning scheme or the conditions of a planning permit or section 173 agreement (section 114 PE Act); proceedings brought before VCAT for the cancellation or amendment of planning permits (sections 87 – 89 PE Act), including orders to stop development; prosecutions for offences under the PE Act brought in the Magistrates' Court (sections 127 and 128 PE Act); and declarations by VCAT under the PE Act (sections 149A and 149B PE Act).

1.4 Enforcement under the Public Health and Wellbeing Act 2008

Part 6 of the Public Health and Wellbeing Act applies to occurrences that may be considered a 'nuisance', and are, or are liable to be, dangerous to health or offensive. For example, odour emanating from a property can be a nuisance.

The Public Health and Wellbeing Act enables those affected by a nuisance to complain to their local council. If the council fails to investigate, or declines to take any action, it empowers persons to seek an order from the Magistrates' Court to stop the nuisance.

1.5 Enforcement under the Environment Protection Act 1970

The EP Act makes it an offence to pollute various elements of the environment, such as the air, water and land. The EP Act also creates a system licensing pollution – polluters are only allowed to pollute in accordance with their licence. The Environment Protection Authority (**EPA**) is responsible for enforcing and prosecuting offences under the EP Act, except in relation to noise pollution, where the police and municipal authorities also have responsibilities.

In almost all circumstances, members of the public do not have standing to prosecute for offences under the EP Act (section 59(2) EP Act). However, section 48A (9) provides that a proceeding may be brought by a person who claims to be affected by 'unreasonable noise' emanating from a residential premises.

Environmental Justice Australia and other environmental bodies have made submissions to the Victorian Government in relation to the introduction of legislative changes to allow for members of the public to have enforcement rights through open standing and third party enforcement provisions under the EP Act. It is hoped that such changes will be introduced in the near future.

1.6 *Is there anything I can do if someone is breaching the EP Act?*

Conditions attached to a licence or works approval issued by the EPA may also form conditions to a planning permit. If those conditions are breached, you may be able to take action under the PE Act.

Otherwise, you can complain to the EPA or your local council.

2.0 Enforcement Orders under the PE Act

2.1 What is an EO?

EOs can:

- **Stop** existing unlawful planning activities;
- **Prevent** threatened unlawful planning activities; and
- **Undo or make good** any works or damage done as a result of the unlawful planning activities.

An application for an EO is made to VCAT under section 114 of the PE Act. In urgent cases, an application may also be made for an interim enforcement order (**IEO**) under section 120 of the PE Act.

The purpose of an enforcement order is to put right any breach of a planning scheme or a planning permit. Although this may require a person to undertake works or to cease certain activities, an enforcement order is not intended to be a form of punishment for the person against whom the order is made.

2.2 Can I apply for an EO?

Any person, including the council, may apply to VCAT for an EO (section 114(1) PE Act).

It is not necessary to identify a personal interest in the matter or to establish that your personal interests are affected by the matter (*Jeffs v Kielor (1996) 7 AATR 134*).

Tip

Before making an application as a member of the public, ask the Responsible Authority (usually the local council) to take action.

You should also write a letter to the owner and occupier of the land demanding that the use or development of the land be brought into compliance with the relevant part of the planning scheme, permit condition or section 173 agreement within an achievable timeframe (unless of course the matter is so urgent that this is not appropriate).

Any communication with the Council or the landowner which relates to a breach of the planning scheme, permit condition or section 173 agreement, and is made prior to filing an application for an EO, should be in writing. You should keep records of all communications sent or received.

2.3 Why would I seek an EO?

If the Responsible Authority is unwilling to take action and the occupier (or owner) of the land refuses to address the problem, you might consider bringing an application for an EO in VCAT where a use or development of land breaches, has breached, or will breach:

- a planning scheme;
- any condition of a permit; or
- a section 173 agreement (an agreement between the responsible authority

and the owner of the land)

(section 114(1) PE Act).

2.4 Against whom can I seek an EO?

An EO may be sought against one or more of the following people:

- the owner of the land;
- the occupier of the land;
- any other person with an interest in the land; and/or
- any other person by whom or on whose behalf the use or development was, is being, or is to be carried out, e.g. a developer or construction company.

(section 114(3) PE Act).

2.5 How do I apply for an EO?

To apply for an EO:

Lodge the application form with the Tribunal (available on the VCAT website).

If making an IEO application, it must be made at the same time as an EO application. (See [Section 3.0](#) below)

Lodge a title search with the application. The title search must be no more than 14 days old.

For details obtaining a title search see [Section 11.2](#) below.

Pay the fee set out in the application form.

If you wish to apply to have the fee waived, you must:

- be the holder of a current Government benefit card (and provide a copy); and
- provide a statement that sets out your net income and how paying the fee will result in financial hardship

See the forms entitled 'Fee waiver form for Concession Card Holders' and 'Fee waiver due to financial hardship form' available on the VCAT web-site.

Pay an additional fee, if an IEO is also being made.

Give notice by sending copies of the EO application to the relevant parties within 7 days of lodging the application with VCAT (section 115 PE Act).

Keep copies of all the correspondence you send to VCAT and the other parties.

Provide evidence to VCAT that such notice has been given by filing a statement of service (see [Section 2.9](#) below).

Practice Note – PNPE4 – Enforcement orders and interim enforcement orders.
Further details are set out below.

- 2.6 What information do I need to include?** Among other things, you should:
- provide a description of the grounds on which the application is made;
 - specify the provisions of the PE Act, planning scheme, permit or section 173 agreement which are being or may be contravened;
 - list any other person who may be affected by the alleged contravention; and
 - state the orders which you wish VCAT to make. See section 2.14 below, to see what orders VCAT can make.

- 2.7 To whom do I give notice?** You must give notice of an EO application to:
- the Responsible Authority (usually the relevant local council);
 - any person against whom the EO is sought;
 - the owner of the land;
 - the occupier of the land; and
 - any other person whom VCAT considers may be adversely affected by the EO. This may include any referral authorities (such as the EPA), mortgagees of the subject land or objectors to the original planning application. (section 115 PE Act)

- 2.8 How do I give notice of the application?** Give each party a copy of your application, any covering letter and any other documentation received from VCAT within **7 days** of lodging the application.

This is called 'serving' your application (Rule 4.07, *Victorian Civil and Administrative Tribunal Rules 2008 (Rules)*).

Methods of service include personal service (i.e. personal delivery), or service by post, document exchange, facsimile or email (section 140, of the *Victorian Civil and Administrative Tribunal 1998 (VCAT Act)*).

- 2.9 How do I prove I have given notice of the application?** You must keep:
- a copy of all documents served on the parties;
 - a record of the date and way the document was served (eg by post, or hand delivered) and where and to whom the documents were sent.

Then you must file a Statement of Service (available from the VCAT website) with VCAT setting out each party you have served and how they were served, attaching copies of the documents you served.

- 2.10 How are objections to the EO application made?** A person who objects to an EO application must lodge with VCAT and serve on the other parties a **written statement of the grounds** on which that person intends to rely at the hearing of the proceeding.

The person may object to the making of the EO on any ground she or he thinks appropriate (Clause 56, Schedule 1, VCAT Act). They can deny the allegations made or assert that they have complied with the relevant permit or agreement.

2.11 What happens if no objections are received?

If VCAT receives no objections, it may within 14 days, without a hearing, either:

- make any EO it thinks fit; or
- reject the EO application.

(Section 116 PE Act)

However, the applicant must still satisfy VCAT that an EO is appropriate. VCAT may require the applicant to file an affidavit setting out all of the relevant facts as proof of the alleged breach.

Alternatively, VCAT may conduct a hearing at which the applicant will need to tender evidence and make submissions.

2.12 What happens if objections are received?

VCAT must conduct a hearing at which the following persons give evidence or make submissions:

- the responsible authority;
- the person against whom the EO is sought;
- the owner of the land;
- the occupier of the land;
- the applicant for the EO;
- any other person whom it considers may be adversely affected by the EO; and
- any person whom it considers has been or may be adversely affected by the contravention.

(Section 117(1) PE Act)

Where VCAT decides that a hearing is necessary, a time and a place will be fixed and you will be notified in accordance with VCAT's listing procedures (Clause 12 *Practice Note – PNPE 6 – Practice Day*).

After giving such an opportunity and considering any submissions, VCAT can either make or reject the EO application (section 117(2) PE Act).

2.13 What standard of proof must I meet to show the need for an EO?

You must prove your case on the 'balance of probabilities', which means that you must prove that your version of events is more probable than not. As an EO can have serious affects on existing rights, VCAT, in making its decision, will take into account the serious nature of the proceedings.

Evidence is normally given on oath or affirmation rather than by just through submissions. Evidence can be in the form of an affidavit, or be given orally.

Even where no objections are received, you must still satisfy VCAT that an EO is appropriate (see [Section 2.11](#) above).

Tips

Before making an application to VCAT, you should gather all the evidence required to prove the contravention. This might include writing to the person who is using or developing the land illegally; obtaining copies of any development plans, permit applications and any supporting material; keeping a regular diary; taking photographs or video; taking statements from neighbours or other eyewitnesses; ordering aerial photography; conducting surveys; or looking for older photographs of the land.

It is important that you obtain a copy of any relevant permit, any plans endorsed under the permit, and any section 173 agreements or planning scheme extract in force at the time of the contravention(s). Your local council will have copies of these documents.

Organise your evidence into chronological order and keep it in a dedicated folder, separate from correspondence files.

Once you have collected all the evidence you think you need, we advise you to seek legal advice from a lawyer with expertise in Planning and Environmental law regarding your options and the possibility of liability for legal costs, should your application be unsuccessful.

2.14 What orders can VCAT make?

VCAT can make an EO which directs the respondent(s) to:

- stop the use or development within a specified time;
- not start the use or development;
- maintain a building in accordance with the EO;
- carry out specified activities to restore the land, as nearly as practicable, to its condition immediately before the use or development started, or to a condition specified in the EO; or
- carry out specified activities to otherwise ensure compliance with the PE Act, planning scheme, permit condition or section 173 agreement.

(Section 119(b) PE Act)

2.15 Who pays the costs of an EO application?

The general rule in proceedings before VCAT is that each party bears its own costs of the proceeding (section 109(1) VCAT Act).

However, VCAT does have the power to order the payment of costs where it is satisfied that it is fair to do so (section 109(2) VCAT Act).

In doing so, VCAT will consider:

- whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding;
- whether a party has been responsible for unreasonably delaying the proceeding;
- the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

- the nature or complexity of the proceedings; and
- any other matter that VCAT considers relevant, e.g. the bringing of an unjustified EO application or the persistent and unjustified failure to comply with planning laws in the face of requests and warnings.

(Section 109(3) VCAT Act and *Practice Note – PNPE4 – Enforcement orders and interim enforcement orders*)

It is more common for costs to be awarded in EO applications than in normal planning applications for review.

3.0 Interim Enforcement Orders

3.1 What is an IEO? Interim Enforcement Orders are EOs made in urgent cases, such as where vegetation is about to be cleared or a building demolished contrary to a planning scheme or planning permit. The purpose of an IEO is to **preserve existing circumstances** pending the hearing of the ordinary EO application.

3.2 Who can apply for an IEO? An application for an IEO can only be made by a person who has already applied for an EO under section 114 of the PE Act (section 120 PE Act). The application for an IEO can be made at the same time as the EO application.

3.3 What if the matter is very urgent? An IEO can be made without giving notice to the parties against whom it is sought (section 120(2) PE Act). Such an application is called an 'ex parte application' and no other party will appear at the application.

3.4 How do I make an IEO application? An IEO application should be made as follows:

Lodge the recommended application form with VCAT at the same time or after the application for an EO. The EO application form includes an application form for an IEO.

The application must set out why the case is urgent and must describe the harm that will occur if an order is not made. The Tribunal will require that you indicate if you are prepared to provide an undertaking to pay damages (explained below in sections 3.9 and 3.10) in the event that the enforcement order application is ultimately unsuccessful.

File an affidavit saying the contents of the application, and any facts you rely on to support the making of your application, are true. This must be lodged with the application (Clause 23 *Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders*).

Note: Sworn oral evidence may be relied upon if circumstances are so urgent that an affidavit is not able to be prepared.

Pay any additional application fee.

3.5 How do I make an ex parte IEO application? An *ex parte* IEO application should be made as follows:

Telephone VCAT on the emergency number (03) 9628 7777. (Clause 28 *Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders*)

If the application is made **outside normal office hours**, telephone the Tribunal on the emergency number (03) 9628 7777. (Clause 29 *Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders*)

Provide the VCAT officer with:

- details of the application;
- reasons why the application warrants such urgent attention;
- a return telephone number or other means of contact.

If appropriate, the VCAT officer will **contact a VCAT member**. The further conduct of the application will then proceed in accordance with the directions of the member. This may result in an urgent *ex parte* hearing (i.e. without other parties attending).

Provide to VCAT 2 copies of any documents, including a draft of the orders sought, relating to the application, before or during such urgent hearing, if not already provided (Clauses 28 and 29 *Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders*).

3.6 What happens at the hearing of an *ex parte* IEO application?

VCAT may make an *ex parte* IEO at the *ex parte* hearing. When considering the application, VCAT will take into account the following:

- whether the matter is so urgent that it cannot wait to be dealt with until after the service of documents on the other affected parties;
- the effect of not making the *ex parte* IEO;
- whether irreparable damage would be caused to the property or to the applicant or other persons if the order is not made;
- the effect of making the *ex parte* IEO upon any person who is the subject of the order or affected by the order;
- whether the applicant has made out a case on the facts provided, i.e. it is probable that an EO would be granted;
- whether, even if a case has been made out, other considerations would make it unjust to grant an IEO;
- whether the applicant would be required to give any undertaking as to damages (to compensate the other party for any loss suffered as a result of the IEO) in the event that an EO is not made; and
- whether VCAT should hear any other person before an IEO is made.

(Clause 25 *Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders*)

3.7 How long does an *ex parte* IEO last?

VCAT must conduct a hearing at which any person affected by an *ex parte* IEO will have a reasonable opportunity to be heard within **7 days** of making the order (section 120(9) PE Act).

VCAT will normally fix a time and place for such a hearing and give directions to the applicant to notify and serve documents on affected parties.

At the hearing, VCAT will determine whether the *ex parte* IEO should be continued pending the hearing of the EO application, varied or cancelled.

Clauses 31 – 33 *Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders*

3.8 What happens at the hearing of an IEO application?

All parties have an opportunity to make submissions at the hearing of an IEO application. VCAT will take into account the following:

- 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 undertakings 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.

(Clause 25 Practice Note – PNPE4 Enforcement Orders and Interim Enforcement Orders)

If an IEO is made, VCAT may also give directions in relation to the future conduct of the matter.

3.9 What is an undertaking as to damages?

If you apply for an IEO, VCAT will generally require you to give an undertaking as to damages. This is a formal promise to VCAT to pay damages to the person who suffers loss because of the IEO if it is ultimately decided that an EO should not be made.

3.10 Do I have to provide an undertaking to pay damages?

Before making an application for an IEO, you should be aware that generally a person seeking an IEO must agree to compensate the affected party if the application fails: see, for example, the decision of Charles J in *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318. This is known as an undertaking to pay damages.

VCAT must consider whether a person applying for an IEO should give an undertaking to pay damages, before deciding to make an IEO (section 120(3)(b) PE Act).

VCAT appears to accept that a member of the public is in a different position to that of a Responsible Authority, given that a Responsible Authority is under a statutory duty to enforce the planning scheme: see *Stonnington CC v Blue Emporium Pty Ltd* [2003] VCAT 1954.

While the provision of an undertaking to pay damages will make it easier to obtain an IEO, you may be able to convince the Tribunal that no undertaking should be provided if you have a strong case with good evidence, where irreplaceable values are at stake.

Consider whether the matter is genuinely urgent. If it is, ask yourself what damage might be suffered by the person who is to be restrained if you ultimately lose the case. For VCAT, this is a question of balancing the risk of injustice. You will need to mount persuasive arguments as to why the risk of injustice is lower if the IEO is made without an undertaking to pay damages being provided.

3.11 What orders can VCAT make?

VCAT can make an IEO, which directs a person:

- to stop the use or development immediately or within the period specified in the IEO;
- not to start the use or development; or
- to do specified things to ensure compliance with the PE Act, planning scheme, permit condition or section 173 agreement.

(Section 120(4) PE Act)

3.12 How long does an IEO last?

An IEO can only operate for a limited time, generally until the determination of the EO application (section 120(6)(b) PE Act).

However, an IEO may also:

- cease on a specific date or on the happening of an event specified in the IEO (section 120(6)(a) PE Act); or
- otherwise be cancelled or amended by VCAT (section 121 PE Act).

4.0 Enforcement of an EO or IEO

4.1 What if an EO or IEO is contravened? If the person against whom the EO and IEO is made does not comply with the Order, any of the following actions may be taken:

- A municipal council (or, with VCAT's consent, any other person) may carry out the work required by an EO or IEO, which has not been done within the specified time (section 123 PE Act); or
- A municipal council may prosecute on the grounds that breaching or non-compliance with an EO or IEO is an offence (section 133 VCAT Act).
- The person who contravenes the order may be fined. The maximum penalties for a breach of an EO or IEO are:
 - imprisonment until the order is complied with or for 3 months, whichever is the sooner; and/or
 - a fine of 20 penalty units, and 5 penalty units for each day the contravention continues after making the order (see Section 11.1) (section 133(1) VCAT Act).
- Any person (including a municipal council) may apply to the Supreme Court, County Court or Magistrates' Court (depending on the amount of money involved) for an order stopping any person from contravening an EO or IEO (section 125 PE Act) (see [Section 8.0](#)). Orders not involving the payment of money (i.e. non-monetary orders) are dealt with by the Supreme Court (section 122 VCAT Act). A breach of an injunction will result in a charge of contempt of court.
- Any person may file a 'certified' EO or IEO (one which has been endorsed by VCAT as being a true copy of the order) in the Supreme Court in order to have it enforced as though it were a Supreme Court order (section 122 VCAT Act), provided it has been personally served on the person against whom it was made.

Means of enforcement include committal of the person or a representative of a corporation for contempt of court or the seizure of the person or corporation's property. (See Supreme Court (General Civil Procedure) Rules 2005, Order 66 under 'Practice and Procedure' at www.supremecourt.vic.gov.au).

5.0 Cancellation or amendment of a permit

5.1 *When can a permit be cancelled or amended?*

VCAT may cancel or amend permits where there has been a substantial failure to comply with the conditions of the permit, regardless of whether the permit was issued at the direction of VCAT, or by the Responsible Authority, usually a Council.

A permit also can be cancelled or amended where any of the following has occurred:

- a material mis-statement or concealment of fact in relation to the permit application;
- any material mistake in relation to the grant of the permit;
- any material change of circumstances since the grant of the permit;
- any failure to give public notice of a permit application, as required by section 52 of the PE Act; or
- any failure to comply with certain sections of the PE Act:
 - section 55 (referral of permit applications to referral authorities);
 - section 61(2) (refusal to grant a permit if the referral authority objects to the grant of the permit); or
 - section 62(1) (inclusion of conditions required by the planning scheme or the responsible authority or non-inclusion of conditions that conflict with such conditions);

(sections 87(1) and 91 PE Act).

VCAT may also amend a planning permit if a building permit cannot be obtained for the development under the Building Act 1993 because the permit issued does not comply with those regulations (section 87(2) PE Act).

The rules which govern VCAT proceedings for cancellation/amendments to permits are contained in *Practice Note – PNPE 3 Cancellation and Amendment of Permits and Stop Orders*.

5.2 *Can I request cancellation or amendment of a permit?*

Potential objectors (other than adjoining owners and occupiers of the land concerned) can only request cancellation or amendment of a permit if they objected or would have been entitled to object to the grant of the permit and believe that:

- there was a failure to give proper notice of the permit application; or
- they have been adversely affected by:
 - a material mis-statement or concealment of fact in relation to the permit;
 - any substantial failure to comply with the conditions of the permit; or

- o any material mistake in relation to the grant of the permit.

(section 89(1) PE Act)

The Tribunal can only direct the Council to amend or cancel the permit at the request of an objector if the objector can show they were substantially disadvantaged by the issue of the permit.

(section 91 of the PE Act)

Otherwise, a request for cancellation or amendment may be made by:

- the Responsible Authority;
- a referral authority; and
- the owner or occupier of the land to which the permit relates.

(Section 87(3) PE Act)

5.3 What time limits apply?

You must act promptly in seeking the cancellation or amendment of a planning permit. VCAT may refuse to consider a request to cancel or amend the permit if you cannot show that you made the request as soon as practicable after you discovered the relevant circumstances (section 89(3) PE Act).

5.4 When can VCAT exercise its powers to amend or cancel a permit?

VCAT may only exercise its powers to amend or cancel a permit in the following circumstances:

- in the case of 'development':
 - o before completion, if the permit relates to the construction of buildings or the carrying out of other works; or
 - o before being substantially carried out, if the permit relates to other development such as subdivision; or
- where the permit relates to the use of land, at any time.

(Section 88 PE Act)

5.5 How do I stop work continuing?

Pending the hearing of a request for cancellation or amendment of a permit, you may apply for a 'stop order'. This is an order that no development other than that specified in the order can be carried out or continued on the land (section 93 PE Act).

In very urgent cases, VCAT may make such an order *ex parte*. This means that the person against whom it is made has no notice of the request and no opportunity to be heard in relation to it.

In applying for a stop order, you should apply for an urgent hearing. The procedure for doing this is set out in *Practice Note-PNVCAT 5 Directions Hearings and Urgent Hearings*, available on the VCAT website. The steps for applying for a stop order include making a written application to VCAT, stating the reasons why the matter should be heard urgently, providing a copy of the application to the responsible authority and person whom the order is against,

and providing VCAT with a written statement that you have done this. VCAT will then list the matter for a hearing about whether the order should be issued, and notify the parties of when the hearing will take place (Clauses 33 and 34 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*).

**5.6 Stop orders –
undertaking as to
damages**

If you apply for a stop order, VCAT may require that you give an undertaking as to damages (Clause 31 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*) (see [Section 3.9](#)).

This means that if the permit is not ultimately cancelled or amended, you will be liable to pay compensation to the owner, occupier and/or developer of the land for any loss or damages they have suffered due to the development being stopped (section 94 PE Act).

**5.7 How do I apply for
the cancellation or
amendment of a
permit?**

A request for cancellation or amendment should be made as follows:

Lodge the recommended application form with VCAT. The application must include details of the parties, the permit, the subject land and reasons for lodging the request.

Lodge copies of the permit, a title search of the subject land and, if the owner or occupier is a company, a company search. The title and company searches should not be more than 14 days old. See [Section 11.2](#) about conducting a title search.

Pay the prescribed fee. An additional fee is payable if a stop order is also sought. See VCAT's website or call VCAT for up to date details of fees payable.

VCAT may then give directions to the applicant as to:

- giving notice of the request to other parties pursuant to section 90 PE Act; and
- providing evidence to VCAT of giving such notice.

Serve a copy of the request on:

- the Responsible Authority;
- the owner and occupier of the land concerned;
- the Minister for Planning;
- any relevant referral authority; and
- any other person who appears to have a material interest in the outcome of the request.

Provide VCAT with a Statement of Service (see [Section 2.9](#)).

(Clauses 5-7 and 19 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*).

**5.8 How can an
application to cancel
or amend a permit**

A person wanting to oppose a request to cancel or amend a permit must lodge with VCAT and serve on the other parties a written notice of the grounds on which that person intends to rely at the hearing of the request (Clause 56,

be opposed? Schedule 1 VCAT Act).

5.9 When will a hearing be held? VCAT will fix a time for a hearing and notify the parties in accordance with its usual listing procedures.

5.10 What happens at the hearing? A request to cancel or amend a permit or an application for a stop order is not the same as a normal planning application for review.

VCAT may require that evidence be given on oath or affirmation rather than by submissions. Evidence may be given orally or by affidavit. (Clause 26 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*).

All parties will be given a reasonable opportunity to be heard, give evidence or to present written submissions. (Clause 22 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*).

VCAT will consider both whether the matters listed in Section 5.2 have been proved, and the general planning merits of the development (section 90A PE Act).

At the hearing of an application for an order to stop development, standing to be heard or make a submission will also be given to any person who wishes to contest the request. (Clause 28 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*).

VCAT will treat the application for an order to stop development in a similar manner to an application for an IEO. (Clause 32 *Practice Note-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*) (See [Section 3.8](#)).

5.11 Who pays the costs of the application? The general rule in proceedings before VCAT is that each party bears its own costs (section 109(1) VCAT Act).

However, VCAT does have the power to order payment of another party's costs where it is satisfied that it is fair to do so (section 109(2) and (3) VCAT Act). (See [Section 2.15](#)).

For example, an unjustified application to cancel or amend a permit or to stop development or the persistent and unjustified failure to comply with planning laws despite requests and warnings may result in orders for costs. (Clause 35 *Practice not-PNPE 3 Cancellation and Amendment of Permits and Stop Orders*).

Costs orders are more common in these cases than in normal planning applications.

6.0 Planning Infringement Notices

- 6.1 What is a PIN?** A planning infringement notice (**PIN**) is an 'on the spot' penalty for minor infringements of the PE Act and is issued by a responsible authority.
- 6.2 When is a PIN served?** A responsible authority may serve a PIN if it has reason to believe that a person has breached the planning scheme, a planning permit or a section 173 agreement.
- (Section 130(1) PE Act)
- 6.3 How is a PIN served?** A PIN will be served by either the Responsible Authority or planning authority, usually the local council. It may be served on the owner or occupier of land either personally or by prepaid letter addressed to the owner or occupier at his or her usual or last-known place of residence or business.
- (Section 145 PE Act)
- 6.4 What penalties apply?** PINs may impose a fine limited to 5 penalty units for natural persons and 10 penalty units for a body corporate or require steps to be taken to rectify an offence without going to a Court or VCAT
- (Section 130(3) PE Act)
- 6.5 What is a penalty unit?** The value of penalty units is fixed by notification in the Victorian Government Gazette each financial year.
- See [Section 11.1](#) below.
- 6.6 What actions can a PIN require?** The PIN must set out (amongst other things) the additional steps required (if any) to rectify the offence. Such additional steps may include, but are not limited to:
- stopping the offending development or use of land;
 - modifying the offending development or use of land;
 - removing the offending development;
 - acting to prevent or minimise any adverse impact of the offending development or use of land;
 - entering into an agreement under section 173 of the PE Act; or
 - doing or omitting to do anything in order to remedy a contravention of a planning scheme, permit or section 173 agreement.
- (Section 130(2A) and (4) PE Act)
- 6.7 What happens if a PIN is contravened?** If a person contravenes a PIN by not paying the fee or taking any specified steps as set out in Section 6.6 above, further steps to require payment of the PIN, as well as punishments, including eventual imprisonment, can be pursued by the Responsible Authority under the *Infringements Act 2006*.

7.0 Prosecution under the PE Act

- 7.1 What is a prosecution?** Prosecution is a way of punishing a person for a contravention of a planning control.
- It can be distinguished from an EO, which orders breaches be put right.
- 7.2 When can a prosecution be brought?** Prosecutions may be brought against someone for:
- contravening or failing to comply with a planning scheme, permit or a section 173 agreement (section 126 PE Act); or
 - contravening or failing to comply with an EO or IEO (section 133 VCAT Act);
 - obstructing, without lawful excuse, an authorised person or member of the police force who is taking action authorised under sections 133 to 138 (powers of entry and investigation) of the PE Act (section 137 PE Act).
- 7.3 Who can bring a prosecution?** A prosecution may be brought under the PE Act by:
- a Responsible Authority; or
 - a member of the public.
- 7.4 Where are prosecutions brought?** Prosecutions are brought in the Magistrates' Court of Victoria and are governed by the *Magistrates' Court Act 1989*.
- 7.5 What time limits apply?** A prosecution must be brought within 12 months after the date on which the offence was committed (section 26(4) *Magistrates' Court Act 1989*).
- For an offence of a continuing nature, the time limit does not start to run until the commission of the offence has ceased.
- 7.6 How do I bring a prosecution?** To commence a prosecution, a charge sheet describing the offence must be signed by you and filed with the Registrar of the Magistrates' Court.
- At the same time as filing the charge sheet, you should apply for a summons setting the matter down for mention and requiring the accused to appear. A copy of the Charge Sheet must be given to the person charged together with a copy of any summons at least 14 days before any mention date.
- See generally sections 24 to 35 of the *Magistrates' Court Act 1989* (www.magistratescourt.vic.gov.au under Practice and Procedure, Legislation).
- 7.7 What penalties apply?** Where no penalty is prescribed for certain offences the maximum penalty is:
- 1200 penalty units (section 127(a) PE Act); and/or
 - 60 penalty units for every day during which the contravention or failure continues after conviction (section 127(b) PE Act).
- See [Section 6.5](#).

The maximum penalty for breaching section 137 PE Act is 60 penalty units.

If the Responsible Authority has brought the prosecution and succeeds, the penalty will be paid to it (section 129 PE Act).

If a member of the public brings proceedings and succeeds, the penalty will be paid into the Consolidated Revenue of the State of Victoria, rather than to the individual or the Responsible Authority.

If a body corporate commits any of the following offences, an officer of the body corporate will be liable for an offence if they failed to exercise due diligence to prevent the commission of the offence by the body corporate (section 128 PE Act) by:

- obtaining or attempting to obtain a permit for use of development of land by wilfully making or causing to be made any false representation or declaration (section 48 PE Act)
- continuing development after being ordered that no development should be carried out (section 93(3) PE Act)
- contravening or failing to comply with a planning scheme, permit or a section 173 agreement (section 126 PE Act)
- obstructing an authorised person or a member of the police force in taking any action authorised under sections 133 to 138 PE Act (powers of entry and investigation) (section 137 PE Act)

In determining whether an officer has failed to exercise due diligence, the Court may consider the following factors:

- what the officer knew or reasonably ought to have known about the commission of the offence;
- whether or not the officer was in a position to influence the body corporate; and
- what steps the officer took or reasonably could have taken to prevent the offence and any other relevant matter.

7.8 Should I bring a prosecution?

If you have a genuine concern that an offence has been committed, you should first raise it with the Responsible Authority.

If the Responsible Authority does not take the action you consider appropriate, you may wish to bring your own prosecution. If you do so, you will be required to prove beyond reasonable doubt that the relevant offence has been committed.

If you do not succeed in the prosecution, you may be ordered to pay the costs of the defendant (section 131, *Magistrates' Court Act 1989*).

It is strongly recommended that you obtain legal advice on the merits of such a prosecution before you proceed. You should also weigh up the benefits and

risks of seeking an EO versus taking a prosecution.

8.0 Injunctions

8.1 *What is an injunction?*

An injunction is an order that a person or entity stop doing certain activities or requiring them to undertake certain actions. Injunctions can only be ordered if someone has broken, or is about to break, the law. There are 3 general types of injunctions:

Interim injunction: an order made in very urgent circumstances, often without the other party attending court or being given notice (*ex parte*). This will only be in force for a short time until the hearing for an interlocutory injunction.

Interlocutory injunction: a temporary order, which lasts until the final hearing of a dispute.

Permanent injunction: an order by the court after a full hearing has been conducted and the parties have tendered all relevant evidence. It may last indefinitely or until a specific date or a certain event occurs.

8.2 *What types of injunctions are available in planning matters?*

The following injunctions are available:

- an injunction may be sought from a court under section 125 of the PE Act to stop someone from breaching an EO or IEO (**section 125 injunction**);
- VCAT may grant an injunction, including an interim injunction, in any proceeding if it is just and convenient to do so, under section 123 of the VCAT Act;
- a common law injunction is also available from a court, although use of this type of injunction is less common due to the availability of less expensive enforcement procedures.

8.3 *Section 125 injunctions – who may apply?*

Any person (including a Responsible Authority) may apply for a section 125 injunction (section 125 PE Act).

8.4 *Section 125 injunctions – in what circumstances?*

A section 125 injunction is available:

- where there is a breach or threatened breach of an EO or IEO;
- whether or not proceedings are brought for an offence against the PE Act;

A section 125 injunction is not available:

- to prevent a contravention or threatened breach of the PE Act or planning controls ;
- if the defendant gives an undertaking not to do certain things in contravention of the EO or IEO.

**8.5 Section 125
injunctions – which
court?**

The value of a dispute normally determines the court to which an application for an injunction should be made as follows:

Magistrates' Court: disputes up to \$100,000

County Court: disputes over \$100,000 and up to \$200,000

Supreme Court: disputes over \$200,000

In working out the value of a dispute about planning controls, you should take into account the value of the relevant property. The Supreme Court is the most likely venue for these types of disputes.

8.6 General

If you apply for an injunction and do not succeed, the relevant court may order you to pay the costs of the other party.

You should seek legal advice before applying for an injunction.

9.0 Declarations

9.1 What is a declaration? A declaration is effectively a statement by a court setting out the parties' rights and obligations in certain circumstances.

9.2 Why would I want a declaration? Declarations are useful when there is doubt about:

- the legality of a use or development under the planning scheme; or
- the legality of a planning permit or about how a use should be classified under the Tables of Uses in the planning scheme (where it is inappropriate to resolve the matter by making an application for a planning permit).

For example, a business may have commenced selling goods in an area where a permit is required to sell some or all of the goods or in which some of the goods are thought to be prohibited. A commercial competitor may ask the Council to enforce the planning scheme. Prior to seeking enforcement orders, the competitor, the Council or the occupier of the land may seek a declaration to clarify the legality of the use, and which goods may legally be sold on the premises.

For another example, a declaration may be sought as to whether an exemption is available from the requirement to obtain a permit to remove native vegetation. Rather than risk being prosecuted, a landowner may ask for a declaration that the removal of certain vegetation for certain purposes is exempt from the requirement for a permit.

9.3 Section 149B Declaration Under section 149B PE Act, **any person** may apply to VCAT for a declaration concerning a planning matter or anything done by a Responsible Authority.

9.4 Section 149A Declaration Under section 149A PE Act, only 'specified persons' may apply to VCAT for a determination of a matter if it relates to:

- the interpretations of the planning scheme or a permit in relation to land, or use or development of land;
- whether section 6(3) of the PE Act (relating to existing uses and developments of land) applies to a use or development of land; or
- a provision of a planning scheme or amendment permitting the continuation of a use that was lawful before the commencement of the planning scheme or amendment.

A 'specified person' or a party to the agreement may also apply to the Tribunal for the determination of a matter of interpretation of a section 173 agreement (section 149A(1A) PE Act).

'Specified persons' include the owner, user or developer of land directly affected by the matter, a Minister, Responsible Authority, referral authority, municipal authority, public authority, or, if the matter affects Crown land, the occupier of the Crown land (section 148 PE Act).

10.0 Nuisance and Enforcement under Part 6 of the Public Health and Wellbeing Act 2008

10.1 What is a nuisance? A nuisance is an interference with the public's right to health, safety, peace and comfort.

10.2 When does the Public Health and Wellbeing Act apply? Division 1 of Part 6 of the Public Health and Wellbeing Act applies to nuisances that are, or are liable to be, dangerous to health or offensive.

'Offensive' means noxious or injurious to personal comfort (section 58 Public Health and Wellbeing Act).

In particular, the Public Health and Wellbeing Act applies to nuisances from:

- premises; or
- water; or
- animals, including a bird or insect, capable of carrying a disease transmissible to human beings; or
- refuse; or
- noise or emission; or
- state, condition or activity; or
- other matter or thing-

which is, or is liable to be, dangerous to health or offensive.
(section 58 Public Health and Wellbeing Act).

10.3 What is an offence under the Public Health and Wellbeing Act? It is an offence for someone to cause a nuisance, or to knowingly allow a nuisance to exist on or come from any land owned or occupied by or in the charge of that person.

The maximum penalty for this offence is 120 penalty units for an individual and 600 penalty units for a corporation (see [Section 6.5](#)) (section 61 Public Health and Wellbeing Act).

10.4 When is a nuisance dangerous to health or offensive? In determining whether a state, condition or activity is a nuisance that is, or is liable to be, dangerous to health or offensive a decision-maker:

- **must consider** the degree of offensiveness;
- **must not consider** the number of persons affected or that may be affected.

(Section 58 Public Health and Wellbeing Act)

- 10.5 Who do I notify of a nuisance?** If you believe that a nuisance exists, you should notify the relevant council (section 62 Public Health and Wellbeing Act).
- 10.6 What is Council's duty?** Council has a general duty to remedy as far as is reasonably possible, nuisances within its municipal district (section 60 Public Health and Wellbeing Act).
- In addition, the council **must** investigate any notice of a nuisance.
- 10.7 What action can council take?** If, upon investigation, a nuisance is found to exist, the council **may**:
- issue an improvement notice or a prohibition notice (ie an order that the nuisance be stopped or fixed;
 - bring proceedings in a court for an offence against the Act; or
 - if the council is of the opinion that the matter is better settled privately, advise you of any available methods for doing so.
- (Section 62 Public Health and Wellbeing Act)
- 10.8 What happens if a notice is contravened?** If a person fails to comply with an improvement or prohibition notice or, if the nuisance, although stopped or reduced, is likely to recur, the council may commence proceedings in the Magistrates' Court by filing a complaint (section 197 Public Health and Wellbeing Act).
- If the Court is satisfied that the nuisance exists or is likely to recur, the Court must order that the person comply with the improvement notice or prohibition notice or carry out works to prevent the recurrence of the nuisance.
- The Court may also impose a maximum penalty of 120 penalty units for an individual and 600 penalty units for a corporation (see [Section 6.5](#)) (section 197 Public Health and Wellbeing Act).
- 10.9 What can I do if Council fails to act?** Where a council fails to investigate a complaint of nuisance within a reasonable time, the person who complained to the council may make a complaint to the Magistrates' Court. The Court can then proceed as though the Council had made the complaint (see 10.6 above).
- If the Court is satisfied that the person making the complaint has reasonable grounds for doing so, the Court may order the council to pay any costs and expenses incurred by the person.
- However, if the Court is satisfied that such a complaint is vexatious or frivolous (for example, made to get revenge on, or annoy someone, rather than having a genuine basis) it may order the person who made the complaint to pay the costs and expenses incurred by the person against whom the complaint was made.
- (Section 63 Public Health and Wellbeing Act)

**10.10 What other options
might I have?**

Where noise is the issue, and the noise is emanating from residential premises, you may take action under section 48A of the EP Act. You should ask the Council, the local police, or the EPA to take action first. If none of these bodies are willing to take action and the noise remains unbearable, contact a solicitor before commencing any proceedings.

11.0 Useful information

11.1 Glossary

EP Act	<i>Environment Protection Act 1970</i>
EPA	Environment Protection Authority
<i>ex parte</i> application	Where an application is made against a person who has no notice of the application and no opportunity at first instance to be heard in relation to it.
PE Act	<i>Planning and Environment Act 1987 (Vic)</i>
Penalty unit	The value of penalty units is fixed by notification in the Victorian Government Gazette each financial year. From 1 July 2014 until 30 June 2015, a penalty unit is \$147.61
Responsible Authority	A body designated to administer planning schemes, including municipal or local council and the Minister for Planning.
VCAT	Victorian Civil and Administrative Tribunal

11.2 Title Search

A title search shows the owner of the land and anybody else who has an interest in the land, such as a mortgagee or caveator.

A title search can be obtained by:

- visiting the Land Information Centre at Level 10, 570 Bourke Street, Melbourne. (phone (03) 8636 2831));
- retaining a professional title searcher;
- retaining a conveyancer or solicitor; or
- searching online at www.landata.vic.gov.au. You will need a credit card for online searching. The Department of Transport, Planning and Local Infrastructure have information about searching a title, which is available at www.dtpli.vic.gov.au.

11.3 Company Search

A company search shows all administrative information about a company, such as the address of its registered office, the names of directors and shareholders and its current status.

A company search can be obtained by:

- visiting the Australian Securities and Investments Commission at Level 7, 120 Collins Street, Melbourne (phone (03) 9280 3200))
- retaining an ASIC information broker, which can be located at www.asic.gov.au; or
- retaining a solicitor.

11.4 Further information

For further details regarding enforcement applications and VCAT procedure see:

- *Practice Note – PNPE 1 - Planning and Environment List – General procedures;*
- *Practice Note – PNPE 2- Information from decision makers;*
- *Practice Note – PNPE 3 – Cancellation and amendment of permits; and*
- *Practice Note – PNPE 4 – Enforcement orders and interim enforcement orders.*

Copies of all practice notes and application forms are available from the VCAT website (below).

11.5 Contact list

VCAT (Planning List)
55 King Street, Melbourne 3000
Ph: (03) 9628 9777

www.vcat.vic.gov.au

Melbourne Magistrates' Court
233 William Street, Melbourne 3000
Ph: (03) 9628 7777

www.magistratescourt.vic.gov.au

Environment Protection Authority Victoria
200 Victoria Street, Carlton 3053
Ph: 1300 372 842

www.epa.vic.gov.au

Supreme Court of Victoria
Level 2, 436 Lonsdale St, Melbourne 3000
Phone: (03) 9603 9300

www.supremecourt.vic.gov.au

11.6 Legal advice

LEGAL ADVICE SHOULD BE SOUGHT IN SPECIFIC CASES

While all care has been taken in the preparation of this publication, it is not a substitute for legal advice in individual cases. For any specific questions you should seek legal advice.