Using Victoria's Planning System

October 2022

A technical guide to interpretation and administrative procedures under the Planning and Environment Act 1987 and the Planning and Environment Regulations 2015 and their interaction with other related legislation and planning schemes

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Contents

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Introduction

Contents

This guide provides information about how the planning system operates under the *Planning and Environment Act 1987* (PE Act). It explains the planning scheme amendment process, the planning permit application process as well as other related processes.

The guide forms part of a suite of guidance material including planning practice notes available on the Department of Environment, Land, Water and Planning website **planning.vic.gov.au**.

Objectives of planning

PEA s 4

The objectives of planning in Victoria are set out in the PE Act. They are:

a) to provide for the fair, orderly, economic and sustainable use and development of land;

b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;

c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;

e) to protect public utilities and other assets and enable the orderly provision and coordination of public utilities and other facilities for the benefit of the community;

f) to facilitate development in accordance with the objectives set out in paragraphs a), b), c), d) and e);

fa) to facilitate the provision of affordable housing in Victoria;

g) to balance the present and future interests of all Victorians.

PEA s 1

The purpose of the PE Act is to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians.

The PE Act is supported by the Planning and Environment Regulations 2015 and the Planning and Environment (Fees) Regulations 2016 which prescribe how certain provisions of the Act are applied.

The Victoria Planning Provisions and planning schemes

PEA s 4(2)(b)

The PE Act provides for a single instrument of planning control for each municipality, the planning scheme, which sets out the way land may be used or developed. The planning scheme is a legal document, prepared and approved under the PE Act. It contains state and local planning policies, zones and overlays and other provisions that affect how land can be used and developed.

The PE Act also provides for the *Victoria Planning Provisions* (VPP) – a template document of standard state provisions for all planning schemes to be derived from. It is not a planning scheme and does not apply to any land.

The PE Act sets out procedures for preparing and amending the VPP and planning schemes, obtaining a permit under a planning scheme, settling disputes, enforcing compliance with planning schemes and other administrative procedures.

Accessing the VPP and planning schemes

The VPP and all planning schemes, including the associated maps are available on the department's website at planning.vic.gov.au.

Using Victoria's Planning System

Chapter 1: Planning Schemes

Contents

1.1 What is a planning scheme?

A planning scheme is a statutory document that sets out objectives, policies and provisions relating to the use, development, protection and conservation of land in the area to which it applies. A planning scheme regulates the use and development of land through planning provisions to achieve those objectives and policies.

PEA ss 4A(2), 6(1), 6(2)

Matters that a planning scheme may provide for are described in section 6 of the *Planning and Environment Act 1987* (PE Act).

PEA s 6(1)

The PE Act requires that a planning scheme:

- must seek to further the objectives of planning in Victoria within the area covered by the scheme
- may make any provision that relates to the use, development, protection or conservation of any land in the area (section 3 of the PE Act defines the meaning of these terms).

1.2 What are the Victoria Planning Provisions?

The PE Act distinguishes between the *Victoria Planning Provisions* (VPP) and a planning scheme. The VPP is a document containing a comprehensive set of planning provisions for Victoria. It is not a planning scheme and does not apply to any land. It is a statewide reference used, as required, to construct a planning scheme. It is a statutory device to ensure that consistent provisions for various matters are maintained across Victoria and that the construction and layout of planning schemes is always the same.

In preparing and maintaining the planning scheme, a council draws from the VPP in two essential ways:

- It must include provisions that are mandatory in all planning schemes in Victoria. These include the 'purpose and vision', the statewide and regional provisions of the Planning Policy Framework (PPF), the 'particular provisions' applying to specified categories of use and development (such as car parking and signs), the 'general provisions' and the 'operational provisions'.
- It may include provisions that are relevant to or give effect to its Municipal Planning Strategy (MPS) and local provisions of the PPF. These provisions will include the relevant state standard zones and overlays to be applied in the scheme. Some of these zones and overlays include local provisions as schedules to the zone or overlay.

In the simplest terms, a planning scheme is constructed by taking the VPP as a basic template. A local planning strategy and policy framework (the MPS and parts of the PPF) are then added. The zones and overlays needed to implement these are then selected and appropriate local provisions (the schedules) are written to support the zones and overlays.

1.3 What is a zone?

All land is subject to a zone. The planning scheme zones land for particular uses, for example, residential, industrial, commercial or other. The zones are listed in the planning scheme and each zone has a purpose and set of requirements. This information describes if a planning permit is required, and the matters that the council must consider before deciding to grant a permit. A zone may also specify information that must be submitted with a planning permit application. The zone also contains information relating to land uses, subdivision of land, construction of new buildings and other changes to the land. The zone

will also list any classes of building and works that can be assessed under the VicSmart shorter permit application process.

A zone sets out land use controls in a table of uses categorised into three sections:

- Section 1: Land uses that do not require a planning permit
- Section 2: Land uses that require a planning permit
- Section 3: Prohibited uses. Some uses are not allowed on land in a zone because they may conflict with other uses; for example, industry is prohibited in the General Residential Zone.

A use that is not specifically mentioned is covered by a reference to 'any other use'. These are usually found in Section 2 and sometimes in Section 3.

Sometimes a use in Section 1 or Section 2 must meet specified conditions. If these conditions are not met, the use may require a permit or may be prohibited.

The table of uses refers specifically to the use of land and not to the development of land.

1.4 What is an overlay?

The planning scheme map may show that a piece of land has an overlay as well as a zone affecting it. Not all land has an overlay. Some land may be affected by more than one overlay. If an overlay applies, the land will have some special feature such as a heritage building, significant vegetation or flood risk. The Heritage Overlay, for example, applies to heritage places of natural or cultural significance and describes the requirements that apply.

The overlay information will indicate if a planning permit is required for the construction of a building or other change to the land and sets out requirements for subdivision, and buildings and works that apply in addition to the requirements of the zone. For example, if a Heritage Overlay applies, a planning permit is required to demolish an existing building. The Heritage Overlay requires a council to consider, before it grants the permit, whether the demolition of the building will lessen the significance of the heritage place. An overlay may specify information that must be submitted with an application for a planning permit.

In some cases, an overlay will list classes of building and works eligible for assessment under VicSmart.

1.5 What do 'use' and 'development' mean?

Use of land refers to using land for a particular purpose (such as a dwelling or a shop) and may not involve building anything.

Development includes the construction, alteration or demolition of a building or works and the subdivision or consolidation of land.

In some zones, the development of land and the proposed new use both require a permit. For example, in the Mixed Use Zone, a permit is required to construct a building and to use a building for industry. In other zones, the use may not require a permit, but a permit may be required to construct the building (the development) for the use. In this situation, a council can only consider the effects of the new building (such as height, visual bulk and so on) and not the change in the use of the land.

Some uses and development types are exempt from requiring a permit. These exemptions are listed in clause 62 of the planning scheme.

1.6 Who and what are affected by a planning scheme?

PEA s 16

Planning schemes may apply to all private and public land in Victoria. A planning scheme is binding on all members of the public and on every Victorian minister, government department, public authority and council.

The land to which a planning scheme may apply includes land covered by water (such as lakes and some coastal waters) and areas above or below ground (such as air rights and excavations).

Exemptions may be provided by a Governor in Council Order published in the *Victoria Government Gazette*.

Current exemptions under section 16 of the PE Act apply to a number of ministers. Exemptions also apply to specific sites and projects, such as parts of Albert Park.

Where they have been exempted from any legal need to comply with planning scheme requirements, as a matter of practice the ministers concerned should consult from an early stage with relevant planning authorities on proposed works. This consultation fosters cooperative involvement of local government in state planning and development matters. Consultation needs to be effective and therefore should be more than the mere circulation of proposals.

Under section 52(i) of the Commonwealth Constitution and the *Commonwealth Places (Administration of Laws) Act 1970* (Vic) and subject to the *Commonwealth Places (Application of Laws) Act 1970* (Cth), the Commonwealth has exclusive legislative power in relation to places acquired by the Commonwealth for a public purpose. Therefore, a planning scheme does not apply to a 'Commonwealth place'. Whether a particular Commonwealth agency is considered the Commonwealth may depend on its governing legislation, funding and level of control. For example, bodies such as the Telstra Corporation, Australian Postal Corporation and Australian Broadcasting Corporation are subject to a planning scheme.

Any requirement in a planning scheme seeking to regulate the use or development of Commonwealth land is inoperative. Land disposed of by the Commonwealth can only be subject to planning controls if an amendment is prepared and approved after disposal. Commonwealth land is identified as 'CA' on planning scheme maps.

1.6.1 Existing uses

PEA s 6(3), (4)

A planning scheme cannot prevent the continuation of a lawfully existing use under the PE Act if the existing use was established before the planning scheme came into operation.

Planning scheme cl 63

Clause 63 of the planning scheme provides that an existing use right is established if any of the following apply:

- the use was lawfully carried out immediately before the approval date
- a permit for the use had been granted immediately before the approval date and the use commences before the permit expires
- a permit for the use had been granted for an alternative use, which does comply with the scheme, and the use commences before the permit expires
- proof of continuous use for 15 years is established

- the use is a lawful continuation by a utility service provider or other private body of a use previously carried on by a minister, government department or public authority, even where the continuation of the use is no longer for a public purpose.

This does not apply to a lawful use of land:

- that has stopped for a continuous period of two years
- that has stopped for two or more periods, which together total two years in any period of three years, or
- in the case of a seasonal use, that does not take place for two years in succession.

For existing use rights established through a use having been lawfully carried out immediately before the approval date, the relevant 'approval date' is:

- the date when the planning scheme commenced operation; or
- the date when an amendment to the planning scheme commenced operation which would have had the effect of restricting or prohibiting the use.

Planning scheme cl 63.11

It is sometimes necessary to trace an existing use back through prior planning schemes or provisions over many years to determine its lawfulness. Planning Scheme historical records are available to support this research. See **planning.vic.gov.au**. After selecting the relevant planning scheme under 'browse planning schemes', refer to the 'histories' tab. However, to avoid cumbersome investigations, planning schemes deem an existing use to have been lawfully established if proof of continuous use for 15 years is established in accordance with clause 63.11 of the planning scheme.

Existing use rights apply to land, not to the owners or others with an interest in the land. It is also important to note that these rights apply only to the use of land, not development. What is allowed to continue is the use that was lawfully carried out immediately prior to the approval date of the amendment or scheme that prohibited the use. In this situation, the use is confined to the same specific use, not by the land use definitions set out in the planning scheme.

The principles of establishing the use to which existing use rights apply are based on those appearing in cases such as *Shire of Perth v O'Keefe* [1964] 10 LGRA 147 and *City of Nunawading v Harrington* [1985] VR 641.

PEA s (6), (4A)

The PE Act allows planning schemes to require that existing uses comply with a code of practice which has been approved by Parliament. For example, planning schemes currently require the use of land for timber production to comply with the *Code of Practice for Timber Production*.

1.6.2 Who administers the planning scheme?

PEA ss 13, 14

The administration and enforcement of a planning scheme is the duty of a responsible authority. In most cases this will be a council, but it can be the minister administering the PE Act or any other person whom the planning scheme specifies as a responsible authority for that purpose. For example, in the Melbourne Planning Scheme, the Minister for Planning is the responsible authority for land in a number of areas including the Melbourne Casino Area, Melbourne Docklands Area, Flemington Racecourse and the Royal Melbourne Showgrounds.

A council will usually act as both planning authority and responsible authority.

PEA s 201A

If the responsible authority for particular land or particular matters changes at any time (for whatever reason), the 'old' responsible authority immediately loses its powers and matters of a continuing nature can be decided (without any need to start again) by the 'new' responsible authority. Relevant documents must be transferred to assist the 'new' responsible authority.

PEA ss 201A, 201B

If the change is due to an alteration in administrative boundaries, a planning scheme amendment will eventually be needed to transfer the control over affected land to another planning scheme.

1.6.3 Where must a planning scheme be available for inspection?

PEA ss 40, 42, 197A

The PE Act requires the Minister, the council and the responsible authority to maintain an up-to-date copy of the planning scheme, incorporating all amendments to it and all documents lodged with those amendments. (In most cases the council is also the responsible authority for the scheme.)

The planning scheme must be made available free of charge in accordance with the public availability requirements of the PE Act by either making it available for public inspection:

- in person at the office of the responsible authority at any time during office hours; or
- on its website as well as on request by any person at their offices at an agreed time during office hours.

These documents are available online at **planning.vic.gov.au**.

PEA s 60(1A)(g); PE Regs reg 25

Regulation 25 requires that before deciding on a permit application the responsible authority must make available for inspection free of charge at its offices a copy of any document that it considers under section 60(1A)(g) of the PE Act. If the responsible authority is not the council for the municipal district in which the land is located, the responsible authority must give a copy of the document to the council for the purpose of making the document available for inspection free of charge at the council's offices.

Under section 60(1A)(g) of the PE Act, a responsible authority may consider any strategic plan, policy statement, code or guideline that has been adopted by a minister, government department, public authority or council before deciding on an application.

In any case where there is some doubt whether a document comes within the scope of this requirement, the responsible authority should make sure it is available.

See Planning Practice Note 74 – *Making Planning Documents Available to the Public* for more information about meeting the requirements for making documents available for inspection.

1.6.4 When must a planning scheme be reviewed?

PEA s 12B(1); 12B(2)

A planning authority that is a municipal council must review its planning scheme no later than one year after each date by which it is required to approve a council plan under section 125 of the *Local Government Act 1989*, or within such longer period as is determined by the Minister for Planning.

PEA s 12B(3)

The objective of the review is to enhance the effectiveness and efficiency of the planning scheme in achieving the objectives of:

- planning in Victoria, and
- the planning framework established by the PE Act.

1.6.5 What must the review evaluate?

PEA s 12B(4)

The review must evaluate the planning scheme to ensure that it:

- is consistent in form and content with the directions or guidelines issued by the Minister under section 7 (see part 1.7 below)
- sets out effectively the policy objectives for use and development of land
- makes effective use of state provisions and local provisions to give effect to state and local policy objectives.

PEA s 12B(5)

When the review is completed, the planning authority must report its findings to the Minister without delay.

1.7 What is the Ministerial Direction – *The Form and Content of Planning Schemes*?

PEA s 7(5); 7(6)

The form and content of all planning schemes prepared under Part 3 of the *Planning and Environment (Planning Schemes) Act 1996* and any amendment to a planning scheme must comply with the Ministerial Direction – *The Form and Content of Planning Schemes*.

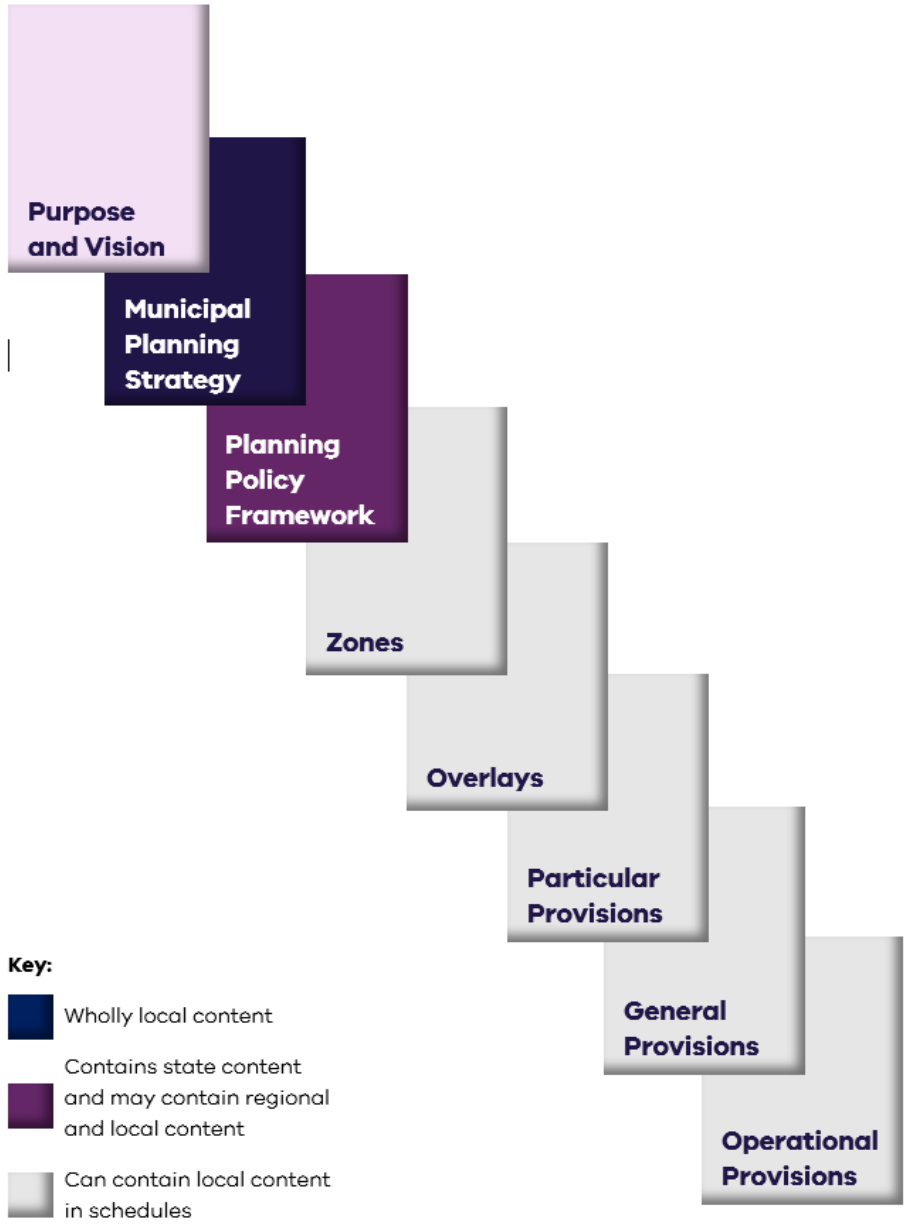
The Ministerial Direction – *The Form and Content of Planning Schemes* requires that a planning scheme must include the following parts of the VPP in the same order:

- Purpose and vision – clause 00
- PPF – clauses 10–19 (inclusive)
- Zones – clauses 30–37 (as relevant to the planning scheme)
- Overlays – clauses 40–45 (as relevant to the planning scheme)
- Particular provisions – clauses 50–59 inclusive
- General provisions – clauses 60–67 (inclusive)
- Operational provisions – clauses 70–74 (inclusive)

The Ministerial Direction – *The Form and Content of Planning Schemes* states that a planning scheme must not include any zone or overlay clause other than a zone or overlay clause selected from the VPP.

1.8 What are the components of a planning scheme?

Figure 1.1: Components of a planning scheme



The strategic foundation of each scheme is made up of two components: the MPS which contains only local policy content and the PPF which includes state, regional and local policy content. The application of zones, overlays and local provisions must have a readily discernible basis in the policy framework.

1.8.1 Planning Policy Framework

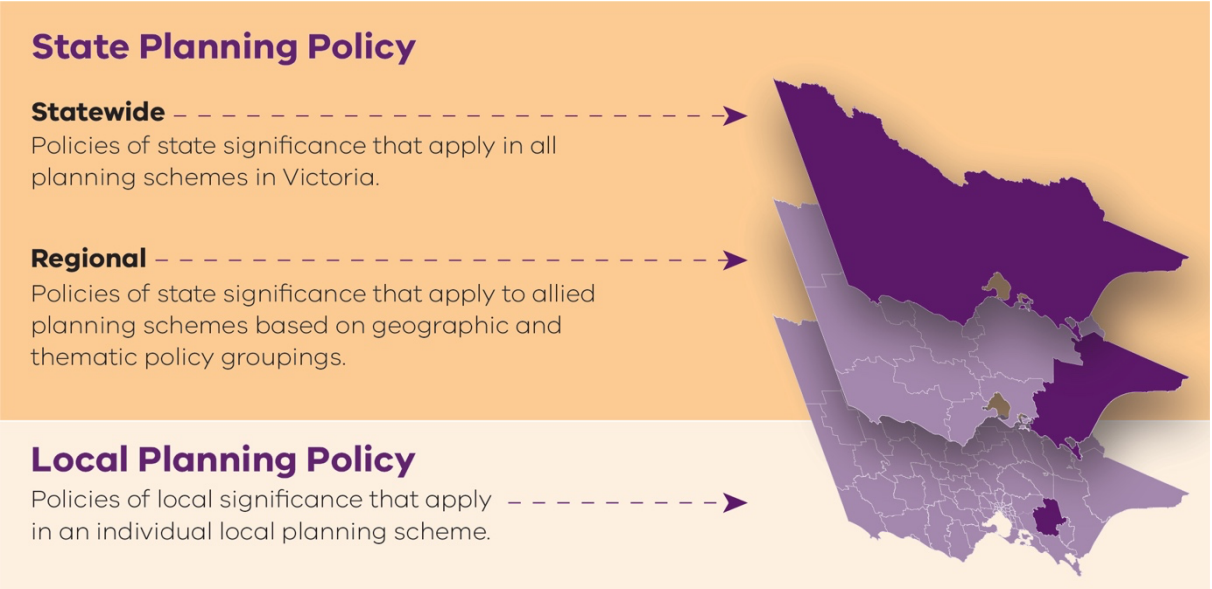
The PPF at clauses 10–19 is the planning policy content of a planning scheme. It contains statewide and regional planning policies and may contain local planning policies, which articulate the land use and development outcomes sought by the planning scheme. These are implemented through the zone, overlay and particular provisions.

Statewide, regional and local planning policies are grouped by theme, with applicable regional and local policies located under the corresponding statewide policy. To help identify the reach of each policy, their clause numbers include a character identifier:

- Statewide planning policies include the letter 'S'.
- Regional planning policies include the letter 'R'.
- Local planning policies include the letter 'L'.

For example, a statewide policy for the protection of biodiversity will be labelled '12.01-1S', while the regional and local equivalents will be named '12.01-1R' and '12.01-1L' respectively.

Figure 1.2: Planning Policy Framework



There are two types of regional planning policies:

- **Regional – state geographic**: Policies that apply to 1 of the 9 regional groupings of planning schemes as set out in Annexure 4 of Ministerial Direction – *The Form and Content of Planning Schemes*.
- **Regional – spatial and thematic**: Policies that apply to two or more of the regional groupings and/or one or more planning schemes in different regions.

Both types of regional policy form part of the VPP.

PEA ss 7(1), 7(4)

Statewide and regional planning policies are both state standard provisions that form part of the VPP. Local planning policies and the MPS are local provisions.

If there appears to be an inconsistency between a local provision and a state standard provision, the state standard provision prevails.

1.8.2 Municipal Planning Strategy

The MPS at clause 2 of the planning scheme operates in conjunction with the PPF to provide the local policy context and direction for a planning scheme. It outlines the strategic direction for the municipality that has informed the preparation of the planning scheme.

The MPS is a succinct expression of the overarching strategic policy directions of the municipality, providing:

- the foundation for local policy based on a municipality's location, regional context, history, assets and strengths, key attributes and influences
- an understanding of the matters that are important to the municipality from a planning perspective
- the context for the local planning policies in the PPF
- an outline of what planning outcomes the municipality seeks to achieve, which are then implemented through controls and policy within the planning scheme.

The MPS changes over time in response to the changing needs of the municipality.

1.8.3 Zones

Standard zones for statewide application are included in the VPP. These zones are used in all planning schemes, as required. An important feature of the zones, which is reflected in the first purpose of each zone, is that they are to be administered to implement the MPS and PPF.

Each planning scheme includes only those zones required to implement its strategy. There is no ability to vary the zones or to introduce local zones. Additional zones can only be introduced by an amendment to the VPP. Some zones have schedules that provide for local circumstances, such as the Mixed Use Zone, the Rural Living Zone and the Public Conservation and Resource Zone. Refer to part 1.8.9 below for a short summary of each zone.

1.8.4 Overlays

In addition to the requirements of the zone, further planning provisions may apply to a site or area through the application of an overlay. Both are equally important. As with the zones, standard overlays for statewide application are included in the VPP. Each planning scheme includes only those overlays required to implement the strategy for that municipality.

Generally, overlays apply to a single issue or related set of issues (such as heritage, an environmental concern or flooding). Where more than one issue applies to land, multiple overlays can be used. Overlays must have a strategic justification. Many overlays have schedules to specify local objectives and requirements. Most overlays make requirements about development rather than land use. Overlays do not change the intent of the zone. Refer to part 1.8.10 for a short summary of each overlay.

1.8.5 Particular provisions

Particular provisions are specific prerequisites or planning provisions for a range of particular uses and developments, such as signs and car parking. They apply consistently across the state and there is no ability to include in planning schemes particular provisions that are not in the VPP. Unless specified otherwise, the particular provisions apply in addition to the requirements of a zone or overlay. Some particular provisions have schedules for local requirements.

The particular provisions also include application requirements and decision guidelines for VicSmart applications in clause 59.

1.8.6 General provisions

General provisions are requirements that are consistent across the state. The general provisions address overarching matters such as general exemptions, existing use rights and referral obligations. Some general provisions provide for schedules to specify local requirements.

1.8.7 Schedules

Schedules are used to identify the needs, circumstances and requirements of individual municipalities in specific circumstances. Together with the MPS and PPF, schedules are the means of including local content in planning schemes. They can be used to supplement or 'fine-tune' the basic provisions of a state-standard clause, zone or overlay in a planning scheme, adapting it to local circumstances and locally defined objectives. This means that schedules are a key tool for implementing the strategic directions of the MPS and PPF policies.

Schedules can only be included in a planning scheme where allowed by the VPP. They must use the format shown in the Ministerial Direction – *The Form and Content of Planning Schemes*.

For more information on schedules, refer to Chapter 6.5 of the *Practitioner's Guide to Victoria's Planning Schemes*.

1.8.8 Operational provisions

The operational provisions specify:

- How provisions of the planning scheme operate (for example, the MPS, PPF, zones, overlays, particular provisions and VicSmart).
- The administration and enforcement details of a planning scheme, including:
    - who the responsible authority is
    - what area a planning scheme applies to
    - incorporated documents
    - background documents.
- The meaning of terms used in a planning scheme.
- The strategic implementation details of a planning scheme, including:
    - the nature of zones, overlays and other provisions used in the planning scheme
    - further strategic work proposed for the planning scheme.

Incorporated and background documents

A planning scheme may incorporate a document that relates to the use, development or protection of land. Incorporated documents may inform the planning scheme, guide decision making or affect the operation of the scheme.

An incorporated document is included in the list at clause 72.04 of the planning scheme. The document then forms part of and carries the same weight as other parts of the scheme and can only be changed by a planning scheme amendment.

At the local level, planning authorities may wish to incorporate their own documents using the schedule to clause 72.04. Development guidelines, incorporated plans or restructure plans are common types of incorporated documents.

If an external document is mentioned in a planning scheme, but has not been formally incorporated, it is only regarded as a background document and carries less weight than if it forms part of the planning scheme.

For further information on incorporated and background documents, refer to the *Practitioner's Guide to Victoria's Planning Schemes*.

Meaning of terms

A set of definitions is included in the VPP and applies in all planning schemes. Defined terms are separated into general terms, sign terms and land use terms.

A term used in this planning scheme has its ordinary meaning unless that term is defined in the planning scheme, PE Act or the *Interpretation of Legislation Act 1984*, in which case the term has the meaning given to it in those Acts unless it is defined differently in the scheme.

1.8.9 Summary of the zones

The following is a short summary of each of the zones.

RESIDENTIAL ZONES

Planning Practice Note 91 – *Using the Residential Zones* explains the purposes and features of each of the residential zones and how to apply them and their schedules.

Low Density Residential Zone (clause 32.03 and schedule)

This zone is applied to areas on the fringe of urban settlements and townships with reticulated sewerage (0.2 ha minimum) or without reticulated sewerage (0.4 ha minimum) to ensure lots remain large enough to treat and retain all wastewater but are small enough to be maintained without the need for agricultural techniques or equipment.

Mixed Use Zone (clause 32.04 and schedule)

This zone is applied to areas suitable for a mixed-use function, including a range of residential, commercial, industrial and other uses. It is suitable for areas identified for residential development at increased densities including urban renewal and strategic redevelopment sites. A schedule to the zone may specify a maximum building height and local requirements for specified clause 54 and clause 55 standards.

Township Zone (clause 32.05 and schedule)

This zone is applied to small towns with no specific structure of residential, commercial and industrial land uses. A schedule to the zone can be used to change the permit requirement for a dwelling, based on lot size. The schedule can also specify a maximum building height for a dwelling or residential building and local requirements for specified clause 54 and clause 55 standards.

Residential Growth Zone (clause 32.07 and schedule)

This zone is applied to areas suitable for housing diversity and housing at increased densities in locations offering good access to services, jobs and public transport, and to provide a transition between areas of more intensive use and development such as activity centres, and other residential areas.

A discretionary maximum building height of 13.5 metres applies to a dwelling or residential building. A schedule to the zone can be used to specify a mandatory maximum building height and local requirements for specified clause 54 and clause 55 standards.

General Residential Zone (clause 32.08 and schedule)

This zone is applied to areas where housing development of three storeys exists or is planned for in locations offering good access to services and transport.

A mandatory maximum building height of 11 metres and three storeys applies to a dwelling or residential building. A schedule to the zone can be used to:

- change the permit requirement for a dwelling (based on lot size)
- specify a higher mandatory maximum building height

- set local requirements for specified clause 54 and clause 55 standards.

Neighbourhood Residential Zone (clause 32.09 and schedule)

This zone is applied to areas where there is no anticipated change to the predominantly single and double storey character, and also to areas that have been identified as having specific neighbourhood, heritage, environmental or landscape character values that distinguish the land from other parts of the municipality or surrounding area.

A mandatory maximum building height of 9 metres and two storeys applies to a dwelling or residential building. A schedule to the zone can be used to:

- change the permit requirement for a dwelling (based on lot size)
- specify a minimum lot size for subdivision
- specify a higher mandatory maximum building height
- set local requirements for specified clause 54 and clause 55 standards.

INDUSTRIAL ZONES

Industrial 1 Zone (clause 33.01 and schedule)

This is the main zone to be applied in most industrial areas. It includes additional requirements for land in proximity to residential areas. A schedule to the zone allows the maximum floor space to be limited for office use.

Industrial 2 Zone (clause 33.02 and schedule)

This zone is for large industrial areas that have a core more than 1500 metres from residential areas and are of state significance. Note that special requirements apply to the 'core' area of this zone (the area more than 1500 metres from a residential zone) as this area is a resource intended to be reserved for uses that require that degree of separation from residential and similar areas. Each industry in the core area will be considered on its merits depending upon its effect on neighbouring industries and communities. Generally, uses that do not depend on such a location are discouraged in this zone.

A schedule to the zone allows the maximum floor space to be limited for office use.

Industrial 3 Zone (clause 33.03 and schedule)

This zone is designed to be applied as a buffer between the Industrial 1 Zone or Industrial 2 Zone and residential areas, if necessary. It may also be applied to industrial areas where special consideration is required because of industrial traffic using residential roads, unusual noise or other emission impacts, or to avoid inter-industry conflict. A schedule to the zone allows the maximum floor space to be limited for office use.

The zone provides for some retailing, including convenience shops, small-scale supermarkets and associated shops in appropriate locations.

COMMERCIAL ZONES

Commercial 1 Zone (clause 34.01 and schedule)

This zone is applied in mixed use commercial centres for retail, office, business, residential, entertainment and community uses. It allows a wide range of commercial and accommodation activities without a permit, including a supermarket or shop.

A schedule to the zone allows a maximum leasable floor space to be specified for office or shop only in rural planning schemes (not in metropolitan Melbourne).

Commercial 2 Zone (clause 34.02 and schedule)

This zone encourages offices and associated business and commercial services together with appropriate industry and retailing. A small-scale supermarket (up to 1800 square metres) is allowed without a permit on land located within the City of Greater Geelong or within an urban growth boundary in metropolitan Melbourne. Any supermarket in a rural area requires a permit to ensure the protection of established centres in regional towns. A supermarket and any associated shops must adjoin or have access to a main road.

Commercial 3 Zone (clause 34.03 and schedule)

This zone is a mixed-use employment zone which is intended to facilitate the establishment and growth of creative industries, small manufacturers and start-up businesses. The zone provides for a wide range of employment uses without a permit, including Arts and craft centre, Education centre, Home based business, Industry (with some exceptions), Manufacturing sales, Market, Office, and Research centre.

A schedule to the zone may provide for an alternate maximum allowable percentage of the combined gross floor area of all buildings on a lot for a Dwelling and Residential building.

RURAL ZONES

Planning Practice Note 42 – *Applying the Rural Zones* explains the purposes and features of the rural zones and how to apply them and their schedules.

Rural Living Zone (clause 35.03 and schedule)

This zone provides for predominantly residential use in a rural environment provided appropriate land management is exercised. This zone should only be used where this type of use exists, or where such a use can be strategically justified. The zone also allows agricultural activities, provided that the amenity of residential living is protected. A schedule to the zone allows the lot size and a number of other matters to be specified.

Green Wedge Zone (clause 35.04 and schedule)

The purpose of this zone is to recognise and protect non-urban land outside the Urban Growth Boundary in the Melbourne metropolitan area for its agricultural, environmental, historic, landscape or recreational values, or mineral and stone resources. The zone provides a minimum lot size of 40 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Green Wedge A Zone (clause 35.05 and schedule)

This zone provides opportunity for most agricultural uses and limits non-rural uses to those that support agriculture or tourism provided that the amenity of residential living is protected. It seeks to protect and enhance the biodiversity, natural resources, scenic landscapes and heritage values and to promote sustainable land management. It also provides opportunity for limited residential development subject to a permit. The zone provides a minimum lot size of 8 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Rural Conservation Zone (clause 35.06 and schedule)

This zone is designed to protect and enhance the natural environment for its historic, archaeological, scientific, landscape, faunal habitat and cultural values. Agriculture is allowed, provided it is consistent with the environmental and landscapes values of the area. This zone could also be applied to rural areas degraded by environmental factors such as salinity or erosion. A schedule requires specific conservation values to be stipulated. The zone provides a minimum lot size of 40 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Farming Zone (clause 35.07 and schedule)

This zone encourages the retention of productive agricultural land and encourages the retention of employment and population to support rural communities. The zone provides a minimum lot size of 40 hectares unless an alternative is specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

Rural Activity Zone (clause 35.08 and schedule)

This zone is designed to be applied to areas where agricultural activities and other land uses can co-exist. A wider range of tourism, commercial and retail uses may be considered in the zone. Agriculture has primacy, but other uses may be established if they are compatible with the agricultural, environmental and landscape qualities of the area. A minimum lot size must be specified in a schedule to the zone. The creation of smaller lots is allowed under particular circumstances.

PUBLIC LAND ZONES

Public Use Zone (clause 36.01 and schedule)

This zone recognises the use of land for a public purpose and prescribes a number of categories of public use which can be shown on the planning scheme map. This is the main zone for public land used for utility or community service provision. A schedule allows specified uses or managers of public land to be exempted from specified requirements. Alternative sign categories may be specified if required.

Public Park and Recreation Zone (clause 36.02 and schedule)

This is the main zone for public open space and public recreation areas. A schedule allows specified uses or managers of public land to be exempted from specified requirements. It also allows an exemption for buildings and works specified in an incorporated plan. Alternative sign categories may be specified if required.

Public Conservation and Resource Zone (clause 36.03 and schedule)

This zone provides for places where the primary intention is to conserve and protect the natural environment or resources. It also allows associated educational activities and resource-based uses. A schedule allows specified uses or managers of public land to be exempted from specified requirements. It also allows an exemption for buildings and works specified in an incorporated plan. Alternative sign categories may be specified if required.

Transport Zone (clause 36.04)

This zone identifies land in the transport system. State-managed transport infrastructure is designated Transport Zone 1. A road declared under the *Road Management Act 2004* is designated Transport Zone 2 and significant municipal roads are designated Transport Zone 3. Other transport infrastructure is designated Transport Zone 4.

SPECIAL PURPOSE ZONES

Special Use Zone (clause 37.01 and schedule)

This zone provides for the use of land for specific purposes. The purposes and the land use requirements are specified in a schedule to the zone. This allows detailed land use requirements to be prescribed for a particular site. Development conditions (where they are necessary) are still set out in a permit rather than the planning scheme. Exemptions from notification and review can be provided in the zone if desired. The Ministerial Direction – *The Form and Content of Planning Schemes* includes some specific requirements for this zone. Planning Practice Note 3 – *Applying the Special Use Zone* explains the operation of this zone in more detail.

Comprehensive Development Zone (clause 37.02 and schedule)

This zone is similar to the Special Use Zone but is designed to allow more complex developments in accordance with a comprehensive development plan incorporated in the planning scheme. Generally, only large or complex developments would warrant the use of this zone.

Urban Floodway Zone (clause 37.03 and schedule)

This zone is applied to urban land where the primary function of the land is to carry or store floodwater. It applies to high hazard areas with high flow velocities, where impediment of flood water can cause significant changes in flood flows and adversely affect flooding in other areas. Where land is subject only to inundation and low velocities, the Land Subject to Inundation Overlay can be used. The views and flooding information of the relevant floodplain management authority must be considered when applying this zone.

Capital City Zone (clause 37.04 and schedule)

This zone provides for the use and development of land in Melbourne's central city area, recognising its role as the capital of Victoria and as an area of national and international importance. It operates in a similar manner to the Special Use Zone. Detailed requirements are prescribed for a particular site or area through the schedule to the zone. The zone does not specify a sign category but requires a permit for all signs unless a schedule specifies otherwise. Exemptions from notice and review can be given if desired.

Docklands Zone (clause 37.05 and schedule)

This zone provides for the use and development of land in Melbourne's Docklands area, in a manner consistent with the development strategy adopted by the Docklands Authority. It operates in a similar manner to the Special Use Zone. Detailed requirements are prescribed for a particular site or area in the schedule to the zone. The schedule specifies car parking requirements. Exemptions from notice and review can be specified if desired.

Priority Development Zone (clause 37.06 and schedule)

This is a specialised zone designed to implement approved strategies and developments of state or regional significance at specific locations. The zone facilitates the approval and management of complex projects where agreement on the desired form of development has been reached between the responsible authority and the developer. The detailed provisions of the zone are linked to agreed development plans. The zone exempts development that conforms with an agreed incorporated plan from third-party reviews unless a right to review is specifically included in the schedule.

Urban Growth Zone (clause 37.07 and schedule)

This zone sets out the requirements for the development of new residential and employment precincts on previously undeveloped land. It requires the establishment of a precinct structure plan before a growth area can be developed and subdivided. The zone includes provisions to ensure that any new use and development does not prejudice the future urban use and development of the land where a precinct structure plan is yet to be applied.

Where a precinct structure plan is in place, the zone provides for specific zone provisions to be applied by way of a schedule.

Planning Practice Note 47 – *Urban Growth Zone* explains the operation of the zone and the role and function of precinct structure plans.

Activity Centre Zone (clause 37.08 and schedule)

The Activity Centre Zone is the preferred tool to guide and facilitate the use and development of land in activity centres. The zone encourages a mix of uses and intensive development including higher density housing. The zone allows for a schedule to specify or vary the land use provisions together with other provisions in the zone. See Planning Practice Note 56 – *Activity Centre Zone* for detailed guidance on the zone.

Port Zone (clause 37.09 and schedule)

This zone seeks to ensure that land use and development recognises the significant transport, logistics and prime maritime gateway roles of Victoria's commercial trading ports. It supports shipping, road and railway access to those ports and uses that derive direct benefit from co-locating with them. While it provides for the ongoing use and development of Victoria's commercial trading ports, the zone also seeks to protect uses in adjacent residential zones, the Capital City Zone or the Docklands Zone and any land used for or proposed to be acquired for a hospital or an education centre. An application is exempt from the notice and review provisions of the PE Act except within 30 metres of such land.

1.8.10 Summary of the overlays

The following is a short summary of each of the overlays in the VPP.

ENVIRONMENT AND LANDSCAPE OVERLAYS

Environmental Significance Overlay (clause 42.01 and schedule)

This overlay seeks to address areas where the development of land may be affected by environmental constraints such as effects from noise or industrial buffer areas, as well as issues related to the natural environment. The schedule to the zone must clearly set out the environmental significance of the area and the resultant objective of the overlay.

Vegetation Protection Overlay (clause 42.02 and schedule)

This overlay focuses on the protection of significant vegetation, including native and introduced vegetation. It can be applied to individual trees, stands of trees or areas of significant vegetation. The significance of identifying the vegetation must be stated, together with the intended outcomes of the imposed requirements. Planning Practice Note 7 – *Vegetation Protection in Urban Areas* explains the function of this overlay and other relevant vegetation provisions in more detail.

Significant Landscape Overlay (clause 42.03 and schedule)

The function of this overlay is to identify, conserve and enhance the character of significant landscapes. The schedule to the zone must explain the significance of the landscape, together with the intended outcomes of imposed requirements. Planning Practice Note 7 – *Vegetation Protection in Urban Areas* explains the function of this overlay and other relevant landscape provisions in more detail.

HERITAGE AND BUILT FORM OVERLAYS

Heritage Overlay (clause 43.01 and schedule)

Any heritage place with a recognised citation should be included in the schedule to this overlay. In addition, any heritage place identified in local heritage studies can also be included.

A heritage place can have a wide definition and may include a single object or an area.

There needs to be a rigorous heritage assessment process leading to the identification of the place. The documentation for each place must include a statement of significance that

establishes the importance of the place. The statement of significance must form part of an incorporated document and be specified in the schedule to the Heritage Overlay.

For guidance on applying heritage provisions see Planning Practice Note 1 – *Applying the Heritage Overlay* and the *Victorian Heritage Register Criteria and Threshold Guidelines* (Heritage Council of Victoria, revised April 2019).

Design and Development Overlay (clause 43.02 and schedule)

This overlay is principally intended to implement requirements based on a demonstrated need to control built form and the built environment. The intended built form outcome, and the way in which the imposed requirements will bring this about, must be clearly stated. Where possible, performance-based requirements should be used rather than prescriptive requirements.

Incorporated Plan Overlay (clause 43.03 and schedule)

This overlay is used to:

- prescribe a plan for an area to coordinate proposed use or development before a permit can be granted under the zone
- exempt from notice and review any permit applications that conform with the plan.

A plan established by the Incorporated Plan Overlay is incorporated in the planning scheme. It can only be introduced or changed by a planning scheme amendment and will normally be publicly exhibited as part of that process, making it appropriate to use when a plan is likely to affect third-party interests.

Planning Practice Note 23 – *Applying the Incorporated Plan and Development Plan Overlay* provides advice on the operation of this overlay.

Development Plan Overlay (clause 43.04 and schedule)

This overlay is used where the form of development is appropriately controlled by a plan that satisfies the responsible authority as there is no public approval process for the plan.

A planning scheme amendment is not required to amend a plan established by a Development Plan Overlay.

For more information on the operation of this overlay see Planning Practice Note 23 – *Applying the Incorporated Plan and Development Plan Overlay*.

Neighbourhood Character Overlay (clause 43.05 and schedule)

This overlay identifies areas of existing or preferred neighbourhood character. It requires a planning permit for buildings and works and the demolition or removal of a building or tree if specified in a schedule to the overlay. A schedule to the overlay can be used to modify certain standards of clause 54 or clause 55 of the planning scheme.

LAND MANAGEMENT OVERLAYS

Erosion Management Overlay (clause 44.01 and schedule)

This overlay identifies land subject to significant erosion. There should be appropriate technical justification to support the application of this overlay.

Salinity Management Overlay (clause 44.02 and schedule)

This overlay identifies land subject to significant salinity. It requires a planning permit for buildings and works, subdivision and the removal of vegetation in areas affected by salinity. All applications are referred to the relevant state environment department. There should be appropriate technical justification to support the application of this overlay.

Floodway Overlay (clause 44.03 and schedule)

This overlay is applied to urban and rural land identified as part of an active floodway, or to a high hazard area with high flow velocities, where impediment of flood water can cause significant changes in flood flows and adversely affect other areas. The identification of these areas should be established in consultation with the relevant floodplain management authority. Planning Practice Note 12 – *Applying the Flood Provisions in Planning Schemes* explains the function of this overlay and other relevant flood provisions in more detail.

Land Subject to Inundation Overlay (clause 44.04 and schedule)

This overlay applies to either rural or urban land in riverine areas that are subject to inundation but are not part of the primary floodway. The overlay is also applied to areas subject to coastal flooding, including areas where the flood risk will increase as a result of climate change. The identification of these areas should be established in consultation with the relevant floodplain management authority. Planning Practice Note 12 – *Applying the Flood Provisions in Planning Schemes* explains this overlay and other relevant flood provisions in more detail.

Special Building Overlay (clause 44.05 and schedule)

This overlay applies to urban land that is subject to overland flow resulting from stormwater flooding where the capacity of the drainage system is exceeded during heavy rainfall. This land is not part of a primary floodway from a river or stream. Planning Practice Note 12 – *Applying the Flood Provisions in Planning Schemes* explains the operation of this overlay and other relevant flood provisions in more detail.

Bushfire Management Overlay (clause 44.06 and schedule)

This overlay is applied to areas identified as having high bushfire hazard. Together with the planning requirements for bushfire protection in clause 53.02, this overlay controls development in order to mitigate risk to life, property and community infrastructure. Planning Practice Note 64 – *Local Planning for Bushfire Protection* explains the use of this overlay in more detail.

State Resource Overlay (clause 44.07 and schedule)

This overlay is applied to protect areas of mineral, stone and other resources, identified as being of state significance, from development that would prejudice the current or future productive use of the resource.

Buffer Area Overlay (clause 44.08 and schedule)

This overlay identifies buffer areas where there is potential for off-site impacts on human health or safety; or significant off-site amenity impacts from industry, warehouse, infrastructure or other uses. The overlay seeks to ensure use and development in buffer areas is compatible with potential off-site impacts.

OTHER OVERLAYS

Public Acquisition Overlay (clause 45.01 and schedule)

This overlay identifies land that is proposed to be acquired for a public purpose. It has the effect of reserving the land under the *Land Acquisition and Compensation Act 1986*. The authority acquiring the land and the purpose of the acquisition must be set out in the schedule. Once land is acquired by a public authority, it should be rezoned to an appropriate zone.

Airport Environs Overlay (clause 45.02 and schedules)

This overlay is applied to land that is subject to high and moderate levels of aircraft noise and sets out requirements to respond to those noise conditions. The Australian Noise

Exposure Forecast (ANEF) defines areas of high aircraft noise levels. Where ANEF contours do not exist, Australian Standard AS2021: 2015, *Acoustics – Aircraft Noise Intrusion – Building Siting and Construction*, gives guidance for determining an appropriate boundary.

Schedule 1 identifies uses that are prohibited, uses for which a permit is required and associated application referral requirements. It is based on the 25 ANEF contour.

Schedule 2 identifies noise-sensitive uses that require a permit and associated application referral requirements. It is based on the 20 ANEF contour.

Environmental Audit Overlay (clause 45.03)

This overlay is applied to land identified, known or reasonably suspected of being contaminated for which certain obligations under the *Environment Protection Act 1970* have not been met. Refer to Ministerial Direction No. 1 – *Potentially Contaminated Land* for further direction on how the overlay is applied.

Planning Practice Note 30 – *Potentially Contaminated Land* provides further direction on addressing contamination and applying the Environmental Audit Overlay.

Road Closure Overlay (clause 45.04)

This overlay is used to identify a road that is closed by an amendment to a planning scheme.

Restructure Overlay (clause 45.05 and schedule)

This overlay applies a restructure plan to old and inappropriate subdivisions as a condition of development approval. The restructure plan should be an incorporated document because it controls whether or not a permit can be considered.

Development Contributions Plan Overlay (clause 45.06 and schedule)

This overlay identifies areas where a development contributions plan is in place. The schedule to the overlay summarises the development contributions required. A more detailed incorporated document and local content within the PPF will usually be associated with the overlay.

City Link Project Overlay (clause 45.07)

This overlay exempts specified use and development associated with certain projects from any requirement of the planning scheme. The overlay includes permit exemptions and requirements for certain signs.

Melbourne Airport Environs Overlay (clause 45.08 and schedules)

This overlay seeks to ensure that land use and development in the vicinity of Melbourne Airport is compatible with the operation of the airport and that exposure of new dwellings and other noise-sensitive buildings to aircraft noise is minimised through appropriate noise attenuation measures.

The overlay controls restrict development or require special consideration to be given to particular uses that may be sensitive to noise in areas that are forecast to be affected by moderate to high levels of aircraft noise.

Schedule 1 identifies areas that will be subject to high levels of aircraft noise and is based on the 25 ANEF contour.

Schedule 2 identifies areas that will be subject to moderate levels of aircraft noise and is based on the 20 ANEF contour.

Parking Overlay (clause 45.09 and schedule)

This overlay is used to manage car parking in a precinct where local parking issues have been identified and a common strategy can be adopted to respond to the issues. Planning

Practice Note 57 – *The Parking Overlay* provides guidance on the preparation and application of the overlay.

Infrastructure Contributions Plan Overlay (clause 45.10 and schedule)

This overlay identifies areas where an infrastructure contributions plan is in place. The schedule to the overlay summarises the development contributions required. A more detailed incorporated document will be associated with the overlay, which applies to infrastructure contributions plans incorporated into a planning scheme before 15 May 2018.

Infrastructure Contributions Overlay (clause 45.11 and schedule)

This overlay identifies the area where an infrastructure contributions plan applies for the purpose of imposing contributions for the provision of infrastructure. The schedule to the overlay summarises the development contributions required. A more detailed incorporated document will be associated with the overlay. The Infrastructure Contributions Overlay is used to implement any new infrastructure contributions plan into a planning scheme. The provision is consistent with the *Public Land Act 2018*.

Specific Controls Overlay (clause 45.12 and schedule)

This overlay is to be used to achieve a particular land use and development outcome in extraordinary circumstances that are deemed to be a major issue of policy. It is only to be applied where no other planning control or combination of controls is suitable.

The overlay may:

- allow the land to be used or developed in a manner that would otherwise be prohibited or restricted
- prohibit or restrict the use or development of the land beyond the controls that may otherwise apply
- exclude any other control in this scheme.

The schedule to the overlay includes a map reference which identifies the application of an incorporated document and the date on which the incorporated document expires.

Using Victoria's Planning System

Chapter 2: Amendments

Contents

2.1 Amending a planning scheme

2.1.1 Who can amend a planning scheme?

PEA ss 8, 8A, 8B, 9

The Minister for Planning may prepare amendments to any provision of a planning scheme (section 8). The Minister may also authorise the preparation of an amendment by:

- another Minister (section 9)
- a public authority (section 9)
- a municipal council (sections 8A and 8B).

PEA s 201C

The *Planning and Environment Act 1987* (PE Act) also makes special provision for the Minister to amend a planning scheme following the restructuring of municipal boundaries.

Municipal council

PEA ss 8A, 8B

A council is a planning authority for any planning scheme in force in its municipal district and for an area adjoining its municipal district for which it is authorised by the Minister to prepare an amendment.

A council cannot prepare an amendment unless it has been authorised to do so by the Minister under section 8A or 8B.

2.1.2 Why a planning scheme amendment may be required

There are many reasons why a planning scheme may need to be amended. Some of the more common reasons are to:

- enhance or implement the strategic vision of a scheme
- implement new statewide, regional or local planning policy
- update the scheme
- correct mistakes
- allow a use or development currently prohibited to take place
- restrict use or development in a sensitive location
- set aside land for acquisition for a public purpose or to remove such a reservation when it is no longer needed in the scheme
- incorporate a document as part of a planning scheme
- authorise the removal or variation of a restriction on title (for example, a registered restrictive covenant)
- incorporate changes made to the *Victoria Planning Provisions* (VPP)
- regulate or prohibit the development of land on which there is or was a heritage building that has been unlawfully demolished.

A planning scheme amendment cannot amend the terms of the VPP.

2.2 Requesting a planning scheme amendment

2.2.1 How is a planning scheme amendment requested?

It is a well-established practice that any person or body can request that the planning authority (usually a council) prepare an amendment. The PE Act does not include a formal procedure for making a request to a council for an amendment. If the council agrees to the request, it must apply to the Minister for authorisation to prepare the amendment.

2.2.2 Discuss with the council first

Before a formal request is made, the proponent should discuss the proposal with the council to determine:

- whether the amendment is necessary or if there are other ways of achieving the desired outcome
- whether the amendment will help to implement the objectives of the PE Act, the Municipal Planning Strategy (MPS) and the Planning Policy Framework (PPF)
- the information the council requires to enable it to evaluate the request
- the appropriate VPP provisions to achieve the objectives sought
- the documentation requirements for the amendment
- the likelihood of the amendment being supported.

2.2.3 Justification for the proposal

PEA s 12(2)

The PE Act requires a council to have regard to and take into account certain matters in preparing an amendment, including:

- the Minister's directions
- the VPP
- any, strategic plan, policy statement, code or guideline that forms part of the planning scheme
- any significant effects the amendment might have on the environment or that the environment might have on any use or development envisaged in the amendment
- the amendment's social effects and economic effects.

A proponent should provide sufficient and relevant information that demonstrates how the matters required to be considered by the council are addressed by the proposed amendment. This is known as the 'strategic justification' for the amendment.

More guidance about preparing an amendment is provided later in this document and online in the following documents:

- Planning Practice Note 46 – *Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments*
- planning practice notes on using and applying different provisions in the VPP
- *Practitioner's Guide to Victoria's Planning Schemes*.

Figure 2.1: The planning scheme amendment process

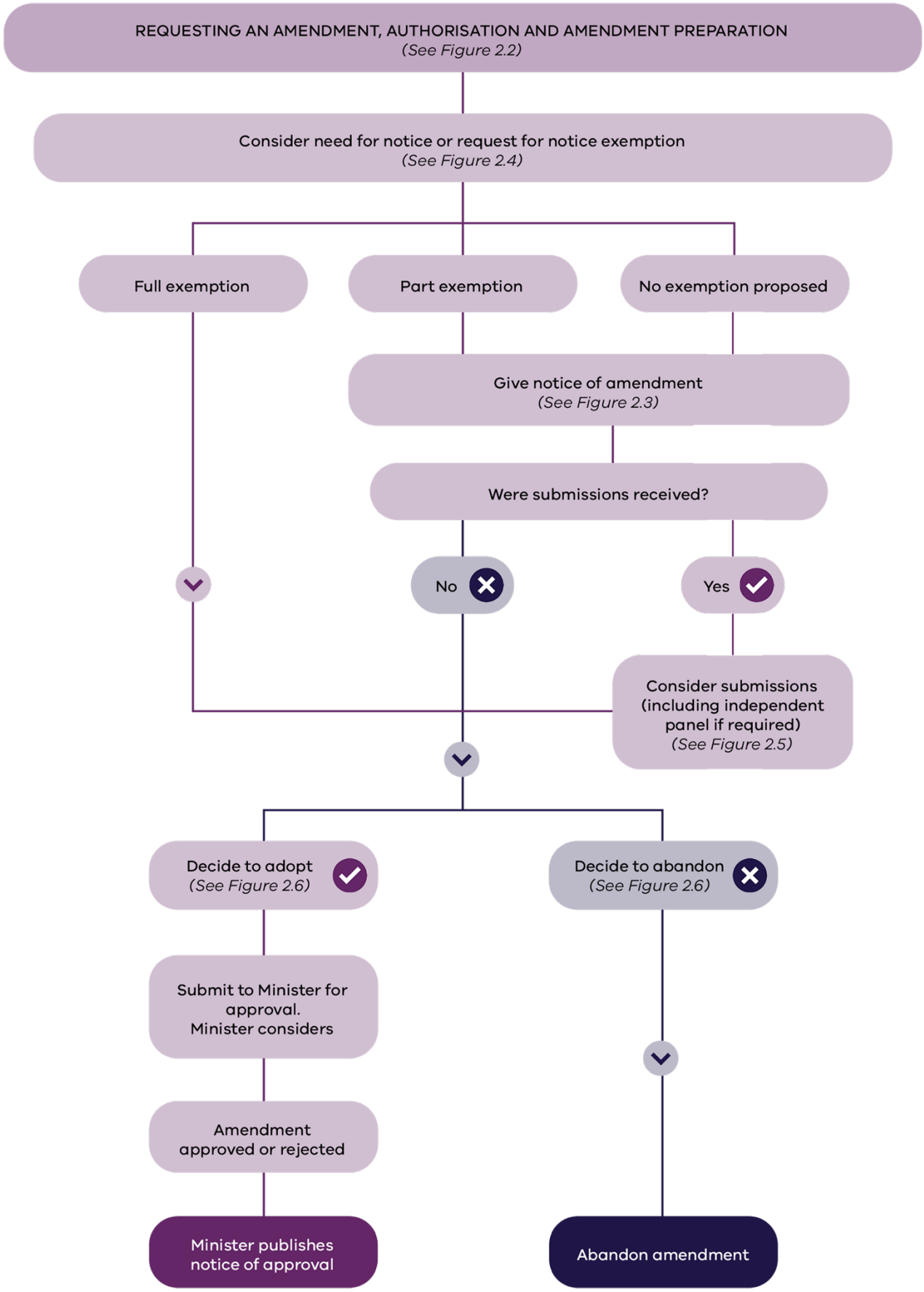
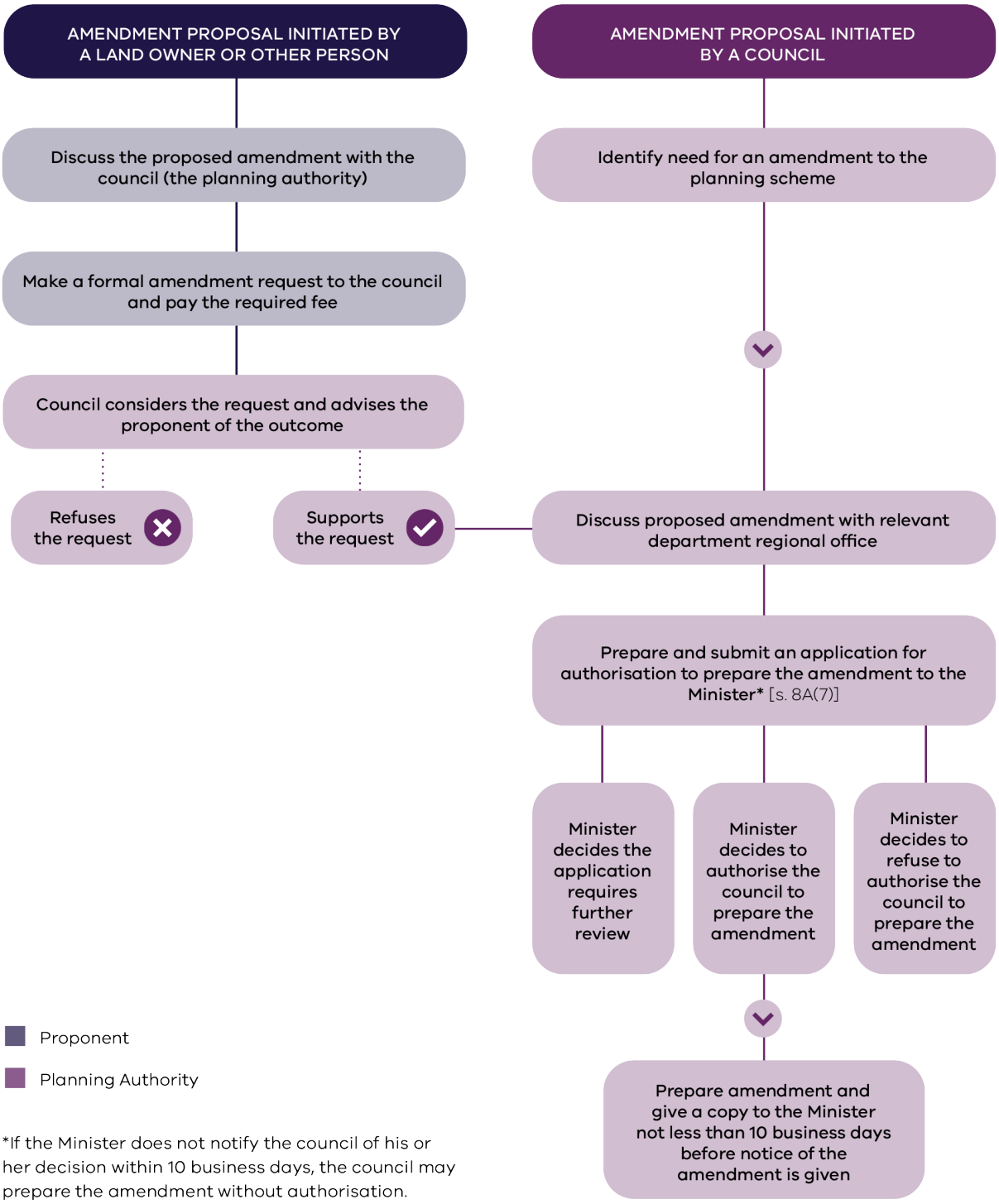


Figure 2.2: Requesting an amendment, authorisation and amendment preparation



*If the Minister does not notify the council of his or her decision within 10 business days, the council may prepare the amendment without authorisation.

2.2.4 Fees and other costs

PE (Fees) Regs regs 6, 7, 8 and 14

The fee prescribed in the Planning and Environment (Fees) Regulations 2016 must be paid to the council by the proponent at the time the request is made. If a request is agreed to, additional fees must be paid for later stages in the amendment process.

PEA s156

If a panel is appointed to consider submissions, the planning authority can ask the proponent to contribute to the amount that the planning authority may be required to pay for the panel.

A council can either require the proponent of an amendment to prepare the amendment documentation or it can prepare them in-house (possibly at the proponent's cost). This is a specialised area and the costs could be quite significant, especially if complex maps are required.

2.2.5 Right of review

There is no right of review of a council's decision not to support the preparation of an amendment.

PE (Fees) Regs reg 7

If the council declines a request, the proponent may ask the Minister to prepare the amendment. This is a separate action, not an appeal. A request to the Minister must be in writing and must identify the basis on which the Minister should be the planning authority for the amendment, addressing the criteria set out in Planning Practice Note 29 – *Ministerial Powers of Intervention in Planning and Heritage Matters*.

2.3 Applying for authorisation to prepare an amendment

2.3.1 Purpose of authorisation

PEA ss 8A, 8B

A council must apply to the Minister for authorisation to prepare an amendment. The purpose of authorisation is to identify whether a proposed amendment is consistent with state policy or interests and to ensure it makes appropriate use of the VPP.

2.3.2 Discuss with the department first

To ensure timely consideration of an authorisation request, early consultation with the department's relevant regional office is desirable. This enables queries about the content and format of the amendment to be resolved and may avoid the need to make changes to the amendment at a later stage.

2.3.3 Seek early advice from EPA

Ministerial Direction No. 19 – *The Preparation and Content of Amendments that may Significantly Impact the Environment, Amenity and Human Health* requires a planning authority to seek early advice from Environment Protection Authority Victoria (EPA) when undertaking strategic planning and preparing a planning scheme amendment that may result in significant impacts on the environment, amenity and human health due to pollution and waste.

2.3.4 Preparing an application for authorisation

When preparing an application for authorisation, a council should have regard to:

Relevant Minister's directions

Any direction relating to the subject matter of the amendment or the form and content of the planning scheme should be followed. Failure to comply with a direction could result in the Minister's refusal to authorise the preparation of an amendment.

Ministerial Direction No. 11 – *Strategic Assessment of Amendments* and the Ministerial Direction – *The Form and Content of Planning Schemes* apply to most amendments and should be used to assess the appropriateness of the amendment.

Ministerial Direction No. 18 – *Victorian Planning Authority Advice on Planning Scheme Amendments* requires a planning authority to consult with the Victorian Planning Authority regarding land set out in Part 5 of the direction.

The VPP

The amendment should use the appropriate VPP tools to achieve the intended outcome. For example, is an appropriate zone or overlay used? The department's planning practice notes and the *Practitioner's Guide to Victoria's Planning Schemes* provide best practice guidance about using and applying particular VPP tools.

Planning policies

An amendment must not seek to change the planning scheme in a manner that conflicts with state and regional planning policies of the PPF. An amendment should support or give effect to those policies.

An amendment should not conflict with the MPS or a local planning policy of the PPF. If the amendment does not seek to implement the MPS or a local planning policy in some way, the council should consider whether the MPS or a local planning policy needs to be changed and the impact of doing so. Is there a strategic basis for the change?

PEA s 46AZC

An amendment should also be consistent with a Statement of Planning Policy for a declared area.

Environmental, social and economic effects

Planning Practice Note 46 – *Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments* should be used in evaluating the environmental, social and economic effects of a proposal.

Strategic Assessment Guidelines

Ministerial Direction No. 11 – *Strategic Assessment of Amendments* requires a planning authority to evaluate and discuss how an amendment addresses a number of strategic considerations. Planning Practice Note 46 – *Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments* explains what should be considered as part of the direction.

Under Ministerial Direction No. 11, not all amendments require a detailed assessment against the strategic considerations. The *Strategic Assessment Guidelines* outline how some minor amendments will only require a brief assessment against the strategic considerations.

Effect on registered restrictive covenants

A planning authority should consider whether the amendment might authorise anything that would result in the breach of a registered restrictive covenant. If it will, the planning authority may wish to consider whether the amendment should also provide for the removal or

variation of the covenant. Otherwise, a planning permit application that is made as a result of the planning scheme being amended may have to be refused under section 61(4) of the PE Act.

2.3.5 Submitting an application for authorisation

PEA ss 8A(3), 8B(4)

An application must be made in writing and contain the information required by the Minister, if required by the Planning and Environment Regulations 2015. Proponents must use the department's authorisation application form and provide a draft explanatory report. Ministerial Direction No. 11 sets out the strategic matters that must be addressed in an explanatory report.

For more complex proposals, the department may require additional information to be submitted to enable it to properly assess the application.

The 'Amending a Planning Scheme' webpage at **planning.vic.gov.au** sets out more information about the requirements for preparing and submitting an application for authorisation.

If Ministerial Direction No. 19 applies to the amendment (see part 2.3.3 above), the application for authorisation must be accompanied by the following information:

- The written views of EPA, including any supporting information and reports.
- A written explanation of how the proposed amendment addresses any issues or matters raised by EPA.

2.3.6 Outcome of making an application

PEA s 8A(4)

Once the Minister has received an application, the Minister may:

PEA s 8A(4)(a)

- authorise the preparation of the amendment

PEA s 8A(6)

- authorise the preparation of the amendment subject to conditions, including conditions relating to notice

PEA s 8A(4)(b)

- require further review

PEA s 8A(4)(c)

- refuse authorisation for preparation of an amendment.

PEA s 8A(5)

The Minister must notify the planning authority in writing of his or her decision within 10 business days of receiving the application.

PEA s 8A(7)

If 10 business days elapse and the planning authority has not been notified of the Minister's decision, the planning authority may proceed to prepare the amendment without the Minister's authorisation.

If what the amendment proposes is inconsistent with state policy or interests, the Minister will not authorise the preparation of the amendment.

PEA s 8A(8)

If the application requires further review, the planning authority may be asked to provide additional information. The Minister may later decide to authorise the preparation of the amendment or refuse the request.

The authorisation of the preparation of an amendment is not an indication of whether the amendment will ultimately be approved by the Minister.

2.4 Timelines for preparing and processing an amendment

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* sets times for completing key steps in the amendment process. It applies to the Minister, the Secretary of the department, a panel appointed under Part 8 of the PE Act and all planning authorities.

The direction sets times for:

- preparing and giving notice of an amendment – 40 business days after authorisation
- considering submissions and requesting the appointment of a panel – 40 business days after the closing date for submissions
- commencement of the panel's functions – 20 business days after its appointment
- a panel to submit its report to the planning authority – 20 business days for a one-person panel; 30 business days for a two person panel; and 40 business days if the panel consists of three or more members
- the planning authority to decide on the amendment – within 60 business days of the closing date for submissions or, if there is a panel, 40 business days after the date the planning authority receives the panel report
- the planning authority to submit an adopted amendment – 10 business days after adoption
- the Minister to decide on the amendment – within 40 business days of receiving the adopted amendment.

In circumstances where more time is required to complete one or more steps in the process, the Minister may exempt an amendment from the need to comply with one or more requirements of the direction. An exemption may be granted subject to conditions.

An exemption may be sought at any time. Each exemption request is considered on its merits. However, the circumstances in which an exemption may be appropriate include:

- the amendment is initiated by a council for a significant strategic matter (for example, to implement a policy review) and specific parties (for example, land and business owners) would not be disadvantaged by a longer processing time
- where the public interest would be served by providing more time to complete a step
- where more time is required to ensure a just and fair process
- to properly address an unforeseen significant environmental, safety or policy issue raised during the amendment process
- where both the proponent and the planning authority agree that an exemption is necessary to ensure the amendment is properly prepared and considered.

PEA s 185A

The Minister may direct a planning authority to take any steps in the planning scheme amendment process within a specified time (not less than six weeks). If the planning

authority fails to take a step within the specified time, the Minister may then take that step and all other steps required to be taken under Part 3 of the PE Act.

2.5 Preparing a planning scheme amendment

2.5.1 The importance of following statutory procedures

Once a planning authority decides to proceed a proposed amendment to public exhibition, detailed procedural requirements of the PE Act come into play. These requirements are designed to ensure that any person who may be affected by a proposed amendment (either as the owner or occupier of land that is to be the subject of changed planning scheme provisions) or who may be affected by changes on other land, is aware of the proposal and has the opportunity to make a submission about the proposal.

PEA s 39

It is important that the requirements of the PE Act and the Regulations are followed carefully. Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* also sets times for completing steps in the amendment process. Failure to do so may lead to challenges at the Victorian Civil and Administrative Tribunal (VCAT) by those seeking to protect rights or to otherwise oppose amendment proposals. Such challenges will inevitably lead to delays in considering the merits of an amendment and add to the authority's costs. It is much better to take extra care in ensuring that the procedural requirements of the PE Act are correctly followed the first time than to risk such challenges and the possibility of being directed to repeat processes that were not followed correctly.

2.5.2 Drafting an amendment

If a council is authorised to prepare an amendment, it can proceed to finalise the amendment in readiness for commencing the formal steps in Part 3 of the PE Act. In some cases, the council may have already prepared a draft amendment to assist it in making an application to the Minister for authorisation.

PEA s 12(2)

The PE Act sets out matters that must be considered by a planning authority in preparing an amendment. These issues should have already been addressed in the information required by the Minister as part of the request for authorisation.

If the Minister has authorised the amendment subject to conditions, the council should ensure the amendment is prepared in accordance with those conditions.

When drafting an amendment, refer to the planning scheme rules set out in Chapter 4 of the *Practitioner's Guide to Victoria's Planning Schemes*.

The guide also provides advice on how local content and schedules should be written. See Chapter 6.

2.5.3 The amendment documentation

The 'Amending a Planning Scheme' and 'Amendment Documentation Templates' webpages at **planning.vic.gov.au** provide guidance on:

- preparing and drafting amendment documents
- documents to be submitted with an amendment
- making an application to the Minister for authorisation.

The webpages also contain checklists, and links to documents relevant to each stage of the amendment process.

In support of an amendment application, a planning authority must prepare:

- an explanatory report
- an amendment instruction sheet
- any new or replacement clauses and schedules (if applicable)
- any amendment map sheets (if applicable)
- any incorporated documents (if applicable)
- any supporting documentation.

The explanatory report

PEA s 12(1)(e)

The PE Act requires an explanatory report to be prepared for every amendment. The explanatory report must explain the purpose, effect and strategic basis for the amendment and address the matters set out in Ministerial Direction No. 11 – *Strategic Assessment of Amendments*. More details about the purpose and content of the explanatory report can be found on the department's website.

The amendment clauses and schedules may be required in 'track change' format and should be attached to the explanatory report to enable all text changes to be easily identified and understood.

The amendment instruction sheet

The amendment instruction sheet is the front page of an amendment and sets out the instructions for amending the planning scheme. The amendment instruction sheet and the attached maps and documents that it refers to constitute the amendment and therefore must clearly state the instructions for executing the amendment. It is essential that these are drafted carefully and accurately. The amendment instruction sheet must:

- identify the planning scheme being amended and the amendment number
- state the name of the planning authority
- list all planning scheme maps being amended, inserted or deleted. Any zoning maps should be listed first, followed by any overlay maps
- list all planning scheme clauses and schedules being amended, inserted or deleted. These should be listed in ascending numerical order.

Amendment clauses and schedules

The amendment clauses and schedules are documents that form attachments to the instruction sheet and should always be presented in a final form.

The format of all attached documents must comply with the Ministerial Direction – *The Form and Content of Planning Schemes*, which outlines the format for all schedules including the font, paragraph, bullets, numbering and layout.

Amendment map sheets

The amendment map sheets also form attachments to the instruction sheet. The map sheets identify how the planning scheme map is being changed. If areas of a zone or an overlay are being removed, a deletion map needs to be prepared.

The department's Mapping Services Team provides a free map preparation service to planning authorities for planning scheme amendments. Instructions and a help guide are available on the 'Map Amendment Requests' webpage at **planning.vic.gov.au**. The online

form can be accessed at **mapshare.vic.gov.au/amendmentrequests**. Allow five business days for preparation.

2.5.4 Identifying amendments

There are four types of amendment:

- a V amendment – makes changes to the VPP only
- a VC amendment – makes changes to the VPP and one or more planning schemes
- a C amendment – makes changes to one planning scheme only
- a GC amendment – makes changes to more than one planning scheme.

Each amendment must have an amendment number. V, VC and GC amendments are prepared by the Minister and the numbering is allocated by the department. The numbering for C amendments is allocated by the relevant council.

2.6 The public exhibition stage

2.6.1 Who must receive copies of an amendment?

PEA s 17(1)

When an amendment is prepared, the planning authority must give copies to:

- a council where the amendment applies to its municipal district
- the Minister
- anyone else specified by the Minister.

PEA s 17(3)

The amendment copy to be provided to the Minister must be given at least 10 business days before the planning authority first gives notice of the amendment under section 19 of the PE Act (unless the planning authority is not required to give notice under section 19, or the Minister is the planning authority for the amendment). The amendment copy should be sent electronically to the department.

The amendment copies required by the Minister to be given to other persons should be sent before notice is given under section 19 of the PE Act so the documents are available for public inspection when the exhibition period starts.

PEA s 20(4)

The Minister may exempt himself or herself from the requirement to provide copies of an amendment. A planning authority cannot be exempted from this requirement.

2.6.2 Where must copies be available for inspection?

PEA ss 18, 197A

The planning authority, the council and the Minister must make an amendment (together with its accompanying documents) available for public inspection in accordance with the public availability requirements until it is approved or lapses. Information about the progress of an amendment can be found on the department's website.

If sections 17 and 19 require an amendment copy and notice to go to the same authority, it may be convenient for these to be sent simultaneously.

2.6.3 Requirement to give notice

PEA s 19

A planning authority must give notice that it has prepared an amendment unless it has been exempted from this requirement.

The notice requirements are summarised in Figure 2.3.

PEA s 8A(7)

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* requires a planning authority to give notice of an amendment within 40 business days of receiving authorisation to prepare an amendment. If the planning authority prepares the amendment without authorisation, notice of the amendment must be given within 40 business days of when the 10 business day period referred to in section 8A(7) lapses.

PEA s 23(1)(b)

Before notice of an amendment is given, the planning authority must also, with the agreement of Planning Panels Victoria, set a date for a directions hearing and a panel hearing to consider any submissions required to be referred to a panel under section 23(1)(b).

Who is given notice?

PEA s 19(1); PE Regs reg 6

Notice of preparation of an amendment must be given to:

- Every minister, public authority and municipal council that may be materially affected by the amendment. This might include local bodies such as water and sewerage boards, EPA and, in many cases, adjoining municipalities.
- The owners and occupiers of land that may be materially affected by the amendment. This includes anyone whose land is subject to changed controls under the amendment and might include owners and occupiers of adjoining or nearby land.
- Any Minister, public authority, municipal council or person prescribed. Regulation 6 of the Regulations requires that the following bodies be notified:
    - any council if it is not the planning authority and the amendment affects land within the municipality
    - any minister, public authority or municipal council that the amendment designates as an acquiring authority
    - the Minister administering the *Conservation, Forests and Lands Act 1987*
    - the Minister administering the *Catchment and Land Protection Act 1994*
    - the Minister administering the *Sustainable Forests (Timber) Act 2004*
    - the Minister administering the *Mineral Resources (Sustainable Development) Act 1990*
    - the Minister administering the *Pipelines Act 2005*.
- The owners and occupiers of land benefited by a registered restrictive covenant being removed or varied by the amendment.
- The Minister administering the *Land Act 1958* if the amendment provides for the closure of a road wholly or partly on Crown land.

Under sections 19(1)(a) and (b), a planning authority must form an opinion on whether or not the proposed amendment materially affects a specified person or body, and what notice should be given. This should be carefully recorded and included in documentation required to accompany the submission of an adopted amendment for the Minister's approval.

The administrative arrangements for the responsibility of Acts of Parliament change from time to time. The Premier issues general orders, which allocate responsibility for the administration of Acts of Parliament to ministers. Occasionally supplementary orders are issued that amend the general order. These documents can be obtained on the Department of Premier and Cabinet website under 'Machinery of Government'.

Traditional owner groups

PEA ss 3, 19

For the purposes of Part 3 of the PE Act, the owner of Crown land includes, if the land is agreement land within the meaning of the *Traditional Owner Settlement Act 2010*, the Traditional Owner group entity (as defined in the *Traditional Owner Settlement Act 2010*). This means that a Traditional Owner group is entitled to notice of preparation of an amendment under section 19(1)(b) of the PE Act when the planning authority forms an opinion that the amendment may materially affect the owner of the land.

To determine whether notice must be given to a Traditional Owner group, the planning authority must establish whether the land is agreement land. Agreement land is identified in a Land Use Activity Agreement entered into under the *Traditional Owner Settlement Act 2010*. Each Land Use Activity Agreement is published on the Register of Land Use Activity Agreements, which is available on the Department of Justice and Community Safety website.

2.6.4 How is notice of an amendment given?

PEA s19

Notice must be given in writing to the individuals and organisations specified in section 19 of the PE Act and prepared in accordance with the Act and the Regulations. Templates for notices to individuals and ministers are provided on the department's website.

PEA s 19(2)

A planning authority must publish a notice of any amendment it prepares in a newspaper generally circulating in the area to which the amendment applies. If an amendment affects a region or the whole state, an appropriate regional or statewide newspaper should be used.

PEA s. 19(2A)

A planning authority must cause a notice to be placed on the land which is the subject of an amendment that seeks to vary or remove a registered restrictive covenant on that land.

PEA s 19(3)

The planning authority must publish a notice of the preparation of an amendment in the *Victoria Government Gazette*. This can be on the same day, or after, the last of the notices has been provided and needs to be arranged in advance to allow enough time for the notice to be published on the chosen date.

PEA s 19(7)

A planning authority may take any other steps to provide notice. For example, additional newspaper notices, use of other media, displays in public places, notices on the land and public meetings. The extent of the notice will depend on how important or wide-ranging the effect of the amendment is likely to be.

A planning authority must make an individual decision for each amendment.

PEA s 32

The Minister may, in any case, require additional notification to be given after an amendment has been adopted. Early consultation with the department's relevant regional office on the extent of notice for a particular amendment should reduce the likelihood of additional notification being required after adoption.

What information is provided in the notice?

PEA s 19(4); PE Regs reg 7

The notice must:

- state the name of the planning scheme proposed to be amended
- state the planning scheme amendment number
- include a description (which may be by map) to identify the land affected by the amendment
- briefly describe the effect of the amendment
- state that the amendment, any documents that support the amendment, and the explanatory report about the amendment, may be inspected at the office of the planning authority during office hours free of charge
- state the name of the planning authority and the address or addresses where the amendment and other documents may be inspected
- state that any person may make a submission to the planning authority about the amendment
- state the closing date for submissions and the address of the planning authority to which submissions may be sent
- state that the planning authority must make a copy of every submission available at its office for any person to inspect during office hours free of charge until the end of two months after the amendment comes into operation or lapses
- be signed on behalf of the planning authority.

PEA s 19(4)(b); ILA s 44

The closing date for submissions must be not less than one calendar month after the date the notice is published in the Government Gazette. For example, if a notice is published in the Government Gazette on 4 September, the closing date for submissions must not be before 4 October or, if this day falls on a weekend, the following business day. This period of public exhibition is intended to enable interested or affected parties to consider changes to existing controls and to prepare and lodge submissions.

2.6.5 Exemption from giving notice

There are three situations in which a planning authority may be exempted from all or part of the normal notice requirements for an amendment:

PEA s 19(1A)

- if the number of owners or occupiers affected makes it impractical for the planning authority to notify them individually

PEA s 20(1)–(3)

- if the Minister exempts a planning authority from part of the notice requirements

PEA ss 20(4), 20A

- if the Minister, as the planning authority for the amendment, exempts himself or herself from all or part of the notice requirements.

Processes related to an exemption from notice for certain amendments are set out in Figure 2.4.

Notice to large numbers of owners or occupiers

PEA ss 19(1)(b), (1A)–(1B)

A planning authority is not required to give notice of an amendment to the owners and occupiers of affected land that it believes may be materially affected by an amendment if the number of owners or occupiers makes it impractical to notify them all individually. In this situation, the planning authority must take reasonable steps to ensure public knowledge of the amendment. Such steps might include extra display notices in local newspapers, news items or a sign on the site of the proposed development.

PEA ss 19(1C), 19(2A)

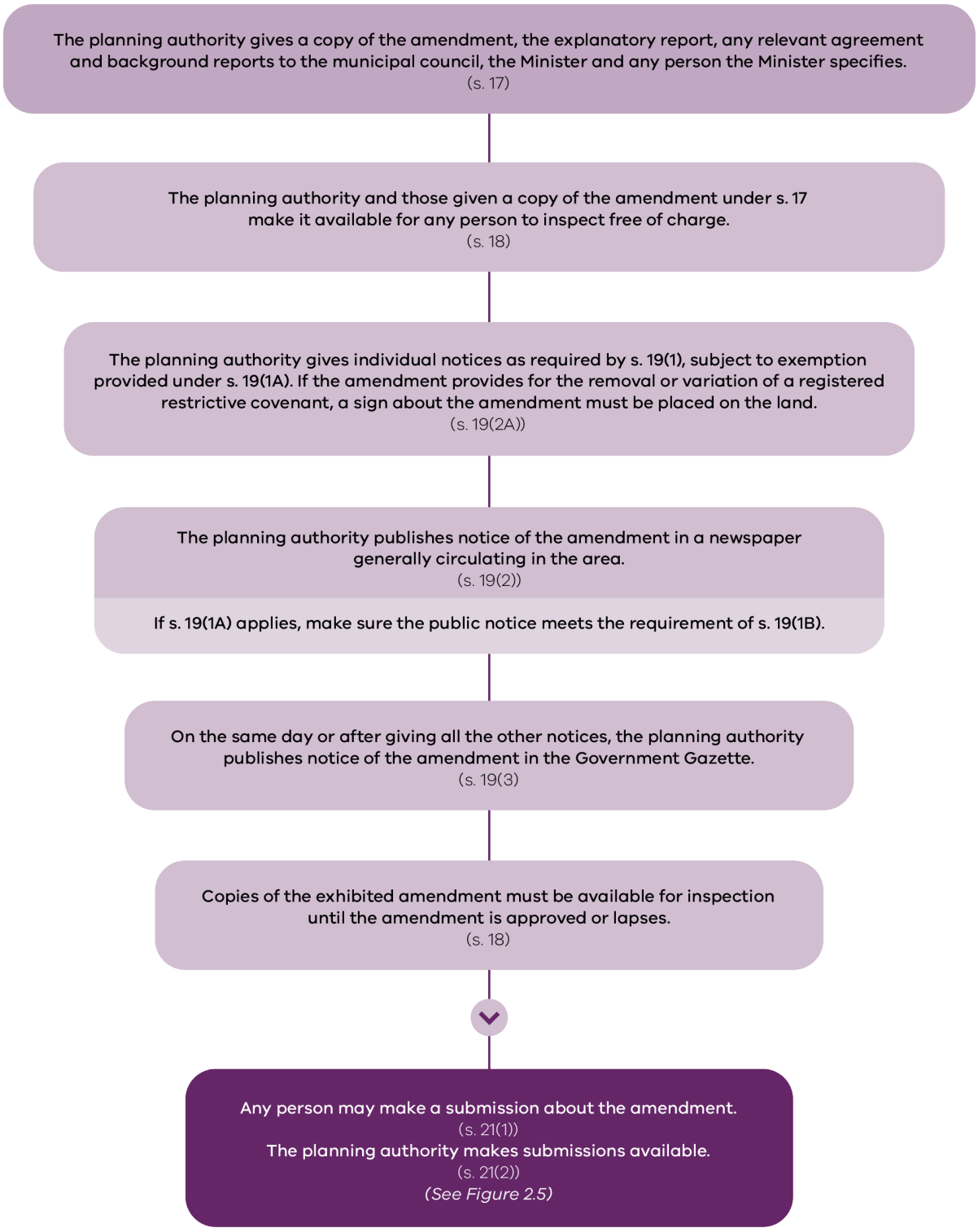
This exemption does not apply to the giving of notice to a landowner of an amendment that provides for any of the following:

- the reservation of that land for a public purpose
- the proposed closure of a road that gives access to that land
- the removal or variation of a registered restrictive covenant on the land.

PEA ss 31(2), 32

A planning authority does not need approval from the Minister before deciding to use section 19(1A). However, in submitting the amendment for approval, it must tell the Minister and give details of the steps taken to ensure knowledge of the amendment. If at this stage the Minister thinks the notice was in any way inadequate, the Minister can require that more notice be given. To avoid the inevitable cost and delay ensuing from this, the planning authority should confer with the department's relevant regional office if it proposes to use this procedure.

Figure 2.3: Giving notice of an amendment



Notice exemption where the Minister is not the planning authority

PEA s 20(2)

The Minister may exempt a planning authority from the requirements relating to notice of an amendment if the Minister considers that compliance with any of those requirements is not warranted or that the interests of Victoria, or any part of Victoria, make such an exemption appropriate.

PEA s 20(1)

A planning authority must apply to the Minister to be exempted from the requirements of section 19 of the PE Act or from the Regulations. The request should be accompanied by a completed 'Application Form – Request for an exemption under section 20(2) of the Act' and address the criteria set out in Planning Practice Note 29 – *Ministerial Powers of Intervention in Planning and Heritage Matters*. To avoid unnecessary delays in the amendment process, an exemption request should be made at the time authorisation is sought.

The application form can be found on the department's website.

PEA s 20(3)

The Minister cannot exempt a planning authority from the requirement to give notice:

PEA s 20(3)(a)

- to the owner of land proposed to be reserved for acquisition for a public purpose or affected by the closure of a road that gives access to that land

PEA s 20(3)(b)

- to any Minister prescribed in the Regulations

PEA s 20(3)(ba)

- if the amendment proposes a change to provisions relating to land set aside or reserved as public open space

PEA s 20(3)(c)

- to the Minister administering the *Land Act 1958* if the amendment provides for the closure of a road wholly or partly on Crown land.

PEA s 20(5)

The Minister can consult the responsible authority or any other person before giving an exemption and may grant the exemption outright or with conditions, for instance, that some other form of notice be given.

The Minister must decide on the exemption request before any notice is given under section 19 of the PE Act.

Notice exemption where the Minister is the planning authority

PEA s 20(4)

The Minister may exempt himself or herself from any of the requirements of sections 17–19 of the PE Act, and the Regulations. The Minister must be the planning authority for the amendment and must consider that compliance with any of those requirements is not warranted or that the interests of Victoria, or a part of Victoria, make such an exemption appropriate.

PE (Fees) Regs reg 7

If a person, planning authority or responsible authority (other than the Minister) seeks the use of this power, they must apply to the Minister. The request should be accompanied by a completed 'Application Form – Request for an exemption under section 20(4) of the Act' and address the criteria set out in Planning Practice Note 29 – *Ministerial Powers of Intervention in Planning and Heritage Matters*. The application must also be accompanied by the prescribed fee.

The application form can be found on the department's website.

PEA s 20(5)

The Minister may consult the responsible authority or any other person before giving himself or herself an exemption.

Notice exemption for prescribed classes of amendment

PEA s 20A; PE Regs reg 8

The Minister may determine to prepare an amendment in accordance with section 20A of the PE Act if the amendment is in a prescribed class. The prescribed classes are set out in regulation 8(1) of the Regulations, including:

- an amendment to correct an obvious or technical error in the VPP or a planning scheme
- an amendment to delete an expired clause in the VPP or a planning scheme
- an amendment to clarify or improve the language or grammatical form of a clause in the VPP or a planning scheme, if the intended effect of that clause or any other clause in the VPP or a planning scheme is not changed by that amendment
- an amendment to remove a clause that duplicates another clause in the VPP or a planning scheme
- an amendment to the VPP or a planning scheme to insert or update a heading
- an amendment to the VPP or a planning scheme to update a reference to a clause in the VPP or a planning scheme
- an amendment to delete a reference to an incorporated document or a background document in the VPP or a planning scheme if that document has expired or the reference is redundant
- an amendment to the description of a person, body, department, Act or statutory rule in the VPP or a planning scheme if the legal description of that person, body, department, Act or statutory rule has changed
- an amendment to delete a reference to a person or body specified as a referral authority in the VPP or a planning scheme if that person or body requests the amendment
- an amendment to delete a reference to a person or body to whom notice of an application for permit must be given in the VPP or a planning scheme if that person or body requests the amendment
- an amendment to the schedule to the Heritage Overlay in a planning scheme to delete a reference to a heritage place being included on the Victorian Heritage Register under the *Heritage Act 2017* if the heritage place is not on that Register
- an amendment to a planning scheme to include land in the Transport Zone if that land has been declared a freeway or an arterial road under the *Road Management Act 2004*
- an amendment to a planning scheme to delete a Road Closure Overlay from land
- an amendment to a planning scheme to delete a Public Acquisition Overlay from land if the person or body designated in the planning scheme as the acquiring authority for that land has acquired the land
- an amendment to a planning scheme to delete an Environmental Audit Overlay from land if a certificate of environmental audit has been issued for that land in accordance with Part 8.3 of the *Environment Protection Act 2017*
- an amendment to extend the expiry of a clause in the VPP or a planning scheme for a period of 12 months or less, beginning on the day the amendment takes effect, if notice has been published in accordance with section 19(3) of the PE Act of the preparation of an amendment to introduce a clause that is similar or substantially the same
- an amendment to a planning scheme to incorporate an infrastructure contributions plan prepared in accordance with Part 3AB of the PE Act if:

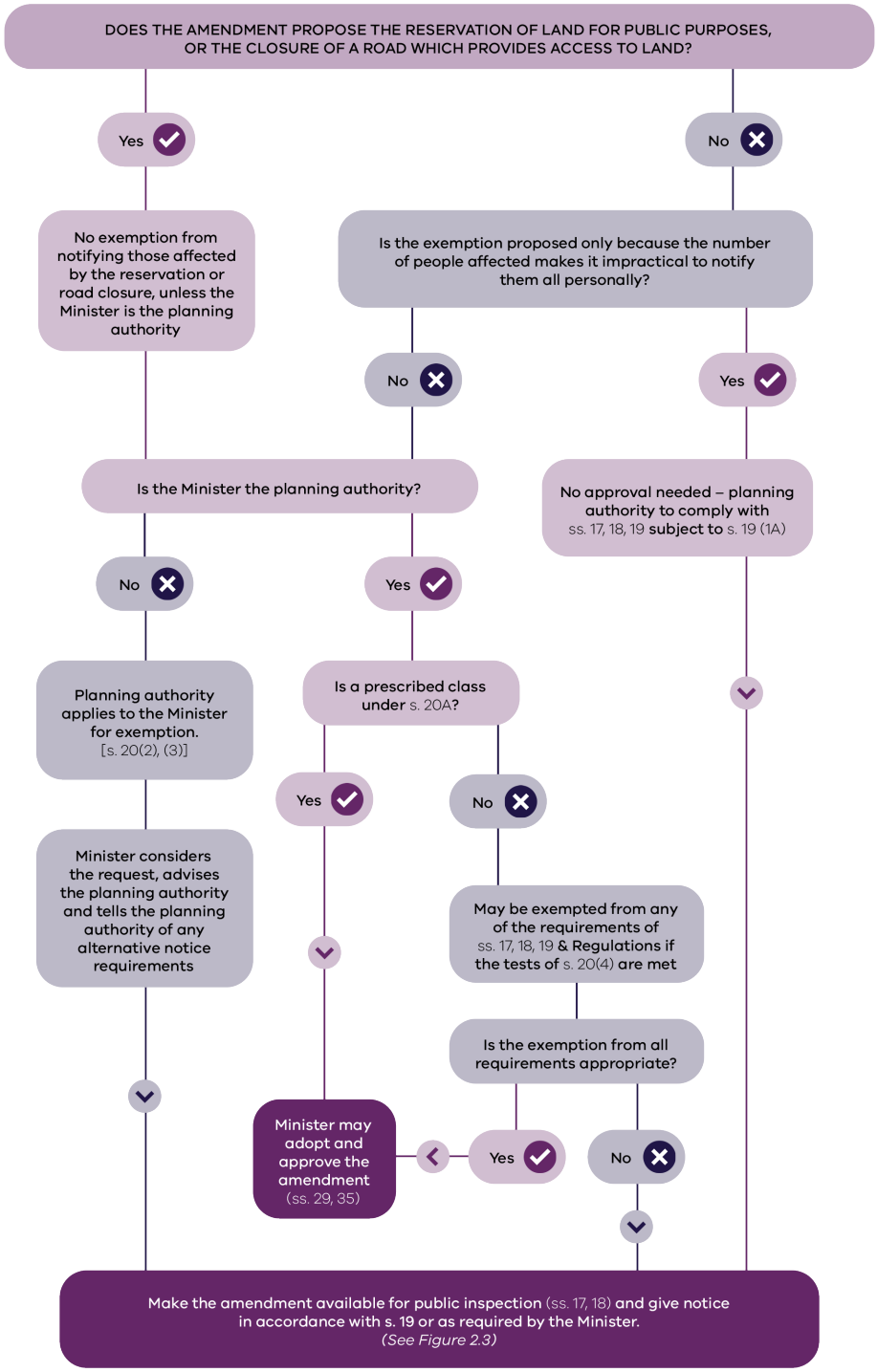
- the amendment has been approved to incorporate a precinct structure plan or strategic plan to which the infrastructure contributions plan relates; and
- the infrastructure contributions to be imposed by the infrastructure contributions plan relate to land to which the precinct structure plan or strategic plan applies and do not contain a monetary component that includes a supplementary levy within the meaning of Part 3AB of the PE Act.

- any combination of the above classes.

PEA s 20A(3)

An amendment prepared by the Minister under section 20A is exempt from the requirements of sections 17–19 of the PE Act.

Figure 2.4: Exemption from notice



PEA s 20A(4), PE Regs reg 8

The Minister must consult with the municipal council for the relevant planning scheme unless the council has requested the amendment or the amendment is exempted from this requirement by the Regulations. Regulation 8(2) exempts two classes of amendment from this consultation requirement:

- an amendment to the VPP
- an amendment to a planning scheme that is of a class prescribed in regulation 8(1) and that is made as a result of an amendment to the VPP prepared under section 20A.

PE (Fees) Regs reg 8

Any person may ask the Minister to prepare an amendment in a prescribed class under section 20A. The request should be accompanied by a completed 'Application Form – Request for an exemption under section 20A of the Act' and clearly identify the applicable prescribed class or classes. An application must also be accompanied by the prescribed fee.

An amendment prepared by the Minister under section 20A may be for one or more matters provided each matter falls within a prescribed class.

If a proposed amendment is not within a prescribed class, it cannot be dealt with under section 20A. However, depending on the particular circumstances, it may be appropriate for the amendment to be exempted from notice under section 20 of the PE Act.

To determine whether an exemption under sections 20 or 20A may be appropriate, early consultation with the department's relevant regional office is desirable.

2.6.6 Making a submission

PEA s 21

Any person may make a submission to the planning authority about an amendment if notice of that amendment has been given. A submission may support, oppose or seek changes to an amendment. A submission must not request a change to the terms of any state standard provision to be included in a planning scheme by the amendment. A submission can, however, request that a state standard provision be included in or deleted from the scheme.

PEA s 21(5)

In the case of an amendment to incorporate an infrastructure contributions plan into a planning scheme, a person is not entitled to make a submission to the planning authority requesting a change to any:

- land credit amount or land equalisation amount specified in the plan; or
- estimate of the value of public purpose land on which the amounts referred to in the first dot point are based.

There are no specific requirements about the form a submission must take, but it should do the following:

- clearly identify the amendment it refers to, by citing the amendment number
- set out the submitter's views on the amendment (for example, why the submitter supports or opposes the amendment and how the amendment will materially affect the submitter)
- where appropriate, the submission should respond to the specific strategic planning basis for the amendment or clearly set out the relevant planning considerations upon which the submitter's view is based

- set out what the submitter would like the planning authority to do (for example, abandon the proposal completely, exclude certain land from its effect, include additional conditions on a proposed use or approve the amendment as exhibited)
- give the submitter's name and address and contact details during office hours.

A person making a submission should ensure that it is received by the planning authority before the advertised closing date for submissions.

PEA ss 21(2), 197A

The planning authority must make a copy of every submission available in accordance with the public availability requirements for two months after the amendment comes into operation or lapses. Planning Practice Note 74 – *Availability of Planning Documents* gives further advice about making copies of planning documents, including submissions, available. Victoria's *Privacy and Data Protection Act 2014* also sets standards for the collection and handling of personal information. More information can be obtained from the Office of the Victorian Information Commissioner, Privacy and Data Protection website.

PEA s 21A

Two or more people may make one submission to a planning authority. In the case of a submission made jointly by more than one person, the submission should nominate one person as the group's representative for receiving notices and representation at a panel hearing. In the case of joint submissions, the PE Act allows for notices to be sent to one of the signatories on a petition.

2.6.7 Late submissions

PEA s 22(2)

It is important that submissions be lodged within the public exhibition period, however a planning authority may consider a submission received after the period stated in the notice. A planning authority should consider a late submission if there are good reasons for it being late and must do so if directed by the Minister. If the authority has not advanced very far in its considerations and a submission is received shortly after the closing date, the submission should normally be considered. A request for consideration of a late submission should be made in a letter to the planning authority or to the Minister if the person is seeking a direction from the Minister that a submission be considered. Any request must clearly identify the amendment referred to and, in the case of a request to the Minister, the planning authority for the amendment.

Generally, a direction will be given only when there is reasonable time for the planning authority to consider the submission before a panel hearing. A direction is likely to be given if:

- reasons are given for the late submission
- the submission raises a major issue of policy
- the submission is received less than a week after the closing of the exhibition period
- the request for consideration of a late submission was made before the planning authority had begun its deliberations
- there is to be a panel hearing, that there is enough time before the hearing begins for the planning authority to consider the submission and form an opinion
- the submission was late owing to postal delays or exceptional circumstances beyond the control of the person lodging it.

2.6.8 Considering a submission

PEA ss 21(5), 22–23

A planning authority must consider each submission but must not consider a submission that requests a change to the terms of a state standard provision or a submission that requests a change to any:

- land credit amount or land equalisation amount specified in an infrastructure contributions plan that is to be incorporated into a planning scheme by the amendment; or
- estimate of the value of public purpose land on which the amounts referred to in the first dot point are based.

It can, however, consider a submission that requests that a state standard provision be included in or deleted from the scheme.

PEA ss 191, 194

A planning authority may nominate a committee to hear any person to clarify a submission and make recommendations to the authority. A committee hearing is a more informal process than the panel process.

PEA s 23(1)

After considering a submission that requests a change to an amendment, the planning authority must:

- change the amendment in the manner requested; or
- refer the submission to a panel; or
- abandon the amendment or part of the amendment.

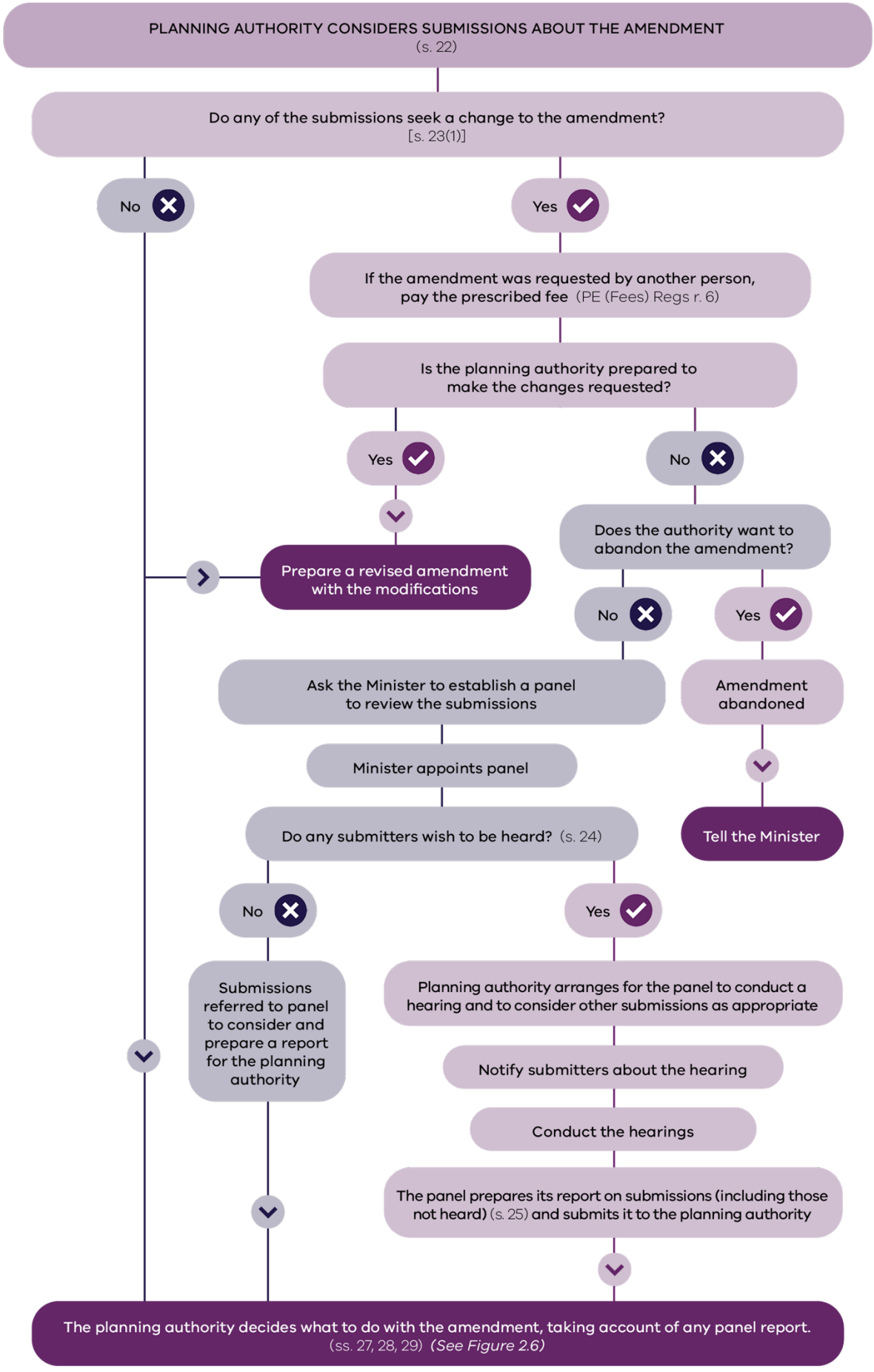
PEA s 23(3)

This does not apply to a submission that requests a change to the terms of a state standard provision to be included in the scheme by the amendment.

PEA s 23(2)

A planning authority may also choose to refer submissions that do not require a change to the amendment to a panel.

Figure 2.5: Considering submissions about an amendment



2.7 The panel stage

PEA ss 23(1)(b), 153–154

Submissions that seek a change to the amendment and are not accepted by the planning authority must be referred to an independent panel appointed by the Minister. A panel may consist of one or more persons. In most instances, although the Minister is responsible for appointing a panel, the panel members are chosen independently by Planning Panels Victoria. It is important to remember that the basic role of a panel is to:

- Give submitters the opportunity to be heard in an independent forum, in an informal, non-judicial manner. A panel is not a court of law.
- Give independent advice to the planning authority and the Minister about an amendment and the submissions referred to it. A panel makes a recommendation to the planning authority. It does not formally decide whether the amendment is to be approved.

PEA ss 22–23

A panel will not be required if all submissions requesting changes are accepted, and the amendment is changed accordingly, or the amendment is abandoned. Otherwise, a panel will be required.

PEA ss 151–152

In some cases, a panel may also be established as an advisory committee under section 151 of the PE Act to consider and report on additional planning matters relating to the amendment. If a panel is also appointed as an advisory committee, and it conducts a hearing in its capacity as an advisory committee, certain procedural requirements in Part 8 of the PE Act apply. The applicable requirements are set out in section 152 of the PE Act.

2.7.1 Appointment of a panel

The planning authority must make a written request to the Minister to appoint a panel. A request is usually made to Planning Panels Victoria, which has delegated authority from the Minister to appoint a panel. The information that should accompany a request is set out in Planning Panels Victoria's *Guide for Planning and Responsible Authorities*, which is available on the department's website.

The request should:

- summarise the nature of the proposal
- identify the applicant or proponent if not the council
- state the total number of submissions
- identify who the submissions are from
- identify the key issues raised in the submissions
- indicate how many days may be required for the panel hearing.

If the amendment has been prepared at the request of another person, an additional fee is payable to the planning authority for considering submissions that seek a change to the amendment and where necessary referring submissions to a panel. The Fees Regulations should be checked to determine the fees payable.

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* requires a panel to commence carrying out its functions (that is, either conduct a directions hearing or, if no directions hearing is required, commence the panel hearing) within 20 business days of its appointment.

PEA s 158

The planning authority must give a panel secretarial and other assistance before, during and after a hearing.

As soon as a panel is appointed, the planning authority should give each member of the panel a copy of the following documents:

- The exhibited amendment, explanatory report and any supporting documents. A note of any changes the planning authority has agreed to make to the amendment since it was exhibited, a copy of all submissions referred to the panel (including late submissions)
- All other submissions.
- Any reports that may assist the panel.

2.7.2 Directions panel

PEA s 159

A panel can hold a 'directions hearing' before any submissions are heard so that preliminary matters can be decided. A panel may give directions about the time and place of a hearing, any preliminary hearing matters and the conduct of hearings, including the manner in which hearings are conducted, whether in person or by audio link or audio-visual link.

PEA ss 155–159

Alternatively, the Minister may appoint a directions panel for hearings to be conducted by a panel. Members of the directions panel do not need to be members of the appointed panel. A directions panel may give any directions in relation to a hearing that a panel may give under section 159. The procedural requirements for a panel relating to the chairperson, costs and expenses, panels with more than one member and the assistance required from planning authorities will also apply to a directions panel.

The benefit of a directions panel is that it can provide directions in preliminary hearing matters and the conduct of hearings, allowing councils, parties and their advocates to better prepare for the panel process and ensure that panel hearings start without unnecessary delays.

Any person who fails to comply with the directions of a panel or directions panel can be refused their opportunity to be heard.

2.7.3 Regulation of panel proceedings

PEA ss 160(1)–(2), 169

A panel must conduct its hearings in public unless a person requests that their submission be made in private and the panel is satisfied that the submission is of a confidential nature. A panel may exclude a person from a panel hearing who is misbehaving. This can include insulting panel members or other people, repeatedly interrupting, or disobeying a direction of the panel.

PEA ss 161,167

A panel can regulate its own proceedings. A hearing is not required to be conducted in a formal manner.

However, in hearing submissions a panel must act according to equity and good conscience without regard to technicalities or legal forms. A panel is bound by the rules of natural justice but not by the laws of evidence. A panel may inform itself in any way it thinks fit without notice to any person who has made a submission.

PEA ss 161(3)–(4)

A panel may hear evidence and submissions from any person whom this PE Act requires it to hear. If a submitter wants to have a witness inform the panel, the panel can decide if there should be any cross-examination of that witness. Submitters are not cross-examined but may be asked questions by the panel to clarify their submission.

2.7.4 Panel hearing procedures

The panel will prepare a draft hearing timetable. The timetable should include the expected time for presentation of submissions. The order of submitters may be based on items within the amendment or on topics of the submissions. A copy of the timetable should be given to each submitter who wishes to be heard. Submitters should be invited to attend all presentations.

Usually, the procedure for a hearing is:

- The chairperson commences the hearing, describes the amendment and introduces the members of the panel.
- An officer of the planning authority outlines the background to and purpose of the amendment, what changes (if any) are proposed to the amendment as a result of considering submissions, and the planning authority's attitude to the referred submissions.
- If the council or the responsible authority is not the planning authority, a representative of the council or responsible authority outlines its view of the amendment.
- If someone asked the planning authority to prepare the amendment (the proponent), that person presents a submission (and usually evidence) to support the request.
- Submitters are heard in the order set out in the timetable or decided by the chairperson.

Typically, the panel will give the planning authority and the proponent a right of reply on matters raised by submitters.

PEA ss 161(2), 165

The panel may require a planning authority or other body or person to produce documents relating to a matter being considered by the panel. The panel can adjourn the hearing to other dates if it considers this necessary and may inspect relevant sites.

PEA s 166

A failure to give proper notice of an amendment, or to comply with any other requirement of the PE Act in relation to preparing the amendment, does not prevent a panel from hearing and considering any submissions referred to it and making its report and recommendations. On these occasions the panel report may include a recommendation that certain things be done, or that further notice be given.

Costs and expenses

PEA s 156

The Minister directs planning authorities to pay fees and allowances on a case-by-case basis. It is normal practice for a direction to be given. If a planning authority believes there is good reason why a direction to pay the costs should not be given, it should ask that no direction be given, or that a direction to meet only some of the costs be given.

If a planning authority has been directed to pay the panel fees and allowances, it can ask any person who has requested the amendment to contribute to the cost. A refusal to contribute could lead to the abandonment of the amendment by the planning authority.

2.7.5 Submissions to a panel

PEA s 161(5)

Submissions and evidence may be given to the panel orally or in writing or both.

PEA s 24

A panel must consider all submissions referred to it and give a reasonable opportunity to be heard to:

- any person who has made a submission referred to the panel
- the planning authority
- any responsible authority or municipal council concerned
- any person who asked the planning authority to prepare the amendment
- any person whom the Minister or the planning authority directs the panel to hear. This could be someone who supports the amendment (without change).

Even if a person does not wish to present their submission at the hearing, the panel must still consider their written submission.

Submitters should usually be given at least three weeks' notice of the hearing date so that oral and written submissions can be prepared.

Presentation of submissions to the panel

PEA s 162

People are encouraged to represent themselves at a panel hearing, however, they may be represented by any other person. If a submitter is to be represented by another person, that person must have written authority to do so. People not wishing to present a submission at the hearing are still welcome to attend.

Submitters should:

- refer to the main arguments in their oral submission and make it as brief as possible, particularly if the matters have been covered in their written submission
- avoid repeating points made by previous speakers
- ensure that the submission relates to the matters under discussion and is based on fact
- provide the panel at the hearing with copies of documents referred to in the submission
- if possible, use visual aids such as photographs and plans to highlight the main points.

Planning Panels Victoria's *Guide to the Public Hearing* provides more information about making submissions at a hearing. It is available on the department's website.

2.7.6 What issues does a panel need to consider?

PEA ss 161, 168

The key function of a panel is to consider the issues raised in submissions. However, a panel may inform itself on any matter as it sees fit and without notice to anyone making a submission. A panel may take into account any matter it thinks relevant in making its report and recommendation.

When considering an amendment, a panel will address:

- the merits of the amendment
- the issues raised in submissions
- the strategic context and implications of the amendment

- the strategic considerations specified in Ministerial Direction No. 11 – *Strategic Assessment of Amendments* (refer to Planning Practice Note 46 – *Strategic Assessment Guidelines for Planning Scheme Amendments* for further guidance)
- any other relevant matters.

To assist the panel in considering these issues, the following matters should be specifically addressed by the planning authority in its submission to the panel.

Description

- What does the amendment propose to do?
- If land is affected by the amendment, where is it located? What does it look like? Who owns it?
- Is the land affected by any specific locational, architectural, environmental, topographic, servicing, social or other features, or constraints that require a special planning response?
- What existing planning provisions apply to the land or the proposal?
- If the amendment has been modified since exhibition, what are the modifications?

Strategic justification

- How does the amendment support or give effect to the PPF and any adopted state policy? Is it consistent?
- How does the amendment support or implement the MPS?
- Does the amendment seek to change the strategic directions of the MPS?
- What effect will any change to the MPS have on the local planning policies of the PPF and the rest of the MPS, either in its own right or cumulatively with other changes that may have been made to those provisions or in other amendments?

Statutory justification

- Is the form of the amendment appropriate?
- Will it achieve the desired result?
- Has the amendment considered any relevant drafting rules or guidance, such as those set out in the *Practitioner's Guide to Victoria's Planning Schemes*?
- Does the amendment comply with the requirements of the Ministerial Direction – *The Form and Content of Planning Schemes*?
- Do any other Minister's directions apply to the amendment and, if so, have these been complied with?
- What notice was given of the amendment?
- How many submissions were received and from whom? What issues do they raise?

If any of the matters are not relevant, this should be stated and the reasons why, rather than the matter simply being ignored.

2.7.7 Panel reports

PEA s 25

The panel must report its findings to the planning authority and, except as noted below, can make any recommendations it thinks fit.

PEA ss 25(3)–(5), 25A

A panel must not recommend that an amendment be adopted that includes changes to the terms of any state standard provision. A panel must also not recommend that an amendment be adopted with a change to any:

- land credit amount or land equalisation amount specified in an infrastructure contributions plan that is to be incorporated into a planning scheme by the amendment; or
- estimate of the value of public purpose land on which the amounts referred to in the first dot point are based.

A panel may, however, recommend to the Minister that an amendment be prepared to the VPP, where the Minister is not the planning authority for the amendment. A panel may also recommend that an amendment provide for a state standard provision to be included in or removed from the planning scheme.

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* sets times for preparing panel reports. Once a hearing is completed and all supplementary submissions to the panel have been received, a panel must submit its report to the planning authority as follows:

- within 20 business days – for a one-person panel
- within 30 business days – for a two-person panel
- within 40 business days – for a panel with three or more persons.

PEA s 27

The planning authority must consider the report, decide what alterations should be made to the amendment and whether to adopt or abandon it. The Minister can exempt an authority from the need to consider a report from a panel if the panel has not reported within six months of its appointment or within three months of the completion of its hearings.

PEA ss 26, 197A

The panel's report must be made available in accordance with the public availability requirements 28 days after receipt by the planning authority or earlier if the planning authority has made a decision about the amendment. A planning authority may also make the report available before this if it wishes.

PEA s 31; PE Regs reg 9(e)

If a planning authority decides not to accept a panel's recommendation, it must give its reasons for this when it submits the adopted amendment to the Minister under section 31 of the PE Act.

2.7.8 Abandonment or lapsing of an amendment

PEA ss 30(1)(a)–(b)

Amendments automatically lapse if they have not been adopted by the planning authority within two years from the date the notice of exhibition was published in the Government Gazette. The two-year period may be extended by the Minister. Requests for an extension should be made at least one month before the lapse date. An extension cannot be granted after the amendment has lapsed. The amendment will lapse if the amendment is not adopted within the extended period. In this case, the Minister must publish a notice in the Government Gazette setting out the date on which the amendment (or part) lapsed.

PEA ss 28, 30(1)(c), 30(2), 188(2)

The planning authority must tell the Minister in writing if it decides to abandon an amendment or part of an amendment. Abandonment of an amendment must be by resolution of the planning authority and recorded in its minutes or reports. An amendment

will lapse once the Minister has been notified that the amendment or part of an amendment has been abandoned. The Minister must publish a notice in the Government Gazette setting out the date on which the amendment (or part) lapsed.

PEA ss 30(1)(d), (2)

An amendment or part of an amendment will also lapse if the Minister refuses to approve it. The Minister must publish a notice in the Government Gazette setting out the date on which the amendment (or part) lapsed.

2.8 The amendment adoption stage

PEA s 29

A planning authority can adopt an amendment, or part of it, with or without changes. Changes may be made as a result of the authority's initial consideration of submissions, the panel's recommendations or for other reasons considered relevant.

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* sets times within which a planning authority must decide to either adopt or abandon an amendment. If no submissions have been referred to a panel, the planning authority must make a decision within 60 business days of the closing date for submissions. If a panel was appointed, the planning authority must decide within 40 business days of receiving the panel's report.

If an amendment is adopted in part, with other parts to be resolved later, the amendment should be split and each part (Parts 1, 2, 3 and so on) progressively adopted as outstanding issues are resolved.

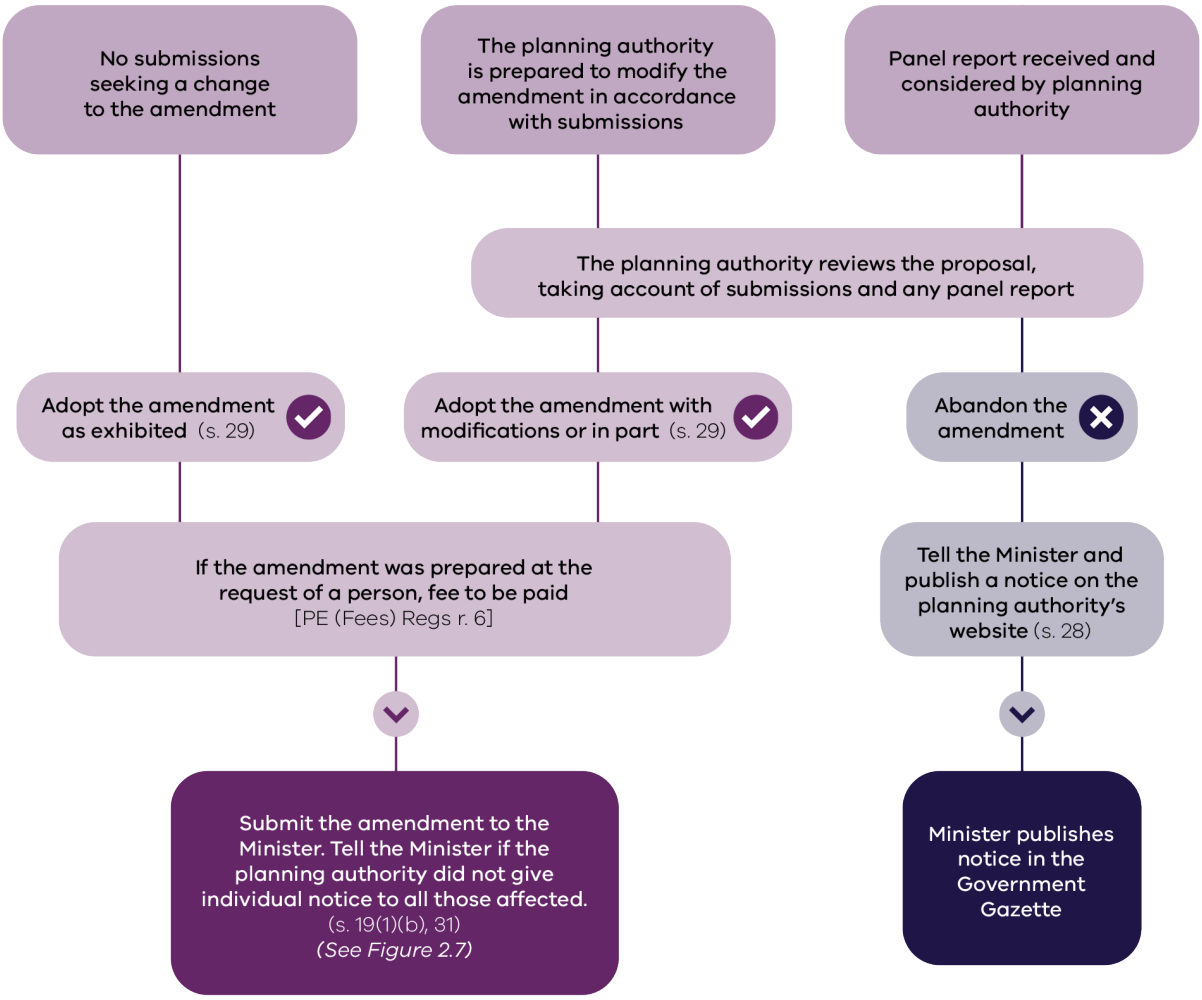
PEA s 188(2)(a)

Adoption of an amendment cannot be delegated to officers. It must be by resolution of the planning authority and recorded in its minutes or reports. A copy of the resolution, or evidence of it, should be attached to the adopted amendment.

PE (Fees) Regs reg 6

If the amendment was requested by another person, the planning authority can charge a fee for adopting it and submitting it for approval. Refer to the Fees Regulations to check the fee payable.

Figure 2.6: Adopting or abandoning an amendment



2.9 The amendment approval stage

Once the planning authority has adopted the amendment, it must be submitted to the Minister for Planning for approval. A planning authority does not have the capacity to change its mind once it has adopted the amendment. It must submit the amendment as adopted to the Minister.

2.9.1 Amendments to be submitted to the Minister for approval

PEA s 31

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* requires an amendment to be submitted to the Minister within 10 business days of when the amendment was adopted.

PE Regs reg 9, PE (Fees) Regs reg 6

The adopted amendment must be submitted with:

- the following prescribed information:
  - the reasons for the amendment
  - a list of the notices given under section 19(1) of the PE Act
  - a summary of action taken under sections 19(1B) (if applicable), 19(2), 19(2A), 19(3) and 19(7) of the PE Act

  - copies of submissions or reports received on the amendment
  - the reasons why any recommendations of a panel appointed under Part 8 of the PE Act were not adopted
  - a report on submissions not referred to a panel
  - a description of and the reasons for any changes made to the amendment before adoption
- a completed application form for requesting the approval of the amendment. A template of this form is available on the department's website
- a copy of the planning authority resolution to adopt the amendment
- the prescribed fee.

A planning authority may submit other supporting information with the application form if it thinks that this will help to explain the amendment. The amendment and accompanying information should be sent electronically in accordance with the 'Amending a Planning Scheme' webpage at **planning.vic.gov.au**.

If the planning authority decided in accordance with section 19(1A) of the PE Act not to give notice to all affected owners and occupiers, the planning authority must inform the Minister of this and provide details of steps that were taken to ensure people were aware of the proposal.

Any other supporting information (letters, reports, plans, photos and so on) may be provided to further amplify 'why', 'where' and 'how' changes are being proposed. Department officers will examine all this information and report the amendment to the Minister. Inadequate information will cause delays in the processing of a proposed amendment.

PEA s 19(5)

A partial failure to give notice does not prevent a planning authority from adopting and submitting an amendment, but this will be considered by the Minister who can require further notice to be given.

PEA s 60(1A)(h)

An amendment that has been adopted by the planning authority but not yet approved by the Minister should be considered by a responsible authority before it makes a decision about a permit application, if the circumstances make it appropriate to do so.

2.9.2 The Minister's consideration of an amendment

Ministerial Direction No. 15 – *The Planning Scheme Amendment Process* requires the Minister to make a decision on an adopted amendment within 40 business days of receiving it from the planning authority.

Figure 2.7 summarises the Minister's consideration of an amendment submitted by a planning authority.

2.9.3 Approving an amendment

PEA s 35(1)

The Minister can approve an amendment, or a part of it, with or without changes and subject to conditions.

PEA ss 35(4)(a)–(b); PE Regs reg 10

If an amendment unreasonably prejudices the objectives or operations of a prescribed government department or public authority, the Minister may need to consult with the relevant Minister and obtain his or her consent before approving an amendment. The Minister must consult with the Minister responsible for administering the *Road Management Act 2004* if the amendment provides for the closure of a freeway or an arterial road.

2.9.4 Refusing an amendment

PEA ss 30(1)(d), 30(2)

When the Minister refuses to approve an amendment, the amendment lapses and the Minister must publish a notice in the Government Gazette setting out the date on which the amendment lapsed.

2.9.5 Additional notice of an amendment

PEA s 32

If the Minister thinks the initial notice given of an amendment was inadequate, he or she can defer making a final decision on the amendment and direct the planning authority to give additional notice and to go through the process again of considering submissions, appointing a panel and considering its recommendations, before adopting and submitting the amendment.

PEA ss 33, 34

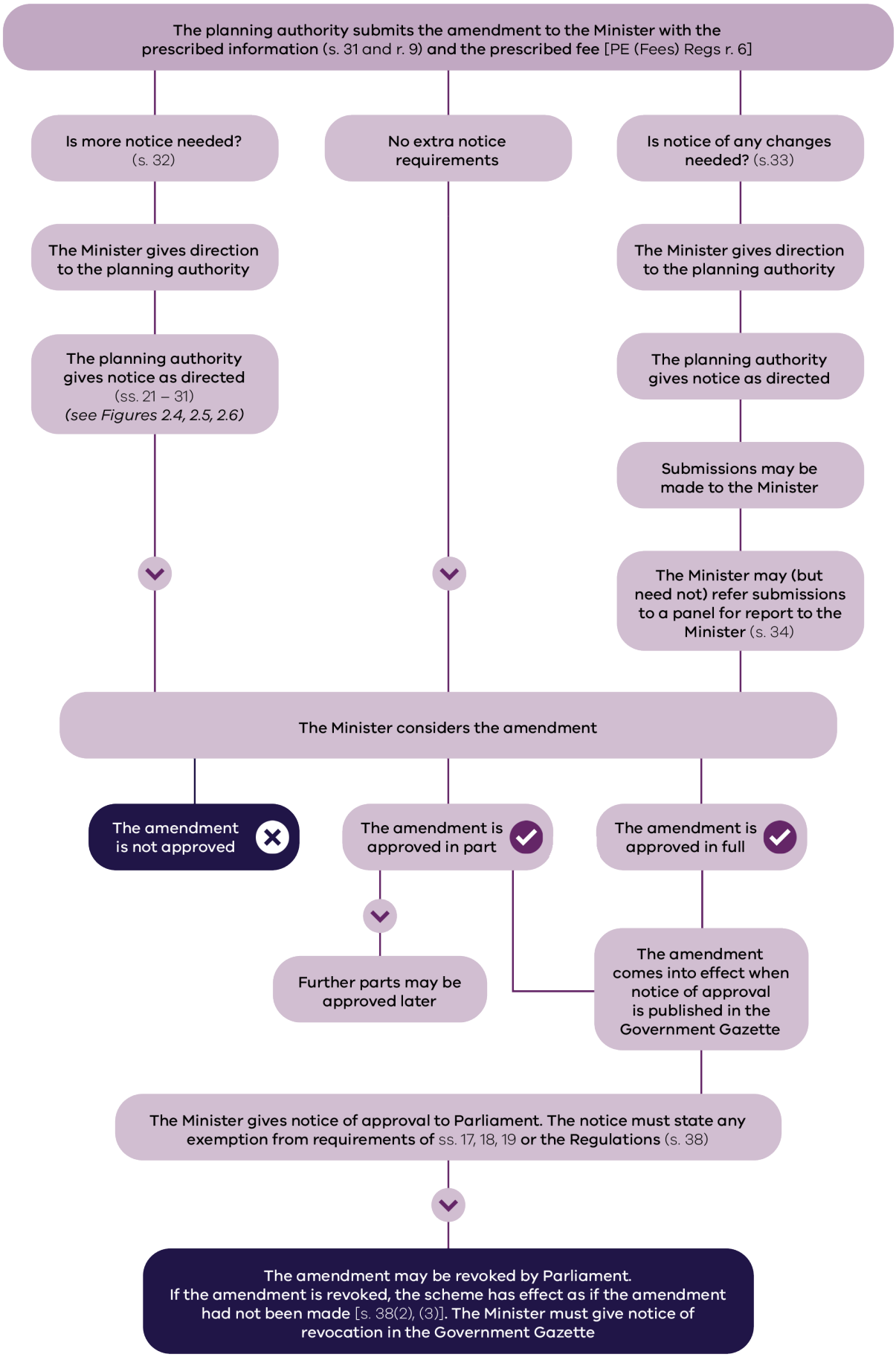
The Minister can also direct a planning authority to give notice of any changes the planning authority has made to the amendment after exhibition, and of any changes the Minister proposes to make. The Minister can specify what form that notice will take and can refer submissions to a panel (that the Minister appoints) before making a final decision.

2.9.6 Notification of an approved amendment

PEA ss 36, 197A

The Minister publishes notice of approval of an amendment in the Government Gazette in accordance with the public availability requirements. The planning authority must give notice of the approval of the amendment in a manner satisfactory to the Minister. The planning authority should promptly advise the Minister that the required notice has been given.

Figure 2.7: Approving an amendment



Lodging of amendments

PEA ss 40(1), (3); PE Regs reg 12

If the Minister approves an amendment, the Minister or (if the Minister directs) the planning authority must lodge the prescribed documents and a copy of the approved amendment with:

- the responsible authority
- the council to which the planning scheme applies if the council is not the responsible authority
- any other person specified by the Minister.

The prescribed documents are:

- an explanatory report relating to the approved amendment
- any document applied, adopted or incorporated in the planning scheme or the VPP by the amendment
- any section 173 agreement that comes into operation when the amendment comes into operation.

PEA s 40(2)

The lodging process must be completed before the notice of approval is published in the Government Gazette. If a planning authority is required to carry out the lodging process, it should promptly advise the Minister in writing when this has been done.

The amendment comes into effect when notice of approval is published in the Government Gazette.

2.9.7 Who keeps a copy?

PEA ss 41, 42, 197A

A copy of an approved amendment and an up-to-date copy of the affected planning scheme must be kept by the Minister, the responsible authority and the council (if it is not the responsible authority) in accordance with the public availability requirements. A copy of an approved amendment must also be kept by the planning authority. If the planning authority is also the responsible authority, only one copy of the approved amendment and updated planning scheme needs to be kept. Any person can inspect these documents during office hours free of charge for two months after the amendment comes into operation; and after that time, on payment of a prescribed fee if prescribed by the Fees Regulations.

2.10 Defects in procedure

PEA s 39

A person who is substantially or materially disadvantaged by a failure of the Minister, a planning authority or a panel to comply with the procedural requirements for an amendment can refer the matter to VCAT by lodging a notice with the Registrar.

This must be done before an amendment is approved and within one month of the person taking such action becoming aware of the failure.

Although VCAT cannot change or substitute a decision if it finds the procedures have not been properly followed, it can require that remedial action take place before the amendment can be adopted or approved.

2.11 Revocation of an amendment

PEA ss 38(1)–(2); PE Regs reg 11

All or part of an approved amendment may be revoked by either House of Parliament within 10 sitting days after notice of the approval of the amendment has been laid before that House.

PEA ss 38(3)–(4)

If an amendment is revoked, the scheme has effect as if the amendment had not been made beginning on the day on which the amendment was revoked. The Minister must publish a notice of the revocation of part or all of an amendment in the Government Gazette. A planning authority must give notice of the revocation of an amendment in whole or in part in a manner to the satisfaction of the Minister.

2.12 Ratification of an amendment

PEA s 46AF

Under section 46AF of the PE Act, the following amendments to a metropolitan fringe planning scheme require ratification after they are approved by the Minister:

- an amendment to or the insertion of an urban growth boundary
- an amendment that has the effect of altering or removing the controls over the subdivision of any green wedge land to allow for the land to be subdivided into more lots or into smaller lots than allowed for in the scheme.

PEA ss 46AA, 46AC

The terms 'metropolitan fringe planning scheme', 'urban growth boundary' and 'green wedge' are defined in Part 3AA of the PE Act. The provisions were included in the PE Act in 2003 to safeguard Melbourne's green wedges and protect rural areas from inappropriate development.

PEA s 46AZE

Under section 46AZE of the PE Act, an amendment to a protected settlement boundary (a settlement boundary in a declared area protected under a Statement of Planning Policy) must be ratified by Parliament after it is approved by the Minister.

2.12.1 Procedure for ratification

PEA ss 46AH(1), 46AZE(1)

After the Minister has approved the amendment, the Minister must cause the amendment to be laid before each House of Parliament. This must be done within seven sitting days after the amendment is approved.

PEA ss 46AG, 46AZE(3)

The amendment does not take effect unless ratified by each House of Parliament within 10 sitting days after it is laid before that House.

2.12.2 Ratification of a combined amendment and permit

PEA ss 46AH(2), 46AZE(2)

If a permit has been granted under section 96I in respect of an amendment that requires ratification, the Minister must cause a notice of the grant of the permit to be laid before each House of Parliament. This must be done at the same time that the amendment is laid before that House.

2.12.3 When does a ratified amendment commence?

PEA ss 40, 46AI, 46AJ, 46AZE(5), 197A

After an amendment is ratified, the Minister must publish a notice of the ratification in the Government Gazette in accordance with the public availability requirements and lodge the amendment with the relevant authorities as required by section 40 of the PE Act. The amendment comes into operation on the date the notice is published in the Government Gazette or any later date specified in the notice.

2.12.4 When does an amendment lapse?

PEA ss 46AK, 46AZF

An amendment that has not been ratified by Parliament within the specified time lapses on the day immediately after the last day on which it could have been ratified. The Minister must publish a notice in the Government Gazette setting out the date on which the amendment lapsed. This Gazette notice is conclusive proof of the date on which the amendment lapsed.

An amendment to a Statement of Planning Policy that requires the preparation of the protected settlement boundary amendment lapses if that protected settlement boundary amendment has lapsed.

2.13 Amendments in special circumstances

2.13.1 Amendments to reserve land for public purposes

PEA s 3

In the VPP, the Public Acquisition Overlay (PAO) is the tool used to reserve land for a public purpose either immediately or in the future outside the infrastructure contributions system. Land identified for a public purpose in an infrastructure contributions plan is dealt with under Part 3AB of the PE Act.

The use of land for a public purpose is defined by the PE Act as any purpose for which land may be compulsorily acquired under any Act to which the *Land Acquisition and Compensation Act 1986* applies.

Planning must ensure that changes to the use and development of the land does not prejudice the purpose for which it is to be acquired. In preparing an amendment to apply the PAO, a planning authority should keep several important points in mind:

Planning schemes cl 45.01-6

- In administering the *Land Acquisition and Compensation Act 1986* or any Act or regulation dealing with land acquisition or compensation, any land included in a PAO is reserved for a public purpose.

PEA ss 19, 20

- Reserving land is a serious step towards depriving the present owners and occupiers of that land. It is important that owners and occupiers of land to be reserved are fully informed at all stages.

PEA ss 19(1C), 20(3)

- The planning authority must give individual notice to the owners and occupiers of affected land under section 19(1A) the PE Act. Exemptions to individual notice under section 19(1A) do not apply to the reservation of land for a public purpose.

PEA s 19(1)(c); PE Regs reg 6

- The planning authority must give notice to any Minister, public authority or municipal council that the amendment designates as an acquiring authority.

PEA ss 20(3), (4)

- The Minister cannot exempt a planning authority (other than where the Minister is the planning authority) from the requirement to give notice to the owner of land to be reserved.

PEA s 19(6)

- Failure to give the necessary notice to an owner is fatal to the amendment.

PEA ss 98(1), 109

- The schedule to the PAO requires that the acquiring authority and the reason for acquiring the land be specified. Before giving notice of an amendment to include land in a PAO, the planning authority should ensure that the acquiring authority (which may or may not be the planning authority) is prepared to meet any compensation claims that may arise.
- Under Part 3AB of the PE Act, an infrastructure contributions plan identifies land that is to be set aside for a public purpose. Once the infrastructure contributions plan is incorporated into the planning scheme the requirement to provide land is triggered when the land is to be developed. Where the land is required before development of the land the *Land Acquisition and Compensation Act 1986* applies.

2.13.2 Rezoning of potentially contaminated land

Ministerial Direction No. 1 – *Potentially Contaminated Land* seeks to 'ensure that potentially contaminated land is suitable for a use which is proposed to be allowed under an amendment to a planning scheme and that could be significantly adversely affected by any contamination'.

Minister's Direction 1, clause 4

In preparing an amendment that would have the effect of allowing (whether or not subject to the grant of a permit) potentially contaminated land to be used for a sensitive use, agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of that land are or will be suitable for that use. Before preparing an amendment, the planning authority should seek advice from the department if there is doubt about how a particular situation should be addressed.

Consult Ministerial Direction No. 1 – *Potentially Contaminated Land* for the specific requirements of the direction.

Planning Practice Note 30 – *Potentially Contaminated Land* and the *Practitioner's Guide to Victoria's Planning Schemes* provides guidance about how to identify potentially contaminated land, the appropriate level of assessment of contamination for an amendment or planning permit, and the application of the Environmental Audit Overlay.

2.13.3 Amendments relating to notice requirements

PEA ss 6(2)(kc)–(kd)

A planning scheme can set out classes of applications for permits exempted wholly or in part from section 52(1) of the PE Act (requirement to give notice of an application) and set out notice requirements, if any, to apply in place of those requirements. The scheme can also set out classes of applications that are exempted from sections 64(1), (2) and (3) (notice of decision to be given to objectors), and section 82(1) (objector may apply for a review to VCAT against a decision to grant a permit).

PEA ss 4(2)(i)–(j)

There are no particular requirements about the types of applications that can be exempted. A planning authority should note the objectives of the planning framework 'to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice' and 'to provide an accessible process for just and timely review of decisions without unnecessary formality'.

Exemption provisions can apply to a class of use or development generally (wherever it occurs) or to a class in a particular zone or overlay. An exemption class could also be related to a specific set of planning controls (such as development that is in accordance with a detailed plan incorporated in the scheme). Classes can be defined in whatever way is appropriate to the outcome being sought.

In planning schemes, exemption provisions typically apply to a class of use or development and can either be a state standard provision or a local provision inserted in a schedule to a zone or overlay. If the exemption provision is a state standard provision it can only be amended by amending the VPP. If the exemption provision is a local provision to be inserted in a schedule, care must be taken when drafting the exemption to ensure that it only exempts classes of applications defined by its 'parent provision'. For example, the schedule to the Design and Development Overlay cannot be used to exempt an application for use from the notice, decision and review requirements of the PE Act, because its parent provisions only control buildings and works. The Special Use Zone, however, contains parent provisions that enable its schedule to regulate use and development. The key to drafting exemptions is to read the parent provision carefully to identify those parts of it that define the scope of the exemption and to ensure that the schedule responds to those requirements.

An exemption relates only to the clause in which it is included. If another part of the planning scheme also requires a planning permit to be obtained, the exemption will not apply to that part.

2.13.4 Amendments to vary or remove a restriction on title

PEA ss 6(2)(g), (ga), (gb), 6A

A planning scheme can regulate or provide for the creation, variation or removal of easements or restrictions under section 23 of the *Subdivision Act 1988* and related matters.

An amendment may authorise a plan to be certified and lodged with Land Use Victoria to vary or remove the specified restriction. It is important that the amendment to authorise this be in a legally effective form.

The appropriate location in a planning scheme to insert provisions relating to easements, restrictions and reserves is the schedule to clause 52.02.

PEA ss 19(1)(ca), (2A)

If the effect of an amendment would be to remove or vary a registered restrictive covenant, notice of the amendment must be given to the owners and occupiers of land benefited by the covenant and a sign about the amendment must be placed on the land.

PEA s 19(1A)

Giving notice of an amendment in alternative ways if the 'number of owners and occupiers affected makes it impractical to notify them all individually' does not apply to an amendment to remove or vary a registered restrictive covenant.

2.13.5 Amendments to control demolition

Section 29A of the *Building Act 1993* requires that certain building applications involving demolition be referred to the responsible authority for report and consent. The requirements

for a responsible authority in responding to such referrals are set out in part 4.3 of Chapter 4 on building permit applications for demolition of buildings.

If a planning permit is not required for the demolition, and the responsible authority considers that a planning permit should be required for the proposed demolition, the planning authority can:

- prepare an amendment which in effect directs that a permit is required to carry out the demolition, and ask the Minister for an exemption from certain notice requirements, in accordance with section 20(1) of the PE Act; or
- make a request to the Minister to prepare an amendment to the effect that a permit is required to carry out the demolition, and for the Minister to exempt himself or herself from certain requirements in preparing that amendment, in accordance with section 20(4) of the PE Act.

If such a request is made within the prescribed time, which is 15 working days starting from the day the application for demolition is received, the responsible authority must give notice to the building surveyor that an application or request has been made so that the building surveyor can suspend consideration of the building permit application.

Either request should be submitted to the Minister through the regional office of the department. The request should include a draft of the amendment proposed and be quite clear whether it is a request by the planning authority for exemption from notice, or a request to the Minister to make the amendment.

A request to the Minister to prepare an amendment should take account of the Planning Practice Note 29 – *Ministerial Powers of Intervention in Planning and Heritage Matters*. It should also be accompanied by the prescribed fee for requesting a planning authority to make an amendment. These requirements do not apply to a planning authority seeking exemption from giving notice of an amendment. Nevertheless, the reasons why such an exemption should be given will need to be clearly set out in the request.

2.14 The combined amendment and permit process

PEA ss 96A(1)–(2)

To avoid the necessity for a two-stage process where a planning proposal requires both an amendment to a planning scheme and a planning permit, Division 5 in Part 4 of the PE Act makes provision for a combined amendment and permit process. This process allows a planning authority, if requested to do so by a person, to simultaneously prepare and give notice of a proposed amendment to a scheme and notice of an application for a permit.

PEA s 96A(5)

The combined amendment and permit process must not be used after notice of the proposed planning scheme amendment has been given under section 19 of the PE Act. However, in certain circumstances, a panel or the planning authority can still recommend that a permit be granted as part of an amendment process even if the permit was not applied for at the time of exhibition of the amendment.

The combined process should not be used for proposals for which a planning permit application can be made under the current provisions of the planning scheme.

PEA s 96A(3)

Under the combined process, a permit application can be for any purpose for which the planning scheme, as amended, will require a permit to be obtained. This includes a use, development or any other purpose that may be prohibited under the existing scheme.

PEA s 96M

Where the combined process is used, the component of the process relating to the permit application is dealt with in similar fashion to the amendment and is quite different to the normal permit process under Divisions 1 and 2 in Part 4 of the PE Act. In particular:

- there are no formal referral requirements
- the requirements for giving notice of the application are different
- the Minister makes the final decision about whether a permit is granted, with no further right of review.

2.14.1 Authority for the combined amendment and permit application process

PEA ss 96A(1)–(2), (6), 96G

The planning authority is the authority responsible for preparing an amendment and considering an application under the combined amendment and permit process. It is responsible for accepting and registering the application, amending it (if necessary), exhibiting the amendment and proposed permit (if applicable) and complying with all other requirements of the PE Act leading up to and including making a recommendation to the Minister about whether the amendment should be adopted and a permit granted.

PEA s 96I(1)

The Minister is responsible for deciding whether a permit should be granted, with or without changes, and subject to conditions.

PEA s 96N

If a permit is granted, the responsible authority under the planning scheme becomes the responsible authority for the permit.

Making a request

PEA s 96A(4); PE Regs reg 40; PE (Fees) Regs reg 14

The application for the permit must be made in writing to the planning authority in accordance with regulation 40 of the Regulations and accompanied by the prescribed fee, together with any information required by the planning scheme. It must be completed and signed in accordance with the requirements of section 48 of the PE Act.

PEA s 96A(4)(c)

If the permit application affects land subject to a registered restrictive covenant, a copy of the covenant must accompany the application. If the application is for a permit to allow the removal or variation of a registered restrictive covenant, or if the grant of the permit would allow anything that would breach a registered restrictive covenant, the application must also be accompanied by:

- information clearly identifying each lot benefited by the registered restrictive covenant; and
- any information required by the Regulations.

PE (Fees) Regs reg 6

The amendment request must also be accompanied by the prescribed fee.

Considering a request to combine the amendment and permit process

The procedure for considering a request to combine the amendment and permit process under Division 5 is the same as for an amendment under Part 3 of the PE Act, which is set out in part 2.2 of this chapter.

There is no right of review of a planning authority's decision not to combine the preparation of an amendment with the consideration of a permit application. It is therefore important for the applicant/proponent to discuss any issues with the planning authority before making a formal request.

PEA . 96A(6)

If a planning authority agrees to combine the amendment and permit process, the requirements of sections 49, 50 and 50A in relation to registering and making changes to the permit application apply.

2.14.2 Public exhibition of a combined application

PEA ss 96C(10), 197A

Notice of a combined permit application and amendment must be given in accordance with the requirements of section 96C, and not section 19. Under section 96C, notice must be in accordance with the public availability requirements and include:

PEA s 96C(1)(a)

- Notice to every Minister, public authority and council that the planning authority believes could be materially affected by the amendment or application.

PEA s 96C(1)(b)

- Notice to the owners and occupiers of land that the planning authority believes could be materially affected by the amendment or application.

PEA s 96C(1)(c); PE Regs reg 42

- Notice to any Minister, public authority, council and person prescribed by the Regulations.

PEA s 96C(1)(d)

- Notice to the Minister administering the *Land Act 1958* if the amendment provides for the closure of a road wholly or partly on Crown land.

PEA s 96C(1)(e)

- Notice to the responsible authority, if it is not the planning authority.

PEA s 96C(1)(f)

- Notice to the owners and occupiers of land adjoining the site to which the permit application applies unless the planning authority is satisfied that the grant of a permit would not cause material detriment to any person.

PEA s 96c(1)(g)

- Notice to the owners and occupiers of land benefited by a registered restrictive covenant if the amendment or the permit would allow the variation or removal of the covenant, or anything allowed by the permit would be in breach of the covenant. An owner for this purpose excludes an owner entitled to be registered as a proprietor of an estate in fee simple.

PEA s 96C(2)

- A notice in a newspaper circulating in the affected area.

PEA ss 96C(2A)–(2B), 197A

- If the amendment would allow the variation or removal of a registered restrictive covenant, a sign on the land that is the subject of the amendment. The sign must state where a copy of the proposed permit may be inspected.

PEA s 96C(3)

- A notice published in the Government Gazette, which can be on the same day as the last of the other notices.

PEA s 96A(6)(b)

Apart from this, all other requirements for the exhibition, consideration of public submissions, adoption and approval of an amendment prepared under Part 3 of the PE Act apply to the combined amendment and permit process as if the permit application were a planning scheme amendment. These requirements are described in part 2.6 of this chapter.

PEA s 96C(4); PE Regs reg 41(1)

The notice of a combined permit application and amendment must include the prescribed information and include the last date for submissions – which must not be less than one month after the date that the notice is published in the Government Gazette.

PEA s 96C(8); PE Regs reg 41(2)

The notice must be accompanied by a copy of an explanatory report about the amendment, a copy of the application and a copy of the proposed permit.

PEA s 96M

Any specific requirements for notice or referral of a particular type or class of application set out in a planning scheme do not apply to an application made under the combined amendment and permit process. However, when deciding what notice should be given under section 96C, a planning authority should consider whether the interests of any individual or body that would normally receive notice of (or be a referral authority for) a permit application under Part 3 of the PE Act could be affected.

In each case, the planning authority should take care in forming an opinion about what notice should be given and to whom and ensure that this is carefully recorded.

The fact that the matter is controversial should not be taken as a conclusive test that a person may be materially affected. Careful judgement of the situation by the planning authority is necessary.

PEA s 96C(9)

The applicant for a permit under this division of the Act must pay the cost of any notice of the amendment and permit application.

Can a combined amendment and permit application be exempted from notice?

PEA s 96B(1)

Under section 96C of the PE Act, a planning authority cannot exempt itself from the requirement to give individual notice of an amendment where the number of owners and occupiers affected makes it impractical to do so. However, the Minister may grant an exemption from this, or any other requirement relating to notice, if the Minister considers that an exemption is warranted. The steps that a planning authority should follow if it wishes to be exempted from notification are described in part 2.6.5 of this chapter.

PEA ss 20(3), 96B(1)

The Minister cannot grant an exemption from giving individual notice to the owner of land that is either proposed to be reserved for acquisition for a public purpose or affected by the proposed closure of a road that gives access to that land.

PEA s 96C(6)

Failure to give notice to a landowner affected by a proposed public reservation or a road closure will mean that the amendment cannot be adopted and a permit cannot be issued.

2.14.3 Proposed permit

When does the proposed permit need to be prepared?

PEA s 96C(8)

A copy of the proposed permit must be given to all persons and individuals who receive a notice of amendment and the application.

PEA ss 96C(8A), 197A; PE Regs reg 43

The proposed permit must be in the prescribed form and the planning authority must make a copy of it available for public inspection in accordance with the public availability requirements until the amendment is approved or lapses.

While it is not a requirement of the PE Act, where a planning authority has formed an opinion about whether it is likely to grant a permit and what the conditions of the permit should be, it should make a copy of the proposed permit available at the same time the amendment and application are exhibited.

Giving a copy of the proposed permit to the relevant persons and individuals at the same time the notice of amendment and application is given enables affected people to make submissions about the general change to the scheme, the specific application and the draft permit and conditions.

If a planning authority has any doubts about what should be included in the permit and the extent to which it can be easily understood and enforced, consultation with the responsible authority (if it is not the planning authority) should occur.

Under the combined permit application and amendment process, there are no referral authorities to whom a copy of the application must be given. However, if a planning authority considers that an individual or body who would normally be a referral authority under Division 1 of Part 4 of the PE Act could be affected by the proposal, or if it considers that specific conditions may need to be included on the proposed permit to address their particular interests, it should consider consulting with and giving notice to that individual or body.

The proposed permit should contain any conditions that the planning scheme requires that it include.

2.14.4 Considering submissions

PEA s 96B

The process for making and considering submissions to a combined amendment and permit application under Division 5 is the same as for an amendment prepared under Part 3 of the PE Act.

PEA s 96B(1)(a)(iii)

If a planning authority receives a submission that seeks a change to a proposed permit, it must make a decision about the submission as if it were seeking a change to the amendment.

The PE Act does not specify what matters can be taken into account by the planning authority in deciding whether a person or body could be materially affected by an amendment and application under this division of the Act. Each proposal must be considered on its merits. As a basic rule, it should be possible to link the effect to specific matters such as restriction of access, visual intrusion, unreasonable noise or overshadowing. General terms such as 'amenity' and 'nuisance' are not specific enough.

The process for making and considering submissions is described in part 2.6.6 to 2.6.8 of this chapter.

2.14.5 Panel hearing

PEA s 96D

If a panel is appointed to consider submissions, it must give the applicant and any other person specified in section 24 of the PE Act an opportunity to be heard.

PEA s 96E

If a panel recommends that an amendment or part of an amendment be adopted, with or without changes, it can also recommend that a permit be granted for any purpose for which the amended planning scheme would require a permit to be obtained (with or without conditions). This applies even if the panel was appointed to consider submissions to amendments prepared under Part 3 of the PE Act, and not under the combined permit application and amendment process.

PEA s 96E(2)

The permit recommended by the panel could be for a purpose that was applied for and for which notice of the proposed permit was given under section 96C (if applicable). It could also be for an entirely new purpose for which no permit application under Division 5 was made.

PEA s 96F

The planning authority must consider the panel's report before deciding whether to recommend that a permit be granted.

2.14.6 Decision by the planning authority

PEA s 96G(1)

After complying with the notice requirements and following the submission stages, a planning authority may decide to recommend to the Minister that a permit be granted with or without changes if:

- the permit application has been made under Division 5 of Part 4 and the relevant sections of that division have been complied with; or
- the panel (where appointed) has recommended the grant of the permit; or
- the planning authority considers it appropriate that a permit be issued for a purpose, that as a result of changes made to an amendment during the amendment process, a permit is required to be obtained. This applies even if no application has previously been made under section 96A of the PE Act.

PEA s 96G(2)

This decision can only be made if the amendment, or the part of the amendment to which the permit applies, has been adopted first.

PEA ss 31, 96B(1), (6), 96H(1)

The recommendation and proposed permit must be submitted to the Minister at the same time as the adopted amendment is submitted, with additional copies for lodging after approval. The adopted amendment must be accompanied by the prescribed information and information described in part 2.9.1 of this chapter.

PEA ss 28, 96B(1), 96G(4)

The planning authority can decide to abandon the amendment or refuse to recommend that a permit be granted. If so, the proponent/applicant and the Minister must be notified in writing of the decision and the reasons for it.

PEA s 96G(3)

If an amendment lapses, or the part of the amendment to which the permit application applies lapses, the application also lapses.

2.14.7 Decision by the Minister

Approving a combined amendment and permit

PEA ss 35, 96B(1)(b), 96I(1), (5), 60(2), (4)-(5)

The Minister can approve the amendment, or part of it, and can grant a permit, with or without changes and subject to conditions.

PEA s 96I(2)

Even if no permit has been applied for, or even if a panel has not recommended the grant of a permit, the Minister may still grant a permit if the Minister considers it appropriate as a result of any changes made to the amendment during the amendment process. The permit granted can be for a purpose recommended by the planning authority or it can be for an entirely new purpose for which the planning scheme, as amended by the proposed amendment, would require a permit to be obtained.

PEA s 96I(3)-(4)

The permit must be granted at the same time as the amendment to which the permit applies is approved. The permit must state the day that it operates from, which is either the day on or after the day on which the amendment comes into operation.

PEA s 96I(6)

The conditions included on a permit granted by the Minister can be those recommended by the planning authority or panel (if applicable), or they can be new conditions that the Minister considers appropriate and necessary. Sections 62(2) to (6) of the PE Act specify the types of conditions that a permit granted under Division 5 can include.

Registered covenants

PEA s 96I(1A)

If the grant of a permit would result in the breach of a registered restrictive covenant, the Minister must refuse to grant the permit unless:

- the amendment to which the permit applies provides for the variation or removal of the covenant; or
- a permit has been issued, or a decision has been made to grant a permit, to allow the removal or variation of the covenant.

PEA s 96I(1B)

If the permit granted would allow anything that would breach a registered restrictive covenant, the permit must be granted subject to a condition that the permit does not come into effect until the covenant is removed or varied.

PEA ss 60(2), (4), (5), 96I(5)

The Minister must not grant a permit that allows the removal or variation of a restriction, unless he or she is satisfied that no loss or other material detriment specified will be suffered.

Can additional notice of an amendment and application be required?

PEA ss 32, 96H(2), (3)

If the Minister thinks that the initial notice given of the amendment or permit application is inadequate, the Minister may direct a planning authority to give additional notice and go through the process again of considering submissions, appointing a panel and considering its recommendations, before adopting and submitting the amendment and permit.

Adopting and approving an amendment

PEA s 96M(5)

The process for adopting and approving an amendment prepared under Division 5 of the PE Act is generally the same as that described in part 2.9 of this chapter. The main difference is that the notice of approval of the amendment published in the Government Gazette and given to Parliament must also specify if a permit has been granted under this division.

Issuing a permit

PEA ss 96J(1)-(2), (4)

A permit is issued by the responsible authority at the direction of the Minister. The permit must be in the prescribed form (PE Reg regulation 43; PE Regs Schedule 1, Form 9) and:

- be issued to the applicant or, if there was no application, to the owner of the land (section 96J(4));
- be issued by the responsible authority within seven days after the direction by the Minister (section 96J(2));
- must state the date the permit was issued by the responsible authority; and
- must state a date the permit comes into operation. If no date is specified, the permit comes into operation on the same day as the associated amendment.

Where a permit issues as a result of the combined process, there is no opportunity for review by VCAT under Division 2 of Part 4 of the PE Act. It is important, therefore, that conditions on the proposed permit are carefully drafted, the ordinary referral requirements of other authorities are included, and that any other potentially affected parties clearly indicate their grounds of objection in any submission.

Refusing a combined amendment and permit application

PEA ss 96I(1)(c), 96K; PE Regs reg 44 Form 10

The Minister can refuse to approve a permit and, if so, can direct the responsible authority to give notice of the refusal of the permit.

The direction given by the Minister and the notice by the responsible authority must set out the specific grounds on which the permit is refused.

PEA s 96M

The applicant cannot apply to VCAT for a review of this decision.

Administering a permit

PEA s 96N

Once a permit is granted the responsible authority under the planning scheme becomes the responsible authority for the permit.

PEA ss 96M(1)–(2)

The provisions of the PE Act apply in relation to permit expiry, extension of time, availability, mistakes, amendments and review of decisions to refuse or extend a permit.

2.15 Amendments to the Victoria Planning Provisions

PEA s 4A(2)

The VPP are state standard planning provisions that were approved by the Minister on 9 July 1998. The VPP can provide for any matter that a planning scheme can provide for.

PEA s 4B(1)

The Minister can prepare an amendment to the VPP at any time. VPP amendments may be a small change to one provision, or major changes or additions.

PEA s 4B(2)

Section 4B of the PE Act enables the Minister to give consent or authorisation for a public authority, another Minister or a municipal council to prepare an amendment to the VPP. This power would only be used in unusual circumstances.

The process for preparing an amendment to the VPP is the same as that for a planning scheme amendment, except for making and considering submissions that request a change to the terms of a state standard provision. Unlike a planning scheme amendment, an amendment to the VPP will always involve making changes to the terms of a state standard provision.

The PE Act includes special provisions for making an amendment to one or more planning schemes at the same time an amendment to the VPP comes into operation. These provisions are discussed in part 2.15.3 of this chapter.

PEA ss 4H, 4I, 197A

The Minister, each responsible authority and any person the Minister specifies, must keep an up-to-date copy of the VPP (incorporating all its amendments and any documents lodged with those amendments) and make it available for public inspection during office hours in accordance with the public availability requirements.

2.15.1 Preparing an amendment

PEA ss 4B(3)–(4)

Unlike a planning scheme amendment, if notice of an amendment to the VPP is given, the Minister or the body or person authorised to prepare the amendment can receive and consider submissions that seek a change to the terms of a state standard provision. The change may be made as requested or the submissions may be referred to a panel for consideration. The panel can recommend that an amendment be adopted with changes to the terms of the VPP.

PEA s 4B(3)

Apart from these differences, the requirements for the exhibition, consideration of submissions (if any), adoption and approval of a VPP amendment are generally the same as for a planning scheme amendment.

2.15.2 Approving an amendment

PEA s 4C(1)

The Minister may approve an amendment to the VPP (or part of it) with or without changes and subject to conditions. The Minister may also refuse to approve an amendment or part of it.

PEA ss 4D, 4E, 197A

If an amendment is approved, notice of the approval must be published in the Government Gazette in accordance with the public availability requirements. The amendment comes into operation when the notice is published in the Government Gazette, or on any later day or days specified in the notice.

PEA ss 4G, 4H, 197A, 197B

A copy of every approved amendment to the VPP must be lodged with each responsible authority, each council and any other person or persons nominated by the Minister. An amendment must be lodged before notice of approval of the amendment is published in the Government Gazette.

A copy of the approved amendment must be made available for inspection in accordance with the public availability requirements by each person the Minister has lodged the amendment with for a two-month period following the approval of the amendment. After this period, each person must make the approved amendment available at their office for inspection in person.

2.15.3 Amendment of planning schemes by the Victoria Planning Provisions

PEA s 4J

An amendment to provisions of the VPP can also amend specified planning schemes that include those provisions. When the amendment to the VPP is approved, the amendment to the planning scheme is also approved under Part 3 of the PE Act. An amendment to a planning scheme comes into operation when the amendment to the VPP comes into operation, or on any later date specified in the notice of approval of the amendment to the VPP.

2.16 Advisory committees

Before making a decision about a proposal or policy or before preparing an amendment or permit application, it is sometimes necessary to evaluate all of the options to be sure about what is to be achieved and to determine the best way of achieving it.

PEA ss 151(1)–(2)

One method of achieving this is through the establishment of an advisory committee. Advisory committees are established by the Minister to consider any matter that the Minister refers to them. An advisory committee may consist of one or more persons.

The PE Act does not include a procedure for making a request to the Minister for the establishment of an advisory committee. However, it is an established practice that planning authorities do make such requests where the proposal raises a major issue of policy, or where it may have a substantial effect on the achievement of the objectives of planning in Victoria, as set out in section 4 of the PE Act.

An advisory committee may invite submissions on the options being considered and it may conduct a hearing into a matter. If a hearing is held, certain sections in Part 8 of the PE Act apply.

PEA ss 152(2)(a), 159

An advisory committee may give directions about the times and places of hearings, matters preliminary to hearings and the conduct of hearings. The advisory committee may refuse to hear any person who fails to comply with a direction.

PEA ss 152(2)(b)–(c), 161(1)–(3), (5)

Most of the general procedures that apply to a panel appointed under Part 8 of the PE Act, will also apply to an advisory committee.

The advisory committee:

- must act according to equity and good conscience without regard to technicalities or legal forms
- is bound by the rules of natural justice
- is not required to conduct the hearing in a formal manner
- is not bound by the rules of evidence but may inform itself on any matter in any way it thinks fit and without notice to any person who has made a submission
- may require a planning authority or other body or person to produce any documents relating to any matter being considered
- may prohibit or regulate cross-examination in any hearing.

PEA ss 152(2)(d), 162–165, 169

Procedures relating to adjournments, submissions (including who may appear before a panel, the effect of failure to attend a hearing) and offences also apply.

The advisory committee usually prepares a report to the Minister outlining its response to the matters referred to it.

PEA s 151(8), VCATA Sch. 1, cl 58

If a matter in a proceeding before VCAT is referred to the Governor in Council for determination, the Minister may decide to establish an advisory committee to provide advice about the matter.

PEA s 189(1)

The Minister can delegate to an advisory committee any of his or her powers or functions under a planning scheme in relation to applications for permits for which the Minister is the responsible authority or a referral authority.

Using Victoria's Planning System

Chapter 3: Planning Permits

Contents

3.1 Planning permits overview

3.1.1 What is a planning permit?

PEA ss 6, 62, 68

Planning schemes regulate the use and development of land. One way they do this is by requiring that certain types of use or development can only be carried out if a planning permit is granted.

A planning permit is a legal document that allows a certain use or development to proceed on a specified parcel of land. The benefit of the permit generally attaches to the land for which it has been granted although a permit is sometimes made specific to a nominated owner or operator. A permit is always subject to a time limit and will expire under specified circumstances. The responsible authority will impose conditions when granting a permit and endorsed plans will also usually form part of the permit. The proposal must satisfy all of the conditions on a planning permit.

The planning permit is the preferred form of development approval in the Victorian planning system. Planning schemes allow a wide range of uses to be considered in each zone through the permit process.

A permit is not always required to use or develop land. Planning schemes allow some changes in land use without the need for a permit, provided conditions are met. Some uses or development may be prohibited.

BA s 24(1)(c)–(d)

A planning permit should not be confused with a building permit. A building permit is issued under the *Building Act 1993* and generally relates only to the construction aspects of a particular building or development. If a planning permit is required, a permit under section 24 of the *Building Act 1993* cannot be granted unless the building surveyor is satisfied that any relevant planning permit has been obtained and the building permit will be consistent with that planning permit or other prescribed approval.

Any building permit issued must be consistent with the requirements of the planning permit, including conditions and endorsed plans.

3.1.2 The regular permit process

PEA s 13

Planning schemes cl 72.01

The authority in charge of administering the planning scheme, including granting permits, is the responsible authority. In most cases the council is the responsible authority. The responsible authority may also be the Minister administering the *Planning and Environment Act 1987* (PE Act), or some other person or authority specified in the planning scheme. The council is the usual first point of contact for permit applications.

PEA ss 47–86

The procedure a responsible authority must follow in deciding whether or not to issue a permit is shown in Figure 3.1. The procedure formally begins when a completed application form is lodged with the responsible authority, accompanied by a complete description of the proposal (which may include plans, supporting information and copy of title), the prescribed fee and where the metropolitan levy applies, a copy of the levy certificate (see 'Metropolitan Planning Levy' in part 3.2.1). In practice, the applicant will benefit from discussing the proposal in detail with the responsible authority before lodging the formal application. Many problems can be avoided in this way.

With many proposals, the views of other agencies will be required before the responsible authority can make a decision. These agencies will be prescribed in the planning scheme based on the proposal, the location and other factors. The responsible authority will send a copy of the application to these agencies for their comment.

In some instances, the responsible authority will give notice or require notice to be given to adjoining owners and occupiers, unless it concludes that material detriment will not be caused to any person, or the planning scheme specifically provides for an exemption from the notice requirements. There are several standard procedures for giving notice of an application.

The responsible authority may also ask for more information to be provided before it makes a decision.

Once notice (if required) has been given and the relevant time has elapsed for submission of objections or comments by any referral authority, the responsible authority can decide the application.

Depending on its view and whether or not objections have been received, the responsible authority will issue a permit, a notice of decision to grant a permit or a notice of refusal to grant a permit.

An application can also be made to the responsible authority to amend an existing permit. The application is processed in the same way as an application for a permit, with the responsible authority ultimately issuing an amended permit, a notice of decision to grant an amendment to a permit or a notice of decision to refuse to grant an amendment to a permit.

An applicant and in many cases an objector may have the decision reviewed by the Victorian Civil and Administrative Tribunal (VCAT) in particular circumstances.

3.1.3 The VicSmart permit process

PEA s 6(2)(hb)

The PE Act enables the planning scheme to set out different procedures for particular classes of applications for permits.

Planning schemes cl 59 and 71.06

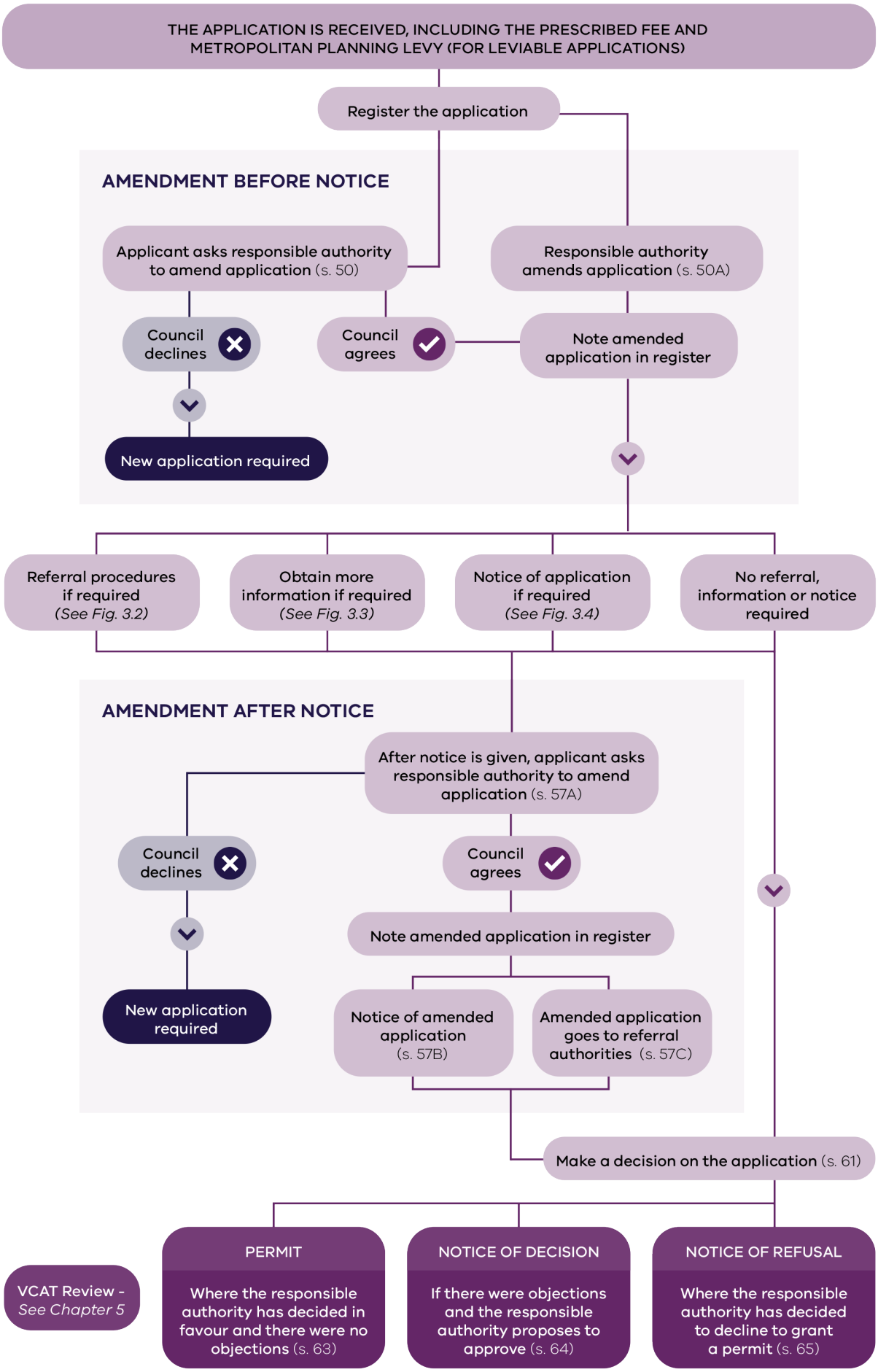
The VicSmart permit process is a specific procedure for assessing straightforward applications that are consistent with the policy objectives for the area and the zoning of the land. The VicSmart process has fewer steps than the regular permit process. It involves a more tightly focused planning assessment and shorter statutory timeframes apply.

The chief executive officer of the council is the responsible authority for deciding a VicSmart permit application.

Clauses 59 and 71.06 of the planning scheme set out the specific provisions that apply to VicSmart applications. These provisions contain information requirements and decision guidelines for each class of VicSmart application, and exempt VicSmart applications from certain requirements of the PE Act.

More information about the VicSmart process is provided in part 3.8.15 of this chapter.

Figure 3.1: Planning permits – an overview (non-VicSmart applications)



3.2 The application

3.2.1 For the applicant – preparing an application

Is a permit required?

The starting point is to find out from the responsible authority if a planning permit is required.

PEA s 47(1)

There is no point in making an application for a use or development for which a permit cannot be granted (because it is prohibited) or is unnecessary (because it is allowed 'as-of-right' by the planning scheme). An application is appropriate only if a planning scheme requires a permit to be obtained.

Planning schemes cl 65 and 71.03-2

Just because a person is able to apply for a permit does not imply that a permit should or will be granted. The responsible authority has to decide whether the proposal will produce acceptable outcomes in line with the statewide and local sections of the Planning Policy Framework (PPF), the Municipal Planning Strategy (MPS), the purpose and decision guidelines of the planning scheme requirements, and any other decision guidelines in clause 65 of the scheme.

Planning scheme controls can relate to the use of the site, to all development on the site or to some aspect of the proposed development.

Clause 72.06 of planning schemes provides that if the scheme allows a particular use of land, it may be developed for that use provided all the requirements of the scheme are met. In some cases, a permit to use the land may be all that is required, while in others, the use may not require a permit at all, although construction of buildings and works may.

PEA ss 60(1), 47(1)(c)

Applicants can help themselves and the responsible authority by making sure that the application is related strictly to those aspects of the proposal that require a permit.

Preliminary discussion with the council's planning officer

It is advisable to discuss a proposed application with planning officers of the responsible authority before the application is finalised and submitted. This can avoid both cost and delay.

Planning officers can provide advice on:

- whether a permit is required and why
- whether the application is a VicSmart application
- the nature and amount of supporting information to submit with an application
- any state and local planning policies (including the MPS) that should be addressed as part of the application
- any relevant guidelines, requirements, particular provisions or VicSmart provisions that may apply
- any referral authorities relevant to the application that must be notified.

Pre-application discussions with neighbours

Permit applicants are encouraged to discuss their initial plans with neighbours so that they can ascertain their neighbours' concerns and attempt to address them before the proposal is fully developed and finalised.

Applicants are not required to do this, but these discussions may avoid an objection at the application stage. Most people appreciate the opportunity to discuss plans before the formal notice process commences, although it will not always be possible to make changes that satisfy everybody.

Information required as part of the application for permit, including an application to amend a permit

PEA ss 47(1), (1A); PE Regs regs 13, 14

The nature and amount of information that should form part of an application will depend on the proposal and its location. Applicants should make sure that the application:

- adequately identifies the land affected and fully describes the proposal, including plans, reports and photographs and that sketches and plans supplied can be readily understood by all interested parties
- clearly identifies the permit to be amended and the amendment to be made to that permit, if the application is to amend a permit
- states clearly the use, development or other matter for which the permit is required, or if the application is to amend a permit, states clearly the amendment applied for
- describes the existing use of the land
- states the estimated cost of any development for which a permit may be required
- clearly states whether the land is affected by any registered restrictive covenant and, if so, is accompanied by a copy of that covenant
- contains the specific information required by the VicSmart provisions, if the application is a VicSmart application
- contains any specific information required by a relevant planning scheme provision.

The department's website provides standard checklists for the following common application types:

- VicSmart applications
- dwelling
- industry
- business
- signs
- car parking waiver
- subdivision.

These checklists can be used as a guide for the information to submit with an application, but it is important to check with the council on its specific requirements, and if the council has any local planning policies in its planning scheme that may require specific information to be submitted as part of the application.

Some planning practice notes also provide guidance for particular categories of application. Planning practice notes are available on the department's website.

The application should include all the information needed for the responsible authority to adequately consider it, including:

- any potential environmental, social and economic impacts associated with the proposal
- a description of how the proposal is consistent with the relevant state planning policies, the MPS, and the local sections of the PPF

- a description of how the application responds to or is consistent with the purpose and particular requirements of the zone and overlay provisions, or other particular provisions that may apply to the application
- a response to any relevant decision guidelines set out in the planning scheme which the responsible authority must consider in deciding the application
- the written consent of the public land manager if the application relates to land in a public land zone.

Planning schemes cl 59, 66, 71.06

If the application is a VicSmart application, it should include all the information listed in clauses 59.01–59.14 or in the schedule to clause 59.16 of the planning scheme that is applicable to that class of application. Additionally, if the VicSmart application is a type that requires referral under clause 66 of the planning scheme, the referral requirements of clause 71.06-2 must be met prior to being lodged as a VicSmart application (see part 3.8.15 of this chapter).

Pre-lodgement certification

Some councils offer a pre-lodgement certification process to help achieve faster processing and decision times.

The pre-lodgement certification process involves an applicant employing a council-accredited certifier to quality check their application before it is lodged with the council. The process may also include a pre-application meeting with the council planners and immediate neighbours of the subject land. The certifier will advise the applicant on measures to ensure that the application contains all the required information and is of an adequate standard.

The service helps prevent delays often associated with incomplete applications. Some councils also offer guarantees on maximum decision timeframes as part of the service.

How to apply for a permit

PEA ss 47, 48; PE (Fees) Regs regs 9; 11; PE Regs regs 13, 14

An application must be made to the responsible authority in accordance with the Planning and Environment Regulations 2015 and be accompanied by the prescribed fee and information required by the planning scheme.

Applicants should use the 'Application for Planning Permit' form or 'Application to Amend a Permit' form supplied by the responsible authority or available online on the department's website where the Minister is the responsible authority. Many responsible authorities now encourage or require applications to be lodged online. Guidelines on how to complete the application forms are also available from the council or on the department's website. The responsible authority may also have a specific 'Application for VicSmart Planning Permit' form for VicSmart applications.

The application must be signed by the owner of the land or accompanied by a declaration that the applicant has notified the owner about the application.

An applicant who is not the owner of the land for which the permit is being sought should be aware that although an application may have been signed by the owner, it does not necessarily carry the owner's permission to use the land as proposed.

In the particular case of Crown land, consent by the Crown land manager to the application being made must not be taken as agreement to the use or development of the land as proposed. This must be negotiated through the appropriate lease or licence agreements.

The nature of the application will affect the fee to be paid to the responsible authority and the authority's consideration of it. Therefore, it is important to take great care in analysing

the requirements of the planning scheme and preparing an application. Care at this stage can avoid misunderstanding, cost and delay later.

It is also helpful when preparing the application to consider how it will be interpreted if notice of the application is to be given. The application should use plain English terms to accurately describe what is proposed in addition to any relevant land use term such as 'Place of assembly'. It is not necessary to include references to specific planning scheme controls or clause numbers to accurately describe a proposal. If this part of the application is not clear, giving notice (and the consideration of the application) may be delayed if the responsible authority needs to negotiate modifications to the application before notice can be given.

How to apply for an amendment to a permit

PEA s 73

An application to amend a permit follows the same procedure as an application for a permit (sections 47–62 of the PE Act). Further information on amending a permit is found in part 3.6.4 of this chapter.

Metropolitan Planning Levy

PEA ss 47(1A)–(1B), 73(1A)
PEA Division 5A of Part 4

Before making a permit application in metropolitan Melbourne for a development with an estimated cost that exceeds the 'threshold amount', a Metropolitan Planning Levy must be paid to the State Revenue Office Victoria (SRO).

After the levy has been paid, the SRO will issue a levy certificate which must be submitted to the responsible authority with the application. The estimated cost of the development stated on the levy certificate must be equal to or greater than the estimated cost of the development stated in the application. If the applicant does not comply with these requirements, the application is void. To ensure compliance, it is important that care is taken when estimating the cost of development so that it accurately reflects the costs associated with the development for which planning permission is required.

These requirements do not apply to an application to amend a planning permit under section 72 of the PE Act, even if the total estimated cost of development allowed by the permit as amended is more than the threshold amount.

The threshold amount is indexed by the Consumer Price Index every financial year. The SRO publishes the indexed threshold amount by 31 May each year.

If the levy certificate is not used within 90 days of being issued by the SRO, it expires and can no longer be submitted with an application. The expiry date cannot be extended and no refund of the levy is permitted unless there was a mathematical error in calculating the amount of the levy required to be paid.

The Metropolitan Planning Levy applies to applications in Metropolitan Melbourne, as defined by the planning scheme.

Planning Practice Note 82 – *Applying the Metropolitan Planning Levy* provides further explanation of Metropolitan Planning Levy and guidance on how to comply with the requirements of the PE Act.

The Aboriginal Heritage Act 2006 and the planning permit process

AHA s 52; AH Regs reg 7

The *Aboriginal Heritage Act 2006* (AH Act) and Aboriginal Heritage Regulations 2017 (AH Regulations) require permit applicants to prepare a Cultural Heritage Management Plan (CHMP) if all or part of the:

- activity is a listed high-impact activity resulting in significant ground disturbance; and

- activity area is an area of cultural heritage sensitivity which has not been subject to significant ground disturbance.

If a CHMP is prepared for an activity, it is also important to ensure that a proposal is consistent with its recommendations and that a copy of the CHMP is provided with the application.

Planning Practice Note 45 – *The Aboriginal Heritage Act 2006 and the Planning Permit Process* provides further explanation of the AH Act and how it interacts with the planning permit process.

3.2.2 For the responsible authority – preliminary steps for an application

Pre-application meetings

Reduce inconvenience and delay in processing an application by discussing the details of the application and information to be submitted with the applicant before the application is lodged. This is particularly important for VicSmart applications as the prescribed time for assessing these applications is short. Pre-application meetings will reduce the likelihood of further information having to be sought.

Guidelines for applicants

It is helpful if the responsible authority provides guidelines for applicants indicating the type of information required for common types of applications. These should draw attention to any guidelines or codes that need to be considered or complied with, and procedural requirements such as the format of documents to be provided (for example, hard copy or digital) and how they are to be lodged.

Checking an application

PEA s 47(1)(a); PE Regs regs 13, 14

Every application must be made in accordance with the Regulations. The application must include sufficient supporting information (such as plans, reports and photographs) to fully describe the proposal.

When the application is submitted check that:

- it is accompanied by any information required by the planning scheme
- an accurate description of the land has been given
- the proposal has been described satisfactorily
- it includes a copy of any registered restrictive covenant affecting the land
- the application addresses the PPF and MPS as applicable
- the application addresses the relevant planning scheme provisions including zones, overlays and any relevant particular provisions, general provisions or VicSmart provisions
- the application fee has been paid
- a current levy certificate for the estimated cost of development has been included where the application is a 'leviable application' to which the Metropolitan Planning Levy applies
- the applicant is the owner of the land or has notified the owner of the land about the application.

These matters can often be checked at the counter if the application is lodged in person.

3.2.3 Application fees

PE (Fees) Regs regs 9, 11

In most cases, a fee must be paid when an application is made. The amount is prescribed in the Planning and Environment (Fees) Regulations 2016. The fee is paid to the responsible authority to consider an application. It is not a permit fee and is not refunded if the application is refused.

PE (Fees) Regs regs 10, 13

If an application relates to a combination of use, development (other than subdivision), subdivision and varying or removal of easements, restrictions or covenants, the total amount payable is the sum of the highest fee plus 50 per cent of the others.

The Fees Regulations prescribe fees for different classes of applications. The class of application – and therefore the fee – will depend on the planning scheme and why a permit is needed:

- In some instances, a permit may be needed to either use or develop land, but not both. In those cases, the application and the fee should be confined to the items for which a permit is needed.
- In some instances, a permit for development may only be required for part of the project, such as construction of access to a main road. In those cases, the application and the fee should be confined to the items for which a permit is needed.
- The application fees for the development or use and development of a single dwelling, or development ancillary to the use of land for a single dwelling, are separate to other development and fall within classes 2 to 6 of the Fees Regulations subject to the development costs being less than $2,000,000.
- In the Fees Regulations, unless specified to the contrary, words in the singular include the plural.

If a permit is needed for development, the applicable fee depends on the cost of the proposed development as stated on the application form.

An applicant must make a realistic estimate of the cost and the responsible authority may ask for information to support this. The cost (for calculating the fee) is the estimate (or contract) cost of undertaking the work for which a permit is required. Any increase in property or land values resulting from the development is not relevant to calculating the cost.

PE (Fees) Regs reg 20

Regulation 20 of the Fees Regulations sets out circumstances under which the responsible authority may waive or rebate fees. Responsible authorities have the discretion to reduce fees, rather than waiving them completely by offering rebates. Responsible authorities will develop their own policies and procedures for this.

Further information about planning fees is available on the department's website.

3.2.4 The register of applications

PEA ss 49, 197A(2)

The responsible authority must keep a register of all applications received and specified information about those applications and must make the register available to the public free of charge in accordance with the public availability requirements of the PE Act by either making it available for inspection:

- in person at their office at any time during office hours; or

- on its website as well as on request by any person at their offices at an agreed time during office hours.

PE Regs reg 15

The register must contain the information prescribed in the Regulations. The register must also specify whether an application is a VicSmart application. A responsible authority may decide on the format of its register, but the register must contain all the information required by the Regulations. The information can also be stored electronically and a printed version made available for public inspection. The register could also record additional information useful to the responsible authority or the public.

3.2.5 Planning scheme check

The application should be checked against the planning scheme provisions at an early stage and the applicant advised quickly if no permit is required or the proposal is prohibited. Pre-application discussion with applicants should largely avoid such applications being lodged.

Where an invalid application is made, the responsible authority should explain the situation and give the applicant the opportunity to withdraw the application.

The planning scheme should also be checked to determine whether the application is a VicSmart application because specific provisions and procedural requirements apply to these applications.

If a landowner or occupier wants formal verification that a use or development does not require a planning permit, they may wish to apply for a certificate of compliance in accordance with Part 4A of the PE Act (see Chapter 4, part 4.1).

Many councils also offer informal processes for seeking written planning advice that are sometimes referred to as planning information requests.

3.2.6 Verification of information

PE Regs reg 21

Regulation 21 of the Regulations allows a responsible authority to verify information either included in an application or supplied as more information under section 54.

PEA ss 48(2), 87(1)(a)

Section 48(2) of the PE Act provides a penalty for attempting to obtain a permit by making false representations.

Section 87(1)(a) allows an application to VCAT to be made for cancellation or amendment of a permit if there has been a material misstatement or concealment of fact in relation to the application. In accordance with section 94(4)(b), no compensation for cancellation or amendment is payable in these circumstances.

A responsible authority may consider it important in some special circumstances to verify information by asking the applicant to make a statutory declaration of certain facts. This may be appropriate if that information is critical to the application and is not otherwise readily verifiable. A false statutory declaration constitutes perjury.

Responsible authorities should note that this provision relates to information contained in the application or supplied under section 54 (more information). It does not cover procedural matters such as a statement by an applicant that notice has been given. Anyone who makes a false statement about giving notice of an application risks cancellation or amendment of any permit issued.

3.2.7 Amending an application – before notice is given

PEA s 50, 50A, 57A

An applicant or a responsible authority with the agreement of the applicant may amend an application before notice is first given under section 52 of the PE Act. An applicant may also ask the responsible authority to amend an application after notice has been given (see part 3.3.5 of this chapter).

PEA ss 50(1)–(2)

Amendment of application at the request of the applicant – before notice is given

An applicant may ask the responsible authority to amend an application before notice is given under section 52. An amendment to an application may include an amendment to:

- the use or development mentioned in the application
- the description of the land to which the application applies
- any plans and other documents forming part of or accompanying the application.

PEA s 50(3)

A request for amendment must:

- be accompanied by the prescribed fee (if any)
- be accompanied by any required information in relation to the planning scheme or a restrictive covenant that was not provided with the original application
- if the applicant is not the owner, be signed by the owner or include a declaration that the applicant has notified the owner of the request.

PEA ss 50(4)–(5)

The responsible authority must amend the application in accordance with the request. However, it may refuse to amend the application if it considers that the amendment is so substantial that a new application for a permit should be made.

PEA ss 50(6)–(7)

The responsible authority must make a note in the register of the amendment to the application.

PEA ss 50A(1)–(2)

Amendment of application by the responsible authority – before notice is given

A responsible authority may make any amendment to an application that it thinks necessary before notice is given. The amendment must be made with the agreement of the applicant and after giving notice to the owner. As with an amendment initiated by the applicant, an amendment to an application initiated by the responsible authority may include:

- the use or development mentioned in the application
- the description of the land to which the application applies
- any plans and other documents forming part of or accompanying the application.

PEA s 50A(3)

The responsible authority may require the applicant to notify the owner and make a declaration that notice to the owner has been given.

PEA ss 50A(4)–(5)

The responsible authority must make a note in the register of the amendment to the application.

What happens to timeframes?

PEA s. 50(7), 50A(5)

The amended application is taken to be the application for the purposes of the PE Act and to have been received on the day that the request for amendment was received by the responsible authority or (in the case of an amendment to an application by the responsible authority) the day that the applicant agreed to the amendment.

This means that the statutory clock begins upon receipt of the amended application.

3.2.8 Who can inspect an application?

PEA ss 51, 57(5), 70, 197A

A responsible authority must make the application, including the accompanying plans and documents, available for inspection by anyone free of charge in accordance with the public availability requirements by either making the application available for inspection:

- in person at the offices of the responsible authority at any time during office hours; or
- electronically on its website as well as on request by any person at the offices of the responsible authority at an agreed time during office hours.

Some councils also provide an online resource on their website that allows applicants, objectors and interested parties to lodge and view application documents and track planning applications online. The relevant council website should be consulted to establish if an online service is available.

PEA s 51

An application must be made available free of charge from the time it is made:

- until the end of the last application for review period in relation to the application; or
- if an application for a review is made, until that application is determined by VCAT or withdrawn.

PEA ss 70, 197A

Accessing an application file after this period may incur a file search fee, but the council must make a copy of every permit that it issues, including any plans forming part of that permit, available in accordance with the public availability requirements.

The council is not obliged to give copies of an application, although it can if it wishes. As long as the planning documents are used for the purpose of the public planning process, including relevant community consultation, no breach of copyright will occur. Administrative charges can, if necessary, be made for copying.

Planning Practice Note 74 – *Making Planning Documents Available to the Public* gives further advice about making available copies of plans and other material relating to planning applications.

Victoria's *Privacy and Data Protection Act 2014* sets standards for the collection and handling of personal information. More information can be obtained from the Office of the Victorian Information Commissioner website at **ovic.vic.gov.au**.

3.3 Considering an application – procedural steps

3.3.1 Referring an application under section 55

PEA ss 55, 62(1)

Section 55 of the PE Act provides for applications to be referred to authorities specified in the planning scheme as referral authorities. A referral authority can be any person, group, agency, public authority or other body specified in the planning scheme or the PE Act whose interests may be particularly affected by the grant of a permit for a use or development.

The key objective of the referrals process is to provide authorities whose interests may be affected by the grant of a permit with the opportunity to ensure that a permit is not granted that would adversely affect that authority's responsibilities or assets.

Referral requirements under section 55 are listed in clause 66 of the planning scheme.

Figure 3.2 sets out referral requirements and procedures.

A planning scheme will identify a referral authority as either:

- a determining referral authority; or
- a recommending referral authority.

PEA s 56(1)

Both types of referral authority can object to the grant of a permit, decide not to object or specify conditions to be included on a permit. However, the effect of that advice on the final outcome of an application is different for each type of referral authority.

If a determining referral authority objects, the responsible authority must refuse the application, and if it specifies conditions, those conditions must be included in any permit granted.

In contrast, a responsible authority must consider a recommending referral authority's advice but is not obliged to refuse the application or to include any recommended conditions. A recommending referral authority can seek a review at VCAT if it objects to the granting of a permit or it recommends conditions that are not included in the permit by the responsible authority.

The process for referring an application is the same for both types of referral authority. The referral authority:

- must be given a copy of the application (section 55(1))
- may ask for more information (section 55(2))
- must consider every application it receives (section 56(1))
- must keep a register of applications it receives (section 56A)
- must give to the applicant without delay a copy of any:
    - request it makes to the responsible authority for more information (section 55(3))
    - decision and comments it gives to the responsible authority (section 56(3A))
- may object to an application or request that conditions be included on a permit (section 56(1))
- may give comments on the application (section 56(3)).

Figure 3.2 sets out referral requirements and procedures.

What must a responsible authority do?

PEA s 55(1); MRA ss. 77TE, 77TG; PE Regs reg 19; Planning schemes cl 52.09-3

A responsible authority must send the application and prescribed information, without delay, to every referral authority specified in clause 66 of the planning scheme for that type of application. The responsible authority is exempt from this requirement if:

- the referral authority has already considered the proposal within the past three months and stated, in writing, that it does not object to the granting of a permit; or
- in its opinion, the proposal satisfies requirements or conditions previously agreed in writing between the responsible authority and the referral authority; or
- the application concerns an extractive industry work plan or variation to a work plan and the work plan (or variation) was given to an authority under section 77TE of the *Mineral Resources (Sustainable Development) Act 1990*.

A copy of the application together with the information prescribed in the Regulations must be given to the referral authority. The prescribed information is:

- the application reference number
- the date the responsible authority received the application
- a description of why a permit is required (using the same words that appear in the permit requirement(s) in the planning scheme)
- a list of clauses in the planning scheme that require the application to be referred to that referral authority
- the description in clause 66 of the kind of application required to be referred to that referral authority
- whether the referral authority is a determining referral authority or a recommending referral authority for the application.

PEA ss 59(2)–(3); PE Regs reg 24

A responsible authority must not decide on an application that has been referred until the prescribed period of 28 days has elapsed. However, if within 21 days of being given a copy of the application, the referral authority tells the responsible authority that it needs further information, the prescribed period is 28 days from the day on which the responsible authority gives that information.

The prescribed time can also be extended by the Minister. Other factors in the application process will also affect when a responsible authority may make a decision, such as the public notice period under section 52 of the PE Act. In these instances, a decision must not be made until the 14-day notice period has elapsed.

PEA s 60(1)(d)

Before deciding on an application, the responsible authority must consider any decision or comments it has received from a referral authority.

Action in response to determining referral authority advice

PEA ss 61(2), 62(1)(a)

In response to a determining referral authority's decision, the responsible authority must:

- refuse to grant a permit if the authority objected to the grant of the permit
- include any conditions on the permit required by the authority.

PEA s 62(1)(b)

A responsible authority must not include additional conditions that may conflict with any condition that a determining referral authority specifies.

PEA ss 65(2), 66(5)

If a responsible authority decides to refuse to grant a permit, the notice of decision must state whether the grounds of refusal were those of the responsible authority or a determining referral authority.

Action in response to recommending referral authority advice

PEA ss 61(2A), 62(2)(ab)

In response to a recommending referral authority's decision, the responsible authority may:

- refuse to grant a permit if the authority objected to the grant of the permit
- include a condition on the permit recommended by the authority.

PEA s 66

The responsible authority must give a copy of any decision to each determining referral authority and if it did not object or recommend a condition, a copy to each recommending referral authority. A notice of the decision is given to a recommending referral authority when it has objected or if any recommended condition of the authority is not imposed on the permit.

Grant of permit where notice of decision has been issued

PEA ss 64A, 82AAA; PE Regs reg 36

The responsible authority must not issue the permit to the applicant:

- until after the 21-day 'review period' (the period within which a recommending referral authority may apply to VCAT for a review of a decision to grant a permit where the authority either objected to the application or sought the inclusion of a permit condition that was not included); or
- if an application for review is made within that 21-day period, until the application is determined by VCAT or withdrawn.

Application for amendment of permit

PEA ss 72-76A

The responsible authority is subject to equivalent referral obligations when processing an application to amend a permit under Division 1A of the PE Act.

What must a referral authority do?

PEA ss 54(1)–(2), 55(2)–(3); PE Regs reg 20

When a referral authority receives an application from a responsible authority, it should first consider whether it needs more information to assist its assessment. A referral authority has 21 days from receipt of the application to tell the responsible authority in writing that it needs more information.

The referral authority must also, without delay, give the applicant a copy of any such request. The responsible authority may then follow with a request to the applicant to provide the required information (see part 3.3.2 of this chapter).

PEA ss 56(1), 56(3)

A referral authority must consider every application referred to it and tell the responsible authority in writing if it:

- does not object to the granting of a permit
- does not object to the granting of a permit providing that certain conditions are included on the permit, or that certain matters are done to its satisfaction
- objects to the granting of a permit on specified grounds.

The referral authority may, in addition to giving directions to the council, provide any other advice which it believes is relevant to the application and may assist the council in reaching its decision. Such advice should be clearly distinguished from any directions.

PEA s 61(2)

While a determining referral authority can direct refusal of a permit by objecting to the grant of the permit, it cannot direct that a permit be issued.

PEA ss 59(2), 197; PE Regs reg 24

A referral authority must act promptly and in accordance with the times prescribed in the Regulations to avoid unreasonable and unnecessary delay.

There is no time within which a referral authority must give its advice or comments, however, the responsible authority may proceed to make a decision without the referral authority's advice after:

- 28 days from the day on which the referral authority is given a copy of the application; or
- if within 21 days of being given a copy of the application the referral authority tells the responsible authority it needs further information, 28 days from the day on which the responsible authority gives that information.

PEA s 56(4)

If a referral authority requires more time to consider an application (for example, an application for a major or complex proposal) it may apply to the Minister for more time, indicating how much time it considers is necessary. If the Minister agrees, both the referral authority and the council will be notified of the extra time allowed. It is good practice however, for a referral authority to discuss its needs with the council first, with an aim to establish a mutually agreed extended timeframe before making a formal request to the Minister.

Record keeping duties for a referral authority

PEA ss 56A, 197A; PE Regs reg 23

A referral authority is required to keep a register of all permit applications, including amended applications, referred to it. The register must be made available in accordance with the public availability requirements.

Basic administrative details are required to be kept such as the application number, address of the land and dates of receipt and decision. The decision or recommendation of the referral authority is also required to be kept on the register.

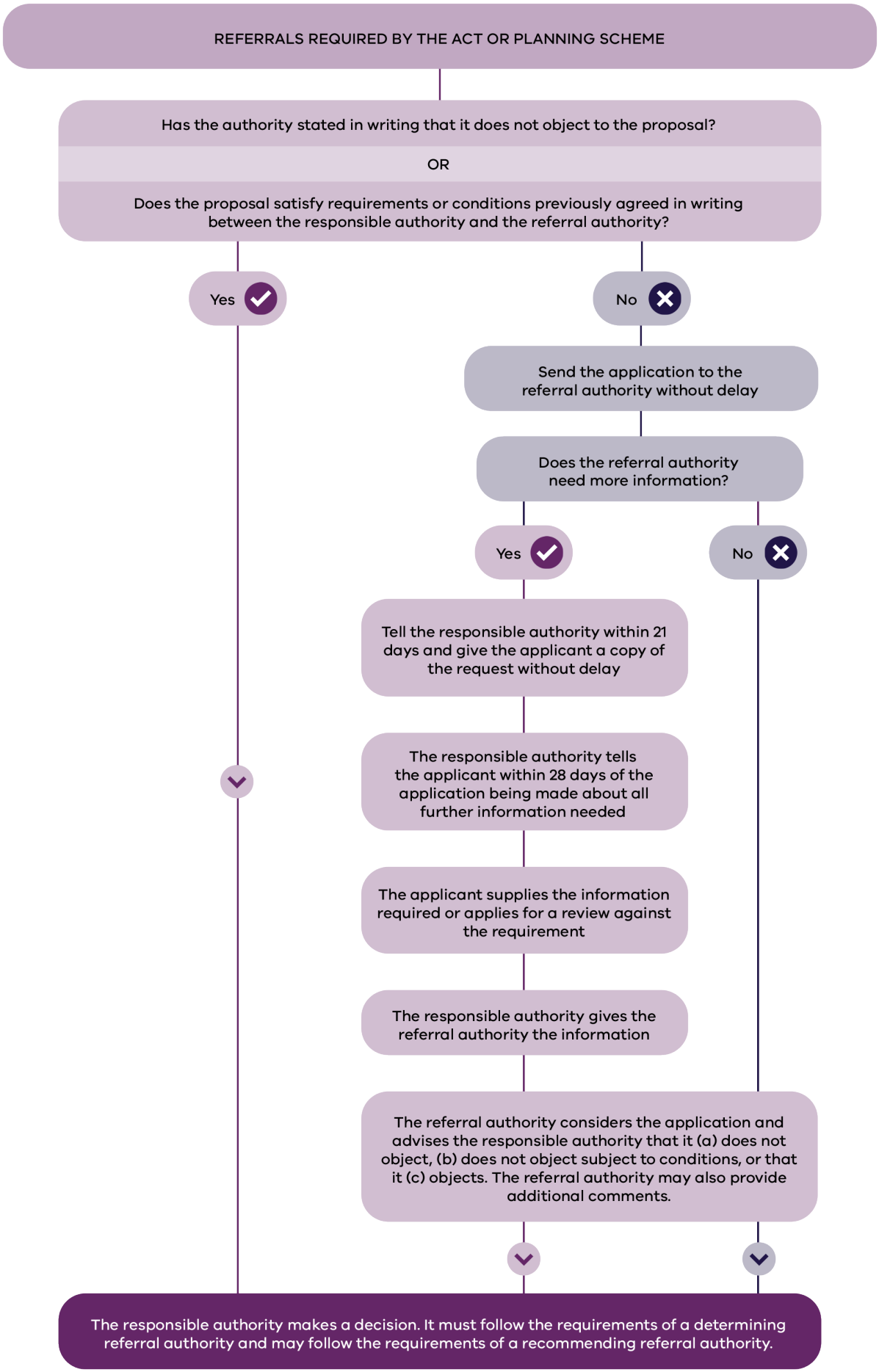
VCAT reviews and referral authorities

PEA s 82AAA

A recommending referral authority may apply to VCAT for review of the responsible authority's decision:

- to grant a permit, where the authority objected to the grant of the permit; or
- to not include a condition on the permit that the authority recommended.

Figure 3.2: Referral requirements and procedures



PEA ss 83(1), (3), 83AB

A referral authority is a party to a proceeding for a VCAT review of a decision of the responsible authority in the following circumstances:

Determining referral authority	• A proceeding for review of a refusal to grant a permit where:
	  • the authority had objected to the granting of the permit; or
	  • it was refused because a condition the authority required conflicted with a condition of another referral authority.
	• A proceeding for review of a permit condition that the authority had required to be included on the permit.

Recommending referral authority	• A proceeding for review where the authority is given notice of an application for review as required under the PE Act – including a review of a refusal to grant a permit if it objected to the grant of the permit or a review of a permit condition if it had recommended the subject condition

Making the referral system efficient and effective

Responsible and referral authorities should have processes in place to minimise delays and to facilitate effective decision making. Advice on good practice is provided in Planning Practice Note 54 – *Managing Referrals and Notice Requirements*.

Notice to an authority under section 52

PEA s 52

A planning scheme or the PE Act may require that other authorities be given notice of certain applications in accordance with section 52(1)(c) of the PE Act, or that the views of other authorities be considered.

There is a clear distinction between section 55 referrals and section 52 notice provisions, particularly in the case of a determining referral authority's ability to veto an application. A responsible authority should specify to the authority whether comments are being sought under section 52 or 55 of the PE Act, or whether non-statutory advice is being sought.

If an objection is lodged by the authority, the objection must be taken into consideration under the normal provisions of the PE Act. The authority has the same review rights as any other objector.

A responsible authority is not bound to refuse to grant a permit if there is an objection or include any specified conditions. If no objections or comments are received within the specified time, consideration of the application need not be delayed. This process also relieves the authority from having to respond to the application if it has nothing to say.

Seeking advice and comments

A responsible authority may seek the views of any other person, authority or body which it believes can provide a useful contribution to its decision-making process (such as expert knowledge or resources). There are no procedures laid down for providing such expert advice.

3.3.2 Further information requirement

PEA s 54(1)

The responsible authority can require the applicant to provide more information about a proposal, either for itself or on behalf of a referral authority.

Processes for obtaining more information are summarised in Figure 3.3.

PEA ss 54(1A)–(1C)

The request for further information must be in writing setting out the information to be provided. If the request for further information is made within the prescribed time, the request must also specify a date by which the information must be received.

PE Regs reg 18

The prescribed time for a VicSmart application is five business days after the responsible authority received the application. For all other applications, the prescribed time is 28 days after the responsible authority received the application.

An application lapses if the requested information is not provided by the date specified by the responsible authority. The lapse date must not be less than 30 days after the date of the notice requesting the information. An application that has lapsed cannot be recommenced. It is important that applicants are made aware of the consequences of allowing an application to lapse. One mechanism is that a council might put a note about the meaning of the lapse date in its letter requesting information.

A responsible authority should not routinely specify this minimum time of 30 days. The date specified by the responsible authority must be reasonable, given the nature of the application and the type of information requested. A responsible authority should also be specific about the information requested rather than asking for an opinion or generalised comments.

PEA ss 54, 79; PE Regs regs 32

A request for more information within the prescribed period means that the 'statutory clock' is stopped. (Note: the statutory clock counts the number of days until the applicant may apply for a review of the failure of the responsible authority to determine the application. The clock starts again from zero when a satisfactory response to the responsible authority's request is received).

PEA ss 54, 76(b)

Information can be requested after the prescribed period, but if this information is not provided, the responsible authority is not protected from an application for review of its failure to determine the application. It is important therefore to ensure that the initial request is comprehensive, as an applicant can apply for a review against a requirement for more information.

The time limits for responsible and referral authorities mean that requirements for more information must be determined quickly. The responsible authority, in particular, needs to liaise with referral authorities so that the applicant is presented with a coordinated request clearly setting out what information is required, who requires it and to whom it should be sent. The applicant can send information required by a referral authority (particularly technical information specific to it) directly to that authority. A copy should be sent at the same time to the responsible authority.

Authorities are encouraged to maximise use of electronic data transfer to expedite decision making.

Applicants can minimise the likelihood of requirements for more information and inevitable delay in considering the application by:

- having prior discussions with the responsible authority to determine what information is required
- seeking agreement from referral authorities before making an application
- considering in advance the matters which the responsible authority must take into account when considering the application (such as the decision guidelines in zones and overlays)
- considering the information which all affected authorities may require to make a decision on the application.

Extending the time to provide further information

PEA ss 54A(1)–(2)

An applicant can apply to the responsible authority to extend the date specified to provide further information. The request to extend the date must be made before the lapse date.

PEA ss 54A(3)–(5)

The responsible authority may decide to extend the time to provide the requested information or refuse to extend the time. It must give its decision to the applicant in writing. If the responsible authority decides to extend the time, it must give a new lapse date for the application.

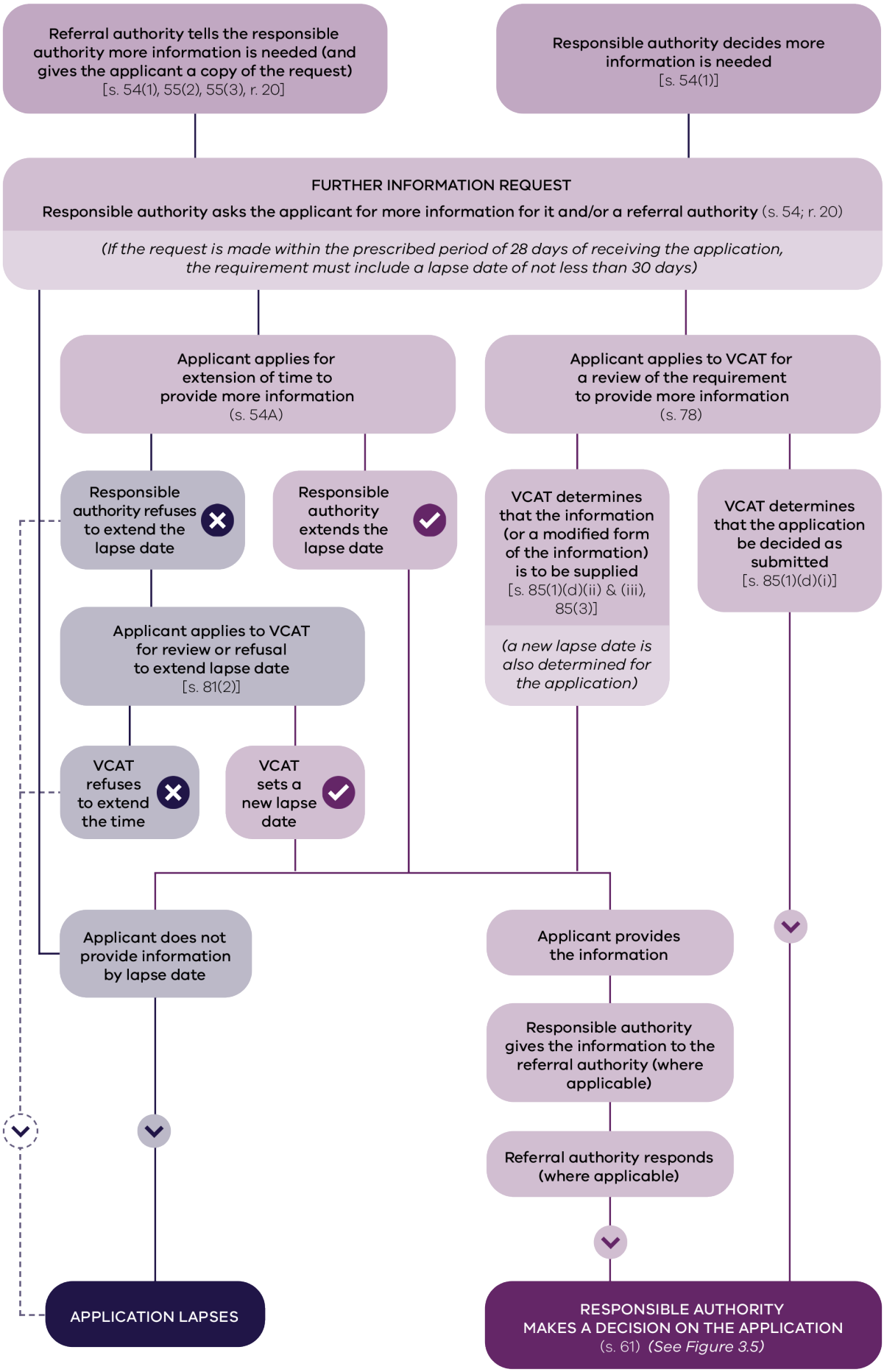
PEA s 54A(6)

If a request to extend the time is refused by the responsible authority, the applicant will have 14 days from that refusal to supply the information.

PEA s 81(2); PE Regs reg 34(2)

An applicant has the right of review to VCAT if the responsible authority refuses to extend the time for providing the required information. An application for review must be made before the lapse date.

Figure 3.3: Requirement for more information about an application



3.3.3 Notice of an application – 'advertising'

Is notice required?

PEA s 52

The requirements for giving notice of an application are set out in section 52(1) of the PE Act. A planning scheme can also specify particular requirements for giving notice.

If a planning scheme sets out specific notice requirements about a particular type of application, those requirements must be followed. Otherwise, the responsible authority must directly consider the likely effect of the use or development proposed.

PEA s 52(4)

A planning scheme may exempt any class or classes of application from some or all of the notice requirements that may otherwise apply under section 52(1) of the PE Act. In these cases, there is no opportunity for other people to make submissions or objections in relation to the application. The application must still be referred to any referral authority and the responsible authority must still take into account all relevant planning considerations in deciding the application.

An exemption from the notice requirements must be included in the planning scheme.

There are many examples of exemptions from notice requirements in planning schemes. The exemptions most commonly arise where the application is a VicSmart application, or where a permit is unlikely to have a significant planning impact or where the use or development generally complies with a policy or plan that has been previously subject to public scrutiny as part of its approval process.

PEA s 47(2)

The notice requirements of the PE Act under section 52 do not apply to an application to remove a restriction over land that has been used or developed for more than 2 years (before the date of the application) in a manner that would have been lawful under the PE Act but for the existence of the restriction.

The processes for giving notice of an application are summarised in Figure 3.4.

PEA ss 52(1), (4)

- The PE Act places the onus on the responsible authority to give notice (or to require the applicant to give notice) of an application. Notice of the application must be given to the owners and occupiers of land adjoining the subject land to which the application applies unless the responsible authority is satisfied that the grant of a permit would not cause material detriment to any person or the planning scheme contains a specific exemption from the notice requirements.
- If the responsible authority forms an opinion that material detriment may be caused to one or more adjoining owners or occupiers, notice must be given to all adjoining owners and occupiers.
- Notice to all adjoining owners and occupiers must be given unless the responsible authority in each case forms an opinion that material detriment will not be caused. This should be carefully recorded and a report on the application should contain clear reasons why the responsible authority is satisfied on this point.
- The PE Act does not specify what matters may be taken into account by the responsible authority in deciding whether or not material detriment may be caused. Each application must be considered on its merits. As a basic rule however, it should be possible to link detriment to specific matters such as restriction of access, visual intrusion, unreasonable noise, overshadowing or some other specific reason. General terms such as 'amenity'

and 'nuisance' are not specific enough, nor is the fact that the matter is controversial a conclusive test that a person may suffer material detriment. Conversely, agreement to the proposal by the owners and occupiers of adjoining land is not conclusive, although it may help the responsible authority form an opinion. Careful judgement of the situation by the responsible authority is necessary.

- Notice must be given to any persons specified in the planning scheme.
- Notice must also be given to the council if the application applies to or may materially affect land within the municipal district. This is particularly important if the council is not the responsible authority. It is also significant in the case of a proposal in one municipality that may have an effect in another municipality.
- Notice must be given to owners and occupiers of land benefited by a registered restrictive covenant if the application applies for anything that would result in breach of a restrictive covenant or if the application is to remove or vary the covenant.
- The responsible authority must also consider whether any other persons would be caused material detriment by the proposal and if so, notice must be given to them also. In that case, the responsible authority will need to consider how that notice should be given.

ILA s 38

- The definition of person in the *Interpretation of Legislation Act 1984* includes a body politic or corporate as well as an individual. Therefore, consideration of who may be affected should be comprehensive as companies, incorporated associations and public bodies may need to be notified.

More information on the notice provisions is provided in Planning Practice Note 54 – *Managing Referrals and Notice Requirements*.

PEA s 89(1)(a)

A responsible authority will not help an applicant by narrowly interpreting the notice requirements. This is because a person who believes they should have received notice but did not, can seek cancellation or amendment of the permit. (See Part 3.7 of this chapter)

PEA s 78(a)

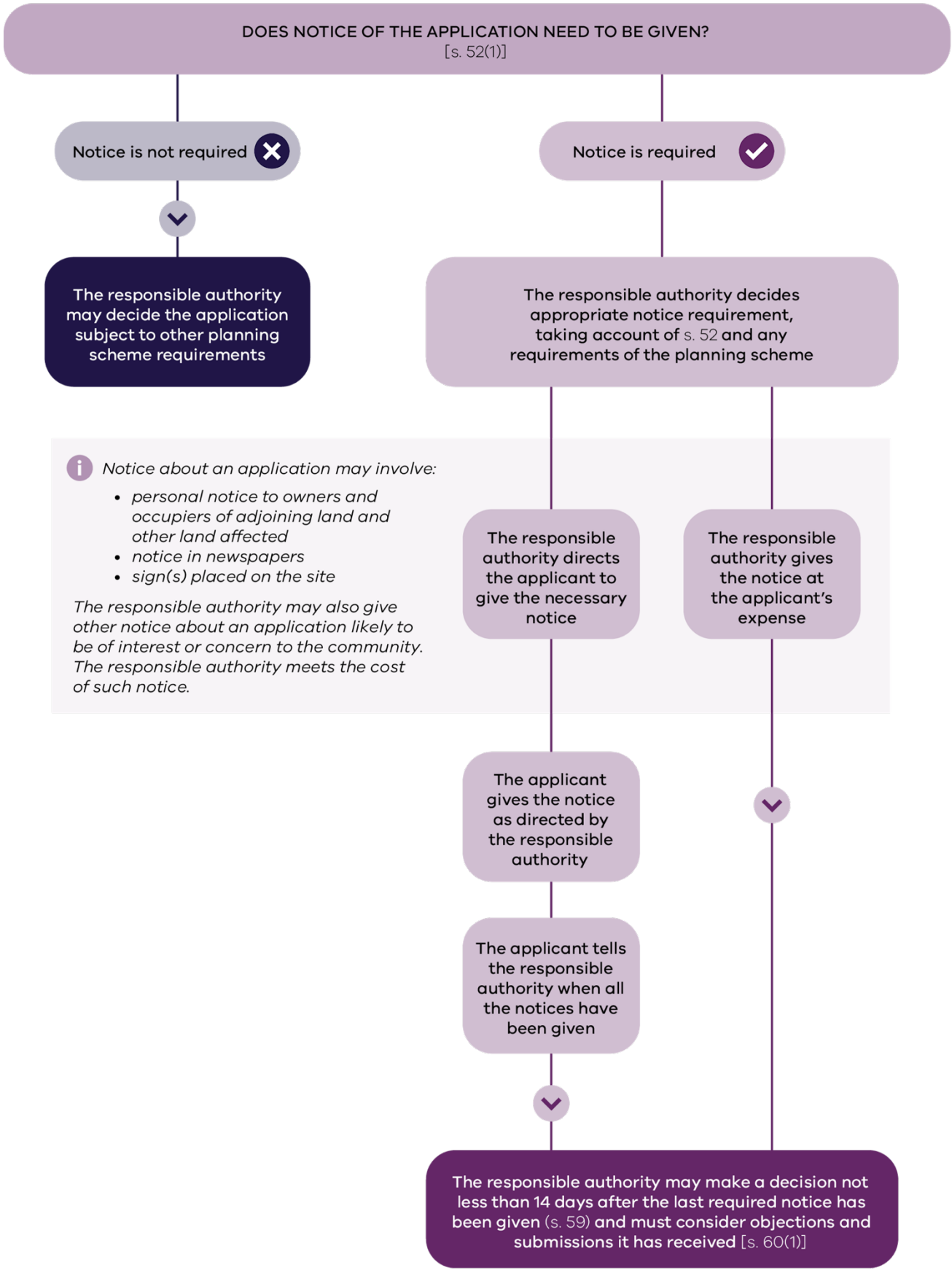
Conversely, the responsible authority must carefully consider the reasonableness of extensive notice requirements as the applicant can apply for a review of an unreasonable requirement.

In deciding who to notify, particularly under section 52(1)(d), the responsible authority should keep in mind the objectives of planning in Victoria, as well as any specific objectives stated in the planning scheme.

PEA s 96C

For applications made through the combined permit and amendment process under Division 5 of the PE Act, separate notification requirements apply.

Figure 3.4: Giving notice of an application



How is notice of an application given?

The methods for giving notice of an application are set out in section 52, which recognises the three most commonly used methods:

- written notice to specified persons
- a sign or signs on the land
- a notice in a newspaper circulating in the area.

It also allows other methods of giving notice where appropriate.

PEA ss 51, 197A

The responsible authority must make a copy of the application available in accordance with the public availability requirements until the application is finalised. Refer to part 3.2.8 of this chapter for more information about public access to application material.

PEA s 52(1); PE Regs regs 16–17, Forms 2 and 3

The notice must be in the prescribed Forms 2 and 3.

PEA ss 52(1), 53(3)

Notice is to be given by the responsible authority, unless the authority requires the applicant to give the notice. In either case, the applicant pays the costs involved.

PEA s 139

A council's rates records can be used as evidence that a person is an owner or occupier of land.

PEA ss 3, 145

In the case of public land, the owner or occupier to whom notice should be given will usually be the Minister or public authority that manages or controls the land. The council can usually assist in identifying the relevant public land manager.

PEA ss 145, 147; ILA s 49

Because of the difficulty in identifying some owners or occupiers, the PE Act also allows for a notice to simply be sent by post to 'the owner' or 'the occupier' at an address.

It is important that all addresses are covered (including each separate unit and, where relevant, a body corporate for apartments or multiple dwellings) and that both owners and occupiers are covered (so that for leased premises both the landowner and tenant will receive notice). Unless proved otherwise, the notice is considered to have been given when the letter would have been delivered in the ordinary course of post.

It is not essential that individual notices be sent by post. Personal delivery by the applicant may be appropriate. However, should there be a query about notification procedures, the applicant will need to be able to demonstrate to the responsible authority, and possibly to VCAT, that the required notices were given on a particular date. Careful records should therefore be kept of the notification procedures.

PEA . 52(3)

If a responsible authority considers that a proposal is likely to be of interest or concern to the broader community, it may itself give notice it considers appropriate. This would be in addition to any further notice given by an applicant or the responsible authority in accordance with section 52(2). It could include publicity in the media, public meetings, newspaper articles, letterbox drops or any other appropriate method. These actions would be at the expense of the responsible authority.

PE Regs reg. 16–17, Forms 2 and 3

When preparing the notice of application for a permit, care should be taken to ensure that the notice clearly communicates to people what is proposed and where it is proposed.

Adequate attention to preparing a notice can avoid any misunderstandings or undue anxiety and opposition to a proposal. A well-prepared notice will assist the applicant, the responsible authority and the public.

The description of the use should be both technically accurate and clearly explained. The notice must be consistent with the actual application. If the application uses land use terms like 'Place of assembly', the responsible authority may wish to discuss the precise nature of the use with the applicant and include this description in the notice, so the proposal can be clearly understood.

In many cases, it may assist in the understanding of a proposal to enclose a plan with any notices, or to display a plan with an on-site notice. This may be a reduced-scale version of plans or an outline sketch prepared for the purpose. The actual form of such plans will need to be considered in each case, taking account of the complexity of the plans, the cost to the applicant of preparing copies and the physical conditions under which an on-site notice must be displayed. In any case, it will be important to ensure that the plans accurately represent the proposal so that those affected are not misled either by a false sense of security or by unnecessary alarm.

Similarly, property descriptions should allow the reader to clearly identify the extent and location of the land concerned. Descriptions such as 'the north-east corner of First and Second Streets…' should be used where possible.

The instructions to the person carrying out the notice should also be very specific. Thought needs to be given in every case to the:

- number, size and location of notices on the land
- properties or persons to be notified (a list of names and addresses and/or a plan should normally be provided)
- length of time any notice must be maintained on a site.

Try to avoid holiday periods if possible.

Whether the applicant or the responsible authority gives the notice, it is desirable to coordinate the timing of different forms of notice. This avoids unnecessary delay and potential confusion about when a decision may be made on the application. Be aware of the closing time for inserting notices in a newspaper. Missing this time will cause delay and result in individual or site notices indicating that a decision could be made earlier than is the case.

The responsible authority should consider preparing guidelines and a checklist for applicants, setting out the procedure for giving notice, and enclose these with every direction to give notice.

PEA ss 53(2), 89(1), 94(4)(b)

If the applicant is required to give the notice, the responsible authority needs to be satisfied that this has been done. The responsibility for ensuring that the notice is correctly given rests with the applicant. The applicant should be able to verify that correct notice was given in case of subsequent action on the grounds that a person should have been given notice but was not. Such a person could take action to cancel the permit and, if the applicant falsely claimed to have given the notices required, no claim for compensation could be made by the applicant for any permit that was subsequently cancelled.

PEA s 59(3)

There is no closing date for objections. The responsible authority must consider any objection it receives up until the time it makes a decision. The responsible authority may make a decision after 14 days from when the last required notice was given. The responsible authority must specify in the notice a date before which it will not make a decision. This cannot be less than 14 days after the date of the notice, but it can be a longer period.

What if the responsible authority is slow in giving directions about notice?

PEA s 52(2A)

The applicant may proceed to give a standard form of notice to the extent specified in section 52(2B) of the PE Act if it has not been told by the responsible authority about the notice requirements within 10 business days of receiving the application.

PEA ss 52(2A)–(2B)

An applicant faced with a delay about the notice requirements should confer with the responsible authority before proceeding to give notice.

If the responsible authority requires that further information be submitted, or the application be modified, the whole process may need to be started again with consequent extra cost.

A responsible authority can minimise delay by delegating decisions about giving notice to appropriate council officers.

3.3.4 Objections

PEA ss 57(1)–(2)

Anyone who may be affected by the grant of a permit may submit an objection to the responsible authority.

An objection must:

- be in writing
- state reasons for the objection
- state how the objector would be affected by the grant of a permit.

Most councils have a standard objection form, but it is not essential that it be used as long as the objection is:

- typed or clearly written
- addressed to the council
- includes the permit application reference number and the address of the land
- includes the objector's name and current contact details
- is signed and dated
- lodged within the 14-day notice period.

Some councils also offer an electronic lodgement process for objections on their website.

PEA s 60(1B)

A responsible authority or VCAT must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect. However, this is only one of the considerations that a responsible authority or VCAT must take into account in making a decision.

PEA s 57(2A)

An objection will carry more weight if it is rational, specifically addresses the proposal and clearly describes how the objector will be affected. Constructive suggestions on how any impacts could be reduced (or even eliminated) by possible changes to the plans are also useful. Most applicants will try to address reasonable concerns.

The responsible authority may reject an objection that it considers to have been made primarily to secure or maintain a direct or indirect commercial advantage for the objector.

PEA s 57(3)

A group of people may make one objection. They should nominate one contact person. If no person is named, the responsible authority will normally send a notice only to the first named individual who signed the objection.

The responsible authority may find it useful to keep a running sheet of the names and addresses of objectors as objections are received. This way, the number received at any time is known, which can assist in responding to enquiries, and a mailing list can easily be produced for notices which will ultimately be required.

Supporting submissions

There is no specific provision for making or considering submissions in support of an application. However, there is no reason why supporters should not tell the responsible authority about their support for a proposal and for the authority to consider this in making its decision. Letters in support of a proposal need not be treated as objections, but good practice suggests that an authority should tell any supporters about its decision on an application.

Public viewing of objections

PEA ss 57(5), 197A

The responsible authority must make a copy of every objection available for inspection free of charge in accordance with the public availability requirements of the PE Act by either making the objection available for inspection:

- in person at the offices of the responsible authority at any time during office hours; or
- electronically on its website as well as on request by any person at the offices of the responsible authority at an agreed time during office hours.

Free public access to objections must be maintained until the period for lodging objections has expired. The responsible authority is not obliged to provide copies of objections, although it can if it wishes.

Planning Practice Note 74 – *Making Planning Documents Available to the Public* gives further advice about making available copies of plans and other material relating to a planning application.

3.3.5 Amending an application – after notice is given

PEA ss 57A(1)–(2)

An applicant may ask the responsible authority to amend an application after notice is given under section 52 of the PE Act. An amendment to an application may include:

- an amendment to the use or development mentioned in the application
- an amendment to the description of the land to which the application applies
- an amendment to any plans and other documents forming part of or accompanying the application.

PEA s 57A(3); PE (Fees) Regs reg 12

A request for amendment must:

- be accompanied by the prescribed fee
- be accompanied by any required information in relation to the planning scheme or a registered restrictive covenant that was not provided with the original application
- if the applicant is not the owner, be signed by the owner or include a declaration that the applicant has notified the owner of the request.

PEA ss 57A(4)–(5)

The responsible authority must amend the application in accordance with the request. However, it may refuse to amend the application if it considers that the amendment is so substantial that a new application for a permit should be made.

PEA ss 57A(6)–(7)

The responsible authority must make a note in the register of the amendment to the application.

All objections to the original application are to be taken as objections to the amended application.

Notice of amended application

PEA s 57B

If an application is amended under section 57A, the responsible authority must determine if further notice should be given of the amended application, taking into account whether, as a result of the amendment, the grant of a permit would cause material detriment to any person.

PEA ss 57A(7)(b), 57B(2)

It is not necessary to re-notify those persons originally notified unless the changes to the application may cause those persons material detriment.

The responsible authority must consider the objections and submissions made to the original application and any new objections or submissions in making a decision on the application. All parties who make an objection or submission will continue to have a right to ask VCAT to review a decision to grant a permit.

PEA s 57C

The responsible authority must give a copy of the amended application to every referral authority unless it considers that the amendment to the application would not adversely affect the interests of the referral authority.

What happens to timeframes?

PEA ss 57A(7)(a), 59(2)–(3)

The amended application is taken to be the application for the purposes of the PE Act and to have been received on the day that the responsible authority received the request for the amendment. This means that the statutory clock will begin upon receipt of the amended application.

Because of this, if the responsible authority decides that notification of the amended application is necessary, it must not make a decision in less than 14 days from the giving of the last notice.

If the responsible authority decides that referral of the amended application is necessary, it must not make a decision less than 28 days from giving the amended application to the referral authorities or after receiving all the replies from referral authorities.

3.4 Making a decision on an application

The process of making a decision about an application is summarised in Figure 3.5.

3.4.1 Can an application be refused without giving notice?

PEA ss 52(1A), 83B

A responsible authority may decide to refuse an application without giving notice. In this case, if the applicant applies for review, VCAT may direct the applicant or the responsible authority to give notice.

3.4.2 Can a responsible authority reject or ignore an objection?

PEA s 60(1)(c)

In most cases an authority must consider any objection or other submission it receives before it makes a decision on the application, even if it thinks the objection is misguided, ill-informed or obstructive.

However, there are two situations in which a responsible authority can reject or disregard an objection:

PEA ss 57(2A)–(2B)

- if the responsible authority considers an objection has been made primarily to secure or maintain a direct or indirect commercial advantage for the objector, the PE Act applies as if the objection had not been made

PEA s 60(3)

- if no notice is required to be given under section 52(1) or 57B of the PE Act or the planning scheme, the responsible authority is not required to consider any objection or submission it receives.

Responsible authorities are advised to take a cautious approach to rejecting or ignoring an objection. A person who made the objection may initiate action at VCAT to have the permit cancelled or amended on the ground that a material mistake was made in granting the permit. This involves the possibility of the responsible authority being required to pay compensation if the permit is cancelled or amended.

3.4.3 When may the responsible authority decide the application?

PEA s 59

The responsible authority may decide an application as soon as:

- 14 days have elapsed after the last of any notices of application for permit have been given; and
- all replies from referral authorities have been received or the prescribed period for replies (28 days or any extension by the Minister) has elapsed.

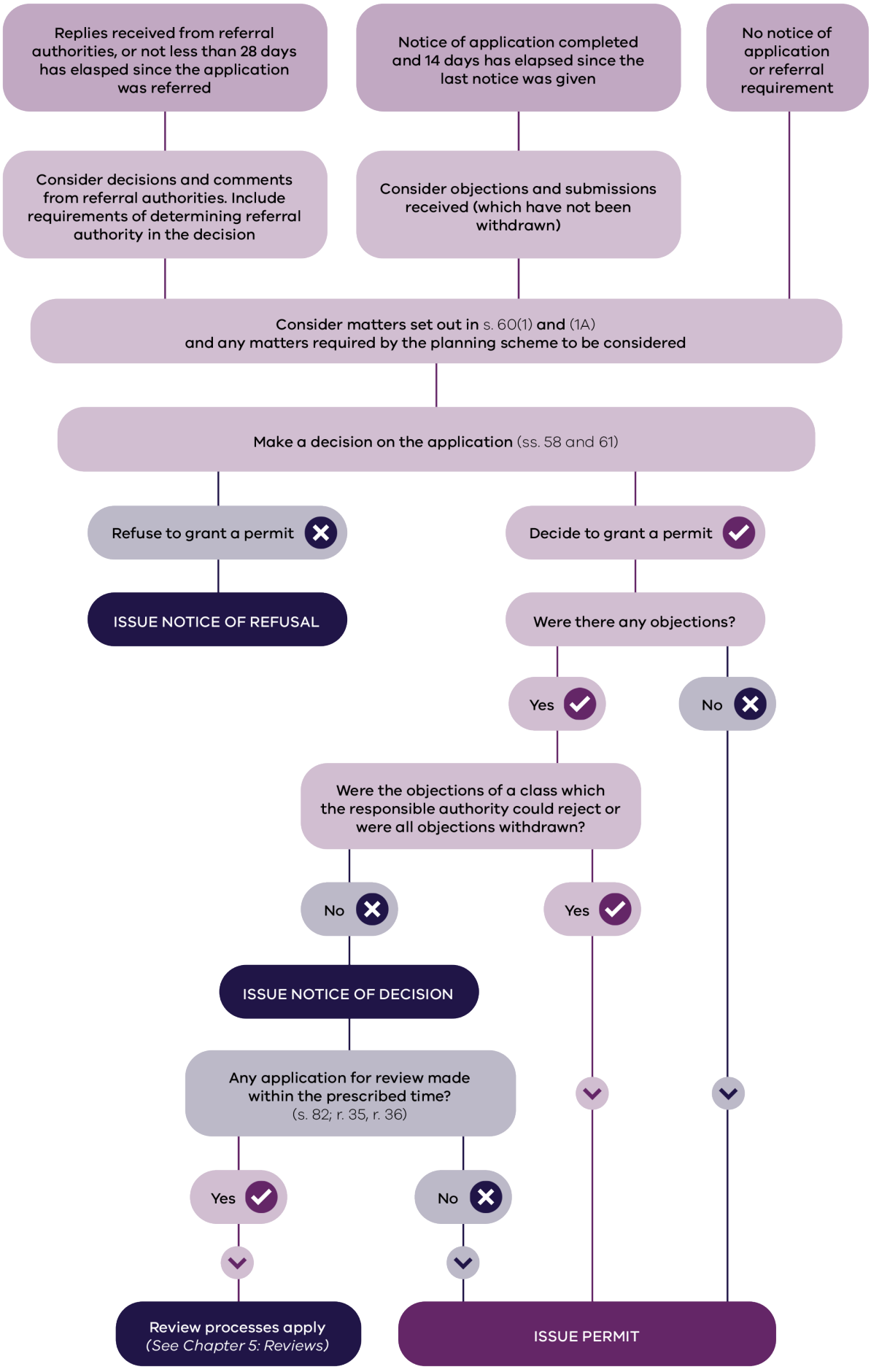
ILA s 49(1)

These times must be measured from when the notices were given, not from when they were dated, or put in the post. A notice sent by post is deemed to have been given at the time the letter would have been received through normal postal delivery. As a rule of thumb, this is usually considered to be up to a week for mail within Australia. For overseas mail, delivery times vary from country to country. See the Australia Post website for estimated delivery times.

PEA s 59(1)

If notice of the application was not given, and it did not need to be sent to any referral authority, the responsible authority may decide the application without delay.

Figure 3.5: Making a decision about an application



3.4.4 When must a decision be made?

PEA s 79

If the responsible authority does not make a decision within the prescribed time, an applicant may apply to VCAT for a review of a failure to grant the permit within the prescribed time.

There are important rules about when the prescribed time starts and when it stops. The prescribed time is:

PEA s 3; ILA s 44(1); PE Regs reg 32

- **VicSmart applications**: 10 business days. A business day means a day other than a Saturday, Sunday or a day appointed under the *Public Holidays Act 1993* as a public holiday or public half-holiday. In calculating the 10 business days for a VicSmart application, the first business day (that is, the day the application is received) is excluded and the last business day is included.
- **All other applications**: 60 days. In calculating the 60 days for any other application, the first day (that is, the day the application is received) is excluded and the last day is included. Weekends and public holidays are included in the 60 days. However, if the last day falls on a weekend or public holiday, the 60 days expires on the next business day.

The prescribed time starts from the date the responsible authority receives the application (or amended application) unless:

- Further information has been sought within the prescribed time under section 54 of the PE Act. The prescribed time starts from the day on which the information is given.
- The applicant has applied for a review of a requirement to give further information and VCAT has confirmed or changed the requirement. The prescribed time starts from the day on which the information is given.

The prescribed time does not run (the clock stops but does not go back to zero):

- if the responsible authority requires the applicant to give notice under section 52(1) or 52(1AA), for the time between the making of that requirement and the giving of the last required notice; and
- for any extension of time granted by the Minister to a referral authority. The prescribed time does not include the time between the responsible authority being advised by the Minister and the time at which the extension ends.

3.4.5 What must the responsible authority consider?

Before making a decision on an application, the responsible authority must consider a number of matters specified in the PE Act and in various places in the planning scheme. All relevant controls in the planning scheme need to be considered.

PEA ss 6(2)(kcb), 60(3A)

A planning scheme may exempt a class or classes of application from some or all of the requirements of sections 60(1)(b) to (f) and (1A). VicSmart applications are exempt from some of these requirements.

Planning and Environment Act 1987

PEA s 60(1)

The PE Act specifies that the responsible authority, when deciding an application, must consider:

- the relevant planning scheme

- the objectives of planning in Victoria
- all objections or submissions that have been received up to the time of making a decision
- any decision or comment of a referral authority
- any significant effects that the proposal may have on the environment, or the environment may have on the proposal
- any significant social or economic effects that the proposal may have.

It should be clear from both the report to the responsible authority on the application and the statement of the responsible authority's decision that these matters have been considered.

PEA s 60(1A)

In addition, where relevant, the responsible authority may consider any:

- approved strategy plan or adopted amendment under:
  - Part 3A of the PE Act – Upper Yarra Valley and Dandenong Ranges Strategy Plan
  - Part 3C of the PE Act – Melbourne Airport Environs Strategy Plan
  - Part 3D of the PE Act – Williamstown Shipyard Strategy Plan
- relevant state environment protection policy
- strategic plan, policy statement, code or guideline adopted by a Minister, government department, public authority or council
- amendment to the planning scheme which has been adopted by the planning authority but is not yet in force
- section 173 agreement affecting the land
- other relevant matter.

PEA s 60(1B)

A responsible authority must (where relevant) have regard to the number of objectors in considering whether the use or development may have a significant social effect. However, this is only one of the considerations.

PEA s 61(4)

If the grant of a permit would authorise anything that would result in the breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit to allow the removal or variation of the covenant.

Planning scheme provisions

PEA s 60(1A); Planning schemes cl 65

The responsible authority is required to consider the relevant planning scheme before deciding on an application and must decide whether the proposal will produce acceptable outcomes in terms of the following:

- the statewide sections (state and regional) of the PPF – which set out the state planning policies applying to Victoria
- the MPS – which sets out the local strategic directions for a municipality
- the local sections of the PPF – which set out the local planning policies, focusing on specific areas and issues in a municipality

- the purpose and decision guidelines of the relevant planning scheme provisions and any other decision guidelines in clause 65 of the scheme
- any other matter set out in the planning scheme that must be taken into account, either generally or in particular circumstances.

Referral authority comments

PEA ss 60(1)(d), 61(2), 62(1)

Although the requirement of section 60(1)(d) is to 'consider' any decisions and comments of a referral authority, the following extra requirements need to be noted:

- The responsible authority must refuse to grant the permit if a determining referral authority objects to the grant of the permit.
- In deciding to grant a permit, the responsible authority must include any conditions which a determining referral authority requires to be included and it must not include any additional conditions that conflict with those required by a determining referral authority.

Deciding VicSmart applications

Planning schemes cl 71.06

When deciding a VicSmart application, the responsible authority is exempted from considering sections 60(1)(b), (c), (e) and (f) and 60(1A)(b) to (h) and (j) of the PE Act. However, the responsible authority must consider the relevant planning scheme and may consider any agreement made under section 173 of the PE Act affecting the subject land.

Planning schemes cl 59

Clauses 59.01 to 59.14 and the schedule to clause 59.16 set out the specific decision guidelines for each class of VicSmart application that the responsible authority must consider.

3.4.6 Inappropriate applications

PEA s 131

If an application is made for a permit which cannot be granted, either because the use or development is prohibited by the scheme or by an order given under section 131, or is allowed as-of-right, the responsible authority should suggest that it be withdrawn.

In the case of an application for a use or development allowed in accordance with the scheme, the applicant may instead wish to apply for a certificate of compliance in accordance with Part 4A of the PE Act for documented verification of the proposal's compliance (see Chapter 4, part 4.1).

If the applicant insists on the application for a prohibited use or development being considered, the responsible authority must do so. The only decision the authority can validly make in such a case where the use or development is prohibited is to refuse to grant a permit. This provides the applicant with an opportunity to test the authority's interpretation of the scheme quickly by applying for a review to VCAT. An exception to this is an application made under the combined amendment and permit process. (See Chapter 2, part 2.14.)

Where a cultural heritage management plan is required under the *Aboriginal Heritage Act 2006*

AHA ss 52(1), 52(3); AH Regs reg. 7

If a CHMP is required for a proposed use or development under the AH Act and AH Regulations, the responsible authority cannot issue a planning permit until it receives a copy of the approved CHMP for the proposal.

The responsible authority also cannot grant a planning permit for a proposal that is inconsistent with an approved CHMP.

Planning Practice Note 45 – *The Aboriginal Heritage Act 2006 and the planning permit process* provides further explanation of the AH Act and how it interacts with the planning permit process.

3.4.7 Drafting a permit

PEA s 61; PE Regs reg 22, Form 4

The form of a permit (other than a permit granted under Division 5 or Division 6 of the PE Act) is Form 4 in Schedule 1 of the Regulations. The information to be included in the permit is set out in Form 4. The manual *Writing Planning Permits* (DSE and the Municipal Association of Victoria, 2007) provides guidance on preparing planning permits. (For amendments to permits, see part 3.6.4 of this chapter.)

The preamble – what the permit allows

A permit should be given for a specific use and/or development and the description of what the permit allows should include all aspects of the proposal that require approval.

When specifying what a permit allows, first check exactly what was applied for. Ensure that the permit covers the whole proposal and gives approval for those aspects of the proposal that require approval under the planning scheme. For example, if the application is only to carry out works, while the proposed use of the land is as-of-right, the permit does not need to specify the use.

It is important to be clear about what the permit will allow, for example:

- use of land only
- development of land only
- use and development of land
- any other matter (such as the reduction of car parking requirements, variation or removal of an easement or restriction).

When specifying what a permit allows, the responsible authority must be careful not to use a broad land use term that may encapsulate specific land uses which are not intended to be approved. For example, a permit for 'Food and drink premises' includes, among other things, a hotel, convenience restaurant and tavern. If all that is intended is restaurant, then the permit should say so. The permit preamble should refer to the use or development at the lowest level of the nesting diagram in the planning scheme (clause 73.04), or simply use a plain English term that clearly describes what is being approved.

Permit conditions

PEA ss 61(1)(b), 62, 85(1)(b)(ii)

A permit must include conditions required by:

- the planning scheme
- a determining referral authority
- VCAT.

The permit can also include any other condition that the responsible authority considers appropriate, including a condition:

- that plans, drawings or other documents be submitted for approval before the use or development starts
- requiring the landowner to enter into an agreement with the responsible authority under section 173 within a specified time

- put forward by a recommending referral authority.

PEA ss 62(1)(b), (4), 62(6)

The responsible authority must not include a condition that:

- conflicts with any condition required by the planning scheme or a determining referral authority
- is inconsistent with the *Building Act 1993*, and regulations under that Act or a relevant determination of the Building Appeals Board under the Building Act
- requires a person to pay an amount for or provide works, services or facilities except in accordance with section 62(6).

The PE Act lists various types of conditions under section 62 that may be included. The list is not exhaustive.

PEA s 80; PE Regs reg 33

An applicant can apply to VCAT for review of any condition imposed except for a condition included under section 62(1)(aa) regarding registered restrictive covenants.

Some basic principles have been established about the validity of conditions. Each condition must:

- be reasonable
- relate to the planning permission being granted
- fulfil a planning purpose
- accurately convey its intended effect and avoid uncertainty and vagueness.

A permit must be written so that the applicant and anyone else will easily understand it. The *Writing Planning Permits* (2007) manual provides guidance on writing conditions.

Section 24(1) of the *Building Act 1993* requires the building surveyor to ensure any building permit issued is consistent with the relevant planning permit, including the endorsed plans. For more information on ensuring consistency between building permits and planning permits, see Building Practice Note 06 – *Building Permit and Planning Permit Consistency* (Victorian Building Authority, 2021).

3.5 Implementing the responsible authority's decision

3.5.1 Grant of a permit

Grant of permit where no objections have been received

PEA ss 63, 64A, 66; PE Regs reg. 22, Form 4

The responsible authority can issue the permit immediately if:

- no objections have been received (including from a recommending referral authority); or
- the only objection(s) received have been rejected by the responsible authority under section 57(2A) of the PE Act; or
- no notice was required to be given under section 52(1) or 57B of the PE Act or the planning scheme; and
- any conditions specified by a recommending referral authority have been included on the permit.

A copy of the permit must be sent to any referral authority that was given the application under section 55 of the PE Act. This does not apply where a recommending referral authority objected or sought a condition that was not imposed on the permit. In that case, the authority will have received a notice of refusal or a notice of decision to grant a permit.

Grant of permit where objections have been received

PEA ss 64, 66; PE Regs reg 26 Form 5, reg 35

If objections have been received, the responsible authority must issue a notice of decision to grant a permit (also known as an 'NOD').

The responsible authority must give a notice of decision to the applicant, any referral authority (as prescribed in sections 64A and 66 of the PE Act) and each objector. The notice should be dated on the day it was actually sent out. This is especially important in the case of objectors because the period in which an objector can apply for review starts from the date of the notice. The notice sets out conditions the responsible authority intends to apply to the permit.

A notice of decision is also issued when no objections have been lodged but a condition proposed by a recommending referral authority is not included on the permit.

PEA ss 64(3), 82, 82AAA; PE Regs regs 35, 36

Once a notice of decision has been given, the responsible authority cannot issue the permit:

- until the end of the 28-day 'review period' – the period within which an objector or a recommending referral authority may lodge an application for review of the decision to VCAT); or
- if an application for review is made within that period, until VCAT directs that a permit be issued.

An application for review must be made to VCAT within the prescribed period by or on behalf of the person seeking a review of the decision. If an application for review is not made within the prescribed time, the responsible authority may issue the permit. (See Chapter 5 'Reviews', Table 5.1.)

ILA s 49(1)

A responsible authority must take care in calculating the time after which a permit can be issued. Under section 64 of the PE Act, the time begins from when the responsible authority gave notice which, if the notice was sent by post, is the time the notice would have been received, not the date it was sent. This is, however, not relevant in the case of objectors. The period for objectors is calculated from the date of the notice of the decision and not the date that the objector would have received the notice.

The responsible authority should set in place an administrative system to ensure that an application for review is not overlooked and a permit mistakenly issued. This could happen if, for example, a person addresses an application for review to the chief executive officer of a council, while the planning office, not having seen it, issues a permit.

To assist responsible authorities, VCAT publishes a list of all applications for review it has received from objectors under section 82 of the PE Act on its website. This list is updated daily. Responsible authorities should check this list to confirm that no application for review has been commenced before it issues any permit for an application that has received objections.

3.5.2 Refusal to grant a permit

PEA s 65; PE Regs re. 28 Form 7

A notice of refusal must be set out as in Form 7 in Schedule 1 of the Regulations.

PEA ss 65(2), 66(5)

The notice must state the grounds on which the application was refused and indicate whether the grounds were those of the responsible authority or a determining referral authority.

The PE Act states that the notice must set out specific grounds. Therefore, broad generalisations such as 'loss of amenity' should be avoided or at least made reasonably specific as to how loss of amenity is expected to come about. Grounds should also avoid just referring to non-compliances with planning scheme provisions by clause number without identifying the real reasons for the refusal. The grounds of refusal may be tested at a review hearing and requests for further particulars or directions hearings may be required if they are not sufficiently clear.

PEA ss 65, 66

A notice of refusal must be given to the applicant and all objectors. The responsible authority must also give a recommending referral authority a notice of refusal if it:

- objected to the grant of the permit; or
- recommended a condition be included on the permit.

Anyone who made a submission, rather than an objection, can be advised of the decision by letter.

PEA ss 61(2), 61(2A)

The responsible authority must refuse to grant a permit if a determining referral authority objected to the proposal but is not obliged to refuse the grant of the permit if a recommending referral authority objected to the proposal.

If a refusal is issued because the use or development proposed is prohibited by the scheme, the notice should make this clear.

3.5.3 Review of a decision to grant or refuse a permit

PEA ss 77, 80, 82, 82AAA; PE Regs regs 35, 36

An application for review must be made to VCAT within the prescribed time and a copy of the application for review must be given to the responsible authority. In the case of an objector's review against a decision to grant a permit, an application for review must be lodged within 28 days from when the notice of decision was given.

A recommending referral authority also has 28 days to lodge an application for review of a decision to grant a permit, a refusal or a decision not to include a condition recommended by the authority.

An applicant has 60 days to apply for review of a decision to refuse to grant a permit or for a review of any condition in a permit.

Refer to Chapter 5 for more information about other types of decisions that can be reviewed by VCAT and the relevant procedures for VCAT reviews.

3.6 After a permit is issued

3.6.1 When does a permit begin?

PEA s 67

A permit operates from:

- the date specified on the permit; or

- the date of VCAT's decision if no date is specified and the permit was issued at the direction of VCAT (in this case it will need to be backdated to the VCAT decision date); or
- the date on which it was issued (where no date is specified).

3.6.2 When does a permit expire and how is the time extended?

A permit can expire in three ways:

- if the permit is not acted upon; or
- if the use is discontinued as set out in section 68 of the PE Act; or
- if a permit condition provides that a use may only be conducted until a certain time or that works must be removed after a certain time.

Permits not acted upon

PEA ss 68, 68A; Planning schemes cl 52.09-5

The PE Act specifies the conditions under which a permit will expire. These vary depending on the type of permit (for example, use, subdivision, other forms of development, or a combination of these). In general, the usual period given is two years to commence but the exact period should depend on the nature of the use or development. In the case of subdivision, two years is allowed for the certification of the plan under the *Subdivision Act 1988*, with expiry occurring five years after certification.

The responsible authority may specify a different time (either shorter or longer) for commencement. In the case of a permit for development other than subdivision, the responsible authority may specify a different time for completion, as appropriate to the particular case. These alternative times must be stated in the permit.

If a permit expiry is specified on a permit, this should be done as a statement in accordance with section 68 of the PE Act. It is not a condition of the permit.

A responsible authority should set practical expiry times and avoid setting unnecessarily short expiry times that are likely to lead to requests for extensions.

If a permit for development does not specify a commencement expiry period, the default completion expiry period set out in the PE Act is two years after the issue of the permit. For use permits, where the permit does not specify a commencement expiry period, the default commencement period set out in the PE Act is two years after the issue of the permit.

There can be exceptions to the normal two-year period, such as extractive industry uses, with this type of use benefiting from a minimum five-year commencement period. Where there is a longer-term commitment, time limits of six to eight years may be appropriate. A person who has been granted a permit should recognise that development rights do not necessarily run forever. Site circumstances and policy context can change. Specifying an expiry date gives the responsible authority the opportunity to review the situation when considering an application for extension of time.

Extension of time

PEA ss 69(1), (1A)

The owner or the occupier of land to which a permit applies, or another person with the written consent of the owner, may ask the responsible authority for an extension of time for a permit where:

- a use or development allowed by the permit has not yet started and the application is made either before the permit expires or within six months of the expiry date; or
- development allowed by the permit has lawfully started and the application is made within 12 months after the permit expires.

More than one extension of time can be granted for a permit. In deciding whether to grant an extension, a responsible authority should reassess the proposal in the present context, taking into account the following considerations:

- whether there have been any changes to relevant planning controls or planning policy
- the likelihood of a permit being granted if a fresh application was made for the proposal
- the total elapsed time, taking into account whether the originally imposed time limit was adequate
- whether the landowner is seeking to 'warehouse' the permit (that is, store the permit without intending to act upon it)
- intervening circumstances, including:
    - action taken by the applicant in the context of any legislative and policy uncertainties, including under other jurisdictions
    - whether conditions on adjoining land may have changed in a way that would affect the proposal
- the economic burden imposed on the landowner by the permit, including whether the cost of having to comply with the permit conditions was so onerous that the time available for compliance was inadequate.

The above considerations are widely applied and are known as the 'Kantor principles'. They stem from a decision of the Supreme Court in *Kantor v Murrindindi Shire Council* (1997) 18 AATR 285.

PEA ss 69(2)–(3)

The responsible authority may extend the time within which a use is to be started or the development or any stage of it must be started or completed.

If the decision to extend the time is not made until after the permit has expired, the extension operates from the day the permit expired so that there is no break in its validity.

The responsible authority should consider whether or not the views of a referral authority should be sought regarding the extension and seek those views before deciding whether the extension should be granted.

The responsible authority should notify both the applicant and the owner of the land of its decision and send a copy of the decision to any relevant referral authority.

PEA ss 81(1), (3)

Any person affected may apply to VCAT for review of a decision to refuse an extension of time or failure to make a decision within one month of the request for extension. The responsible authority and VCAT have no power to consider an extension of time if the request is made after the timeframes set out in sections 69(1) and (1A) of the PE Act.

Use discontinued

PEA ss 68(3)(d), 68A(1)

The PE Act also provides that a permit to use land expires if the use is discontinued for two years. In the case of extractive industry permits, a period of 10 years is allowed before these types of permits expire. The permit may be extended in the same way as a permit which has not been acted upon, provided the request for an extension is made within six months of the permit expiry.

It may be difficult to determine when the right to apply for an extension actually expires as there may be no set date to indicate when the use ceased. The responsible authority may need to rely on evidence from the landowner or occupier and other enquiries in a similar way to deciding when established use rights cease in accordance with section 6(4).

Permit ceases at a given time

If it is intended that a proposal be permitted only:

- until a particular event occurs; or
- for a fixed period of time; or
- for a period of time specified by the responsible authority (who may wish to review the operation of the proposal afterwards)

then the permit should include a condition that the use must cease (and that any development permitted be removed) at that time.

This time cannot be 'extended' using the procedures under the PE Act for extension of time. In these circumstances the responsible authority could consider amending the permit. Alternatively, the provisions of section 87 may apply and VCAT could amend the permit. Otherwise, a new application is necessary.

3.6.3 Correcting mistakes in a permit

PEA s 71

The PE Act allows the responsible authority to correct a permit (including a permit issued at the direction of VCAT) where it contains a clerical mistake or omission, a miscalculation of figures or a mistake in any description of a person, thing or property.

A copy of the corrected permit should be prepared with the original date of issue. A note should be included at the end of the permit indicating the nature and date of the correction.

If possible, copies of the original incorrect permit should be recovered and marked superseded. Then the corrected permit can simply be substituted. A copy of the corrected permit should be sent to the owner, the applicant and any relevant referral authority. The correction must be noted in the register of permits held by the responsible authority.

3.6.4 Amending a permit

The Victorian planning system recognises that a permit holder's intentions may change over time. Rather than requiring a new permit application to be made every time a change is proposed, the following processes may be applied, depending on the circumstances of the change amendment sought:

- application to amend a planning permit
- secondary consent, where a condition of a permit allows for this.

An applicant should discuss their revised proposal with a council planner before submitting their application to determine the best course of action.

Application to amend a permit

PEA ss 72(1), 72(3), 73(1); PE Regs reg 14; PE (Fees) Regs reg 11

An application to amend a permit, including any plans, drawings or other documents approved under a permit, follows the same process as an application for a permit (under sections 47 to 62 of the PE Act). It has the same requirements for giving notice and referral. However, the assessment for an application to amend a permit focuses only on the amendment itself and avoids reopening all the issues associated with the approved use or development. It also avoids the proliferation over time of permits for different aspects of the use and development of a parcel of land.

There is no limit to the number of times an applicant can request an amendment.

A correction of a mistake is not required to undergo the same process (see part 3.6.3 of this chapter).

PEA ss 72(2), 85(1A)

A permit issued at the direction of VCAT cannot be amended under this process if VCAT has specifically directed that the permit (or a part of the permit) must not be amended by the responsible authority. Instead, an application will need to be made to VCAT under section 87 or 87A of the PE Act.

PEA s 72(2)(b)

Any permit issued by the Minister under Part 4 of Division 6 of the PE Act cannot be amended by the responsible authority. Only the Minister can amend this type of permit.

Who may request an amendment to a permit?

PEA ss 48(1), 72(1)

A person who is entitled to use or develop land in accordance with a permit may apply to the responsible authority for an amendment to a permit. The permit 'runs' with the land, not an individual person.

If the applicant is not the owner, section 48(1) provides for the application either to be signed by the owner or for a declaration by the applicant that the applicant has notified the owner about the application.

What is the procedure for an application to amend a permit?

PEA s 73; PE Regs reg 17, Form 3

Because an amendment to a permit is considered in the same way as an application for a permit, the responsible authority must consider whether:

- more information is required under section 54
- notification of the application is required under section 52
- referral is required under section 55.

The same statutory timeframes apply. This includes timeframes relating to notification, referral and review.

Consideration of the application to amend a permit, including notification and referral, should be based only on the changes proposed by the applicant.

Amended permit

PEA ss 73(2)–(3), 74

If the responsible authority has decided to amend a permit, it must issue an amended permit to the applicant if:

- notice was required to be given under section 52(1) or 57B of the PE Act and:
  - no objections have been received; or
  - the only objection(s) received have been rejected by the responsible authority under section 57(2A) of the PE Act
- a recommending referral authority has not objected to the grant of the amendment to the permit
- all conditions recommended by a recommending referral authority have been included on the amended permit.

The conditions on the permit must relate to the amendments and they form part of the permit when it is issued.

PE Regs reg 22, Form 4

An amended permit must include a table indicating the date and nature of the amendment. This is prescribed in the Regulations.

Notice of decision to amend a permit

PEA ss 75, 75A, 76A(2); PE Regs reg 27, Form 6

If there are objections to the amendment (including an objection from a recommending referral authority) and the responsible authority has decided in favour of the application, then a notice of decision to amend a permit must be issued. The notice must set out any conditions to which the amendment to the permit will be subject. The form for the notice of decision is prescribed in the Regulations.

If a condition specified by a recommending referral authority is not included on the amended permit, a notice of decision to amend a permit must also first be issued before the final decision.

Refusal of amendment

PEA s 76; PE Regs reg 28, Form 7

If the responsible authority decides to refuse to grant an amendment to the permit, a notice of refusal to amend a permit must be issued. The notice must set out the grounds on which the application is refused and whether the grounds are those of the responsible authority or a determining referral authority. The form for the notice of refusal is prescribed in the Regulations.

Notice to referral authority

PEA ss 76A, 76C

The responsible authority must give each determining referral authority a copy of the amended permit if it decides to grant a permit, or a copy of any notice of decision to grant a permit or notice of refusal. Similarly, a recommending referral authority must be given a copy of notice if it did not object to the grant of the amended permit or did not specify conditions for the amended permit.

Where a recommending referral authority objected to the grant of the amended permit or specified conditions that were not included, a notice must be given to the authority. The notice gives the authority a right of review against the responsible authority's decision.

When does an amended permit begin and expire?

PEA ss 69, 76B

An amended permit replaces the original permit.

Once a permit has been amended, the original form of the permit is superseded, and can no longer be acted on. Amending a permit does not change its expiry date, although the person seeking an amendment may at the same time ask for an extension of time under section 69 if the person is the owner or occupier.

It is good practice to include the specific date the permit expires on the planning permit. A permit should always show both the original issue date (a mandatory requirement) and the date on which the permit expires.

PEA s 49

The register of permit applications should record the latest version of the permit. There is no need to cancel previous versions of the permit. However, it would be useful for applicants and the responsible authority to denote file copies appropriately (for example, by marking the original permit as 'superseded').

Review of decision on amendment

PEA s 76C

Because an amendment to a permit is considered in the same way as an application for a permit the same rights of review exist.

If the responsible authority determines not to issue an amended permit, the applicant has a right of review to VCAT. The applicant also has a right of review against any conditions placed on the amended permit.

Relevant third parties will have a right of review against the decision to grant an amendment to a permit. A recommending referral authority may also seek review of a responsible authority's decision to not include a permit condition that it specified.

More information about reviews is included in Chapter 5.

Secondary consent

A permit condition may provide that some future or further changes be carried out 'to the satisfaction of the responsible authority' or not be carried out 'except with the further consent of the responsible authority'. For example, a condition may limit the operation of a use to particular hours but may also provide for the hours to be altered with the consent of the responsible authority. This is known as a 'secondary consent'.

A primary consent relates to the planning scheme requirement for a permit, whereas a secondary consent is a less formal planning approval commonly available under permit conditions. The distinction between the two is described in the VCAT decision *Cook v Mornington Peninsula SC* [2017] VCAT 1129.

The most common type of secondary consent provision included on a permit relates to compliance with endorsed plans. The usual words are:

'The (use and) development as shown on the endorsed plans must not be altered without the written consent of the responsible authority.'

A secondary consent given under a permit condition does not substitute for any new permission required by the planning scheme. For example, where an existing building is to be extended, in addition to obtaining secondary consent to vary the plans of the original permit, it may be necessary to obtain a new permission, because a new planning provision has been introduced since the permit was granted.

The following considerations, known as the 'Westpoint principles' (see the VCAT decision *Westpoint Corporation v Moreland City Council* [2005] VCAT 1049 at paragraph 38) are generally applied when deciding if the use of secondary consent is appropriate. That is, the secondary consent process is considered suitable for a proposed amendment to a permit, when the amendment:

- does not result in a transformation of the proposal
- does not authorise something for which primary consent is required under the planning scheme
- is of no consequence having regard to the purpose of the planning control under which the permit was granted
- is not contrary to a specific requirement (permit condition) as distinct from an authorisation within the permit, which itself cannot be altered by consent.

The permit holder may lodge an application for review of a responsible authority's decision or its failure to make a decision with VCAT in relation to an application for secondary consent under a condition of a permit. Third parties have no formal right of objection or right of review in relation to the merits of a responsible authority's decision on a secondary consent application.

A permit condition may also provide for a secondary consent to be exercised by a Minister, public authority or referral authority.

The secondary consent process can only be used where changes are proposed to the plans or conditions.

Where a secondary consent is not appropriate, a new permit application or an application to amend a permit should instead be made.

Responsible authorities need to carefully consider any proposal to amend a permit by secondary consent. If a secondary consent is subsequently found to be inappropriate or inconsistent with a permit, there may be grounds for an affected person to request that the permit be amended under section 87 of the PE Act. This process is addressed in the following part.

3.7 Cancellation or amendment of a permit by VCAT

3.7.1 Under what circumstances can a permit be cancelled or amended?

PEA s 87(1)

VCAT can cancel or amend any permit if it considers that there has been:

- a material misstatement 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 PE Act
- any failure to comply with the requirements of a referral authority in respect to sections 55, 61(2) or 62(1) of the PE Act.

PEA s 87A

VCAT can cancel or amend a permit that has been issued at its direction if it considers it appropriate to do so. A cancellation or amendment under section 87A can only be undertaken at the request of the owner or occupier or any person who is entitled to use or develop the land concerned.

PEA s 87(2)

VCAT can amend any permit to comply with the *Building Act 1993*. It can do this if a building permit cannot be obtained under the *Building Act 1993* (for the development for which the permit was issued) because the development does not comply with the Building Regulations 2018.

PEA ss 87(5)–(7)

VCAT can cancel or amend a permit it has granted. However, it cannot cancel or amend permits required by Ministers or government departments granted by the Governor in Council under section 95 of the PE Act. To prevent repetitious reviews, a permit cannot be cancelled or amended on grounds related to misstatement or concealment of fact, a mistake in granting the permit, or failure to comply with referral requirements if these matters have been previously raised in a review about the permit.

PEA s 88

There is no limitation on the time when a permit can be cancelled or amended if it relates to the use of land. However, if it relates to either the development of land or construction of buildings or works, it can only be cancelled or amended before the development has been substantially carried out.

3.7.2 Making a request to cancel or amend a permit

PEA s 87(3)

A request to amend or cancel a planning permit can be made by:

- the responsible authority (usually the local council)
- a referral authority
- the owner or occupier of the land
- any person who is entitled to use or develop the land
- any person who objected or would have been entitled to object to the issue of a permit if the person believes that he or she:

  PEA ss 87(3)(b), 89(1)

  - should have been given notice of the application for the permit and was not given that notice; or
  - has been adversely affected by:
    - a material misstatement 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.

Before making a request, careful consideration should be given to which ground or grounds as specified in section 87 will be relied upon. It will be necessary at the hearing of the request to produce evidence to satisfy VCAT that one of these grounds existed. Consideration should also be given to whether or not to seek an order to stop development (see part 3.7.5 of this chapter).

Any request must be in writing. Forms containing notes and guidance for a person requesting cancellation or amendment of a permit or seeking an order to stop development are available from VCAT.

PEA s 89(3)

VCAT may refuse to consider a request if it is not satisfied that the request was made as soon as practicable after the facts became known to the person or authority making the request.

3.7.3 Hearing a request to cancel or amend a permit

PEA s 90

VCAT must give the following parties the opportunity to be heard:

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

VCAT has discretion to give any other person who appears to have a material interest in the outcome an opportunity to be heard.

PEA s 91(3)

If the request was made by an objector or person who would be entitled to object, VCAT must be satisfied before it makes a direction to amend or cancel a permit that:

- there would be substantial disadvantage to the person making the request
- the person did not receive notice of the application and therefore could not have become aware of the application in time to lodge an objection
- it would be fair and just to amend or cancel a permit.

3.7.4 VCAT's decision

PEA s 91

VCAT may direct the responsible authority to cancel or amend a planning permit and to take any other actions as required.

PEA s 92

The responsible authority must comply with VCAT's direction without delay and forward a copy of the notice of cancellation or amendment to any person entitled to be heard by the tribunal in accordance with the Regulations.

PE Regs regs 38, 39

A notice of cancellation or amendment of a permit under section 92 of the PE Act must be given within seven days of the responsible authority receiving VCAT's decision and must give:

- sufficient information to identify the permit
- details of the amendment or amendments made to the permit or a statement that the permit has been cancelled
- the ground or grounds for each amendment or for cancellation.

A notice must contain advice that there may be a right to compensation under the PE Act.

3.7.5 Order to stop development

PEA s 93

If the circumstances warrant, VCAT may immediately make an order to direct that all or part of a development cease until the outcome of a hearing. It may further direct the responsible authority to give notice of the order, without delay, to a specified person in a specified manner.

PEA s 94(1)

The responsible authority or person making the request, where that person has given an undertaking as to damages, may be liable for compensation if the planning permit is not subsequently cancelled or amended.

PEA s 93(1A)

Before making an order, VCAT must consider whether the person making the request should give any undertaking as to damages.

PEA s 93(3)

It is an offence for a person to fail to comply with an order to stop development.

3.7.6 Compensation for permit cancellation or amendment

PEA s 94

If a permit is cancelled or amended, the responsible authority may be liable to pay compensation to any person who has incurred expenditure or is liable for expenditure as a result of the issue of a permit.

This applies particularly where expenditure is wasted because a permit is cancelled or amended or when additional land must be bought to develop in the required manner.

PEA s 94(2A)

A referral authority is liable to pay this compensation instead of the responsible authority, if the permit is cancelled or amended because of a material mistake in relation to the issue of the permit that arose from an act or omission of the referral authority.

PEA s 94(4)

Compensation is not payable if the permit is cancelled or amended in the following circumstances:

- if there has been a failure to satisfy permit conditions
- the permit was granted following an application in which there was a material misstatement or concealment of facts
- if the cancellation is on the ground of a material mistake in relation to the grant of the permit, and if VCAT considers that the mistake in the grant of a permit was due to an action or omission by or on behalf of the applicant
- if the permit must be amended to enable the development to comply with regulations made under the *Building Act 1993*.

PEA s 94(5)

It should be noted that provisions of the *Land Acquisition and Compensation Act 1986*, parts 10 and 11 and section 37 (regarding the determination of disputes and claims where no offers have been made) would apply as necessary where compensation has to be determined.

PEA ss 150(4)–(5)

Section 150(4) of the PE Act provides for compensation to be paid by a person if VCAT is satisfied that the person has brought proceedings vexatiously, frivolously or primarily to secure or maintain a direct or indirect commercial advantage. If VCAT determines that the circumstances set out in section 150(4) have occurred, it may order the person who brought the proceedings (or another person who sponsored the bringing of the proceedings) to pay compensation as well as costs.

3.8 Applications in special circumstances

3.8.1 Subdividing land

PEA s 3; Planning scheme cl 72.06

The subdivision of land involves three main stages:

- planning permit application
- certification
- statement of compliance.

A planning permit is generally required for subdivision unless a planning scheme provision allows for or exempts a class of subdivision from the need for a planning permit.

The *Subdivision Act 1988* sets out the procedures to be followed by councils in certifying plans and issuing statements of compliance.

Planning permit application

The approval process for a planning permit application to subdivide land is the same as for any other type of planning permit application.

It is essential that councils and referral authorities give proper consideration to subdivision at the planning stage as it will not be possible to place additional requirements on a subdivision once a planning permit is issued.

Conditions on permits should cover the full range of matters that both the council and referral authorities require to be addressed.

An application for subdivision can run in parallel with the certification process under the *Subdivision Act 1988*. A plan cannot, however, be certified before a planning permit is issued. If planning and certification applications are processed concurrently, the prescribed time under the PE Act applies.

Certification

SA s 6(1)(a)

A plan must be certified by the relevant council when the planning permit or planning scheme requirements have been met or arrangements have been made to meet those requirements, along with any other matter set out in section 6(1) of the *Subdivision Act 1988*.

A plan certified under the *Subdivision Act 1988* has a life of five years. The plan lapses if it is not registered at the Titles Office within that time.

Each council must keep a register of plans and decisions made.

Statement of compliance

The statement of compliance is the main tool that councils use to seek compliance with the requirements placed on subdivisions through the planning system or under the *Subdivision Act 1988*.

A statement of compliance cannot be issued before a plan is certified and it must be obtained before a plan can be registered at Land Use Victoria.

SA s 21

Before a statement of compliance can be issued, written advice from a licensed surveyor must be provided to the council in a prescribed form. This should be to the effect that the subdivision (including all lots, roads, common property and reserves) has been marked out or defined.

The council must issue a statement of compliance as soon as the applicant has provided all the prescribed information and has satisfied all requirements under the planning system and the *Subdivision Act 1988*.

For more information about subdivision procedures, refer to the *Subdivision Act User Guide* (November 2012).

3.8.2 Applications for licensed premises

Planning scheme cls 52.27, 66.03, 66.04

In addition to other requirements of the planning scheme, a permit is required under clause 52.27 if it is proposed to issue or vary a licence to sell or consume liquor.

A permit is required to use land to sell or consume liquor if any of the following apply:

- a licence is required under the *Liquor Control Reform Act 1998*

- a different licence or category of licence is required from that which is in force
- the hours of trading allowed under any licence are to be extended
- the number of patrons allowed under a licence is to be increased
- the area that liquor is allowed to be consumed or supplied under a licence is to be increased.

Clause 52.27 sets out some exceptions to this permit requirement, such as a variation that reduces the number of patrons allowed under a licence or if the schedule to clause 52.27 specifies that a permit is not required to use land to sell or consume liquor under a particular type of licence. The schedule to clause 52.27 may also specify that a permit cannot be granted to use land to sell or consume liquor under a particular type of licence.

If a planning permit is required for modifications to a licensed premises, such as an extension of the building area, a permit will also be needed under this clause where a change to the liquor licence is required. The application must make it clear that it is an application for approval under clause 52.27, in addition to any other use or development approval required.

This means that even if a licensed premises has long-standing existing use rights, a permit is still needed if the licence is to be changed.

An application under clause 52.27 associated with a hotel, tavern or nightclub that will operate after 1.00 am must be referred to the Victorian Gambling and Casino Control Commission (VGCCC) until its powers and responsibilities are transferred to the Department of Justice and Community Safety (DJCS) in the latter part of 2022. Notice of the same application must also be given to the Chief Commissioner of Victoria Police under section 52(1)(c) of the PE Act.

Cumulative impact

In assessing an application for a licensed premises, a responsible authority has to consider the possible impacts of that premises in relation to any existing cluster of licensed premises in the locality – the 'cumulative impact'. Planning Practice Note 61 – *Licensed Premises: Assessing Cumulative Impact* provides guidance on assessing the cumulative impacts of licensed premises.

The role of local government in the issuing of a liquor licence

LCR Regs reg.10(1)

Under the *Liquor Control Reform Act 1998,* appropriate planning permission, or evidence that an application for such permission has been made, must be lodged with a new licence application and certain licence variation applications to the VGCCC (or DJCS, as relevant).

It is important to note the following:

- a licence can be issued before a relevant planning permit is issued, but a licence does not come into effect until the planning permit is issued
- liquor trading hours approved on a liquor licence will not exceed trading hours specified in the planning approval
- licensees are required, as a condition of their liquor licence, to comply with planning permit conditions.

LCRA ss 33(2), 40

A copy of an application for a licence under the *Liquor Control Reform Act 1998* must be given to the council. The council may object to the granting of the licence on the grounds that the licence would detract from, or be detrimental to, the amenity of the area in which the premises are situated. In addition, a council may object to a proposal relating to a

packaged liquor licence on the ground that the grant, variation or relocation would be conducive to or encourage the misuse or abuse of alcohol.

LCRA s 91(1)(b)(iii)

A council may also initiate disciplinary proceedings through the VGCCC against a licensee on the grounds that the licensee has conducted the business in a manner that is detrimental to the amenity of the area or other relevant concern. The council must set out the reasons in its request to the commission.

A comprehensive range of fact sheets and other resources about liquor licensing are available through the DJCS website at **justice.vic.gov.au**.

3.8.3 Restrictive covenants

PEA s 47(1)(d)

If a registered restrictive covenant applies to the land, the applicant must submit a copy of the covenant with the permit application affecting the land. As a registered restrictive covenant is defined as a restriction under the *Subdivision Act 1988*, the applicant will need to check both the plan of subdivision (if the land is a lot on a plan) for restrictions and the Register Search Statement for restrictive covenants registered or recorded on the title. A title Register Search Statement can be obtained from Land Use Victoria's Land Information Centre, 2 Lonsdale Street, Melbourne, or on the department's website, via the 'Property and titles' link.

PEA s 47(1)(e)

If the permit authorises anything that would result in a breach of a registered restrictive covenant, the applicant must provide information clearly identifying each allotment or lot benefited by the covenant and any information that is required by the Regulations.

The applicant is encouraged to ask a qualified person to obtain this information, because determining which land is benefited by the covenant may not be straightforward.

If an applicant does not submit details of land benefited by a restrictive covenant because he or she considers there would be no breach and if the responsible authority disagrees and considers a breach would result, the responsible authority should inform the applicant without delay.

If there is disagreement between the responsible authority and the applicant about whether there is a breach or what land is affected, the matter may need to be referred to VCAT for determination.

PEA ss 52(1)(ca)–(cb), 52(1AA)

If a permit would authorise anything that would result in breach of a restrictive covenant or if the application is to remove or vary a restrictive covenant, the responsible authority must, in addition to complying with existing notice provisions of the PE Act:

- give notice (or require the applicant to give notice) to owners and occupiers of land benefited by the restrictive covenant;
- place (or require the applicant to place) a sign on the land; and

PEA s 57(1A)

- publish a notice (or require the applicant to publish a notice) in a newspaper circulating in the area.

If the permit would allow the removal or variation of a registered restrictive covenant or if anything authorised by the permit would result in a breach of the covenant, an owner or occupier of land affected by the covenant is deemed to be a person affected by the grant of a permit. Therefore, no objection can be disregarded on the basis that the owner or occupier is not affected.

PEA s 47(2)

The notice and referral requirements of the PE Act under section 52 and 55 do not apply to an application to remove a restriction over land that has been used or developed for more than two years (before the date of the application) in a manner that would have been lawful under the PE Act but for the existence of the restriction.

PEA s 61(4)

If the grant of a permit would authorise anything that would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit, except where a permit has been issued, or a decision has been made to grant a permit, to allow the removal or variation of the covenant.

If a responsible authority considers it must refuse an application because the proposal would result in a breach of a registered restrictive covenant, it should discuss the following options with the applicant to avoid a refusal:

1. Apply for a separate permit to remove or vary the covenant. If a permit is first granted to remove or vary the covenant, the responsible authority could then issue the original permit. The responsible authority could consider both applications together. As long as it issues a permit to remove or vary the covenant, it can issue the original permit. If that permit is granted, it must include a condition that the permit is not to come into effect until the covenant is removed or varied.
2. Apply to the Supreme Court for an order to remove or vary the covenant. If the court orders the removal or variation and if the necessary steps to actually remove or vary the covenant are completed, the responsible authority can then grant or decide to grant the permit.
3. Ask the council, as planning authority, to prepare an amendment to the planning scheme to remove or vary the covenant. If the amendment is prepared and approved, and if the necessary steps to actually remove or vary the covenant are completed, the responsible authority can then grant or decide to grant the permit.
4. Ask the council, as planning authority, to prepare an amendment to the planning scheme to remove or vary the covenant and, at the same time, consider a permit application that would otherwise authorise something that would result in breach of the covenant. If the amendment is prepared and approved to remove or vary the covenant, a permit can be simultaneously granted to authorise something that would otherwise result in breach of the covenant. The permit must include a condition that it does not come into effect until the covenant is removed or varied.

PEA s 62(1)(aa)

If the grant of a permit would authorise anything that would result in a breach of a registered restrictive covenant, the responsible authority must include a condition that the permit is not to come into effect until the covenant is removed or varied.

In effect, this permit can only be granted in the circumstances described in section 61(4); that is, if a permit is granted or a decision has been made to grant a permit to remove or vary a covenant. This ensures that an owner takes the necessary steps under the *Subdivision Act 1988* to actually remove or vary the restrictive covenant. It also means that failure to do so is an offence. A responsible authority can prosecute or apply for an enforcement order against the offence.

3.8.4 Earth and energy resources industry

Planning schemes cl 52.08

The VPP seeks to encourage land to be used and developed for exploration and extraction of earth and energy resources in accordance with acceptable environmental standards.

The mining and stone extraction industries are regulated by the *Mineral Resources (Sustainable Development) Act 1990* (MRSD Act). Other earth and energy resources industries are regulated by the *Greenhouse Gas Geological Sequestration Act 2008*, the *Geothermal Energy Resources Act 2005*, and the *Petroleum Act 1998*.

In general, a planning permit is not required to use and develop land for earth and energy resources industry where it complies with the relevant legislation governing these land uses. It is important that planning controls are consistent with this legislation.

Extractive industry

Planning scheme cl 52.09

The VPP specifically recognise the importance of sand and stone resources and the need to ensure that land used for extractive industry does not adversely affect the environment or amenity of an area.

The statutory approval process for extractive industry takes three steps:

- statutory endorsement of a work plan
- issue of a planning permit (if required); and
- grant of a work authority.

The MRSD Act regulates the work plan and work authority processes, addressing the operational aspects of the industry. The PE Act regulates the planning permit process.

Planning scheme cl 52.08-1, MRSDA s 77T

The use and development of land for extractive industry will not require a planning permit where it complies with the provisions of the MRSD Act regarding the preparation of an Environment Effects Statement (EES).

Planning scheme cls 52.09-2, 52.09-3

If a planning permit is required, most applications will need to be accompanied by a copy of a work plan that has been statutorily endorsed in accordance with section 77TD of the MRSD Act. The submission of the statutorily endorsed work plan with a planning permit application means that the usual referral requirements will not apply (with the exception of the referral requirements for Head of Transport for Victoria).

Before preparing an application for a work plan or a planning permit, it is important to meet with the relevant authorities to discuss the proposal.

Planning Practice Note 89 – *Extractive Industry and Resources* provides more information and guidance on the extractive industry approvals process.

Environment Effects Statement (EES)

The EES process provides an alternative mechanism to the planning permit assessment process for the use of land for extractive industry and mining. Matters that are normally addressed in a planning permit assessment process are addressed in the EES process.

The *Ministerial Guidelines for Assessment of Environmental Effects* and further information about the EES process can be viewed on the department's website.

3.8.5 Pipelines

Pipelines Act s 85

If a licence is issued under the *Pipelines Act 2005* to construct and operate a pipeline, a planning permit is not required for the use or development of land, including the removal, destruction and lopping of native vegetation, or the doing or carrying out of any matter or thing for the purpose of the pipeline.

3.8.6 Applications that could have a significant effect on the environment

PEA s 60(1)(e)

The PE Act requires a responsible authority to take account of any significant effects a use or development may have on the environment or that the environment may have on the use or development. Under section 54 of the PE Act, a responsible authority can ask the applicant for more information on the possible environmental effects of a use or development.

A proposal can be referred to the Minister under the *Environment Effects Act 1978* to decide whether an EES will be required by:

- a proponent directly seeking the advice of the Minister
- another Minister, or an authority that grants permits, licences or approvals, referring a proposal to the Minister
- any person or group requesting the Minister to decide whether the proposal should be subject to an EES.

The *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* (June 2006) provide guidance on referrals and what could be considered to be a potentially significant environmental effect. The Minister may also direct that a referral be made.

EEA ss 3(1), 8B(7)

The *Environment Effects Act 1978* (EE Act) can apply to any works (public or private). When the Minister gives notice under the EE Act that an EES is required, he or she determines that the EE Act applies to the works. The EE Act can also apply to declared public works by Order of the Minister published in the Government Gazette.

EEA s 8

Section 8 of the *Environment Effects Act 1978* provides for proponents and relevant decision makers to refer proposals to the Minister to determine whether an EES is required.

EEA s 8A

The Minister may notify decision makers to put decisions about projects on hold until the Minister has advised whether an EES should be prepared.

Section 8C of the *Environment Effects Act 1978* requires that no decision be made about a project until the EES has been prepared and the Minister's assessment of the project has been considered by the relevant decision maker. This includes any decision made under the PE Act to grant or refuse a permit.

PEA s 97B(1)(c)

As a general practice, when an EES is required, the Minister will consider calling in a planning application prior to the responsible authority making a decision.

EEA ss 4, 8B

The *Environment Effects Act 1978* allows the Minister to make one of three decisions on the referred proposal:

- an EES is not required
- an EES is not required if certain conditions are met
- an EES is required to be prepared by the proponent.

An EES process provides for the analysis of a proposal's potential effects on the environment and identifies means of avoiding and minimising those effects, including through refinement of the proposal, feasible alternatives and appropriate environmental management measures.

In considering whether an EES will be required for a proposal, the Minister considers the extent to which the project is capable of having a significant effect on the environment, taking into account the project's consistency with applicable policy frameworks, uncertainties and complexities of potential effects, any suitable alternative statutory assessment processes, feasible alternatives and the level of public interest.

For more information about the EES process, refer to the *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* available on the department's EES webpage.

Impacts on matters of national environmental significance

Where a proposal may have a potentially significant impact on a matter of national environmental significance, a separate assessment may also be required under the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999*. Further information on the operation of this legislation is available from the relevant Commonwealth Environment Department.

It is possible for Victoria to assess proposals that the Commonwealth has determined as 'controlled actions' that are likely to have a significant impact on matters of national environmental significance. The accredited state processes are set out in the Bilateral Agreement on environmental assessment between the Australian Government and Victoria. More information can be found at **planning.vic.gov.au/environmental-assessment**.

3.8.7 Applications that require an EPA works approval or licence

Planning scheme cl 66.02

Clause 66.02-1 of planning schemes establishes Environment Protection Authority Victoria (EPA) as a referral authority for any application that requires a permit under the planning scheme, where a licence or a licence amendment is required under the *Environment Protection Act 2017*.

As the planning scheme requires referral of applications to EPA for a use or development needing a licence, the two processes can be undertaken either concurrently or separately.

An applicant can apply for a planning permit first, in which case the responsible authority will have the benefit of EPA advice on the potential environmental effects of the proposal. EPA, as a determining referral authority, can require incorporation of conditions or refusal of a permit.

The planning permit can then set out the main conditions that should apply to the project before the more detailed documentation needed for the works approval is prepared.

Applications can also be made simultaneously and the cross-referral provisions enable consideration and notice by the responsible authority and EPA to be coordinated.

In the event of objections, assuming that the responsible authority and EPA approved the project:

- the responsible authority would decide to grant a permit in accordance with section 64 of the PE Act; and
- EPA would grant a licence under sections 69(1), 74(1) or 78(1) of the *Environment Protection Act 2017*. In the case of a development licence, the EPA is required to impose a condition stating that the licence does not take effect until a planning permit has been issued and a copy is provided to EPA.

Alternatively, a refusal could be issued by both bodies and the applicant could apply for a review against these refusals or against any conditions. Applications for review to VCAT would then likely be combined and heard together.

EPA s 69(2), EP Regs reg 22

If an application is made to EPA for a development licence, EPA will refer the application to the responsible authority. EPA must also refer an application for a significant development licence to the Secretary of the Department of Health, any protection agency EPA considers may be directly affected and, if it relates to exploration for minerals or mining, to the Minister administering the MRSD Act. Notice must be given in a newspaper circulating throughout Victoria.

EPA ss 52, 69(3)

Public consultation occurs at the development licence stage. EPA is required to publish a notice of a development licence application on its website and in at least one other publication which is selected based on EPA's Charter of Consultation and the characteristics of the application. Other publications can include statewide, regional or local media, or websites such as that of Engage Victoria. EPA must allow a minimum period of 15 business days during which public comments or submissions are invited. Any comments received during this time must be considered by EPA in determining whether to issue the development licence.

EP Regs reg 22(3)

The responsible authority must advise EPA in writing on the planning status of the proposal within 15 business days of the day on which the application was sent. Within 32 business days, the responsible authority must indicate its support, non-objection, or objection. The responsible authority may ask EPA to include specified conditions in the works approval (if it is issued).

EPA s 71

When a development licence is issued before a planning permit is obtained, the works approval or licence must be issued subject to a condition that it does not take effect until a planning permit is issued by the responsible authority and a copy is given to EPA.

3.8.8 Applications relating to marine and coastal Crown land

MACA s 65

Before marine and coastal Crown land is used or developed, the written consent of the Minister responsible for the *Marine and Coastal Act 2018* needs to be obtained. This consent is in addition to any requirement for a planning permit under the planning scheme affecting the land.

MACA s 4

Under the *Marine and Coastal Act 2018*, marine and coastal Crown land comprises Crown land (whether or not covered by water):

- to a depth of 200 metres below the surface of that land

- between the outer limit of Victorian coastal waters and 200 metres inland of the high-water mark of the sea.

It also includes any water covering that land:

- from time to time
- to a depth of 200 metres below the surface of that land that is:
  a) more than 200 metres inland of the high-water mark of the sea; and
  b) reserved under the *Crown Land (Reserves) Act 1978* for the purposes of the protection of the coastline.

The Governor in Council, by Order published in the Government Gazette, may declare any additional area of Crown land (whether or not covered by water) and any water covering that land to be marine and coastal Crown land for the purposes of the *Marine and Coastal Act 2018*.

The Governor in Council may also declare land not to be marine and coastal Crown land.

While coastal Crown land extends to the limit of any sea in Victoria (three nautical miles or approximately 5.5 kilometres offshore), the limit of planning schemes varies between coastal municipalities ranging from the low water mark (the municipal boundary) to 600 metres offshore.

MACA s 68

The *Marine and Coastal Act 2018* provides a consent process for the use and development of coastal Crown land. Consent can be obtained by applying directly to the department or if a planning permit is required, as part of the planning permit process. The approval process is illustrated in Figure 3.6.

To streamline the approval process, prior consent has been granted to some 'low impact' uses and developments (subject to some conditions and limitations). Low impact uses and developments generally comprise day-to-day maintenance, repairs and safety works. They do not include new works, works that increase the height or footprint of structures or excavation of land. Further information on prior consents can be obtained from the department.

If a council is unsure about whether consent is required under the *Marine and Coastal Act 2018*, it can either require the applicant to provide more information about this or it can contact the department to seek confirmation about whether consent is required.

MACA s 68(3)

If a planning permit application is referred to the relevant state environment Minister and an application for consent has not been made, the referred application is deemed to be an application for consent under the *Marine and Coastal Act 2018*.

MACA s 70

Upon receiving a copy of the application for consent, the Minister has 60 business days to:

- request additional information; or
- consent to the use or development with or without conditions; or
- refuse to consent to the use or development.

If the Minister fails to make a decision within 60 business days, the Minister is deemed to have refused to consent to the use or development.

There is no right of review of a decision to refuse consent under the *Marine and Coastal Act 2018*.

PEA s 61(3)(a)(b)

The responsible authority must not decide to grant a permit to use or develop coastal Crown land unless consent, or consent with conditions, has been granted by the Minister under the *Marine and Coastal Act 2018*. If the Minister has refused consent, the planning permit must be refused.

PEA s 82AA

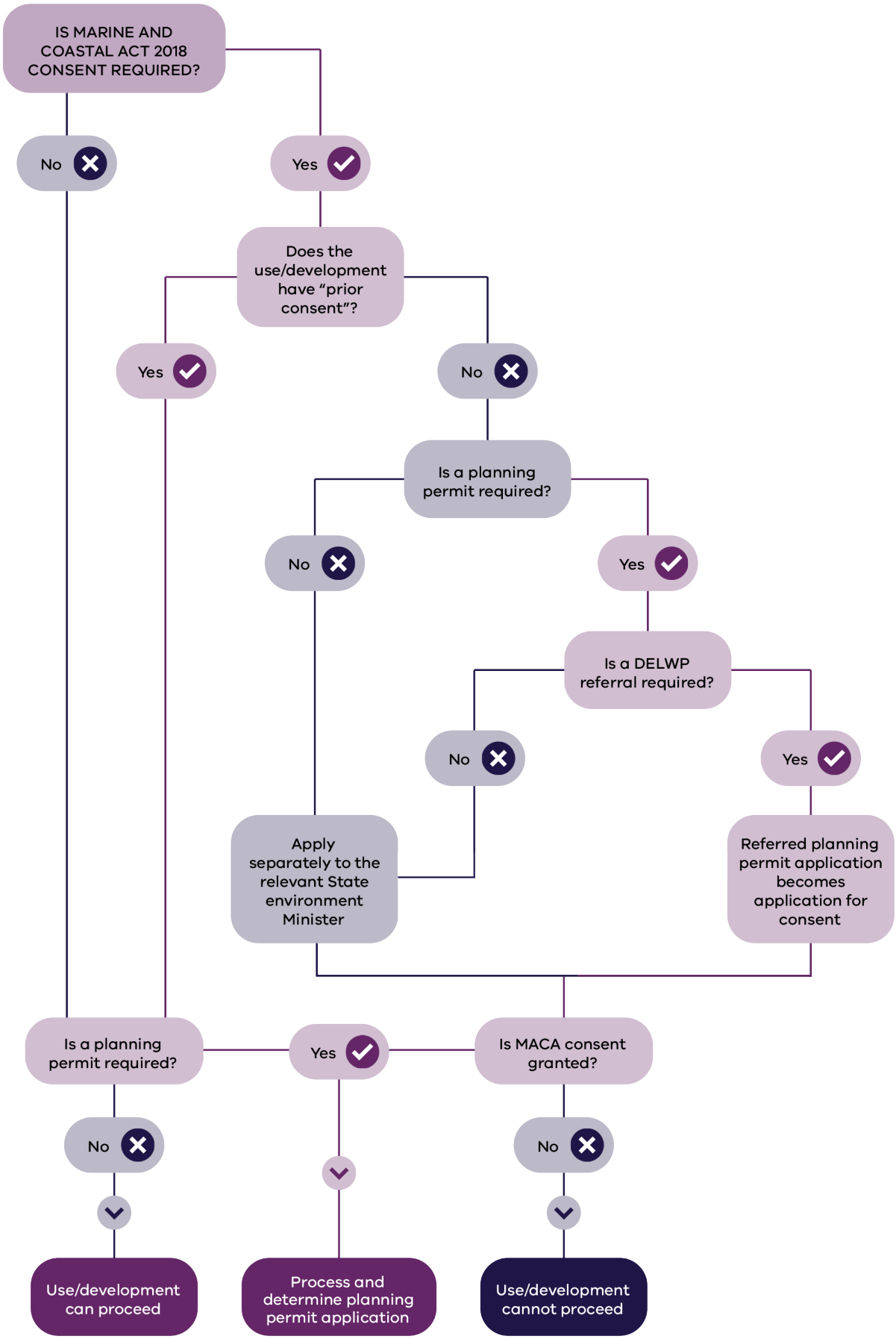
There is no right to apply to VCAT for a review of a decision by the responsible authority to refuse to grant a permit if *Marine and Coastal Act 2018* consent has been denied.

The *Use, Development and Works on Marine and Coastal Land – Fact Sheet* (Department of Environment, Land, Water and Planning, 2018) provides further information on the consent process under the *Marine and Coastal Act 2018*.

When assessing planning permit applications on coastal Crown land, consider:

- the Marine and Coastal Crown Land policy at clause 12.02-2 of the PPF and other relevant provisions in the planning scheme
- the *Marine and Coastal Strategy* (Department of Environment, Land, Water and Planning, 2022)
- Native title that may exist over any coastal Crown land (the department will consider all planning permit applications with native title implications)
- the *Siting and Design Guidelines for Structures on the Victorian Coast* (Department of Environment, Land, Water and Planning, May 2020) available at **marineandcoasts.vic.gov.au**.

Figure 3.6: Approval process under the *Marine and Coastal Act 2018*



3.8.9 Registered heritage places

Although places registered in the Victorian Heritage Register are listed in the schedule to the Heritage Overlay, these places are subject to the requirements of the *Heritage Act 2017* not the planning scheme. In other words, if a permit for development has been granted under the *Heritage Act 2017* (or the development is exempt under section 92 of that Act), a planning permit is not required under the Heritage Overlay. However, this does not apply to applications to subdivide a heritage place that is included in the Victorian Heritage Register or other planning provisions that may still apply to the use or development.

Planning Practice Note 1 – *Applying the Heritage Overlay* provides further advice on the use of this overlay.

3.8.10 Brothels (sex work premises)

Part 4 of the *Sex Work Act 1994* includes planning controls on brothels that apply in addition to the provisions of the VPP. These controls place restrictions on who may apply for a permit for a brothel and where brothels may be located and requires certain matters to be considered by the responsible authority before deciding on a permit application for a brothel.

SWA s 72

Only certain persons may make an application for a permit to use or develop land for the purposes of a brothel. These requirements are set out in section 72 of the *Sex Work Act 1994*.

SWA s 73

Section 73 of the *Sex Work Act 1994* sets out a range of specific matters which the responsible authority must consider before deciding on a permit application to use or develop land for the purposes of a brothel. These apply in addition to the matters in section 60 of the PE Act, and they aim to minimise the impact of a brothel on the community and particularly on children.

SWA s 74

Strict controls apply to the location of brothels. Under section 74 of the *Sex Work Act 1994*, the responsible authority must refuse to grant a permit to use or develop land for the purposes of a brothel if land is within specified areas or located within certain distances of specified land uses.

On 22 February 2022, the Victorian Government passed the *Sex Work Decriminalisation Act 2022*.

The legislation decriminalises sex work to achieve better public health and human rights outcomes for all Victorians. The changes mean a sex services business will now be treated like any other business, subject to the same rules and regulations. In planning, this is made possible by Amendment VC217 which commences on 1 December 2023.

More information is available on the 'Decriminalisation Sex Work in Victoria' webpage at **vic.gov.au**.

3.8.11 Applications called in by the Minister

PEA Part 4 Div. 6

Part 4 of Division 6 of the PE Act sets out the procedure to be followed if the Minister calls in a planning permit application that has not been decided by a responsible authority.

PEA s 97B

The Minister may call in an application being considered by a responsible authority if it appears that:

- the application raises a major issue of policy and the determination of the application may have a substantial effect on the achievement or development of planning objectives; or
- the decision on the application has been unreasonably delayed to the disadvantage of the applicant; or
- the use or development to which the application relates is also required to be considered by the Minister under another Act or regulation, and that consideration would be facilitated by the referral of the application to the Minister.

VCATA Sch. 1 cl 58

The first of these criteria is the same as that for the Minister in calling in a review under the *Victorian Civil and Administrative Tribunal Act 1998*.

The responsible authority may also request the Minister to call in an application. The above criteria do not necessarily apply if the responsible authority makes the request.

The circumstances in which a Minister may exercise this power are addressed in Planning Practice Note 29 – *Ministerial Powers of Intervention in Planning and Heritage Matters*.

In the first instance, the planning permit application is always made to the responsible authority to whom the prescribed fee must be paid. There is no provision for an application to be made directly to the Minister (unless the Minister is the responsible authority under the planning scheme or the PE Act, in which case the application would not be called in).

If an application is called in by the Minister, the responsible authority must give the Minister any documents relating to the application. Any actions taken by the responsible authority (such as giving notice of the application) are taken to have been done by the Minister. All further steps until the decision is made are to be taken by the Minister. The responsible authority may make a formal submission about the application.

PEA ss 97E–97G

The process for considering an application called in by the Minister includes the referral of submissions to a panel, which then advises the Minister about the application. Details are set out in sections 97E to 97G of the PE Act.

PEA s 6(2)(kf)

These processes are different for some amendments to referred wind energy facility permits. A planning scheme can specify that applications to amend a referred wind energy facility permit are wholly exempted from the requirement to refer objections and submissions to a panel or are instead required to be referred to an advisory committee established under section 151 of the PE Act.

The responsible authority is (subject to section 97H) responsible for the administration and enforcement of the PE Act and the planning scheme in relation to any permit issued by the Minister, and for entering details of decisions in the Register.

3.8.12 Applications on land owned or controlled by a responsible authority

PEA s 96

The PE Act provides that if the responsible authority, or some other person, proposes to use land that is managed, occupied or owned by the responsible authority and a permit is required, a permit must be obtained from the Minister, unless the planning scheme gives an exemption from this requirement.

PEA s 6(2)(ka); Planning scheme cl 67

Clause 67 of planning schemes has the effect of exempting specified classes of use or development from this requirement. Effectively, all applications are exempt.

Notice of an application must be given to the owners and occupiers of adjoining land. The responsible authority does not have the option to avoid this notice on the basis that the grant of a permit would not cause material detriment to any person. Notice must also be given to the National Trust of Australia (Victoria) if the application relates to land on which there is a building classified by the trust.

The notice requirements do not apply to an application:

- to which the exemption from notice and review in clause 52.31–2 applies; or
- for a sign or advertisement; or
- to remove, destroy or lop native vegetation under clause 52.17 of the planning scheme; or
- where a permit is only required under particular overlays listed in clause 67.02.

An application to remove, destroy or lop native vegetation under clause 52.17 of the scheme does, however, require notice to be given under section 52(1) of the PE Act (refer also to clause 66.05 of the scheme) to the Secretary to the Department of Environment, Land, Water and Planning (as constituted under Part 2 of the *Conservation, Forests and Lands Act 1987*).

In addition, clause 62.02-1 exempts a council from any requirement in the planning scheme relating to buildings or works with an estimated cost of $1,000,000 or less, carried out by or on behalf of the municipality. Clause 52.31-1 also exempts any requirement in a zone or a schedule to a zone to obtain a permit to construct a building or construct or carry out works for the development of land carried out by or on behalf of a municipal council with the exception of a development:

- with an estimated cost of more than $10 million
- in the Urban Floodway Zone unless the development is carried out to the satisfaction of the relevant floodplain management authority
- associated with the use of land for accommodation, earth and energy resources industry, energy generation facility, industry or warehouse
- for which an EES has been, or is required to be, prepared under the *Environment Effects Act 1978*
- for which the Minister for Planning has decided that an assessment through an EES under the *Environment Effects Act 1978* is not required if the Minister's decision is subject to conditions.

Any requirements for the development of land carried out by or on behalf of a municipal council in the Floodway Overlay, Land Subject to Inundation Overlay and Special Building Overlay are also exempt from the need to obtain a permit to the satisfaction of the relevant floodplain management authority.

3.8.13 Applications by a Minister or government department

Section 16 exemption

PEA s 16A

A planning scheme is binding on all members of the public, on every Minister, government department, public authority and council.

PEA s 16

Exemptions may be provided by a Governor in Council Order published in the Government Gazette.

Current exemptions under section 16 of the PE Act apply to the Minister administering the *Conservation, Forests and Lands Act 1987*, the Minister for Health, the Minister for Education and the Minister for Skills and Workforce Participation. Exemptions have also been made for specific sites and projects.

However, even when they have been exempted from any legal need to comply with planning scheme requirements, the ministers concerned should, as a matter of practice, consult from an early stage with relevant responsible authorities on proposed works. This consultation fosters cooperative involvement of local government in state planning and development matters. Consultation needs to be effective and therefore should be more than the mere circulation of proposals.

Orders under section 95

PEA s 95

Section 95 of the PE Act provides for:

- the Governor in Council to publish an Order in the Government Gazette requiring that specified applications by Ministers or government departments must be referred to the Minister administering the PE Act; and
- the Minister to direct the responsible authority to refer an application to the Minister if conditions in the PE Act are met.

There is no review against a determination by the Governor in Council.

Unless either of these actions are taken, applications to which section 95 of the PE Act could apply are dealt with in the usual way by the responsible authority.

3.8.14 Permits issued under the *Town and Country Planning Act 1961*

PEA s. 208

Any permit issued under the *Town and Country Planning Act 1961* which was in force immediately before the Act came into effect, continues in force and is treated as though it were issued under that Act.

PEA s. 208(2)

Note that the PE Act provides for the expiry of such permits under certain circumstances. This means that some older permits that previously may have had an indefinite life will now have expired.

3.8.15 VicSmart permit process

PEA s 6(2)(hb)

The PE Act enables planning schemes to set out different procedures for particular classes of applications for permits. The VicSmart permit process is a specific procedure for straightforward, low-impact applications.

Key features of the VicSmart permit process include:

- the responsible authority is expected to assess an application within 10 business days of receiving the application
- the classes of application to which the process applies are set out in the planning scheme

- applications are exempt from the notice requirements in section 52 of the PE Act
- applications are exempt from certain decision-making considerations in sections 60 and 84B of the PE Act
- the application is only assessed against specific decision guidelines set out in the planning scheme
- the chief executive officer (CEO) of the council is the responsible authority for the application.

There are two types of VicSmart application: state VicSmart applications and local VicSmart applications.

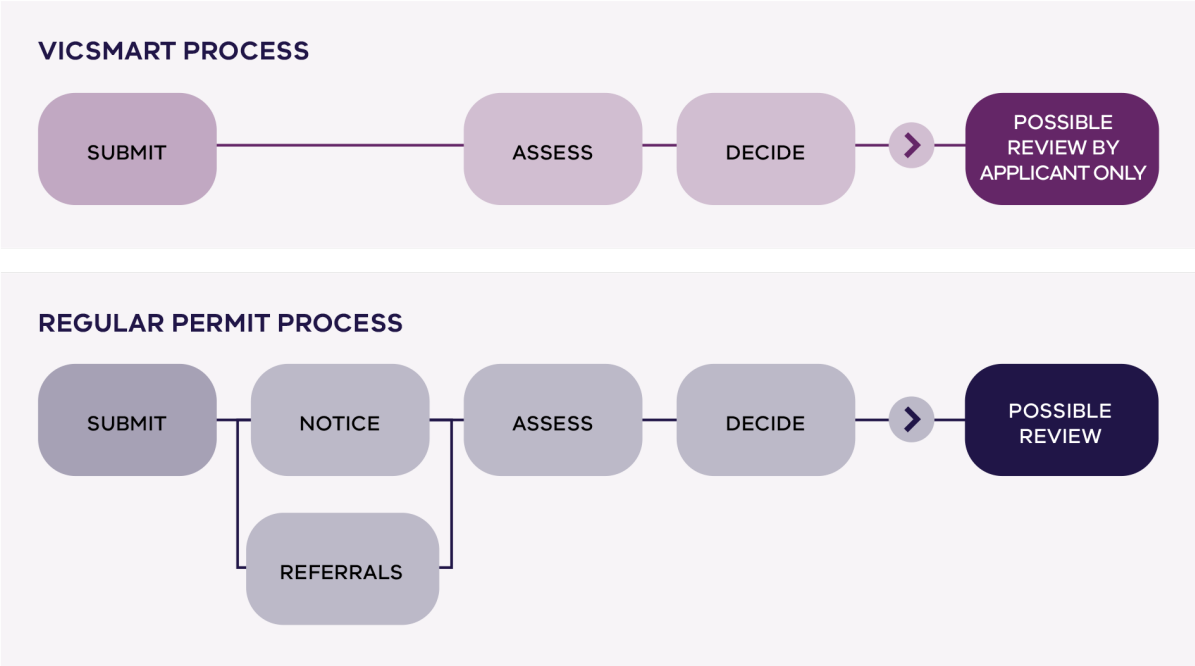
State VicSmart applications are established by the Minister and apply in all planning schemes. Local VicSmart applications are put in place by the council for its planning scheme and may be different in each scheme.

Differences between VicSmart and the regular permit process

The two processes differ in some important respects. The VicSmart process has fewer steps than the regular permit process; it involves a more tightly focused planning assessment; and different statutory times apply for requesting further information and deciding an application. Also, the council CEO is the responsible authority for VicSmart applications whereas the council is typically the responsible authority for regular applications.

The VicSmart and regular permit processes are illustrated in Figure 3.7.

Figure 3.7: The two permit processes



The VicSmart planning provisions

Planning schemes cl 59 and 71.06

Specific provisions in clauses 59 and 71.06 of the planning scheme apply to VicSmart applications. These provisions set out:

- the operational requirements for assessing VicSmart applications, including the criteria for when an application is a VicSmart application and exemptions from certain procedural requirements of the PE Act (clause 71.06)

- the classes of state VicSmart application, in the applicable permit requirement in a zone, overlay or particular provision
- information requirements and decision guidelines for each class of state VicSmart application (clauses 59.01 to 59.14)
- the classes of local VicSmart application (schedule to clause 59.15)
- information requirements and decision guidelines for each class of local VicSmart application (schedule to clause 59.16).

More information about the VicSmart planning provisions can be found in the *VicSmart Planner and Practitioner Guide* on the department's website.

Responsible authority for VicSmart applications

PEA s 13; Planning schemes cl 72.01

Section 13 of the PE Act enables a planning scheme to specify a person other than the municipal council or the Minister as the responsible authority for a class or classes of applications.

The responsible authority for considering and deciding VicSmart applications is the CEO of the council. This is specified in clause 72.01 of the planning scheme.

PEA s 188

Under section 188 of the PE Act, the CEO may delegate responsibility for administering and deciding VicSmart applications to other officers of the council.

PEA s 61A; LGA s 130

Section 130 of the *Local Government Act 2020* applies to the CEO and any other council officer that may exercise a power, duty or function as a responsible authority. Section 130 requires a council officer to disclose any conflict of interest and to exclude themselves from the decision-making process and refrain from exercising that power, duty or function if he or she has a conflict of interest. Under section 61A of the PE Act, the officer must delegate the power to another council officer.

Identifying a VicSmart application

An application is a VicSmart application if:

- it is identified as a VicSmart application under the permit requirement in a zone, overlay or particular provision, or in the schedule to clause 59.15
- all the permit triggers for the application are identified as a VicSmart application under the permit requirement in a zone, overlay or particular provision or in the schedule to clause 59.15
- nothing authorised by the grant of a permit would result in a breach of a registered restrictive covenant
- the application has been considered by the referral authority, if the application requires referral to a referral authority, within the three months prior to the application being made, and the referral authority has stated in writing that it does not object to the proposal.

If an application does not meet all of these requirements, it is not a VicSmart application and the regular permit process applies.

Preparing and submitting a VicSmart application

Before lodging an application, the applicant should discuss the proposal with the council to confirm that it is a VicSmart application, identify the applicable information requirements

and decision guidelines, and obtain any checklists that will assist in preparing the application.

Checklists for each class of state VicSmart application are available on the department's website.

PEA s 47; PE Regs regs 13, 14; Planning schemes cls 59.01–59.14

A VicSmart application must be made in accordance with the Regulations and be accompanied by the information required by the PE Act and the planning scheme.

The information requirements for state VicSmart applications are set out in clauses 59.01 to 59.14 of the planning scheme and the information requirements for local VicSmart applications are listed in the schedule to clause 59.16.

PE (Fees) Regs regs 9, 11

A fee must be paid when a VicSmart application is made. The Planning and Environment (Fees) Regulations 2016 prescribe fees for different classes of application and are based on why a permit is needed. There are specific prescribed fees for VicSmart applications.

Amending a VicSmart application

PEA ss 50, 50A, 57A

A VicSmart application may be amended in the same way that amendments to a regular application may be made. The requirements for amending an application are explained in part 3.2.7 of this chapter.

The responsible authority should check any amendment carefully to determine whether the application may continue to be processed in the VicSmart permit process. For example, if an application is amended to seek permission under a planning scheme provision that is not listed under the permit requirement in the zone, overlay or particular provision or the schedule to clause 59.16, the application ceases to be a VicSmart application and the regular permit process applies.

Referral

PEA s 55; Planning schemes cls 66, 71.06

An application may require referral to a referral authority specified in clause 66 of the planning scheme. The application may be dealt with under the VicSmart permit process if the applicant satisfies the responsible authority that:

- the referral authority has considered the proposal within the past three months from when the application was made to the responsible authority;
- the referral authority has stated in writing that it does not object to the granting of a permit; and
- the written statement and plans endorsed by the referral authority are submitted with the application.

Further information

PEA s 54(1)

The responsible authority can require an applicant to provide further information about a VicSmart application. If the request for further information is made within the prescribed time of five business days of receiving the application, the request must also specify a date by which the information must be received. An application lapses if the requested information is not provided by the specified date. Refer to part 3.3.2 of this chapter for more details about an application lapsing.

A request for further information within the prescribed time of five business days means that the 'clock' is stopped. (Note: the clock counts the 10 business days until the applicant may apply for a review of the failure of the responsible authority to determine the application.

The clock starts again from zero when a satisfactory response to the responsible authority's request is received).

Advertising

PEA s 52; Planning schemes cl 71.06

VicSmart applications are exempt from the notice requirements of sections 52(1)(a), (b), (c) and (d) of the PE Act under clause 71.06 of the planning scheme.

Making a decision on a VicSmart application

PEA ss 60, 79

There is no time limit for a responsible authority to make a decision on a VicSmart application. However, if the responsible authority does not make a decision within the prescribed time, an applicant may apply to VCAT for review of a failure to grant the permit within the prescribed time.

PE Regs reg 32

The prescribed time is 10 business days. The time starts from the date on which the responsible authority receives the application unless:

- further information has been sought within the prescribed time of five business days under section 54 of the PE Act. The 10 business days starts from the day on which the information is given.
- the applicant has applied for a review of a requirement to give further information and VCAT confirmed or changed the requirement. The 10 business days starts from the day on which the information is given.

Refer to part 3.4.4 of this chapter for more information about calculating the prescribed time.

PEA s 60; Planning schemes cl 71.06

Before making a decision on an application, the responsible authority must consider particular matters specified in the PE Act and particular decision guidelines specified in the planning scheme.

The responsible authority must consider the planning scheme, any decision or comments received from a referral authority and any section 173 agreement affecting the land. However, the responsible authority is not required to consider the other matters specified in section 60 of the PE Act because VicSmart applications are exempted from those matters, as set out in clause 71.06 of the planning scheme.

Planning schemes cls 59.01–59.14, sch to cl 59.16

The VicSmart planning provisions set out specific decision guidelines for each class of VicSmart application. In some cases, the decision guidelines enable the responsible authority to consider a relevant local planning policy in the planning scheme or the decision guidelines of a zone, overlay or particular provision. A responsible authority cannot consider the decision guidelines in clause 65 of the scheme.

VCAT review of VicSmart applications

PEA ss

Refer to Chapter 5, part 5.6.1 for more information about the VCAT review procedure for VicSmart applications.

Using Victoria's Planning System

Chapter 4: Other Procedures

Contents

4.1 Certificates of compliance

4.1.1 What is a certificate of compliance?

PEA s 97N(1)

A certificate of compliance is a document issued by a responsible authority in accordance with Part 4A of the *Planning and Environment Act 1987* (PE Act). A certificate of compliance verifies that:

- an existing use or development complies with the requirements of the planning scheme, or
- a proposed use or development would comply with the requirements of the planning scheme.

In either case, the certificate states the facts at the date the certificate was issued.

PEA s 97N, PE Regs reg 48, Forms 14, 15

The PE Act requires that a certificate be in the prescribed form and include prescribed information. Different forms are prescribed. The appropriate form depends on whether the certificate relates to an established use (section 97N(1)(a), Form 14) or a proposed use or development (section 97N(1)(b), Form 15).

A certificate is not a form of development approval. If a use or development complies with the planning scheme, there is no need to apply for a certificate before proceeding. However, a certificate gives some certainty in interpreting a scheme, or in establishing the extent of existing use rights that predate the scheme. It may also be useful to a person other than the developer who needs to rely on it, such as a financial institution lending on the security of the land.

A certificate of compliance issued under Part 4A is not to be confused with either a planning certificate issued under section 199 (which states the provisions of a planning scheme applying to a particular parcel of land) or certification of a plan under Part 2 of the *Subdivision Act 1988*.

4.1.2 How is a certificate of compliance obtained?

PE (Fees) Regs reg 15

An application for a certificate of compliance is made to the responsible authority administering the relevant planning scheme. The PE Act provides for an application to be accompanied by a prescribed fee.

4.1.3 What must the responsible authority do?

PEA s 97O

On receiving an application for a certificate, the responsible authority must either issue or refuse to issue the certificate, in accordance with the PE Act. In the case of a certificate relating to a proposed use or development, the certificate may specify any part of the proposal that would require a permit, or is prohibited.

The responsible authority does not have discretion whether or not to issue a certificate based on whether it supports the proposed use or development, or whether the proposal would have a material effect on the locality. Nor is there any requirement or power to give notice about the application. The certificate must be issued or refused on the basis of the provisions of the planning scheme.

The certificate must be refused if:

PEA s 97O(4)

- **existing use or development**: any part of the use or development would require a permit or is prohibited. It is helpful to ask the question, 'Could what is on the land be established without the need for a permit today if the land was currently vacant and had no existing use rights?' If the answer is 'yes', a certificate should be issued.

PEA s 97O(5)

- **proposed use or development**: the whole of the use or development would require a permit or is prohibited.

If some aspects of a proposal are allowed by the scheme 'as-of-right', while others require a permit or are prohibited, the certificate may specify those parts that are not 'as-of-right'.

A certificate cannot be issued subject to conditions but it may include information setting out any requirements that the proposed use or development would need to meet in order to comply with the scheme.

4.1.4 What does it mean if a certificate is refused?

If a person's application for a certificate for an existing use or development is refused, this does not mean there is anything unlawful about the use of the land. It simply means that if the person wanted to establish that use and development now, a permit would be needed for some aspect of the project, or that some aspect of it could not be permitted.

Similarly, if a person's application for a certificate about a proposed use or development is refused, they should not automatically infer that the responsible authority is opposed to the proposal. The responsible authority may be prepared to grant a permit if an application was made.

A certificate indicating the parts of the proposal that require a permit will assist a person to make an appropriately targeted application.

4.1.5 Reviews about certificates

A review about a certificate is not about the merits of a proposal. It is essentially to settle the appropriate interpretation of the planning scheme to the existing or proposed use.

PEA s 97P, PE Regs regs 49, 50

The applicant for a certificate can ask the Victorian Civil and Administrative Tribunal (VCAT) to review a decision by the responsible authority to refuse a certificate, or its failure to issue a certificate within the prescribed time of 30 days.

VCAT may direct that a certificate must not be issued or may direct the responsible authority to issue the certificate.

PEA s 97Q

Any person may request VCAT to cancel or amend a certificate if they believe they have been adversely affected by either a material misstatement or concealment of fact in the application for the certificate, or a material mistake in relation to the issue of the certificate.

After hearing from the person who made the request for cancellation or amendment, as well as the responsible authority, the Minister and the owner and occupier of the subject land, VCAT can direct the responsible authority to cancel or amend the certificate if it is satisfied that:

- there was a material misstatement or mistake
- the person who made the request was substantially disadvantaged by the refusal

- it would be just and fair to do so.

4.2 Planning certificates

4.2.1 What is a planning certificate?

PEA s 199

A planning certificate is an official statement of the planning controls that apply to a property. It will set out the zoning details of the land and any relevant overlay controls and exhibited amendments to the planning scheme that affect the land.

PEA ss 199(2), 200; PE Regs reg 65

A planning certificate must contain the prescribed information about the effect of the relevant planning scheme on the land at the date of the certificate in accordance with the PE Act. A planning certificate will not provide the details of all planning scheme provisions that might apply to the land.

PEA s 200

A certificate is an authoritative statement of the planning controls that apply to the land. Any person acting on the basis of a certificate who suffers financial loss because of an error in the certificate may recover damages.

4.2.2 Obtaining a planning certificate

Any person can apply for a certificate. The application must be made to the responsible authority for issuing certificates.

The planning scheme states who is responsible for issuing a planning certificate in the schedule to clause 72.01.

PE (Fees) Regs r. 17

Where the Minister for Planning is responsible for issuing a planning certificate, an application for a certificate can be made online at **www.landata.vic.gov.au** and following the links to Titles, and Property Certificates. You will need to supply:

- either your contact details, or your login identification (if you are a registered user)
- information about the property or properties in question
- your credit card details for the purchase of the certificate or certificates.

4.3 Building permit applications for demolition of buildings

Sections 29A and 29B of the *Building Act 1993* (and related provisions of Schedule 2 of that Act):

- require a report and consent of the relevant responsible authority in relation to certain applications for a building permit for demolition, and
- enable the suspension of certain applications for a building permit for demolition, pending amendment of planning schemes.

A 'report and consent' is the process under the *Building Act 1993* for consulting with and obtaining the approval of a specified authority for certain building works. It is required for a range of building-related matters including for proposals to build over an easement, build in a flood-prone area and for certain demolitions.

4.3.1 When is a report and consent required for building demolition?

In the context of the planning system, demolition (among other matters) requires report and consent under the building system.

BA s 29A

The report and consent of the relevant responsible authority (usually the relevant council) will be required for an application for a building permit for demolition, if:

- the proposed demolition, together with any other demolition completed or permitted within three years immediately preceding the date of the application, amounts to the demolition of more than half the volume of the building as it existed at the date the first building permit was issued within the demolition period for any part of the building; or
- the demolition is of any part of a building's facade facing the street.

Parts of a building that are covered by a roof should be included in calculating the volume, and unroofed areas should not be included. Internal demolition that does not reduce the volume of a building should not be included when calculating the volume.

The Victorian Building Authority's *Practice Note 57-2020 – Report and Consent* provides more detailed information about the report and consent process.

4.3.2 How long does a responsible authority have to provide a report and consent?

A responsible authority is required under the *Building Regulations 2018* to provide the report and consent within 15 business days. The 15 days start when the responsible authority receives a copy of the application from either the relevant building surveyor or the applicant. The day the request is lodged is not included in the 15 business days.

4.3.3 Failure of responsible authority to respond within 15 days

In accordance with clause 6A of schedule 2 to the *Building Act 1993*, the building surveyor may proceed to decide an application without a report from the responsible authority if one is not supplied within the prescribed time of 15 business days.

After this time, a reporting authority is deemed to have consented to the application, except in the circumstances of section 29A(2) of the *Building Act 1993*, where a planning permit is required for the demolition but has not been obtained. In that case, the reporting authority is deemed to have refused its consent.

It is essential for a building surveyor to establish whether a planning permit is required for the demolition and, if so, whether it has been issued. In the case of a responsible authority not responding within the prescribed time, the application can be determined using the decision on the planning application as the deemed response.

4.3.4 Request to Minister to introduce a planning scheme amendment

BA s 29B

If during the prescribed time for report and consent:

- the relevant planning authority applies to the Minister for Planning for an exemption from the requirement to give notice (section 20(1) of the PE Act) about an amendment to the planning scheme (this amendment would be to the effect that the relevant building may not be demolished or externally altered, except in accordance with a permit under the planning scheme), or
- the Minister for Planning is asked to make an amendment to the effect that the relevant building may not be demolished or externally altered, except in accordance with a permit under the planning scheme

the responsible authority must notify the relevant building surveyor accordingly within the 15-business-day period.

The building surveyor must then suspend the determination of the application for a demolition permit until after the planning scheme amendment is resolved.

4.3.5 Approval of planning scheme amendment

BA s29B

If the Minister agrees to:

- exempt a planning authority from the notice requirements of the PE Act in accordance with these provisions, or
- amend the planning scheme as requested

the Minister will advise the relevant planning authority or responsible authority of this decision.

The relevant building surveyor will also be advised that the Minister has agreed to the proposed planning scheme amendment, and the suspension of the determination of the application for a building permit for demolition will continue until the planning scheme is amended.

The application for a building permit for demolition cannot be approved unless a planning permit is granted.

The responsible authority must advise the relevant building surveyor if any of the following occur:

- withdrawal of the request by the planning authority for exemption from notice, or the application by the responsible authority to the Minister for an amendment
- refusal by the Minister of the request by the planning authority for exemption or the Minister's refusal of an application for an amendment to the planning scheme
- an amendment to the planning scheme coming into operation and having the effect of requiring that a permit be obtained to demolish or alter the building
- lapsing of an application for an amendment to the planning scheme.

BA s 29A(2)

If the planning scheme is amended that gives the effect of requiring a planning permit for demolition of a building, the responsible authority must refuse consent to any application under section 29A of the *Building Act 1993* until a planning permit is obtained.

Using Victoria's Planning System

Chapter 5: Reviews

Contents

5.1 Opportunities for review of planning decisions

Applications can be made to the Victorian Civil and Administrative Tribunal (VCAT) to review different types of planning decisions made by a responsible authority.

This chapter provides a general overview of the procedures and processes in the *Planning and Environment Act 1987* (PE Act) and the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) for the independent review of planning decisions by VCAT. The chapter provides general information only and is not a substitute for planning or legal advice.

PEA s 4(2)(j)

The right to an independent review of specified decisions is set down in the PE Act. One of the objectives of the PE Act is 'to provide an accessible process for just and timely review of decisions without unnecessary formality'. The PE Act establishes opportunities for VCAT to independently review decisions about planning permits made by the responsible authority administering the planning scheme. VCAT makes an independent assessment of the relevant issues. Most of the applications for review involve decisions about planning permits for the use and development of land.

VCAT also has other decision-making powers in circumstances where no review of an earlier decision is made because the application is made directly to VCAT, for example, applications to cancel permits, applications for enforcement orders and applications for declarations in relation to the interpretation of planning permits and planning schemes.

An application made to VCAT to review a decision or planning matter is an 'application for review'. The 'applicant for review' is the party who made the application.

5.1.1 The review process

The VCAT Act sets out VCAT's jurisdiction, powers and authority. The president or head of VCAT is a Supreme Court Judge. VCAT has five divisions: the Civil, Administrative, Residential Tenancies, Human Rights and Planning and Environment Divisions. Each division has lists of members who specialise in the various types of applications for review. Members of the Planning and Environment List are qualified and experienced legal practitioners, planners and other specialists.

The process of reviewing the decision begins when an application for review is made to the Principal Registrar, VCAT Planning and Environment List.

The Registrar may arrange mediation, a directions hearing or a compulsory conference to try to settle the matter or to clarify an aspect of the dispute. Most applications proceed to a hearing before a member of the Planning and Environment List, who is appointed by VCAT to decide the application.

The hearing gives all parties to the application for review the opportunity to present written and oral submissions, to call or give evidence and to ask questions of witnesses. VCAT decides the merits of the application and can affirm, modify or set aside the decision being reviewed. If the decision is set aside, VCAT can make a new decision.

VCAT's decision contains an order to give effect to its decision. For example, the order may direct that a permit is not issued, or that a permit is issued with specified conditions.

VCATA ss 116, 117

Sometimes VCAT will indicate its decision at the end of the hearing and orally give reasons for that decision. However, the decision can be reserved. In all cases a written decision is issued to all parties sometime after the hearing. If oral reasons have not been given, the decision must include written reasons.

VCAT's decision is final and binding on all parties unless there is an appeal to the Supreme Court on a question of law.

VCATA s 109

Parties to an application for review in the Planning and Environment List usually meet their own costs for preparing and presenting submissions at the hearing. However, VCAT can require a party to pay some or all of another party's costs if one party has been unnecessarily disadvantaged by another party's conduct. The failure of the applicant for review to attend the hearing without a good reason is a circumstance where costs might be awarded to another party.

VCATA ss 115B, 115CA

VCAT can at any time make an order that a party to a proceeding reimburse another party for the whole or any part of any fee paid by that other party in a specified time, in future in the proceeding or within a specified time after the fee is paid. It can also order a party to the proceeding pay, on behalf of another party, the whole or any part of any fee that may be required to be paid in the future by that other party in the proceeding.

5.1.2 Legislative provisions

The provisions for review of planning decisions are set out in the:

- PE Act
- VCAT Act.

The accompanying rules and regulations are set out in the:

- Planning and Environment Regulations 2015
- Victorian Civil and Administrative Tribunal Rules 2018 (VCAT Rules).

Table 5.1 provides a summary of general information about the more common types of decisions that are subject to independent review by VCAT. The table does not include every opportunity for review that is provided in the legislation. Applicants for review should confirm their review rights, the precise nature of the application for review and the relevant provisions of the Act with the responsible authority. It may also be prudent to obtain planning or legal advice.

In the first instance, it is essential to identify the type of application for review to be made, or the decision that is disputed, and to confirm that an application for review to VCAT can be made. This information will also help to clarify the scope of the matter and the relevant planning considerations.

Table 5.1 Summary of provisions for common types of applications for review to VCAT

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 39	Failure by the Minister, a planning authority or a panel to comply with procedures relating to a planning scheme amendment which has not been approved (Divisions 1, 2 or 3 of Part 3; or Part 8 of the PE Act)	A person who is substantially or materially affected by the failure	Not later than one month of becoming aware of the failure	PEA section 39(1)

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 77	Refusal to grant a permit	Applicant for permit	Within 60 days after the responsible authority gave notice of refusal to grant a permit under section 65	PE Regs reg 30
section 78(a)	Requirement to give notice of an application under sections 52(1)(d) or 57B of the PE Act	Applicant for permit	section 52(1)(d) – Within 30 days of requirement to give notice	PE Regs reg 31(1)
			section 57B –Within 30 days of requirement to give notice	PE Regs reg 31(1)
section 78(b)	Requirement for more information about a permit application under section 54(1) of the PE Act	Applicant for permit	Within 60 days after the responsible authority requested the information	PE Regs reg 31(2)
section 79	Failure to grant a permit within the prescribed time:	Applicant for permit		PE Regs reg 32
	• for a VicSmart permit application		After 10 business days from: • the day the responsible authority received the application; or • if more information was required, from when the information was provided taking account of the periods that the time does not run	
	• for any other permit application		After 60 days from: • the day the responsible authority received the application; or • if more information was required, from when the information was provided taking account of the periods that the time does not run	

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 80	Condition(s) in a permit	Applicant for permit	Within 60 days after the responsible authority gave notice of decision to grant a permit under section 64 of the PE Act, or, if no notice was given, within 60 days after the date the permit issued	PE Regs reg 33
section 81(a)	Refusal to extend time to commence development or use or to complete development An application for review cannot be made under section 81(a) if the request for the extension to the responsible authority was not made within the time specified in section 69(1)	An affected person	Within 60 days of the decision	PE Regs reg 34(1)(a)
section 81(aa)	Refusal to extend time for a subdivision plan to be certified in circumstances mentioned in section 6A(2) of the PE Act An application for review cannot be made under section 81(aa) if the request for the extension to the responsible authority was not made within the time specified in section 69(1)	An affected person	Within 60 days of the decision	PE Regs reg 34(1)(a)
section 81(b)	Failure to extend time within one month of request to extend time	An affected person	After one month from making the request, and within 60 days from that time	PE Regs reg 34(1)(b)
section 81(2)	Refusal to extend time within which information must be given by the applicant	Applicant for permit	Before the final lapse date for the permit application	PE Regs reg 34(2)
section 82	Decision to grant a permit	An objector who lodged a written objection to the grant of a permit, unless the application is exempt from right to review under section 82(1) of the PE Act	Within 28 days of the date of the notice of decision to grant a permit	PE Regs reg 35

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 82AAA(a)	Decision to grant a permit	A recommending referral authority who objected to the grant of a permit	Within 21 days of the notice of decision to grant a permit	PE Regs reg 36
section 82AAA(b)	Decision not to include a condition on a permit	A recommending referral authority who recommended that the condition be included on a permit	Within 21 days of the notice of decision to grant a permit	PE Regs reg 36
section 82B	Request to VCAT for leave to make an application for review of a decision to grant a permit for an application in which a written objection was received	A person affected by the decision but who objected to the grant of a permit, unless the application is exempt from right to review under section 82(1) of the PE Act	Does not apply if • the application for a permit is exempted from notice • a permit has been issued	N/A
sections 87(3), 87A, 88, 89(1)	Application to VCAT to cancel or amend a permit	The responsible authority; a referral authority; the owner or occupier of the land; any person who is entitled to use or develop the land concerned; or any person under section 89 of the PE Act (persons who objected or would have been entitled to object if they should have been given notice of the application, or they have been adversely affected by a material misstatement or concealment of fact in relation to the application, or a substantial failure to comply with the conditions of the permit or any material mistake in relation to the grant of a permit)	No prescribed time, but VCAT must be satisfied that the request was made as soon as practicable and that the limits on the power to cancel or amend a permit in section 88 of the PE Act are satisfied	N/A
section 97P(1)(a)	Refusal to issue a certificate of compliance	The applicant for a certificate of compliance	Within 60 days after notice of decision is given	PE Regs reg 49

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 97P(1)(b)	Failure to issue a certificate of compliance within the prescribed time	The applicant for a certificate of compliance	30 days	PE Regs reg 50
section 97Q	Request to VCAT to cancel or amend a certificate of compliance	A person who believes they have been adversely affected by a material misstatement or concealment of fact or a material mistake	No time prescribed	N/A
section 114	Application to VCAT to make an enforcement order	The responsible authority or any person	No time prescribed	N/A
section 120	Application to VCAT to make an interim enforcement order	The responsible authority or any person who has applied for an enforcement order under section 114 of the PE Act	No time prescribed	N/A
sections 149(1)(a), 149(1)(b), 149(1)(c)	Review of a decision in relation to a matter if: • (1)(a) a planning scheme; • (1)(a) a permit condition; • (1)(b) an agreement under s173; or • (1)(c) an enforcement order; requires that the matter: • must be done to the satisfaction of the specified body/person [(a),(b),(c)]; • must not be done without the consent or approval of the specified body [(a) and (b)]; or • makes no provision for settling disputes in relation to the matter (b)	A specified person (as prescribed under section 148 of the PE Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	30 days	PE Regs reg 54
section 149(1)(d)	Review of a decision if the specified body fails to make the decision in relation to section 149(1) (a), (b) or (c), within a reasonable time (if there is no prescribed time for the decision)	A specified person (as prescribed under section 148 of the PE Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	No time prescribed	N/A

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 149A	Application for a determination/declaration if a matter relates to: • the interpretation of the planning scheme or a permit in relation to land or a particular use or development of land • whether or not section 6(3) of the PE Act applies to a particular use or development • the continuation of a lawful use, or permitting the use of buildings or works for a lawful purpose before the coming into operation of the planning scheme or amendment • the interpretation of an agreement under section 173 of the PE Act	A specified person (as prescribed under section 148 of the PE Act) – the owner, user or developer of the land directly affected; a specified body or the occupier of Crown land	No time prescribed	N/A
section 149B	Application for a declaration concerning any matter which may be the subject of an application to VCAT under the PE Act; or anything done by a responsible authority under the PE Act	Any person	No time prescribed	N/A
section 184(1)	Application for an amendment to a proposed agreement under section 173 of the PE Act if the use or development of the land is conditional upon the agreement being entered into and the owner objects to any provision of the agreement	The owner of the land	Within 60 days of being given a copy of the proposed agreement	PE Regs reg 61
section 184A(1)(a) and (b)	Review of a decision to: • amend the agreement in a different manner to the proposal • end the agreement in a different manner to the proposal	The person who applied to amend or end the agreement	Within 21 days after the responsible authority gave notice of its decision	PE Regs reg 62

Section of PEA	Type of application for review	Who can make the application for review	Time limit for making the application for review	Time limit prescribed in
section 184B	Review of a decision to amend or end an agreement	A party to the agreement (other than the person who applied to amend or end the agreement)	If the party must be given notice of the responsible authority's decision to amend or end the agreement under section 178E(30)(a) or (b), within 21 days after the responsible authority gave notice	PE Regs reg 63
section 184C	Review of a decision to amend or end an agreement	An objector	Within 21 days after the responsible authority gave notice of its decision	PE Regs reg 64
section 184D	Review of a decision to amend or end an agreement	Any person entitled to object to a proposal but did not object because the person was not given notice of the proposal under section 178C	No prescribed time	N/A

PEA – *Planning and Environment Act 1987*

PE Regs – Planning and Environment Regulations 2015

5.1.3 Establishing the scope of an application for review

Most applications for review to VCAT involve decisions made by the responsible authority to grant or refuse to grant a permit under a planning scheme. Planning permits relate to the use and development of land. In some circumstances a permit will be required to change the use of land. In other circumstances, a change of land use will not require a permit, but a permit may be required to construct a building or to carry out works.

In the case of applications for review concerning the use and development of land, it is recommended that the parties identify why and for what purpose a planning permit is required with direct reference to the relevant parts of the planning scheme. The reason why a permit is required for a particular proposal will establish the scope of the relevant planning considerations at the hearing. The relevant planning considerations include the Municipal Planning Strategy, the Planning Policy Framework, the purpose of the zone and/or overlay and any decision guidelines contained in the planning scheme.

VCAT has established a specific procedure for applications for review that relate to VicSmart permit applications. More information about this procedure is provided in part 5.6.1 of this chapter.

5.1.4 Exemption from objector review rights

PEA s 82

Some provisions in the planning scheme exempt particular types of permit applications from review by objectors under section 82(1) of the PE Act. This section enables an objector to apply to VCAT for the review of a decision by the responsible authority to grant a permit. If an application is exempt from notice, an objector does not have a right of review of the decision made by the responsible authority.

Planning scheme cls 32.08-12 and 71.06-2

For example, this exemption applies in the General Residential Zone for permit applications which seek to subdivide land into lots each containing an existing dwelling or car parking space. It also applies to VicSmart permit applications.

An objector to the grant of a permit should confirm with the responsible authority that the planning scheme does not exempt the application from the review rights of section 82(1) of the PE Act.

PEA ss 83A, 83(2)

In some instances, councils give notice of an application, even though notice is not required by the PE Act, resulting in an objection being lodged. Such objections may not lead to rights to seek a review of a decision.

While planning schemes only expressly specify the review rights of section 82(1) when exempting a class of application from notice and review, objectors who received such a notice are also excluded from participation in other review types. These other review types include appeals against refusal, failure and conditions. The reasons for this are set out by VCAT in *West Valentine Pty Ltd v Stonnington City Council* [2005] VCAT 224 (9 February 2005).

5.2 Making an application for review

5.2.1 What must the person making the application for review do?

Lodge the application for review within the prescribed time

An application for review must be made to VCAT within the prescribed time. The prescribed time varies for different types of applications for review. Table 5.1 provides information about the prescribed time for making applications for review. The time limits for making an application for review are prescribed by the PE Act and the Regulations.

An application for review by an objector to the grant of a permit must be made no later than 28 days after the date of the notice from the responsible authority advising the objector of its decision to grant a permit.

Where the permit has been refused or the applicant wishes to have the conditions reviewed, an application for review must be made no later than 60 days after the responsible authority gave notice of its decision.

VCATA s 126(1)

A request to VCAT to extend the time for making an application for review is unlikely to be successful unless unusual circumstances apply, or all parties consent to the application being made outside of the permitted timeframe.

Requirements for an application for review

VCATA s 67; VCAT Rules rr 4.03(1), 8A.03

An application to VCAT must be made in accordance with the Victorian Civil and Administrative Tribunal Rules 2018 and must:

- be submitted in the appropriate application form published on VCAT's planning disputes webpage (**planning.vcat.vic.gov.au**)
- be in writing
- contain the full name and address of the applicant and the respondent
- contain a brief description of the issue or matter in dispute
- state the remedy being sought from VCAT
- include an electronic address for the applicant.

For the most common types of cases, the applicant is required to provide a 'statement of grounds' as part of the application for review. The statement of grounds is a short summary of the grounds that the applicant for review wishes to present to VCAT at the hearing. It is important because it explains to the other parties the reasons for the review and position of the applicant for review.

VCATA s 68

A fee must be paid when the application is lodged. Information about fees and the waiving of fees can be found on the relevant application for review form. VCAT will not take any further action in relation to the application until the required fee is paid. The forms can be obtained on VCAT's website **vcat.vic.gov.au**.

VCAT Rules r 4.04

The completed application for review form – including the statement of grounds and the required fee – must be sent to or lodged with the Principal Registrar, VCAT Planning and Environment List, at 55 King Street, Melbourne, within the prescribed time. An application may be lodged electronically or by post.

VCAT's website provides a platform for completing application forms online and for filing them electronically. Application fees can also be paid online when the application is lodged.

For assistance in completing the form, VCAT's customer service team can be contacted by email to admin@vcat.vic.gov.au or by calling 1300 018 228.

Notice to other parties by the applicant for review

After an application for review is made, VCAT instructs the applicant for review to serve a copy of the application on all other parties. These instructions must be complied with, or the application may be struck out.

Statement of grounds by other parties

VCATA Sch. 1, cl 56; VCAT Rules r 8A.02

A person who wishes to contest an application for review must lodge a statement of grounds with VCAT within any time directed by the tribunal, or if no time is specified, within 14 days of receiving a copy of the application for review. A copy of the application must also be served on the applicant and the responsible authority. Unless VCAT and the applicant for review receive a statement of grounds from an objector within 14 days from the date of the notice, the objector will not be recognised as a party to an application for review and may not receive any further correspondence from VCAT about the application.

If a person fails to provide a statement of grounds within 14 days, VCAT cannot allow them to be heard as a party to the review unless it has considered the views of the applicant for

review and the responsible authority. Requests to be heard in these circumstances are usually made and decided at the commencement of the hearing or at an earlier directions hearing. (Refer to part 5.8.1 for more information about directions hearings.)

All persons should establish their right to be heard as a party to the proceeding before VCAT by circulating a statement of grounds to the other parties within 14 days of receiving notice or as directed by VCAT.

PEA s 84A

At the hearing, the arguments presented by a party are not necessarily restricted to those included in the circulated statement of grounds. However, if additional grounds are introduced during the hearing, VCAT will ensure that the other parties have a reasonable opportunity to consider and reply to them. This may include adjourning the hearing and the possibility of costs being incurred.

Administrative arrangements

VCAT acknowledges receipt of an application for review by writing to the applicant. It provides further instructions to the applicant for review to ensure that all other parties are given adequate notice of the application and the applicant's statement of grounds.

The applicant and the other parties are required to follow VCAT's directions regarding notice to other parties, procedures, circulation of statement of grounds and any other matter. Failure to do so can result in the application for review being dismissed without a hearing.

VCATA s 82

VCAT may direct the consolidation of applications for review into one proceeding (in the case of multiple applications for review by objectors) or a combined hearing. It is common practice for applications for review relating to the same land to be heard together. For example, a review of the conditions in a permit and a review of the decision to grant a permit concerning the same permit application will usually be combined and heard together.

VCATA s 144

The Registrar of VCAT keeps a register of all applications for review. These can be inspected during office hours.

5.2.2 Who are the parties to an application for review?

Applicant for review

VCATA s 59(1)(b)(i)

The person who makes the application for review is a party to the application and is known as the applicant for review. Table 5.1 identifies the person (permit applicant, objector to the grant of a permit or other party) who can make an application for review.

Objector

PEA s 83(2); VCATA Schedule 1, cl 56

An objector is a party to a proceeding for review if the objector is given notice of the application for review and lodges with VCAT a statement of grounds on which they intend to rely at the hearing.

If an objector lodges a statement of grounds and indicates on the form that they do not intend to participate in the hearing, then that objector is not a party to the proceeding, but their statement of grounds will still be considered by VCAT.

Responsible authority

VCATA s 59(1)(b)(ii)

The responsible authority is automatically a party to most applications for review.

Referral authority

PEA s 83(1)

A determining referral authority is a party to a proceeding for refusal to grant a permit if it had objected to the grant of a permit or the permit application was refused because a condition required by the referral authority conflicted with a condition required by another referral authority. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

PEA s 83(3)

A recommending referral authority is a party to a proceeding for review if the authority is given notice of the application for review. At the hearing, the referral authority's representative is required to explain the reasons why the referral authority took the action it did in relation to the application for a permit.

Affected persons

VCATA ss 59, 60

VCAT may order that a person be joined as a party to a proceeding if it considers that the person's interests are affected by a proceeding, or that the person ought to be bound by or have the benefit of an order of the tribunal. Any other person whose interests may be affected by an application for review can apply to VCAT to be made a party.

VCATA s 61

An unincorporated association cannot be a party to a proceeding. However, it is usual practice to allow a member of such an association to make a submission at the hearing or be joined as a party in their own right.

5.2.3 Arrangements for the hearing

Responsible authority to supply information

VCAT Practice Note – *PNPE2 Information from Decision-Makers and Authorities* sets out the information to be provided by a responsible authority or other decision-making body on receiving notice that an application for review has been made.

The responsible authority must provide the VCAT Registrar with the documents and information in writing set out in VCAT Practice Note – *PNPE2* within 10 business days of receiving notice of an application for review. The required information depends on the type of application for review. The information required may include:

- a full copy of the application for permit, including plans and accompanying documents
- a copy of the responsible authority's decision
- the name of the planning scheme, zone, and any overlay or other control that applies to the subject land
- the planning scheme provision under which a permit was required
- details of public notice required to be given
- the officer's report on the application for permit
- names and addresses of all objectors and other parties to the application for permit.

In applications for review of a decision to refuse to grant a permit, or a failure to decide to grant a permit, VCAT requires the responsible authority to provide draft permit conditions not later than one week before the hearing. This does not mean that VCAT has decided to grant the permit. However, it gives the responsible authority and other parties an opportunity to comment on the draft conditions during the hearing.

VCAT also requires the responsible authority to provide a realistic estimate of the time required for the hearing and to indicate whether the application for review raises a question of law.

Setting the hearing date

The Registrar sets the date of the hearing. Any request to change the date of a hearing must be made following the procedures in VCAT Practice Note – *PNVCAT1 – Common Procedures*.

VCATA s 99

VCAT advises all parties when and where the application for review is to be heard.

Most hearings are held at VCAT, 55 King Street, Melbourne. Hearings may be held in regional centres, and must be specifically arranged, depending on a suitable venue being available.

VCATA s 99

If appropriate, VCAT can also conduct hearings wholly or partly using video conference (online) or telephone. These methods have been used where, for example, a party is unable to attend the hearing venue or where (more recently) government health directions have prevented indoor gatherings.

Giving notice of an application for review

PEA s 52

Notice to the owners and occupiers of adjoining land has usually been given for applications for permit that are subject to an application for review.

PEA s 83B

If notice of an application for permit was not given, or the notice was not adequate, the President of VCAT can direct notice of the application for review to be given. If the applicant for review fails to comply with the direction for notice, the application for review lapses.

PEA s 83(2)

A person who objects to the grant of a permit (as a result of receiving notice at the direction of VCAT) is a party to the proceeding, provided a statement of grounds is lodged with the tribunal.

5.3 Withdrawing, adjourning or amending an application

5.3.1 Can an application for review be withdrawn?

VCATA s 74

The applicant for review can withdraw the application for review only with the formal agreement of VCAT. A withdrawal can result in an order for costs being made against the applicant for review if the other parties have spent time and money preparing for the hearing and short notice of the request for withdrawal is given. A written request to withdraw an application for review must be made to the Registrar at the earliest opportunity.

When leave is granted by VCAT for the withdrawal of an application, the usual course is for the tribunal to also make the following orders for the different review types:

- Section 77 – Refusal to grant a permit: that no permit be issued if parties have agreed that no permit is to issue.
- Section 79 – Failure to grant a permit: that no permit be issued if the applicant has agreed not to pursue the permit application.

- Section 80 – Conditions on a permit: that the contested conditions remain unchanged from the condition included on a permit or notice of decision if parties have reached agreement on that basis.
- Section 82 – Objector review: that a permit be issued in accordance with the notice of decision issued by the council if all parties have agreed that a permit is to issue based on the same plans and with the same conditions specified in the notice of decision.

If agreement has been reached with the council and other parties to vary the plans or conditions, then a consent order should be sought from VCAT.

Procedures for withdrawing an application or seeking a consent order are set out in VCAT Practice Note – *PNVCAT1 – Common Procedures*.

5.3.2 Can the hearing date be adjourned?

If a party wishes to seek an adjournment, a written request for an adjournment must be made to the Registrar giving detailed reasons for the request. VCAT Practice Note – *PNVCAT1 – Common Procedures* sets out the procedure for any party to apply for an adjournment. In the Planning and Environment List, the consent of other parties will usually be required for an adjournment. VCAT may refuse an adjournment, even if all parties consent, and the parties must work on the basis that the hearing is proceeding unless or until they are notified that the tribunal has granted the adjournment.

Any request for an adjournment should be made well before the hearing date to avoid successful claims for costs.

5.3.3 Can amended plans be considered at the hearing?

VCATA sch. 1 pt 16 cl 64

VCAT can make any amendment to the application for permit. The permit applicant may request VCAT to agree to amend the permit application.

The usual types of request include changing the name of the permit applicant, the description of the land or the nature of the proposal. Most often, VCAT is asked to agree to a request to substitute revised plans for the original plans submitted with the permit application. Application plans cannot be substituted without VCAT's formal agreement.

As a guiding principle, amendments should not be used to materially increase the scale or intensity of a proposal or to introduce significant new aspects that have not been considered by the responsible authority or primary decision maker based on the original application.

VCAT must also be satisfied that all parties have had a reasonable opportunity to consider the changes and how they might be affected.

5.3.4 What is the process to amend the permit application and plans?

What must the applicant do to seek an amendment to the application?

VCAT Practice Note – *PNPE9 Amendment of Planning Permit Applications and Plans* sets out the steps that must be followed if a permit applicant seeks to amend plans in a permit application or an application to amend a permit. At least 30 business days (if sent by email, or 35 business days if sent by post) before the hearing date, a permit applicant must file with VCAT and give all parties to the proceeding, the following documents:

- a cover letter advising the recipient, as appropriate:

  - if they are not a party to the tribunal proceeding but wish to be, or if they are already a party and want to amend their statement of grounds, they must lodge a completed statement of grounds form with VCAT
  - the date by which statement of grounds forms must be lodged with VCAT (date to be calculated by the permit applicant in accordance with *PNPE9 Amendment of Planning Permit Applications and Plans*)
  - that they can obtain more information including copies of amended plans and supporting material from the permit applicant
  - the date of any hearing and/or compulsory conference.
- a completed *PNPE9 Form A – Notice of Amendment of an Application*
- a written statement:
  - describing the changes from the previous plans or other changes made to the application (statement of changes), including a full list of any:
    - amended plans, including the drawing number, revision number and the date of each plan
    - plans that are not being amended but which are to remain part of the application
  - explaining changed outcomes (for example, garden area calculations or car parking provision)
  - giving the reasons why the permit applicant wants to make the changes, including a detailed explanation of each change and how it will improve the proposal or respond to issues that have been raised about the proposal.
  - providing corresponding updates to supporting material, such as planning, traffic, car parking and sustainability assessments.
- a copy of the amended plans (including amended supporting plans, such as shadow diagrams), which must:
  - be clearly readable and drawn to scale (with dimensions)
  - highlight where changes have been made using notations or other graphic measures (for example, through symbols, coloured highlights or by encircling changes with a 'cloud')
  - reflect changed outcomes (for example, shadows, streetscape elevations and garden areas).

The permit applicant must also give any objector or person notified of the permit application who is not a party to the hearing copies of the following documents:

- a cover letter (containing the information described above)
- a completed *PNPE9 Form A – Notice of Amendment of an Application*
- a statement of changes (described above).

The completed *Form A – Notice of Amendment of an Application* should include a date by which a statement of grounds must be lodged with VCAT. That date should be at least 19 business days after the day the permit applicant gave the last of the notices specified under *PNPE9 Amendment of Planning Permit Applications and Plans*.

The permit applicant must also give notice to persons of how to access copies of amended plans. Documents can either be inspected at the main office of the responsible authority or a request can be made to the permit applicant for copies.

Three business days after notice has been given, the permit applicant must submit a *PNPE9 Form B – Statement of Service* to VCAT to confirm that notice has been given to all parties. This form can be accessed and submitted online via the VCAT website.

What action can a person that receives a notice of an amended application take?

A person that receives notice of an amended application may:

- if already a party to the hearing:
  - do nothing, and continue to rely on their statement of grounds that has been filed with VCAT
  - amend their statement of grounds
  - object to the request for the amendment to the permit application, explaining the reasons for their objection.
- if not a party to the hearing and the person:
  - does not want to be involved in the proceeding – do nothing
  - wants to become a party to the proceeding:
    - lodge a statement of grounds with VCAT by the date specified in the notice (form available from the VCAT website)
    - tick the box in the statement of grounds form indicating that you intend to appear and present a submission at the hearing
    - pay the relevant fee
    - give a copy of the statement of grounds to the permit applicant and the responsible authority by the date specified in the notice.
  - does not want to become a party and appear at the final hearing, but would like to provide a statement of grounds for VCAT's consideration:
    - lodge a statement of grounds with VCAT by the date specified in the notice (form available from the VCAT website)
    - tick the box in the statement of grounds form indicating that they do not intend to appear and present a submission at the hearing.
    - give a copy of the statement of grounds to the permit applicant and the responsible authority by the date specified in the notice.

How will VCAT consider an application to amend the plans?

VCAT will normally consider a request to amend a permit application including proposed amendments to plans at the commencement of the hearing. However, an application may be considered earlier than this, for example, at a practice day hearing (a brief hearing, usually no more than 30 minutes, where VCAT may give generally procedural directions, but may also make orders on matters).

In deciding whether to amend a permit application including any plans, VCAT will consider a range of factors, including the extent and impact of the changes and whether all parties and potentially affected persons have been given sufficient time to consider the proposed changes before the hearing. VCAT will also take into account whether the time limits in *PNPE9 Amendment of Planning Permit Applications and Plans* have been complied with and any disadvantage caused to other persons by any non-compliance.

If VCAT amends a permit application, the amended plans and other amended documents are substituted as the application documents in the proceeding. This means that the VCAT

member hearing the proceeding will consider the merits of the amended permit application including any amended plans.

In a proceeding for the review of permit conditions under section 80 of the PE Act, VCAT may allow an amendment request conditionally, pending the final determination of the proceeding. This would enable the hearing to proceed on the basis of the applicant's 'preferred' permit application or plans. However, there would be no formal substitution of the application or plans at the hearing in a manner that may pre-empt the outcome in the proceeding or create possible anomalies for the permit or plans if the application is wholly or partly unsuccessful.

If VCAT refuses the request to amend the permit application, the hearing will proceed only in relation to the plans and material that were before the responsible authority. If parties had prepared for the hearing based on the assumption that the plans would be amended and are not in a position to make submissions in circumstances where the plans are not amended, then VCAT may consider whether the hearing should be adjourned.

5.4 What happens at the hearing?

5.4.1 Who hears an application for review?

VCATA s 64, sch. 1 pt 16 cl 52

Members of the Planning and Environment List of VCAT are appointed by the President to hear and decide an application for review. Members of the Planning and Environment List are qualified legal practitioners, planners or other professionals with relevant expertise. Most applications are heard by either a single member or two members sitting together.

5.4.2 Attendance by the parties

VCATA s 62; PNVCAT1; PNPE1

Most parties attend the hearing to present their submission in person or through a representative. Attendance is an effective way of convincing VCAT to support the arguments and provides the opportunity to respond to the material put by other parties at the hearing, and to question expert witnesses. The applicant for review and the responsible authority's representative are required to attend the hearing.

Objectors do not have to attend the hearing. An objector can inform VCAT in writing that they are not attending the hearing and request that their written submission be taken into account in deciding the application. However, it is recommended that objectors attend the hearing to present their case and to participate in the hearing. As noted above in part 5.2.2, if an objector lodges a statement of grounds and indicates on the form that they do not intend to participate in the hearing, then that objector is not a party to the proceeding, but their statement of grounds will still be considered by VCAT.

A party may attend in person and present its own case or be represented by another person.

VCATA ss 97, 98; PNVCAT3

Whether or not a party is represented, VCAT has a general duty to ensure a fair hearing for all parties. A fair hearing involves the provision of a reasonable opportunity for parties to put their case and to have the case determined according to law by a competent, independent and impartial tribunal.

VCATA ss 51(5), 99(2)

If the applicant for review fails to attend a hearing (personally or by representative) VCAT must confirm the decision of the responsible authority. Costs may be awarded against the applicant.

If another party fails to attend the hearing and VCAT is satisfied that adequate notice of the hearing was given, the matter can still be heard and determined in the absence of the party.

VCATA s 120

A proceeding can be reopened within specified time limits following the request of a person affected by an order who neither appeared nor was represented at the hearing due to circumstances beyond their control. However, it is unusual for such a request to be granted. Strong grounds would be required for such a request to succeed.

5.4.3 Procedure at hearings

VCATA ss 97, 98; PNVCAT3

Hearings are open to the public and conducted by VCAT in a structured manner to ensure all parties are given a reasonable opportunity to be heard. VCAT is not bound by the rules of evidence or any of the formal court practices. However, it must act fairly and is bound by the rules of natural justice. This means that all parties must be given the opportunity to be heard.

Hearing notices are published on the VCAT website the evening before the hearing day and can be inspected on the day of the hearing in the ground floor foyer of VCAT at 55 King Street, Melbourne. These notices contain advice about the commencement time for the hearing, the hearing room and its location, and VCAT members appointed to conduct the hearing. The party should proceed to the hearing room and take a seat at the table and fill in the appearance sheet. This sheet is the record of the parties who attended the hearing.

When the VCAT members enter the hearing room, it is usual to stand until invited to be seated. The presiding member is often addressed as Mr Chairman or Madam Chair or Member with their surname and the other tribunal members are addressed as Mr or Ms or Member with their surname or Member. Other parties are addressed as Mr or Ms with their surname.

While the atmosphere at a hearing before VCAT is relatively informal compared to a court hearing, there is a structured order of proceedings and courteous behaviour is expected.

The usual procedure is for the parties or their representatives to speak in the following order:

- the responsible authority
- the council if it is not the responsible authority
- the referral authority or relevant statutory authorities
- the objector(s)
- any other person or body who is not a party
- the permit applicant
- a right of reply to parties other than the permit applicant.

This order of presentation is usually followed, but it can be changed at VCAT's direction.

VCATA s 102; PNVCAT2

A party may call an expert witness to give evidence. Witnesses are available for cross-examination by other parties, in the order of appearance. More information about giving evidence and cross-examination of witnesses is provided later in this chapter.

Parties making submissions, such as the objectors and the responsible authority, are not subject to cross-examination or questions by other parties. However, VCAT may allow questions for clarification by other parties and can ask questions of parties during or after their presentation.

Each party may have a reasonable opportunity to respond to the case put by the other parties by way of right of reply. A right of reply is not to be used as an opportunity to simply repeat submissions which a party has already made; rather it should be confined to matters arising from the submissions of the other parties, which have not already been addressed by the replying party.

VCATA s 129

VCAT can inspect the site and surrounds before deciding the application for review.

5.4.4 Submissions

VCATA s 102

The VCAT website contains information and guidelines to help parties make an effective submission to VCAT. The guidelines contain advice about the structure and content of submissions, as well as the general procedures followed at a hearing.

VCAT will only consider issues relevant to the decision being reviewed. Therefore, a submission should directly address the decision or planning matter that is the subject of the review. For example, building height is not relevant if the application for review concerns the decision to grant a permit to reduce a car parking requirement.

A submission to VCAT must set out the arguments relied on by the party in support of its case and the reasons it takes the view that it does.

Written submissions by the responsible authority must support its original decision and establish the context of the application for review. Relevant information includes:

- a description of the subject site
- a description of the proposed use and/or development
- the history/background of the application
- the relevant planning policies and provisions as they affect the subject site and surrounds
- summary of objections
- the matters taken into account by the responsible authority in reaching its decision and the reasons for the decision.

Submissions may be presented orally or in writing, or both. Most parties prepare a written submission in advance of the hearing. Written submissions are not compulsory, but they are the most common and the preferred form of presentation to VCAT.

Sometimes VCAT will ask for written submissions and any supporting documents to be filed before the hearing. VCAT may also require one or more parties to also prepare and file a tribunal book containing relevant documents prior to the hearing. These requirements will be set out in an order.

If submissions have not been filed prior to the hearing, a party should provide sufficient copies of the written submission and any other documents for VCAT member(s) and all other parties at the hearing. At least six copies are usually required. If there are a large number of parties involved, additional copies will be required.

Submissions may include visual material such as locality plans. Photographs of the site and surrounding area can be an effective way of demonstrating the relevant points. Photographs should be accompanied by information about where and when they were taken.

Projection facilities are available in some hearing rooms. If a party wishes to use these facilities, a request should be made to the VCAT registry ahead of the scheduled hearing.

5.4.5 Expert evidence

VCATA ss 97, 98; PNVCAT2

VCAT will take into account material presented to it at the hearing, including the evidence presented by witnesses. A lay person may give evidence, however, it is more likely to be given by an expert witness.

Expert evidence is not required to decide most applications for review. However, expert evidence on a key issue may be of assistance to VCAT in some cases. For example, where traffic and parking impacts are disputed, expert evidence from a traffic engineer may assist VCAT in deciding the merits of the application. Expert evidence from a conservation architect may assist the tribunal in deciding the merits of an application to demolish a building in a heritage area.

VCAT Practice Note – *PNVCAT2 – Expert Evidence* sets out the obligations of an expert witness and requirements for presenting expert evidence to the tribunal. The practice note clearly states that an expert witness's duty is to assist VCAT on relevant matters. An expert witness is not an advocate for the party retaining the expert. The guidelines contain requirements for the content and form of the expert's report. Unless specified in a direction or order by VCAT, circulation of the expert's written report to all parties and the tribunal is required at least 10 working days before the hearing.

5.4.6 Questioning an expert witness

VCATA s 102

Expert witnesses will be made available for questioning (cross-examination) by the other parties. The questioning normally follows the same order as that used when presenting submissions to VCAT (see part 5.4.3 'Procedure at hearings' in this chapter). Questions must relate to the evidence given or to other matters relevant to the application for review within the expertise of the witness.

After the cross-examination by other parties, the person who called the witness then has the opportunity for further questions to clarify any matters raised. New areas of questioning cannot be introduced at this stage.

Questions in cross-examination may seek to draw out information or challenge the evidence put by the witness. It may be helpful to make notes during the initial submission about points to query. A party can ask questions of the witness but cannot use this opportunity to make statements about their views.

5.5 The decision

5.5.1 What factors must be taken into account?

PEA s 60(1)

Before deciding on an application, the responsible authority must consider a range of matters, as specified in section 60(1) of the PE Act. Section 60(1A) of the PE Act also lists matters that the responsible authority may consider, if the circumstances appear to so require.

VCATA s 51

When VCAT is hearing an application for review, it takes the role of the decision maker and has all the functions of the decision maker as well as the functions conferred on the tribunal under the VCAT Act.

PEA s 84B

In addition to setting out the matters that the responsible authority must consider in assessing an application, the PE Act includes a complete list of the matters that VCAT must take into account in determining an application for review.

VCAT must first take into account and have regard to the matters that the original decision maker:

- took into account and had regard to; or
- was required to take into account and have regard to.

Not all the matters listed in section 84B of the PE Act will be relevant in all cases; but where they are relevant, they must be considered. The matters likely to be relevant in most cases include:

- the planning scheme
- the objectives of planning in Victoria
- any relevant state environment protection policy
- the extent of participation of persons residing or owning land in the vicinity of the subject land in application procedures required to be followed before the responsible authority could make a decision
- any amendment to a planning scheme which has been adopted by the planning authority, but not, as of the date on which the application for review is determined, approved by the Minister or planning authority
- any agreement made under section 173 of the PE Act that affects the subject land.

Planning schemes cl 71.06

VicSmart permit applications are exempt from some decision-making considerations in sections 60 and 84B(2) of the PE Act. The responsible authority and VCAT must not have regard to these 'exempted' considerations.

PEA s 84AB

VCAT may confine a review to particular matters in dispute if all the parties agree. If a review is so confined, the matters that must be considered under section 84B are also confined to the particular issues in dispute.

VCATA s 51A

VCAT at any time in the proceeding can invite the decision maker to reconsider the decision.

On being invited by VCAT to reconsider a decision, the decision maker may:

- affirm the decision
- vary the decision
- set aside the decision and substitute a new decision for it.

If the decision maker varies or sets aside and substitutes a new decision and the proceeding continues, it is taken to be a proceeding for review of the decision as varied or the new decision.

5.5.2 The form of the decision

VCATA s 116; PEA s 85

VCAT's decision or 'order' must be in writing and will contain the reasons for the decision or record that oral reasons were given. All parties involved in the application for review receive a copy of VCAT's decision.

A decision is not final until it is issued in writing and authenticated by being stamped with VCAT's seal.

The decision may contain a direction for the responsible authority. For example, the decision might be that the permit is granted and the responsible authority is directed to issue the permit.

VCATA s 117

VCAT is required to give reasons for its decision. If the reasons are given orally, a party may request the tribunal to give the reasons in writing. The request must be made within 14 days of the order being made.

5.5.3 Acting on a VCAT decision

PEA s 86

If VCAT directs the responsible authority to issue a permit, the permit must be issued within three business days after:

- receiving a copy of the order, if the responsible authority is a Minister; or
- the first ordinary meeting of the responsible authority is held following receipt of the order.

PEA ss 52(1), (4)

No further action is required by the responsible authority when a notice of decision to grant a permit has been issued and VCAT directs that the application for review be allowed in favour of the objector(s), (that is, a refusal notice is not required to be issued).

VCATA s 148

VCAT's decision is final and binding on all parties to the application for review. However, an appeal to the Supreme Court on a question of law may be made. The outcome of an appeal to the Supreme Court may uphold, quash or change VCAT's decision. The Supreme Court can also refer a matter back to VCAT for a rehearing.

5.5.4 Costs

VCATA ss 109, 111; PEA s 150(4); VCATA sch. 1 pt 16 cl 63

Each party to an application for review in the Planning and Environment List usually meets its own costs. It is unusual for VCAT to order that a party pay a specified part of the costs of another party.

However, VCAT has the power to make an order for costs if it is fair to do so in circumstances where a party has acted unreasonably to the disadvantage of other parties.

In determining whether to make an order for costs, VCAT may also consider whether the proceeding was brought primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceeding.

If VCAT considers that the proceedings have been brought vexatiously or frivolously, or primarily to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings, and that any other person has suffered loss or damage as a result, it can order the person who brought the proceedings to pay costs to that other person. The amount is assessed by VCAT and may include compensation for loss or damage and an amount for costs.

It is recommended that a party obtain legal advice if it is concerned about the potential for costs to be awarded against it.

5.6 Short and major cases lists

5.6.1 Reviews relating to VicSmart permit applications

Applications for review relating to VicSmart permit applications are heard and determined in the VCAT Short Cases List (see part 3.8.15 for more information about VicSmart applications).

The Short Cases List is a sub-list of the Planning and Environment List and handles short and less complex disputes that allow parties to have their matter heard and determined within a short timeframe. Tribunal members hearing cases in this list are encouraged to provide oral decisions at the conclusion of the hearing. Site inspections are unlikely to be taken.

The applicant for review of a VicSmart matter must complete VCAT's VicSmart application form and submit the following information with the application:

- a copy of the responsible authority's decision (unless the review relates to a failure of the responsible authority to make a decision within the prescribed time)
- all application documents and plans
- if the land is affected by a registered restrictive covenant, a copy of the covenant
- where the application required referral under clause 66 of the planning scheme, a copy of any written response from the referral authority
- a copy of the council officer's report (if available)
- where the review relates to a failure of the responsible authority to decide within the prescribed time, a calculation of elapsed days from when the permit application was received by the responsible authority.

The application form can be obtained from VCAT's website **vcat.vic.gov.au**.

For more information about the VCAT review process for VicSmart, its operation, and preparing submissions, refer to the information sheet VCAT Review Process for VicSmart (March 2017) on the department's website.

5.6.2 Major Cases List

The VCAT Major Cases List is a sub-list of the Planning and Environment List and handles certain applications for review involving larger developments.

A permit applicant or permit holder can apply to have their case heard as a major case if it is one of the following types of cases:

- An application for review by a permit applicant under sections 77 or 79 of the PE Act.
- An application for review by a permit applicant or permit holder under section 80 of the PE Act.
- An application for review by an objector under sections 82 or 82B of the PE Act.
- An application by a permit holder, owner or occupier of the subject land under section 87A of the PE Act.

VCAT (Fees) Regs 2016 reg 7, sch. 1 cl 12

At the commencement of a proceeding under sections 77, 79, 80 and 87A of the PE Act, an applicant may elect to have the proceeding entered into the Major Cases List. An applicant in these proceedings cannot seek to transfer a case to the Major Cases List after the application has been submitted.

In an application under section 82 or 82B of the PE Act, the applicant for the permit may elect to have the proceeding entered into the Major Cases List at any time on payment of the relevant fee.

The Major Cases List application forms can be found on the VCAT website. A higher application fee applies where the applicant elects to have the proceeding included in the Major Cases List.

If an applicant does not choose to have an eligible proceeding included in the Major Cases List, it will be processed and heard in accordance with the usual procedures and timeframes that apply in the Planning and Environment List for applications of that type.

5. 7 Other types of applications to VCAT

The previous parts of this chapter addressed applications to VCAT that required it to review an earlier decision made by the responsible authority.

Other types of applications to VCAT require it to make a decision or a declaration in its own right as distinct from the remaking of an earlier decision by another authority. Examples of these types of applications to VCAT include: the cancellation or amendment of a planning permit; the making of an enforcement order; or the determination of whether a permit was lawfully granted.

The next section of this chapter describes the more usual applications of this type made to VCAT.

5.7.1 Procedural defects in the planning scheme amendment process

PEA s 39

A person who is affected by a failure of the Minister, a planning authority or a panel to comply with the procedural requirements for an amendment to a planning scheme can refer the matter to VCAT. This can only be done before the amendment has been approved and must be within one month of the person becoming aware of the alleged failure.

VCAT can make a declaration and a direction in relation to the procedural defect. The direction may be that the planning authority must not adopt or approve the amendment until the Minister, planning authority or a panel takes action specified by VCAT.

VCAT's role in applications of this nature is to review whether or not the procedures set down in the PE Act have been correctly followed. VCAT does not review the merits of the planning scheme amendment. It cannot vary a decision made by a planning authority or the Minister in relation to the amendment, or set aside a decision or make a substitute decision. Examples of VCAT decisions of this type are *Coastal Estates Pty Ltd v Bass Coast SC & Ors* (includes Summary) (Red Dot) [2010] VCAT 1807, *Lend Lease Apartments (Armadale) Pty Ltd v Stonnington CC* [2013] VCAT 1663 and *Canaan Holdings Pty Ltd v Whitehorse CC* [2015] VCAT 1608.

5.7.2 Requirement to give notice

PEA s 78(a)

The applicant for a permit can apply to VCAT for a review of a requirement by the responsible authority to give notice of an application under section 52(1)(d) or 57B of the PE Act. These sections set out the considerations to be given by the responsible authority regarding notice of an application for permit or an amended application. The applicant may consider that the responsible authority's notice requirements are excessive or irrelevant in relation to the use or development proposed in the permit application.

PEA s 52

There is no right of review by VCAT in relation to notice requirements under sections 52(1) (a), (b) and (c), which relate to giving notice to owners and occupiers of adjoining land, to a council, or to any person to whom the planning scheme requires notice be given. The application for review can relate only to a requirement under section 52(1)(d) or 57B.

PEA s 85(1)(c)

VCAT may decide to confirm or change the requirement for the giving of notice in accordance with section 52(1)(d) or 57B. For example, see *SunnyCove Management Ltd v Stonnington CC* [2006] VCAT 1705.

5.7.3 Request for more information

PEA s 78(b)

The applicant for a permit can apply to VCAT for review of a request for more information made under section 54 of the PE Act. This includes a requirement made by the responsible authority because a referral authority made a requirement under section 55(2). Such an application for review might be made if the applicant for permit considered the requirement to be unreasonable or unnecessary in relation to the use or development proposed.

PEA s 85(1)(d)

After hearing the application for review of a requirement for more information under section 54, VCAT can direct the responsible authority to consider the application for permit as made, or it can confirm or change the requirement made by the responsible authority. For example, see *Calodoukas v Moreland CC* (includes Summary) (Red Dot) [2010] VCAT 498.

Extension of time for giving information

PEA s 85(1)(da)

VCAT can also decide on the time within which information is to be given under section 54 in the case of applications for review of the refusal or failure of the responsible authority to extend the time under section 54A. For example, see *James Martakis Architect v Moreland CC* (Red Dot) [2005] VCAT 2087.

5.7.4 Failure to grant a permit within the prescribed time

PEA ss 58, 79

The responsible authority must consider every application for a permit. There is no time limit for a responsible authority to make a decision on an application. However, if the responsible authority does not make a decision within the prescribed time, the permit applicant may make an application for review of the responsible authority's failure to decide the application.

Calculating the prescribed time

ILA s 44; PEA s 3(1); PE Regs reg 32

There are important rules set out in the Regulations about when the prescribed time starts and when it stops.

The prescribed time starts from the date the responsible authority receives the application (or amended application) unless either of the following apply:

- Further information has been sought within the prescribed time under section 54 of the PE Act. The prescribed time starts from the day on which the information is given.
- The applicant has applied for a review of a requirement to give further information and VCAT has confirmed or changed the requirement. The prescribed time starts from the day on which the information is given.

The prescribed time is calculated as follows:

- **VicSmart applications**: 10 business days. A business day means a day other than a Saturday, Sunday or a day appointed under the *Public Holidays Act 1993* as a public holiday or public half-holiday. In calculating the 10 business days for a VicSmart application, the first business day (that is, the day the application is received) is excluded and the last business day is included.
- **All other applications**: 60 days. Weekends and public holidays are included in the 60 days. If the last day falls on a weekend or a public holiday, the 60 days expires on the next business day. In calculating the 60 days for any other application, the first day (that is, the day the application is received) is excluded and the last day is included. Weekends and public holidays are included in the 60 days. However, if the last day falls on a weekend or public holiday, the 60 days expires on the next business day.

A different calculation of the prescribed time may arise where the application has been required to be referred to a referral authority. If you are considering an application against the responsible authority's failure to decide an application for permit, it is essential to check the relevant dates against the Regulations.

The VCAT website contains a table Calculating Elapsed Days in Failure Applications, which is useful for calculating the number of elapsed days in relation to an application for review under section 79 of the PE Act. An example of a VCAT decision on the calculation of elapsed days is *National Property Group Pty Ltd v Manningham CC* (Red Dot) [2018] VCAT 313.

Determining an application after a failure review is lodged

The applicant for permit must advise the responsible authority at the time that the application for review has been made. Section 84 of the PE Act provides that the responsible authority can make a decision on an application for permit. However, it must not issue the permit, notice of decision or notice of refusal.

PEA s 84

If the responsible authority decides to grant a permit, it must advise the Principal Registrar of VCAT. The Principal Registrar must refer the responsible authority's decision to a presidential member of VCAT for further consideration and decision about the application for review.

The presidential member may decide that a permit can be issued and that a hearing is not required because there are no parties other than the applicant and the responsible authority involved.

However, most applications for a review of the failure of the responsible authority to grant a permit involve objectors and proceed to a full hearing unless resolved by consent.

VCAT will only be prepared to consider resolving an application for review of a failure to grant a permit in the circumstances described below – otherwise the application for review proceeds to a hearing:

- The responsible authority decides to grant a permit without conditions and the presidential member has not directed that the application for review be advertised (because advertising was not considered necessary).
- The responsible authority decides to grant a permit without conditions. The application for review has been advertised and no other party has asked to be heard.
- The responsible authority decides to grant a permit subject to conditions. The application for review has not been advertised and the applicant for permit notifies the Registrar that the proposed conditions are acceptable.

- The responsible authority decides to grant a permit subject to conditions. The application for review has been advertised, no requests to be heard have been made and the applicant for permit notifies the Registrar that the proposed conditions are acceptable.
- The responsible authority has received objections to the grant of a permit. The Registrar has advised the objectors of the application for review and enquired if they wish to be heard. After a period of 14 days, no request to be heard has been received.

Reimbursement of VCAT application fee

VCATA ss 115B, 115CA; PEA s 79

An applicant to VCAT under section 79 of the PE Act is entitled to have the responsible authority reimburse the whole of any fees paid by the applicant in the review proceeding (this includes the fee for making the application for review and daily hearing fees). However, this does not apply if the responsible authority satisfies VCAT that there was reasonable justification for the responsible authority to fail to grant the permit, having regard to:

- the nature and complexity of the permit application
- the conduct of the applicant in relation to the permit application
- any other matter beyond the reasonable control of the responsible authority.

5.7.5 Extensions of time

PEA ss 81(1)–(3)

An affected person can apply for review of the following:

- a decision to refuse to extend the time within which a development or use is to be started or completed
- the time for certification of a plan under sections 23, 24A or 36 of the *Subdivision Act 1988*
- the failure of the responsible authority to extend the time within one month after the request for extension was made
- a decision to refuse to extend the time for the provision of more information in respect of an application for permit.

However, an application for review of a decision to refuse to extend the life of a permit or a failure of the responsible authority to extend the life of a permit cannot be made if the initial request to the responsible authority for the extension of time was not made within the time specified under section 69(1) or (1A) of the PE Act.

An application cannot be made directly to VCAT if there has been no request made first to the responsible authority.

PEA ss 85(1)(da), (f)

VCAT can direct that the time must be extended for a specified period, or direct that it must not be extended.

5.7.6 Seeking leave to apply for a specified purpose

Seeking 'leave to apply' is the formal term used by VCAT to describe a request for permission from VCAT for a specified purpose. For example, the applicant for permit must seek and obtain the leave of VCAT before amended plans can be substituted for the original plans.

PEA s 82B

The PE Act allows any person to apply to VCAT for permission to make an application for review of the decision to grant a permit under section 64 of the PE Act, if they are affected by

any application in which a written objection to the grant of the permit was received by the responsible authority. This provision applies to affected parties who were not objectors to the grant of a permit.

An objector has a right of review under section 82 of the PE Act. Therefore, the leave of VCAT is not required for the objector to make an application for review within the prescribed time.

PEA ss 82B(2)–(3)

Before making a decision about a person's application for leave to apply for review of a decision, VCAT must give the responsible authority, the applicant for the permit and the affected person an opportunity to be heard unless the applicant for permit consents to the request for the leave to be granted.

VCAT may grant the leave if it believes it would be just and fair in the circumstances to do so. Leave to make an application for review cannot be granted if a permit has been issued.

These provisions do not apply if a permit has been issued under section 63 of the PE Act (grant of permit if no objectors) or the application for permit is exempt from the review rights of section 82(1).

5.7.7 Cancellation and amendment of planning permits

PEA s 87(1)

Under section 87(1) of the PE Act, VCAT has the power to cancel or amend a planning permit if it considers there has been:

- a material misstatement 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 PE Act
- any failure to comply with the referral authority requirements contained in sections 55, 61(2) or 62(1).

PEA s 89(1)

Section 89 of the PE Act provides for any person who objected, or would have been entitled to object to the issue of a permit, to request VCAT to cancel or amend the permit if the person believes that he or she:

- should have been given notice of the application and was not; or
- has been adversely affected by a material misstatement or concealment of fact in relation to the application for the permit; or any substantial failure to comply with the conditions of the permit; or any material mistake in relation to the grant of a permit.

PEA s 87A

In addition to the powers under section 87, VCAT has the power to cancel or amend a permit that has been issued at its direction if it considers it appropriate to do so. The request under this section must be made by the owner or occupier of the land concerned or any person who is entitled to use or develop the land concerned.

VCAT fact sheets *Amend or Cancel a Permit under Section 87A* and *Amend or Cancel a Permit under section 87 or 89 (and stop orders)* set out the procedures to be followed in applications for review to amend or cancel a permit under sections 87, 87A and 89 of the PE Act and applications for orders to stop development under section 93 of the PE Act.

PEA s 88

It is important to note that section 88 of the PE Act provides limits on VCAT's power to cancel or amend a permit under section 87. VCAT will need to be satisfied that the application was made as soon as practicable and before the construction of buildings or the carrying out of works or before the development is substantially carried out or completed. If the development or construction is completed, VCAT cannot amend or cancel the permit under section 87 of the PE Act. These limits do not apply to a cancellation or amendment of a permit under section 87A.

If the permit relates to the use of the land only, an application to cancel or to amend the permit can be made at any time.

Guidance on making an application to cancel or amend a permit is also available in the following VCAT Planning and Environment Division fact sheets:

- Fact sheet – *Amend or Cancel a Permit under section 87 or 89 (and stop orders)*
- Fact sheet – *Enforcement Orders under the Planning and Environment Act 1987*

5.7.8 Enforcement orders and interim enforcement orders

PEA ss 114, 120

VCAT has the power to make enforcement orders and interim enforcement orders under sections 114 and 120 of the PE Act. These orders may relate to a breach of the PE Act, a planning scheme, a condition in a permit or an agreement under section 173 of the PE Act. Enforcement orders are usually requested by the responsible authority but can also be requested by other persons.

VCAT Planning and Environment Division Fact sheet – *Enforcement Orders under the Planning and Environment Act 1987* provides general information and guidance on making an application for an enforcement order or interim enforcement order, including advice on the procedures to be followed.

Interim enforcement orders are intended for urgent cases. They enable the maintenance of existing circumstances pending the hearing of the enforcement order application.

The conduct of a hearing for an enforcement order application is not the same as other application hearings. 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.

PEA s 116

It should be noted that VCAT has the discretion not to make an enforcement order, even if a breach of the legislation or permit condition is found to have occurred. VCAT will consider the consequences of making an enforcement order as part of its decision whether or not to make the order.

VCAT has the power to order the payment of costs in enforcement order applications where it considers that circumstances justify it doing so. Such circumstances might include, for example, the bringing of an unfounded enforcement order application or a persistent and unjustified failure to comply with planning laws. Orders for costs are more common in enforcement order applications compared to other applications to VCAT.

5.7.9 Applications under sections 149, 149A and 149B of the PE Act

PEA ss 149, 149A, 149B

An application for review to VCAT under section 149 of the PE Act is appropriate where there is a dispute between a party and the responsible authority about a matter that falls outside the permit application process. Such matters include, for example, whether or not a plan is to the satisfaction of the responsible authority or whether or not something can be done with the consent or approval of the responsible authority.

An application to VCAT for a determination under section 149A is used if the matter relates to the interpretation of the planning scheme or a permit, lawful continuing use rights or an agreement made under section 173.

Under section 149B, a person can make an application to VCAT for a declaration concerning any matter that may be the subject of an application to the tribunal under the PE Act, or anything done by a responsible authority under the PE Act.

An application for a declaration under sections 149A or 149B must identify a respondent who has a real interest in opposing the application. This will often be the responsible authority. VCAT may be reluctant to make a declaration if the issues involved are not properly contested by an opposing party. A declaration is a discretionary remedy. VCAT is not obliged to make a declaration. VCAT will consider whether a declaration is necessary or whether other suitable remedies are available.

VCATA s 67; VCAT Rules rr 4.03(1), 8A.03

An application to VCAT under these sections of the PE Act must be made in accordance with the VCAT Rules. See part 5.2.1 for more information about the required documentation for the application.

The responsible authority is a party to any proceedings under sections 149 and 149A of the PE Act. Persons who may have earlier objected to the grant of a permit are not automatically made parties to the proceedings under sections 149, 149A and 149B. However, VCAT may advise persons other than the applicant for review. The persons can then seek leave to be made parties to the proceeding under section 60 of the VCAT Act.

After hearing the application, VCAT can determine the matter and make any declaration it considers appropriate.

5.7.10 Amendments to agreements

PEA ss 184A–184G

Section 184 of the PE Act provides for an owner of land who is affected by a proposed agreement under section 173 of the Act to make an application to VCAT to amend the agreement. The particular provisions are summarised in Table 5.1.

5.8 Procedures

5.8.1 Directions hearing

There are many circumstances when a directions hearing in advance of the full hearing of the proceeding will enable a preliminary matter to be addressed that might otherwise delay the hearing. VCAT Practice Note – *PNVCAT5 – Directions Hearings and Urgent Hearings* sets out the usual practice for these types of hearings.

A directions hearing can clarify procedures to be followed in complex cases. It can also establish that there are adequate grounds for review; decide who are, or who should be

made parties to the application for review; and who should have notice of the application for review. Following the directions hearing an order is issued in writing to all parties.

VCAT frequently conducts directions hearings, and orders are issued orally and in writing to all relevant parties. Most directions hearings are brief and usually run for about half an hour.

A party to an application for review can request a directions hearing to raise a particular issue they believe needs to be resolved before the mediation, compulsory conference or final hearing. An application should be made using the *Application for Directions Hearing or Orders Form*, which can be accessed on the VCAT website. Written requests are made to the Registrar and must set out the nature of the directions sought and the reason for the request. A copy of the request must be given to all the other parties to the proceeding. All parties are advised when a directions hearing is arranged. Parties are invited to attend and address VCAT on the matters to be considered.

5.8.2 Urgent hearing

There are certain pressing matters that require prompt attention from VCAT, such as to prevent or stop existing unlawful planning activities through an interim enforcement order or an application to stop development pending hearing of an application to cancel or amend a permit.

For such cases, VCAT offers an urgent hearing procedure. The procedure is set out in VCAT Practice Note – *PNVCAT5 – Directions Hearings and Urgent Hearings*.

5.8.3 Practice days

PNVCAT5

In the Planning and Environment List, directions hearings are held on a practice day, conducted each Friday commencing at 10 am or otherwise as specified in a notice given by VCAT. The hearing schedule can be checked using the tribunal's upcoming hearings list on the VCAT website.

A practice day hearing may also be held to consider an urgent application. An urgent hearing may also be held at other times, as specified in a notice given by VCAT.

5.8.4 Compulsory conference

VCATA s 83

VCAT or the Principal Registrar can require the parties to a proceeding to attend a compulsory conference conducted by either VCAT or the Principal Registrar in advance of the full hearing of an application for review.

A compulsory conference has a similar purpose to a directions hearing. However, VCAT initiates the conference and attendance is mandatory.

A compulsory conference is used to:

- identify and clarify the nature of disputed issues in the proceeding
- promote settlement of the proceeding
- identify the question of fact and law to be decided by VCAT
- allow directions to be given about the conduct of the proceeding.

Notice in writing is given to all parties by the Principal Registrar. A compulsory conference is generally not open to the public and the proceedings are at the discretion of the presiding Member.

5.8.5 Mediation

VCATA s 88

VCAT can initiate mediation between the parties to try to reconcile differences and settle a dispute without the need for a full hearing of the proceeding. Mediation under section 88 of the VCAT Act is arranged at the discretion of the Principal Registrar. Consent of the parties is not required and attendance is compulsory. If a party does not attend mediation, they may be struck out as a party.

Selection for mediation is made on the basis that the material on VCAT's file suggests that there is a reasonable chance of the dispute being resolved through mediation.

Written requests for mediation can also be made by a party and should be directed to the Registrar.

A member of the Planning and Environment List conducts a mediation session. If the mediation is successful, the member will usually make any orders necessary to give effect to the settlement. If the mediation is not successful, the case will be listed for conventional hearing before another member.

Anything said in a mediation session is confidential and is not conveyed in any subsequent hearing unless all the parties agree.

5.8.6 A question of law

A question of law may be relevant in an application for review. Deciding a question of law is significant because it establishes a legal interpretation which may apply in other applications. A question of law may be known in advance of the hearing or it may be unforeseen and only become apparent during the hearing of the proceeding. VCAT does not expect a lay person to recognise a question of law.

Any party who becomes aware of a question of law to be decided in a forthcoming hearing must advise the Registrar immediately so that VCAT can be constituted with a legal practitioner. All the other parties to the proceeding should also be notified immediately and, preferably, no later than 10 business days before the hearing date.

The failure of a party to identify a question of law, which ought reasonably to have been raised prior to the hearing date or at the commencement of the hearing, may be taken into account by VCAT when determining costs. This is because another party may have been unnecessarily disadvantaged.

PNPE2

VCAT requires the responsible authority to provide certain information within 10 business days after a notice of an application for review has been served. The information includes advice about any question of law to be decided in advance of the full hearing.

If the legal matter identified before the hearing commences raises a threshold issue that could determine the outcome of the application, without consideration of the merits of the case, the party should make application for a practice day hearing. This may allow the question of law to be decided in advance of the full hearing.

In these circumstances VCAT will often list the matter for a preliminary hearing. For example, preliminary hearings are often used to determine whether a cultural heritage management plan may be required for a proposal under the *Aboriginal Heritage Act 2006*. Issues like these can determine whether VCAT has the power to grant a permit and it is important that they are resolved at the earliest opportunity. If a question of law is not resolved at a directions hearing or preliminary hearing and the matter proceeds to a full hearing, VCAT will be constituted with a legal practitioner who will decide the question of law, whether or not that member presides.

VCATA Sch. 1 Pt. 16 cl 66

Sometimes a question of law is not evident until the full hearing has commenced. If VCAT is constituted without a legal practitioner, a question of law can be decided by that member if all parties agree to the matter being decided by the presiding member. The question of law will otherwise be decided by a judicial member or a member who is a legal practitioner nominated by VCAT's President. The member may also elect to refer a question of law to a judicial member or a member who is a nominated legal practitioner.

VCATA s 148

A party to a proceeding before VCAT has the right of appeal to the Supreme Court of Victoria against VCAT's decision on a question of law only. The right of appeal is subject to leave to appeal being granted by the court. A question of law might, for example, concern the interpretation of a section of the legislation, or an alleged failure to take into account a mandatory consideration required in the legislation.

The right of appeal is confined to the question of law and involves a review of the applicable legal issue only. The court cannot review the evidence or any other matter that VCAT took into account in reaching its decision.

An application for leave to appeal to the Supreme Court must be made within 28 days of VCAT's decision.

It is recommended that a party contemplating an appeal to the Supreme Court obtain legal advice.

5.8.7 Intervention by a minister

VCATA Sch. 1 Pt. 16; cls 57, 58, 59

The VCAT Act provides the opportunity for a minister of the Crown with the power to intervene in a proceeding for review of a decision made to VCAT. The relevant clauses contain the circumstances for intervention and the applicable timeframes. In summary, a minister can intervene at any time if he or she considers that the proceeding raises a major issue of policy and the determination of the review could have a substantial effect on the future planning of the area.

VCATA Sch. 1 Pt. 16 cl 58

The Minister for Planning can 'call in' a proceeding under the PE Act, provided VCAT has not commenced to hear the proceeding and the Minister considers that the proceeding raises a major issue of policy, and that the determination of the proceeding could have a substantial effect on the achievement or development of planning objectives.

VCATA Sch. 1 Pt. 16 cl 58

The Minister can direct the Registrar to refer the matter to the Governor in Council for determination; or invite VCAT to hear the proceeding and refer it to the Governor in Council for determination; or hear the proceeding and then refer it to the Governor in Council for determination. Such a direction or invitation must be made not later than seven days before the date fixed for the hearing.

Clause 60 of Schedule 1 of the VCAT Act provides the tribunal with the power to refer an application for review directly to the Governor in Council for determination in prescribed circumstances.

If a matter is referred to the Governor in Council before the hearing commences, a hearing before VCAT will not take place.

The Governor in Council determines the proceeding referred to it by a minister or VCAT and makes any orders in relation to the proceeding.

From time to time, the Minister for Planning releases guidelines on the use of the 'call-in' powers under the VCAT Act. Further information about the Minister's intervention powers and details about procedures and guidelines for requests is provided in Planning Practice Note 29 – *Ministerial Powers of Intervention in Planning and Heritage Matters*.

5.9 Further information about reviews

5.9.1 VCAT practice notes

Copies of the VCAT Practice Notes are available from VCAT's public information counter or online at **vcat.vic.gov.au**. The practice note series are numbered for reference and include:

- *PNVCAT1 – Common Procedures*
- *PNVCAT2 – Expert Evidence*
- *PNVCAT3 – Fair Hearing Obligation*
- *PNVCAT4 – Alternative Dispute Resolution (ADR)*
- *PNVCAT5 – Directions Hearings and Urgent Hearings*
- *PNVCAT6 – Hearing Fees*
- *PNPE9 – Amendment of Planning Permit Applications and Plans*
- *PNPE2 – Information from Decision-Makers and Authorities*

5.9.2 VCAT forms

All VCAT forms can be accessed online at **vcat.vic.gov.au/case-types/planning/apply-planning** or are available from VCAT's public information counter.

In addition to the forms for a review of a decision, VCAT's website also provides access to other general forms that may be required by parties from time to time. These include:

- *Application for an Adjournment* form
- *Request for Practice Day or Preliminary Hearing* form
- *Application for Costs or Fee Reimbursement – planning* form
- *Application for Directions Hearing or Orders* form
- *PNPE9 Form A: Notice of an Amendment of an Application*
- *PNPE9 Form B: Statement of Service*

5.9.3 VCAT decisions

VCAT maintains a computer index of previous high-profile decisions by reference number, municipality, address and subject matter. Copies are available from VCAT for a photocopy fee. All other decisions can be accessed on the Australian Legal Information Institute (AustLII) website.

The AustLII website at **austlii.edu.au** provides free access to all significant VCAT decisions and the decisions of other courts and tribunals (including VCAT's predecessor, the Administrative Appeals Tribunal) that may be relevant to a planning dispute. New VCAT decisions are added regularly.

5.9.4 General Information

General information about the operation of VCAT, including review procedures and requirements in accordance with the relevant acts and regulations, is available from VCAT:

- Website: **vcat.vic.gov.au**
- Telephone: 1300 01 8228
- Address: 55 King Street, Melbourne 3000.

Council planning departments can also be contacted for information about VCAT reviews.

The information provided is general only and is not to be taken as a substitute for any legal advice which may be required depending on the circumstances of an individual case and the interests of a particular party.

Using Victoria's Planning System

Chapter 6: Acquisition and Compensation

Contents

6.1 Public land acquisition

6.1.1 Who may compulsorily acquire land?

LACA s 3

An authority may obtain title to land either by purchasing it or by formal statutory acquisition. Many authorities have the power to compulsorily acquire land for a public purpose. These include a range of ministers, government departments, public authorities, utility service providers and municipal councils. A body given the power to compulsorily acquire land is known as an 'acquiring authority' under the *Planning and Environment Act 1987* (PE Act).

An acquiring authority may acquire the whole of a piece of land or several pieces of land (for example, for a school or parkland), or part of the land (for example, for a road widening). An authority may also acquire only an interest in the land (for example, an easement across a piece of land to allow for a pipeline or utility service).

'Compulsory' acquisition means that the land can be acquired despite the fact that the landowner may not consent to the acquisition. The power to compulsorily acquire land is therefore strictly regulated. An authority can only compulsorily acquire land if the power to do so is set out in its governing legislation, which is deemed for such purpose to be a 'special act'. In some cases, the special act requires that the acquiring authority can only compulsorily acquire land with the consent of a relevant minister or the Governor in Council.

LACA s 4

Where an authority is given the power under a special Act to compulsorily acquire an interest in land (including acquisition or other interest, such as an easement), the authority must follow the process for acquisition set out in the *Land Acquisition and Compensation Act 1986* (LAC Act) if it wishes to acquire that land compulsorily or by agreement.

If an authority does not have the power of compulsory acquisition, the compensation provisions of the LAC Act do not apply. The transaction will be like any other private sale between a vendor and a purchaser and both parties will be free to negotiate a sale price, subject to any government audit or tendering requirements.

6.1.2 Can the Minister for Planning or a responsible authority compulsorily acquire land?

PEA s 172

The Minister for Planning and responsible authorities are given a special power to compulsorily acquire land. This power extends to any land that is:

- required for the purposes of a planning scheme
- vacant, unoccupied or used for any purpose not conforming with the planning scheme (if the minister or the responsible authority believe it is desirable that the non-conforming use should be discontinued, or that the land should be put to appropriate use in order to achieve proper development in the area)
- subject to a declaration by the Governor in Council to facilitate the better use, development or planning of an area.

PEA ss 172C, 172D

The PE Act also gives an authority that is identified as a collecting agency or development agency under an Infrastructure Contributions Plan the power to compulsorily acquire land within an Infrastructure Contributions Plan area that is required to be set aside for a public purpose as 'inner public purpose land'. A development agency may also compulsorily

acquire land that is outside an Infrastructure Contributions Plan area that is required to be set aside for a public purpose as 'outer public purpose land'.

Infrastructure Contributions Plans are usually prepared and administered by the relevant council and assist in securing contributions and land to deliver important public infrastructure for growing communities. They are prepared and approved as part of planning schemes in accordance with Part 3AB of the PE Act.

6.1.3 Government policy on land acquisition

All transactions involving the purchase or acquisition of land by Victorian Government agencies, authorities and representatives must take place in accordance with the *Victorian Government Land Transactions Policy and Guidelines* (Department of Environment, Land, Water and Planning, April 2016), available online at **land.vic.gov.au**. The Victorian Government Land Monitor (VGLM) is responsible for ensuring accountability and integrity in land transactions and can provide guidance on the requirements.

6.1.4 How is land acquired?

The LAC Act places strict obligations on an acquiring authority in relation to the process for acquisition. This includes the timing of the service of notices, when and how offers must be made and when and how possession may be taken. Particular care needs to be taken by all parties, as failure to comply with the legislation can result in penalties against the acquiring authority or an acquisition process having to be abandoned or recommenced.

Below is a brief outline of the main procedures that apply. This outline should not be used as a substitute for the LAC Act, which should be read carefully before any acquisition procedure begins.

Land to be reserved under the planning scheme

LACA s 5

Before the commencement of the acquisition process, the land must first be reserved under a planning scheme. Generally, this will involve a planning scheme amendment to apply a Public Acquisition Overlay to the land. There are a number of exceptions to this requirement.

The process for reserving land and the exceptions to this requirement are set out in part 6.2.

Service of Notice of Intention to Acquire

LACA ss 6, 7, 8; LAC Regs regs. 7, 10, Schedule 1, Forms 1, 4

A Notice of Intention to Acquire must be served on each person with an interest in the land, except in cases where section 7 of the LAC Act specifies that a notice is not required.

In the case of a proposed acquisition of a rented house on which there is a mortgage, the authority must serve the registered owner, mortgagee and tenant with a Notice of Intention to Acquire, as persons with an interest in the land.

The notice must be in the prescribed form (Form 1) and be accompanied by a prescribed statement. This statement (Form 4) clearly sets out the rights and obligations of the landowner and is a helpful document to both acquiring authorities and those whose land may be acquired or affected by the acquisition.

The Notice of Intention to Acquire has three major functions:

- It is the first formal notification of the authority's intention to acquire an interest in the land (after the reservation in the planning scheme, if applicable).
- It prevents carrying out of improvements on the land without consent of the authority.

- It provides an opportunity for the authority to elicit information from the person served about the land and other interested parties.

LACA ss 9, 10

A copy of the Notice of Intention to Acquire must also be served on the responsible authority under the planning scheme in which the land is situated, as well as the council (where these differ). A notice must also be lodged with the Registrar of Titles in accordance with a prescribed form under the *Transfer of Land Act 1958*.

LACA ss 11, 14, 15, 18

The Notice of Intention to Acquire does not constitute an offer or a binding agreement. It may be amended or cancelled at any time before publication of the Notice of Acquisition. It does not bind the authority to proceed with the compulsory acquisition. At any time before the lapsing or cancellation of the Notice of Intention to Acquire, or the publication of the Notice of Acquisition, the authority may acquire an interest by agreement with the owner.

LACA s 16

The Notice of Intention to Acquire lapses six months after the service of that notice if the authority has not acquired an interest, or an extension to the period of its operation has not been mutually agreed.

LACA s 9(2); LAC Regs reg. 12

The acquiring authority can ask the council or responsible authority for certain information. For example, it may seek information on the zoning or possible use or development of the land in order to assist with the assessment of compensation.

Publication of Notice of Acquisition

LACA ss 19, 20, 106; LAC Regs reg. 16, Schedule 1, Form 7

An authority formally acquires the land by publishing a notice in the Government Gazette. Unless agreed in writing between the parties, or unless time is varied under section 106 of the LAC Act, the authority must not acquire the land until two months after service of the Notice of Intention to Acquire. Given that a Notice of Intention to Acquire expires after six months, this generally means that an acquiring authority has a period of two to six months in which to complete its acquisition following the Notice of Intention to Acquire.

The map, which forms part of the Notice of Acquisition, must be survey-accurate (unless the whole of a title is being acquired) and must describe precisely what is being acquired. The notice must be in the prescribed form.

LACA s 31(2)(a)

An initial offer of compensation must be made within 14 days of publishing a Notice of Acquisition. Therefore, the acquiring authority should ensure that it is ready to make an offer of compensation before it publishes the Notice of Acquisition.

Effect of Notice of Acquisition

LACA s 24

When a Notice of Acquisition is published in the Government Gazette, the interest in the land described in the notice frees the authority of all mortgages, encumbrances, licences and charges. Public utility easement rights are preserved unless specifically acquired. This means that, from the date of publication, the acquiring authority owns the land, even if compensation has not by then been assessed or paid.

LACA s 22; LAC Regs regs. 16, 17, Schedule 2, Forms 7, 8

A copy of the Notice of Acquisition in the prescribed form and a statement of rights and obligations must be served within 14 days of the date of acquisition. This applies to everyone who received the Notice of Intention to Acquire and, where there was no Notice of Intention to Acquire, on each person having an interest immediately before the date of acquisition.

LACA s 23

A copy of the Notice of Acquisition must also be published in the prescribed form in a newspaper generally circulating in the area in which the land is situated.

Subdivision and title arrangements for acquired land

SA s 35

If part of a lot is acquired, a plan of subdivision must be submitted to the council after the land is acquired. The plan will serve to re-describe the land acquired and any remaining land, as well as to make any required alterations to easements. A special process is laid down in the *Subdivision Act 1988* for certification of these plans.

Entry into possession

LACA s 26

The authority cannot take possession of land used as a principal place of residence or business until three months after the date of acquisition, except with Governor in Council's certification or by agreement with the claimant and the consent of the minister administering the special act. The authority may enter the land after giving seven days' written notice of its intention to take possession to the person in occupation of that land.

Compensation for acquisition

LACA s 30

A person whose interest in land has been divested or diminished through a Notice of Acquisition has a right to claim for compensation. A person who makes or is entitled to make a claim for compensation is known as a claimant.

The first offer of compensation

LACA s 31

The authority must make an offer of compensation to every claimant within 14 days of the date of acquisition or within a further period approved by the minister administering the special Act or with the agreement of the claimant.

LACA ss 31(4)–(5); LAC Regs reg. 19, Schedule 1, Form 10

The offer is to be a fair and reasonable estimate of the compensation payable and be accompanied by a certificate of valuation used by the authority in making its offer. The authority is to have regard to a valuation of the Valuer General or registered valuer. The offer is to be accompanied by statements explaining any difference between the sum offered and the valuation and setting out the claimant's rights and obligations.

LACA s 37

If no offer is made to a person entitled to compensation, that person may make a claim within two years after the date of acquisition. The LAC Act sets out the procedures to be followed in these circumstances.

Response by claimant

LACA ss 33–35, 80; LAC Regs regs. 20, 21, Schedule1, Form 11

A claimant is to respond with a Notice of Acceptance or a Notice of Claim, in the prescribed form, within three months of the offer being served. If the claimant fails to serve a notice on the authority, the claim becomes a disputed claim and can be referred to the Land Valuation List of the Planning and Environment Division of the Victorian Civil and Administrative Tribunal (VCAT) or the Supreme Court. If the amount of compensation offered is not disputed by the claimant, the amount offered is binding on the authority, unless the authority can demonstrate that information contained in the offer, and relied upon by the authority, was incorrect.

Authority's reply to claim

LACA s 36; LAC Regs reg. 24, Schedule 1, Form 13

The authority must reply to a Notice of Claim within three months of receiving it. This is done through a statement in writing (Form 13). The authority may admit a claim in whole or part, propose to vary a previous offer, or reject the claim and repeat its offer.

If the authority fails to reply to the Notice of Claim within three months, it is deemed to have rejected the claim and to have repeated its offer. The claim then becomes a disputed claim.

If the authority offers to increase or vary its first offer, the claimant must accept or reject the revised offer within two months of receiving it. If the authority rejects the claim by the claimant, the claim becomes a disputed claim.

Time

LACA ss 106, 107

In certain circumstances, the LAC Act allows for an extension or reduction of the periods for response and replies. It also provides that certain time limits applying to claimants do not expire until seven days after the authority has advised the person in writing of the effect of that expiration.

How is compensation assessed?

LACA ss 41–45

The principles for measuring the compensation payable on the acquisition of an interest in land are set out in the LAC Act. The compensation paid generally takes into account the following:

- the market value of the land acquired
- any losses attributable to severance or as a result of disturbance
- any enhancement or depreciation in value of the interest of the claimant and in other land adjoining or severed from the acquired land
- legal, valuation or other professional expenses incurred
- any special value to the claimant
- any previous payment for loss on sale compensation or other forms of financial loss compensation payments
- the use to which the property was put at the date it was compulsorily acquired
- the payment of compensation for any intangible and non-pecuniary disadvantages resulting from the acquisition, known as 'solatium'.

LACA s 53

The assessment of the precise amounts to be paid is made on the basis of independent valuation advice combined with a practical evaluation of other losses occasioned by the acquisition, together with fees and expenses. It is important to note that the LAC Act provides for the payment of interest on compensation agreed upon by the parties or awarded by the Court.

What happens if planning compensation has been previously paid?

LACA ss 41(5), (7)

If an authority is acquiring an interest in a property for which planning compensation under Part 5 of the PE Act has already been paid, the amount of compensation for the compulsory acquisition is reduced by a 'prescribed amount'. This amount is calculated in accordance with a formula set out in the LAC Act, which takes account of the timing and payment of the prior compensation.

Advance of compensation

When an offer of compensation of $5,000 or more is served on a claimant, the claimant may require the authority to advance an amount equal to the amount of compensation offered in respect of the claimant's interest.

The authority must make the advance within one month of receiving the notice requiring the advance.

Dispute

LACA s 80

Either the acquiring authority or claimant may apply to VCAT for determination of a disputed claim or refer a disputed claim to the Supreme Court of Victoria for determination.

6.2 Public Acquisition Overlay

6.2.1 What is reserved land?

PEA s 6(2)(c)

A planning scheme may designate land as being reserved for a public purpose. Land reserved for future compulsory acquisition is identified by including the land in a Public Acquisition Overlay.

The objectives of the Public Acquisition Overlay include 'to reserve land for a public purpose and to ensure that changes to the use and development of land do not prejudice the purpose for which the land is to be acquired'. The Public Acquisition Overlay indicates that, for the purpose of the LAC Act, any land included in the overlay is reserved for a public purpose. This satisfies the requirement in section 5 of the LAC Act that an authority cannot commence to acquire the land 'unless the land has been first reserved by or under a planning instrument for a public purpose'.

CLRA s 4; SA s 24(2)

The use of the term 'reserved' in this context is quite separate from its use in other legislation, such as the *Crown Land (Reserves) Act 1978* (where provision is made for Crown land to be reserved for certain purposes, and for its management) or the *Subdivision Act 1988*, which refers to land being set aside as a reserve.

6.2.2 Why is land included in a Public Acquisition Overlay?

LACA s 5(1)

If land is to be compulsorily acquired, it must in most cases be 'reserved' under the planning scheme through its inclusion in a Public Acquisition Overlay before the acquisition process can commence.

Land may be included in a Public Acquisition Overlay well in advance of its proposed acquisition. There is often a period of many years between the recognition that an area will be needed for a public purpose and the actual acquisition of that land. For example, the Public Acquisition Overlay is often applied to land designated for future roads or freeways. While the relevant road authority may not wish to formally acquire the land until the final road alignment has been approved and project funding is available, the identification of the land at an early stage assists the affected landowners and others in the vicinity to make informed decisions about the use and development of their land.

Early reservation enables control of the use and development of land that will eventually be acquired, so that the acquiring authority is not faced with the need to compensate owners of buildings and works constructed on that land once the need for its acquisition has been recognised. Where land is subject to a Public Acquisition Overlay, all further use,

development or subdivision of the land will generally require a planning permit. Permit applications must be referred to the acquiring authority.

PEA ss 98, 99, 106

Owners of land can also plan in the knowledge that the land is proposed for eventual acquisition and can, in some cases, be compensated for subsequent loss. Compensation is payable only when a loss occurs (for example, the refusal of a planning permit on the ground that the land is required for a public purpose).

6.2.3 Is a Public Acquisition Overlay always required?

There are a number of exemptions to the requirement that land to be compulsorily acquired must first be 'reserved' under a planning scheme through its inclusion in a Public Acquisition Overlay. These exemptions apply in the following instances:

LACA s 5(2), LAC Regs reg. 6(a)

- if the interest to be acquired is for a minor widening or deviation of a road; and
    - the total value of interests to be acquired is less than 10 per cent of the value of the unencumbered freehold interest in the allotment; and
    - less than 10 per cent of the area of an allotment is to be acquired

LACA s 5(2), LAC Regs reg. 6(b)

- if an easement is to be acquired and the acquisition of that easement does not reduce the value of the unencumbered freehold interest by more than 10 per cent

LACA s 5(3)

- if the Governor in Council has certified that reservation is unnecessary, undesirable or contrary to the public interest

LACA ss 5(4), 7

- if the authority is not required to serve a Notice of Intention to Acquire because of section7(1)(a) or (b) of the LAC Act – for example, an ordinary market purchase

LACA s 5(4A)

- if a declaration is in force under section 172(2) of the PE Act

LACA s 5(4B)

- if the land has been declared special project land under section 201I of the PE Act.

6.3 Planning compensation

6.3.1 What is planning compensation?

PEA s 98

Apart from compensation payable as a result of the actual acquisition of land, Part 5 of the PE Act creates a right to interim compensation (known as 'planning compensation'). This occurs in certain limited circumstances stemming from the proposed future use of the land for public purposes.

These circumstances arise where the owner or occupier of land has suffered financial loss as the natural, direct and reasonable consequence of:

PEA s 98(1)(a)

- the land being reserved for a public purpose under a planning scheme (it has been included in a Public Acquisition Overlay)

PEA s 98(1)(b)

- a proposed amendment to a planning scheme to include the land in a Public Acquisition Overlay

PEA s 98(1)

- a declaration by the minister that the land is proposed to be reserved for a public purpose

PEA s 98(1)(d)

- the access to the land being restricted by the closure of a road by a planning scheme, or

PEA s 98(2)

- a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose.

The most common form of compensation arises where land is designated for future acquisition well in advance of it actually being acquired, and where affected landowners are unable to use or develop the land fully during the intervening period because of the 'blight' that the Public Acquisition Overlay places over the land.

PEA s 107(1)

A claim for compensation also arises if an owner of land has suffered financial loss as the natural, direct and reasonable consequence of:

- an amendment of a planning scheme to remove any reservation over the land (that is, to remove a Public Acquisition Overlay);
- a lapsing of an amendment that proposed to include the land in a Public Acquisition Overlay; or
- a cancellation of a declaration by the minister that had indicated that the land was proposed to be reserved for a public purpose.

PEA s 99

The time at which the right to claim compensation arises is set out in the PE Act. In general terms, the right to compensation arises at the time a loss is suffered – for example, when the land is sold at a lower price than would have been expected had the land not been included in a Public Acquisition Overlay.

PEA ss 98(3), 103, 108

A person cannot claim compensation if the planning authority has already bought or compulsorily acquired the land, or a condition on a permit provides that compensation is not payable. A compensation claim may also be rejected if the financial loss is of a minor nature. Generally, a person does not have a right to claim compensation if the person was not the owner or occupier of the land at the time the right to compensation arose.

PEA ss 98AAA, 172F

Part 5 of the PE Act does not apply to land within an Infrastructure Contributions Plan area that is required to be set aside for a public purpose as part of an Infrastructure Contributions Plan approved under Part 3AB of the Act. A separate mechanism is established under the PE Act for determining the amount of compensation payable for this type of land that is compulsorily acquired.

6.3.2 Compensation for financial loss

PEA ss 98, 106, 108(2)

Compensation is payable if it can be shown that land has sold at a lower price than would reasonably have been expected if the land had not been affected by its inclusion, or proposed inclusion, in a Public Acquisition Overlay. With a few exceptions, to be eligible to claim 'loss on sale' compensation, the owner must give the planning authority 60 days' notice in writing of their intention to sell the land and must have been the owner of the

property at the time the Public Acquisition Overlay (or prior reservation) first came into effect.

Compensation arising from a permit refusal

The right to claim compensation for loss or damage arising from the refusal of an application for a permit is established in the following circumstances:

PEA s 99(a)

- when the permit is refused by either the responsible authority or VCAT on the basis that the land is required for a public purpose

PEA ss 98(2), 99(a)

- when the permit is refused on the basis that the land may be required for a public purpose, that is, it is not yet included in a Public Acquisition Overlay but there is reasonable evidence that the land will need to be acquired for public purpose in the future

PEA s 99(a)

- when the responsible authority:
    - fails to grant a permit within the period prescribed (for the purposes of section 79 of the PE Act), or
    - grants a permit subject to any condition that is not acceptable to the applicant, and
    - VCAT disallows an application for review of either the failure or condition on the ground that the land is, or may be, required for a public purpose.

Compensation for closure of a road

PEA ss 98(1)(d), 99(c)

Compensation for financial loss suffered as the natural, direct and reasonable consequence of access to land being restricted by the closure of a road by a planning scheme can become payable once the relevant provision of the planning scheme comes into operation.

Compensation for removal or amendment of a Public Acquisition Overlay

PEA s 107

An authority may become liable for compensation arising from an amendment of a planning scheme to remove a Public Acquisition Overlay. An authority could also be liable for compensation due to the lapsing of an amendment for a proposed overlay, or the cancellation of a ministerial declaration indicating that the land was required for a public purpose. However, in such instances, it may be much more difficult for an affected owner to substantiate direct financial loss.

6.3.3 Who is responsible for the payment of compensation?

PEA ss 98(1)–(2), 109

The claim for compensation is made against the planning authority where land has been reserved for a public purpose under a planning scheme; where land is shown as reserved for a public purpose in a notice of amendment; or where the Minister has made a declaration under section 113 of the PE Act. The claim is made against the responsible authority in the case of a claim relating to a refusal by the responsible authority to grant a permit on the ground that the land is, or will be, needed for a public purpose.

However, another authority may become responsible for the compensation. Usually, this is the authority responsible for having the Public Acquisition Overlay placed over the land and that will ultimately acquire it. For example, the Roads Corporation may require the responsible authority to refuse to grant a permit in an area covered by a Public Acquisition Overlay for a future freeway. The Roads Corporation would then take responsibility for any consequential compensation.

6.3.4 How is planning compensation assessed?

PEA s 105

Section 105 of the PE Act refers to section 37 and Parts 10 and 11 of the LAC Act in relation to the determination of compensation. The authority has three months to respond to a claim which it can reject or admit in part.

PEA s 104

Generally, the compensation is assessed on a 'before and after' basis. This means the difference between:

- the land value at the date on which the liability to pay compensation first arose if it had not been affected; and
- the actual value of the land at the date on which the liability to pay compensation first arose.

For 'loss on sale' compensation, this means obtaining valuation advice at the date of the sale. The valuer should consider the worth of the property as though the Public Acquisition Overlay did not exist, as compared with its value when encumbered by the overlay. Often the encumbered value will equal the sale price actually achieved, provided that every effort was made to obtain the best price on the open market.

PEA ss 100, 101

In addition to compensation assessed on the difference between the value of the property unencumbered and encumbered by the Public Acquisition Overlay, the authority may also be liable for the claimant's legal, valuation and other costs reasonably incurred in establishing the claim. Further, if a residence is affected, compensation may be payable for any intangible and non-financial disadvantages (being a consolation payment similar to the payment of solatium in a compulsory acquisition matter). This amount must be no more than 10 per cent of the compensation otherwise payable.

The PE Act sections 100 and 101 (Claims for financial loss arising from the refusal of a permit) should be assessed at the date the right to compensation arises, that is the date of refusal of the permit or the date of the tribunal's decision – whichever is applicable. Assessments of the encumbered and unencumbered value of the property should be made as at that date. As with loss on sale compensation, additional amounts may be payable for costs incurred by the claimant and any intangible and non-financial disadvantages arising when a residence is involved.

6.3.5 What if the amount of compensation cannot be agreed?

LACA s 81(1)(a)

VCAT will determine claims where the amount in dispute is not more than $400,000. (The 'amount in dispute' is the difference between the authority's offer and the amount claimed, rather than the overall amount of the claim). If the amount in dispute is more than $400,000, the claimant may choose either the Supreme Court or VCAT. If the claimant does not exercise this option within one month of being asked to do so, the authority may choose the forum.

LACA s 84A

The Supreme Court and VCAT also have discretion to transfer a dispute to the other forum on the application of a party or by its own motion. In making a transfer order the Supreme Court or VCAT must have regard to a range of factors, including whether the dispute could be more efficiently dealt with in the other forum and whether it raises questions of general importance.

LACA s 91

The LAC Act provides that the Supreme Court or VCAT may award costs as it thinks proper, taking into account a comparison between the amount of compensation awarded and that offered by the authority, the conduct of the parties, the failure of the claimant to give adequate particulars of his or her claim or to provide supporting material when requested, or excessive claim or an unduly low offer.

6.3.6 Can compensation be recovered?

PEA ss 110, 111; PE Regs regs. 51, 52, Schedule 1, Forms 16, 17

The PE Act specifies when and how the authority can recover from the owner compensation that the authority has previously paid. For example, previously paid compensation may be recovered from the current owner in the event that the overlay is removed or the proposed overlay lapses or the Attorney-General's declaration is cancelled.

Where land over which planning compensation has been paid is subsequently acquired, the acquiring authority reduces the compensation payable on the acquisition to take into account the interim planning compensation already paid. This avoids any gap or overlap in the compensation. The formula for varying the compensation on this basis is set out in the PE Act.

Any compensation that is repayable becomes a charge on the land.

Compensation must be registered on the title. The authority must use Form 16 under the Planning and Environment Regulations 2015 to notify the Registrar of Titles of the amount of compensation paid.

6.4 Planning compensation checklist

To check the eligibility of a claim

- ☐ What person or authority is liable to pay compensation? [PEA, s 109]
- ☐ Has the claim been made within the specified times? [PEA, s 107]
- ☐ Has the claim been received after any of the events specified in section 99 of the *Planning and Environment Act 1987*?
- ☐ Was the claimant the owner or occupier of the land at the time the right to claim compensation first arose? [PEA, s 108]
- ☐ Does a permit provide that no compensation is payable?

Processing a claim

- ☐ Is the size of the claim such that it may be rejected under section 103 of the *Planning and Environment Act 1987*?
- ☐ Has compensation previously been paid? [PEA, s 102]
- ☐ Is there a residence and are there non-financial disadvantages that will affect the amount of compensation payable? [PEA, s 100]
- ☐ Has the compensation been determined according to the procedures under section 37 of the *Land Acquisition and Compensation Act 1986*?
- ☐ Is the amount of compensation in accordance with the limits prescribed in section 104 of the *Planning and Environment Act 1987*?

- ☐ Has the statement of compensation paid been lodged with the Registrar of Titles? [PEA, s 110]
- ☐ An authority which had previously paid compensation under the *Planning and Environment Act 1987* may recover that payment from another authority that has subsequently compulsorily acquired the land. [PEA, s 110]

Using Victoria's Planning System

Chapter 7: Enforcement

Contents

7.1 Enforcement and the planning system

7.1.1 Why is enforcement important?

Planning schemes are designed to regulate the use and development of land so that it meets agreed community objectives. A planning scheme is a law (technically, a subordinate instrument) that regulates the way land can be used and developed. As with any other law or regulation, planning schemes are only effective if their requirements are enforced.

PEA s 14(a)

The responsible authority is required by law to efficiently administer and enforce the planning scheme.

The responsible authority will typically be the council of the municipality to which the planning scheme applies.

Enforcement is used to ensure compliance with the planning scheme, planning permits and agreements made under section 173 of the *Planning and Environment Act 1987* (PE Act), and to:

- avert or prevent threatened breaches
- stop existing breaches
- punish for breaches.

7.1.2 When is enforcement action appropriate?

PEA s 126

Any person who uses or develops land in contravention of, or fails to comply with, a planning scheme or a planning permit or an agreement under section 173 of the PE Act is guilty of an offence.

Enforcement should occur when there is a clear breach of the PE Act, a planning scheme, permit condition or section 173 agreement and the breach warrants enforcement, especially if it causes detriment to the community. The main emphasis of enforcement should be on securing compliance rather than on prosecuting offenders. Adopting a conciliatory approach through a process of education, communication and negotiation will more often provide a positive outcome. The various enforcement options should be viewed with this in mind.

7.1.3 What enforcement options are available?

Depending on the nature and seriousness of the problem, the responsible authority can do one or more of the following:

- **Preliminary negotiation**: Negotiate informally with the alleged offender. The role of enforcement often includes educating an alleged offender who may not be conversant with planning considerations and laws. This type of positive conciliation may avoid the need for formal action and should usually be the first step taken.

IA s 8

- **Official warning**: Issue an official warning under the *Infringements Act 2006* where an infringement notice is considered excessive under the circumstances.

PEA s 130

- **Planning infringement notice**: Issue a planning infringement notice, which provides a monetary penalty and provides the responsible authority with the option to require remedial action. This is usually for less serious breaches.

PEA s 114

- **Enforcement order**: Make an application to the Victorian Civil and Administrative Tribunal (VCAT) for an enforcement order to achieve compliance.

PEA s 120

- **Interim enforcement order**: Make an application to VCAT for an interim enforcement order where there is a need for immediate action.

MCA s 25, CPA s 7

- **Prosecution**: Commence prosecution proceedings in the Magistrates' Court. This must be commenced within 12 months of the alleged offence. This time limit means that a responsible authority should not continue negotiation to secure compliance if there is a risk that the opportunity to prosecute will become unavailable. Prosecution in the Magistrates' Court may be needed to follow up non-compliance with either an infringement notice or an enforcement order.

PEA s 125

- **Court injunction**: Seek an injunction from a court of competent jurisdiction (Supreme, County or Magistrates' Court) to restrain a person from contravening an enforcement order or interim enforcement order.
- **Common law injunction**: Seek a common law injunction from a court of competent jurisdiction to restrain a person from contravening a law.

PEA ss 87, 88, 89

- **Cancel or amend a permit**: Make an application to VCAT to cancel or amend a permit – for example, for a substantial failure to comply with the conditions of a permit.

PEA s 123

- **Carry out work**: Undertake work to secure compliance with an enforcement order or interim enforcement order and recover the cost of doing so.

THE ENFORCEMENT SYSTEM – Corrective Action versus Prosecution

The enforcement system separates the functions of VCAT (which deals with the planning issues in relation to enforcement orders and disputes) and the courts (which deal with prosecutions).

Enforcement order proceedings are designed to prevent or stop existing unlawful planning activities and to achieve compliance, reinstatement or remedial works. They are not designed to punish. Only prosecution under section 126 of the PE Act will do that.

PEA s 126

A section 126 prosecution is designed to punish for what has occurred and provide a deterrent against a recurrence. It cannot directly achieve a cessation of the act complained of (or rectification or reinstatement) unless the person who is prosecuted voluntarily does this in an attempt to lessen a penalty or agrees to do it as a condition of any bond imposed by way of penalty.

It is therefore necessary to choose which of the enforcement mechanisms is the most appropriate in the circumstances. This choice will be influenced by considering any differences in procedure and standards of proof, the delay involved in getting to a final hearing and decision and what is sought to be achieved by the enforcement.

In a criminal proceeding, for example, a prosecution in the Magistrates' Court, the offence must be proved beyond a reasonable doubt. In a civil proceeding, for example, applying to VCAT to have a planning permit cancelled, the burden of proof is to a civil standard on the balance of probabilities.

The PE Act does not stop both actions being taken at the same time. Whether this is done is up to the body seeking enforcement.

7.1.4 What administrative arrangements should a responsible authority make?

To make its enforcement action effective, a responsible authority should consider training an officer in enforcement methods and skills. Appropriate delegations and authorisations should also be in place to enable the officer to take any necessary action, including:

PEA ss 133, 134

- entry to properties to carry out and enforce the PE Act, regulations, planning scheme, planning permits, enforcement orders or agreements made under section 173 of the Act

PEA s 130

- issuing planning infringement notices

PEA ss 114, 120

- applying for enforcement orders and interim enforcement orders

PEA s 87

- applying for the cancellation or amendment of planning permits

LGA ss 224(1)

- instituting proceedings on behalf of the council under any Act, regulation or local law.

7.1.5 What is the role of the Local Government Act 1989?

Section 224 of the *Local Government Act 1989* allows a council to appoint an officer to be authorised 'for the purposes of the administration of any Act, regulations or local laws which relate to the functions and powers of the Council'.

LGA s 224(7)

The powers of an officer authorised under the *Local Government Act 1989* are extensive. The authorised officer may enter any land or building at any reasonable time to carry out and enforce the *Local Government Act 1989* or any Act without notice.

While an officer could be authorised under the provisions of both the *Local Government Act 1989* and the PE Act, the officer should be careful not to confuse the powers and duties under each Act. It would be unwise for an officer authorised under the *Local Government Act 1989* to enter property using provisions of the PE Act unless that was the only authorisation relevant to the circumstances. Although there may be an inconsistency between the two Acts, the more specific (and restrictive) provisions of the PE Act are likely to prevail in these circumstances.

7.1.6 Monitoring compliance and responding to contraventions

Regular checks and inspections can be carried out by an authorised officer of a responsible authority to ensure that the use or development of land does not contravene a planning scheme, section 173 agreement or planning permit. However, due to the extent of use and development activity that goes on across a municipality, most responsible authorities rely on a complaint alleging a planning breach to trigger an investigation. A lesser number of investigations are carried out as routine inspections to monitor planning scheme compliance.

The complaint may raise matters that require referral to other council branches, such as health, building or local laws or it may fall under the jurisdiction of other authorities or agencies, including:

- Victoria Police (for example, wilful damage)
- Department of Justice and Community Safety (for example, liquor licensing)
- Environment Protection Authority (for example, major industrial noise/odour, contaminated land)

- service authorities and providers (for example, infrastructure damage)
- WorkSafe Victoria (unsafe working environment).

In some circumstances it may be appropriate for a joint site inspection to be conducted. This would be particularly relevant when the cause of complaint falls across more than one jurisdiction.

Where the owner of the land is not the occupier, the investigating officer may consider advising the owner of the matter at this preliminary stage. This gives the owner the opportunity to undertake measures to resolve the issue and may result in a more timely resolution.

Assembling Information

In each case, the investigating officer should start with a desktop audit and an initial assessment to assemble relevant facts, including (as relevant):

- zone and overlays applicable to the land and relevant provisions of the planning scheme
- occupancy and land use history (particularly where existing use rights may be a consideration)
- planning and building history, including planning permits, endorsed plans or section 173 agreements relevant to the land
- consultation with the planner who provided any advice or assessed any applications relevant to the land (where possible)
- aerial and street photography (both current and historic).

The desktop audit will assist the investigating officer to form an initial view on the nature of the suspected breach, based on information from the initial complaint and the research conducted.

Eyewitness accounts can establish when an offence was committed. In the absence of a witness, aerial photography, physical evidence on the ground and receipts or other documents may provide proof that something happened on a day, or between dates.

7.1.7 Site inspections

Following a desktop audit, an initial inspection of the land will help obtain first-hand evidence of a contravention. An officer must be authorised to enter the land.

PEA s 133

The following persons are authorised to enter any land at any reasonable time to carry out and enforce the PE Act, the regulations, a planning scheme, a permit condition, an enforcement order or an agreement under section 173 of the PE Act or, if the person has reasonable suspicion, to determine whether any of them has been or is being contravened:

- an authorised person of the department
- an authorised officer of the responsible authority
- any other person whom the Minister for Planning authorises to assist an authorised officer of the Ministry or authority.

PEA s 134(1); SWA s 78

Prior to entering a property for enforcement purposes an authorised officer is required to:

- obtain the occupier's consent, or
- provide two clear days prior notice if the land is not a brothel (special entry provisions in the *Sex Work Act 1994* apply to brothels) or

- obtain a warrant.

PEA s 136

An authorised officer may request the assistance of the Victoria Police to gain entry to land where an occupier refuses to allow entry following the provision of two days' notice.

MCA s 75

The option to take out a warrant may be necessary where entry to a property is required without giving two days' notice and the occupier refuses consent. A warrant is obtained from the Magistrates' Court.

Caution should be exercised when entering all construction sites. The officer should seek out any site office or on-site constructions manager in the first instance to advise of the reason for the inspection, to obtain consent, and to obtain a hard hat and vest if necessary.

All evidence compiled should be assembled and recorded methodically and clearly by the authorised officer to facilitate a fair and accurate assessment of the alleged contravention. This documentation is important as it is the basis on which an authorised officer or responsible authority decides if further monitoring or enforcement is warranted. It would also be part of the responsible authority's supporting information for any case the authority may make in a hearing before VCAT or during the course of legal proceedings.

PEA s 135

On entering land, the PE Act provides for evidence to be obtained through a variety of means. The inspection record should detail the address of the land and the matters being investigated, together with:

- time and date of the inspection
- persons in attendance
- details of activities or development noted at the time of the inspection
- names of any persons interviewed
- details of any interviews
- photographs, measurements, sketches, recordings and samples, as required.

In some instances, regular inspections of a site may be required to monitor activities or changes. Each inspection is to be recorded.

What if an authorised officer is obstructed when trying to inspect a property?

LGA ss 224(3)–(4)

If the breach or elements of the breach are not clearly apparent from outside the land, the investigating officer should request consent to enter the land from the occupier. The officer should identify himself or herself by name as an officer of the council (or department, Ministry or other authority, as relevant) and explain the reason for the inspection. It is good practice for the officer to provide a business card. Formal identification, such as proof of authorisation, a warrant or notice, should be made available if requested. An authorised officer must produce their identity card if requested to do so.

PEA ss 134, 135, 137; MUA s 6; SWA s 78

A person in attendance at a premises under investigation may choose to cooperate with the investigating officer and allow immediate entry to the property but can insist on being given two clear days' notice – unless the officer has a warrant or the officer believes on reasonable grounds the premises is being used for the purposes of a brothel.

It is an offence to obstruct an authorised officer from taking action in accordance with the PE Act, including obtaining entry to land to conduct an inspection. A penalty of 60 penalty units applies to such an offence.

PENALTY UNITS

Penalty units are used to define the amount payable for fines in relation to offences under Victorian Acts and Regulations. The value of a penalty unit is set each year in accordance with section 6 of the *Monetary Units Act 2004*. Information on the value of a penalty unit can be obtained from the 'Indexation of Fees and Penalties' webpage at **legislation.vic.gov.au**.

More information about penalty units and planning infringement notices is also available at **planning.vic.gov.au** on the 'Planning Infringement Notices' and 'Penalties' webpages.

The rate for a penalty unit is indexed each financial year so that it is raised in line with inflation. Any change to the value of a penalty unit occurs on 1 July each year and is published in the *Victoria Government Gazette*.

7.1.8 Negotiating compliance

For less serious or less urgent breaches, the responsible authority may consider negotiating compliance by writing to the alleged offender advising them of the breach. The letter should explain:

- the nature of the breach/complaint
- the findings of the investigation
- what needs to be done to achieve compliance
- specific timeframes to achieve compliance
- if any referrals have been made to other departments or external agencies
- details of the enforcement options available to the responsible authority should compliance not be achieved and associated penalty provisions.

The responsible authority may also consider serving an official warning under the *Infringements Act 2006* and include this in the letter. More information about official warnings is provided below.

At the end of the period specified for the achievement of compliance, the enforcement officer should conduct a second inspection. This may be carried out at an earlier date where the respondent has contacted council advising that necessary actions have been taken to achieve compliance.

Where compliance has not been achieved at the time of the second inspection, the following actions may be taken:

- where appropriate, discuss the non-compliance with the alleged offender and:
    - negotiate an extended timeframe for the achievement of compliance
    - reaffirm other enforcement consequences if compliance is not achieved.
- provide further correspondence to the alleged offender detailing the failure to comply within the specified period and emphasise to both owner and occupier that continued non-compliance is evidence of a breach that may result in further actions, including punitive measures and the potential for prosecution. The correspondence should provide a second opportunity to achieve compliance, again providing an extended timeframe for compliance to be achieved.

Where compliance is still not achieved and all attempts to negotiate compliance have failed, it may be necessary to employ other enforcement options.

7.1.9 Official warnings

IA s 8; IA Regs reg. 12

If the responsible authority believes on reasonable grounds a person has committed an offence but in considering all the circumstances decides an infringement notice is not appropriate, it can serve an official warning in writing in accordance with section 8 of the *Infringements Act 2006* (with prescribed details outlined in the Infringements Regulations 2016).

Issuing an official warning can also be used in negotiating compliance as detailed above.

The prescribed format of an official warning does not provide for any scope to direct an offender to rectify a breach, to cease a non-compliant use and/or development or show cause why the responsible authority should not take further action. These types of directions should be specified in a covering letter accompanying the official warning.

IA s 10

An official warning does not affect the power of the responsible authority to:

- commence proceedings against the person upon whom the official warning was served
- serve an infringement notice
- take no further action
- take any other enforcement action provided for in the PE Act.

IA s 11

However, the responsible authority must withdraw an official warning if it is going to commence proceedings or serve a planning infringement notice.

An official warning may be withdrawn at any time within six months of the serving of the official warning.

IA Regs reg 13

An official warning must be withdrawn by serving a withdrawal of an official warning on the person on whom the official warning was served. A withdrawal of an official warning must be in writing and contain the prescribed details.

7.2 Planning infringement notices

7.2.1 When is a planning infringement notice appropriate?

Planning infringement notices provide responsible authorities with a means of dealing quickly and easily with some less serious breaches of planning schemes, planning permits and agreements. They also provide an owner or occupier of land who has committed an offence a means of expiating that offence, without conviction or a finding of guilt.

PEA s 130

If an authorised officer of a responsible authority has reason to believe that a person has committed an offence against section 126 of the PE Act, the officer can serve a planning infringement notice on the alleged offender.

7.2.2 What must an infringement notice include?

IA s 13; IA Regs reg 14

Under section 13 of the *Infringements Act 2006* an infringement notice must:

- be in writing and contain the prescribed details, including the infringement penalty (the prescribed details are contained in regulation 14 of the Infringements Regulations 2016)
- state that the person is entitled to elect to have the matter of the infringement offence heard and determined in the Magistrates' Court (additional requirements also apply to an infringement notice served on a child).

PEA s 130(2A)

In addition to these requirements, the details of the additional steps (if any) required to expiate the offence must be included in an infringement notice. Any form of infringement notice can be used as long as it includes the prescribed information.

7.2.3 What can an infringement notice require?

PEA s 130(4)

In addition to requiring the payment of an infringement penalty, additional steps that can be required under an infringement notice to expiate an offence may include, but are not limited to:

- stopping the development or use
- modifying the development or use
- removing the development
- preventing or minimising any adverse impacts of the use or development that constituted the offence
- entering into an agreement under section 173 of the PE Act
- anything else required to remedy the contravention.

7.2.4 What happens if an infringement notice is served?

A person served with an infringement notice can:

- choose to pay the penalty and take other steps required by the notice, or

IA s 16

- elect to have the matter of the infringement offence heard and determined in the Magistrates' Court, or

IA s 22; IA Regs reg 16

- apply to have the decision to serve the infringement notice internally reviewed by the responsible authority (the requirements for internal reviews is contained in Division 3 of the *Infringements Act 2006*)
- ignore the infringement notice.

PEA s 130 (5)–(6)

If a planning infringement notice requires additional steps to be taken to expiate an offence and, before the end of the specified remedy period, the person served with the notice informs the responsible authority that those steps have been taken, an authorised officer must, without delay, find out whether or not those steps have been taken. That officer is then required to serve on the offender a further notice confirming whether or not the required steps have been taken.

IA s 32

Once the penalty has been paid and any required additional steps taken, the offender has 'expiated' the offence and no further proceedings can be taken. It is therefore important for a notice to state precisely what steps are needed, such as stopping, modifying or removing the development or use that constituted the offence.

If the person believes that they have not committed an offence, it is advisable that they contact the responsible authority to clarify the situation and, if necessary, obtain legal advice. However, if the person recognises that an offence has been committed and that the requirements of the notice are a reasonable way of rectifying the situation, it is wise to pay the penalty and comply with the other requirements of the notice.

Failure to pay the infringement penalty by the date specified in the infringement notice may result in further enforcement action being taken.

A responsible authority proposing to use planning infringement notice procedures should note that:

- Serving an infringement notice gives an alleged offender the opportunity to expiate an offence by paying the penalty and carrying out the other requirements. Anybody receiving an infringement notice can choose to ignore it, although this action could result in further action by the responsible authority and the incurring of further costs. An unpaid infringement notice can be registered by a responsible authority with the Office of Fines Victoria for collection and enforcement. If an infringement notice is not complied with it must instead be heard at the Magistrates' Court by prosecuting the original offence (for a breach of section 126 of the PE Act) that gave rise to the issue of the planning infringement notice. It is not a prosecution of any failure to comply with the planning infringement notice itself. An unsatisfied planning infringement notice does not generate a new offence, so it cannot be prosecuted.
- Unless the notice is withdrawn, the responsible authority must be prepared to prosecute an offender through the Magistrates' Court every time a penalty is not paid or the required additional steps are not carried out. Failure to prosecute will render infringement notices an empty threat. An infringement notice should not be served unless there is enough evidence about the offence to take the case to court as the offender is entitled to have the matter of the infringement offence heard and determined in the Magistrates' Court.
- If a prosecution follows an infringement notice, the court cannot force the offender to carry out the required additional steps set out in the notice. If the responsible authority wants to try and directly achieve the carrying out of these additional steps, it needs to apply for an enforcement order at VCAT.

CPA s 7

- The 12-month period allowed for commencing a prosecution relating to the subject matter of an infringement notice is calculated from the time of the alleged offence, rather than from the discovery of the alleged offence or the deadline for a contravened planning infringement notice.

For more information on the infringement notice process, refer to the *Infringements Act 2006*, the Infringements Regulations 2016 and the Victorian Department of Justice and Community Safety website **justice.vic.gov.au**.

7.2.5 Can an infringement notice be withdrawn?

IA s 18, CPA s 7

The responsible authority may withdraw an infringement notice by serving a withdrawal notice. A withdrawal notice can be served at any time before the outstanding amount of the

infringement notice together with any penalty reminder notice fee are registered with the Office of Fines Victoria.

7.2.6 When might withdrawal of a notice be appropriate?

IA s 18(4)

A notice cannot be withdrawn in situations where the required steps have been taken by the offender and the penalty has been paid.

IA s 18(3), 18(5)

If an infringement notice does not require any additional steps to be taken, it can be withdrawn even if an infringement penalty and any penalty reminder notice has been paid. In this circumstance, any penalty or fee must be refunded. Withdrawal may be appropriate if the alleged offender can convince the responsible authority that there was no offence, or that they will rectify the alleged offence if the notice is withdrawn.

Withdrawing a notice may also be necessary if the responsible authority realises, after serving it, that the notice was an inappropriate action in the circumstances. The authority may decide that it wants positive action to fix the problem and should have sought an enforcement order. It may realise that the evidence available could not lead to a finding of guilt by the court.

A responsible authority should, wherever possible, avoid having to withdraw a notice. If the points above are carefully considered before a notice is served, a responsible authority should rarely have to withdraw an infringement notice.

IA s 19; IA Regs reg 15

A withdrawal notice must be in writing and contain the prescribed details and state that the responsible authority intends to proceed in respect of the infringement offence by:

- continuing proceedings and issuing a summons, or
- issuing an official warning, or
- taking no further action, or
- taking any other specified action permitted under the *Infringements Act 2006* or the PE Act, that is, commencing proceedings in the Magistrates' Court or applying for an enforcement order at VCAT.

7.2.7 Internal reviews

IA s 22

An alleged offender or their representative may apply to the responsible authority for review of the decision to serve the infringement notice.

IA s 24; IA Regs reg 16

The review must be undertaken by an officer not involved in the issuing of the infringement notice. Usually this is a more senior person in the agency. Reviews must be completed within 90 days after the agency receives the application. However, this can be extended if the agency seeks additional information to consider the matter. Once the decision is made, the agency must provide the applicant with written confirmation of the decision within 21 days.

You can find more information about internal reviews in the Attorney-General's *Guidelines to the Infringements Act 2006* available on the Department of Justice website, **justice.vic.gov.au**.

7.2.8 Paying penalties

PEA ss 129

Penalties are to be paid directly to the responsible authority. Most councils provide for payments online, over the phone, by post or in person. Contact the relevant council to determine their payment method options.

IA s 29

The responsible authority should be ready to take further action promptly (such as serving a penalty reminder notice, prosecution or seeking an enforcement order), if a penalty is not paid or any required additional steps are not taken by the date specified.

7.3 Enforcement orders

7.3.1 What is an enforcement order?

An enforcement order is intended to prevent or stop unlawful planning activity and to achieve reinstatement. Enforcement order proceedings are not designed to punish by way of a financial penalty. Part 6 Division 2 of the PE Act addresses prosecution, which is discussed below in part 7.4 of this chapter.

PEA s 114

Any person, including a responsible authority, may apply to VCAT for an enforcement order to rectify a breach of a planning scheme, planning permit or section 173 agreement, or to avoid the commission or continuance of such a breach.

It is important that the system allows any person to apply for an enforcement order, as it provides:

- a potential form of sanction against an authority that is not properly enforcing the planning scheme (such as if a responsible authority is reluctant to take action on a particular case or where it is itself acting in contravention of planning laws)
- protection for an authority from unwarranted demands that it take enforcement action (which may not be appropriate or in the public interest).

An individual can take the matter directly to VCAT rather than relying on the responsible authority.

A responsible authority can seek an enforcement order through VCAT at the same time as it prosecutes a planning offence in the Magistrates' Court (and seek an appropriate penalty).

PEA s 124

Any enforcement order or interim enforcement order is binding on every subsequent owner and occupier to the same extent as if the order had been served on them, so there is no need to serve new notices.

7.3.2 How is an enforcement order made?

PEA s 114

A person seeking an enforcement order may apply to VCAT for the order. An enforcement order can be issued against an owner, occupier or any other person who has an interest in the subject land, such as a developer.

VCATA s 67; VCAT Rules rr 4.03(1), 8A.03

An application for an enforcement order is made to VCAT and must be made in accordance with the VCAT Rules. An application must:

- be submitted in the appropriate application form published on VCAT's planning disputes webpage (**planning.vcat.vic.gov.au**)
- be in writing
- contain the full name and address of the applicant and the respondent
- contain a brief description of the issue or matter in dispute
- state the remedy being sought from VCAT
- include an electronic address for the applicant.

VCAT's website provides a platform for completing application forms online and for filing them electronically. A fee is payable, which can also be paid online when the application is lodged.

VCAT Planning and Environment Division Fact Sheet – *Enforcement Orders under the Planning and Environment Act 1987* provides general information and guidance on making an application for an enforcement order or interim enforcement order, including advice on the procedures to be followed.

PEA s 115

When a person applies for an enforcement order, VCAT will direct they give notice of their application to the responsible authority, the person against whom the order is sought, the owner and the occupier of the land, and any other persons that may be affected by the grant of the enforcement order.

7.3.3 Options for the respondent to an enforcement order

On being served with an application, a person against whom an order is sought ('the respondent') has two options:

PEA s 117; VCATA Sch 1, cl 56; VCAT Rules r 8A.02

1. **Contest the application**: This is done by lodging an objection with VCAT under schedule 1, clause 56 of the *Victorian Civil and Administrative Act 1998* (VCAT Act). VCAT must then give specified persons a reasonable opportunity to be heard or to make written submissions in respect of the application.

PEA s 116

2. **Take no action**: If no other objections are lodged from other relevant parties, VCAT may directly make an order under section 116 or may reject the application. The order may be in the terms set out in the application or in different terms if VCAT thinks fit.

7.3.4 Objections to an application for an enforcement order

VCATA Sch. 1 Cl. 56; VCAT Rules r 8A.02

Relevant interested or affected parties may object to the grant of an enforcement order by lodging a statement with VCAT within 14 days of the date of service of the application. This includes a person against whom an order is sought (for situations where they may believe there is no contravention or an order ought not to have been made in the circumstances).

An objection must be in writing and must set out the grounds for making the objection using VCAT's statement of grounds form (available on the VCAT website). A copy of any objection must also be served on the applicant and the responsible authority (if not the applicant) within the 14-day period.

PEA s 116

If VCAT does not receive any objections to an application for an enforcement order, it can make any order it thinks fit in accordance with section 119 of the PE Act (see below), or it can reject the application altogether.

PEA s 117(1)

If VCAT receives an objection to the application within the period specified in the notice, it must give the following persons a reasonable opportunity to be heard or to make written submissions in respect of the application:

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

VCAT will typically schedule a hearing to consider the matter. All relevant parties will be sent a notice of the hearing. If the applicant, respondent or any other affected person does not attend the hearing, VCAT may make orders in that person's absence.

PEA ss 117(2), 119

Following the consideration of all relevant matters, VCAT may reject the application or issue an enforcement order in accordance with section 119 of the PE Act to:

- direct a person to stop a use or development within a specified time
- direct a person not to start a use or development
- require that a building be maintained in accordance with the order
- direct that other things be done within a specified period to restore the land:
    - as closely as possible to its condition before the contravention occurred, or
    - to some other specified condition, or
    - to some other condition acceptable to the responsible authority or a specified agency, or
    - otherwise ensure compliance with the PE Act, scheme, condition of planning permit or section 173 agreement.

VCATA s 116(2)

A copy of the order must be served on all relevant persons. This is done by VCAT or by a party specified by VCAT.

7.3.5 Awarding costs

VCAT's approach to awarding costs in applications for enforcement orders is different to its approach in other matters. VCAT has awarded costs in enforcement matters more commonly than in normal planning reviews especially where, despite requests and warnings, there is a 'persistent and unjustified' failure to comply with planning controls.

VCATA s 109

Although enforcement proceedings warrant a different approach to costs than that taken in normal planning reviews, the successful party is not entitled to being awarded costs as a matter of course. Each case must be viewed on its merits.

7.3.6 Interim enforcement orders

PEA s 120(1); VCATA s 68(3)

Where circumstances require more immediate action, a responsible authority or person who has applied to VCAT for an enforcement order under section 114 of the PE Act may also apply for an interim enforcement order.

The application form, available from VCAT's website (**vcat.vic.gov.au**), allows for an application to be made for an interim order at the same time as the enforcement order. Refer to part 7.3.2 of this chapter for information about the form and procedures.

Interim enforcement orders are similar to interlocutory injunctions made by courts. The purpose of these proceedings is to preserve the status quo until the hearing and subsequent determination of the case.

PEA s 120(2)

The important distinguishing feature of an interim enforcement order application is that it may be considered by VCAT without notice to any person. Hence these applications can ensure a prompt response.

PEA s 120(3)

Before making an interim enforcement order, VCAT must consider:

- the effect of not making the interim enforcement order
- whether the applicant should give any undertaking as to damages
- whether or not it should hear any other person before the interim enforcement order is made.

Other matters which may be considered include the urgency of the matter and whether irreparable harm will be caused if the order is not granted.

PEA s 120(9)

If VCAT makes an interim enforcement order without notice to a person, it must give any affected person an opportunity to be heard within seven days of making the order.

PEA s 120(4)

The service of an interim enforcement order and the types of remedial measures it may require are similar to those of an enforcement order and may include stopping or preventing commencement of a use or development.

PEA ss 120(10), 121

VCAT has the power to cancel or amend an enforcement order or interim enforcement order at any time.

PEA s 150(4); VCATA ss 75(2), 78(1)

The PE Act and VCAT Act make specific provision for payment of compensation for loss or damage as a result of proceedings that have been brought vexatiously or frivolously, or in order to secure or maintain a direct or indirect commercial advantage for the person who brought the proceedings. This should be considered before seeking an interim enforcement order which may cause significant loss to affected parties.

7.3.7 What happens if an enforcement order is not complied with?

PEA s 14

A responsible authority has a statutory duty to enforce any enforcement order or interim enforcement order.

PEA s 122(5); VCATA s 133

If a person has not complied with an order, they can be prosecuted in the Magistrates' Court for this offence. In such a prosecution, it is not necessary to prove the scheme and controls or the breach of them, only that the order was properly made and had not been complied with. To assist in obtaining compliance, the penalties for failure to comply with an enforcement order or interim enforcement order are substantial. They involve both imprisonment under the VCAT Act (which is not a penalty available for prosecution under section 126 of the PE Act) and fines.

VCATA s122

An enforcement order that has been contravened can be filed in the Supreme Court. The enforcement order effectively becomes an order of the Supreme Court and can be prosecuted accordingly.

PEA s 123

Furthermore, the responsible authority can carry out any work required by an enforcement order or interim enforcement order that was not carried out within the specified period. With the consent of VCAT, any other person may also carry out these works. The cost of carrying out these works is then recoverable as a debt from the person in default.

Any responsible authority or other person contemplating taking such direct action should proceed with great caution and only on the basis of well-informed legal advice.

7.4 Prosecution for a breach of the Act

7.4.1 The role of prosecution in planning enforcement

PEA ss 126, 127

The statutory planning system ultimately relies on the fact that planning schemes are part of the law of Victoria and that any person who uses or develops land in contravention of, or fails to comply with, a planning scheme, planning permit or section 173 agreement or an enforcement order is guilty of an offence. Penalties apply and are referred to in more detail below.

Prosecution for a breach under section 126 of the PE Act take place in the Magistrates' Court. Prosecution for a breach of an enforcement order or interim enforcement order under section 133 of the VCAT Act takes place in the Supreme Court. It is a form of criminal proceeding and offences must be proved on the same standard as any other criminal proceeding – that is, beyond a reasonable doubt.

7.4.2 When is it appropriate to prosecute an offence?

If a person has not complied with an infringement notice, some further action must be taken. It is not an offence to ignore an infringement notice. However, a person who ignores a notice does not expiate the offence and so remains open to prosecution or other action relating to the infringement notice.

Alternatively, the responsible authority may consider the breach and its associated impacts to be so significant, or an infringement notice would be inappropriate because of the risk of future breaches, that prosecution would be the most appropriate action to take in the first instance.

PEA ss 127, 131

If the responsible authority is concerned about continuing unlawful use of land, prosecution for the offence may be the most appropriate remedy. A penalty of up to 1200 penalty units is provided. If the offence does not stop when a person is convicted, a further penalty of up to 60 penalty units per day, for as long as the offence continues, may be applied. The continuing penalty will most often make the offender cease the offending use. (See part 7.1.7 of this chapter for information about penalty units). In the case of unlawfully demolished heritage buildings, the Governor in Council may declare by an order published in the Government Gazette under section 131 that land may not be used or developed for a period of time not exceeding 10 years.

Prosecution for an offence to carry out development may not be helpful where the responsible authority wishes to see the development removed or modified to comply with the scheme. Given the offence was to carry out the development, the prosecution does not provide a basis to secure its removal or require restoration works.

In such cases, it may be more appropriate to seek an enforcement order to direct that the development be removed or modified. If this is not complied with, there would be an ongoing offence of failing to comply with the order. However, remembering that both processes may happen simultaneously, prosecution may still be appropriate if the responsible authority considers that the nature of the offence makes it appropriate that the person be fined and/or convicted.

PEA s 122(5)

Even if the offence relates to an alleged unauthorised use, it may still be preferable to seek an enforcement order to direct that the use cease, especially if there is room for some dispute about whether the use in fact breaches the planning scheme. The standard of proof necessary at VCAT is a civil standard (balance of probabilities) which is less than the criminal standard (beyond a reasonable doubt) which applies in the Magistrates' Court. Additionally, VCAT may be better placed than the Magistrates' Court to consider matters of interpretation to characterise the land use or development that is alleged to have contravened the PE Act. There is the added consideration that, if VCAT makes an enforcement order, any failure to comply with that order can be separately prosecuted in the Supreme Court without the need to separately prove the original breach of the PE Act to criminal standards.

Section 126 is not the only offence section in the PE Act:

- Section 137 creates an offence of obstructing an authorised person or member of the police force taking action under sections 133–136 (powers of entry). The penalty provided for in section 137 is 60 penalty units.
- Section 169 creates an offence of behaving in an insulting or obstructive manner at a panel hearing. The penalty provided for in section 169 is 60 penalty units.

(See part 7.1.7 of this chapter for information about penalty units.)

7.4.3 Procedure in prosecution

MCA s 25

Prosecution usually takes place in the Magistrates' Court, which has jurisdiction to hear and determine (among other things) all summary offences. An offence under the PE Act is a summary offence – an offence that can be heard by a magistrate sitting alone, rather than by a judge and jury.

The PE Act is silent on who can prosecute an offence. At least, for the purposes of section 126, it would be the responsible authority and its authorised officer. As well as the person

breaching the planning control being guilty of a section 126 offence, the owner and the occupier of the land are also guilty of that offence.

PEA s 128

If a body corporate (also known as a corporation) commits an offence against a specified provision of the PE Act, an officer of the body corporate also commits an offence against the provision if the officer failed to exercise due diligence to prevent the commission of the offence by the body corporate. The specified provisions are sections 48(2), 93(3), 126(1), 126(2), 126(3) and 137. Section 128(3) of the PE Act sets out the matters a court may have regard to in determining whether an officer of a body corporate failed to exercise due diligence. An officer of a body corporate may:

- rely on a defence that would be available to the body corporate if it is charged with the same offence, and in doing so, bears the same burden of proof as the body corporate
- commit an offence whether or not the body corporate has been prosecuted for, or found guilty of, that offence.

PEA s 129

If an offence has been prosecuted by the responsible authority, any penalty is paid to the responsible authority.

If the prosecution is successful, an order for costs will usually be made against the defendant in favour of the person who has brought the charge. However, if the defendant is successful and the prosecution fails, the defendant is normally entitled to an order for costs. The costs, which are usually ordered by a court to be paid, are called party/party costs and do not provide full indemnity for the costs incurred by a successful party.

VCATA s 98(1)

In comparison to seeking an enforcement order at VCAT, prosecuting a planning non-compliance offence in the Magistrates' Court is more difficult to prove because it has to be proven beyond a reasonable doubt, whereas at VCAT the burden of proof is the civil standard. Additionally, in the Magistrates' Court the normal rules of evidence apply, whereas VCAT is not bound by the rules of evidence.

It is beyond the scope of this guide to give advice on court procedure. If prosecution is contemplated, legal advice should be sought. Similarly, a person who is being prosecuted under the PE Act needs to take the matter seriously and obtain legal (and possibly other professional) assistance, because the penalties that may be imposed are significant.

7.5 Injunctions

7.5.1 Types of injunction proceedings

An injunction is a court order that requires a party to do or refrain from doing a specific act. A party that fails to comply with an injunction faces penalties and may have to pay damages or accept sanctions.

PEA s 125

In planning, there are two ways an injunction can be obtained from a court to restrain non-complying activities. The PE Act only mentions one of these. Section 125 of the PE Act allows an application to a court or VCAT for an injunction restraining any person from contravening an enforcement or interim enforcement order. The other option is a general common law injunction.

SCA ss 31, 33, 37; CCA s 37; MCA s 100

The Supreme Court, the County Court and the Magistrates' Court (subject to some limitations) have power to grant injunctions under section 125 and general common law injunctions.

VCATA s 123

VCAT also has the power to grant an injunction applied for under section 125 of the PE Act.

In addition to a section 125 injunction, a responsible authority has the option to seek a general common law injunction. The two types of injunction are discussed in more detail below.

7.5.2 Section 125 injunctions

PEA s 125

A section 125 injunction is used to restrain a person from contravening an enforcement order or interim enforcement order.

The PE Act gives a responsible authority or any other person the right to apply for the injunction. The PE Act avoids the technical arguments that general common law injunctions attract such as whether the intervention or fiat (consent) of the Attorney-General is necessary.

Section 125 injunctions may be applied for, whether or not proceedings have been instituted for an offence under the PE Act. However, there must be a contravention of an existing enforcement order or interim enforcement order.

7.6 Cancellation and amendments of permits

7.6.1 Can a permit be cancelled or amended?

PEA s 87

When non-compliance with a planning scheme involves a permit, VCAT may, if requested to do so, cancel or amend the permit.

VCAT may only do this when there has been:

- material misstatement or concealment of facts in the original permit application, or
- a substantial failure to comply with the conditions of the permit, or
- a material mistake in the granting of the permit, or
- a material change of circumstances since the permit was granted, or
- a failure to give notice as required by the PE Act.

Cancellation is probably the ultimate sanction against the person wishing to use or develop the land under a planning permit.

7.6.2 Who may apply for cancellation or amendment?

PEA ss 87(3), 89(1)

The responsible authority or specified persons can apply to VCAT for an order cancelling or amending a permit.

PEA ss 88, 89(3), 91(5)

An application needs to be made as soon as possible. VCAT may refuse to hear an application unless the person making it has done so as soon as they became aware of the facts supporting the application.

Further, VCAT is unable to cancel or amend a permit (at least in relation to development) if the development has already been substantially carried out, or, in relation to a subdivision, if the plan of subdivision has been registered.

VCATA s 67; VCAT Rules rr 4.03(1), 8A.03; PE Regs reg 37

An application to cancel or amend a permit must be made in accordance with the Victorian Civil and Administrative Tribunal Rules 2018. See part 5.2.1 for more information about the required documentation for the application.

In addition to the standard information requirements, the Planning and Environment Regulations 2015 require that an application to cancel or amend a permit must include:

- the name and address of the person making the request, including whether the request is made as:
    - the responsible authority
    - a person under section 89 of the PE Act (any person who objected or would have been entitled to object)
    - a referral authority
    - the owner or occupier of the land
    - a person who is entitled to use or develop the land
- a description of the land sufficient to identify it
- the name of the responsible authority (if it is not making the request)
- if known by the person making the request:
    - the name of any referral authority that was required to be given a copy of the application
    - the names and addresses of the owner and the occupier of the land (if the request is not made by the owner or occupier)
- the date on which the person making the request had notice of the facts relied on
- the facts relied on in support of the request
- if a request is made by a person under section 89 of the PE Act, the request must also include reasons why the person believes they:
    - should have been given notice (if the person was not given notice of the application)
    - have been adversely affected by a matter under section 89(1)(b) of the PE Act (if applicable) by:
        - a material misstatement or concealment of fact in relation to the application
        - any substantial failure to comply with the conditions of the permit
        - any material mistake in relation to the grant of the permit.

VCAT's website provides a platform for completing application forms online and for filing them electronically. A fee is payable, which can also be paid online when the application is lodged.

Guidance on making an application to cancel or amend a permit is also available in the VCAT Planning and Environment Division Fact Sheet – *Amend or Cancel a Permit under section 87 or 89 (and stop orders)*.

PEA s 93

VCAT may, if it considers it appropriate, make an order that no specified development may be carried out or continued on the land, pending the final hearing of the application. This is

like an interim enforcement order and usually attracts an undertaking as to damages. See part 7.6.4 of this chapter for more details.

7.6.3 Hearing and order

VCATA sch 1 cl 56

A person seeking to oppose an application for cancellation or amendment must file a statement of grounds with VCAT using the tribunal's statement of grounds form (available on the VCAT website). A copy of the statement of grounds must also be served on the applicant and the responsible authority (if not the applicant).

PEA s 90A

The PE Act specifies what VCAT must take into account in coming to its decision. These are set out in section 84B(2).

The approach to costs in these types of proceedings is much the same as that in enforcement order proceedings. See part 7.3.5 of this chapter.

PEA s 92; PE Regs regs 38, 39

If an order is made cancelling or amending a permit, the responsible authority must serve notice of that within seven days of receiving VCAT's decision. The notice must be given to:

- the responsible authority
- the owner and the occupier of the land concerned
- any person who asked for the cancellation or amendment of the permit
- any relevant referral authority
- any other person whom VCAT considers may have a material interest in the outcome.

7.6.4 Compensation obligations

PEA ss 93, 94(1), (4)

Where a stop order is made, pending a hearing of a request to cancel or amend a permit and VCAT ultimately decides not to cancel or amend the permit, an applicant is liable to compensate the permit holder for any loss or damage suffered as a result of the stop order.

PEA s 94(2)

Irrespective of whether a stop order is made, if a permit is cancelled or amended by VCAT, a responsible authority is liable to pay compensation to any person who has incurred expenditure or liability for expenditure as a result of the issue of the permit in respect of any:

- expenditure that is wasted because the permit is cancelled or amended
- additional expenditure or liability incurred by necessity in purchasing other land to use or develop in the required manner because the permit is cancelled or amended.

PEA ss 87(2), 94(4)

Compensation is not payable if the reason for cancellation or amendment of the permit was due to:

- substantial non-compliance with a permit condition
- material misstatement or concealment of facts in the original permit application
- a material mistake in the granting of the permit that arose because of the permit applicant's conduct
- a permit being amended to comply with the Building Regulations under the *Building Act 1993*.

7.7 Evidence

One of the challenges with enforcement proceedings is being able to obtain evidence that is appropriate, relevant, sufficient and accurate enough to show that non-compliance has occurred or, in some cases, is going to occur.

The evidence necessary for these purposes and to gain a successful outcome is often complicated.

Essentially, the evidence needs to prove the existence of the planning control, any activity contrary to the planning control and the liability facing the person who is the subject of the proposed or existing proceedings.

Apart from the evidence necessary to prove formal matters such as the planning controls, evidence of other matters is needed. That evidence can consist of direct observations, photos, notes, admissions and information gained during an inspection. Mere assertions are not enough.

VCAT requires a more stringent standard of evidence in enforcement proceedings and in permit cancellation and amendment proceedings than in other types of reviews. Evidence is usually given on oath or affirmation rather than by assertion or written submissions. The applicant's case needs to be proven on the balance of probabilities, but the degree of proof required must reflect the gravity of the facts to be proved.

The standard of evidence required at VCAT is a civil standard 'on the balance of probabilities', which is less than the criminal standard 'beyond reasonable doubt' which applies in the Magistrates' Court (relevant in planning prosecutions).

7.7.1 Proof of formal matters

As part of proving the ingredients of the offence or non-compliance, it is frequently necessary to provide details of a planning scheme, permit, section 173 agreement, ownership and occupation of the land, that the land is in the municipality of the responsible authority and other similar matters.

PEA ss 139–146; LGA s 242

The legislation provides shortcuts in proving such matters, either by dispensing with the requirement to provide proof of them altogether or by providing for certificates to constitute conclusive or prima facie evidence of those matters.

If the person proceeded against is not a human being (for example, a corporation, which is still a legal 'person'), it is necessary to prove that the person legally exists. In the case of the corporation, a company search of the relevant corporation obtained from the Australian Securities and Investments Commission (ASIC) is generally such proof.

Sometimes there will be a question of whether existing use rights protect a particular activity. Proving the existence of such rights is the responsibility of the person seeking to take advantage of them.

CPA s 72

Where legislation contains exceptions, provisos, exemptions or qualifications, the burden of proving that they apply in any prosecution is the responsibility of the accused.

7.7.2 Evidence of other matters

Because of the passage of time between an event occurring and the giving of evidence in relation to it, proposed witnesses (including complainants) should make running notes of what they observed and experienced. The witnesses can then use these notes to refresh their memories when giving evidence.

A great deal of valuable evidence is usually obtained in the form of admissions made by the alleged contravener when interviewed by an officer of the responsible authority. Those admissions can be used as evidence against the alleged contravener.

Where the person proceeded against is a body corporate, such as a company, care needs to be taken that the person interviewed is a person legally capable of speaking and making admissions on behalf of the corporate body.

PEA ss 135

Interviews are usually more fruitful where the officer has formal proof and other relevant documents to show to the alleged contravener during questioning.

Frequently, it is necessary for entry to be made to and an inspection made of premises to ascertain if non-compliance exists. Valuable evidence can also be gathered during such a visit. In the case of brothels, the *Sex Work Act 1994* gives special rights of entry, discussed below.

7.8 Brothels

SWA s 3

A 'brothel' means any premises made available for the purpose of sex work by a person carrying on the business of providing sex work services at the business's premises.

SWA ss 21A, 75

The *Sex Work Act 1994* creates numerous offences in relation to the operation of brothels. Only some of these strictly relate to planning laws.

SWA ss 80–85

In addition to the normal enforcement mechanisms generally available, the *Sex Work Act 1994* has some special mechanisms for brothels. These include the power for a Magistrates' Court to declare premises to be a proscribed brothel, thus 'quarantining the premises' from occupation or use. Breach of the declaration is an offence.

SWA s 80(1)

The declaration application is made by a member of the police force or an authorised officer of the responsible authority, depending on what ground is relied on to support the application. Authorisation of a council officer is not provided under the *Sex Work Act 1994*. In such circumstances council would rely upon the overarching authorisation set out in section 232 of the *Local Government Act 1989*.

SWA ss 80(3A), 83, 85, 89

Other provisions of the *Sex Work Act 1994* facilitate enforcement by providing procedural aids not found in the PE Act, or more flexible than those contained in the PE Act.

7.9 Using other legislation for enforcement

A land use related offence may not necessarily be within the jurisdiction of the PE Act. Alternative courses of action under other legislation may sometimes be more appropriate. Other legislation that may be relevant includes:

- the *Heritage Act 2017* (such as for demolition of a historic building) – contact Heritage Victoria
- the *Public Health and Wellbeing Act 2008* (such as for unsanitary premises and nuisances) – contact the relevant state health department or the council's health department

- local laws under the *Local Government Act 2020* (such as for parking infringements) – contact the council. In most cases the same council will also be the responsible authority for the planning scheme
- the *Environment Protection Act 2017* (such as for excessive noise and disposal of wastes) – contact the Environment Protection Authority or the council, depending on which body has responsibility for the particular part of that Act
- the *Sex Work Act 1994* (for illegal brothels) – contact the council or Victoria Police.

Individuals may also be able to bring civil proceedings in nuisance cases if statutory remedies are not available, or as an alternative to them. Legal advice should be sought in such cases.

7.10 Other information about enforcement

Further reading and assistance on enforcement can be found on the VCAT website. The Planning and Environment Division fact sheets and practice notes are especially helpful (**vcat.vic.gov.au**), particularly:

- Fact Sheet – *Amend or Cancel a Permit under section 87 or 89 (and stop orders)*
- Fact Sheet – *Enforcement Orders under the Planning and Environment Act 1987*

Another useful source of information is LexisNexis's guide to planning and environment law in Victoria.

7.11 Enforcement checklist

Delegation and authorisation

☐ Has an officer of a responsible authority been authorised or delegated to perform the necessary enforcement powers and duties, such as site inspections?

Nature of offence

☐ Have the nature and effect(s) of the alleged contravention been clarified, for example, activity, person responsible, identity of the land?

Appropriate method of enforcement

☐ What method of enforcement is appropriate in the first instance for a particular offence?

- negotiation
- official warning
- planning infringement notice
- enforcement order
- interim enforcement order
- injunction
- prosecution
- cancellation or amendment of a permit?

Other enforcement methods may be needed subsequently.

Entering a property

- ☐ Has the consent of the occupier of land been obtained to enter the property? Alternatively, if the property is not a brothel, has two clear days' notice been given to the occupier or a warrant obtained before entering the property?

Evidence

- ☐ Can sufficient documentary and other evidence be obtained to uphold a contravention of the PE Act, planning scheme, planning permit or agreement?

Compliance

- ☐ Has all evidence and action been reviewed to determine whether compliance has been achieved or further enforcement action is required?

Payment of penalty

- ☐ Has the appropriate penalty payment been received?

Using Victoria's Planning System

Chapter 8: Agreements

Contents

8.1. What is a section 173 agreement?

PEA s 173

The responsible authority can negotiate an agreement with an owner of land to set out conditions or restrictions on the use or development of the land, or to achieve other planning objectives in relation to the land.

These agreements are commonly known as 'section 173 agreements'. The power to enter into the agreement arises under section 173 of the *Planning and Environment Act 1987* (PE Act).

Like other agreements, a section 173 agreement is a legal contract. However, the benefit of a section 173 agreement is that it is recorded on the title to the land so that the owner's obligations under the agreement bind future owners and occupiers of the land. A further benefit of being recorded on the title is that it gives prospective owners notice of the agreement.

PEA ss 114, 126

A section 173 agreement is enforced in the same way as a permit condition or planning scheme. It is an offence to use or develop land in contravention of a section 173 agreement.

The purpose of an agreement is to make it easier to achieve specific planning objectives for an area or particular parcel of land than is possible with other statutory mechanisms.

8.2 Parties to an agreement

PEA ss 3, 173

The PE Act provides that a section 173 agreement can be entered into between a responsible authority and an owner of land (normally the registered proprietor) or a purchaser of land in anticipation of that person becoming the owner.

Where the agreement is entered into with a prospective owner, it does not bind the existing owner unless the existing owner agrees. Normally, an agreement with the prospective owner will specify that the agreement does not commence operation until that person becomes the owner of the land. Once the prospective owner becomes the owner of the land, the obligations under the agreement will then commence and bind the owner and any future owners and occupiers.

Provided the responsible authority and owner (or prospective owner) are parties to a section 173 agreement, other persons or bodies may be additional parties to the agreement and become bound by the terms of the agreement. This may include, for example:

- a planning authority or referral authority where it is useful for that body to coordinate its powers or functions in relation to the land
- a developer or occupier with an interest in the development or use of the land.

It is not possible for a section 173 agreement to be entered into with a developer or occupier of land without the owner or prospective owner also being a party. This is because the owner must agree to the obligations under the agreement being recorded on the title to the land.

PEA s 182A

After an agreement has been entered into, parts of the land that are subject to the agreement may pass into separate ownership through subdivision or by sale of separate lots.

If such land is transferred to another person, the new owner becomes an additional party to that agreement unless the agreement includes a provision to the contrary. This means that obligations under an agreement are assigned to subsequent owners of separate holdings.

8.3 When should an agreement be used?

Before deciding to use a section 173 agreement, a responsible authority should carefully consider other mechanisms available to achieve its desired planning objective.

Section 173 agreements can be complex and costly to administer and are difficult to amend or end, particularly after the affected land is subdivided.

8.3.1 Advantages of agreements

The advantages of a section 173 agreement include:

- It can be recorded on the title to land and become binding upon future owners as well as giving notice of the obligations under the agreement to prospective owners.
- Unlike a planning scheme provision or permit condition, which allows something to be done, a section 173 agreement can expressly require something to be done. This is particularly useful where a responsible authority wants to guarantee certain outcomes prior to, or as part of, the granting of a planning permit for a specific use or development.
- An agreement can set out a level of detail or site-specific information which is difficult to include in a permit condition or other form of planning provision.
- Unlike restrictive covenants, a section 173 agreement can include positive covenants and thus include performance criteria or more innovative arrangements for the use or development of land.
- An agreement can create positive obligations on a responsible authority or other parties and thus achieve broader planning objectives than a permit.
- An agreement can continue to operate and impose restrictions on land even if the need for a permit ceases and the need to operate under that permit no longer exists.

8.3.2 When not to use an agreement

PEA s 180

An agreement cannot and should not be used as a basis for trying to extend an authority's powers under the PE Act. A section 173 agreement cannot authorise any use or development contrary to the planning scheme or a permit. This means that an agreement cannot provide for less restrictive provisions than those in a planning scheme or permit, such as allowing a use or development that is otherwise prohibited. However, an agreement could provide for more restrictive provisions than those in the planning scheme or a permit, such as prohibiting or placing greater restrictions on a use or development that is otherwise allowed.

An agreement is not a substitute for planning provisions and should not be used if an objective can be met and enforced through a permit condition. Before requiring a section 173 agreement, the responsible authority must ensure that the issue involved really requires the powers and complexity of an agreement rather than a clearly worded permit condition.

For example, an agreement should not simply provide for certain works to be done to the satisfaction of the responsible authority, when a similar condition could just as easily have been included in a permit or restrict a particular use or development that would in any event require an amendment to the permit.

An agreement is a contract and should not be entered into without first obtaining legal advice. If an agreement is not carefully drafted, there may be difficulties in enforcing or amending it.

Importantly, an agreement can only be entered into voluntarily.

8.3.3 What can an agreement cover?

PEA s 174

The PE Act allows the section 173 agreement to provide for:

- the prohibition, restriction or regulation of the use or development of land
- conditions subject to which the land may be used or developed for specified purposes
- any matter intended to achieve or advance the objectives of planning in Victoria under the planning scheme or an amendment.

This provides a wide scope for agreements. However, there should generally be a connection between the agreement and the specific planning outcomes sought to be achieved for the land over which the agreement will be recorded.

Section 173 agreements have been used in a wide variety of matters. Some examples are:

- coordination of development with adjoining landowners or other regulatory authorities
- to provide for staged developments
- rehabilitation of property, repair of the environment, heritage protection or vegetation protection
- provision of community infrastructure or specific development infrastructure – such as open space or facilities on the land or nearby land under a contributions plan
- securing developer contributions under a contributions plan
- restrictions on change of use, or abandoning existing use rights
- limits on future development, including neighbourhood agreements to protect neighbourhood character
- planning 'trade-offs', such as a planning concession on one property based on a commitment to do something on another property
- the development or provision of land for affordable housing.

8.4 Procedure for making and amending an agreement

8.4.1 Negotiating an agreement

Negotiating agreements can be involved and time-consuming, therefore the objectives must be clear and must relate to the planning approval process. The most successful agreement is one in which both parties actively consider and negotiate conditions, without viewing it as a technique for restricting development by the responsible authority. The focus of all parties should be joint problem-solving and achieving a performance-oriented planning outcome for the land.

While agreements are generally negotiated, a section 173 agreement can sometimes be required by a planning scheme or a permit condition prior to the commencement of a specific use or development. To avoid any perception that the responsible authority has an undue negotiating 'advantage', an authority should be careful not to act unreasonably in seeking planning concessions or other covenants in the agreement beyond those necessary to achieve its proper planning objectives for the land.

PEA s 188

To avoid delays in negotiations, it is useful for the responsible authority to delegate negotiating powers to officers who can liaise with the relevant parties and report to the authority as required.

8.4.2 Content of an agreement

PEA s 174

The PE Act details the matters an agreement can address. An agreement can be more positive and specific than a permit condition. In this way it can be used as an effective means of ensuring performance of obligations and, if there is a need, attaching the obligations in the agreement to the land.

PEA s 174(1)

An agreement must bind the owner of the land to the covenants specified in the agreement. This means that the primary purpose of the agreement is to set out the owner's obligations so that they can be clearly enforced against the owner or future owners of the land.

Care must be taken by a responsible authority when defining its own obligations (if any) under an agreement. The responsible authority has no power to enter into an agreement that obliges it to exercise a statutory discretion in a particular manner in the future. For example, if an owner is prepared to enter into an agreement that is conditional upon the approval of a planning scheme amendment, then the agreement should specify that it does not commence until the amendment is approved. If the amendment is not approved, the owner will not be bound by the agreement. The agreement should not attempt to bind the responsible authority to the future approval of the amendment or the grant of a permit, as this would fetter the future exercise of its statutory discretion and be beyond its power, and therefore be subject to legal challenge.

PEA s 180

An agreement must not require or allow anything to be done that would breach a planning scheme or a permit. An agreement can become unnecessarily complicated by including an array of matters between the responsible authority and the owner, or between the owner and other parties to the agreement, with different or unspecified end times. Any obligation set out in a section 173 agreement should only be put in place with the intention that it would run with the land as a covenant and be enforced under the PE Act.

PEA s 175

Bonds and guarantees may form part of an agreement, with provision for forfeiture of money if the owner fails to carry out the agreement to the satisfaction of the responsible authority. This does not apply if the responsible authority is entering into an agreement with a Minister. An agreement must not require a Minister to provide a bond or guarantee to the responsible authority.

PEA ss 176, 177, 184

An agreement will usually begin immediately after it is executed (by way of signature of all parties to it in the presence of at least one adult witness who is not a party to the agreement). An agreement will not usually be binding on subsequent owners until it is recorded on the title to the land. However, the PE Act allows a date to be specified or for the commencement to be tied to a specified event, including a planning scheme amendment coming into operation or a permit being granted. This can be useful if the obligations under the agreement are tied to a specific use or development. The same triggers can be used for the ending of an agreement. An agreement can also be ended by agreement between the responsible authority and all persons bound by any covenant in the agreement.

8.4.3 Availability of agreement

PEA ss 179, 197A

The responsible authority must keep a current copy of each agreement at its office and make it available in accordance with the public availability requirements.

If an agreement is recorded on the title to the land, the copy lodged for record is available for inspection as part of a search of the certificate of title.

PEA s 17(2)

If an agreement coming into effect is conditional on a planning scheme amendment being approved, and the agreement is executed prior to exhibition of the amendment, a copy of the agreement must be forwarded to all parties who receive a copy of the amendment.

8.5 Form of an agreement

An agreement must clearly and precisely set out the obligations and rights of the parties. Generality, vagueness and ambiguity must be avoided.

PEA s 174(1)

Corporations Act 2001 s 127

The agreement must be in writing, made under seal and signed by all parties in the presence of at least one adult witness who is not a party to the agreement. For the responsible authority or any party that is a company, the common seal of the authority or company will need to be affixed in accordance with its legal requirements. Where there is a clear written delegation, an officer of the responsible authority may be able to seal the agreement on the authority's behalf.

Ensure that sufficient original copies of the agreement are signed and sealed to satisfy the requirements of the Registrar of Titles for recording in accordance with section 181 of the PE Act. Copies are also needed for each party and the responsible authority.

The basic elements of an agreement are listed below to give some insight into the sorts of things that need to be considered before seeking legal assistance in drafting the document. This information is not necessarily exhaustive.

8.5.1 Date and parties to agreement

The heading of the agreement should contain the date of the agreement and identify the parties, for example, the responsible authority and the individual or company who owns the subject land. The name of the owner of the land should be consistent with what appears on the title. A title search should be undertaken to confirm the owner of the land.

Addresses should be included for all parties. Companies should include an Australian Company Number (ACN). In some cases, there will be additional parties to the agreement, such as another government agency, a developer or an occupier. Similar information should be included for these parties.

8.5.2 Recitals

This section gives the background to the agreement so that the operative provisions can be readily understood. It should clearly identify:

- the land to be encumbered, by reference to the certificate(s) of title on which the covenants will be recorded and also by reference to a plan if appropriate (the street address of the land should also be inserted)
- the owner (or prospective owner) of the land

- why the agreement is being entered into
- the municipal jurisdiction and the responsible authority for the administration and enforcement of the related planning scheme – for example, 'the land is within the Gumnut Planning Scheme for which the Gumnut City Council is the responsible authority' (also add zoning information if this is relevant)
- other parties, if any, and the basis on which they are necessary parties.

The responsible authority should conduct a title search to ensure that all the relevant land is referred to in the agreement; otherwise there may be problems with registration or enforcement. This section should also indicate whether a planning permit or an amendment to the planning scheme affects the land and the basis of the agreement.

8.5.3 The agreement

This section details what each party to the agreement is agreeing to do. Depending on the detail of the agreement it may include the following:

- **Definitions and interpretation:** Important terms should be defined. This helps to prevent potential legal problems. It should be clearly stated that the agreement is made in accordance with section 173 of the PE Act.
- **Effect of agreement:** This requires the parties to indicate their intention to be bound by the agreement and should indicate that the agreement will run with the land and bind future owners.
- **Requirement to record the agreement on title:** It is common practice to include a term requiring the owner to do all things necessary to enable the responsible authority to submit the agreement to the Registrar of Titles so that it can be recorded on title in accordance with section 181 of the PE Act.
- **Procedural terms:** The linking of the agreement to any planning permit or planning scheme amendment should be set out if necessary.
- **Commencement or completion times of the agreement:** These should be clearly set out, including whether commencement or completion is tied to a specific event.
- **Points of agreement:** The points of agreement detail what each party is undertaking to do and may include a bond or guarantee by the owner. The covenants should be clearly identified for example, 'the owner of the subject land covenants that…'. The covenants should be specific and provide sufficient detail of the obligations to enable the covenants to be clearly understood and enforceable.

There are legal difficulties in incorporating personal obligations in a section 173 agreement, intended for a specific person. However, if for some reason personal obligations are being included in an agreement (such as a condition that is relevant only to the initial developer of the land), these must be clearly separated and identified to avoid confusion with any covenants that will run with the land and bind future owners or other parties.

The responsible authority should try to foresee how the agreement will operate in the future to ensure that the need for any amendments to the agreement are minimised. In particular, if land affected by an agreement is subsequently subdivided, the agreement will ordinarily affect all the new titles unless the agreement specifies otherwise. This may not be what was intended by the parties and may lead to difficulties in amending the agreement or releasing individual allotments. Where possible, the agreement should set out the effect of the agreement in relation to the original parcel of land and on any subsequently subdivided allotments.

- **Dispute resolution:** If an agreement relies heavily on performance criteria, it may be advisable to include a dispute resolution clause. The Victorian Civil and Administrative Tribunal (VCAT) has only limited jurisdiction to resolve disputes where matters require the consent or satisfaction of the responsible authority.
- **Service of notices:** A party to an agreement may be required to advise other parties of certain information (such as when certain works have been completed). In these cases, the agreement should describe the manner in which this notice is to be given (for example, in writing, within a specified time period and to a specified address).

PEA s 177

- **Lapse or termination:** Many agreements will also include a time clause (that is, the agreement lapses after a certain period of time or if planning provisions are amended). Agreements can also require subsidiary agreements at a later date and can make provisions conditional upon approval from another authority (for example, the Head, Transport for Victoria).
- **Cost apportionment:** Many agreements list which of the parties are to be responsible for any associated costs. This is a matter for negotiation between the parties, although it is common for a responsible authority to require that an owner meet the authority's costs in the preparation of an agreement where the agreement is for the primary benefit of the owner.

8.6 Procedure for recording an agreement

PEA ss 181, 182; PE Regs reg 59, Form 21

The purpose of recording an agreement on title is to ensure that the obligations in the agreement run with the land and therefore bind all future owners of the land.

An application to record an agreement must be made without delay. The responsible authority should lodge a copy of the agreement with the Registrar of Titles using the prescribed Form 21. A fee is payable. Relevant fees are specified on the 'Fees, guides and forms' page of the department's website.

The Registrar of Titles cannot record an agreement over Crown land or common property.

PEA ss 221(4)–(5)

Agreements entered into before 28 October 2013 are not required to be recorded on title. The discretion to record these earlier agreements rests with the responsible authority.
A responsible authority must, however, apply to record an agreement entered into before 28 October 2013, without delay, if it is amended after that date.

PEA ss 179, 197A

The responsible authority must keep a copy of each agreement available, indicating any amendment made to it, in accordance with the public availability requirements.

8.6.1 Mortgagee's consent

The duplicate certificate of title does not need to be provided to the Titles Office to record an agreement. The record is only noted on the original title held at the Titles Office in the same way as caveats and other covenants. This may mean that the custodian of the duplicate title, if not the owner (such as a bank or mortgagee), may be unaware of the making of the agreement and/or the effect of the agreement on its security.

When this may be an issue, the responsible authority will generally require the owner to either notify the mortgagee or obtain the mortgagee's consent before the agreement is entered into, particularly in situations where the owner's obligations under the agreement could materially affect the mortgagee's interests. It is best to involve the mortgagee early on

in the process, as a request for their consent too late in the process could cause considerable delay if the mortgagee then requires changes to the agreement.

8.6.2 Cancelling or altering the record of an agreement

PEA s 183; PE Regs reg 60, Forms 22, 23, 24

If an agreement is cancelled or amended, the responsible authority must, using the prescribed form, notify the Registrar of Titles to cancel or amend the record of the agreement.

It is particularly important to monitor agreements that have a termination date or event included as part of the agreement and to ensure that the Registrar is immediately notified of the ending of that agreement. This will avoid unnecessary complications, for example, if land is subsequently subdivided and a covenant inadvertently placed on each individual lot because the Registrar was not advised of the ending of the obsolete agreement.

8.7 Amending or ending an agreement

PEA s 177

An agreement may provide that the agreement ends wholly or in part or as it applies to any part of the land on or after:

- the happening of a specified event
- a specified time
- the ending of the use or the development of the land for a specified purpose.

If the agreement does not specify when it ends, it can be ended by agreement between the responsible authority and all persons who are bound by any covenant in the agreement. An agreement can also be amended in the same way.

PEA ss 178, 178A–H; PE Regs reg 55

However, obtaining the consent of all persons bound by the agreement to amend or end the agreement can take considerable time and may be impossible to achieve if there is opposition to the proposal or a large number of parties are involved.

Where the consent of all parties to amend or end an agreement cannot be obtained, a landowner (or a prospective landowner who has entered into an agreement) can apply to the responsible authority to have the proposal assessed.

The proposal can be to amend or end the agreement wholly or in part, or to end it in relation to a defined part of the land.

The process is similar to the process for making an application for a planning permit and can be broken down into the following key steps:

1. Responsible authority's in-principle support
2. Notice of the proposal – 'advertising'
3. Responsible authority's decision
4. Notice of decision
5. The decision takes effect

A responsible authority may require the applicant to pay the cost of preparing the amended agreement.

The responsible authority may, on its own initiative, also propose to amend or end an agreement.

8.7.1 Step 1 – Responsible authority's in principle support

PEA ss 178A, 178B, PE Regs reg 55, PE (Fees) Regs reg. 16

An application to amend or end an agreement must be made in writing to the responsible authority. It must include the information set out in regulation 55 and it must be accompanied by the prescribed fee. Currently a fee is prescribed in the Planning and Environment (Fees) Regulations 2016.

Section 178B sets out a number of matters that the responsible authority must consider when forming a view about a proposal. The matters required to be considered include the purpose of the agreement and the reasons why the responsible authority entered into the agreement in the first place.

After considering the matters set out at section 178B, the responsible authority must notify the applicant and owner (if a different person to the applicant) as to whether it agrees 'in principle' to the proposal. If the responsible authority does not agree in principle, that is the end of the matter. The applicant cannot apply to VCAT for a review of the responsible authority's decision.

8.7.2 Step 2 – Notice of the proposal – 'advertising'

PEA ss 178C, 178D, 178H, 184A(2)(a); PE Regs regs 56, 62, Form 18

If the responsible authority agrees in principle to a proposal (or proposes to end or amend an agreement on its own initiative) it must give notice (also known as 'advertising') of the proposal to:

- all parties to the agreement
- any other persons, if the responsible authority considers that the decision to amend or end the agreement may cause material detriment to them.

The notice must include the prescribed information set out Form 18 in Schedule 1 of the Regulations. The responsible authority may require the applicant to pay the costs of giving the notices.

Any person who is given (or ought to have been given) notice of a proposal may object to the proposal or make any other submission in relation to the proposal.

If the responsible authority does not give notice of the proposal within 21 days of notifying the applicant that it agrees in principle to the proposal, the applicant may apply to VCAT for a review of the failure of the responsible authority to make a decision on the matter. This is discussed further in part 8.8 of this chapter.

8.7.3 Step 3 – Responsible authority's decision

PEA s 178E

The responsible authority must not make a decision on a proposal until at least 14 days after the giving of the last notice.

Before making a decision on the proposal, the responsible authority must consider any objections and submissions together with matters under section 178B that it considered in forming its original view on the proposal.

The responsible authority may then decide to:

- amend or end the agreement in accordance with the proposal
- amend or end the agreement in a manner that is not substantially different to the proposal

- refuse to end or amend the agreement.

If there are objections or other submissions, the responsible authority may also propose to amend or end the agreement in a manner that is substantially different to the proposal. If the responsible authority does decide to do this, it must give notice of the revised proposal as if it were a new proposal.

8.7.4 Step 4 – Notice of decision

PEA ss 178F, 184A; PE Regs regs 57, 58, Forms 19 and 20

If an objection or submission is lodged, the responsible authority must give notice of its decision to both the applicant and each person that made an objection or a submission. Where no objections or submissions are lodged, notice is given to the applicant.

A notice of a decision to amend or end an agreement must include the information set out in Form 19 in Schedule 1 to the Regulations.

A notice of a decision to refuse to amend or end an agreement must include the information set out in Form 20 in Schedule 1 to the Regulations

Where a notice of refusal is issued, it must set out the grounds of the refusal.

The PE Act enables the applicant, a party to the agreement, an objector and any affected person to apply to VCAT for a review of the responsible authority's decision. This is discussed further in part 8.8 of this chapter.

A responsible authority must not proceed to amend or end an agreement until at least 21 days after the giving of notice of the decision, or if an application for review to VCAT is made, until the application is determined by VCAT or the application is withdrawn.

8.7.5 Step 5 – Implementing the decision

PEA ss 178G, 178I, 183; PE Regs. reg. 60, Forms 22, 23 and 24

If the responsible authority decides to amend or end an agreement, it must not proceed to do so:

- until at least 21 days after the giving of any required notice of its decision
- where an application for review is made within the 21-day period, until the matter is determined by VCAT or withdrawn.

If the responsible authority amends the agreement, then it must without delay:

- sign the amended agreement
- give a copy of the signed amended agreement to each other party to the agreement.

It is not necessary for the amended agreement to be signed or otherwise agreed to by any other party to the agreement. A party to an agreement is bound by the agreement as amended, even though the party did not sign the amended agreement.

The responsible authority must without delay notify the Registrar of Titles of any amendment to an agreement or an ending of an agreement. This must be done in the manner prescribed under the regulations.

An amendment or ending of an agreement comes into effect on the day on which the Registrar of Titles:

- cancels in whole or part the recording of the agreement in the Register under section 183(2)
- makes a recording in the Register of the matters notified under section 183(1).

8.8 Reviews and enforcement of agreements

8.8.1 Application to VCAT for an amendment to a proposed agreement

PEA s 184; PE Regs reg. 61

A landowner can apply to VCAT for an amendment to a proposed agreement where a planning scheme or a permit makes the use or development of land for specified purposes conditional upon an agreement being entered into and the owner objects to any provision of the agreement.

The application for review must be made within 60 days of the applicant being given a copy of the proposed agreement.

VCAT may approve the proposed agreement with or without amendments.

8.8.2 Reviews in relation to ending or amending of agreements

PEA s 178

If the responsible authority decides that it does not agree in principle to a proposal to amend or end an agreement, the matter does not proceed and the agreement remains in place unchanged. The applicant cannot apply to VCAT for a review of this initial decision.

Reviews of the responsible authority's failure to make a decision

PEA ss 184A, 184F; PE Regs reg. 62

If the responsible authority agrees in principle to a proposal to amend or end an agreement, the applicant may apply to VCAT for a review of the responsible authority's failure to make a decision on the application if the responsible authority fails to:

- give notice of the proposal within 21 days of giving notice to the applicant that it agrees in principle
- decide on the application within 60 days of giving notice to the applicant that it agrees in principle.

The responsible authority may decide to amend or end the agreement at any time after the application for review is made and must inform VCAT's principal Registrar if it does make a decision. However, the responsible authority must not proceed to amend or end the agreement or give notice of the decision except in accordance with the advice of the Registrar.

Reviews of the responsible authority's decision

The applicant may apply to VCAT for a review of a decision by the responsible authority to:

- amend or end the agreement in a manner that is different from the proposal (if the applicant received a notice of the responsible authority's decision, the application for review must be made within 21 days after the responsible authority gave the notice)
- refuse to amend or end the agreement (the application for review must be made within 60 days after the responsible authority gave notice of its decision).

PEA ss 184B–E; PE Regs regs. 63, 64

In addition to the applicant, the following people can apply to VCAT for a review of the responsible authority's decision to amend or end an agreement:

- a party to the agreement
- an objector

- any person who was entitled to object to a proposal to amend or end an agreement but did not object because the person was not given notice.

An application for review by a party to the agreement or an objector must be made within 21 days of the responsible authority giving notice of their decision.

An objector is entitled to notice of an applicant's application to VCAT for review of the responsible authority's decision or failure to make a decision.

VCAT decision on reviews

PEA s 184G

VCAT may direct the responsible authority to amend or end the agreement, or it may determine that the agreement should not end or be amended. The responsible authority must comply with the direction without delay.

8.8.3 Application to VCAT for an interpretation of an agreement

PEA ss 148, 149A(1A)

A specified person or a party to an agreement may apply to VCAT for a determination of a matter relating to the interpretation of a section 173 agreement.

8.9 Affordable housing agreements

PEA s 173(1A)

Section 173(1A) enables a responsible authority to enter into an agreement with an owner of land for the development or provision of land in relation to affordable housing.

An example affordable housing agreement has been prepared by the department to assist councils in entering into a voluntary affordable housing agreement under the PE Act and is available on the department's website.

8.10 Other agreements

There are other forms of statutory agreements that affect the use and development of land. Some operate in a similar way to section 173 agreements and can be recorded on a title.

Examples of other statutory agreements include agreements:

- for the preservation of heritage places under sections 134 and 135 of the *Heritage Act 2017*
- to secure the completion of works or compliance with statutory requirements under section 17 of the *Subdivision Act 1988*. (These agreements can be less formal than a section 173 agreement but, if executed under seal, can be recorded as if they were section 173 agreements)
- relating to exemptions from Building Regulations under the *Building Act 1993*.

Using Victoria's Planning System

Glossary

As-of-right

An 'as-of-right' use or development of land is one that may be carried out without a planning permit.

Delegation

PEA ss 186–190

The *Planning and Environment Act 1987* (PE Act) provides the Minister, planning authorities and responsible authorities scope to reassign or 'delegate' certain responsibilities under the Act to a specified person. Decisions on planning permits are often delegated by a responsible authority to an officer or a designated committee.

Discretionary uses

Discretionary uses are those uses that require a planning permit under the planning scheme. A responsible authority is required to exercise discretion in determining if a planning permit should be granted or refused.

Exercising discretion

Exercising discretion is acting according to one's own judgement. Responsible and planning authorities have wide discretionary powers under the PE Act. Discretion is most frequently exercised by responsible authorities in granting and refusing planning permits. State and local planning policies, zones and overlays guide the exercise of discretion over use and development in day-to-day decision making.

Natural justice

Reference: the Macquarie Dictionary, Eighth Edition

Natural justice is justice that responds to fundamental logic and objective fairness rather than to the laws of a particular place and time.

The legal concept of natural justice is the minimum standard of fairness that must be applied in the adjudication of disputes, requiring that both parties be granted a fair hearing and that there be no bias on the part of the adjudicator.

Overlays

An overlay is a state-standard provision, forming part of a suite of provisions in the *Victoria Planning Provisions* (VPP). Each planning scheme includes only those overlays that are required to implement the strategy for its municipality.

Each overlay addresses a single issue or related set of issues (such as heritage, bushfire or flooding). The planning scheme maps identify land affected by overlays. Not all land is affected by an overlay, but where more than one issue applies to a parcel of land, multiple overlays can be used. Overlays must have a strategic justification and be linked to the Municipal Planning Strategy (MPS) and local planning policy. Many overlays have schedules to specify local objectives and requirements. Most overlays set out requirements about development, not use. The requirements of an overlay apply in addition to the requirements of the zone. Neither is more important than the other. Overlays do not change the intent of the zone.

Planning authority

PEA ss 8, 8A, 8B, 9

A planning authority is any person or body given the power to prepare a planning scheme or an amendment to a planning scheme. The Minister is a planning authority and may authorise any other Minister or public authority to prepare an amendment to a planning scheme. The Minister is also the planning authority for land not incorporated into any municipality, such as land falling under the Alpine Resorts Planning Scheme, the Port of Melbourne Planning Scheme, and the French Island and Sandstone Island Planning Scheme.

A council is planning authority for its municipality and for any area adjoining its municipality that the Minister authorises.

Planning permit

A planning permit is a legal document that allows a certain use or development to occur on a particular parcel of land – usually subject to conditions. Council planners can provide advice on whether a planning permit is required and why. A planning permit ensures that:

- land uses are appropriately located
- buildings and land uses do not conflict with each other
- the character of an area is not detrimentally affected
- development will not detrimentally affect the environment
- places of heritage significance are not detrimentally altered or demolished.

A planning permit should not be confused with a building permit. A building permit is certification issued under the *Building Act 1993* that a building or alteration to a building meets the minimum standard of construction specified in the Building Regulations 2018.

Planning scheme

A planning scheme controls land use and development within a municipality. It contains state and local planning policies, zones and overlays and other provisions that affect how land can be used and developed. Each planning scheme consists of maps and an ordinance containing planning provisions. The planning scheme is a statutory document and each municipality in the state is covered by one.

Responsible authority

A responsible authority is the body responsible for the administration or enforcement of a planning scheme or a provision of a scheme. A responsible authority is responsible for considering and determining planning permit applications and for ensuring compliance with the planning scheme, permit conditions and agreements. The responsible authority is usually the municipal council. However, in the Melbourne Planning Scheme, for example, the Minister for Planning is the responsible authority for land in a number of areas including the Melbourne Casino Area, Melbourne Docklands Area, Flemington Racecourse and the Royal Melbourne Showgrounds.

Schedules

PEA s 13

Together with the MPS and local policies of the Planning Policy Framework (PPF), schedules are the means of including local content in planning schemes. They are used to supplement the basic provisions of a state-standard clause, zone or overlay in a planning scheme, adapting it to local circumstances and locally defined objectives. This means that schedules are a key tool for implementing objectives and strategies in the PPF.

A schedule can only be included where the relevant VPP provision provides for it. A schedule must use the format shown in the Ministerial Direction – *The Form and Content of Planning Schemes*.

For more information on schedules refer to *A Practitioner's Guide to Victoria's Planning Schemes*.

Statutory planning

The basic instrument for statutory planning is a planning scheme. Statutory planning entails the process of decision making on planning permits for new use and development. It includes the preparation and implementation of planning provisions for the planning scheme.

Strategic planning

Strategic planning is the research and formulation of policies or strategies to implement goals and objectives relating to particular land uses or areas. Strategic planning also involves monitoring and evaluating the implications of the provisions on land use and development.

Zones

A planning scheme uses zones to designate land for particular uses, such as residential, industrial or business. A zone will have its own purpose and set of requirements. It will identify if a planning permit is required and the matters that must be considered before deciding to grant a permit.

Standard zones for statewide application are set out in the VPP. These zones are used in all planning schemes, as required. Each planning scheme includes only those zones required to implement its strategy, as set out in its MPS and the PPF. There is no ability to vary the zones or to introduce local zones. However, some zones have schedules to provide for local circumstances, such as the Mixed Use Zone and the Rural Living Zone.

Acts and Regulations – annotated abbreviations

This document includes annotated references to legislation in order to identify the source of information provided. The lists below provide a glossary of those abbreviated annotations:

Annotated reference – Act name

AHA – *Aboriginal Heritage Act 2006*

BA – *Building Act 1993*

CCA – *County Court Act 1958*

CLRA – *Crown Land (Reserves) Act 1978*

CPA – *Criminal Procedure Act 2009*

EE Act / EEA – *Environment Effects Act 1978*

EPA – *Environment Protection Act 2017*

HA – *Heritage Act 2017*

IA – *Infringements Act 2006*

ILA – *Interpretation of Legislation Act 1984*

LACA – *Land Acquisition and Compensation Act 1986*

LCRA – *Liquor Control Reform Act 1998*

LGA – *Local Government Act 1989*

LGA2020 – *Local Government Act 2020*

MACA – *Marine and Coastal Act 2018*

MCA – *Magistrates' Court Act 1989*

MRSDA – *Mineral Resources (Sustainable Development) Act 1990*

MUA – *Monetary Units Act 2004*

PE Act / PEA – *Planning and Environment Act 1987*

SA – *Subdivision Act 1988*

SCA – *Supreme Court Act 1986*

SWA – *Sex Work Act 1994*

VCATA – *Victorian Civil and Administrative Tribunal Act 1998*

Annotated reference – Regulation name

AH Regs – Aboriginal Heritage Regulations 2017

EP Regs – Environment Protection Regulations 2021

IA Regs – Infringements Regulations 2016

LAC Regs – Land Acquisition and Compensation Regulations 2021

LCR Regs – Liquor Control Reform Interim Regulations 2020

PE (Fees) Regs – Planning and Environment (Fees) Regulations 2016

PE Regs – Planning and Environment Regulations 2015

VCAT Rules – Victorian Civil and Administrative Tribunal Rules 2018

VCAT (Fees) Regs 2016 – Victorian Civil and Administrative Tribunal (Fees) Regulations 2016