

Practice Note – PNPE10
Enforcement Order and Interim Enforcement Orders
under the Traditional Owner Settlement Act 2010
(Vic)

Application	Planning and Environment List
Effective date	14 December 2018
Supersedes practice note	PNPE10 – effective 18 September 2017
Special note	Please ensure that you are using an up-to-date version of this practice note. Other practice notes may also apply.
Further information	A complete set of current practice notes are available on the Tribunal website at www.vcat.vic.gov.au .

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Introduction

The Victorian Civil and Administrative Tribunal (VCAT) can make orders about breaches of a land use agreement under the [Traditional Owner Settlement Act 2010 \(Vic\)](#).

This practice note gives guidance on the Tribunal process for applications under section 66A, 66E and 66H of the *Traditional Owner Settlement Act 2010*, which allow applicants to request that VCAT make, cancel or amend enforcement orders and interim enforcement orders.

VCAT can make one or more of the following enforcement orders:

- stop the land use activity within a specific period
- not start the land use activity
- cancel or suspend the land use activity
- restore the land as much as practicable to the condition it was in before the land use activity started
- do something that ensures the Act is followed.

VCAT can also make an interim enforcement order directing the person against whom the order is made to do one or more of the following:

- stop the land use activity immediately or within a specific period
- not to start the land use activity
- suspend the land use activity
- do something else that ensures the Act is followed.

In any proceeding, VCAT may change the operation of this practice note by making an order or a direction.

This practice note has been issued by the VCAT Rules Committee pursuant to section 158 of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#).

Definitions

Word	Definition
Act	Traditional Owner Settlement Act 2010 (Vic)

Decision maker in relation to the land use activity	The Minister, body or person who would authorise, permit, administer, licence or have management responsibility for the land use activity under other legislation.
Ex parte	An order made by VCAT without requiring all parties to be present, including people or bodies affected by the order.
Responsible person for the land use activity	Person who reached agreement with the traditional owner group about undertaking the land use activity.
Rules	Victorian Civil and Administrative Tribunal Rules 2018 (Vic)
Statement of grounds	A statement of grounds sets out your reasons for contesting a case at VCAT.
Tribunal	Victorian Civil and Administrative Tribunal (VCAT)

A word or term used in this practice note:

- a) has the same meaning if defined in the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) or in the [Interpretation of Legislation Act 1984 \(Vic\)](#)
- b) has the same meaning as defined or used in the *Traditional Owner Settlement Act 2010 (Vic)*

What application form should I use?

The [application form for an enforcement order under the Traditional Owner Settlement Act 2010](#) should be used to apply under section 66A for an enforcement order and section 66E for an interim enforcement order.

Steps prior to a VCAT hearing

Requirements described in the Act under sections 66A(2), 66A(3), 66B, 66C and 66D must be followed for applications for an enforcement order. The following steps explain these requirements.

Provide copies of the application to others

Once an application has been lodged and the application fee paid, VCAT will direct that notice be given to:

- the responsible person for the land use activity
- the decision maker in relation to the land use activity
- the body responsible for managing the land
- any other person VCAT considers may be impacted by the enforcement order and the applicant is instructed to notify.

Notice must be given by providing a copy of the application by post, email, in person or other method of delivery. The notice must tell the person or body that if they wish to contest the application they must lodge a statement of grounds within 15 days of the date of the notice.

The applicant must advise VCAT in writing that they have given the relevant people notice, and state the date and method of delivery.

VCAT may ask for further information from parties throughout the proceeding.

Contesting the application

If a person wishes to contest an enforcement order application, they must write a statement setting out reasons for contesting the application. This written statement is called a [statement of grounds](#).

The person who has written a statement of grounds must lodge it with VCAT and at the same time provide copies to the other parties.

If the application is not contested

If VCAT does not receive a written statement of grounds within 15 days of the date of the notice from any person or body affected by the order, VCAT may make any enforcement order it considers appropriate without hearing from those people.

If the application is contested

VCAT will give the applicant, parties to the case and any person who wishes to contest the application a reasonable opportunity to be heard or to make a written submission.

VCAT will schedule a time and place for a practice day hearing and notify parties in accordance with the VCAT's usual listing procedures.

What happens at the practice day hearing?

When VCAT receives all required information and all preliminary steps have been carried out, a practice day hearing will be scheduled.

At this hearing, VCAT has several options:

1. If the application is one that has few issues and can be considered within 60 minutes, VCAT may proceed to hear the merits of the application. Sometimes a decision may be made on the day.
2. If the application has a number of issues or has complex issues, VCAT will give directions about the future conduct of the proceeding. It may decide to schedule a mediation, a compulsory conference or a hearing.

VCAT's normal practices in relation to requests for directions, practice day hearings, consent orders, adjournments and other matters apply. These are set out in other practice notes, such as [PNVCAT1 Common Procedures](#) and [PNPE6 Practice Day](#).

How is the hearing conducted?

At the hearing, the applicant will have an opportunity to speak in support of the application and all other parties will have an opportunity to speak about their response to the application.

Verbally made submissions are normally supported by written submissions. Parties are therefore encouraged to attend the hearing with all the material they consider necessary to support their respective position. This material may include plans or maps, photographs, notes, other related documents and written submissions.

Some parties may choose to rely only on written submissions, in these cases the party may not be required to attend. This matter can be addressed in the practice day hearing.

Evidence is normally given on oath or affirmation. Written statements of evidence should be prepared as sworn affidavits.

Evidence may be given by a person who specialises in a field related to the issues. Any evidence of this nature, known as expert evidence must be prepared and sent to the parties in accordance with [Practice Note PNVCAT2 – Expert Evidence](#) or as directed by VCAT at a practice day hearing. Witnesses who do not specialise in the field related to the issues are known as lay witnesses. For proceedings about enforcement orders, lay evidence is given in the form of a sworn affidavit.

What is in the enforcement order?

If VCAT decides to make an enforcement order, the order will:

- state the land use activity that breaches, has breached or will likely breach the Act
- specify the agreement land affected or likely to be affected by the breach
- direct the person against whom it is made to do one or more of the things
 - stop the land use activity within a specific period
 - not start the land use activity
 - cancel or suspend the land use activity
 - restore the land as much as practicable to the condition it was in before the land use activity started
 - do something that ensures the Act is followed.

What is an interim enforcement order?

Interim enforcement orders are intended for urgent situations to prevent serious or irreversible damage to the land or the interests of the traditional owner group. These orders allow for existing circumstances to be maintained for a specified period. An interim enforcement order can only be in effect for a limited time. It usually stays in effect until a VCAT decision is made on the ordinary enforcement order application. Sometimes, it may cease on a date or the occurrence of an event specified in the interim enforcement order.

An interim enforcement order can direct the person against whom the order is made to do one or more of the following:

- stop the land use activity immediately or within a specific period
- not to start the land use activity
- suspend the land use activity
- do something else that ensures the Act or the land use agreement is followed.

VCAT can cancel or amend an interim enforcement order (see section 66H of the Act).

Applying for an interim enforcement order

An application for an interim enforcement order can only be made by a person who has applied for an enforcement order.

You can apply for an enforcement order and an interim enforcement order using the same application form.

When applying for an interim enforcement order, applicants should provide sworn evidence. If circumstances allow, applicants should provide an [affidavit](#) swearing to the truth of the contents of the application and any other facts to be relied upon as the basis of making an order.

What VCAT considers when making an interim enforcement order

VCAT must decide if it is fair to make the interim enforcement order.

VCAT must consider whether, because of circumstances of urgency, it is desirable to make the interim enforcement order before the application for the enforcement order is determined to prevent serious or irreversible damage to the agreement land or the interests of the traditional owner group.

VCAT must also consider whether to hear any other person before the interim enforcement order is made.

The applicant should provide material with their application that addresses these matters and any other matters that the applicant thinks is necessary to support the application.

Interim enforcement order without notifying affected parties

Sometimes a matter is so urgent that an interim enforcement order is sought when there is not enough time to give notice of the application to the persons against whom it is sought. The hearing of an application, made in the absence of those parties, is often called an *ex parte* hearing.

Ex parte is a legal term meaning an order is made by VCAT without requiring all parties to be present, including people or bodies adversely affected by the order.

Applying for an *ex parte* interim enforcement order

To apply for an *ex parte* interim enforcement order, applicants must:

1. Call VCAT on 1300 018 228 (between 8.30 am and 4.30 pm Monday to Friday).
2. During the call, provide the VCAT officer with details of the application and the reasons why it warrants urgent attention. Also provide your contact details.

A VCAT member will give directions about the future conduct of the proceeding. The member may schedule an urgently convened *ex parte* hearing.

VCAT will direct the applicant to send the *ex parte* interim enforcement order and other documents on the other parties affected by the order.

If documents relating to the application have not already been lodged with VCAT, they must be made available to the VCAT member or officer before or during an urgent hearing. An application for an ex parte interim enforcement order should be accompanied by duplicate copies of a draft of the order sought.

Rights of parties affected by an ex parte interim enforcement order

VCAT must give adversely affected people or bodies the opportunity to be heard within seven days of making the ex parte interim enforcement order (see section 66G of the Act). VCAT will usually schedule a time and place for such a hearing and give directions to notify and send documents to affected parties.

The hearing will determine whether the ex parte interim enforcement order:

- should remain in place pending the hearing of the ordinary enforcement order application, or
- should be amended or cancelled.

The applicant should be ready to state its case at this hearing. The applicant may need to prove they followed VCAT instructions to send documents properly to affected parties.

How can I amend or cancel an enforcement order?

Only VCAT can amend or cancel an enforcement order or interim enforcement order.

VCAT may amend or cancel an enforcement order or interim enforcement order if:

- the traditional owner group, the responsible person, the decision maker and the body responsible for managing the land agree to the amendment or cancellation; or
- VCAT decides the land use activity may proceed.

If the parties agree to amend or cancel an enforcement order or interim enforcement order, they must prepare and sign minutes of consent and send a copy of the minutes of consent to VCAT.

In cancelling or amending such an order VCAT will normally have to be satisfied that it is appropriate to do so.

After VCAT receives a copy of the minutes of consent, VCAT may:

- prepare an order without scheduling a further hearing; or
- schedule a short final hearing or issue orders about the future conduct of the proceeding.

VCAT will notify all parties involved if it amends or cancels an enforcement order or interim enforcement order.

Can costs be awarded?

It is generally expected that each party must bear its own costs.

However, VCAT can order costs to be awarded if it considers it appropriate.

For example, orders for costs to be awarded might be made in the following situations:

- a matter was unjustifiably brought to VCAT
- a party repeatedly or unnecessarily failed to comply with the Act or land use agreement despite repeated requests and warnings.