VCAT | victorian civil & administrative tribunal

Environment Protection Act 2017

Planning and Environment Division FACT SHEET

Version 1.0 – issued 1 July 2021

This fact sheet contains general information and should not be considered as legal advice. Seek professional advice if you are unsure about your rights, and be aware that the law may change.

What has happened to Environment Protection legislation?

On 1 July 2021 the *Environment Protection Act 1970* was repealed and replaced by new powers and statutory framework for environment protection under the amended *Environment Protection Act 2017*. The purposes of the new laws are to prevent or minimise the risk of harm to public health and the environment from pollution and waste.

The Environment Protection Authority (EPA) will have oversight of the new laws.

The amended Act gives the EPA enhanced powers. The EPA can use these powers to minimise risks of harm to the environment and human health. They will be able to issue new sanctions and penalties for breaches of the Act.

The amendments to the Act assign additional powers to VCAT to review decisions made by EPA. Under the *Environment Protection Act 1970* VCAT was able to review 33 different decisions made by the EPA or local councils. The new powers under the amended Act enable VCAT to review a much greater number and types of decisions made by the EPA or local councils under the *Environment Protection Act 2017*.

Why has the Environment Protection Act changed?

In 2016 the Victorian Government commissioned a public enquiry into the EPA and environmental protection legislation. The review recommended sweeping changes to the regulatory regime to improve how the EPA (and all Victorians) can manage the risks of harm to the environment and human health.

In response to the public enquiry's recommendations, the Victorian Government introduced regulatory reform in two steps. The first was to reform the purposes and structure of the EPA through the *Environment Protection Act 2017*. The second step has been to introduce new environmental protection laws by amending the 2017 Act.

The general environmental duty (GED) is a centerpiece of the new laws.

The GED applies to all Victorians. If you conduct activities that pose a risk to human health and the environment, you must understand those risks. The GED requires you to take reasonably practicable steps to eliminate or minimise those risks. Compliance with the GED will be enforceable through a range of statutory mechanisms including permissions, mandatory reporting and notices that require specified action to be taken.

Further information about the new laws, the GED and other environmental protection obligations can be found on the EPA website (www.epa.vic.gov.au).

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What kinds of applications can be made to VCAT under the Environment Protection Act 2017?

VCAT can review decisions made about:

- permissions (licenses, permits, registrations);
- authorisations;
- notices;
- Better Environment Plans;
- financial assurances; and
- site management orders.

VCAT can also hear and determine disputes about:

- the scope of environmental audits; and
- certain environmental auditor appointment matters.

You can apply for a review of decisions made under the Environment Protection Act 2017 by:

- the Environment Protection Authority (EPA);
- A council; or
- A litter authority or one of their authorised officers.

How can I make an application to VCAT?

There are two types of applications that can be made to VCAT under the *Environment Protection Act 2017*. A review of a decision (a review application) or an application for a declaration (original jurisdiction).

Note that a review of fees is an application for a review of a decision.

You must use one of these two forms:

- For a review, use only the form: *Application for a Review – Environment and Resources List*.
- For a declaration, or request for an order use only the form: *Application for an Order - Environment and Resources List*.

These application forms can be completed online via VCAT's website.

Fees may apply when making an application to VCAT. Information about application fees and hearing fees is available on VCAT's website.

There are time limits for making an application

Time limits apply for when you can make an application to VCAT to review a decision.

The time limits may vary for different decisions so you should carefully check the decision notice sent to you, or the legislation, to find out what time limits apply.

VCAT can sometimes extend the time to apply for a review, but only if it is reasonable to do so. VCAT must consider if extending time would disadvantage or cause injustice to anyone else. VCAT will also hear from the decision-maker and anyone else with an interest in the application before deciding whether to grant an extension of time.

Making an application to review a notice

Under the *Environment Protection Act 2017*, you can make an application to VCAT for review about notices issued or amended by the EPA.

However, if the notice was issued or amended by an authorised officer of the EPA, you must make an application to the EPA for a review first. You can then apply to VCAT for a review if you are not satisfied with the decision from the EPA's review.

You should check the notice of decision from the EPA or seek advice about these requirements before making an application to VCAT.

What happens after you make an application?

All applications to VCAT are assessed to see what the dispute is about, whether VCAT can deal with it, and whether it is complex or urgent.

An application may be urgent if there is an immediate risk of harm to the environment or to human health. VCAT may also consider the interests of people affected by the decision or the nature of the orders being sought.

Whether a matter is complex will depend on:

- the issues in dispute.
- the number of different people or organisations that are or may be involved in the application.
- the time required for the hearing.
- whether expert or lay evidence is going to be relied on, and the nature of that evidence.

After your application has been processed, VCAT will send an order to the applicant and the relevant decision maker or other people named in the application. This is known as an 'initiating order'.

An initiating order sets out what the parties need to do, and the timelines, in order to prepare the matter for initial case management and hearings. This may involve asking the decision-maker to send VCAT certain background information, and for the parties to each send VCAT a 'statement of contentions' setting out a concise statement of the issues in dispute.

The initiating order will also usually set out the date of a 'practice day hearing', which will take place 4 to 6 weeks after the initiating order is sent.

A practice day hearing is a short hearing that makes decisions about how an application will be conducted. This may include clarifying the issues in dispute, who can take part in the proceeding, dealing with procedural matters and scheduling arrangements for a final hearing.

After the practice day hearing, VCAT will make further orders. These orders may:

- set out a timetable for the exchange of relevant documents and evidence.
- set out the process for a meeting and joint report between expert witnesses (known as a conclave) to identify the areas of agreement and disagreement and to explain why the experts disagree.
- set out the requirements for the preparation of a Tribunal Book or a folder of common materials that contains all the documents and evidence that each party will rely on at the hearing.
- give directions about how a hearing will be conducted, including the order of presenting and timetabling of evidence, and whether any expert evidence will be heard though a conclave or concurrent process at the hearing.

The practice day hearing may also sometimes result in a direction that other people be notified about the application. This typically occurs where the decision-maker has made a decision (or failed to make a decision) about a permission that has involved consultation with other people.

A practice day hearing may also finalsie an application.

Will there be a compulsory conference?

In most applications, VCAT will direct the parties to attend a compulsory conference after the practice day hearing. The initiating order will set out the date for a compulsory conference.

A compulsory conference is a form of alternative dispute resolution where parties are encouraged to discuss ways to reach an agreement to settle the dispute instead of VCAT deciding the case. The conference is held in confidence. A VCAT member will conduct the compulsory conference with the purpose of assisting parties to reach common ground and an agreement. All parties must come to the compulsory conference or have someone represent them who is authorised to settle the dispute if an agreement is reached.

A compulsory conference will usually be held 4 weeks after the practice day hearing (i.e. about 8 to 10 weeks after the initiating order).

If an agreement is not reached at the compulsory conference, the case will go to a final hearing.

About the hearing

Depending on the issues in dispute, and its urgency and/or complexity, the hearing will usually be listed between 12 and 22 weeks after the practice day hearing.

Urgent matters, such as a stay application or urgent enforcement matters, will be heard more quickly.

In disputes about environment protection, the tribunal will be constituted at a final hearing with a member or members with expertise and experience relevant to the particular issues raised in the application.

What can VCAT decide?

On an application for review of a decision, VCAT may affirm the decision, vary the decision, or set aside the decision and make a new decision. This is known as the final order or orders.

In an application for a declaration VCAT may make any declaration it deems fit, such as interpreting the legislation or a deciding how a permission operates in a particular circumstance. VCAT may also decline to make any declaration.

In all applications, VCAT will consider the submissions made by the parties and the evidence that is presented to it.

In environmental protection proceedings VCAT's decision (i.e. its final order) is based on the powers available to it under the *Victorian Civil and Administrative Tribunal Act 1998* and the *Environment Protection Act 2017*, as well as any relevant regulations, policies, protocols or guidelines that apply to the matters in dispute.

When will I get a decision?

VCAT will sometimes give an oral decision at a hearing, particularly if the matter is urgent or straightforward. A written final order will still be sent to the parties after the hearing, and a party can request written reasons even after oral reasons are given.

In the Planning and Environment Division, VCAT will usually 'reserve' its decision, particularly if the matter is complex. The final order will be issued at a later date. The final order will include written reasons to explain the tribunal's decision.

Further information and assistance

Cases about environment protection (and natural resources) are often complex, and some terms used in the legislation have certain meanings when used in the legislation or by tribunals and courts. VCAT cannot provide legal advice to any party about such matters. You should obtain independent advice about these matters if you are unsure what application you can make in your circumstances.

For further information:

- for the review of a decision, carefully read the decision letter and other documents sent by the decision-maker and/or visit their website.
- check the relevant sections of the relevant legislation.
- look at the decisions in other similar cases decided by VCAT or the courts. VCAT decisions can be found on the Austlii website (www.austlii.edu.au). You may need to enter a search term or the name and section of the relevant legislation to find the most relevant cases.
- seek professional advice as appropriate.