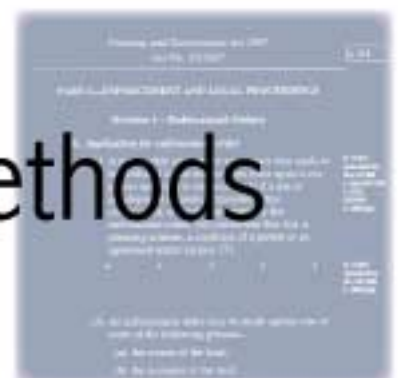


Reference Group On Decision-making Processes

November 2002

This section sets out the Strategic Statement and the Planning Policies which apply to covered by this scheme

These policies must be taken into account when preparing amendments to scheme or making decisions under scheme.



Report 3 Enforcement Methods

Foreword

This is the report for Project 3 of the Reference Group on Decision-making Processes appointed by the Minister for Planning to analyse specific issues and provide advice about improvements to aspects of the Victorian planning system.

As required by its terms of reference, the Reference Group has looked at the issue of enforcement methods.

The terms of reference required the Reference Group to consider any shortcomings of VCAT and the Magistrates' Court, as the primary means for enforcement, and recommend ways to address this as well as best practice examples of utilising existing enforcement mechanisms.

The Reference Group is of the view that much of the confusion and criticism that currently exists about VCAT as an enforcement forum may be alleviated if prosecution jurisdiction were to be available at VCAT. This would enable punishment to be sought at the same time as rectification in the same forum. There should also be the ability for VCAT to cancel or amend a permit without the need for a separate application. The Reference Group also recommends a number of other changes to the powers of VCAT to give greater weight to enforcement proceedings.

The Reference Group has considered best practice measures to improve enforcement and recommended that appropriate collaboration with other law enforcement agencies and Councils will result in more efficient resource use and that the production of an enforcement manual would be useful to new and isolated enforcement officers. The Reference Group notes the number of initiatives already in train in relation to professional development and supports their further development.

On this project the Reference Group met on three occasions and a workshop was held involving a number of industry, professional and community bodies.



David Whitney
Chair
Reference Group on Decision-making Processes

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Appendix 1: Reference Group Terms of Reference

1.0 FINDINGS AND RECOMMENDATIONS

1. IMPROVING STATUTORY PROCESSES AND PROVISIONS

FINDING	RECOMMENDED ACTION	BY
VCAT is the most appropriate forum for enforcement action and its jurisdiction should be expanded to provide for prosecution and the imposition of penalties in addition to its administrative powers to issue enforcement orders.	1. The <i>Victorian Civil and Administrative Tribunal Act 1998</i> and the <i>Planning and Environment Act 1987</i> should be amended so that VCAT has jurisdiction for prosecution and imposition of penalties.	DOJ DOI
The ability for VCAT to cancel or amend a permit on hearing an enforcement order application should be created.	2. The <i>Planning and Environment Act 1987</i> be amended to allow VCAT on the hearing of an enforcement order application to amend or cancel a permit without a separate application being made under Section 87 of the Act.	DOI
The ability for VCAT to enforce an enforcement order is a logical extension of its powers.	3. The VCAT Act should be amended to enable VCAT to make all necessary orders, including contempt, if an enforcement order is breached.	DOJ
Provision for the police to be able to enforce an enforcement order should be explicitly provided for.	4. The legislation should be reviewed to ensure that Councils can enforce an enforcement order without recourse to the Supreme Court and if needed with police assistance.	DOJ
The maximum penalties provided for in the <i>Planning and Environment Act 1987</i> are high enough to be a deterrent, however, the low recovery of costs and requirements for damages undertakings are significant impediments to effective enforcement by Councils.	5. If Recommendation 1 is not implemented then a review of the cost scales in the Magistrates' Court should be undertaken with the view to increasing the base recovery rate.	DOJ
	6. The <i>Planning and Environment Act</i> should be amended to enable recovery of costs from undertaking the works by a first charge on the land.	DOI
	7. The <i>Planning and Environment Act 1987</i> requirement should be amended to exempt Councils from a damages undertaking in interim enforcement order proceedings.	DOI
There should be an ability for VCAT to 'punish' offenders through penalties as suggested in Recommendation 1 at the same time as hearing the merits of a permit application.	8. Same as Recommendation 1.	DOJ DOI

2 ENCOURAGING AND DOCUMENTING BEST PRACTICE

FINDING	RECOMMENDED ACTION	BY
Collaboration with other enforcement agencies and other Councils is a useful resource sharing initiative.	9. Inter-Council and inter-agency agreements should be developed to ensure a clear distinction in responsibilities and commitment to work interactively.	MAV Local government
Good enforcement practices involve monitoring and random auditing of planning permits.	10. Performance criteria should be established for auditing of planning permits.	MAV Local government
Assistance in undertaking the role of enforcement officer is impeded by an absence of clear guidance documentation.	11. An enforcement manual outlining legislative requirements, collection of evidence, prosecution briefs etc. should be prepared.	Planning Enforcement Officers Association
The quality of planning permit conditions is sometimes poor resulting in difficulties in enforcement.	12. Release and promote the <i>Writing Planning Permits</i> manual as soon as possible.	DOI MAV

3 PROFESSIONAL DEVELOPMENT AND TRAINING

FINDING	RECOMMENDED ACTION	BY
There is a need to determine the professional development requirements of enforcement officers in local government, recognising their specialist role within the planning system.	13. A competency set be developed for the planning enforcement function.	MAV Planning Enforcement Officers Association DOI
Emphasis on enforcement in the tertiary education system has been lacking.	14. The Planning Education and Training Roundtable be supported in its consideration of a planning and building enforcement certificate or diploma.	DOI MAV Local government VCAT

DOI = Department of Infrastructure

DOJ = Department of Justice

MAV = Municipal Association of Victoria

2.0 INTRODUCTION

2.1 Establishment of the Reference Group

Following representations from the Inner South Metropolitan Mayors Forum and others about the operation of various aspects of the planning decision-making process, the then Minister for Planning, the Hon. John Thwaites MP, established a Reference Group to analyse specified issues and provide advice about what improvements can be made to the planning system or other processes to deliver better process performance and better planning outcomes.

The Reference Group was established under the auspices of the Continuous Improvement Program, a joint DOI and MAV initiative that promotes improvements in the operation of the planning system. The implementation of recommended improvements will be managed through this program.

The members of the Reference Group are:

David Whitney	- Chair
Catherine Dale	- MAV nominee
Julian Hill	- MAV nominee
Richard Horsfall	- VCAT
Ian Lonie	- Victorian Environmental & Planning Law Association(VPELA)
Ian Marsden	- VCAT
Rob Spence	- MAV
George Ward	- Planning Institute of Australia (PIA)

Russell Byard and Jeanette Rickards (VCAT), Matthew Evans (MAV) and Bruce Phillips (local government) also contributed to the Reference Group for this project.

The Committee was supported by DOI:

Michelle Croughan	- DOI Project Manager
Peter Allen	- DOI

2.2 Terms of reference

The terms of reference are attached in the appendix. The Reference Group is required to consider three projects. Each project has a specific brief set out in the terms of reference.

In considering all the projects, the Reference Group is required to have particular regard to the need for action in relation to:

- β improving statutory processes and provisions
- β encouraging and documenting best practice
- β professional development and training.

Project 3

This report responds to Project 3: *Enforcement Methods*.

The terms of reference for this project suggest there is a perception that enforcement through VCAT is predisposed to normalising the matter or reviewing the merits rather than terminating the unlawful activity. Concern has also been expressed about other matters such as the relative costs of the two approaches, exposure of Councils to damages claims and lack of ability to enforce determinations.

The Reference Group is required to:

1. *Recommend any additional methods for promoting understanding of best practice in the use of the existing enforcement provisions of the Planning and Environment Act 1987 and other legislation.*
2. *Document and review identified shortcomings of the VCAT and Magistrates' Court options and recommend ways in which these might be addressed.*

2.3 Other contributors

A facilitated workshop was held on 11 June 2002 to inform the Reference Group. Participants included:

- β Representatives from local government, including Banyule, Brimbank, Melbourne, Mornington Peninsula, Port Phillip, Stonnington, Wyndham and Yarra Ranges
- β Planning Enforcement Officers Association
- β VCAT
- β Save our Suburbs
- β Property Council of Australia
- β Master Builders Association of Victoria
- β MAV

The outcomes of the workshop were reported to the Reference Group.

3.0 WHAT ARE THE CONCERNS?

The Inner South Metropolitan Mayors Forum has expressed the following concerns in relation to enforcement:

- β *The relative inability of Councils to have alleged illegal use of development stopped immediately through VCAT due to the required cost undertaking, applicants/consultants lodging applications to validate illegal uses and VCAT's inability to empower police to ensure that orders are complied with.*
- β *Many Councils are referring enforcement matters direct to Magistrates' Courts to avoid the uncertainties and delays of the VCAT system, despite the Act's clear intention that VCAT be the appropriate review body.*
- β *VCAT is tending to open up the merits of the matter as part of the hearing, rather than dealing with the specific enforcement issue at hand.*

The facilitated workshop identified further issues in relation to enforcement:

- β VCAT, upon considering an enforcement order, often considers the 'merits' of a permit for rectification. If the applicant is successful at achieving a rectification permit then this can be seen as a reward for the wrongdoer.
- β While Councils can pursue both rectification (through VCAT) and punishment there is still the perception that only one avenue can be pursued.
- β The twelve month statute of limitation on matters being initiated at the Magistrates' Court.
- β Resources and organisational culture.
- β The provisions relating to the recovery of costs to rectify works are unclear.
- β Entry requires 48 hours notice. This obstructs the gathering of evidence.
- β Slow outcomes at VCAT.
- β Difficult to obtain interim enforcement orders.
- β The ability to enforce enforcement orders through prosecution in the Supreme Court is constrained by cost.

4.0 THE CURRENT RULES

4.1 Background

This chapter outlines the enforcement methods currently available under the *Planning and Environment Act 1987* and the circumstances in which these methods should be utilised.

Prior to doing this it is relevant to consider some statistics about enforcement. The Planning and Environment List of VCAT determine about 170 applications for enforcement orders each year. Of these, around 80% are made by Councils and the balance by third parties. Most Council applications are successful in that they result in an order, settlement or rectification outcome. Although these are outcomes in compliance terms they may not be considered successful in punishment terms. There are between 10 and 20 applications for 'ex parte' interim enforcement orders each year. In 2001 there were about 100 applications to cancel and amend planning permits by Councils, permit holders or third parties.

The number of prosecution heard by the Magistrates' Court each year is not known. The number of Planning Infringement Notices issued by Councils is not collected.

4.2 Roles and responsibilities

The responsible authority, generally the Council, is required under section 14 of the *Planning and Environment Act 1987* 'to administer and enforce the planning scheme' and 'to enforce any enforcement order or interim enforcement order related to land covered by a planning scheme for which it is the responsible authority'.

Any other party may apply for an enforcement order or interim enforcement order or to cancel or amend a planning permit. The Act is silent on whether any other party can prosecute through the Magistrates' Court.

4.2 The Planning and Environment Act 1987

Using Victoria's Planning System (Chapter 7) provides advice on the enforcement options available and the circumstances in which they should be utilised:

- β Negotiate informally with the alleged offender. This type of positive conciliation may avoid the need for formal action and should usually be the first step taken.
- β Serve a planning infringement notice - usually for less serious breaches or matters.
- β Apply to the Victorian Civil and Administrative Tribunal (VCAT) for an enforcement order to achieve compliance.
- β Apply to VCAT for an interim enforcement order where there is a need for immediate action.
- β Start prosecution proceedings. 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 Magistrate's Court may be needed to follow up either an infringement notice or an enforcement order.
- β Using section 125 of the Act, seek an injunction from the Court to restrain a person from contravening an enforcement order or interim enforcement order. This procedure may be justified, but it is recommended that legal advice be sought before commencing action. Legal advice will be needed in preparing Court documents.
- β Seek an injunction from the Court without the aid of section 125 of the Act. This is done under the general common law to restrain a person from contravening a law ie, planning controls. In most cases the action must be taken in the name of the Attorney-General or with the Attorney-General's knowledge and consent.
- β Request VCAT to cancel or amend a permit – for example for a substantial failure to comply with the conditions of a permit. To the extent that the permit relates to carrying out buildings or works or subdivision, this action is only available until they are substantially carried out.

- B Carry out work to secure compliance with an enforcement order or interim enforcement order and recover the cost of doing so.

When is a planning infringement notice appropriate?

Planning infringement notices provide responsible authorities with a means of dealing quickly and more easily with some less serious breaches of planning schemes, permits and agreements. They also provide an owner or occupier of land who has committed an offence a means of expiating (paying an appropriate penalty for) that offence, without conviction or a finding of guilt.

What is an enforcement order?

Enforcement Order proceedings are designed to prevent or stop existing or unlawful planning activities and to achieve reinstatement. They are not designed to punish. Only a section 126 prosecution will do that.

An enforcement order is made by VCAT, directing steps which must be taken to rectify a breach of a planning scheme, permit or section 173 agreement, or to avoid the commission or continuance of such a breach.

Following the repeal of section 122 (4) of the Act in 2000, responsible authorities (usually Councils) are now able to prosecute a planning offence (and seek an appropriate fine) at the same time as they are seeking an enforcement order to stop the offending activity, or when they are trying to resolve the matter through VCAT.

Where circumstances require more immediate action, a responsible authority or person who has applied to the Tribunal for an enforcement order under section 114, may also apply for an interim enforcement order against the person or persons in relation to whom the application under section 114 was made.

When is it appropriate to prosecute for an offence?

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 a 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.

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 to be so significant, or that because of the risk of future breaches, an infringement notice would be inappropriate.

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 (\$120,000) 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.

This does not help very much if the offence was to *carry out development* which has been completed, and which the responsible authority wishes to see removed or modified to comply (or at least, nearly comply) with the scheme. The offence was to carry it out and there is no basis to secure its removal or require restoration works.

If the offence involved carrying out development which the responsible authority wishes to see removed, 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.

5.0 ENFORCEMENT MECHANISMS

5.1 Introduction

This chapter considers the most appropriate forum for enforcement action and the various enforcement mechanisms and makes recommendations about how the perception of VCAT as a 'toothless tiger' can be removed. The chapter also considers the question of whether the 'merits' of an illegal use or development should be considered by VCAT at the same time as enforcement proceedings.

5.2 One-stop-shop for enforcement

It has become clear to the Reference Group that confusion exists both in local government and amongst third parties as to the most appropriate enforcement mechanisms and forum to pursue. This confusion and the potential costs involved with initiating enforcement action, particularly through the Magistrates' Court, can be a disincentive to pursuing offenders more rigorously.

It is no longer true that Councils and third parties have to decide between rectification and penalty. The provision that originally prevented prosecution through the Magistrates' Court when there were enforcement proceedings before VCAT has been repealed. Nevertheless, the perception remains.

The Reference Group is of the view the VCAT is the most appropriate forum for enforcement action and its jurisdiction should be expanded to provide for prosecution and the imposition of penalties in addition to its administrative powers to issue enforcement order. The advantage of combining the powers of VCAT and the Magistrates' Court is that those wishing to take action can come to one forum for both punishment and rectification. Matters can be dealt with at the one forum more quickly, efficiently, cheaply and more expertly.

The expertise point is an important one. One of the problems about prosecuting in the Magistrates' Court is that the court is constituted by a generalist lawyer with responsibility for a wide range of jurisdiction. Such a lawyer may lack specialist knowledge and experience in planning and enforcement law. This can result in mild penalties for serious matters and vice versa. In contrast VCAT is an expert Tribunal which is constituted on the basis of the area of expertise required.

An additional advantage of the Tribunal having jurisdiction to impose penalties is that this would make it clear that the enforcement order jurisdiction, aimed at rectification, is something different to the prosecution jurisdiction, aimed at punishing. It would assist in alleviating the frustration felt by those who think that enforcement order proceedings are for the purpose of punishment rather than rectification. This misunderstanding gives rise to a level of continuing, if misinformed, criticism of VCAT.

There are a number of administrative implications of enabling prosecution through VCAT. It may be necessary to establish an Enforcement List at VCAT under the broader umbrella of the Planning and Environment List. VCAT does, for example in the Land Valuation List and the Real Property List, have broader powers of prosecution and the imposition of penalties. Similar administrative arrangements may need to be considered. A Tribunal, hearing prosecutions and with the ability to impose penalties may also need to operate more as a court (for those proceedings) and the rules of evidence may be invoked.

FINDING	RECOMMENDED ACTION	BY
VCAT is the most appropriate forum for enforcement action and its jurisdiction should be expanded to provide for prosecution and the imposition of penalties in addition to its administrative powers to issue enforcement orders.	1. The <i>Victorian Civil and Administrative Tribunal Act 1998</i> and the <i>Planning and Environment Act 1987</i> should be amended so that VCAT has jurisdiction for prosecution and imposition of penalties.	DOJ VCAT

5.3 Cancellation and amendment of permits

At present VCAT, on the hearing of an enforcement order application, does not have the power to cancel or amend a permit. This is only possible if the Council has brought a separate application under Section 87 of the *Planning and Environment Act 1987*. VCAT and the parties would have greater ability to resolve the issues if VCAT had a power to order the cancellation or amendment of a permit, on the hearing of an enforcement order application, without the need of a separate application.

FINDING	RECOMMENDED ACTION	BY
The ability for VCAT to cancel or amend a permit on hearing an enforcement order application should be created.	2. The <i>Planning and Environment Act 1987</i> be amended to allow VCAT on the hearing of an enforcement order application to amend or cancel a permit without a separate application being made under Section 87 of the Act.	DOJ

5.4 Enforcement of enforcement orders

It is an offence not to comply with an enforcement order and prosecution in the Supreme Court is possible. 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. The penalties for failure to comply with an enforcement order or interim enforcement order are substantial. They involve both imprisonment and fines. An ability for the responsible authority to carry out work required by an enforcement order or interim enforcement order that was not carried out within the specified period is also provided for in the *Planning and Environment Act 1987*. The cost of this can be recovered from the person in default.

While the penalty for non-compliance can be quite high it is a significant disincentive for Councils or third parties that further action has to be pursued through the Supreme Court.

If Recommendation 1 of this report is pursued then the fact that prosecution may be pursued through VCAT may reduce some of the concerns in relation to time and cost of enforcing enforcement orders. To give enforcement orders some weight it may still be appropriate to consider how the 'contempt' power might be implemented. At present this power is only exercisable by a judicial member of VCAT.

The power of VCAT to authorise another party, such as the police, to 'enforce' an enforcement order also needs to be broadened. There are circumstances, particularly in relation to licensed premises, brothels and the like, in which it would be more appropriate for the police to be able to take action.

FINDING	RECOMMENDED ACTION	BY
The ability for VCAT to enforce an enforcement order is a logical extension of its powers.	3. The VCAT Act should be amended to enable VCAT to make all necessary orders, including contempt, if an enforcement order is breached.	DOJ
Provision for the police to be able to enforce an enforcement order should be explicitly provided for.	4. The legislation should be reviewed to ensure that Councils can enforce an enforcement order without recourse to the Supreme Court and if needed with police assistance.	DOJ

5.5 Penalties and costs

The maximum penalties are set out in Chapter 4 of this report. They can be substantial with a fine of up to \$120,000 and a daily penalty of up to \$6000. Penalties are not increased for second, third or subsequent offences nor are there higher penalties for some offences compared to others.

Penalties are imposed either by a Planning Infringement Notice (maximum penalty limited) or by the Magistrates' Court.

It appears to the Reference Group that there is no real argument with the maximum penalties that are able to be imposed but rather with the mechanism by which these penalties must be sought. There have been instances of relatively low fines being imposed through the Magistrates' Court and this may relate to a lack of planning law expertise in this forum. The implementation of Recommendation 1 provides an opportunity to remove this concern.

The more pertinent issue appears to be the recovery of costs rather than the imposition of penalties. Within the Magistrates' Court system there are currently three cost scales. After prosecution, there generally follows an argument about the recovery of costs for the successful party. There is no set level of reimbursement and often the successful party is left out of pocket. This does not provide any encouragement for Councils to pursue prosecution of offenders. The Reference Group considers that if Recommendation 1 is not adopted a review of costs for planning and building matters in the Magistrates Court should be instigated.

A further issue with the recovery of costs relates to a Council carrying out of works required by an enforcement order if compliance is not undertaken by the offender. The *Planning and Environment Act 1987* necessitates further action through the Supreme Court if the offender does not pay. This is a time consuming and costly process. A first charge on the land under the *Local Government Act* should be contemplated as an alternative cost recovery mechanism.

The 'damages' undertaking required as a prelude to any interim enforcement order is also seen as a disincentive to undertaking enforcement action. The *Planning and Environment Act 1987* (section 120(3)(b)) provides for the Tribunal to consider whether an the applicant for an interim enforcement order should give any undertaking as to damages. Supreme Court decisions have ruled that public authorities endeavouring to enforce the law are not exempt from the obligation to give damages undertakings in interim enforcement or injunction proceedings.

This requirement, again acts as a significant deterrent to Councils initiating proceedings for interim enforcement order. The Reference Group considers that, if a Council is pursuing a breach of the planning scheme or planning permit, it should not be required to give an undertaking as to damages and the legislation should be amended accordingly.

FINDING	RECOMMENDED ACTION	BY
The maximum penalties provided for in the <i>Planning and Environment Act 1987</i> are high enough to be a deterrent, however, the low recovery of costs and requirements for damages undertakings are significant impediments to effective enforcement by Councils.	5. If Recommendation 1 is not implemented then a review of the cost scales in the Magistrates' Court should be undertaken with the view to increasing the base recovery rate.	DOJ
	6. Amendment to the <i>Planning and Environment Act</i> to enable recovery of costs from undertaking the works by a first charge on the land.	DOI
	7. The <i>Planning and Environment Act 1987</i> requirement be amended to exempt Councils from a damages undertaking in interim enforcement order proceedings.	DOI

5.6 Merits consideration

The Reference Group appreciates that there can be a perception that an offender is being rewarded for wrongdoing if at the same time as an enforcement proceeding, the merits of a planning permit application for rectification are considered and a permit subsequently issued. The Reference Group is of the view that VCAT should also have the power to pursue 'punishment' alternatives, such as fines, if a Council so requests, irrespective of any rectifying permit application. This is the basis of Recommendation 1 of this report.

The discretion to adjourn an enforcement order application to enable the hearing of another related application (including a 'merits review') should be retained. It may well be appropriate that the matters be heard together and indeed this is often requested by the Council or the parties involved, particularly for alleged unauthorised buildings and works. In alleged illegal 'use' enforcement applications it may be more appropriate that the enforcement order application proceed to stop the use.

VCAT should pursue its planned objective of fast tracking enforcement order applications. Respondents are entitled to apply for stay of any order pending an appeal to the Supreme Court.

FINDING	RECOMMENDED ACTION	BY
There should be an ability for VCAT to 'punish' offenders through penalties as suggested in Recommendation 1 at the same time as hearing the merits of a permit application.	8. Same as Recommendation 1.	DOJ DOI

6.0 BEST PRACTICE

6.1 Introduction

This chapter outlines improvements that can be made to the operational aspects of enforcement within Councils but also explores the role a strong professional body can play in educating members and influencing the use of enforcement procedures.

Councils can vary considerably in their commitment, resources and skills in undertaking the enforcement of their planning schemes. There are also varying organisational models as to how the enforcement function can be fulfilled.

The Reference Group has witnessed the commitment of enforcement officers, as a distinct group within the planning community, to contribute to discussion and to suggest improvements to their day to day work environment.

6.2 Collaboration

A key to effective enforcement is quite often the use and sharing of information between a network of other enforcement agencies. Such agencies may include the police, Environment Protection Authority and Liquor Licensing Commission. This allows the most efficient use of resources for all agencies and access to unique skills.

The same also applies to resource sharing across Councils. For rural Councils this may include the sharing of an enforcement officer or information sharing at the very least. Councils should investigate joint working relationships with adjoining Councils and other enforcement agencies.

FINDING	RECOMMENDED ACTION	BY
Collaboration with other enforcement agencies and other Councils is a useful resource sharing initiative.	9. Inter-Council and agency agreements should be developed to ensure a clear distinction in responsibilities and commitment to work interactively.	MAV Local government

6.3 Culture to enforce

Some Councils' combine all enforcement activity (building, planning, environmental health and local laws) into one unit. Others combine planning enforcement with their statutory planning unit. Smaller, often rural, Councils include the enforcement role in the job description of the planning officer.

Whatever the model used by a Council, there must be a willingness to pursue enforcement or the desired outcomes of the planning scheme will not be achieved. Part of a commitment to enforcement is a process of follow up compliance checks and random auditing. This action needs to be followed up by an increased awareness of Council action and a subsequent willingness to pursue enforcement action if there are breaches of the planning scheme or permit. In order to achieve this, adequate resources and training are required.

FINDING	RECOMMENDED ACTION	BY
Good enforcement practices involve monitoring and random auditing of planning permits.	10. Performance criteria should be established for auditing of planning permits.	MAV Local government

6.4 Education

Enforcement, as a component of planning has not traditionally received much coverage within planning courses. Professional development seminars, primarily concentrating on the collection of evidence and preparation of an enforcement case, have been held on an irregular basis.

While the value of these seminars should not be underestimated, concentrated effort on identifying the skills required for effective enforcement and a consistent means of delivery of these skills should be a priority. The establishment of generic competencies of those that carry out other forms of enforcement such as building, local laws, liquor licensing and police investigation would also be useful.

The Minister for Planning has established a Planning Education and Training Roundtable chaired by the Hon. Brian Howe. This Roundtable will consider planning competencies for local government planners, including consideration of the unique role of enforcement officers and the potential to develop a certificate or diploma course in planning and building enforcement. This initiative is supported by the Reference Group.

A more immediate need seems to be an enforcement manual that would outline the relevant legislative framework, detail the collection of evidence, preparation of a prosecution brief and the like. The document *Using Victoria's Planning System* includes a chapter on enforcement but does not go into sufficient detail necessary for the day to day operations of a planning enforcement officer. The preparation of such a manual would be valuable in establishing consistent practices for enforcement officers and to educate new or occasional users of the enforcement system. The enforcement manual could be prepared by the Planning Enforcement Officers Association as a toolkit for its members.

An element of the planning system of considerable frustration to enforcement officers has been the vagueness and lack of enforceability of some planning permit conditions. This issue has been acknowledged by the MAV and the Department of Infrastructure and a *Writing Planning Permits* guide has been produced and is about to be circulated to all Councils. This guide also provides some model conditions that should help to improve the clarity of planning permit conditions. This guide should be published and promoted as soon as possible.

FINDING	RECOMMENDED ACTION	BY
Assistance in undertaking the role of enforcement officer is impeded by an absence of clear guidance documentation.	11. An enforcement manual outlining legislative requirements, collection of evidence, prosecution briefs etc. should be prepared.	Planning Enforcement Officers Association
The quality of planning permit conditions is sometimes poor resulting in difficulties in enforcement.	12. Release and promote the <i>Writing Planning Permits</i> manual as soon as possible.	DOI MAV
There is a need to determine the professional development requirements of enforcement officers in local government, recognising their specialist role within the planning system.	13. A competency set should be developed for the planning enforcement function.	MAV Planning Enforcement Officers Association DOI
Emphasis on enforcement in the tertiary education system has been lacking.	14. The Planning Education and Training Roundtable should be supported in its consideration of a planning and building enforcement certificate or diploma.	DOI MAV Local government VCAT

7.0 CONCLUSION

The Reference Group concludes that although enforcement action can be pursued at both VCAT and the Magistrates' Court there remains a perception that only one avenue can be followed. The Reference Group considers that this perception would be removed and the enforcement framework considerably simplified if the prosecution jurisdiction and the imposition of penalties were undertaken by VCAT.

The Reference Group has made other recommendations which relate to clarifying and enhancing the powers of VCAT in relation to enforcement in an attempt to reduce criticism of VCAT being a body that rewards wrongdoers or a 'toothless tiger'.

A conscious effort has also been made by the Reference Group to look beyond structural and organisational change to best practice techniques that Councils may adopt to be more effective in undertaking their enforcement obligations. The report also highlights and supports other education and professional development initiatives.

Appendix 1

CONTINUOUS IMPROVEMENT PROGRAM

Reference Group on Decision-making Processes

Terms of Reference

Purpose

Following representations from the Inner South Metropolitan Mayors Group and others about the operation of various aspects of the planning decision-making process, the Minister for Planning, the Hon. John Thwaites MP, has established this Reference Group to analyse specified issues and provide advice about what improvements can be made to the planning system or other processes to deliver better process performance and better planning outcomes.

Background

The Continuous Improvement Program (CIP) is a joint DOI and MAV initiative that promotes improvements in the operation of the planning system. The Reference Group is established under the auspices of the CIP and the implementation of recommended improvements will be managed through that program.

Methodology

The Reference Group will comprise representatives from the MAV, the VCAT and the Royal Australian Planning Institute (Victorian Division) (RAPI).

Specific projects are identified for the Reference Group's consideration and a project brief provided for each issue. The Reference Group should analyse the issue identified, including examining case studies, consulting stakeholders, analysing data or other means as the Reference Group thinks appropriate. The Reference Group should, respond to any matters specified in the project brief, identify any problems in relation to the issue and recommend appropriate actions to address the issue, including evaluating options where alternative options are available.

In considering issues, the Reference Group should have particular regard to the need for action in relation to:

- improving statutory processes and provisions
- encouraging and documenting best practice
- professional development and training.

Delivery

The advice of the Reference Group must be delivered in a short written report, delivered within the time frame specified in the project brief. Administrative support will be provided to the Reference Group by the Planning Systems Unit of DOI.

Hon. John Thwaites MP
Minister for Planning

PROJECT 1: USING AND INTERPRETING LOCAL POLICY

Background

A recent decision by the Supreme Court in *Glen Eira City Council v. Gory* has highlighted different views about how policy in schemes, particularly local planning policy, should be used and interpreted.

Issue

To operate effectively, policy in planning schemes must be given appropriate weight when decisions are made, must be clear in its intent and be able to be applied in a realistic way. The Gory decision has raised uncertainties about these issues that need to be resolved.

The task

Examine the issues raised by Glen Eira in relation to the Gory decision and the consequent advice from the Victorian Government Solicitor, consider the intended role of policy in the statutory planning system as expressed in relevant documentation associated with the introduction of the new format schemes and recommend any actions needed to ensure that the statutory role of policy in schemes can be effectively implemented. An opportunity must be given to the City of Glen Eira and to VCAT to make a submission to the Reference Group.

Timetable

A report and recommendations should be delivered within four months of this project being initiated.

PROJECT 2: SUBSTITUTION AND AMENDMENT OF PLANS

Background

It is common practice for development plans to be changed during the consideration of a planning application. This can happen either during the consideration of the application by the responsible authority or at any hearing at VCAT. VCAT has issued a Practice Note that sets out the procedural arrangements that apply when plans are sought to be changed at a VCAT hearing.

Issue

There is perceived inconsistency about the circumstances and criteria which should reasonably apply when plans are sought to be changed. Decision-making by all parties would benefit from clearly articulated performance or decision-making guidelines that assist decisions about when changes can be considered to be 'minor' and when additional notice or consultation is appropriate. Suitable guidelines would also potentially discourage the practice of including 'ambit claims' in applications.

The task

Prepare appropriate draft performance or decision-making guidelines that assist decisions about changes to plans. Recommend an appropriate format for publishing the guidelines (such as a Planning Practice Note).

Timetable

A report and recommendations should be delivered within four months of this project being initiated.

PROJECT 3: ENFORCEMENT METHODS

Background

Enforcement of planning matters can be made via either VCAT or the Magistrate's Court. The enforcement provisions of the *Planning and Environment Act 1987* have recently been documented in *Using Victoria's Planning System*. The 2002 PLANET training program will include a seminar on enforcement run in conjunction with the Planning Enforcement Officers Association.

Issue

There is a perception that enforcement through VCAT is predisposed to normalising the matter or reviewing the merits rather than terminating the unlawful activity. Concern has also been expressed about other matters such as the relative costs of the two approaches, exposure of Councils to damages claims, lack of ability to enforce determinations and other matters.

There is a need to:

ensure that users understand the differences between the two approaches and best practice in the use of each method.

identify any shortcomings of either approach and suggest ways in which these might be addressed.

The task

1. Recommend any additional methods for promoting understanding of best practice in the use of the existing enforcement provisions of the *Planning and Environment Act 1987* and other legislation.
2. Document and review identified shortcomings of the VCAT and Magistrate's Court options and recommend ways in which these might be addressed.

The Reference Group should take into account the views of the Planning Enforcement Officers Association and any other party it considers relevant

Timetable

A report and recommendations should be delivered within six months of this project being initiated.