

FOLEY'S | LIST

ORDERS AS TO COSTS AND REIMBURSEMENT OF FEES

Author: Serena Armstrong

Date: 15 August, 2018

© Copyright 2018

This work is copyright. Apart from any permitted use under the *Copyright Act 1968*, no part may be reproduced or copied in any form without the permission of the Author.

Requests and inquiries concerning reproduction and rights should be addressed to the author c/- annabolger@foleys.com.au or T 613-9225 6387.

ORDERS AS TO COSTS AND REIMBURSEMENT OF FEES

VCAT: PLANNING AND ENVIRONMENT LIST

INTRODUCTION

- 1 This paper provides a brief overview of the practical approach and key provisions regarding costs and reimbursement of fees in hearings before the Victorian Civil and Administrative Tribunal. It is tailored to applications where the enabling enactment is the *Planning and Environment Act 1987* (**PE Act**).

NATURE OF THE PROCEEDINGS

Merits Proceedings

- 2 The general rule is that each party must bear its own cost: section 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**). This rule is well-known and almost always followed in merits proceedings in the Planning and Environment List. Clients unfamiliar with such proceedings should be advised of this. When acting for a party, be alert to truly exceptional circumstances or conduct that has unnecessarily disadvantaged your client and be ready to seek costs in such situations.

Cancellation, Amendments of Permits and Stop Orders

- 3 An award of costs is more common for applications to cancel or amend permits or for stop orders, as is recognised in the final paragraph of the *Practice Note – PNPE3 Cancellation & Amendment of Permits and Stop Orders*. It is of course section 109 of the VCAT Act, not the practice note, which gives the Tribunal the power to award costs and guides how the Tribunal is to exercise its discretion.
- 4 Clients should be advised that an award of costs is not automatic in proceedings of this nature, but as a general rule an unjustified application to cancel or amend a permit or an application to stop development, especially by a non-permit holder under s 89 of the PE Act, may result in an order for costs being made.

Enforcement Orders

- 5 An award of costs is commonly made in proceedings for interim or permanent enforcement orders but this is not “an invariable rule”. The position is reflected in the *Practice Note PNPE4 Enforcement Orders and Interim Enforcement Orders*, which gives two examples where costs orders may arise:
- the bringing of a quite unjustified application for an Enforcement Order; or
 - a persistent and unjustified failure to comply with planning laws in the face of repeated requests and warnings.
- 6 It is important to advise clients of the cost risks associated with such proceedings and to be ready to argue for, or against, an award of costs at the hearing.

Declaration Proceedings

- 7 An award of costs is more likely in declaration proceedings under either section 149A or section 149B of the PE Act, but will depend on the circumstances. Commencing declaration proceedings under section 149B in lieu of enforcement proceedings is unlikely to avoid any adverse costs consequences that would flow if the proceedings were commenced under section 114 or 120 of the PE Act.

TIMING FOR COSTS APPLICATIONS AND WRITTEN SUBMISSIONS

- 8 An award of costs can be made at any time. Where costs are ordered before the end of a proceeding, the Tribunal may require the order be complied with before the proceeding continues: section 109(6) of the VCAT Act.
- 9 If costs are sought after the final decision has been delivered, the reason why they were not sought during the hearing will need to be explained. The preferable approach is to make, or at the very least foreshadow, an application for costs during the substantive hearing.
- 10 If further time is required, an order can be sought allowing for written submissions to be filed and circulated. Well drafted submissions will facilitate a determination for costs on the papers.

POWER TO AWARD COSTS

Section 109 of the VCAT Act

- 11 The rules as to costs are found at Division 8 of the VCAT Act. Section 109 sets out the power to award costs. As previously identified, the general rule is that parties bear their own costs: section 109(1).
- 12 The Tribunal has the power to award costs under section 109(2), but subsection (3) requires that it must be “satisfied it is fair to do so” having regard to the matters set out at in the subsection – discussed in further detail below.
- 13 The power to award costs includes the power for costs to be awarded against the representative of a party, rather than the party itself: section 109(4) and (5).
- 14 Where costs are ordered before the end of a proceeding, the Tribunal may require the order be complied with before the proceeding continues: section 109(6).
- 15 The Tribunal may fix the amount of costs itself or order that costs be assessed, settled, taxed or reviewed by the Costs Court: section 111. Under rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2018*, the default scale is the County Court scale (being 80% of the Supreme Court Scale).
- 16 Keep in mind, an award of costs on an indemnity basis, should be a “most unusual award” that is made only in “exceptional circumstances”: *Hobsons Bay CC v Haouli* (2001) 7 VPR 249; [2001] VCAT 433 at [29]-[30]. However, despite the case law to this effect, the seeking of indemnity costs is by no means unusual. The take away lesson – if seeking costs, do so on an indemnity basis. If resisting costs, have to hand cases such as *Haouli* in order to ensure your client is not disadvantaged.

Section 109(3) - Factors as to the award of costs

- 17 The Tribunal may only award costs if it is “satisfied that it is fair to do so” having regard to the matters set out at section 109(3). That section is reproduced in full at the end of this paper. Broadly summarised, the factors are:
 - s109(3)(a) - whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party;

- s109(3)(b) - whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
- s109(3)(c) - the relative strengths of the claim;
- s109(3)(d) - the nature and complexity of the proceeding – see the *Sweetvale* decision discussed below; and
- s109(3)(e) - any other matter the Tribunal considers relevant.

18 The last of these factors provides a broad discretion.

19 Keep in mind that orders for costs turn on the particular circumstances of the case. Be familiar with those circumstances. Understand how they might relate to previous costs decisions by the Tribunal, but make your assessment as to the cost consequences primarily on the specific facts for your case and the manner in which the proceedings have been conducted.

***Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000**

20 As to section 109(3)(d), the nature and complexity of the proceeding, Justice Morris P in *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 at [19] set out what have become now well-known factors. It will be more likely to be fair to award costs if:

- the proceeding is in VCAT’s original jurisdiction, not review jurisdiction;
- it involved a large number of issues or a small number of particularly complex issues;
- the proceeding succeeded and was a type that was required to be brought (eg statutory duty/unlawful or improper conduct that warranted redress);
- the proceeding failed and was a type where a party asserted a right it knew or ought to have known was tenuous; and
- a practice has developed that costs are routinely awarded in a particularly type of proceeding.

POWER TO REIMBURSE FEES

21 Division 8A of the VCAT Act sets out the rules regarding the reimbursement of fees. The Tribunal is empowered by section 115B(1) to make orders for the payment or reimbursement of fees. For planning matters, there is a presumption that an order for reimbursement of fees will be made:

- (a) in favour of the successful party in enforcement and section 149A declaration proceedings: section 115C(1)(d) of the VCAT Act.
- (b) in favour of the applicant in section 79 (failure to determine) proceedings: section 115CA of the VCAT Act. The presumption only applies to the lowest rate payable, not a higher rate if the applicant has elected to be heard in the Major cases list. The presumption will be rebutted if the responsible authority satisfies the Tribunal there was reasonable justification for the failure 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.

Serena Armstrong

12 Isaacs Chambers

15 August 2018

Limited by a scheme approved under professional standards

Victorian Civil and Administrative Tribunal Act 1998

109 Power to award costs

- (1) Subject to this Division, each party is to bear their own costs in the proceeding.
- (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
- (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
 - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
 - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
 - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
 - (iii) asking for an adjournment as a result of (i) or (ii);
 - (iv) causing an adjournment;
 - (v) attempting to deceive another party or the Tribunal;
 - (vi) vexatiously conducting the proceeding;
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
 - (d) the nature and complexity of the proceeding;
 - (e) any other matter the Tribunal considers relevant.
- (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
- (5) Before making an order under subsection (4), the Tribunal must give the representative a reasonable opportunity to be heard.
- (6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.
- (7) A power of the Tribunal under this section is exercisable by any member.

Note

See section 17D(1)(b) to (d) of the **Supreme Court Act 1986**.