

SUBDIVISIONS WITH THE LOT

**A complete guide to subdivisions, bodies
corporate and sales 'off the plan'**

SIMON LIBBIS

REBECCA LESHINSKY

**Law
@rest**

Published by Law Crest, a publishing imprint of
Hybrid Publishers
Melbourne Victoria Australia

© Simon Libbis and Law Crest 2008

The legislation in Stage 6 is Crown Copyright Material. Reproduced by
permission of the Government Printer for the State of Victoria.
These documents are not an official copy of Crown Copyright Material and the
State of Victoria accepts no responsibility for their accuracy.

Address all inquiries to:
Hybrid Publishers
PO Box 52, Ormond, Victoria 3204
Telephone (03) 9504 3462
Fax (03) 9504 3463

Visit our web site: www.hybridpublishers.com.au

First published 1999
Latest update May 2008

ISBN 1 876462 04 3

Mail order sales

Hybrid Publishers
PO Box 52, Ormond, Victoria 3204
Telephone (03) 9504 3462
Fax (03) 9504 3463

This publication is copyright. No part may be reproduced by any
process except in accordance with the provisions of the Copyright
Act.

This publication is not intended to be and is not a complete or
definitive statement of the law on the relevant subject matter. It
is sold with the understanding that the author and publisher are
not engaged in rendering legal advice. No person should take any
action or refrain from taking any action in reliance upon the contents
of the publication without first obtaining advice from a competent
practitioner. The author and the publisher and each of them
expressly disclaim liability for any loss or damage suffered by any
person arising out of any errors or omissions in this publication or
any reliance in part or in full upon the contents of this publication.

This publication contains a number of handouts in the hard copy
book and some are available on the computer disk that accompanies
the publication. The purchaser acknowledges and agrees that the
author, publisher and any other contributor to the publication and/or
the disk will not be under any liability to the purchaser or to any third
party in respect of any loss or damage (including inconsequential
loss or damage) however caused, whether by negligence or
otherwise, which may be suffered or incurred or which may arise
directly or indirectly from the use or operation of the disk.

The purchaser acknowledges and agrees that the disk referred to
above is provided to the purchaser on the basis that the purchaser
will conduct such tests and virus scanning as may be necessary
each time before using the disk to ensure that it does not contain
any virus and that it will not in any way corrupt the purchaser's data
or systems or those of any other persons.

About this book

Subdivision With the Lot is intended to assist researchers and research students in the area of subdivision of land and buildings, including the law relating to bodies corporate and apartments. Further, it is a necessary publication for practitioners, professionals and others researching and working in this field of law.

Organisation

Subdivisions with the Lot is organised in five *stages*, or sections, like a staged subdivision (plus legislation, in Stage 6):

- Stage 1: The Basics
- Stage 2: The Process
- Stage 3: Sales
- Stage 4: Bodies Corporate & Common Property
- Stage 5: Redevelopment and Conversion

The five stages are divided into chapters, called *lots*. Appendixes to each stage – called *accessory lots* – are located at the end of each stage. For example,

- Stage 1: The Basics
 - Lot 1: Introduction
 - Lot 2: The development of multiple ownership
 - Lot 3: Matters to be considered before the subdivision
 - Lot 4: The plan
 - Accessory Lot A
 - Part 1: Two lot plan of subdivision
 - Part 2: Plan of subdivision with section 12 easement
 - Part 3: Plan of subdivision excluding section 12 easements for part of land
 - Part 4: Plan for multi-storey building
 - Part 5: Plan creating restriction

A detailed table of contents is on page vii. To help you navigate through the text, each stage contains a detailed table of contents, positioned on page 3 of each stage (after the title page).

The paging scheme has been kept as simple as possible, to facilitate the insertion of updates. For example, in Stage 1, the author's commentary is on pages 1-1 to 1-28. This is followed by appendixes (on pages A-1 to A-28 in Accessory Lot A) of relevant plans and other information, which have been referred to in Stage 1.

Legislation

Subdivisions with the Lot includes the following legislation, in Stage 6:

Subdivision Act 1988 (on pages S-1 to S-88)

Subdivision (Body Corporate) Regulations 2001 (on pages BC-1 to BC-46)

Subdivision (Procedures) Regulations 2000 (on pages P-1 to P-56)

The legislation incorporates amendments up to November 2007.

Disks

Subdivisions with the Lot initially included a computer disk containing copyright-free documents for use by subscribers. Subscribers now receive annually a CD-ROM containing the entire publication.

Keeping up to date

Rebecca Leshinsky and Law Crest (an imprint of Hybrid Publishers) are committed to keeping this subscription service *up to date* and *affordable*. Subscriptions are available on an annual basis. The current update is May 2008.

If you are not registered with the publisher, send your contact details to:

Hybrid Publishers

Telephone (03) 9504 3462

PO Box 52, Ormond 3204

Fax (03) 9504 3463

Email <hybridpublishers@optusnet.com.au>

Visit our web site: www.hybridpublishers.com.au

About the authors

Simon Libbis was practising as a property lawyer in Victoria before taking up the position of Registrar-General of South Australia. He is currently Executive Director of the National Electronic Conveyancing Office. This is a joint initiative by governments in Australia for a national system of electronic land dealings. The office is based in Melbourne.

Simon's extensive experience in property law has had a particular focus on all aspects of property development. In this book he shares with his readers the expertise he has acquired over more than twenty years.

In addition to being a well known presenter on property law issues, Simon has written numerous articles and papers on the subject. He has published five other books – *Subdivisions and Bodies Corporate*, *The Conveyancing Companion*, *The Body Corporate Book* (with Jonathan Cohen), *Conveyancing Plus GST* (with Daniel Hirsh) and *ConveyanceWorks* (with Sandra Murphy).

Rebecca Leshinsky has been a member of the Victorian bar since 1999 and practices in the areas of property law, town planning and environment law, bodies corporate law, liquor licensing and alternative dispute resolution. Rebecca holds a Master of Laws degree from Melbourne University and is the author of the looseleaf legal service *The ABC of Victorian Bodies Corporate* (Hybrid Publishers). In 2006, Rebecca takes over the authorship of the looseleaf service Libbis' *Subdivisions with the Lot* (Hybrid Publishers). Rebecca also teaches at Victoria Law School, Victoria University, Melbourne.

Preface

Thanks to Simon Libbis for providing me with the opportunity to become a team player in *Subdivisions With the Lot* and guiding me through my endeavours to take it forward. I am further grateful to Simon and Louis de Vries for initially having faith in my work to permit me to experiment with *The ABC of Victorian Bodies Corporate*. I thank Louis for his continued support and encouragement as well as very useful suggestions.

Looking back, many thanks to Russell Cocks for stimulating my interest in Property Law at Deakin University and to JF who has always proven to be a true teacher enabling and providing golden opportunities for me to appreciate learning and pedagogy. I would not have been able to practise law without the numerous opportunities kindly provided to me by Leslie Clements, including acting as my Principal whilst an articulated clerk at Clements & Co., stimulating my interest in subdivision and bodies corporate law and permitting me to seek counsel on an ongoing basis.

Thanks also to my three sons Adam, Gabe and Ben who have made me realise that there is more to life than real property law, namely Aussie rules football!

–Rebecca Leshinsky, 12 May 2006

Contents

| | |
|---------------------------------------------------------------------|-------------|
| About this book | iii |
| About the author | v |
| Preface | vi |
| Glossary | xvii |
| Introduction | xxv |
| Owners Corporations Bill – Explanatory Memorandum | xxxii |
| Stage 1: The Basics | |
| Lot 1. Introduction | 1-3 |
| Lot 2. The development of multiple ownership | 1-5 |
| Before the Subdivision Act | 1-5 |
| Land subdivisions | 1-5 |
| Company share schemes | 1-5 |
| Stratum titles | 1-6 |
| Strata titles | 1-6 |
| Cluster titles | 1-6 |
| After the Subdivision Act | 1-7 |
| Company share schemes | 1-7 |
| Stratum titles | 1-7 |
| Other subdivisions | 1-7 |
| Moving into the 21st century | 1-8 |
| Lot 3. Matters to be considered before the subdivision | 1-9 |
| Zoning | 1-9 |
| The title | 1-10 |
| Physical features | 1-12 |
| Marketability | 1-20 |
| Environmental implications | 1-20 |
| Tax implications | 1-21 |
| Lot 4. The plan | 1-23 |
| Stage number | 1-23 |
| Edition | 1-23 |
| Plan number | 1-23 |
| Location of land | 1-24 |
| New Land Registration requirements for Owners Corporation | 1-24 |
| Accompanying documents — owners corporation rules | 1-25 |

Subdivisions with the Lot

| | |
|-------------------------------------------------------------------------------------|------------|
| Plan format | 1-25 |
| Limitations on owners corporation | 1-26 |
| Council certification and endorsement..... | 1-26 |
| Vesting of roads or reserves | 1-27 |
| Depth limitation | 1-27 |
| Staging | 1-27 |
| Other notations | 1-27 |
| Easement information | 1-28 |
| Compliance and registration | 1-29 |
| Signatures..... | 1-29 |
| Sheet number | 1-29 |
| The lots..... | 1-30 |
| Restrictions | 1-31 |
| Body corporate..... | 1-31 |
| Owners corporation..... | 1-31 |
| Owners corporation search report | 1-31 |
| Accessory Lot A..... | A-1 |
| Part 1 Two lot plan of subdivision | A-1 |
| Part 2 Plan of subdivision with section 12 easement | A-3 |
| Part 3 Plan of subdivision excluding section 12 easements for part of land | A-6 |
| Part 4 Plan for multi-storey building..... | A-9 |
| Part 5 Plan creating restriction | A-13 |
| Part 7 State Revenue Office Revenue Ruling DA.026..... | A-25 |

Stage 2: The Process

| | |
|----------------------------------------------------------|-------------|
| Lot 5. The planning process | 2-3 |
| Applying for the permit | 2-3 |
| Easements and covenants | 2-4 |
| Staged subdivision | 2-6 |
| Owners corporation | 2-7 |
| Common property | 2-7 |
| Referral authorities..... | 2-7 |
| Obtaining the planning permit | 2-8 |
| Certification..... | 2-9 |
| Statement of compliance..... | 2-11 |
| Aboriginal cultural heritage | 2-11 |
| Lot 6. Registration of plans of subdivision | 2-13 |
| Preparing the way | 2-13 |
| Where to lodge..... | 2-13 |
| What to lodge..... | 2-14 |
| Accompanying documents — owners corporation rules | 2-14 |
| Plan format | 2-15 |

| | |
|---------------------------------------------------------------------------------------------------------------------|-------------|
| Limitations on owners corporations | 2-15 |
| The plans | 2-15 |
| Consents | 2-15 |
| The title | 2-16 |
| Planning permits..... | 2-17 |
| Registration fees..... | 2-17 |
| The owners corporation | 2-18 |
| Progress through the Land Victoria | 2-18 |
| Compliance | 2-18 |
| Registration | 2-19 |
| Consolidation | 2-19 |
| Subdivision via the internet | 2-20 |
| Lot 7. Not in Common Ownership subdivisions | 2-21 |
| Requirements for registration | 2-22 |
| Effect of registration | 2-22 |
| Transferring the land | 2-22 |
| Mortgagee | 2-23 |
| GST | 2-24 |
| Accessory Lot B..... | B-1 |
| Part 1 Subdivision process | B-1 |
| Part 2 Notice of an application for planning permit..... | B-2 |
| Part 3 Planning permit..... | B-3 |
| Part 4 Refusal to grant a permit..... | B-5 |
| Part 5 Notice of decision to grant a permit | B-7 |
| Part 6 Section 173 agreement..... | B-9 |
| Part 7 Application to register section 173 agreement | B-17 |
| Part 8 Application for certification..... | B-18 |
| Part 9 Statement of compliance..... | B-20 |
| Part 10 [deleted – blank page]..... | B-21 |
| Part 11 Application for registration of subdivision | B-23 |
| Part 12 Subdivision checklist | B-24 |
| Part 13 Plan of consolidation | B-26 |
| Part 14 Land Registry guide to lodging a plan of consolidation..... | B-27 |
| Part 15 Land Registry guide to NICO plans and titles | B-29 |
| Part 16 NICO (not in common ownership) plan | B-31 |
| Part 17 State Revenue Office: Real property value statutory declaration..... | B-33 |
| Part 18 Statutory Declaration for State Revenue Office | B-37 |
| Part 19 [deleted – blank page]..... | B-38 |
| Part 20 GSTR 2003/3: Goods and Services Tax Ruling | B-39 |
| Part 22 Guidelines for preparation of agreements under section173 of the Planning and Environment Act 1987 | B-75 |
| Part 23 ATO fact sheet – subdividing law..... | B-76 |

| | | |
|---------|----------------------------------------------------------|------|
| Part 24 | ATO fact sheet – subdividing and amalgamating land | B-77 |
| Part 25 | Spear news | B-78 |
| Part 26 | GSTR 2003/3: Goods and Services Tax Ruling | B-83 |
| Part 27 | Advisory Note: The Aboriginal Heritage Act 2006 | B-93 |

Stage 3: Sales

| | |
|--------------------------------------------------------------------|------------|
| Lot 8. Selling lots on plans of subdivision | 3-3 |
| Background | 3-3 |
| Vendors statement | 3-4 |
| Building approvals | 3-5 |
| Defects insurance | 3-5 |
| Restrictions | 3-5 |
| Rates and taxes | 3-6 |
| Services | 3-7 |
| Title | 3-7 |
| Staged subdivisions | 3-8 |
| Planning permit | 3-8 |
| Contract | 3-9 |
| Settlement date | 3-9 |
| Deposit | 3-9 |
| Disclosure of works | 3-11 |
| Possession | 3-11 |
| Insurance | 3-12 |
| Registration of the plan | 3-13 |
| Stamp duty | 3-15 |
| Adjustment of outgoings | 3-15 |
| Caveats | 3-16 |
| Requisitions on title | 3-16 |
| Substitution/nomination | 3-17 |
| Environmental matters | 3-18 |
| Creation of covenant | 3-18 |
| Section 173 agreements | 3-18 |
| Guarantees | 3-19 |
| Foreign purchasers | 3-19 |
| Goods and Services Tax | 3-19 |
| Settlement | 3-21 |
| The title | 3-21 |
| The transfer of land | 3-22 |
| Heritage properties | 3-22 |
| Note on the removal or modification of restrictive covenants | 3-22 |

| | |
|------------------------------------------------------------------|-------------|
| Lot 9. Building legislation..... | 3-25 |
| Residential property | 3-26 |
| Registered builders | 3-26 |
| Non-registered builders | 3-27 |
| Owner-builder reforms | 3-28 |
| Incomplete home | 3-28 |
| Difficulties with compliance | 3-30 |
| Establishment of commencement date | 3-30 |
| Uncertainty of the scope of the Building Act | 3-30 |
| Pre-selling | 3-31 |
| Non-residential property | 3-31 |
| Lot 10. Buying off the plan..... | 3-33 |
| Plan of subdivision | 3-34 |
| Boundaries | 3-34 |
| Car park spaces..... | 3-34 |
| Lot liability and entitlement | 3-34 |
| Easements..... | 3-35 |
| Covenant | 3-35 |
| Staged subdivision | 3-35 |
| Body corporate rules | 3-35 |
| Building plans | 3-36 |
| The contract of sale | 3-36 |
| Settlement..... | 3-37 |
| Purchaser | 3-37 |
| Registration of the plan | 3-38 |
| Completion of building works | 3-39 |
| Deposit | 3-40 |
| Outgoings | 3-41 |
| Caveat..... | 3-41 |
| Stamp duty | 3-42 |
| Rental guarantees | 3-43 |
| New land registration requirements for owners corporation | 3-44 |
| Accompanying documents — owners corporation rules | 3-44 |
| Plan format | 3-45 |
| Limitations on owners corporations | 3-45 |
| Other considerations | 3-45 |
| Foreign purchasers | 3-46 |
| Owners corporation | 3-46 |
| Planning restriction | 3-46 |
| Agreements under s 173 of the Planning and Environment Act | 3-47 |
| Taxation | 3-47 |
| Insurance | 3-49 |
| Contamination and land fill | 3-49 |

| | |
|--------------------------------------------------------------------------------------|------------|
| Manuals and warranties..... | 3-49 |
| Maintenance | 3-50 |
| Finance | 3-50 |
| First home owners | 3-50 |
| First Home Owner's Grant Act 2000 and deceased estates | 3-52 |
| The Tribunal's decisions | 3-53 |
| The Supreme Court appeals | 3-53 |
| Background analysis | 3-54 |
| Enquiries | 3-55 |
| Caveat | 3-55 |
| Transfer of land | 3-56 |
| Final search and inspection | 3-57 |
| Settlement | 3-57 |
| Registration of the transfer..... | 3-57 |
| Some practical tips relating to off-the-plan contracts | 3-58 |
| Introduction | 3-58 |
| Misrepresentation | 3-59 |
| What is the contract for? | 3-60 |
| Amending legislation | 3-61 |
| Certainty | 3-62 |
| Bodies corporate..... | 3-64 |
| Builders' warranty insurance..... | 3-65 |
| Who can be sued for defects?..... | 3-65 |
| Collateral contracts..... | 3-66 |
| Conclusion..... | 3-67 |
| Accessory Lot C..... | C-1 |
| Part 1 [deleted – blank page]..... | C-1 |
| Part 2 Contract of sale of real estate..... | C-3 |
| Part 3 Owner/builder warranties | C-10 |
| Part 4 Domestic building insurance: Ministerial Order | C-11 |
| Part 4A Domestic building insurance: Ministerial Order | C-27a |
| Part 5 Approved insurers under the Building Act 1993 | C-28 |
| Part 6 Condition in contract where vendor to complete building | C-30 |
| Part 7 Condition in contract where building to be completed – not by vendor | C-31 |
| Part 8 Obligations of vendor under building legislation | C-32 |
| Part 9 Letter of advice to purchaser off the plan | C-34 |
| Part 10 Nominee statutory declaration | C-40 |
| Part 11 Foreign investment policy – urban land | C-42 |
| Part 12 Requisitions on title | C-57 |
| Part 13 Letter to builder/developer about GST | C-58 |
| Part 14 Caveat by purchaser off the plan | C-60 |
| Part 15 Duties Act Bulletin, November 2004 | C-61 |

| | | |
|---------|-----------------------------------------------------------------------------------------|-------|
| Part 16 | Stamp duty on sub-sales and nominations under a contract of sale of real property | C-67 |
| Part 17 | Stamp duty concession for refurbished lots | C-70 |
| Part 18 | Stamp duty on land and building packages | C-72 |
| Part 19 | First Home Owner Grant | C-74 |
| Part 20 | State Revenue Office: Refurbished lots statutory declaration | C-78 |
| Part 21 | State Revenue Office: Land and building packages statutory declaration | C-81 |
| Part 24 | Duties Act 2000: The new sub-sale provisions | C-110 |
| Part 25 | Transactions treated as sub-sales of land: Statutory Declaration | C-117 |
| Part 26 | Transactions treated as sub-sales of land: Election | C-125 |
| Part 27 | GST and the margin scheme – real property after 2000 | C-127 |
| Part 28 | GST and the margin scheme – real property acquired before 1 July 2000 | C-135 |
| Part 29 | GST and time of choice to apply the margin scheme | C-147 |

Stage 4: Bodies Corporate and Common Property

| | |
|---------------------------------------------------------------------|------------|
| Lot 11. Owners corporation and common property | 4-3 |
| New regime for Victoria – <i>Owners Corporation Act 2006</i> | 4-3 |
| Transitional provisions and the <i>Owners Corporation Act</i> | 4-3 |
| The need for an Owners Corporation | 4-4 |
| Creation of owners corporation | 4-4 |
| New Land Registration requirements for Owners Corporation | 4-5 |
| Accompanying documents — owners corporation rules | 4-6 |
| Plan format | 4-6 |
| Prescribed owners corporation | 4-7 |
| Two-lot subdivision | 4-7 |
| Common property | 4-7 |
| Limited owners corporation | 4-9 |
| Multiple owners corporation | 4-9 |
| Lot entitlement and liability | 4-10 |
| Functions and powers | 4-10 |
| Power to bring legal proceedings | 4-11 |
| Financial management | 4-11 |
| Accounts and audit | 4-12 |
| Maintenance plan and fund | 4-12 |
| Asset management – Repair and maintenance | 4-13 |
| Insurance | 4-13 |
| Owners Corporation Register | 4-13 |
| Owners corporation certificate | 4-14 |
| Meetings | 4-15 |
| Interim special resolution | 4-15 |

Subdivisions with the Lot

| | |
|-------------------------------------------------------------------------------------------|------------|
| Committees | 4-16 |
| Managers | 4-17 |
| Rules | 4-17 |
| Dispute resolution | 4-19 |
| First tier | 4-19 |
| Second tier | 4-19 |
| Third tier | 4-19 |
| Exemption orders | 4-20 |
| Merging | 4-20 |
| Staged subdivision | 4-20 |
| Dissolution | 4-21 |
| Privacy legislation | 4-22 |
| Development applications and use of common property | 4-23 |
| Forms | 4-24 |
| Prescribed forms | 4-25 |
| Approved forms | 4-25 |
| Accessory Lot D..... | D-1 |
| Part 1 Types of subdivision under the Subdivision Act | D-1 |
| Part 2 Plan of subdivision with body corporate | D-2 |
| Part 3 Body corporate rules | D-6 |
| Part 4 Body corporate Form 3 certificate | D-7 |
| Part 5 Accounting guidelines for the body corporate | D-9 |
| Part 6 Licence of common property | D-14 |
| Part 7 Notice to body corporate of change of ownership | D-17 |
| Part 8 Notice of first meeting of body corporate | D-18 |
| Part 9 Agenda of first meeting of body corporate | D-19 |
| Part 10 Minutes of first meeting of body corporate | D-20 |
| Part 11 Notice of annual general meeting of body corporate | D-22 |
| Part 12 Agenda of annual general meeting of body corporate | D-23 |
| Part 13 Minutes of annual general meeting of body corporate | D-24 |
| Part 14 Form of proxy | D-26 |
| Part 15 Postal ballot | D-27 |
| Part 16 Appointment of manager | D-28 |
| Part 17 The new Body Corporate Regulations | D-29 |
| Part 18 Strategies for managers dealing with bodies corporate neighbour disputes | D-36 |
| Part 19 Plan to change lot entitlement and liability | D-43 |
| Part 20 Application for alteration of lot entitlement and liability | D-44 |
| Part 21 Notification of change or adoption of rules | D-46 |
| Part 22 Agreement with a body corporate about maintenance of lots | D-47 |

Stage 5: Redevelopment and Conversion

| | |
|---------------------------------------------------------------------------------------|-------------|
| Lot 12. Redevelopment | 5-3 |
| Body corporate plan | 5-3 |
| Staged subdivisions | 5-4 |
| An alternative | 5-6 |
| Lot 13. Company share and stratum titles | 5-9 |
| Stratum and company share titles: Management issues – A common-sense approach | 5-12 |
| Understanding the legal requirements | 5-12 |
| Australian Securities and Investment Commission requirements | 5-12 |
| Day to day management issues | 5-14 |
| Comparison to body corporate management | 5-14 |
| Liaison | 5-14 |
| Insurance | 5-14 |
| Disputes | 5-14 |
| Rules | 5-14 |
| Maintenance | 5-15 |
| Information to purchasers | 5-15 |
| Meetings | 5-15 |
| Fees | 5-15 |
| Appointment of a manager | 5-15 |
| Further information | 5-15 |
| Conversion of stratum and company share titles: (How to become a body corporate)..... | 5-19 |
| Company share..... | 5-19 |
| Stratum title..... | 5-19 |
| The applicable legislation | 5-19 |
| Authority to proceed | 5-20 |
| Structuring the plan of subdivision | 5-20 |
| Caveats | 5-22 |
| Plan of subdivision..... | 5-22 |
| Lease of part of the residual land | 5-22 |
| Application to register a plan of subdivision | 5-23 |
| Registration of plan of subdivision | 5-24 |
| Termination of company (share schemes only) | 5-25 |
| Assessment of transfers of land for stamp duty | 5-26 |
| Capital gains tax implications | 5-27 |
| Stratum and company share titles made easy: company share title schemes | 5-30 |
| What is a company share title scheme? | 5-30 |
| Acting for the vendor | 5-31 |

| | |
|--------------------------------------------------------------------------------|-------------|
| The documents to be obtained | 5-31 |
| Statutory requirements | 5-31 |
| Acting for the purchaser..... | 5-35 |
| Searching title and documents related to title | 5-36 |
| Other agreements or deeds with the company | 5-38 |
| Settlement | 5-38 |
| Finance | 5-39 |
| References | 5-39 |
| Appendix A: Suggested letter to the company..... | 5-40 |
| Appendix B: Policy Statement 67..... | 5-41 |
| Appendix C: Class Orders | 5-50 |
| Appendix D: Draft Contract of Sale | 5-55 |
| Appendix E: Goods statement for residential use..... | 5-64 |
| Appendix F: Goods statutory declaration | 5-66 |
| Appendix G: Draft Caveat | 5-70 |
| Appendix H: Suggested requisitions..... | 5-71 |
| Stratum titles | 5-73 |
| What is a stratum title? | 5-73 |
| Transfer of Land Act 1958 | 5-73 |
| Other relevant sections of the Act..... | 5-74 |
| Acting for the vendor | 5-77 |
| Vendors statement | 5-79 |
| Contract of Sale..... | 5-80 |
| Other matters for attention | 5-81 |
| Acting for the purchaser..... | 5-81 |
| References..... | 5-86 |
| Appendix I: Letter to service company..... | 5-87 |
| Appendix J: Draft special conditions for stratum title contracts of sale | 5-89 |
| Appendix K: Suggested stratum requisitions..... | 5-91 |
| Accessory Lot E..... | E-1 |
| Part 1 [deleted – blank page]..... | E-1 |
| Part 2 Stage 1 of staged subdivision | E-2 |
| Part 3 Stage 2 of staged subdivision | E-5 |
| Part 4 Special condition about development..... | E-8 |
| Part 5 Agreement about use of common property | E-9 |
| Part 6 Creation of restriction | E-11 |
| Part 7 Special conditions | E-12 |
| Stage 6: Legislation | |
| Subdivision Act 1988..... | S-1 |
| Subdivision (Body Corporate) Regulations 2001 | BC-1 |
| Subdivision (Procedures) Regulations 2000 | P-1 |

Glossary

The following is a glossary of the terms commonly used in subdivisions, sales and bodies corporate.

Aggregation

This is what the State Revenue Office does when assessing stamp duty on multiple transfers of land that arise out of ‘one arrangement’. The effect is that they are treated as one transfer for the purpose of calculating stamp duty. It applies to transactions that occur within a 12-month period and also transactions with ‘associated persons’.

Australian Business Number

This is commonly known as the ABN and is the way in which the Australian Taxation Office will identify enterprises for GST purposes.

By-laws

The rules made by the body corporate under the *Strata Titles Act*.

Body corporate

The separate legal entity that comes into existence when a plan of subdivision that provides for the creation of such an entity is registered. The members of the entity are those lot owners specified on the plan.

Body corporate rules

The laws that regulate the conduct of members of the body corporate. Unless rules are lodged with the plan of subdivision, the rules set out in Form 1 of the Schedule of the Subdivision (Body Corporate) Regulations will apply to the body corporate on registration of the plan of subdivision. The rules can be changed by a special resolution of the body corporate and that change must be notified to the Land Registry before the new rules take effect.

Caveat

The notice lodged at the Land Registry by any person claiming some sort of right or interest in land. Its effect is to prevent the land being dealt with.

Certification

This is what the planning authority does to a plan of subdivision when it is satisfied that the plan complies with all of its requirements and those of the referral authorities. Once this has been done a plan can be lodged at the Land Registry.

Cluster title

This type of title allowed for the creation of a body corporate in a subdivision of land and did not require the land to have a building on it.

Common property

The area on a plan of subdivision which is not included in one of the lots but is owned and used in common by those lot owners who are members of the body corporate. It can consist of land, buildings, air space or area below the ground.

Common seal

The stamp that a body corporate uses to indicate its agreement to something. The stamp needs to show the body corporate's distinctive number, which is the same as the registration number of the plan of subdivision.

Company share flat

An earlier form of multiple ownership under which a company would own a block of flats and issue shares which entitle the shareholder to occupy one of those flats. The shareholders and company would normally enter into a service agreement which regulated the conduct of shareholders and use of common areas.

Consolidation

A number of separate lots or pieces of land are formed into one single lot.

Covenant

An agreement registered on the title to land that restricts the use that can be made of that land. Anyone who buys the land must comply with the restrictions in the covenant.

Creditable acquisition

A creditable acquisition includes goods and services purchased by an enterprise where:

- (a) it is acquired for creditable purposes;
- (b) the supply is a taxable supply;
- (c) consideration is payable in return for the supply; and
- (d) the enterprise is registered or required to be registered.

Creditable purpose

A purchase which is made for the purpose of operating a business. Private purchases and purchases for input taxed supplies are not included.

Domestic building work

The construction of residential premises and any renovation, alterations or extensions carried out to residential premises.

Dual occupancy

This occurs where a house block is subdivided to enable an additional dwelling to be built on it. It requires a two lot subdivision.

Easement

Part of the land owned by one person that can be used by another person or a public authority for a particular purpose. The most common easements are for such things as drains, water supply and other services.

Enterprise

Businesses, ventures or concerns in the nature of trade.

Environmental Impacts

There is both a Commonwealth and a Victorian State based regime for the assessment of the environmental impacts of proposed developments. The State regime is governed by the *Environment Effects Act 1978* (Vic) and the Commonwealth regime is regulated by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Form 3 certificate

The statement that the body corporate must provide to any person making application for it. The statement contains financial information about the body corporate and is set out as Form 3 of the Schedule of the Subdivision (Body Corporate) Regulations.

General law land

Land that is not under the operation of the *Transfer of Land Act* (the Torrens system). With this land there is no single title that can be searched. To establish a good title it is necessary to investigate every dealing with the land during the last thirty years and in some cases longer.

GST free supply

This means that GST is not payable on the supply, but the supplier is still entitled to claim input tax credits for things acquired for business purposes.

Input tax credit

The acquirer of a creditable acquisition can claim a credit for the GST payable by the supplier on the supply of things acquired. Input tax credits are off set against GST which a person is liable to pay on its supplies.

Input taxed

No GST is payable on the supply and no input tax credit can be claimed for anything acquired to make the supply.

Land Tax

The *Land Tax Act 2005* (Vic) imposes an annual tax on the total taxable value (known previously as 'unimproved value') of all land owned in Victoria at midnight on 31 December of the year preceding the year of assessment. Land tax is assessed on a calendar year basis. The State Revenue Office (SRO) issues assessments from March to June each year.

Limited body corporate

A body corporate which has a particular function which is ancillary to the main body corporate. A limited body corporate can, however, exist on a plan where there is no unlimited body corporate.

Lot

This is the name given to the separate pieces of land, air space or building that come into existence when a plan of subdivision is registered.

Lot entitlement

The share of ownership that a lot owner has in the common property.

Lot liability

The proportion of the body corporate expenses for which a particular lot owner is responsible.

Major domestic building contract

An agreement to carry out domestic building work where the value of the work to be carried out is more than \$5,000.

Manager

A person appointed by the body corporate to look after its affairs. The manager will not, generally, be a member of the body corporate.

Member of body corporate

The owner of a lot that is shown on a plan of subdivision as being affected by the body corporate.

New residential premises

The sale of these will attract GST if the vendor is registered for GST. The include premises that:

- have not previously been sold before
- have been created through substantial renovations, or
- have been built to replace demolished premises on the same land.

This will not apply to premises that were used for residential accommodation before 2 December 1998.

Notice of decision to grant permit

Where there have been objections to an application for a planning permit and the planning authority decides to grant the permit, then this notice is sent to the applicant and each objector. This is not the planning permit. That cannot be issued until the time for the objectors to appeal has expired.

Not in common ownership (NICO) subdivision

Separate pieces of land with different owners are subdivided in one plan of subdivision. This is most commonly used where boundaries between properties are to be moved or where common property is being added to the title of a lot.

‘Off the plan’

This expression is used primarily to describe the sale of yet to be built, or partially built, residential units. It can, however, apply to non-residential developments. When something is sold ‘off the plan’ there will be an obligation on the seller to complete the building and register the plan of subdivision.

Owner builder

A person who is not a registered builder and carries out building work on their own property.

Owners Corporation

The *Owners Corporation Act 2006* (Vic) introduces a new name for bodies corporate. An Owners Corporation means a body corporate which is incorporated by registration of a plan of subdivision or a plan of strata or cluster subdivision.

Planning permit

The written approval from a planning authority to use land for a particular purpose. A planning permit is nearly always required before a subdivision can be carried out.

Plan of subdivision

The drawings (usually by a surveyor) that show the layout of the lots and provide all necessary information about the development.

Pre-selling

Entering into contracts for the sale of lots on a plan of subdivision where that plan has not yet been registered.

Public open space

As a condition of allowing a subdivision, the planning authority can require the subdivider to set aside up to 5 per cent of the land being subdivided for recreational purposes. It may require payment of up to 5 per cent of the value of the land in lieu of land being set aside or a combination of land and payment.

Proxy

The authorisation that a member of the body corporate gives to someone to attend meetings of the body corporate on their behalf and to speak and vote at the meeting. The authorisation may be general in nature or may give specific instructions on how to vote on a particular matter.

Referral authority

A body to which a planning authority must send a plan of subdivision for consideration and approval prior to granting a planning permit and certifying the plan. The body will usually be responsible for providing a service (such as water, electricity or gas) to the property.

Registered builder

A person who carries out building work and whom the Building Practitioners Board has registered as a Building Practitioner.

Refusal to grant a permit

A notice sent to an applicant for a planning permit which tells the applicant that the responsible authority has refused to grant a permit. The notice must set out the grounds on which the application is refused.

Responsible authority

The body that administers a planning scheme. It will usually be the local council.

Registration

The final approval of the plan of subdivision by the Land Registry. At this stage the lots and any body corporate created by the plan come into existence.

Registered proprietor

The person shown on the title to the land as its owner.

Section 173 agreement

An agreement between a person applying for a planning permit and the planning authority which is noted on the title to the land. It will normally impose either a positive or negative obligation on the owner of the land. As the obligations run with the land, whoever owns the land from time to time will be bound to comply with the terms of the agreement.

Service agreement

An agreement between the owners of units and the service company under a company share or stratum title arrangement which sets out the rights and obligations of the owners and the service company. In the case of stratum titles, service agreements can be registered on the title.

Service company

The company incorporated under company share and stratum title arrangements which owns the common area and deals with matters that are of common interest and benefit to all lot owners. In the case of stratum titles, the ownership of the shares is registered on the title to the unit.

Single dwelling covenant

A covenant that restricts the use of land by providing that only one dwelling house can be built on it.

Special resolution

A vote of three-quarters of the membership of the body corporate. At a meeting such a resolution needs three-quarters of the votes of all lot owners. A poll or ballot requires three-quarters of the votes of total lot entitlement.

Staged subdivision

Parts of the land on a title are subdivided at different times. As each part is subdivided the rest of the land is shown as a separate lot.

Statement of compliance

When the planning authority is satisfied that the subdivider has done everything required by it and the referral authorities, or that arrangements have been made for those things to be done, it will provide a statement of compliance. A plan of subdivision cannot be registered until a statement of compliance has been obtained.

Strata title

This is, in effect, a three-dimensional title as distinct from a standard land subdivision. As well as depth and width it has an upper and lower boundary. This type of subdivision can only be used where there is a building on the land. There must be a body corporate and common property.

Stratum title

This was the predecessor to strata titles and describes the three-dimensional title to land. Instead of a statutory body corporate, a service company would be used and its existence would be noted on the title.

Tax invoice

A document issued by the supplier that shows the price of a supply and the GST component on the supply. The tax invoice must be presented to the Australian Taxation Office to make a claim for input tax credits.

Unanimous resolution

A vote by all members of the body corporate. At a meeting it needs the agreement of all lot owners. A poll or ballot requires the agreement of the total entitlement.

STAGE 1

THE BASICS

Short contents

| | |
|---------------------------------------------------------------------|-------------|
| Lot 1. Introduction | 1-3 |
| Lot 2. The development of multiple ownership | 1-5 |
| Lot 3. Matters to be considered before the subdivision | 1-9 |
| Lot 4. The plan | 1-23 |
| Accessory Lot A | A-1 |



Lot 1

Introduction

The hallmarks of the procedure for subdivision in Victoria are simplicity and flexibility. Like any system, however, it has its traps and pitfalls. This book is designed to assist those involved in subdivisions by examining the process from beginning to end and beyond. Changes to the owners corporation regime in 2007 have made the running of these bodies more complex with more accountability upon owners corporations, lot owners, and managers.

Unlike many other systems for subdivision, the Victorian model does not differentiate between subdivisions of land, air space or buildings. Nor does it limit the type of subdivision in which an owners corporation may be created. Subdivision of land is dealt with in Victoria by the *Subdivision Act 1988*, and where there is common property, the *Owners Corporation Act 2006*. While this compendious approach has the advantage of simplicity, it creates some difficulties by trying to be 'all things to all people'. This book attempts to deal with those difficulties. In the overall scheme of things, the difficulties are not significant but one does need to be mindful of them.

Subdivisions are not the exclusive domain of any one professional adviser. It will be seen that during the process of subdivision a number of consultants will need to be engaged. They should not be working in isolation. A smooth transition from raw material to saleable or lettable product requires co-operation and communication between all the subdivider's advisers.

A typical subdivision could require the services of a town planner, a surveyor, an engineer, a lawyer, a real estate agent and a property manager. A building subdivision may also require an architect and a builder. Liaison between these people from the outset is essential.

This book will identify the roles played by all professional advisers but will deal primarily with the legislation and the procedures established by the legislation to effect subdivision and sales. These aspects of the procedure are normally, but not necessarily, part of the role of the lawyer who should be acting in consultation with the subdivider's other professional advisers.

The primary legislation is the *Subdivision Act 1988*. In addition there are the *Subdivision (Procedures) Regulations 2000* and the *Subdivision (Registrars' Fees) Regulations 2004*. Important changes to the *Subdivision Act* have removed the components relating to the day-to-day operation of owners corporation, and placed them in a unique legislative scheme effective from 31 December 2007. Hence, an understanding is now required of the operation of the *Owners Corporation Act 2006* and the *Owners Corporation Regulations 2007*. The *Owners Corporation Act* must, however, be read in the context of the *Subdivision Act* particularly, Part 5 of the *Subdivision Act*, which deals with subdivisions with owners corporation. Important too, is schedule 2 of the *Subdivision Act* which deals with the savings

Subdivisions with the Lot

provisions relating to strata and cluster subdivisions. A good understanding of the *Planning and Environment Act 1987* is also required and the *Sale of Land Act 1962* also impacts significantly in this area.

Quite often an unfinished building is being sold 'off the plan'. Detailed knowledge of the relevant provisions of the *Building Act 1993* is also important.

Lot 2

The development of multiple ownership

The purpose of subdivision is to enable a number of people to own land, a building or airspace which was previously in single ownership. Its aim, therefore, is multiple ownership.

In order to fully understand the operation and significance of the current legislation it is necessary to have a basic knowledge of previous schemes of multiple ownership. This lot (chapter) will deal with those earlier schemes and the impact of the current legislation on their continued existence and future use.

Before the *Subdivision Act*

Prior to 30 October 1989 different types of subdivision were governed by separate legislation, each with its own requirements and peculiarities.

Land subdivisions

The most common type of subdivision is the one that results in one piece of land becoming a number of separate blocks of land (known as lots). Usually these lots are used for the construction of houses.

This very basic subdivision of residential land used to be carried out under provisions of the now repealed *Local Government Act 1958*. The subdivision would then be registered at the Land Victoria under provisions of the *Transfer of Land Act 1958* which have also been repealed.

This type of subdivision was inflexible in that it only allowed for the subdivision of land along defined horizontal boundaries on the ground.

Company share schemes

The rigid scheme of land subdivision did not enable a person to own a separate flat. As the demand for 'own your own' flats developed, a system to enable separate ownership of them evolved. This was the company share scheme.

The way this scheme worked was that a company was incorporated for the purpose of purchasing or building flats. The company remained the owner of the flats but issued shares which enabled the owners of those shares to occupy a particular flat. The relationship between the various shareholders and their rights and responsibilities with respect to common areas were governed by the memorandum and articles of association of the company and possibly also by other documents such as service agreements.

There were numerous problems with these schemes. As each one was set up differently there was no standard way of dealing with them. Transactions involving company share flats could be quite complex and costly.

As the dealings related to shares in a company, rather than land, the *Transfer of Land Act* and the *Sale of Land Act* did not apply as they only covered land transactions. This meant that normal conveyancing procedures could not be used.

One major difficulty with the schemes was that the owners of the flats did not have titles in their name. As lenders normally require a mortgage over a title as security for a loan, there were problems obtaining finance to purchase these properties. Because of the difficulties encountered in dealing with units under these schemes it is desirable to convert them so that they come under the *Subdivision Act*. The way in which this is done is covered in detail in Lot 13.

Stratum titles

The *Transfer of Land (Stratum Estates) Act* 1960 provided a legislative framework for separate ownership of flats. It enabled titles to be issued for what was effectively a three-dimensional space, usually being the area inside part of a building.

There was a title for the common areas and this was owned by a service company which needed to be incorporated separately. Each owner was a party to an agreement with the service company. This service agreement would, as with the company share scheme, regulate the relationship between the owners and also their rights and responsibilities in respect of common areas.

While owners of stratum titles had the benefit of the title in their name, this form of multiple ownership did not overcome some of the complexity resulting from the existence of a separate service company. As with company share schemes, stratum titles can be converted to a plan under the *Subdivision Act*. The procedure for doing this set out in the *Transfer of Land Act* and is dealt with in more detail in Lot 13.

Strata titles

The next development in multiple ownership was the *Strata Titles Act* 1967. The great innovation here was the introduction of a statutory service company or 'body corporate'.

Separate titles were available for each unit. The body corporate (from 31 December 2007, bodies corporate are now known as 'owners corporation') came into existence by virtue of the plan of strata subdivision being registered so there was no need to incorporate a separate service company. Each owner was automatically a member of the owners corporation.

Details of the owners corporation, such as its rules, the rights and liabilities of owners in respect of common property, and meeting procedures were either set out on the plan lodged at Land Victoria or contained in the *Strata Titles Act*. This meant that dealing with strata titles was considerably less complex than its predecessors.

While offering many advantages, strata titles were quite inflexible. Each unit had to contain a building, common property needed to be created on the plan and an owners corporation always came into existence. A number of artificial techniques were developed in order to overcome the rigidity of strata titles.

Cluster titles

The *Cluster Titles Act* 1974 was designed to overcome some of the inflexibility of the *Strata Titles Act*. It did not require the lot to contain a building. This meant that there could, effectively, be a subdivision of land with common property and an owners corporation. It also allowed the subdivision to be done in a number of stages.

Cluster titles incorporated most of the provisions relating to strata titles and, therefore, inherited some of their rigidity. There still had to be common property and an owners corporation. The failure to depart from this inflexibility probably explains why cluster titles were not used by developers to any great extent.

After the *Subdivision Act*

The aim of the *Subdivision Act* was to ensure that all existing and future schemes of multiple ownership came under one piece of legislation. Consideration will now be given to the effect of the *Subdivision Act* on previous schemes of multiple ownership and also to whether they can be used in the future.

Company share schemes

Because company share schemes have no official legislative status they are not affected by the *Subdivision Act*. They continue to exist in exactly the same way as before and can still be used for multiple ownership of a building.

In view of the problems associated with such schemes it is unlikely that they will be used to any great extent in the future. But they could still be useful in a situation where it was not possible to obtain approval for a subdivision because of planning or building regulations, or where it was thought desirable to maintain control over who could purchase a unit in the development.

Stratum titles

Existing stratum titles are not affected by the *Subdivision Act*. They will continue as they are and be dealt with in the same manner. It will not, however, be possible for any subdivision carried out after the *Subdivision Act* to use the device of a service company in a stratum subdivision. This means that there will not be any new stratum title subdivisions.

Other subdivisions

All other subdivisions carried out before the *Subdivision Act* will, of course, continue to exist. But future dealings with them will come under the new Act.

An owners corporation created on a cluster or strata plan is now an owners corporation under the *Owners Corporation Act* 2006, and is governed by this new regime even though it was created under the earlier legislation. Schedule 2 of the *Subdivision Act* preserves some of the features of the previous schemes for owners of existing strata and cluster titles. These relate primarily to matters such as accessory or restricted units (usually car park spaces) as they are not available under the new legislation.

Subdivisions can no longer be carried out under the *Local Government Act* 1958, the *Strata Titles Act* 1967 or the *Cluster Titles Act* 1974. These Acts have been repealed. Every subdivision must now be carried out under the provisions of the *Subdivision Act*.

To be able to deal with all subdivisions the *Subdivision Act* needed to avoid the inflexibility inherent in the earlier schemes of subdivision. This has been done by allowing, under one Act, the subdivision of land, buildings or air space with or without common property and with or without an owners corporation. The only restriction is that when common property is created there must also be an owners corporation. The *Owners Corporation Act* is concerned with the operational arm of running an owners corporation.

The products of the subdivision are all called 'Lots'. The expression 'Unit' is no longer used.

The requirements and procedures for subdivision under the *Subdivision Act* will be dealt with in some detail in subsequent chapters. A fundamental change from the old system of subdivision is the shift in emphasis towards town planning. The planning process is now the engine room of subdivisions. It dictates the direction a subdivision will take.

Moving into the 21st century

By the late 1980s, most owners corporations were under five lots and were self-managed. Large tower developments have emerged in 21st century Melbourne and medium-sized developments, including master planned estates, have been expanding throughout the metropolitan suburbs and in regional areas of Victoria. It has been estimated that there are now some 65,000 owners corporations in Victoria, comprising some 480,000 lots.

In Victoria, new owners corporation legislation came into operation on 31 December 2007. The *Owners Corporation Act* 2006 is a package of reforms for the operational arm of developments with an owners corporation. It has established a fresh dispute resolution mechanism and other compliance specifications. Important under the new regime is that now bodies corporate are known as owners corporation, there is a more active role for the Victorian Civil and Administrative Tribunal, an Owners Corporation Register must be set up and maintained and so too, maintenance plans and maintenance funds. Two-lot subdivisions are exempted from these later provisions. Managers will now have to be registered under the Business Licensing Authority (Consumer Affairs Victoria).

Lot 3

Matters to be considered before the subdivision

Before launching into a subdivision there are a number of matters that a potential subdivider should consider. Failure to do this at the initial stages could result in additional costs, delays and frustration.

If the land to be subdivided has not yet been purchased, these issues should be dealt with before the contract to purchase has been signed. Where it is desirable to secure the property this should be done by way of a conditional contract or option to purchase. All documents should be carefully checked by an appropriately qualified lawyer before they are signed.

In the case of a person who wishes to subdivide land already owned, these matters should be considered before any work is commenced on the subdivision.

It was said in the introduction that the subdivider should, from the outset, involve the various consultants required in the process of subdivision. As will now be seen their advice should, in fact, be obtained before that process begins.

Zoning

The very first thing to do is check how the property is zoned. Practically all land is affected by a planning scheme which is administered by a planning authority. This will usually be the local council. Under the planning scheme, areas are classified as being in a certain zone. The planning scheme will then specify what can and cannot be done with land in a particular zone. Subdivision of that land is normally specifically dealt with in the scheme.

In some cases, the zoning of the land will prohibit its subdivision. There is no point in making an application for subdivision as the planning authority must refuse it. Before a subdivision can take place it will be necessary for the land to be re-zoned or the planning scheme to be amended. These steps need to be initiated by the planning authority. Accordingly, a subdivider needs to convince the planning authority of the benefit of taking these steps. Even then, the process is lengthy and subject to frustration by objectors.

The most common situation is where a subdivision may be carried out but a permit must first be obtained from the planning authority. This permit, known as a planning permit, will set out the conditions on which the subdivision can be done. It is necessary to ascertain, firstly, that it will be possible to obtain a planning permit and, secondly, that the conditions contained in the planning permit are not such as would make the development non-viable.

There can be objection to the issue of planning permits. This can delay and, in some cases, prevent a development from proceeding. It is worthwhile determining the likely extent and strength of any objection before proceeding. This can be

done by discussions with the planning authority and the owners and occupiers of properties in the neighbourhood of the proposed subdivision. This should provide some indication of the likelihood and strength of any objection.

The other thing to be ascertained from the planning authority is the likely conditions that will be imposed in the planning permit. In some cases compliance with those conditions will be onerous and expensive. This could have significant consequences for the viability of the subdivision.

The planning authority may require a contribution for public open space. This could involve setting aside up to 5 per cent of the area of the land being subdivided or, alternatively, a payment of up to 5 per cent of the value of the land. Other payments to authorities could include development levies and headworks charges. These vary and the authority's policy on them should be ascertained.

Conditions in a permit may also include such matters as landscaping, planting trees, or preserving vegetation and buildings. All of these conditions will add to the cost and restrict the type of subdivision being done.

One requirement may be the creation of an owners corporation. While this will not add significantly to the cost of the subdivision it may have an effect on the marketability of the lots. Under the new *Owners Corporation Act*, there are strict compliance procedures which need to be maintained by the owners corporation.

Sometimes a planning authority will require the developer to enter into an agreement which will extend beyond the completion of the subdivision. These are agreements under s 173 of the *Planning and Environment Act 1987*. Because these agreements usually continue to bind a purchaser of the land they can also affect its marketability. The likelihood of a requirement for such an agreement should be determined at an early stage.

These matters are generally dealt with by a town planner. It is, therefore, vital that the town planning consultant's advice is sought at the very outset to ensure that any potential problems can be detected.

The title

There can be matters affecting the title to the land which will inhibit or prevent its subdivision. If the subdivision is to proceed, consideration will need to be given as to whether they can be dealt with.

Most land is under the operation of the *Transfer of Land Act 1958*. There is still some land, known as 'general law land' which does not come under the Act. If general law land is to be subdivided it must be brought under the operation of the *Transfer of Land Act*. This is not always possible, and where it is, there is a cost involved.

The land shown on a title does not always correspond with the location of the property on the ground. Fences and buildings are sometimes not on title boundaries. This can affect the ability to subdivide that land. Even though you may own all the land shown on the title other people may have obtained rights over parts of it by being in possession. So it may not be possible to include all the

land you own in the subdivision. This will clearly be an important consideration when determining if, and how, a subdivision is to be carried out.

Titles to land can be affected by a number of restrictions and these may prevent or limit its subdivision potential. The most common are easements and covenants.

Easements enable the owner of another property or a public authority to use part of your property for a particular purpose such as drainage, water supply or roads. You still own the land but your ability to use it is limited by the rights of the other person. Clearly such rights will affect the suitability of land for subdivision.

Not all easements are registered on the title to the land. There are also statutory and implied easements, together with those obtained by use over a long time. A careful investigation into the existence of such easements needs to be carried out.

A covenant affects land where the owner enters into an agreement which binds all future owners. It must be negative or restrictive in nature and is shown on the title. Some covenants specifically prohibit subdivision or require that only one house can be built on the land. While this should not actually prevent the subdivision from being carried out it will create a defect in the title to the subdivided lots and make them difficult to deal with.

Recent amendments to the *Planning and Environment Act 1987* prohibit the granting of a planning permit for anything that would be a breach of a covenant on the title. Accordingly, it will no longer be possible to carry out a subdivision if it would result in a breach of the covenant. It will be necessary to have the covenant removed or varied.

Easements and covenants can be removed or varied as part of the subdivision process. There is however never any guarantee that an application for the removal or variation will be successful.

Some restrictions on title are not obvious, in that they form a condition of the Crown Grant. This can be in the form of either an easement or a covenant. If the title to the land being subdivided is a Crown Grant the conditions in it should be checked carefully.

Agreements under s 173 of the *Planning and Environment Act* are also restrictions on title which can affect subdivision of the land in much the same way as a covenant. The main difference is that these agreements can be positive in nature and can be removed by agreement with the planning authority.

Before a subdivision can be lodged for registration at Land Victoria the consent of people with an interest in the land is required. These include people who have mortgages, charges or caveats on the title. If the subdivider is not registered as the proprietor of the land the consent of the registered proprietor will also be required.

A current title search for the property should always be obtained to ascertain whose consent will be required. If that consent will not be available then there

is not much point in proceeding further with the subdivision. This should be checked out early in the piece.

The issues relating to the title could require input from a lawyer and surveyor. Obtaining their advice in the initial stages could help avoid later problems.

Physical features

A subdivision may be made more difficult, if not impossible, by the physical nature of the property. Advice on this should be obtained at the outset.

The ground itself may pose a problem. If the land is contaminated there will be restrictions on its use. It may not be possible to use it for residential purposes. Land that has been filled will also cause problems. Hard rock near the surface could add to development costs as it will be more difficult to excavate for the purpose of installing services and constructing roads. A simple soil test could help identify these types of problems.

Drainage of a property is a major issue in subdivisions. An unavoidable consequence of subdivision is a greater demand on drainage. If a property already has drainage problems, these will be exacerbated by more people occupying it. The ability of a property to cope with the drainage requirements of a subdivision needs to be considered. Failure to do this could result in the refusal of a planning permit or in costly works being required.

Access to the property must be taken into account. Subdivision will normally increase the demand for access. The means of access, generally a road, must be able to cope with the increase in traffic resulting from the subdivision. If the means of access cannot cope with the increased traffic, the subdivider will be required to provide appropriate access.

Access easements were recently considered by VCAT in *JT Snipe Investments Pty Ltd v Hume City Council (Red Dot)* [2007] VCAT 1831. At issue was the proper application of s 36 of the *Subdivision Act*, being one of the rare instances under Victorian law where a private landowner can compulsorily acquire an interest in land from another private landowner.

In the Snipe case, a process of subdivision and consolidation some 20 years ago resulted in two lots (No. 87 and No. 89 Killara Road) which were used as factories. A 6.4m driveway ran between the lots and the driveway was located entirely within the title of No. 89. The plans of subdivision and consolidation sealed by Council did not contain any 'carriageway easement' over the No. 89 driveway in favour of No. 87 and no such easement was registered on the title to either No. 87 or No. 89. Ownership of both lots changed in 2006 and the 'friendly' relationship of the past relating to use of the driveway, was forgotten.

At the VCAT hearing, the applicant conceded that, given there was no registered easement, the applicant could not rely solely on the 'intent' of the 1987 plans and therefore had to make out its case for the acquisition of an easement on its merits under s 36 of the *Subdivision Act*. Deputy President Mark Dwyer took time to consider the proper meaning of the relevant provisions under s 36.

Section 36 Subdivision Act. Power of owner to acquire or remove easements
36 (1) If—

- (a) when considering a proposed amendment to a planning scheme or an application for a permit or to amend a permit; or
- (b) in implementing an amendment to a planning scheme; or
- (c) in a condition in a permit—
 - the Council or a referral authority states in writing that it considers that the economical and efficient subdivision or consolidation (whether existing or proposed) or servicing of, or access to, land covered by the amendment, proposed amendment, application or permit requires the owner of land to—
- (d) remove a right of way over the owner's land; or
- (e) acquire or remove an easement over—
 - (i) other land in the subdivision or consolidation; or
 - (ii) other land in the vicinity—

and that the removal or acquisition will not result in an unreasonable loss of amenity in the area affected by the removal or acquisition, the owner may apply to the Victorian Civil and Administrative Tribunal for leave to remove the right of way or acquire or remove the easement compulsorily.

(1AA) In conferring powers on a Council or referral authority under sub-section (1) it is the intention of Parliament that, in considering a matter for the purposes of that sub-section, the Council or referral authority should make an assessment of the engineering and amenity aspects of the matter, is not bound to notify anyone affected or to hear objections, but objections to that assessment may be raised before the Tribunal.

(1A) The Tribunal may give leave subject to any conditions it thinks fit.

The consequence of the s 36 process is the compulsory acquisition by one private landowner of an interest in the land of another private landowner. This may significantly impact upon the landowner whose interest is sought to be acquired, and there is no Public Acquisition Overlay or 'public purpose' test such as commonly applies to the compulsory acquisition of land by public authorities. DP Dwyer carefully canvassed the elements of s 36 noting that despite the potential for compensation to be paid, a provision which facilitates compulsory acquisition and affects private interests in land, must be examined with utmost care and applied strictly.

Practitioners should note the following important considerations raised by DP Dwyer which are relevant to a section 36 application:

- The Council or a referral authority must make the s 36 statement. As there is a right of review in s 40(2) of the *Subdivision Act*, if the Council or a referral authority refuses to make the statement, VCAT on review can itself make the statement or direct the Council or a referral authority to make the statement;
- The Council or a referral authority, is not ‘at large’ in exercising its power to make a s 36 statement. It can only do so in the circumstances described – i.e. if there is a ‘trigger’ through considering a proposed planning scheme amendment or permit application, in implementing a planning scheme amendment, or in a condition in a permit;
- It follows that a landowner can also only seek a s 36 statement if one of the trigger circumstances applies. There is however no requirement for a landowner to formally ‘request’ a s 36 statement, or to do so in writing. The Council or a referral authority could act of its own volition, provided one of the trigger circumstances applies. DP Dwyer noted that a right of review can only sensibly arise if there has been a ‘request’ or ‘application’ by an ‘owner’ that has been ‘refused’;
- If the s 36 trigger is a permit application, the ‘permit’ is any planning permit under the *Planning and Environment Act 1987*. (S 3 of the *Subdivision Act* defines ‘permit’ as a permit under the *Planning and Environment Act 1987*). The permit does not have to be a permit for subdivision or consolidation. There is nothing inherent in the wording of s 36(1), by itself, that prevents a s 36 trigger from arising through a planning permit application for some other use or development. It will be necessary to comply with all of the other elements of s 36 that will necessarily operate as an indirect fetter to the sorts of permit applications that might act as a trigger. The provision may thus be triggered proactively, and not only as a consequence of a permit application for subdivision, and could conceivably arise through a permit application for the creation of an easement or where the primary purpose of the permit application is to trigger s 36 to obtain a statement. The power of a Council to make a s 36 statement is ‘subsidiary’ to the consideration of the permit application;
- The Council must be satisfied that access to the ‘land covered by the application’ requires the acquisition of an easement over ‘other land’. Accordingly, there must be two discrete land parcels involved; and
- By reference to the two preceding elements, there is potentially a significant constraint on using a permit application for the creation of an easement as the sole basis for triggering the s 36 process to acquire that easement. If the permit application covers exactly the same land as the land over which the easement is sought, there is no ‘other land’ for the purpose of s 36(1)(e), and a necessary pre-condition to the s 36 process would not be met;
- The Council’s s 36 statement must be ‘in writing’. However, this

requirement is satisfied if the s 36 statement is included as a permit condition;

- The Council must consider that the ‘economical and efficient’ access to the land requires the acquisition of the easement. These terms are used conjunctively, and both must be objectively satisfied;
- Consideration of the relevant factors must lead to a view that the landowner ‘requires’ acquisition of the easement. The word ‘requires’ in this context must be given its plain meaning – i.e. the easement must be necessary or indispensable, rather than merely useful or desirable or convenient. If the matter can be resolved by any reasonable or practical means, other than the creation of the easement, that means should be adopted and preferred.
- By reference to the two preceding elements, it is not sufficient for the landowner to demonstrate that the easement will simply improve the economic return from the land or facilitate improved and more efficient access. For an easement to be ‘required’, it is necessary to demonstrate that there is a real and material impediment to be overcome. For example, without limiting how this might be demonstrated in a particular case, it might need to be demonstrated that the use and development of the land is not technically or economically viable without the acquisition of the easement. Normally, supporting evidence would be required to support such a claim on both of these ‘economical’ and ‘efficient’ grounds;
- The ‘necessity’ for the easement is not limited to the existing use or development of the land, but may arise from its future use or development. However, this does not require the Council to consider ‘at large’ the future potential of the land – rather it allows the Council to consider whether an easement is required in the context of any future use or development specifically contemplated by the permit application before it;
- The Council must, in considering all of the matters under s 36, make an assessment of the engineering and amenity aspects of the matter. The separate references to ‘engineering’ and ‘amenity’ aspects in s 36 suggests that the relevant factors to be taken into account by the Council in deciding to make a s 36 statement are not limited solely to either technical or planning considerations, but involve both;
- Does the Council consider that the acquisition of the easement will not result in an unreasonable loss of amenity in the area affected by the acquisition. This is an additional constraint that applies even if the easement is ‘required’. The ‘affected area’ may presumably vary from case to case, depending on the nature of the acquisition. In some instances, the immediate area affected by the acquisition may only be the land over which the easement is sought. In other instances, a changed access arrangement may have broader amenity impacts to be assessed – e.g. different traffic patterns, noise etc;

- The s 36 statement is required *before* a landowner can apply to the Tribunal for leave to compulsorily acquire an easement. The statement and leave cannot be sought from the Tribunal at the same time.
- The requirement to obtain leave from the Tribunal after a s 36 statement has been obtained, and the fact that the Tribunal has been given no clear decision guidelines but can grant leave on such terms as it deems fit, suggests that there is still an overriding test of reasonableness that may be applied to the compulsory acquisition according to the circumstances of a particular case. A Council's s 36 statement that the easement is 'required' is not, by itself, determinative, but only a necessary pre-condition to the leave application to VCAT.

The availability of services is important. The subdivider will normally be required to provide services such as electricity, water, sewerage, gas and telephone to each lot on the subdivision. If these services are not readily available to the land being subdivided there could be significant costs involved in obtaining them.

Water and sewerage information for developers

When thinking about developing your land or even prior to purchasing a property for development, you need to take the time to get advice from a number of organisations and servicing utilities involved in the process to find out what is really involved in property development. The earlier you talk to them the better. This way you can obtain information that will be valuable when assessing the feasibility of your proposal. It is better to be aware of the costs involved and the servicing requirements up-front before proceeding too far.

This advice may be particularly invaluable for example when developing a property in older suburbs that often share private water and sewerage services with neighboring properties. In some cases it may be necessary to construct new water authority services. You should speak to the relevant water authority before proceeding too far with building construction to avoid costly alterations and delays to your project.

Following this advice will assist you with getting your development proposal right the first time.

Plumbing Industry Commission

Avoid costly problems when engaging the services of a plumber – make sure you have a licensed plumber perform your plumbing (including privately owned water infrastructure in multi-unit developments, sanitary, drainage, water, roof, gas and mechanical services). Ask to see their Licence Card. Make sure your plumber gives you a Compliance Certificate which is a proof of ten years cover on the workmanship.

For further information contact the Plumbing Industry Commission, 450 Burke Road, Camberwell VIC 3124, telephone 03 9889 2200. Web site: www.pic.vic.gov.au

Contact details for Victorian water authorities dealing with development

Barwon Region Water Authority
61-67 Ryrie Street
PO Box 659
Geelong VIC 3220
Telephone: 1300 656 007
Fax: 03 5221 8236
Internet: postmaster@barwonwater.vic.gov.au

Central Gippsland Region Water Authority
Hazelwood Road
PO Box 348
Traralgon VIC 3844
Telephone: 1800 066 401
Fax: 03 5174 0103
Internet: www.gippswater.com.au

Central Highlands Region Water Authority
7 Learmonth Road
Wendouree
(PO Box 152
Ballarat VIC 3353)
Telephone: 03 5320 3100
Fax: 03 5320 3299
Internet: www.chw.net.au

City West Water Limited
247-251 St Albans Road
Locked Bag 350
Sunshine VIC 3020
Telephone: 03 9313 8422
Fax: 03 9313 8417
Internet: www.citywestwater.com.au

Coliban Region Water Authority
37-45 Bridge Street
(PO Box 2770)
Bendigo Mail Centre VIC 3554
Telephone: 1300 303 200
Fax: 03 5434 1341
Internet: www.coliban.vic.gov.au

Subdivisions with the Lot

East Gippsland Region Water Authority
133 McLeod Street
PO Box 52
Bairnsdale VIC 3875
Telephone: 1300 720 700
Fax: 03 5150 4477

Glenelg Region Water Authority
From 1 July 2005, Glenelg Region Water, Portland Coast Water and South West
Water merged to become Wannon Region Water Authority
PO Box 1158, Warrnambool VIC 3280
Telephone: 1300 926 666
Fax: 03 5564 7650
Internet: www.wannonwater.com.au

Goulburn-Murray Rural Water Authority
104-110 Fryers Street
(PO Box 185)
Shepparton VIC 3632
Telephone: 03 5833 5500
Fax: 03 5833 5501
Internet: www.gvwater.vic.gov.au

Grampians Region Water Authority
11 McLachlan Street
PO Box 481
Horsham VIC 3402
Telephone: 1300 659 961
Fax: 03 5381 9881
Internet: www.grampianswater.org.au

Lower Murray Water
741-759 Fourteenth Street
(PO Box 1438)
Mildura VIC 3502
Telephone: 03 5051 3400
Fax: 03 5051 3480
Internet: www.lmrwa.vic.gov.au

North East Region Water Authority
Level 1, City Offices, Hovell Street
(PO Box 863)
Wodonga VIC 3689
Telephone: 1300 361 622
Fax: 02 6024 7454
Internet: www.nerwa.vic.gov.au

Portland Coast Region Water Authority
From 1 July 2005, Glenelg Region Water, Portland Coast Water and South West
Water merged to become Wannon Region Water Authority
PO Box 1158, Warrnambool VIC 3280
Telephone: 1300 926 666
Fax: 03 5564 7650
Internet: www.wannonwater.com.au

South East Water Limited
20 Corporate Drive
(PO Box 1382)
Moorabbin VIC 3189
Telephone: 03 9552 3000
Fax: 03 9552 3001
Internet: www.sewl.com.au

South Gippsland Region Water Authority
14-18 Pioneer Street
(PO Box 102)
Foster VIC 3960
Telephone: 03 5682 0444
Fax: 03 5682 1199
Internet: www.sgwater.com.au

South West Water Authority
From 1 July 2005, Glenelg Region Water, Portland Coast Water and South West
Water merged to become Wannon Region Water Authority
PO Box 1158, Warrnambool VIC 3280
Telephone: 1300 926 666
Fax: 03 5564 7650
Internet: www.wannonwater.com.au

Western Region Water Authority
36 Macedon Street
Sunbury, VIC, 3429
PO Box 2371
Sunbury, VIC, 3429
Telephone: 9218 5400
Fax: 9218 5541
Internet: www.westernwater.vic.gov.au

Westernport Region Water Authority
2 Boyhome Road
Newhaven VIC 3925
Telephone: 1300 720 711
Fax: 03 5956 4101
Internet: www.westernportwater.com.au

Yarra Valley Water Limited
Lucknow Street,
PO Private Bag 1
Mitcham VIC 3132
Telephone: 03 9872 1358
Fax: 03 9872 1353
Internet: www.yvw.com.au

Some land is liable to flooding. This is not limited to land near waterways as flooding can be the result of storm water. It is unlikely that a permit to subdivide will be obtained for flood-prone land. If it were, costly protective works may be required.

If a subdivision is to be carried out over a period of time climatic conditions in the area of the subdivision may be relevant. For example, heavy rainfall can impede the progress of a development. Delays can be costly and their likelihood needs to be considered before a development project begins.

The surveyor and engineer will be able to provide advice on these and numerous other physical aspects of the land that could affect its subdivision. It is important that their advice is sought at the outset.

Marketability

The usual reason for subdivision is to produce something that can be sold or leased. So it is necessary to give thought to the marketability of that product. Advice on marketability should be obtained from real estate agents or property managers, depending on the type of development involved.

Matters such as location, layout, design, or lot size are all relevant to the marketability of the subdivision. Another issue that can have an impact is whether or not the land will be affected by an owners corporation. If it will be, then some early input from an owners corporation manager would be advisable.

Environmental considerations

There is both a Commonwealth and State regime for the assessment of the environmental impacts of proposed developments. The Commonwealth regime is regulated by the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act') and the Victorian regime is governed primarily by the *Environment Effects Act 1978* ('EE Act'); the *Planning and Environment Act 1987* and the

Environment Protection Act 1970 also stipulate that the environmental effects of certain developments be considered in decision making.

Sustainability, water and energy efficiency are undoubtedly matters that should now be on the mind of every developer. Recently, VicUrban launched a pilot Sustainability Charter which provides practical criteria to guide design and help developers assess and report on the sustainability of their projects.

The criteria integrate five core objectives, being commercial success, community wellbeing, environmental leadership, urban design excellence and housing affordability.

More information can be obtained from the VicUrban website (www.vicurban.com).

Tax implications

Assuming that the subdivision is marketable, the subdivider is likely to make a profit. As sure as night follows day, taxes follow profits. The way in which the profits are to be taxed will have serious consequences for the subdivider and, accordingly, should be considered at an early stage.

Depending upon the size and type of subdivision, the profits could be subject to either capital gains tax or income tax. Whether or not the subdivider is involved with other subdivisions could also be relevant. A subdivision may have the effect of converting a previously capital gains tax-free asset into one that is liable to capital gains tax.

The tax implications for the subdivider should be considered when determining the way in which ownership of the land is to be structured. The land could be owned by individuals, a trading company, a unit trust or a discretionary trust. Each would have different taxation consequences.

If the land being subdivided was previously used for a purpose which made it exempt from land tax or municipal rates, or liable only to municipal rates at a reduced level, its change of use by subdivision may result in the charging of special land tax or back rates. These could involve significant sums of money and should be taken into account in the financial planning for the project.

It used to be possible to reduce stamp duty where a number of separate parcels of land were being purchased. Under the aggregation provisions of the *Duties Act 2000*, this is no longer available. See Accessory Lot A, Part 7: State Revenue Office Revenue Ruling DA.026. Where there are a number of transfers in one transaction, the consideration for each transfer should be added together, duty calculated on the total sum, and then apportioned pro-rata over each individual transfer. Aggregation applies when the transfers arise from one transaction, the parties are identical or associated and the transfers occur within a twelve-month period. Revenue Ruling DA.026 indicates that the SRO will not apply the aggregation provisions where a builder buys a number of lots on a new subdivision with the intention of constructing new houses on each lot.

Goods and Services Tax will be payable on the sale of some properties. This is covered in some detail on pages 3-20 to 3-21.

Developers that sell apartments 'off the plan' claim that significant stamp duty savings are available. This is because stamp duty is only paid on the value of the property at the time of the contract, not when the building is complete. There has for some time been a proposal to rewrite the Stamp Duty legislation. If these proposals do take effect then the ability to reduce stamp duty by the methods mentioned in the last two paragraphs will probably disappear. It is important to keep an eye on developments in this area.

Accountants and taxation lawyers can provide the necessary advice on the tax implications of a proposed subdivision. That advice should be obtained before it is too late to change the course of the development.

Some developments provide for rent to be pooled. In these cases and also in the case of some serviced apartments, the provision of the *Managed Investments Act 1998* may apply.

Having considered these issues, and any other issues that arise, a decision can be made whether or not to proceed with the purchase or subdivision. Advice should have been obtained from the relevant consultants. Before the next step is taken a meeting between all those advisers and the subdivider should be arranged. At that meeting all details of the subdivision can be finalised. It is important to do this before moving to the next stage. That next stage is the planning process and, after that point, any alteration to the subdivision can be difficult and costly.

Lot 4

The plan

It is not absolutely necessary to have a formal plan of subdivision prepared at the outset of the subdivision process. Failure to do so could, however, result in delays. It is, therefore, advisable to engage a surveyor to draw up the plan of subdivision at the very beginning. A plan of subdivision contains quite a bit of information. It provides relevant information as to the development. It is important to understand the significance of this. Accessory Lot A, Part 1 is a plan for a basic two-lot plan of subdivision. As well as showing new boundaries, it tells us a number of other things about the subdivided land.

Land Victoria requires plans to be clear and fully dimensional. The use of colour coding is not acceptable as it will not be clear as an imaged copy where the land is located within a title boundary. Plans which are not of acceptable quality and clarity will not be accepted for lodgment.

Stage number

Section 37 of the *Subdivision Act* allows a subdivision to be done in a number of stages. Ascertaining whether or not a plan is staged can have significant consequences. It is also important to know how many stages have preceded the plan you are dealing with.

If this box on the plan is left blank then it is not a staged subdivision. If it is a staged subdivision then this box will indicate which stage the plan is. What is called the master plan (which is the first plan of subdivision) is shown as stage number 1.

Edition

As can be seen from this panel, it is only to be completed by Land Victoria. As can be seen from this panel, it is only to be completed by Land Victoria. For most plans of subdivisions, nothing will appear in this box. Usually the plan of subdivision, when it is lodged, is the first edition. There are only subsequent editions if after registration of the plan, changes have been made which could be a further stage in the case of a staged subdivision.

When dealing with land created on a plan of subdivision it is important to ensure that you have the latest edition of the plan. This will be obtained from Land Victoria (see www.land.vic.gov.au).

Plan number

Every plan of subdivision is allocated a number. The number is preceded by the letters 'PS'. This is done for identification purposes.

The surveyor obtains the numbers from Land Victoria and gives the number to a plan at the very outset of the process. This will usually be done even before an application for a planning permit is lodged. It is, therefore, important to recognise that a number is not allocated by Land Victoria on registration of the plan. The plan will have a number before it is registered and even before it is actually lodged at Land Victoria for registration.

The plan number enables the plan and lots to be created by the plan to be identified in the same way throughout the process. When the plan is lodged for registration, the plan number becomes the dealing number at Land Victoria and when the plan is registered it becomes the registration number of the plan.

If an owners corporation is created by the plan then it becomes the owners corporation number (formerly known as the body corporate number and body corporate numbers allocated prior to 31 December, 2007 will still be valid).

If the plan is a staged subdivision then each subsequent stage retains the same plan number as the first.

Location of land

It is important to carefully identify exactly what land is being subdivided. That is the purpose of this panel. It gives details of the crown description, the title reference, street address and Australian Map Grid coordinates. It will also provide details of a previous plan of subdivision.

New Land Registration requirements for Owners Corporation

The *Owners Corporation Act 2006* came into operation on 31 December 2007. Extra information is now required when lodging plans that create a new owners corporation. All additional owners corporation information, other than rules, must be contained in a single accompanying document. A separate document will be required for each owners corporation created on a plan. The details required in the first accompanying document (NB: references below are to the *Subdivision Act 1988* and the *Subdivision (Procedures) Regulations 2000*) are:

- purpose of owners corporation (mandatory) — sections 27B(2) or 27C(2);
- address for service of notice (mandatory) — section 27F(2)(b) and Regulation 16(a);
- basis of allocation of entitlement and liability (mandatory) — section 27F(2)(a);
- where an owners corporation is ‘Limited’ other than as to common property, the limitation(s) will need to be defined (mandatory) — section 27F(2)(b) and Regulation 16(b);
- referred functions and obligations (optional) — section 27C(4)

There is still no prescribed form for the accompanying document as a form is in the process of being approved by the Registrar of Titles. A sample of a proposed

form, applicable for an unlimited owners corporation, is included in Land Victoria *Customer Information Bulletin* (edition 107, November 2007).

Land Victoria Customer Information Bulletins may be downloaded from <http://www.land.vic.gov.au/titles/cib>.

Accompanying documents — owners corporation rules

A second document containing the rules of an owners corporation will:

- be optional
- be notified in a form to be approved by the Director of Consumer Affairs Victoria
- be submitted with a copy of the rules (*Owners Corporation Act 2006* section 142(2)).

The *Owners Corporation Act 2006* provides that an owners corporation:

- may make rules with respect to the matters listed in Schedule 1 of the Act;
- be subject to prescribed Model Rules (Reg. 8 and Schedule 1 Owners Corporation Regulations 2007) if no rules are made by an owners corporation;
- be subject to a Model Rule if the owners corporation has not made a rule relating to a ‘matter’.

The new Model Rules will apply to existing plans that are subject to the old ‘Standard Rules’. A copy of the Model Rules are located in Accessory Lot 8.

If an owners corporation makes, amends or revokes its rules, it must notify the Registrar of Titles. The notification must be accompanied by a certified and consolidated copy of the rules. A fee of \$48.50 is payable to lodge notification of rules when lodging the plan.

Plan format

Minimal changes are required on plan formats with amendments centred on the Body Corporate Schedule (renamed the Owners Corporation Schedule). The changes are:

- reference to address for service of notice removed from the schedule, now included in an accompanying document;
- reference to rules removed from the schedule, now included in an accompanying document;
- three possible entries now used in the ‘Limitations’ panel; unlimited, limited or limited to common property.

Given the long life of a certified plan (which must be registered within five years of certification), plans drawn in the existing format will continue to be acceptable.

Plans prepared and signed by the surveyor after 31 December 2007 should be drawn in the new format.

Limitations on owners corporations

A plan lodged for registration must specify whether the owners corporation is unlimited or limited (section 27(3) *Subdivision Act* 1988).

If the owners corporation is limited — other than to common property — limitation details must be included in the additional owners corporation information document (Regulation 16(b) Subdivision (Procedures) Regulations 2000).

A plan may specify that an owners corporation is limited to the common property (section 27G *Subdivision Act* 1988). If so, sections 48 to 51 of the *Owners Corporation Act*, regarding maintenance and access rights to lots, do not apply to the owners corporation (section 8 *Owners Corporation Act*)

Council certification and endorsement

The municipal council, as a planning authority, plays a significant role in the subdivision process. A plan must be certified by the council before it can be lodged with Land Victoria. The council certifies the plan when it is satisfied that it complies with the requirements of the council and the referral authorities. At that stage, however, the subdivider may not have complied with all of the conditions imposed. In such cases, Item 3 in this panel will be deleted. The plan cannot be registered by Land Victoria until the subdivider provides a separate statement of compliance, which the council will give when it is satisfied that all of the requirements have been complied with or arrangements to do so have been made. If, as is shown in the plan in Accessory Lot A, Part 1, this clause is not deleted, the plan can then proceed directly to registration.

Section 18 of the *Subdivision Act* empowers the Council to impose a public open space requirement. Details of this requirement are also shown in the panel.

If it is necessary for a plan that has been certified to be amended then the subdivider has to have the plan recertified after the amendments are made. If this is necessary, then the part of the panel about re-certification is left in.

Also in this panel there is provision for signature or sealing by the council and dating. As was mentioned above, a plan cannot be lodged at Land Victoria until the plan has been certified. It is, therefore, important to ensure that appropriate execution has been made by the council or its delegate in this section.

The date of certification is also important. A plan can only be lodged for registration if the certification remains valid. Section 7 of the *Subdivision Act* provides that certification of a plan is valid for five years from the date of certification. If, therefore, the date shown in this panel were more than five years ago, then the plan could not be lodge for registration. It would be necessary to have the plan certified again, which could require going through the whole planning process.

Vesting of roads or reserves

Many plans of subdivision will create roads and public reserves. This may be a decision of the subdivider or it may be a condition imposed by the council or referral authorities. The effect of it will be that part of the land is taken out of the subdivision and will be owned by the council or some other authority.

There is no need to create separate lots and transfer these to the relevant authorities. Section 24(2) of the *Subdivision Act* provides that by showing an area in the plan as a road or reserve it can then be nominated on the plan that this will be the property of the council or some other authority. This means that when the plan of subdivision is registered that land is then owned by the council or authority nominated on the plan.

Depth limitation

Unless a title or plan specifies otherwise, there are no upper or lower limits on the title. This means that the owner of the land owns all the air space above it and all the ground below. Sometimes an existing title will show a depth limitation. These used to be shown as 50 feet, which is 15.24 metres. If there is an existing depth limitation then this will be shown in this panel.

In the plan shown in Accessory Lot A, Part 1 there is a depth limitation of 15.24 metres, which applies to all the land. There could be some titles where it applies to only part. It is important to ascertain whether there is a depth limitation if significant excavation is required for foundations or where lots were going to be below the ground, such as basement car parks. If these foundations or lots are located below the depth limitation then they could not form part of the land as they are not owned by the property owner.

Staging

This panel sets out whether or not the plan is a staged subdivision. If the plan is to be carried out in this way then it is necessary to obtain a planning permit authorising it. The planning permit number will be shown in this panel.

Other notations

Details of depth limitation and staging as mentioned above come under a general heading of 'Notations'. Other information can also be included in this panel. This is normal information that surveyors must provide for Land Victoria.

It sets out whether or not a plan is based on survey. Sometimes a plan of subdivision can be done without the need to actually go to the property and survey it. This does, however, need to be shown on the plan so that any person dealing with the land can ascertain whether a survey was carried out.

Sometimes only part of the land in the plan needs to be surveyed. For example, the plan shown in Accessory Lot A, Part 1 indicates that only the small lot, being lot 1 on the plan, was surveyed. The measurements shown for lot 2 were not obtained by the carrying out of a survey but by deducting the measurements that

were taken for lot 1 from those shown on the existing title. It does not, therefore, guarantee that the boundaries shown for lot 2 do, in fact, accord with the property. It was merely calculated by deduction.

Easement information

Section 24(2)(d) of the *Subdivision Act* provides that on registration of a plan of subdivision any easement is created, varied or removed as specified in the plan. This panel provides details of easements created. The easement reference is how the easement is shown on the plan. In the case of the plan in Accessory Lot A, Part 1, the easement is shown as 'E-1'. The broken line on the plan shows the location of the easement.

The panel shows the purpose of the easement. In the case of this plan it is for drainage. It could, however, be for a number of purposes, including roads or the provision of other services.

The panel also shows how wide the easement is. In the case of this plan it is 3 metres wide.

The land being subdivided may be subject to an existing easement. This easement needs to be shown on the plan even though it was created before the land was subdivided. Under the heading of 'Origin' details of where the easement was created are set out. This could be in a deed of creation of easement, a transfer of land or an earlier plan of subdivision. Providing these details on the plan enables a person dealing with the land to obtain the document that created the easement and ascertain details of it.

In many cases the easement has been created by the plan of subdivision. This is the case in the example shown and in these circumstances the origin of the easement is shown as being 'this plan'.

If an easement is created then some other land has the right to use that easement. That is called the land benefited. In other cases, the easement will be to enable a servicing authority to have access over the property. The easement is then said to be 'in favour of' that authority. There is a panel that is headed 'land benefited/in favour of'. That panel is completed by setting out details of which land benefits from the easement or the authority in whose favour it is granted.

As well as express easement a plan can also have implied easements. These easements will exist in all subdivisions that create an owners corporation or subdivide a building. They will also apply if the plan specifies that they apply. The plan shown in Accessory Lot A, Part 2 is a plan which provides for implied easements under s 12 to apply to the land.

If a subdivider does not want implied easement to affect land on a plan in which an owners corporation is created then that can also be specified on the plan. This is done on the plan shown as Accessory Lot A, Part 3. It is not possible to exclude s 12 easements in the case of the subdivision of a building.

Compliance and registration

As can be seen, both these panels can only be completed by Land Victoria. It was mentioned above that where item 3 in the panel for Council Certification and Endorsement is deleted then it is necessary for the subdivider to provide a separate statement of compliance. When this is done this panel is completed and the plan can then proceed to registration.

When the plan is registered Land Victoria will complete the time and date of registration and this is then signed on behalf of the Registrar of Titles. This date can be important as quite often the date of registration of a plan is the commencement of a period at the end of which purchasers will be required to settle.

Following a request from industry groups to make owners corporation information more accessible to the public, Land Victoria is currently capturing all owners corporation information onto the Victorian Online Title System (VOTS).

Land Victoria sees the following advantages with such a system:

- Improved delivery of owners corporation information directed at the individual apartment owner or buyer;
- A standard format for all owners corporation information across all plans;
- A folio search will identify an owners corporation affecting the folio; and
- Improved processing times for certain dealings affecting an owners corporation.

Owners corporation information once captured will be available via an owners corporation Search Report.

Signatures

The plan must be signed by either the surveyor or the subdivider. The latter would only occur for a plan where there was no surveyor. In most cases there will be a surveyor and the name of that surveyor is to be completed in the appropriate place. The surveyor then needs to sign and date the plan. By doing this the surveyor is certifying that the plan and survey are accurate and were done by or under the supervision of that surveyor.

If the plan has been changed since the plan number was first used then a version date or number must be given.

There is also provision for the council delegate who signed the certification of the plan to sign each sheet of the plan in this panel.

Sheet number

A plan of subdivision usually consists of a number of pages. It is important when dealing with the plan to know that all pages of the plan are included. For this reason, each page of the plan must show what page or sheet number it is and

how many pages or sheets in total make up the plan. It can be seen in the plan in Accessory Lot A, Part 1 that there are two sheets and each page is numbered Sheet 1 or 2 of 2 Sheets.

The lots

What the plan is all about, of course, is creating the separate parcels of land or lots on the plan. There do, therefore, need to be diagrams showing the location of the lots being created. Regulations 11 to 13 of the Procedures Regulations set out how lots are to be defined. It is important to note the exact location of the boundaries of the lots.

As has been pointed out earlier, lots can consist of land, air space, buildings or any combination of these. They are defined by their boundaries. Failure to correctly identify the boundary of a lot can result in a property transaction dealing with something other than what was intended. Accordingly it is important to correctly locate the boundaries of lots on a plan of subdivision.

Apart from strata titles, land does not usually have an upper limit. Accordingly the owner also owns the air space above it. This space can be subdivided in much the same way as land.

Most subdivisions of air space are ancillary to the subdivision of a multi-storey development. Strictly speaking, however, this does not have to be so.

A diagram showing these lots must form part of the plan of subdivision. The plan shown in Accessory Lot A, Part 4 is for a multi-storey development. Sheet 2 of the plan shows a cross-section of the different levels. The area inside the broken line is air space, that being the space above the balconies. The plan is a subdivision of a building. Because some of the boundaries are structures, being walls, floors or ceilings, a particular point in those structures must be located as the actual boundary. It is therefore necessary to specify whether the boundary is the interior face, the external wall or some other location in the structure. This plan adopts the medium of some boundaries, namely the ones marked 'M'. This means that the middle of the dividing wall forms the boundary of these lots. All other boundaries that are the walls of the building are defined as being the external face, that being the outside of the walls.

Details of the location of the boundaries come under the heading of 'Notations'.

The plan in Accessory Lot A, Part 1 is a traditional land subdivision. The boundaries are shown by a continuous line. It is also effectively a subdivision of the air space as it includes everything inside a vertical line from the boundary and everything below it. A depth limitation may apply to the area below the land but no height limitation will apply unless the plan provides for it.

A number of lots on the plan in Accessory Lot A, Part 4 have the letters 'PT' before the number. This indicates that that is part of the lot. This is used to tie a

main unit to a car park area. So part of the lot is the building or apartment and the other part is the car park space. This means that the car park cannot be dealt with separately from the living area.

Restrictions

Covenants are called restrictions in the *Subdivision Act*. A plan of subdivision can have the effect of creating, removing or varying a restriction. Accordingly, a subdivider who wants to impose a covenant on the land being developed can create a covenant as part of the plan of subdivision. All lots are then affected by the covenant as soon as the plan is registered.

The plan in Accessory Lot A, Part 5 is a plan that creates a restriction. The fact that the restriction is created is set out under the 'Notations' panel and a separate sheet which contains the restriction forms part of the plan of subdivision.

A plan of subdivision can also remove or vary a covenant provided that a planning permit is obtained for this purpose. If the plan has this effect then it will be accompanied by a statement. When the plan is registered the restriction will be removed or varied as specified in the statement.

Owners corporation

If a plan of subdivision creates an Owners Corporation then there will be an additional sheet on the plan which is called the 'Owners Corporation Schedule'.

A Post Office Box or a care of address for an owners corporation will not be recorded as an address for an owners corporation by Land Victoria. The reason for this is that if necessary it is not possible to serve court papers on a post office.

Transitional arrangements for plans lodged on or after 31 December 2007

Plans lodged with Land Victoria on or after 31 December 2007 for registration under the *Subdivision Act* 1988 must comply with the new requirements.

Accompanying documents required must be lodged with plans that create an owners corporation.

Plans currently held unregistered in Land Victoria:

- will be processed as presented, if the Statement of Compliance was presented before 31 December 2007
- will require accompanying documents for each owners corporation created if registered on or after 31 December 2007.

Owners corporation search report

Land Victoria is currently extracting owners corporation information from registered plans and holding it as electronic data.

After the commencement of the *Owners Corporation Act*, information about the owners corporation will be presented to Land Victoria partly in the plan and

Subdivisions with the Lot

partly in accompanying documents. The plan and accompanying documents, when registered, will go through the same process of information extraction to be reproduced, when required, in an Owners Corporation Search Report.

The 'accompanying documents' will be imaged and be available for public search. The Owners Corporation Search Report will contain an expanded range of information presented in an easy-to-read format that will be uniform across all plan types. An example of the proposed Owners Corporation Search Report is included in Land Victoria Customer Information Bulletin (edition 107, November 2007).

Land Victoria Customer Information Bulletins may be downloaded from <http://www.land.vic.gov.au/titles/cib>.