



25 September 2023

[REDACTED]
[REDACTED]
Department of Transport and Planning

Email: [REDACTED]

Cc [REDACTED]

Dear [REDACTED]

[Submission: Land Use Victoria: Registrar's Requirements Consultation.](#)

The Urban Development Institute of Australia, Victoria (UDIA Victoria) thanks the Department of Transport and Planning (DTP) for engaging with us on this consultation process and welcomes the opportunity to respond to the draft proposal provided for feedback.

UDIA Victoria is the peak body representing the urban development industry. UDIA Victoria is a not-for-profit advocacy, research and educational organisation supported by a membership of land use and property development organisations, across the private sector and Victoria's public service. We are committed to working with both industry and Government to deliver housing, infrastructure, and liveable communities for all Victorians.

UDIA Victoria and our industry recognize the vital role registrars fulfil in assisting in the creation of critical housing supply and we commend any intention to streamline, improve and progress this process to accelerate this creation.

The changes proposed appear to be targeted towards formalizing the shift towards digital lodgement of conveyancing transactions which is appreciated by our industry. However, UDIA Victoria cannot support their implementation in its current form as they create significant concerns for our members and will negatively impact their ability to deliver the vital housing stock our state requires to combat the growing housing crisis.

UDIA Victoria in conjunction with the Consulting Surveyors Victoria (CSV) has identified several unintended impacts that will occur if this proposal is implemented in its current format.

Specifically, proposed change 10 will create substantial hurdles, complexities, time delays, and increased costs in its current form and requires a significant rework to rectify this.

Proposed change 4 also has some difficulty in achieving the desired outcome given the lack of current integration of the proposed system and existing ambiguity around effective deadlines.

We have outlined our preliminary concerns with both proposed changes below.

[Proposed Changes](#)

4. Mandate for all remaining instrument types capable of being lodged electronically (proposed amended Registrar's Requirements 6.5 (h))

UDIA Victoria requests greater specificity to be provided in relation to the effective deadline date for compliance. We understand this is the cementing of an existing in-place practice however, to avoid the implementation of an effective grey area for compliance, we would request a specific date be provided.

It is also our understanding, that PEXA cannot currently accommodate a Not in Common Ownership (NICO) settlement or transfer so a requirement on enforcing its utilisation will in turn require PEXA to be capable of dealing with all envisaged transfer types. If it is unable to accommodate a NICO settlement or transfer, we would seek an exemption for this specific instance.

10. Recording of Approved Building Envelopes only accepted in an agreement lodged under section 173 of the *Planning and Environment Act 1987* (proposed new Registrar's Requirement 16)

UDIA Victoria's concerns stem from the requirement of all building envelopes to only be contained within a Section 173 Agreement (s.173).

According to our understanding, it becomes more difficult to vary and/or remove a s.173 than the existing process. For example, unlike an application to vary a restriction which, if the Council refuses, can be appealed, an application to amend a provision in a s.173 can only be made to a Council if the Council in principle agrees to such a variation. If the Council fails or refuses to provide that in principle agreement that is not a decision that can be appealed, and the matter can therefore not proceed to be tested on its merits.

S.173's are often a restriction to be imposed not because of a planning requirement but because of a particular outcome that is sought by a subdivider/developer in respect of an estate. A Council may have no particular interest in that outcome, but, if the only way that that restriction can be recorded on the title is via a s.173, the local Council must be a party to that agreement.

Accordingly, in circumstances where a Council has no interest in the substance matter of the restriction, it may be reluctant to be a party to such an agreement.

To proceed by way of an agreement to amend or end a s.173, the consent of all parties bound by any covenant in the agreement is required. Unlike a restriction where, for example, an application is made to vary or end the restriction, the consent of the beneficiaries to that restriction is not a prerequisite to the application being made or indeed the restriction being ended or varied. That for example, avoids the situation that otherwise may arise under a s.173 where one person's non-agreement to a variation or ending means that such variation or ending could not be given effect. In those circumstances, unless the responsible authority agrees in principle to the variation sought or the ending requested a stalemate will arise which cannot be resolved through the Victorian Civil and Administrative Tribunal (VCAT).

Whilst there may be an opportunity of referring such a dispute to the Supreme Court it would be a lengthy, and expensive process even if there were to be a basis for such a referral to the Court.

Additionally, it is our understanding that actions alleging a breach of a s.173 are not a common occurrence thus the limitation to a s.173 to approve Building Envelopes can be viewed as unnecessarily constraining.

Technical constraints and impacts

The CSV has provided an in-depth analysis of the technical constraints and potential impacts this proposal will create if implemented in its current form.

Building envelopes and key milestones

Building envelopes are part of a wide range of subdivision areas, to understand the individual knock-on effects at each stage of the process we have identified and sought to explain this below.

Within the timeline of a greenfields subdivision, the two key milestones in the process are certification and Statement Of Compliance (SOC) of a Plan of Subdivision.

- a) Certification of a plan is required before construction (civil) works can begin and is thus a key milestone with significant costs associated with any delays to works commencement.
- b) SOC is required before the plan can be lodged for registration at Land Registry and is a key milestone for the settlement of contracts and the sale of land.

Time

The preparation of a s.173 is substantially more time-intensive than the creation of a restriction on a plan or referenced in a Memorandum of Common Provisions (MCP) due to the higher number of approval and ‘handling’ steps required by Council officers, developers, solicitors, and surveyors.

Plan of Subdivision Restriction	MCP	s.173
1. Surveyor plan drafting as part of the current certified plan.	1. Surveyor plan drafting 2. Legal document preparation. 3. Land Registry Services (LRS) registration. 4. MCP referenced in final certified plan.	1. Surveyor plan drafting 2. Legal document preparation. 3. Legal review by other party (owner or council depending on who drafted). 4. Owner signed 5. Mortgagee / caveator consent 6. Council signed 7. Registration on title.
Envelope part of certified plan.	MCP instrument then referenced in restriction in final certified Plan of Subdivision.	Building envelopes then registered on existing (parent) title.

	<i>Registration of MCP (and reference on Plan of Subdivision) is not typically required prior to initial certification of plan.</i>	<i>Registration of s.173 typically will be required prior to initial certification of plan.</i>
No additional time	Preparation and registration 4-6 weeks.	Preparation and registration 3-6 months.

Amendments to Envelopes

- a) Throughout the subdivision process and up until registration, amendments to the Plan of subdivision are a common occurrence to address issues such as;
 - i. Changes to lot boundaries, easements, substation reserves etc.
 - ii. Changes required by referral authorities.
 - iii. Inclusion or exclusion of additional lots within a stage and splitting or consolidating stages.
 - iv. Changes to road names etc.
- b) All changes to an envelope will require the registered s.173 to be amended.
 - i. The Amendment process is in effect a full repeat of the initial creation process (above), making changes time-consuming and costly.
- c) These delays become critical when the amendment is needed before a key certification / SOC milestone.
- d) We note that changes to an envelope within a Plan of Subdivision or within an MCP allow for efficient changes to building envelopes up until SOC, whereas the proposed s.173 process registers these at the start of the process.

Stacked Agreements on Parent Title

- a) Within a multi-staged greenfield development, it is usual practice for a developer to have multiple stages proceeding concurrently, to ensure a continual supply of lots for sale, without requiring unnecessary upfront civil and development works costs.
- b) As such, it is anticipated that multiple s.173s will be entered into and registered on the parent title, creating further complexities upon the registration of each stage and which agreements are relevant to the 'child' titles.
 - i. I.e., stages 1, 2, 3 & 4 may all be concurrently underway as the first stages of the subdivision of title A. Each of these stages will require a separate s.173 to be registered on the current title (A), meaning when the first

stage is registered, the title will have 4 encumbering s.173s. These will require further administration to ensure that non-relevant agreements for Stages 2, 3 & 4 are then not registered on the new titles issued for the Stage 1 lots.

ii. This problem will continue through each of the subsequent stages, when each child title is further subdivided.

Council Approval required

- a) The current system allows for the developer to create building envelopes, even when these envelopes are not required by the subdivision planning permit. These ‘developer-led’ envelopes ensure:
 - i. A degree of uniformity within an estate.
 - ii. Protects lot owners from out-of-sequence development (i.e., ensure each lot owner has the same restrictions whether they are the first dwelling built in a street or the last).
 - iii. The current system utilises the Building Regulations to enforce conformance with developer-led envelopes, with adjoining lot owners the usual beneficiary of the restriction that enforces the building envelope.
 - iv. With all envelopes proposed to be within a s.173, Councils will now become the primary enforcement entity for conformance with building envelopes.
 - v. This may result in Councils not agreeing to the creation of building envelopes that require Council enforcement when the envelopes are not a planning requirement.
 - vi. This means that it may no longer be possible to create ‘developer-led’ building envelopes.

Cost

Excluding time as a cost factor (e.g., holding costs, stand-down costs etc.), the following summarise the typical fees associated with preparing and registering a building envelope via different approaches (*initial creation*).

Plan of Subdivision Restriction	MCP	s.173	Covenant
No additional	Fee: \$2000	Fee: \$2500	Fee: \$2500
LRS Fee: \$110	LRS Fee: \$200	LRS Fee: \$200	LRS Fee: \$200

In summary, removing Building Envelopes from MCP’s or Restrictions on Plans of Subdivisions and requiring such matters to be dealt with by Council enforcing s.173s against Title, is fundamentally shifting the process of registering such matters from the



end of the Certification & SOC process to the start of that process.

This fundamental change will have unintentional but significant implications for developers and Councils in managing the new process and meeting current expectation timelines. Primarily because shifting a process that is in continual flux until late in the Plan of Subdivision process to the early stages will not allow for fluidity to occur throughout the Certification process without major disruption, time delays and cost impost.

The proposed change to the creation of building envelopes has no apparent benefit to any participant in the development process and logistically creates additional time constraints given the inherent processes behind s.173 creation versus MCPs.

Furthermore, the Building Regulations specifically allow building envelopes to be created in Restrictions on a Plan of Subdivision. It would not seem appropriate for changes to be introduced that are contrary to the Building Regulations.

Next steps

Without substantial reform, the outlined amendments will directly impact the deliverability of critical housing stock and negatively impact the Victorian Government's stated target of delivering 80,000 dwellings per year for the next ten years. We recommend that the proposed amendments be taken into review with further industry engagement to assist with future-proofing these changes for any unattended impact on our sector.

We trust that this feedback is constructive and look forward to engaging further in finalising these draft planning provisions.

Contact

Should you wish to discuss any of the matters raised in this response, please contact UDIA Victoria's Director of Policy, Jack Vaughan at [REDACTED]

Yours faithfully,

[REDACTED]

Linda Allison
Chief Executive Officer
Urban Development Institute of Australia, Victoria