

## 8. Agreements

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### 8.1. What is a section 173 agreement?

PEA s. 173

The responsible authority can negotiate an agreement with an owner of land to set out conditions or restrictions on the use or development of the land, or to achieve other planning objectives in relation to the land.

These agreements are commonly known as section 173 agreements. The power to enter into the agreement arises under section 173 of the *Planning and Environment Act 1987* (the Act).

Like other agreements, a section 173 agreement is a legal contract. However, the benefit of a section 173 agreement is that it can be registered over the title to the land so that the owner's obligations under the agreement bind future owners and occupiers of the land. A section 173 agreement can also be enforced in the same way as a permit condition or planning scheme.

The purpose of an agreement is to make it easier to achieve planning objectives for an area or particular parcel of land than is possible when relying on other statutory mechanisms.

### 8.2 Who can enter into an agreement?

The Act provides that a section 173 agreement can be entered into between a responsible authority and an owner of land (normally the registered proprietor) or a person - in anticipation of that person becoming the owner of the land.

Where the agreement is entered into with a prospective owner, it does not bind the existing owner unless the existing owner agrees. Normally, an agreement with the prospective owner will specify that the agreement does not commence operation until that person becomes the owner of the land.

Provided the responsible authority and owner (or prospective owner) are parties to a section 173 agreement, other persons or bodies may be additional parties to the agreement and become bound by the terms of the agreement. This may include, for example:

- a planning authority or referral authority where it is useful for that body to coordinate its powers or functions in relation to the land; or
- a developer or occupier with an interest in the development or use of the land.

It is not possible for a section 173 agreement to be entered into with a developer or occupier of land without the owner or prospective owner also being a party. This is because the owner must agree to the obligations under the agreement being registered over the title to the land.

## 8.3 When should an agreement be used?

### 8.3.1 Advantages of agreements

The main advantages of a section 173 agreement are:

- it can be registered over the title to land and become binding upon future owners
- unlike a planning scheme provision or permit condition, which allows something to be done, a section 173 agreement can positively require something to be done. This is particularly useful where a responsible authority wants to guarantee certain outcomes prior to, or as part of, the granting of planning permission for a specific use or development
- an agreement can set out a level of detail or site-specific information which is difficult to include in a permit condition or other form of planning provision
- unlike restrictive covenants, a section 173 agreement can include positive covenants and thus include performance criteria or more innovative arrangements for the use or development of land
- an agreement can create positive obligations on a responsible authority or other parties and thus achieve broader planning objectives than a permit
- an agreement can continue to operate and impose restrictions on the land even if the need for a permit ceases and the need to operate under that permit no longer exists.

### 8.3.2 When not to use an agreement

PEA s. 180

An agreement cannot and should not be used as a basis for trying to extend an authority's powers under the Act. A section 173 agreement cannot authorise any use or development contrary to the planning scheme or a permit. This means that an agreement cannot provide for less restrictive provisions than those in a planning scheme or permit, such as allowing a use or development which is otherwise prohibited. However, an agreement could provide for more restrictive provisions than those in the planning scheme or a permit, such as prohibiting or placing greater restrictions on a use or development which is otherwise allowed.

An agreement is not a substitute for planning provisions and should not be used if the responsible authority's planning objectives can be adequately met through the conditions of a permit. Before including a condition on a permit requiring a section 173 agreement, an authority must ensure that the issue involved really requires an agreement rather than a clearly worded permit condition.

For example, an agreement should not simply provide for certain works to be done to the satisfaction of the responsible authority, when a similar condition could just as easily have been included in a permit.

An agreement is a contract and should not be entered into without prior legal advice. If an agreement is not carefully drafted, there may be difficulties in enforcing or amending it.

### 8.3.3 What can an agreement cover?

The Act allows the section 173 agreement to provide for:

- the prohibition, restriction or regulation of the use or development of land
- the conditions subject to which the land may be used or developed for specified purposes
- any matter intended to achieve or advance the objectives for planning in Victoria under the planning scheme or an amendment.

This provides a wide scope for agreements. However, there should generally be a connection between the agreement and the specific planning outcomes sought to be achieved in relation to the land over which the agreement will be registered.

Section 173 agreements have been used in a wide variety of matters. Some examples are:

- coordination of development with adjoining landowners or other regulatory authorities
- to provide for staged developments
- rehabilitation of property, repair of the environment, heritage protection or vegetation protection
- provision of community infrastructure or specific development infrastructure – such as open space or facilities on the land or nearby land
- securing developer contributions
- restrictions on change of use, or abandoning existing use rights
- limits on future development, including neighbourhood agreements to protect neighbourhood character
- planning ‘trade-offs’, such as a planning concession on one property based on a commitment to do something on another property.

## 8.4 Procedure for making and amending an agreement

### 8.4.1 Negotiation

Negotiating agreements can be involved and time-consuming. Therefore the objectives must be clear and must relate to the planning approval process. The most successful agreement is one in which both parties actively consider and negotiate conditions, without viewing it as a technique for restricting development by the responsible authority. The focus of all parties should be joint problem-solving and achieving a performance-oriented planning outcome for the land.

While agreements are generally negotiated, a section 173 agreement can sometimes be required by a planning scheme or a permit condition prior to the commencement of a specific use or development. To avoid any perception that the responsible authority has an undue negotiating 'advantage', an authority should be careful not to act unreasonably in seeking planning concessions or other covenants in the agreement beyond those necessary to achieve its proper planning objectives for the land.

PEA s. 188

To avoid delays in negotiating, it is useful for responsible authorities to delegate negotiating powers to officers who can liaise with the relevant parties to the agreements and report to the authority as required.

#### 8.4.2 Content of an agreement

PEA s. 174

The Act details the matters provided for by an agreement. An agreement can be more positive and specific than a permit condition. In this way it can be used as an effective means of ensuring performance of obligations and, if there is a need, attaching the obligations in the agreement to the land.

PEA s. 174(1)

An agreement must bind the owner of the land to the covenants specified in the agreement. This means that the primary purpose of the agreement is to set out the owner's obligations in a manner which can be clearly enforced against the owner or future owners of the land.

Care must be taken by a responsible authority when defining its own obligations (if any) under an agreement. The responsible authority has no power to enter into an agreement which obliges it to exercise a statutory discretion in a particular manner in the future. For example, if an owner is prepared to enter into an agreement which is conditional upon the approval of a planning scheme amendment, then the agreement should specify that it does not commence until the amendment is approved. If the amendment is not approved, the owner will not be bound by the agreement. The agreement should not attempt to bind the responsible authority to the future approval of the amendment or the grant of a permit, as this would fetter the future exercise of its statutory discretion and be beyond its power, and therefore be subject to legal challenge.

PEA s. 180

An agreement must not require or allow anything to be done which would breach a planning scheme or a permit. Furthermore, it should not duplicate matters provided for in the scheme or a permit.

An agreement can detail different types of obligations - either procedural obligations or mandatory obligations of a positive nature, and those which are covenants restricting the owner's use or development of the land. It is suggested that wherever possible only the latter should form part of a section 173 agreement. The agreement can become unnecessarily complicated by including other matters between the responsible authority and the owner, or between the owner and other parties to the agreement. If peripheral issues are set out in an agreement it can be difficult to ascertain which of the obligations are intended to run with the land as covenants and be enforced under the Act. Obligations which do not need to run with the land should be put in a separate part of the agreement, or in a separate document.

PEA s. 175

Bonds and guarantees may form part of an agreement, with provision for forfeiture of money if the owner fails to carry out the agreement to the satisfaction of the responsible authority. This does not apply if the responsible authority is entering into an agreement with a Minister.

PEA ss. 176, 177

The time at which an agreement begins or ends can form part of the provisions of an agreement. It may also be ended by the responsible authority with the approval of the Minister, or by agreement between the responsible authority and all persons who are bound by any covenant in the agreement.

An agreement will usually begin immediately it is executed by all parties to it. However, the Act allows the commencement to be tied to a specified event (such as a planning scheme amendment coming into operation). This can be useful if the obligations under the agreement are tied to a specific use or development.

#### 8.4.3 Availability of agreement

PEA s. 179

The responsible authority must lodge a copy of every agreement, as soon as it is made, with the office of the Minister administering the Act. The responsible authority must also keep a current copy of each agreement at its office and make it available for public inspection free of charge.

If an agreement is registered on the title to the land, the copy lodged for registration is available for inspection as part of a search of the certificate of title.

PEA s. 17(2)

If the coming into effect of an agreement is conditional on a planning scheme amendment coming into operation, and the agreement is executed prior to exhibition of the amendment, a copy of the agreement must be forwarded to all parties who receive a copy of the amendment.

### 8.5 The form of an agreement

An agreement must clearly and precisely set out the obligations and rights of the parties. Generality, vagueness and ambiguity must be avoided.

PEA s. 174(1)

The agreement must be in writing, made under seal and signed by all the parties in the presence of at least one adult witness who is not a party to the agreement. For the responsible authority or any party which is a company, the common seal of the authority or company will need to be affixed in accordance with its legal requirements. Where there is a clear written delegation, an officer of the responsible authority may be able to seal the agreement on the authority's behalf.

Ensure that enough original copies of the agreement are signed and sealed to cover the needs of the Registrar of Titles for registration in accordance with section 181. Copies are also needed for each party, the responsible authority and the office of the Minister administering the Act.

The basic elements of an agreement are listed below to give some insight into the sorts of things which need to be considered before seeking legal assistance in drafting the document. This information is not necessarily exhaustive.

#### 8.5.1 Date and parties to agreement

The heading of the agreement should contain the date of the agreement and identify the parties, for example Gumnut City Council (the responsible authority) and (name of individual or company owner).

The name of the owner of the land should be consistent with what appears on the title.

Addresses should be included for all parties and a title search should be undertaken to ensure the agreement is being made with the actual owner of the land. Companies should include an ACN number. In some cases there will be additional parties to the agreement, such as other government agencies, or developers or occupiers. Similar information should be included for these parties.

### 8.5.2 Recitals

This section gives the background to the agreement so that the operative provisions can be readily understood. It should clearly identify:

- the land to be encumbered, by reference to the certificate(s) of title on which the covenants will be registered and also by reference to a plan if appropriate. The street address of the property should also be inserted
- the owner (or prospective owner) of the land
- why the agreement is being entered into
- the responsible authority (for example, 'the land is within the Gumnut Planning Scheme for which the Gumnut City Council is the responsible authority'). Add zoning information if this is relevant
- other parties, if any, and the basis on which they are necessary parties.

The responsible authority should conduct a title search to ensure that all the relevant land is referred to in the agreement, otherwise there may be problems with registration or enforcement. This section should also indicate whether a permit or amendment to a scheme affects the land and the general basis of the agreement.

### 8.5.3 Agreement

This section details what each party to the agreement is agreeing to do. Depending on the detail of the agreement it may include the following:

#### **Definitions and interpretation**

Important terms should be defined. This helps to prevent potential legal problems. It should be clearly stated that the agreement is made pursuant to section 173 of the Act.

#### **Effect of agreement**

This requires the parties to indicate their intention to be bound by the agreement and should indicate that the agreement will run with the land and bind future owners.

It is common practice to include a term requiring the owner to do all things necessary to enable the responsible authority to register the agreement with the Registrar of Titles in accordance with section 181 of the Act.

#### **Procedural terms**

The linking of the agreement to any permit or amendment should be set out if necessary.

The commencement or completion times of the agreement should be clearly set out, including whether commencement or completion is tied to a specific event.

### **Points of agreement**

This details what each party is undertaking to do and may include a bond or guarantee by the owner. The covenants should be clearly identified for example, 'the owner of the subject land covenants that...'. The covenants should be specific and provide sufficient detail of the obligations to enable the covenants to be clearly understood and enforceable.

There are legal difficulties in incorporating personal obligations in a section 173 agreement.

However, if for some reason personal contractual obligations are being included in an agreement (such as conditions which are relevant only to the initial developer of the land), it is recommended that these be clearly separated and identified to avoid confusion with the covenants which run with the land, and bind future owners or other parties.

The responsible authority should try to foresee how the agreement will operate in the future to ensure that the need for variations are minimised. In particular, it should remember that if land affected by an agreement is subsequently subdivided, the agreement will ordinarily affect all the new titles unless the agreement specifies to the contrary. This may not be what was intended by the parties and may lead to difficulties in amending the agreement or releasing individual allotments. Accordingly, where possible, the agreement should set out the effect of the agreement on subdivided allotments.

### **Dispute resolution**

If an agreement relies heavily on performance criteria, it may be advisable to include a dispute resolution clause. The Victorian Civil and Administrative Tribunal (VCAT) has only limited jurisdiction to resolve disputes where matters require the consent or satisfaction of the responsible authority.

### **Service of notices**

A party to an agreement may be required to advise the other parties of certain information (such as when certain works have been completed). In these cases, the agreement should describe the manner in which this notice is to be given (for example, in writing, within a specified time period and to a specified address).

### **Lapse or termination**

Many agreements will also include a time clause (that is, the agreement lapses after a certain period of time or if planning provisions are amended). Agreements can also require subsidiary agreements at a later date and can make provisions conditional upon approval from another authority (for example, Roads Corporation).

### **Cost apportionment**

Many agreements list which of the parties are to be responsible for any associated costs. This is a matter for negotiation between the parties, although it is common for a responsible authority to require that an owner meet the authority's costs in the preparation of an agreement where the agreement is for the primary benefit of the owner.

PEA s. 177

## 8.6 Procedure for registration of agreements

PEA ss. 181, 182

The purpose of registering an agreement is to ensure that the covenants run with the land and therefore bind all future owners of the land. If the obligations placed on the owner are of a short term nature such as works to be carried out within three months, registration may not be necessary. However, even in these cases, it may be appropriate to provide for registration before there is any transfer in ownership of the land. The discretion to register the agreement rests with the responsible authority.

PEA ss. 173(4), 181;  
PE Regs r. 42, Form  
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An application to register the agreement should generally be made without delay. If the land is subject to the *Transfer of Land Act 1958*, a copy of the agreement should be lodged with the Registrar of Titles using the prescribed Form 18. This form sets out the key details (such as the land covered by the agreement and parties). A registration fee is also payable.

The Registrar of Titles cannot register an agreement over Crown Land or common property.

The duplicate certificate of title does not need to be produced to the Titles Office for registration. A recording of the agreement is only noted on the original title in the same way as caveats and other covenants. This may mean that the custodian of the duplicate title, if not the owner (such as a bank/mortgagee), may be unaware of the making of the agreement and/or the effect of the agreement on its security.

Where this may be an issue, the responsible authority may require the owner to provide the mortgagee's consent.

To ensure there are no delays in registering the agreement, it is important that the description of the land on the application for registration is consistent with that on the agreement.

PEA s. 183; PE Regs  
r. 43, Forms 14,15,16

If an agreement is cancelled or amended the responsible authority must, using the prescribed form, tell the Registrar of Titles to cancel or alter the recording of the agreement.

It is particularly important to monitor agreements that have a termination date or event included as part of the agreement and ensure that the Registrar is immediately notified of the termination. This will avoid unnecessary complications for example, if land is subsequently subdivided and a covenant placed on each individual lot because the Registrar was not advised of the termination of the agreement.

## 8.7 Amendment of agreements

Section 173 agreements can only be amended with the approval of the Minister. This can sometimes be time consuming and generally difficult to achieve. An amendment also requires agreement between the responsible authority and all persons who are bound by any covenant in the agreement. This may be particularly difficult to achieve where the land covered by the agreement has been subdivided into a number of lots (and there are several parties bound by it) or where there are multiple parties to the agreement. It is therefore important that agreements are prepared carefully to avoid the necessity for subsequent variation.

Where an agreement is no longer applicable to part of the land over which it was originally registered, VCAT may approve an amendment to the agreement to remove that part of the land from the application of the agreement.

Where the amendment to an agreement is minor, it may be able to be achieved by a short Deed of Variation. If the agreement is longer, it will be less confusing if the original agreement is brought to an end and a new agreement incorporating the changes is executed.

If an agreement is amended, the responsible authority should ensure that its own copy is altered accordingly and, if an agreement has been registered on the title, the Registrar of Titles is also advised using the prescribed form.

PE Regs r. 43, Forms  
14, 15 and 16

## 8.8 Reviews and enforcement in relation to agreements

The owner of land can apply to VCAT for an amendment to a proposed agreement. This is permitted if, under a planning scheme or a permit, the use or development of land for specified purposes is conditional upon an agreement being entered into under the Act and the owner objects to any provision of the agreement. The Tribunal may approve the proposed agreement with or without amendments. It is important to note that this provision does not operate once an agreement has been executed.

PEA s. 184

Certain disputed matters in relation to agreements may also be referred to the Tribunal for determination under the general review provisions of section 149A. This is where an agreement provides for something to be done to the satisfaction, or with the consent, of the responsible authority, and there is no dispute resolution mechanism set out in the agreement. Apart from this general provision, there is no general jurisdiction for the Tribunal to hear disputes in relation to an agreement once it has been executed.

PEA s. 149A

A purchaser of land who is a party to an agreement, or an owner of land, can apply to the Tribunal for an amendment to the agreement to remove the land from the application of the agreement. The Tribunal may approve the amendment if it considers that the landowner is not subject to any further liability under the agreement or, having regard to any relevant permit or requirements under the *Subdivision Act 1988*, it considers it inappropriate that the agreement should continue to apply to the land and the owner.

PEA s. 184(3),(4)

A responsible authority may prosecute a person who fails to comply with a section 173 agreement. A responsible authority or any person may also seek an enforcement order to prevent contravention of a section 173 agreement. The proceedings in each case are the same as those which would apply to a breach of a planning permit condition.

## 8.9 Other agreements

There are other forms of statutory agreements which affect the use and development of land. Some operate in similar fashion to section 173 agreements and allow registration of the agreement on the title to an owner's land.

Examples of other forms of statutory agreements include:

- agreements for the preservation of heritage places under section 85 of the *Heritage Act 1995*
- agreements to secure the completion of works or compliance with statutory requirements under section 21 of the *Subdivision Act 1988*. (These agreements can be less formal than section 173 agreements but, if executed under seal, can be registered as if they were section 173 agreements.)
- agreements relating to exemptions from building regulations under the *Building Act 1993*.

## 8.10 Checklist for agreements

### **Is an agreement necessary?**

- No, if objectives can be achieved through use of planning scheme provisions or permit conditions.
- Yes, if it is desired to register specific requirements on the title which will run with the land and bind consecutive owners.

### **Negotiating an agreement**

- Has the responsible authority delegated power to an officer to negotiate the agreement?
- Are all parties that should be party to the agreement involved in the negotiations?
- Is it clear what the terms of the agreement are to be and what each party is accepting responsibility for?
- Should a bond or guarantee form part of the agreement?
- Should the agreement be linked to another event such as an amendment to the planning scheme or a planning permit?

### **Making the agreement**

- Has legal advice been sought?
- Is the description of the land concerned accurate?
- If it is wished to register the agreement on title, is the owner a party to the agreement?
- Have enough copies of the agreement been made to ensure all parties have their own copies, together with the copies needed for the responsible authority, the office of the Minister administering the Act, and for registration (if required)?
- Have all parties signed each copy of the agreement and was it signed in the presence of a witness and made under seal?

### **Availability of agreement**

- Has a copy of the agreement been sent to the Minister administering the Act?
- Is a copy of the agreement available for public inspection at the offices of the responsible authority?
- Where an agreement is conditional upon the approval of an amendment to a planning scheme, have copies been sent to all parties notified of the amendment?

### **Registration of agreement**

- If it is intended that the agreement run with the land, has it been registered?

### **Amendment of agreement**

- Have all parties agreed to the proposed amendment before making application to the Minister?
- Is a copy of the amendment available for public inspection at the offices of the responsible authority?
- If the agreement is registered, has the amendment been registered with the Registrar of Titles/Registrar General?

### **Cancellation of agreement**

- Have all parties who hold copies of the agreement been notified of the cancellation?