

WHAT IS A SECTION 173 AGREEMENT?

The Responsible Authority may enter into an agreement under Section 173 of the *Planning and Environment Act 1987 (the Act)* with a landowner or a person in anticipation of that person becoming the landowner.

Section 173 agreements may provide for any one or more of the following matters:

- prohibiting, restricting or regulating the use or development of land;
- specifying conditions subject to which land may be used or developed for specified purposes; and
- any matter intended to achieve or advance the objectives of planning in Victoria.

A Section 173 agreement binds the landowner to the obligations specified in the agreement. It is recorded on the Title/s to the land so the landowner's obligations bind future owners of that land.

RECORDING A SECTION 173 AGREEMENT ON THE TITLE/S TO THE LAND

After a Section 173 agreement has been entered into and recorded on the Title/s to the land, the land subject to the Section 173 agreement (or part of the land) may then be developed and/or pass into separate ownership.

Where land burdened by a Section 173 agreement is transferred to another landowner, the new landowner is bound by the obligations contained in that agreement.

Section 173 agreements must be recorded without delay and the Responsible Authority must lodge an agreement with the Registrar of Titles (Land Use Victoria/Titles Office) and must keep a copy of each agreement in its records.

ADVANTAGES OF A SECTION 173 AGREEMENT

There are many advantages of a Section 173 agreement, including:

- It runs with the land and the landowner's obligations are binding on future landowners.
- It can expressly require something to be done. This is particularly useful where the Responsible Authority requires certainty of a particular outcome before, or as part of granting a Build Over Easement approval or for a specific use or development. For example, an agreement may:
 - require land to be developed in accordance with a specified planning permit, therefore allowing the subdivision of the land to be registered beforehand while giving Council the necessary comfort;
 - prohibit further subdivision of land; and
 - provide for the provision of infrastructure.
- Unlike restrictive covenants, section 173 agreements may include positive obligations and even performance criteria or specified arrangements for the use or development of the land.

THE FORM OF A SECTION 173 AGREEMENT

A Section 173 agreement must clearly and precisely set out the obligations and rights of the parties. Generality, ambiguity and vagueness must be avoided, and the Section 173 agreement must be in writing and signed by all parties before being recorded on the Title/s to the land.

MORTGAGEE'S CONSENT

Generally, the Responsible Authority requires the owner to obtain a mortgagee's consent before a Section 173 agreement is recorded on the Title/s to the land. This is particularly so where the owner's obligations under the Section 173 agreement may materially affect a mortgagee's interests.

AMENDING OR ENDING A SECTION 173 AGREEMENT

A Section 173 agreement may provide the agreement ends wholly or in part or as to any part of the land on or after:

- the happening of a certain event;
- a specified time; or
- the use or the development of the land for a specified purpose ending.

An agreement may also be amended or ended by agreement between the Responsible Authority and 'all persons who are bound by any covenant in the agreement' under Sections 177 and 178 of the Act.

Obtaining agreement from all 'persons who are bound by any covenant in the agreement' may sometimes be impractical (or impossible where there is opposition).

In these cases, it may be necessary for an application to be lodged with the Responsible Authority to amend or end a Section 173 agreement under s 178A of the Act.

In any instance, the Responsible Authority must provide written consent or confirmation allowing the landowner to proceed with the amendment or removal.

WHO PREPARES A SECTION 173 AGREEMENT?

To enter into a section 173 agreement, you may choose one of the following options:

1. Use Council's solicitors:

You can request that Council's solicitors prepare the agreement. You may contact:

Name	Contact
Marcus Lane Group	Email: enquiries@marcuslanegroup.com.au Web: www.marcuslanegroup.com.au

2. Use your own representative:

You can use your own representative to prepare the agreement. The agreement will then need to be referred to Council's solicitors for review, which is at the cost of the applicant/owner (in addition to fees associated with your representative drafting the agreement).

To begin the process, Marcus Lane Group will require the following:

- details of the request: i.e. draft, amend or end a Section 173 agreement;
- contact details of the landowner/s;

- the relevant permit/s requiring the landowner/s to enter into a Section 173 agreement (or if no permit exists, the relevant correspondence demonstrating the arrangement between the parties to enter into the Section 173 agreement and the terms);
- endorsed plans and reports under the permit (if applicable);
- certificate/s of Title (if available);
- company search/es (if applicable and available); and
- the Responsible Authority's written confirmation to the landowner/s allowing the Section 173 agreement to be amended or ended (if applicable).

WHO PAYS FOR DRAFTING, AMENDING OR ENDING A SECTION 173 AGREEMENT ON THE TITLE/S TO THE LAND?

The usual position is the landowner/s must bear all reasonable costs and expenses (including legal expenses) incurred in drafting, reviewing, lodging, amending or ending a Section 173 agreement.

Our professional costs vary depending on the complexity of the Section 173 agreement.

The administrative costs to lodge a Section 173 agreement are in accordance with the fees prescribed by the Registrar of Titles and charged separately.

WHAT IF I CHOOSE MY OWN LAWYER TO DRAFT THE SECTION 173 AGREEMENT?

Before entering into a Section 173 agreement not prepared by Marcus Lane Group, the Responsible Authority may request us to review the drafted agreement. This expense is also borne by the landowner/s (in addition to the legal fees associated with another lawyer first drafting the agreement).

It is important to know the Responsible Authority must lodge every Section 173 agreement or amendment or ending of an agreement (and not the landowner/s or the landowner/s' legal representative).

SECTION 173 AGREEMENTS – THE PROCESS

<p>1. Provisional approval issued</p>	<p>A letter is provided by Council requiring the landowner/s to enter into a Section 173 agreement (agreement).</p>
<p>2. Draft request</p>	<p>The landowner/s requests Marcus Lane Group (MLG) to draft and lodge the agreement.</p>
<p>3. Disclosure statement issued</p>	<p>MLG emails the landowner/s a third- party costs disclosure statement and standard terms of agreement for their review and approval.</p>
<p>4. Disclosure statement signed</p>	<p>The landowner/s signs and returns the third-party costs disclosure statement to MLG by email.</p>
<p>5. Draft</p>	<p>MLG starts drafting the agreement.</p>

6. Draft issued	MLG emails a draft agreement to Council and the landowner/s for consideration and approval (or further amendment/s). This is usually within 2 weeks of having received the signed third-party disclosure statement.
7. Approvals received	MLG receives approvals of the draft from Council and the landowner/s and prepares a final iteration of the agreement.
8. Agreement issued	MLG emails the final agreement to Council and the landowner/s for signing (separately, noting the agreement may be signed electronically and/or in counterparts).
9. Agreement signed	MLG receives the signed agreement/s from Council and the landowner/s.
10. Agreement lodged	MLG lodges and records the agreement on the relevant Title/s to the land.
11. Agreement confirmed	MLG receives confirmation of the recording of the agreement and a dealing number. This generally takes between 1-10 working days, but is at the discretion of Land Use Victoria (Titles Office).
12. Agreement confirmation issued	MLG emails Council and the landowner/s confirming the successful lodgement and provides the dealing number.
13. Title/s issued	MLG provides a copy of the relevant Title/s to Council and the landowner/s, demonstrating the agreement is recorded on the Title/s.
14. Formal Build Over Easement Approval issued	Council issues the official Build Over Easement Approval including stamped/approved plans, and works can commence.
15. The matter is complete.	

DISCLAIMER

This advice is to be used as a general guide only. Council has made all reasonable effort to ensure the information provided is true and accurate. However, it is recommended that readers seek professional advice before acting or making decisions on the basis of this information. For any questions or clarification, please contact Council's Planning and Design Unit on 1300 787 624.