SECTION 8

PLANNING AND DEVELOPMENT
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8.1 Introduction
Surveyors have been instrumental in planning for the development of this State since the first European settlement, primarily because they have been intimately connected with the land and its use.

Acting under the general direction of the Surveyor-General, Crown land was subdivided by surveyors for sale and development; a prime example being the layout of Melbourne by Robert Hoddle which established this city as being well planned. Although there was no local legislation in these early days there were a number of publications, both English and European, which provided a background of planning principles.

During the 15 years as the Port Phillip District of New South Wales, much of this State had towns and rural areas laid out with regard to planning principles, and a steady orderly growth took place.

8.2 Brief History of Land Use Control
Following the gazettal of Victoria as a separate State in 1851, and the discovery of gold in that year, the ensuing population explosion was such that the newly created authorities had difficulty in coping with demands, especially in providing housing accommodation.

This provided an opportunity for many of the holders of alienated land to subdivide and develop it for quick profits with little regard for community interest and long term effect.

In consequence, more orderly and controlled use of land was called for. This was accomplished by the introduction of The Public Health Statute 1865 and amending Acts of 1883 and 1888 which were administered by the Board of Public Health and were cited together as The Public Health Acts 1865-1889, and by the introduction of The Local Government Act 1874.

Under the Public Health Acts, as from 1 January 1890, all residential streets were required to be not less than 50 feet wide, and all lanes and footways at least 10 feet wide. House lots were required to be of at least 1650 square feet in area, and proper drainage for any house and site and curtilage thereof, had to be provided.

Under the Local Government Act, municipal councils were empowered to control land subdivision and building construction, as well as the construction of private streets at the cost of adjoining land owners, and were given many other duties. This Act, with by-laws brought down by each council was reasonably effective over a period of some 40 years, when the rapid and substantial development of Melbourne and other cities and towns in Victoria was accomplished.

Following the bursting of the Land Boom in 1891, there was a fairly quiescent period until the end of World War I, and in 1919 changing conditions and the growth of secondary industries indicated another high population growth was likely and that the system of development control should be reviewed.

An agitation over some years by persons and bodies culminated in a resolution being passed by the Melbourne City Council on 26 July 1920, namely -

"That this Council considers the rapid growth of the City and Metropolis is creating unsatisfactory conditions, which require immediate attention, and that is therefore necessary to further regulate development on modern scientific lines, so as to provide for the future demands of business, recreation, housing, traffic and other matters and that the Lord Mayor be requested to call a conference of representatives of the Metropolitan municipalities to consider the best means of carrying out this proposal."
8.2.1 Metropolitan Town Planning Commission 1922

Such a conference was held, a committee being formed to further the matter, and with the support of other authorities and organizations, a Bill was presented to Parliament and the Act No.3263 to establish the Metropolitan Town Planning Commission was passed and received the assent of the Governor in Council on 31 December 1922.

The Act provided for an advisory and honorary Commission of nine members who were appointed on 27 March 1923 for a period to end on 31 December 1925.

The Commission membership comprised Alderman Frank Stapley FRVIA, representing the City of Melbourne, who was elected Chairman. Four members represented four groups of municipalities in the metropolitan area, namely Councillor Colonel C.E. Merrett CBE, WD, JP, Councillor J.J. Listen JP, Councillor E.C. Rigby and Councillor W.A. Wharington.

Four members were appointed in pursuance of Section 4 of the Act which provided for their appointment "by reason of their respective qualifications in the business, technical and professional matters to be dealt with or investigated by the Commission". These were:

E. Evan Smith, FR1BA, FRVIA, MRSanI(London), - Chief Architect, Public Works Department of Victoria;

H.E. Morton, MInstCE, MIEAust, LS, - formerly City Engineer Melbourne;

T.P. Strickland, BE, MSc, MIEE, MAmriEEE, MEICanada, MIE Aust, - Chief Engineer, Melbourne and Metropolitan Tramways Board; and

Saxil Tuxen, MVIS, AMIEAust, MAmrCPI, Licensed Surveyor, Certificated Municipal and Water Supply Engineer.

An additional member, C.H. Fethney, Superintending Engineer, Way and Works Branch, Victorian Railways was appointed on the nomination of the Victorian Railways Commissioners under Section 2 of the 1925 Act.

Frederick C. Cook, also a Licensed Surveyor, was appointed as the Executive Officer.

8.2.2 Melbourne and Metropolitan Town Planning Report 1929

Setting to work immediately, the Commission made a comprehensive study of existing conditions, including street systems together with a traffic census, public transport, waterfront and river improvement, amenities and open spaces, classification of districts for residential, industrial, business and noxious trade purposes, and buildings generally, especially housing. It consulted with many authorities and individuals and planned for the development of the Metropolis leading to an excellent and most comprehensive report which was presented to the Minister of Public Works on 6 December 1929.

The extended time span was due to several special reports being required by the Minister on specific projects and the large volume of work which was carried out by a staff which never exceeded 10 persons.

8.2.3 Legislation takes shape

It was one of the strong recommendations of the Commission that a Town Planning Act be passed without delay so that the value of this report would not be lost to the community by reason of adverse development. Unfortunately, the presentation of this report coincided with the advent of the Great Depression and no follow-up legislation was to come for many years, although some features of the planning were adopted by several municipalities, and many of its proposals were incorporated in later legislation.

During 1938, the Slum Reclamation Act was brought down, primarily for that purpose but did give some impetus to planning and gave some extra power to municipal councils.

Under powers conferred by the Local Government (Building Regulations) Act 1940 No.4796 Uniform Building Regulations were approved by the Governor in Council and came into force on 1 August.
1945 These regulations, *inter alia*, dealt with five alternatives in regard to site requirements such as areas of allotments, distances of houses and flats from street alignments, distances from boundaries for buildings other than houses and flats etc. Councils were given the power to make by-laws prescribing brick areas, limiting the height of residential buildings and their set-back from streets. Also provision was made to restrict the height of other buildings relative to the width of streets.

8.2.4 *Town and Country Planning Act 1944.*

This was the first Act related to planning which gave statutory controls over land use. Under it, the Town and Country Planning Board consisting of a full-time Chairman and two other members was created. The duties of the Board included advising the Minister of Public Works on any matters or disputes arising out of any of the provisions of the Act or its administration, and also when required by the Minister any matter relating to town and country planning. Further, the Board was required on request of the Minister, to prepare a planning scheme for any area or areas of land specified by the Minister.

The Board was required to report annually to the Minister on all its decisions, recommendations and other transactions. It was given the power to issue memoranda, reports, bulletins, maps or plans relating to planning and to appoint staff to carry out its works, and with the consent of the responsible Minister make use of the services of any officer or employee of any department of the public service. Also with the consent of the council of a municipality to make use of its staff and with the consent of a public authority to make use of its staff.

The Act gave municipalities the power to prepare a planning scheme or schemes within its boundaries and allowed two or more adjoining municipalities to prepare joint schemes. However, if the Minister so required, the municipality or municipalities were obliged to prepare a planning scheme or schemes.

The Board was given the power to prepare a planning scheme in the case of default by a municipality or municipalities, at the expense of the council or councils, or it could enter into agreements with councils to prepare such schemes.

At the commencement of the preparation of a planning scheme the responsible authority was given the power of issuing an interim development order (IDO) prohibiting the development of land and the construction of buildings, roads or other works. The responsible authority was required to publish such order and serve land owners and occupiers affected with a copy thereof.

The Act provided a schedule of matters to be considered in preparing a planning scheme which had to be prepared to the Minister's requirements.

This having been done, copies of the scheme were to be deposited at the office of the Responsible Authority and the Board for public inspection for a 3 month period, and *Government Gazette* and newspaper advertisements inserted setting out the purport of the scheme and inviting persons affected to register any objections.

After the expiration of this 3 month period any person or any person acting on behalf of the objector could appear before the Responsible Authority to support the objections which would be considered before the scheme was adopted. On adoption, the scheme was submitted to the Minister, with a copy of objections and a report from the Board, before forwarding to the Governor in Council for approval.

Notice of such approval was published in the *Government Gazette* and local newspapers before coming into force. Notwithstanding this, either House of Parliament could revoke the scheme within 24 days of its next sitting. After final approval it was incumbent upon the Responsible Authority to observe and enforce all the requirements of the scheme in respect of all subdivisions of land and all new works or buildings. A copy of every approved scheme (and later modifications) was to be kept at the office of the Responsible Authority, the Board, the Office of Titles and the Central Plan Office.

Provision was made for the Board to report to the Minister before approval of any housing scheme or any reclamation scheme under provisions of Part 28 of the *Local Government Act 1928*, also any scheme under section 592 of that Act.

The Responsible Authority was empowered to either by agreement or compulsory purchase, take land or any easement, right or privilege affecting any land for the purposes of any planning scheme.
The \textit{Lands Compensation Act} 1928, was incorporated with this Act for the purchase of land for the purpose of any planning scheme.

After gazettal of any scheme, the Responsible Authority could require the owner of any land to demolish or alter any building, road or other work which contravened the scheme, or in default could do so at the owner's expense.

Provision was made in the \textit{Town and Country Planning Act} for regulations to be made for:

\begin{itemize}
    \item the preparation and approval of planning schemes;
    \item the appointment by municipal councils of representatives to form committees to be responsible authorities, meetings of responsible authorities, and the conduct and carrying out of their business inquiries, reports, notices in relation to the preparation, approval and carrying out of planning schemes;
    \item prescribing reasonable fees to be charged in respect of any schemes submitted for approval;
    \item the enforcement and observance of the requirements of planning schemes;
    \item prescribing penalties for failure to comply with any approved planning scheme; and
    \item prescribing all matters as are authorized or required under this Act.
\end{itemize}

The Annual Reports of the Town and Country Planning Board (the Board) set out in detail the progress in planning developments during the 36 years it was in existence. Copies of these are available for perusal at the library of the Ministry for Planning and Development at 477 Collins Street, Melbourne.

The membership of the original Town and Country Planning Board comprised J.S. Gawler (Chairman), F.C. Cook and A.N. Kemsley. J.O. McNamara was appointed Secretary and H.P. George, Technical Officer.

The initial meeting of the Board was held on 13 March 1946 and it met on a weekly basis; firstly drafting regulations for the preparation and submission of planning schemes and enlisting support from other authorities.

After two years during which a Vehicular Traffic Census was undertaken and completed, it was found necessary to request various amendments to the Act to improve its workability, and to provide for the Melbourne and Metropolitan Board of Works (MMBW) to be a Responsible Authority to prepare a planning scheme for the Metropolitan Area. A Bill to this effect was passed in May 1949 and proclaimed on 11 January 1950 as Act No.5404.

By June 1950, the Board reported that 50 schemes were in progress or finalized and that the Board was preparing a Model Ordinance.

An Amending Act, No.5778, became effective on 11 May 1954 and dealt with:

\begin{itemize}
    \item Amendments to joint planning schemes;
    \item Interim Development Orders;
    \item Deposition of copies of proposed and approved schemes;
    \item Submission and consideration of objections;
    \item Further exhibition of planning schemes;
    \item Acquisition and use of land;
    \item Compensation;
    \item Contents of planning schemes;
    \item Widening of streets;
\end{itemize}
• Issue of certificates;
• Evidence of maps;
• MMBW as Authority for Metropolitan Area, may delegate powers to municipalities, may grant permits for the use of land, and may make a rate not restricted to cost of preparing planning schemes.

8.2.5 The First Metropolitan Planning Scheme

The operation of Act No.5778 facilitated the public exhibition of the Metropolitan Planning Scheme for 3 months from 21 July 1954 to 21 October 1954.

This Act also enabled the establishment of a Metropolitan Improvement Fund and gave approval for the MMBW to introduce an IDO for the whole Metropolitan Area (covering 700 square miles and a population of 1,524,000) to be effective from 1 March 1954.

If under the IDO, development of land required for such uses as roads, parks, schools etc., is prohibited, an owner could receive compensation from the Metropolitan Improvement Fund.

The *Melbourne and Metropolitan Act* 1956 No.5982 proclaimed on 29 June 1956 gave the MMBW power to declare and control metropolitan bridges, main highways, parks and foreshores and allowed for the Metropolitan Improvement Rate to be increased from 2 pence to 4 pence in the pound.

As part of the general consolidation of Victorian statutes the new *Town and Country Planning Act* 1958 No.6396 came into operation on 1 April 1959, but did not include various machinery amendments proposed by the Board.

However, the *Town and Country Planning Amendment Act* No.6637 was proclaimed on 1 August 1960, amending sections 5, 14, and 18 of the Principal Act and removed legal doubts as to the power of the Minister to prepare a planning scheme even if a scheme was being prepared by a council.

Also it gave power to a Responsible Authority to require an applicant for a permit to publish notice in cases where it might be detrimental to another person, and to enable the preparation of an amending scheme before approval of a principal scheme.

On 30 June 1960 the Board reported that the Metropolitan Planning Scheme adopted by the Responsible Authority (MMBW) had been referred to the Town and Country Planning Board for approval on 2 November 1959 and was being examined.

An Act, No-6751, to amend the *Town and Country Planning Act* came into effect in April 1961 dealing with incidental matters.

By this time 90.6% of the population of Victoria lived in areas under planning control - but these areas comprised only 9.6% of the area of the State.

8.2.6 The *Town and Country Planning Act* 1961 No.6849

This Act became effective on 21 February 1962 and was a major and important Act amending and consolidating previous Acts as well as incorporating many new provisions, a large proportion of which arose from recommendations of the Town and Country Planning Board and the MMBW.

Under this Act, the Town and Country Planning Board became a corporate body giving it legal entity, and incidentally allowing it to give scholarships at the University of Melbourne.

It is significant that with the planning activities now being experienced, the Board drew attention to the insufficiency of the staff of 22 persons to carry out the large volume of work in hand.

Town and Country Planning Regulations under this Act were approved by the Governor in Council on 7 November 1962 and published as Statutory Rules No.7,1962.
8.2.7 Planning and Environment Act 1987

The wide ranging Planning and Environment Act 1987 No. 45 was a comprehensive attempt to overhaul Victoria's planning legislation. There had been a number of amendments to legislation since specific planning legislation was first introduced in 1944, the central legislation being the Town and Country Planning Act 1961 No.6849. The numerous amendments and alterations subsequently made had rendered the interpretation of that Act difficult for practising planners and surveyors, and for the public in general.

In 1983 it was announced by the Minister for Planning and Environment that changes to the existing Act were proposed and submissions were invited and evaluated. In June 1986 a Draft Bill was presented and again submissions invited from interested persons and bodies. In September 1986 the Planning and Environment Bill was introduced into Parliament but was deferred by the Legislative Council in November 1986 for three months. A number of changes were subsequently agreed and the Act was assented to on 27 May 1987.

Some important features of the new legislation were:

(a) New format presentation.

The Act is presented in the more recently styled format to assist understanding by the public and practitioners. It is intended that this approach is continued in the regulations and any planning schemes made under the new legislation;

(b) A single planning scheme for an area.

Under the new Act only one planning scheme can apply to a single piece of land. Under the previous Act several different planning schemes or interim development orders could apply simultaneously to the same parcel of land causing confusion. Each planning scheme is made up of three sections, not just local government requirements but also recognizing the policies and requirements of State and regional agencies. The local government section must be consistent with the regional and State section, and the regional section must be consistent with the State section;

(c) Local councils to be responsible for administering planning schemes.

Under the new Act the local council is to be given the responsibility for the day-to-day administration of the scheme including dealing with permit applications. It is distinguished from the planning authority which prepares amendments to the scheme.

8.2.7.1 Scope of Planning

Under the new Act the scope of planning has been broadened and clarified. It specifies that environmental, economic and social effects can and should be taken into account when preparing planning scheme amendments or allowing planning permits.

8.2.7.2 Improved Public Awareness of Planning Scheme Provisions

The new Act requires that the Minister, municipal councils, and regional planning authorities keep an up-to-date copy (including amendments) of the planning scheme for public inspection.

The one planning scheme for an area should assist in clarifying public understanding of the planning process.

8.2.7.3 Permits and Appeals

(a) Speeding up the Permit Procedure.
The Act aimed at overhauling and speeding up the permit procedure process to ensure that the process was as straightforward and simple to the applicant as possible. Improvements in the Act to ensure this included:

- allowing applications to be changed by agreement between parties,
- decreasing the opportunities for responsible authorities to keep requesting further information,
- standardising requirements to minimise uncertainties

(b) Notification to Abutting Owners

The Act provides that notification of permit applications must be made to owners of adjoining land before a permit will be granted.

(c) Referral Authorities

Planning permit applications must be referred to various referral authorities and the requirements of those authorities will be given effect through a single permit, together with the local council’s requirements. Strict time limits are to apply to both the referral authorities and the responsible authority.

(d) Planning Appeals

An appeal to the Administrative Appeals Tribunal may be made for the following reasons:

- Appeals against refusal to grant the permit
- Appeals against requirements by the responsible authority to give notice under section 52(l)(d) or a requirement by the responsible authority for more information under section 54
- Appeals against failure to grant the permit within the prescribed time
- Appeals against conditions on permits
- Appeals relating to failure of a responsible authority to extend the time for a development to be started or completed
- Appeals by objectors against a decision of the responsible authority to grant a permit

8.2.7.4 Compensation

Part 5 of the Act refers to the compensation provisions.

The right to claim compensation has been clarified and the possibility of payment and expenses to claimants has been recognized.

8.2.7.5 Enforcement Provisions

Under the previous Act, there was concern that the provisions for planning enforcement were too cumbersome, slow and expensive. The overall objective of the new enforcement provisions was to achieve conformity with the scheme, not to punish offenders. Enforcement is to be in the hands of the responsible authority with enforcement orders subject to appeal to the Administrative Appeals Tribunal. See Section 831.

The Act also allows...
• that individuals who are concerned by a breach in the planning scheme where the responsible authority is perceived to be slow in taking action, may themselves take action for enforcement to the Administrative Appeals Tribunal;

• "on the spot" type penalties for minor breaches;

• the responsible authority to carry out works which an enforcement order required to be carried out and recover the costs from the person in default.

The Act does not attempt to define or limit the scope of "planning" as such, because it is considered that "planning" is a constantly evolving and changing process which continually takes new forms and directions, and quickly renders legislation "out of date".

8.2.7.6 Legislation Related to Planning

Town planning legislation in Victoria consists predominantly of the following Acts and Regulations:

• Planning and Environment Act 1987

• Planning and Environment Regulations 1988

• Planning and Environment (Amendment) Act No.86/1989

• Planning Appeals Act 1980

• Administrative Appeals Tribunal Act 1984

• Administrative Appeals Tribunal (Planning Appeals) Regulations 1987

• Subdivision Act 1988

• Subdivision (Procedures) Regulations 1989

8.2.7.7 Planning Literature

In addition to Planning Scheme Texts and Planning Scheme Maps, the Department of Planning and Development has for sale, as an expansion to the various legislative provisions, a wide range of reference material related to planning considerations and objectives.

Planning scheme/s information and updates are available from the Department as a subscription service.

8.3 Planning Appeals

8.3.1 Planning Appeals Tribunals

The Town and Country Planning (Transitional Appeals) Act 1969 No.7787 passed on 1 April 1969 provides that all appeals lodged with the Minister and not determined by 3 February 1969 could be delegated to the Town Planning Appeals Tribunal.

The Tribunal was then to consist of three members appointed by the Governor in Council: one to be Chairman who shall be a barrister and solicitor of the Supreme Court of Victoria, one a person having experience in town and country planning, and the third a person having knowledge of and experience in public administration, commerce or industry. The original tribunal consisted of H.C. Chapman (Chairman), T.C. Widdop and A.D. Whalley.
This Tribunal was replaced by the Planning Appeals Board which was established under the Planning Appeals Act 1980 No 9512. In the constitution of the Board, the Chief Chairman and the Deputy Chief Chairman were to be a barrister and solicitor of the Supreme Court, and a sufficient number of members were appointed to enable the hearings and jurisdiction of the Board to be exercised by divisions consisting of one or more members. The Board's jurisdiction encompassed parts of the Drainage Areas Act 1958; Health Act 1958, Local Government Act 1958, Town and Country Planning Act 1961, Port Phillip Authority Act 1966, Strata Titles Act 1967, Environment Protection Act 1970, Cluster Titles Act 1974, and the Drainage of Land Act 1975.

The Planning Appeals Board became a division of the Administrative Appeals Tribunal when the Tribunal was first constituted by the Administrative Appeals Tribunal Act 1984 No 10155 and as subsequently amended. Under this Act, the Board's role was to review decisions by responsible authorities for permit applications, and to deal with disputes about the operation of the Act and procedures, and the interpretation of planning schemes.

On 1 August 1987, the Planning Appeals Board was abolished by the Planning Appeals (Amendment) Act 1987 and its jurisdiction transferred to the Planning Division of the Administrative Appeals Tribunal (AAT). This preserved the identity and special features of the Planning Appeals Board while incorporating it into the general framework of the AAT.

This was part of a general overhaul of planning legislation which culminated in the passing of the Planning and Environment Act 1987. At this time, the Administrative Appeals Tribunal (Planning Appeals) Regulations 1987 S R 198/1987, came into operation. These have since been subject to a number of minor amendments.

The proclamation of the Subdivision Act 1988 led to the introduction of the Administrative Appeals Tribunal (Planning Appeals) (Subdivision) Regulations 1989, S R 263/1989. These prescribed matters relating to the jurisdiction and procedure of the AAT under the Subdivision Act.

In January 1990, the Attorney-General initiated a review of the planning appeals system. Various submissions led to the preparation of a discussion paper, the “Wren Report”, prepared by a barrister, Christopher Wren. Subsequently, on 9 January 1992, the Administrative Appeals Tribunal (Planning) Act 1991 was proclaimed in association with a number of amendments to the Planning and Environment Act 1987. This new Act dealt with the prevalence of the Planning and Environment Act over inconsistencies with the Administrative Appeals Tribunal Act, enforcement orders, objections and persons who are eligible to chair appeal hearings.

The Planning Appeals Act 1980 No 9512 has also been amended in regard to requirements to give notice to “other parties” and the presentation of a statement of grounds for appeal.

There have also been minor amendments to the Administrative Appeals Tribunal Act 1984 No 10155 regarding applications for review, preliminary conferences and costs.

8.3.2 Appeals before the Administrative Appeals Tribunal

The interrelationship between the Subdivision Act and the Planning and Environment Act has increasingly involved the surveyor in the appeals process. Surveyors are widely recognized for their expertise in many matters associated with the Subdivision Act, and are increasingly representing their clients at appeal hearings. The following brief notes provide some guidelines for the conduct of an appeal before the AAT.

The First Step
Plan your approach, do you need legal representation, expert witnesses, other professional evidence?

Preparation
Statutory basis of the appeal, documentation relating to the case. Municipal Officer's report, clear plans and photographs (do not use polaroid prints). All these should be assembled into a separate appendix to your submission.

Research
The relevance of past cases provides a critical background and precedents and assists in the interpretation of a relevant Act or planning scheme provision, especially in marginal cases.
The Written Submission

Introduction:... what the appeal is about; keep it brief.

Use a logical structure with a paragraph numbering system. Discuss the appeal site, the locality, the proposal, relevant history, planning scheme provisions, relevant council policies and guidelines. Use these items judiciously to emphasize aspects which are helpful to your case.

The Argument

Be literate and concise. Be prepared to concede points. If calling evidence, briefly summarize it. Draw a short conclusion, and if possible, sustain it by reference to the statutory basis at the heart of the appeal.

Calling Evidence

Useful when technical issues are in dispute. Make sure you know what the witness is going to say. Do not call your own client.

Cross Examination

Avoid long preambles, keep questions short. Do not ask a question if you are not sure of the answer. Do not expect a witness to agree to your point of view; try instead to demonstrate that their viewpoint is untenable or unreasonable.

Critical "Don'ts"

Do not be unduly complex; keep it simple. Do not argue with the opposition. Do not argue with the Tribunal. Do not be long-winded.

The AAT has issued a number of Guidelines and Practice Notes which may be useful to surveyors making representations to the Tribunal. See AAT Guidelines for Making Submissions in Planning Appeals February 1992, and the Practice Notes which cover such things as:

- General Provisions
- Requirements to be provided by Responsible Authorities
- Cancellation and amendment of permits
- Enforcement orders
- Drainage claims
- Recording and transcript of proceedings.

8.3.3 The Surveyor as an Expert Witness

Surveyors are being increasingly called upon to make personal representations in substantiation of clients' interests. These range from informal discussions and visits through formal meetings to attendance before courts and legal tribunals. To assist as appropriate, some notes on attendances as an expert witness are provided.

The Oxford Dictionary describes the word "expert" as trained by practice, skillful.

It is important to appreciate, therefore, that if you are called as an expert witness, it is your knowledge, training and skill in the science and art of surveying that is required of you.

Your survey qualifications already are evidences that you have been properly taught and properly and fairly examined in accordance with the Laws and Regulations of the State of Victoria.

It is necessary for you to provide the inquiring body with evidence of your level of skill, particularly in the type of survey about which you are to give evidence. Your curriculum vitae should be sufficiently comprehensive to enable the inquiring body to assess your level of competence. It must contain your name and your qualifications, including the number of your Certificate of Competency. If you are a Member or Fellow of the Institution of Surveyors Australia, say so, and include your date of membership. Obviously your inclusion in the body of your Institution will enhance your level of natural acceptability in the minds of the members of the inquiring body.

You must add your current professional position and, where there is particular relevance, your previous position.
You should indicate your membership of other professional bodies and it is useful if you mention any positions of responsibility held by you.

If you are a private practising surveyor you should provide a short list of major clients.

You should indicate the types of survey work in which you consider yourself to be particularly competent.

You must sign and date your *curriculum vitae* and ensure you have sufficient copies for the members of the hearing and all barristers. It is useful if you attach a more extensive list of actual survey work in which you have been involved.

The manner in which you present yourself is always important. Naturally you will be neat and well groomed; it is suggested you wear a dark suit because of the thought association of strength and dependability.

You should anticipate the type and form of the evidence which will be required of you. You will need to allow ample time to prepare and organise it so as to be confident of it, comfortable with it and familiar as to the location and full meaning of its various parts.

You will be required, in most cases, to prepare a written statement. Ensure you have sufficient copies of the statement and of any plans or documents you might be asked to submit as evidence.

It is usual that you be required to attend at least one conference with your client's barrister prior to any hearing.

Please understand that, in the matter before the inquiry you stand alone. Your client might very well be your employer. You are presenting yourself and your knowledge, experience with the full weight and force of the professional tradition preceding and surrounding you. You are a professional surveyor and that is your support.

Reflect too, on the nature of our legal system - the adversary system.

Do not be disturbed if your client's barrister tests you; be calm, be firm, be positive and be polite. Do be willing to provide more information or information in a form more readily understood by people outside the profession to your client's barrister. In all these matters your integrity must remain absolute.

On the day of the hearing you will be well prepared and well rested. Allow ample travelling time and, as you approach the hearing take several slow, deep breaths; relax and calm yourself. The hearing is all about finding the truth of a particular matter. There is nothing for you to fear.

When presenting your evidence, do so with a clear voice; be calm and present it in a manner which is neither slow nor rushed. You will be given sufficient time to present it properly. It is time allotted by the hearing to learn from you; use it efficiently and effectively.

In most circumstances you can be expected to be cross-examined. You should be concise in your answers. In many cases a simple yes or no will suffice. You are neither there to complain or explain. **You** are there to give the evidence asked of you - no more and no less.

During cross-examination, be aware of our adversary system; that the opposing barrister is carrying out his or her responsibilities and is not involved in a personal attack. Be calm and, if pressed on your reply, simply repeat it if you consider it to be the appropriate reply.

If you are asked about something which is outside your field of expertise then clearly and simply state that it is outside your field of expertise. There is no guilt or shame; it is a statement of fact.

Remember that it is not your responsibility to ensure the hearing is supplied with all your knowledge; it is the responsibility of your barrister (and yours to previously inform him or her), the opposing barrister and, ultimately, the members hearing the matter to ensure they have sufficient knowledge. Remember, too, their perspective is more broad in the matter than yours.

Finally, it is the prerogative of the hearing to excuse you from further attendance and, until excused, you are legally bound to the hearing. Your client's barrister will ask the hearing to excuse you and, if
it is granted, you should rise quietly, bow slightly with inclined head to the duly appointed representatives of your State and move quietly from the hearing room knowing that you have discharged your professional responsibilities to the best of your ability.

8.4 The Surveyor and Environment Impact Assessment

8.4.1 Introduction

In our present day society there is an increasing frequency for land use to be critically appraised to furnish the land administration decision makers with facts and opinions which are designed to relate the impact of projected changes in land use with the prevailing attitudes of the affected community, politicians, scientists, ecologists, planners and economists conscious of any micro-economic effects.

These facts and opinions are the end product of environmental impact assessment studies often called for in terms of the Environment Effects Act 1978. Commonwealth government interests may also intrude into this sensitive area, and federal interests are exposed in the Environment Protection (Impact of Proposals) Act 1975.

Surveyors may often be called into preparation of an Environment Effects Statement (EES) as a practical contributor in a multi-disciplinary team. It is important that these studies reflect the practical experience of the various members of the team.

8.4.2 Environment Effects Act 1978 No.9135

With the current concern over environmental issues and a growing, public awareness of ongoing environmental degradation, a need was seen to study and to document the environmental impact of large scale projects. The Environment Effects Act 1978 is the latest State legislation to set up a procedure which sets out to examine the impact of a proposed development, prior to any final decision being made by government agencies.

The aims of the procedures set up are:

• to ensure that the likely and significant environmental effects of proposals are carefully described and considered before any decisions are made;

• to promote greater awareness of environmental issues;

• to encourage environmentally sensitive, high quality planning, design, management and operations;

• to provide for informed public involvement in the decision making process;

• to ensure careful consideration of environmental policy in decision making.

The Environment Effects Statement (EES) is a document prepared before any proposed change of land use or other action occurs. It defines and evaluates the effect of the proposed project on the environment, both the positive and negative effects, and describes any feasible alternatives to it.

If the study finds that the environmental effects are sufficiently serious it may cause the project to be abandoned. Included in the options is the alternative of doing nothing. On the other hand, political or economic considerations may outweigh other considerations.

The statement is publicly exhibited and submissions are invited from any individual or group likely to be affected by it, or with an interest in the proposal. The statement is then forwarded to those who will make the decision about whether the project should proceed or not. This is usually a State or local government agency.
The statement is not an implement of decision making rather it should aid the decision makers. It is a scientific study aimed at providing and collating data which assists in making the final decision. Other factors relevant to the decision would probably include cost, need, public benefit and problems of construction. A statement should result from a comprehensive and logical assessment using a wide range of specialist skills. As such it would probably require an interdisciplinary approach.

8.4.2.1 Proposals

The process begins with the proponent seeking permission from a government or local government agency, or by directly notifying the Minister for Planning and Environment of a proposal. Under the Act, agencies involved in decision making which can significantly affect the environment can seek the opinion of the Minister as regards the need to provide an Environmental Effects Statement.

Environmental impact assessment applies equally to public, municipal and private sector proposals. It also applies to longer term programmes which provide for the implementation of a project in stages.

The following characteristics will determine whether an EES will be required:

- proposals which could have a significant effect upon the environment because of their nature, scale, intensity or complexity,
- proposals which could have a significant effect upon the environment because of their location in or near sensitive, valued or significant environments,
- proposals which are not subject to adequate scrutiny for environmental effects under other procedures, for example, proposals which may have an impact on the landscape,
- proposals which could have significant social impacts or which could be controversial.

8.4.2.2 Concepts

Because of the wide range of factors involved, there is no standard approach to the production of an Environmental Effects Statement. Some areas may be dominated by geographical or environmental factors, others economic, acoustic, engineering or water quality controlled. A thorough review of available data and a site inspection will normally provide an indication of the range and breadth of necessary disciplines. These of course will vary with proposed actions.

The assessment should include:

- a description of currently existing factors,
- a description of alternatives,
- the result of superimposing the project on the area,
- suggestions for the minimization of effects or improvement to the environment.

The evaluation should not only look at the immediate vicinity of the project but must also look at regional changes likely to result. The number of effects can of course be infinite so a judgement must be made to determine levels of significance.

8.4.3 Preparation of Environment Effects Statement

The proposed project establishes the parameters for the breadth and depth of data. Generally an Environmental Effects Statement would follow the broad headings of:

(a) Area Description,
(i) Regional (ii) Local (iii) Site

(b) Environmental Conditions;
   (i) Physical (ii) Socio-economic

(c) Proposed Action;

(d) Environmental Impact;
   (i) Physical (ii) Socio-economic

(e) Alternatives to minimize negative impacts.

As far as possible it should contain the following information:

• include a summary of the EES;
• provide an outline of the various approvals required for the project to proceed, including an outline of public consultation undertaken;
• state the objectives of the proposal;
• contain a description of the proposal;
• in the summary and the description of the proposal, provide information about the need for the proposal;
• examine feasible alternatives to the proposal (including the consequences of the 'no proposal' alternative);
• describe the environment that could be affected by the proposal and by alternatives;
• include information and technical data sufficient to permit a careful analysis of the impact on the environment of the proposal and of any feasible alternative;
• analyze the potential impact on the environment of the proposal and alternatives;
• outline the reasons for the choice for the proposal;
• describe, and analyze the effectiveness of any safeguards or standards for environmental protection intended to be applied, including any monitoring programmes intended to be implemented;
• describe the way the proposal and alternatives relate to policies in the State conservation strategy and other government policies;
• list persons consulted and summarize community views and attitudes towards the proposal;
• state the names of those involved in the preparation of the EES.

Information on the existing environment, the impact of the proposal and alternatives, and safeguards will be easier to read if grouped under issue headings, for example, noise abatement, landscape quality, and traffic management.
8.4.4 Public Access

A brief summary of the proposal and the availability of a draft outline of the proposed contents of the EES should be publicly advertised and comments invited. The period specified for access and comment is generally 28 days. After considering comments on the proposed outline, the proponent must revise the draft outline to cover issues of public concern.

On completion, the EES is placed on public exhibition, usually for a period of two months. This may be altered by the Minister in particular circumstances. Every effort must be made to publicize the EES.

The Minister for Planning and Environment may appoint a public inquiry panel to provide advice as part of the assessment process. Where necessary, additional information may be sought.

Inquiries are normally held where the issues are particularly controversial, difficult to assess, where particular expertise is required, or where a planning scheme amendment is necessary.

An Assessment Report, which may contain the findings of any panel, is prepared by the Minister and provided as advice to decision makers. Multiple copies are printed and made publicly available free-of-charge.

Decision makers must carefully consider the Minister's Assessment Report. If its recommendations are not adopted, the decision maker must provide the Minister with a statement (in writing) giving reasons for not doing so. This statement is treated as a public document.

8.4.5 Commonwealth Government Interests

The Commonwealth Department responsible for environmental matters also has responsibilities under the Environment Protection (Impact of Proposals) Act 1975. Where funding for public-works is from a Commonwealth source, or where Commonwealth approval, for example an export licence, is necessary, an Environmental Impact Statement may be required under that legislation.

The State Department of Planning and Development co-operates closely with the Commonwealth authorities. It aims to avoid duplication of effort by attempting to ensure that any environmental information which might be called for will fulfil both State and Commonwealth requirements.

8.5 Land Subdivision Prior to 1989

8.5.1 Introduction

This Section is an overview of land subdivision policies and practices over the last century, culminating in the major reformation and consolidation of practices now embodied in the Subdivision Act 1988. With its proclamation on 30 October 1989, a new era in the control and management of land subdivision has been devised which largely flowed from the extensive investigations conducted by the Building and Development Approvals Committee (BADAC), which completed its report in 1973.

As the bulk of the subdiisional records held at the Land Titles Office deal with land subdivided under former legislation, the interpretation of records requires knowledge of this former legislation.

8.5.2 The Earliest Controls

The first European settlement in Victoria (or the Port Phillip District of New South Wales as it then was) occurred around 1835 with the arrival of unauthorized settlers. The first sale of Crown land was around 1837 when auctions took place in Melbourne and Williamstown. As the population increased land originally classed as rural was changed to residential and small farms and allotments became uneconomical, and hence there developed a need for subdivision of the original Crown allotments.
The first controls of these private subdivisions (as opposed to the Crown subdivisions) were to be found in The Public Health Act 1889, mentioned earlier in Section 8.2.

8.5.3 Local Government Control of Subdivision - A Brief History

The first enactment in Victoria requiring the consent of a municipal council to a subdivision of land was the Local Government Acts Amendment Act 1914. Prior to this some subdivisions had been approved by municipalities but these approvals only ensured compliance with the provisions of the Health Act and the Local Government Act 1903 concerning the laying out of new streets.

In spite of these provisions, indiscriminate subdivision of properties occurred in the City of Melbourne and the inner suburbs. Many of these subdivisions were not marked on the ground by a surveyor and this has led to many of the amendment of title problems which have been and still are present. The Local Government Acts Amendment Act 1914 No.2557 came into operation on 2 November 1914.

The first of the relevant provisions of that Act was section 58 which was expressed to apply to all lands situated in boroughs and shires.

This section provided that where any person intended:

(a) to make or lay out on such land any new road, street, lane or passage ......; or

(b) to subdivide such land for the purpose of selling, conveying or transferring the same in allotments, any of which will not have means of drainage therefrom by a lane or passage at the side or rear thereof as well as a frontage to an existing road or street; notice of intention and submission of a plan to the council was required. The form of notice is prescribed and it refers to an "intention to subdivide land into allotments". Section 59(b)(ii) provided that the plan submitted set out all such details as the council considered necessary to ascertain whether or not the land when it is subdivided and occupied could be sufficiently drained.

Section 65(a)(b) and (d) related to penalties imposed on persons who neglected or omitted to give notice and submit the plan as required by section 58, or who sells conveys or transfers the land or any part thereof in allotments before the plan is sealed.

Section 69 extended the field of operation of the relevant provisions to certain lands in shires or those cases where a person intended to subdivide land for the purpose of selling conveying or transferring allotments of area less than one acre.

A new requirement was added that sealed plans were to be lodged with the Registrar of Titles within one month of sealing by council, or the plan was deemed to be cancelled. This legislation continued in force through the consolidations of the Local Government Act 1915 and 1928.

Next followed the consolidating Act of 1946 No.5203 in which sections 568(1), 568(2)(b)(ii), 568(10)(a)(b) and (d) and 561(2) correspond respectively with sections 58,59(b)(ii), 65(a)(b) and (d) and 69 of the 1914 Act. In the year 1952 Re Nelson and rammer's Contract, 1952, VLR 391 a case on the interpretation of the above sections was decided in the Supreme Court of Victoria by Mr. Justice Smith.

In that case it was held, inter alia, that section 568 of the 1946 consolidation, corresponding with section 58 of the 1914 Act, was directed at overt acts by which land is divided into two or more parts with the intention that those parts should be separately occupied, including a subdivision for the purpose of leasing the parts, as well as a subdivision for the purpose of selling, conveying or transferring the fee simple.

An amending Act in 1949, No.5443 extended the period for lodging to three months etc.

The next legislative measure dealing with this matter was the Local Government (Amendment) Act 1954 No.5843. Two material amendments were effected by this Act.

The first was to section 561(2) of the 1946 Act (previously section 69 of the 1914 Act) and had the effect of making the provisions of the Act regarding subdivisions of land applicable to all land in all shires regardless whether the area of the allotments into which the land was subdivided was more than one acre or not.
The second was a direct result of the decision in *Nelson and Tammer's Contract* It is now contained in sub-section (2) of section 569 of the *Local Government Act* 1958, as amended by section 23 of the *Sale of Land Act* 1962 No 6975 Briefly the purpose of this amendment was to make it clear that any separate disposition in fee simple of a part of land was caught by the Act notwithstanding that part had previously been leased or separately occupied.

The above provisions relating to subdivision of land were carried forward unamended into the 1958 consolidation, and were also incorporated substantially unamended so far as this aspect is concerned in the amendments affected by section 23 of the *Sale of Land Act* 1962 No 6975 Other amendments arose from the amendments to the *Sale of Land Act* 1965 No 7272

8.5.4 *Local Government Act* 1958 - Subdivision - A Brief Summary of Relevant Sections

With the introduction of the *Subdivision Act* 1988 and the subsequent *Subdivision (Miscellaneous Amendments) Act* 1991 and the *Subdivision (Amendment) Act* 1993, the various sections of the *Local Government Act* 1958 which related to land subdivision as set out below, have all now been repealed Municipal council authority in matters of land subdivision has since been controlled by the various sections of the *Subdivision Act* and the *Planning and Environment Act*

The sections of the *Local Government Act* 1958 which related to subdivision of land were contained in Division 9 of Part XIX, sections 562-574

These sections applied virtually over the whole of Victoria as outlined in section 562 of the Act, and applied to all cities, towns and boroughs and to all parts of shires which had previously been boroughs.

A brief summary of various parts of these sections is

Section 569AA - definition of what constitutes a subdivision of land

Section 569AB - council may seal a plan of consolidation

Section 569 - Any intention to make or lay out any new street, road lane or passage or to subdivide land into two or more parts (other than by the disposal of a part to the Crown or any public statutory body) requires notice to the municipal council.

The form of notice is provided in the Thirtieth Schedule of the Act and should be accompanied by the plan of subdivision and as many copies as the council requires.

Section 569A - details the information to be distinctly shown on the plan submitted to the council in respect of

(a) the new allotments (lots),

(b) the existing streets within the parcel,

(c) abutting streets,

(d) new streets,

(e) the method of drainage,

(f) the access to new streets,

(g) the lands subject to easements of drainage and sewerage,

(h) the lands subject to an easement appurtenant to the subdivision,

(i) the lands which have a dominant tenement over easements contained within the subdivision,

(j) the appropriation of easements for the supply of water, gas, electricity, sewerage services, drainage and underground telephone plant.
Section 569A(2) - requires the plan to be submitted to the council to set out levels and other particulars as required to enable the council to:

(a) fix levels of streets;

(b) ascertain whether the subdivision complies with the *Health Act*;

(c) ascertain whether the land can be adequately drained;

(d) ascertain whether every new street is connected with another street;

(e) ascertain whether there will be a reserve or allotment abutting or continuous with a street other than a reserve for the use of purchasers; and

(f) ascertain in respect of land in a sewerage district as to whether all the allotments and roads can be sewered.

Section 569B(4) - provides power for the council to fix the level of every new street proposed and requires the council to seal the plan or supply in writing notice of refusal to seal both within 100 days of submission of the plan to council.

Section 569B(7) - details the reasons requiring council to refuse to seal the plan such as:

(a) inadequate drainage;

(b) non-compliance with *Health Act* requirements;

(c) incapacity for allotments to be used for permitted purposes;

(d) lack of consent of Minister for Lands in case required as to access over Crown land;

(e) inadequate procedures taken, where necessary, as to the referral to or the obtaining of consents of, the State Rivers and Water Supply Commission or the First Mildura Irrigation Trust;

(f) proposed development fails to comply with the provision of any interim development order or planning scheme or any relevant permit has not been obtained.

Section 569B(8) - details reasons allowing the council to refuse to seal the plan such as:

(a) inadequate connection of a new street to another street;

(b) insufficient rounding of street intersections;

(c) the existence of a reserve or allotment abutting or continuous with or along any portion of a new street;

(d) the intended position of a road ought to be varied;

(e) the lack of distinction of the land subject to inundation;

(f) the width of any new street will be less than 20 metres;

(g) direct vehicular access to allotments should not be permitted and alternative means of access has not been but could be provided;

(h) the land to be subdivided is the site of a building comprised of two or more attached dwellings and the size of the land does not conform with requirements;

(i) the intended position etc. of any road ought to be altered to facilitate sewerage connections;

(j) any allotment cannot be adequately sewered;

(k) any street cannot be readily provided with sewers;
(1) the allotments will not be provided with adequate water supply or sewerage;

(m) the owner does not agree to transfer any reserve to the council;

(n) the owner does not have relevant crossings constructed;

(o) proper provision has not been made for the reticulation of water, gas, electricity, sewerage, drainage and underground telephone plant;

(p) for any reason.

Sections 569B(8A) (and following) - deals with the right for a council to require a contribution for a place or places of public resort and recreation and the subdivider can contribute either one-twentieth part of the land or a monetary levy equal to one-twentieth part of the site value.

Section 569B(9) - refers to cancellation of a plan of subdivision. The only circumstances in which the plan can be cancelled are if no new road, lane, street or passageway has been made or laid out on the land and also if no allotment into which the land has been subdivided has been sold, conveyed or transferred.

Section 569BAA - relates to amendment of the sealed plan of subdivision before the approval of the plan by the Registrar of Titles vide section 97 of the Transfer of Land Act 1958.

Section 569BA - relates to reserves, as set out on plans of subdivision, to vest in the municipal authority.

Section 569D(3A)(a) - the council is given powers to exempt certain subdivisions from the provisions of section 569. The usual circumstances are where an owner intends to subdivide land into not more than two parts and to dispose of one of those parts to the owner of an abutting parcel of land.

Section 569E - If any new street, lane, road or passage is shown on the plan of subdivision, the council can require the construction or partial construction of the new street, lane, road or passage. The construction is either carried out by the subdivider under the supervision of municipal engineers, or carried out by the municipality at the subdivided expense. This section also relates to “bonding” by payment of security to council and the subdivider undertaking to complete the construction within a certain period as the council directs,

In addition to the above the council may require the owner to cause to be provided any services as specified by council or servicing authorities, and requiring the subdivider to agree to contribute towards the cost of future drainage works.

Section 569H - Open space contribution for construction of buildings within the municipality which are to be used for residential purposes.

Section 570 - Any person who has given notice of intention to subdivide, vide section 569, or who has applied to council, vide section 569AB, may appeal to the Administrative Appeals Tribunal against a council’s failure or refusal to seal the plan of subdivision or plan of consolidation.

8.5.5 Restrictions on Sale of Land in a Subdivision

1914 - Local Governments Acts (Amendment) Act - Plan of subdivision to be referred to council where it did not comply with certain requirements.

1944 - Local Government Act No.5056 - Amended section 568 to require submission of plan to council when subdividing but exempting plans where all allotments were in excess of one acre.

1962 - Sale of Land Act No.6975 - Defined “Sale” etc. Act did not bind the Crown, but all statutory bodies and authorities required to give notice of intention to subdivide. Section 9 debarred sales before plan approval. Amended section 97 of Transfer of Land Act to require approved plan to agree with sealed plan, and Registrar of Titles to be satisfied there was no contravention of section 9 of the Sale of Land Act before approving plans.
1963 - Sale of Land (Amendment) Act No.7052 - Amended section 9 to restrict its operation to plans showing three or more allotments. Section 569D of Local Government Act 1958 amended to regulate sales on plans showing only two allotments, and inserted section 569D(3A) in Local Government Act to provide exemption from pre-selling requirements for such "subdivisions".

1966 - Local Government Act No.7495 - Amended section 569 to exclude from Local Government Act subdivision provisions relating to sales to the Crown or any Commonwealth or State public or statutory body.

1967 - Railway Lands Act No.7571 - Provided that Sale of Land did not apply to certain sales by the Railway Commissioners under certain scheduled Acts relating to dismantled railways.

1969 - Transfer of Land (Subdivision of Allotments) Act No.7814 - By inserting section 569AB in the Local Government Act it prevented sale without a plan of subdivision of a part of an allotment etc.

1969 - Sale of Land (Amendment) Act No.7898 (operative 1 March 1970) - Added a new section 8A regulating sale of land subdivided into not more than two allotments.

8.5.6 Transfer of Land Act and Subdivision

1862 - Real Property Act No.140 - Required a proprietor subdividing for purpose of selling in a township to deposit a map of the township with the Registrar-General.

1866 - Transfer of Land Statute No.301 - Similar to above, but the deposition read "if required".

1886 - Transfer of Land Amendment Statute No.872 - Strengthened requirements for plans, surveys and surveyors following Royal Commission. In section 2 ".....and on any proposed subdivision under section 34 of the Act, the Commissioner may require such surveys and plans to be made.....as the Commissioner may think fit".

1887 - Transfer of Land Statute Alteration and Amendment Act No.945 - Introduced the concept of the Commissioner's Plan to determine doubtful boundaries of old subdivisions and to prepare a new plan.

1921 - Transfer of Land Act No.168 - First apparent provision for the appropriation of easements (for way and drainage).

1934 - Local Government Act No.4279, section 70(2) - Amended section 212 of the Transfer of Land Act 1928 to include provisions for the supply of water, gas and electricity and for the provision of sewerage purposes. Also set out that easements applied without express reservation.

1941 - Land Act No.4869, section 35 - Substituted a new section 212(2) in the Transfer of Land Act 1928 to provide that a transfer by reference to a plan deposited with the Registrar of Titles was deemed to include and always to have included easements for underground telephone services as well as the others already described above.

1944 - Local Government Act No.5056, section 33 - Substituted new section 211 in the Transfer of Land Act 1928. Section 211(1) read "Any proprietor subdividing into two or more parts shall, if so required by the Registrar lodge with him a plan of such land and such plan may in the discretion of the Registrar be treated as a deposited plan".

1955 - Transfer of Land Act 1954 No.5842 - This re-arranged, re-drafted and amended sections 211 and 212 of the 1928 Act as sections 96,97 and 98 of the 1954 Act. Section 97 referred to where any proprietor subdividing into two or more parts is "required by the Registrar to lodge a plan.....". The Registrar could refuse to accept for lodgement any plan of subdivision for which written consent of council had not been given. Section 98 provided that a transfer by reference to an approved plan of subdivision would include inter alia a grant of easements appropriated or set apart on the plan as may be necessary for the enjoyment..... without express reservation.

1959 - Transfer of Land Act No.6399 - Carried forward sections 96, 97 and 98 unaltered from the 1954 Act.
1960 - *Transfer of Land (Amendment) Act* No.6544 - Set out the classes of easement which could be appropriated in a plan of subdivision under section 98 and which were deemed appurtenant and at all times to have been appurtenant to the allotment of a proprietor.

1963 - *Sale of Land Act* No.6975, section 27 - Slightly changed section 96 of and added section 97A to the *Transfer of Land Act* 1958. Section 97A required the Registrar before approval to ensure that the plan as approved accorded with the plan as sealed and to be satisfied there had been no contravention of the provisions of section 9 of the *Sale of Land Act*.

### 8.5.7 Stratum Subdivision

#### 8.5.7.1 Background

Until the mid-1950s it was not possible to subdivide buildings, and the separate ownership of flats was achieved by the use of a company registered under the *Companies Act*.

There were varied ways of doing this and they may still all be found in practice. The principal one was to have groups of shares, the ownership of which gave the right of occupation of one of the flats and the rights to use the common property.

In some cases there was a formal lease and the right of occupancy was not left to rely on the deemed contract relationship between shareholders of companies and it was further reinforced by the *Landlord and Tenant Act*.

In many instances, it was very difficult to obtain finance to purchase one of these flats and an eminent practising solicitor, Morris Komesaroff, developed the scheme known generally as stratum titles by using a service company incorporated under the *Companies Act*.

An amendment to the *Local Government Act* was procured in 1965 to provide for the subdivision of a building into flats and areas intended for use and enjoyment in common by the occupants of the flats.

In 1959 the *Transfer of Land Act* was also amended in relation to section 98 to allow the entitlement of easements in the subdivision of a building to give each flat owner appropriate rights over the other flats and those parts of the property not occupied by the separate flats.

Sections 98A, 98B and 98C of the same Act includes the relationship between title to stratum estate and shares in the service company together with the rules affecting shares in the service company and the registration of a service agreement which was necessary to fix contributions by shareholders for the proper maintenance of the service company and buildings and surrounds.

#### 8.5.7.2 Aspects of the Plan and Survey

The plans of subdivision prepared for the sale of "stratum titles" were particularly complicated as the buildings being subdivided had to be located precisely both vertically and horizontally taking account of every small buttress, pillar and every change of level etc. The levels were determined relative to the local datum for levels. In Melbourne at that time, it was the Melbourne & Metropolitan Board of Works Datum. Da turns are discussed in some detail in Section 8.3 of the *Survey Practice Handbook Part 2, Survey Procedures*. The extent of the information required was expensive in survey and examination costs and also in preparation of the folios of the Register.

#### 8.5.7.3 Aspects of the Purchase and Registration of Land in a Stratum Subdivision

This scheme almost invariably adopted a lot for each flat plus an additional lot encompassing the "residual land" which contained those parts of the property (including the roof and the land under the ground floor) not occupied by the flats. The lot for the "residual land" was transferred to a service company formed for that purpose.
The contract of sale of a lot on such a plan included additional features such as:

- a condition requiring specific treatment of easements and appropriate covenants to run with the land;
- a statement that all lots were to be sold subject to the same conditions;
- an agreement for the issue to the purchaser of a specified group of shares in the service company;
- an undertaking by the vendor to procure the execution by the company of an agreement with the purchaser in a form annexed to the contract;
- an undertaking by the purchaser that he would execute a registerable charge over the lot in a form annexed to the transfer.

The purchaser eventually received a share certificate and service agreement. A folio of the Register would issue to the lot defined three dimensionally in space.

8.5.7.4 Summary

Stratum schemes were often converted to strata plans under the former Strata Titles Act 1967 by application to the Registrar of Titles but conversion now falls under the provisions of sections 98CA to 98CF of the Transfer of Land Act requiring the cancellation of the building subdivision and the registration of a plan of subdivision under the Subdivision Act 1988. About 7500 stratum schemes remain.

Stratum subdivisions are widely spread throughout many parts of Victoria and surveyors must be familiar with both the defined title rights of measurements and levels, and the expressed easement entitlements within a building subdivision.

8.5.7.5 Bibliography Taylor W.J. Introduction to Stratum Titles, The Australian Surveyor Vol. 16 No. 8, December 1957.

8.5.8 Strata Titles Act 1967 No.7551

8.5.8.1 Background

The subdivision of land by way of a strata subdivision and the sale of units of such subdivisions was regulated by the provisions of the Strata Titles Act 1967 No.7551. The Act introduced the concepts of the Body Corporate, common property, lot entitlement, lot liability and special provisions for support, transmission of services and so on.

With these newer concepts, service companies were not necessary, and so conveyancing by comparison became quite simple. The Act was eminently successful, but has now been repealed following the introduction of the Subdivision Act 1988, which is much wider in its application.

The original concept of the Strata Titles Act was to subdivide buildings "in strata", that is into the various different levels of residential occupancy of the building. This concept identified units on different levels of the building, and had been expanded over the years to include:

(a) brick pairs with surrounding common land;

(b) detached or attached villa units with common land;

(c) non-residential units such as commercial or industrial units; or

(d) in the one development it was possible to have residential units as well as units for commercial or professional purposes.
8.5.8.2 Units and Accessory Units

A plan of subdivision in strata differs from a conventional plan of subdivision in that it defines the boundaries of lots (units) by reference to levels (i.e. strata) so that such unit has upper, lower and side boundaries, i.e. a three-dimensional definition.

Accessory units are units such as garages, car parking spaces, private garden areas and storage spaces which are attached to the main unit and which cannot be sold, leased or mortgaged unless in conjunction with a main unit.

When a plan of strata subdivision was registered at the Land Titles Office a separate title issued for each unit.

8.5.8.3 Common Property

This is the land within a subdivision in strata which is neither a main unit nor an accessory unit. All unit owners have a share in the use and maintenance of the common property in proportion to their unit entitlement and unit liability which is set out on the plan of subdivision.

Any dealing, such as a transfer of the common property as whole or part, required the agreement of all the registered proprietors.

8.5.8.4 Body Corporate and By-Laws

Upon the registration of the plan at the Land Titles Office a statutory body corporate automatically came into existence. The members of the body corporate were all the registered proprietors of the units at any particular time. The body corporate is responsible for the upkeep and maintenance of the common property, the insurance of buildings and the general administration of the units.

The First Schedule of the Act contained by-laws concerned with the powers, obligations and administration of the body corporate. These by-laws could be added to, amended or repealed only by unanimous resolution of the members. The by-laws in the Second Schedule were the ‘house-rules’ involved in management of the body corporate, and concerned with particular instances of the community code of living within the development, such as the ownership of animals, colour of painting of external surfaces of the units, and so on. The by-laws as set out in this Second schedule could be amended or repealed by a majority of the members. The body corporate was required under the Act to insure all buildings in the strata subdivision against fire and other risks unless otherwise decided by unanimous resolution.

With the repeal of the Strata Title’s Act, the provisions for the creation of bodies corporate are now set out in Part 5 - Subdivisions with Bodies Corporate, of the Subdivision Act 1988. The duties, powers and so on relating to the operation of bodies corporate are set out in the Subdivision (Body Corporate) Regulations 1989 - S R No 249/1989.

8.5.8.5 Easements

Section 12(1), (2) and (3) referred to easements appurtenant to the common property and units on the registered plan.

Included within this section as appurtenant are all rights such as rights of support, shelter and protection, and for the supply of water, sewerage, gas, drainage, electricity and all other services.

No specific appropriation of encumbrances is necessary or would be permitted on a plan of strata subdivision.
8.5.8.6 Surveyors Responsibility

This Act placed far more responsibility on the surveyor than is involved with conventional subdivision of land. The Land Titles Office examination of strata subdivision did not involve more than a cursory glance at the title re-establishment if title dimensions and title connection were laid out. If occupation was reasonably close to title boundaries the Office accepted the re-establishment of the site without question. This of course places total responsibility for the survey re-establishment upon the surveyor.

In situations where new buildings (units) are to be constructed, it is important that the re-establishment of the site be done before construction commences to ensure that the buildings are not constructed over title boundaries and that minimum offsets of buildings to title boundaries are maintained.

This responsibility has not lessened with the introduction of the *Subdivision Act* 1988.

8.5.8.7 Aspects of the Survey and Plans

The Strata Titles Regulations provided for buildings to be surveyed to the degree of accuracy necessary to plot the plan to scale on a relatively small sheet. Thick lines could be used without dimensions to represent building lines. Heights and depths could be related to the site boundary or floors and ceilings without the need to quote levels.

The survey and plan production was in many cases much simpler than in stratum subdivision, but difficulties in the narrative style legend occurred in many of the larger strata subdivisions. These difficulties arose from describing such things as split levels, overlapping units, sloping sites etc.

In addition, because a lot could not consist of more than one piece, the practice of linking remote parts of a lot by an underground tunnel was introduced. A tunnel and other boundaries not defined by walls or buildings required dimensions.

These complications often led to many and various requisitions from the Land Titles Office. It also become apparent that many non-specialists had problems interpreting the plan and understanding the intention of the surveyor.

There were also problems with re-development of strata units due to the inflexibility in the then current requirements for the presentation of plans. Much of this has been clarified by new forms of presentation. *Vide* Plans related to *Subdivision Act* 1988 in *Survey Practice Handbook Part 1, 1993* update.

8.5.8.8 Sale and Transfer of Lots

Lots on a proposed plan of strata subdivision could be sold before the plan was sealed by the municipal council and approved by the Registrar of Titles, provided that the contract for the sale of the lots required that the deposit and any other moneys payable by a purchaser be paid to a named solicitor or estate agent to be held by that solicitor or estate agent upon trust pending registration of the plan at the Land Titles Office. If the plan was not so registered within six months of the date of the contract then the purchaser could avoid the contract of sale and thereupon be entitled to recover all moneys paid by him under the contract, but would be liable to pay an occupational rent if he or she has been in actual occupation of the unit.

No person could sell, transfer or mortgage an accessory lot unless such transaction was made in conjunction with a dealing with a main or primary unit. The owner of one lot could sell and transfer ownership of an accessory lot to a person who was already the owner of another unit.

8.5.9 Licences for Strata of Crown Land

The *Conservation, Forests and Lands Act* 1987 No.41 was amended in November 1989 by the *Conservation, Forests and Lands Acts (Amendment) Act* No.90/1989, to permit the issue of licences for a stratum of Crown land under specified conditions. This amendment added section 138A to the Principal Act, and defines "Stratum of Crown land" as "a part of land consisting of a space of any shape below, on or
above the surface of the land or partly below and partly above the surface of the land, all the dimensions of which are limited". See also Section 5.8.

8.5.10 Cluster Titles Act 1974 No.8661

8.5.10.1 Background

In 1972 acting on a recommendation from the Building and Development Advisory Committee (BADAC) - the Government of Victoria established a committee to investigate and report on legislative amendments required to introduce the concept of cluster housing in Victoria.

The committee (subsequently known as the "Cluster Committee") in June 1973, recommended to the Minister for Local Government that amendments be made to the Strata Titles Act 1967 No.7551 and the Uniform Building Regulations (now the Victoria Building Regulations) to facilitate more flexible siting of houses and to allow for land-only subdivision of cluster sites.

Further recommendations called for a revision of the rigid standards applying to site requirements for residential subdivision and a suggestion was made that the committee should help prepare the necessary amending legislation and also to formulate a model code for municipalities to use in the absence of other regulations.

8.5.10.2 Introduction of Cluster Titles Act

It transpired that a completely new Act was prepared and became the Cluster Titles Act 1974 No.8661 taking effect from 1 October 1975.

8.5.10.3 Application of the Cluster Titles Act

As can be assessed from the amount of time from first consideration of the cluster concept up to the commencement of operation of the Act a vast number of meetings, seminars and public discussions had already taken place by 1 October 1975.

During the next twelve months, however, as the public in general, developers, municipalities, architects, surveyors, planners and engineers began to grapple with the legislation, the amount of public discussion and debate increased tremendously.

All the involved professional institutions, developer and builder associations, held at least one seminar, committees were formed to examine the legislation, legal opinions were sought and circulated and submissions calling for immediate amendment or repeal of certain parts of the Act were starting to flow into the Minister's Department.

One major reason for this was that section 5 of the Act called for all subdivisions previously covered by the Strata Titles Act, except the subdivision of multi-storey buildings, to be carried out under the Cluster Titles Act after twelve months operation of the Act.

The section of the Act requiring this procedure came under intense pressure from almost all sectors of the community. Municipalities were scrambling to formulate policies now that certain provisions of the previous Uniform Building Regulations no longer applied. Instead of being able to accept the spirit of the cluster principle which required sensitive consideration and a flexible attitude by councils and in general a lessening of some of the over-design requirements of roads and servicing, most municipalities were coming out with more conservative policies requiring even lower densities and higher standards than before.

The whole cluster concept looked to be in danger of failing due to the application of this new legislation to a situation which was already operating very efficiently.
The true application of cluster really applied to larger and newer areas but it was being forced on to a nervous and frustrated section of the building industry which was only just beginning to come out of a deep economic recession.

The offending section 5 was removed by the *Cluster Titles (Amendment) Act* 1976 No.8876 which gave subdividors the option of using either the *Cluster Titles Act* as amended, or the *Strata Titles Act*.

### 8.5.10.4 Choice of Strata Titles Act or Cluster Titles Act

Many municipalities allowed the “Cluster Concept” as set out in the Model Code prepared by the Cluster Committee to be effected by use of the *Strata Titles Act*.

The *Strata Titles Act* was more acceptable to developers for the following reasons:

- They were familiar with it.
- It was more simple, particularly in relation to the appropriation of easements to cover services through the units and common property.
- Sales of units could commence at any time, even “off the plan”, whereas sales of cluster title lots could only commence after approval of the plan at the Land Titles Office.
- Strata subdivisions were generally not circulated to servicing authorities and would therefore be sealed more quickly with less cost such as “headworks levies”, which usually applied to cluster subdivisions.

The Cluster Committee recognized that the above 4 matters required attention and recommended further amendments to the Minister. A further Amending Act was passed in May 1978.

### 8.5.10.5 Cluster Titles (Amendment) Act 1978 No.9128

Three main amendments were incorporated in this Act which were:

- An amendment to section 7 to obviate the need for creating specific easements within common property.
  
  The problem of delineating and recording the location of services installed in common property was overcome in section 11 (12) (aa) which gave councils the power to require “as constructed” plans of service works.

- Amendment to section 11 to give the municipal engineer discretion as to whether or not the plan was to be circulated to authorities.

- Amendment to the *Sale of Land Act* 1962 No.6975 by insertion of section 9A. This amendment allowed the pre-selling of cluster lots where a building is erected or intended to be erected on the lot.

### 8.5.10.6 Review of Cluster Titles Act

This Act was not widely used even following the 1978 amendments. The Government subsequently appointed a task force to investigate the possibility of consolidating all legislation relating to land subdivision into what eventually became the *Subdivision Act* 1988.

### 8.5.10.7 Validity of Existing Strata and Cluster Titles

Although both the *Strata Titles Act* and the *Cluster Titles Act* have now been repealed, plans registered pursuant to these Acts retain their validity. In section 44 of the *Subdivision Act* 1988, it is set out that:
(I) an approved plan of subdivision, or  

(II) a registered plan of strata subdivision, or  

(iii) a registered cluster plan, or  

(iv) an approved plan of consolidation -  

must be taken to include a reference to a registered plan under the Subdivision Act 1988', and goes on to include plans of re-development under the Strata Titles Act 1967 and plans of cluster re-development  

The cluster concept when transformed into legislation did not achieve wide acceptance, and although there were some cluster applications still in various stages of the approval process at the time of the introduction of the Subdivision Act, cluster titles are now not being pursued, although applications for cluster subdivision approval can be sought under the new Act Cluster subdivisions in existence in Victoria number about 2000, with many of them being quite small  

As there are several thousand strata titles and a lesser number of cluster titles and stratum titles issued prior to the introduction of the Subdivision Act, the land surveyor will need to be conversant with the origins and establishment of these titles for many years to come  

8.5.11 Amendments to Sale of Land Act 1962 No.6975  

8.5.11.1 The Original Act  

The Cluster Titles Act, as originally enacted, inserted subsections (1A) and (1B) in section 9 of the Sale of Land Act 1962  

Section 9(1A) prohibited the sale of a lot on a cluster subdivision unless the relevant plan had been registered  

Section 9(1B) dealt with staged cluster subdivision and prohibited the sale of a lot on a stage on which a requirement was outstanding  

8.5.11.2 Later Amendments  

Section 8 of the Cluster Titles (Amendment) Act 1978 No 9128 introduced a further section - Section 9A - into the Sale of Land Act  

This provided in effect that, as from 1 July 1978, the Sale of Land Act provisions would not apply to the sale of a lot on a cluster subdivision provided that certain pre-requisites as to building were met, that the relevant plan had been sealed by council, that a certificate of a licensed surveyor as to agreement with title was attached to the contract, that the contract contained specified provisions as to purchase money being held on trust, and that the vendor was registered or entitled to be registered as proprietor of the lot sold  

Provided therefore that the requirements of the new sub-section (9A) of section 9 of the Sale of Land Act were complied with on the sale of a lot on a plan of cluster subdivision, that sale did not constitute a breach of section 9 of the Sale of Land Act The usual requisition as to non-contravention of section Q was to be made before registration of the plan of cluster subdivision and before the issue of any title on any subsequent stages  

One of the requirements to be satisfied before lots could be sold prior to registration of a plan of cluster subdivision was the provision of a certificate of a licensed surveyor as to agreement with title To enable such a certificate to be given in doubtful cases, section 97B provided for the lodgment and approval by the Registrar of a surround plan  

Section 97B of the Transfer of Land Act provided that ‘Where it is intended to subdivide land in cluster form the registered proprietor may lodge with the Registrar a plan setting forth the prescribed matters and complying with any requirements of the regulations for approval for the purposes of section 9A of the Sale of Land Act 1962
This entailed examination by the Land Titles Office of the surveyor’s re-establishment, and required provision by the surveyor of a plan of survey, abstract of field notes of survey and licensed surveyor’s report.

The Cluster Titles (Amendment) Act also provided for the authorization of the council to require the owner to submit a plan showing the location of any services over the common property (section 4).

The Sale of Land Act has been extensively amended by the provisions of the Subdivision Act 1988 and further amended by the Sale of Land (Amendment) Act No.42/1989.

8.6 Impact of the Subdivision Act 1988

Before being proclaimed on 30 October 1989, this Act had already been amended by the Subdivision (Amendment) Act No.47/1989 and subsequently amended by the Subdivision (Further Amendment) Act No.92/1989. Further amendments occurred with the passing of the Subdivision (Miscellaneous Amendments) Act No. 48/1991 which inter alia repealed Acts 47/1989 and 92/1989. With the experience of 4 years, some further refinements have been introduced with the passing of the Subdivision (Amendment) Act No.57/1993.

The transition from the previously existing practices of subdivision of land to comply with the provisions of the Planning and Environment Act and the day-to-day application of the Subdivision Act and their attendant Regulations will necessitate close attention by the surveyor until the numerous variations in practice have stabilized to a large extent.

8.7 Subdivision Act 1988

These notes are intended as an overview only and to guide users to the appropriate section of the Act. Precise interpretation is only possible by close examination of the published Act. These notes are based on Reprint No.3 of the Subdivision Act 1988 dated 16 September 1993 which incorporates amendments up to Act No.57/1993 mentioned above.

When the principal Act came into operation on 30 October 1989, the objectives were:

(a) a uniform process for subdivision approvals which are part of the planning system.

(b) a uniform style of title for property in Victoria.

(c) a system that is sufficiently flexible to allow for changes to be implemented from time to time.

(d) a system which has the municipal council as the central body responsible for the co-ordination of planning, building, traffic and drainage control etc.

(e) a simplified Act which can be more readily understood by interested users.

8.7.1 Part 1 - Preliminary

This Act applies to the subdivision and/or consolidation of land, buildings, creation and/or variation or removal of easements, and also the compulsory acquisition of land by authorities, or persons acting as authorities, in the development of land.

To be properly acquainted with the understanding of the Act, the user should be aware of the meanings attached to some 40 definitions set out in section 3.

At its core is the system of referrals to authorities where planning permits are sought. This can be further grouped into classes of applications. A starting point is that some applications may not need to be referred to authorities. There are several types of applications and these can be examined as follow:
(a) Either a planning permit will be required, or the planning scheme will allow subdivisions without the need for a permit

(b) Planning permit applications must be referred to servicing authorities

(c) Subdivision proposals which do not require a planning permit must also be similarly referred, as in the case of easements which are created in favour of a servicing authority

(d) The following types of subdivision are exempt from requiring a permit

1. Simple 2 lot plans involving re-alignment of boundaries,
2. Subdivisions to create a dual occupancy development in certain zones in the Melbourne Metropolitan area, and with the exception of the municipalities of Lilydale, Flinders, Healesville, Upper Yarra and Sherbrooke
3. Subdivisions arising from the acquisition of land by an acquiring authority, where the subdivision does not create any additional lots
4. Procedural plans These are plans which require neither a planning permit nor a referral

8.7.2 Planning Permit Applications

These need to show sufficient details to allow referral authorities to adequately examine the plans, as the legislation now emphasizes that the these authorities have only one opportunity to provide comments or requirements which will be set out in the planning permit

When an application is lodged at the council and any referral is required, the date of referral is recorded, and the plans must be sent on within 7 days to the servicing authorities. Referral authorities have 28 days to respond, and if no response is received in that time, they are deemed to have no requests. Should more information be required, the time is extended from the time of the request.

Councils have 60 days to consider the application, after which the council must either issue a permit with or without conditions or refuse to issue a permit. In the latter case the council must give a reason for refusal. This allows an applicant the opportunity of appealing against the council's decision. Appeals are made through the Administrative Appeals Tribunal.

Councils, through and with advice from referral authorities, can specify conditions in the permit. Commonly, this can specify that the applicant enter into an agreement with the referral authority for say, the supply of water, sewerage, electricity etc. They can also require the construction of works such as road or drains and the provision of open space, or a cash contribution in lieu, on a sliding scale of up to 8% of the unimproved value of the land, depending on the local municipality.

8.7.3 Part 2 - Certification of Submitted Plans

Application for certification is made under section 6. This is the signing of the plan by the council's designated officer, and replaces the former 'sealed plan'. This is an administrative process, and allows the applicant to lodge the certified plan at the Land Titles Office, and the examination process to start. The council must certify the plan within the prescribed time if

- The plan complies with this Act, planning scheme regulations and relevant permits,
- The land is under the *Transfer of Land Act* 1958, or steps are being taken to bring it under the Act,
- Referral authorities have given consent,
- Alterations required by council have been made,
- Where the only access is over Crown land, road reserves or proclaimed roads, the consent of the administering Mmistel has been obtained in writing to access over such lands,
• Any consent of body corporate members or an order of the Court has been obtained if a plan removes or varies a restriction in accordance with a planning scheme, and the Registrar has declared the restriction has been modified or varied;

• In the case of plans removing or varying the whole or part of an easement, council must certify the plan if this is in accordance with the planning scheme or permit, or if the easement has been abandoned or extinguished. This also applies to easements which have been set apart for council, public authorities or other persons or if all interested parties have agreed to the removal or variation.

• If the Administrative Appeals Tribunal has given permission under section 36, and subject to the conditions relating to the plan having been met.

Where those conditions have not been met, council must refuse to certify the plan, and give its reasons to the applicant in the set time. Council may rely on a verified copy of a unanimous resolution of a body corporate or Court order. Certification is valid for 5 years from the date of the certification.

8.7.4 General Provisions

Section 12. Plans must show easements and other rights. These easements may consist of existing and/or new easements and should show the purpose and any land in whose favour the easement applies.

There may also be implied rights for way, drainage etc. but these do not apply where an easement is specified in favour of a public authority, council or person.

This section does not prevent the exercise of rights conferred by easements, or agreements to create an easement, by a public authority, council. Minister or person, made under any other Act, or the **Transfer of Land Act 1958**

Easements specified under s.12 (2) are in addition to easements under s.98(a) of the **Transfer of Land Act.** Section 98(b) does not apply to a plan under this Act.

Section 13 provides that certification of the plan is conclusive evidence that the provisions of the Act have been met.

8.7.5 Part 3 - Statutory Requirements for Plans

Sections 14 to 21 refer to the application and practice of council’s and referring authorities’ requirements.

Section 14. Applies where an acquiring authority proposes to create additional lots. Section 15. This deals with engineering plans for works. Section 16. Covers standards for works.

Section 17. This is detailed and extensive, but essentially sets out requirements on plans and agreements, supervision, payments by owners, responsibility of maintenance periods and also refers to the effect of the **Planning and Environment Act 1987,** and defines supervision.

Section 18. Council requirements on open space. The limits of council’s powers, the choices of either land, land and cash, or cash **in lieu** of open space. It also refers to staged subdivisions, building subdivision, transfer of land to a public authority, and land being subdivided into 2 lots.

Section 19. Deals with valuation of land for public open space, and the time limit for payments and appeals against the valuation.
Section 20. Use of public open space, and the buying and improvement of land Council may also sell land provided replacement land is available

Section 20A. Refers to written advice by a licensed surveyor that the boundaries have been marked out and a completed Form 19 as described in the Regulations has been submitted

Section 21. A statement of compliance will be issued by a council when all requirements of the Planning and Environment Act 1987 have been met, or agreements have been secured covering the outstanding works. Council cannot refuse to issue a statement of compliance if there are requirements outstanding under the Building Act 1993. Agreements end on the date that all financial and works requirement obligations have been met.

Section 21A. Enforcement of agreements. Definition of agreement, which can be written, oral or by conduct. Deals with agreements under seal and not under seal.

8.7.6 Part 4 - Registration of Certified Plans

Section 22. Lists when and how the Registrar can register a plan.

Section 23. Creation, removal, or variation of rights under a planning scheme.

Section 24. Deals with the effect of registration which is operative once the Registrar records that the plan has been registered.

Upon registration, lands as roads or reserves vest in the council or body named, and any road vested in the council becomes a public highway. Easements, including implied easements, or rights to take water under the Water Act 1989, and any amendments to previous registered plans become effective as shown on the registered plan.

When land set aside as a road vests in a council, person or body, the land continues under the Transfer of Land Act 1958, but there is no need for a title to be issued by the Registrar as the council, person or body is deemed to be the registered proprietor.

However, the Registrar must create a folio of the Register for each lot or reserve. There are certain circumstances where the Registrar may decide not to create a folio of the Register. In addition, the Registrar must make any necessary amendments to plans which require amendments.

Section 24A. Refers to reserves and other similar land. It is the means of vesting or removing reserves on plans. When the plan relating to this section is registered, the body may sell it or use it for a purpose consistent with the Act.

Section 25. Relates to the notification of councils and other referral authorities regarding the creation of an easement or the vesting of a reserve, or if the plan has been withdrawn or refused registration by the Registrar.

Section 26. This governs the submission of a boundary plan prior to subdivision, for the approval of the boundaries, and allows the Registrar to approve or reject giving reasons in writing within a prescribed time.

8.7.7 Part 5 - Subdivisions with Bodies Corporate

Section 27. Bodies corporate or limited bodies corporate can be created on a plan, and any plan showing common property must create one or more bodies corporate. Limited bodies corporate allow different uses for certain common property.

There is provision for proposed rules for the body corporate, which become effective on the registration of the plan, which must specify details of lot entitlements and lot liability. The Registrar must amend any information in prescribed circumstances.
Section 28. With the registration of a plan containing common property;

- each body corporate is incorporated;
- the owners of specified lots become the first owners of the body corporate;
- common property vests shares to owners in proportion to their lot entitlements;
- the Registrar creates folios of the Register for common property in the name of the body corporate as nominees for the owners, but must not produce a certificate of title for those folios;
- the Registrar may require submission of and cancellation of any existing title for any common property.

Section 28A. Shares in the common property can only be dealt with as part of a dealing with a member's lot. Any dealing with a member's lot affects the owner's share in the common property, even though it is not specified. Any dealing with the common property will appear on the folio for the common property and not on the lots.

Section 29. Lists the liabilities and rights of the body corporate and it's members. Section 30. A body corporate must take out insurance to cover land affected by the body corporate.

In the case of a lot which is mortgaged, the mortgagee cannot require the owner to include his share in the common property in the insurance cover, unless the mortgagee's interest in the lot is noted on the body corporate's policy, and unless the sum insured for the lot and share is less than the sum owing under the mortgage, and the extra insurance is for the amount of the difference.

In the case of damage or loss to an owner who has a lot affected by the body corporate's insurance policy, there is provision for the insurer to pay the owner for either re-instatement or a sum up to the insured value.

Winding up of a body corporate

Section 31. A body corporate, member, mortgagee, or administrator may make an application to the County Court to wind up the body corporate. A Court can order the winding up of a body corporate, and can make directions, vary or modify the order. Any subsequent dissolutions, or amendments, cancellations etc. require the Registrar to notify the council of such happenings.

Alterations to a subdivision containing a body corporate

Section 32. If there is a unanimous resolution of the members of a body corporate, the following actions are possible:

- Disposal of all or part of any common property or other land purchased or obtained by it;
- Purchase or otherwise obtain land for inclusion in or to become common property or to become a lot;
- Alter boundaries, increase or reduce the number of lots affected by the body corporate;
- Create new lots or new common property;
- Create and name a body corporate; dissolve itself if it owns no land and has no common property, or if it disposes of all its common property and all the land it owns;
- Merge with another body corporate under certain circumstances; create vary or remove any easement or restriction;
- Consolidate into a single lot all land affected by the body corporate under some conditions, and create, alter or extinguish lot entitlement;
• There is also power to amend or cancel a scheme of development under the Cluster Titles Act 1974, or to create roads or reserves.

There are further sections listing the areas where the powers of a body corporate affect changes to plans and mergers with other bodies corporate.

The owner or owners of a lot or lots affected by a body corporate may consolidate, subdivide or alter the lot or lots, provided the common property boundaries are not changed, or the entitlement or liability of the lots is not changed. If the owner proceeds in this manner, a plan showing the changes to be made to the registered plan must be submitted for certification and registration. This can only be done under sections 23, 32A, 36 or 37 or in accordance with a Court Order under this Act.

The Registrar must also be satisfied that the body corporate on the registered plan has no accrued or accruing debts, before the plan can be registered. The legal identity or continuity of the operation of the body corporate is not affected by the alteration of the registered plan. But on registration of a plan of consolidation the body corporate or bodies corporate are dissolved, and the land is vested in the former lot owners as tenants in common in proportion to their lot entitlements. The Registrar must then create a folio of the Register. The Registrar may also, if he thinks it, either create separate folios of the Register in the case of existing or newly created common property, or a single folio of the Register.

Total consolidation or re-subdivision

Section 32A This section enables owners of all land in a plan that is affected by one or more bodies corporate to subdivide or consolidate their land. The Registrar must not register the plan until all accrued or accruing debts have been cleared.

Plan may create body corporate

Section 32B. This refers to owners of lots on one or more plans that are not lots affected by a body corporate who may wish to create a body corporate. It also only applies where no common property or alteration of boundaries is involved. Consent of any other person who is not the subject of the plan is not required.

Alteration to lot entitlement and liability

Section 33 Subject to unanimous resolution of the members, the body corporate may apply to the Registrar for a change in the above. Due regard must be taken of the value of the lot entitlement and the proportion of the total value of the lots affected by the body corporate. Similarly, the just and equitable amount required for the administration and general expenses from the lot owner should be taken into account by the body corporate.

Records of changes to plan

Section 34. The Registrar must record all changes and alterations, and the body corporate must inform the Registrar of any change of address. Notices to the body corporate may be served by post to the address shown in the Register.

8.7.8 Part 6 - Miscellaneous Acquisition by an acquiring authority

Section 35. This section applies to land acquisitions by public authorities. Where such land cannot be disposed of without subdivision, the authority must submit a plan for certification to the council and lodge it as if it were the owner of the whole area. The plan submitted by an acquiring authority may do any of the following:

• maintain the same number of lots, except for the acquisition,

• reduce the number or alter the separately disposable parcels,

• create new lot liabilities or entitlements in the case of bodies corporate,
• create additional lots, include abutting land, alter the lot entitlement or liability of land on the plan;
• it can also consolidate into a single lot where appropriate, and amend a registered plan in any way necessary.

The plan must state which land is to be acquired by the authority, whether it is to be encumbered or otherwise, and whether this is to happen on registration etc. The same principle applies to land being consolidated in a similar way.

Consent is not necessary to the registration of the plan by any person to the extent that the plan maintains the same number of lots, or creates new lot entitlements and liabilities, or lands either vested in the authorities name or relates to land acquired or to be acquired by the authority.

Sections 5(3)(b) and 6(l)(b) do not apply to land submitted or lodged under this section.

Dates of vesting are to be advised by the authority to the Registrar. It is assumed that these dates are the dates from which the Act applies, except for plans of consolidation.

If so requested, the holder of the relevant certificates of title must deliver same to the Registrar, and where the land is not under the Transfer of Land Act 1958, or steps have not been taken to do so, the Registrar, before registering the plan must bring the land under the Act by direction. Unless otherwise shown on the plan, the land acquired ceases to be land affected by a body corporate, and loses any lot entitlement or liability from the date of the acquisition.

Land can be consolidated into a single lot as shown on the plan.

The Registrar need not create folios until the conclusion of the compulsory acquisition or consolidation process. He can create single or any number of folios in the name of an authority.

The Act does not limit or affect the operation of the Land Acquisition and Compensation Act 1986.

An acquiring authority can subdivide or consolidate land vested in its own name by submitting land for certification and registration.

Power to acquire or remove easements

Section 36. When it is considered by an authority that the efficient or economical servicing of a subdivision would require the acquisition or removal of an easement, the owner may apply to the Administrative Appeals Tribunal for leave to take the appropriate action.

The council or authority should make an assessment of the engineering aspects of the matter, but is not bound to notify anyone, but the assessment can be challenged at the Tribunal. The Tribunal may give leave subject to any conditions it sees fit. If leave is given, the owner may compulsorily acquire the easement subject to the conditions under which the leave is given.

The owner may then submit a plan for certification and lodging to remove the easement. Parts 3,4,6, 7,10, and 11 of the Land Acquisition and Compensation Act 1986 then apply.

Staged subdivisions

Section 37. This section allows an owner to subdivide land in stages. If a planning scheme or permit authorizes a staged subdivision, a master plan specifying the lot numbers in the first stage, and in addition, a second or a subsequent stage must contain, like the first, the prescribed information. The second stage can create additional lots, or alter lots on that stage, create bodies corporate, lot entitlement etc. It can also create, vary or remove easements or restrictions over the land in that stage. As well, it can amend the master plan or plan of an earlier stage by adding to the membership of a body corporate, or to the existing common property, or change lot liability etc. It can also amend the master plan to show land as land benefited by an easement or restriction created over the second or subsequent stage.

A plan for the second or subsequent stage may be submitted for certification and lodged by the owner of all the land in that stage or the applicant for the master plan.
The Registrar is required to record the prescribed information and make any necessary amendments to the earlier stage or subsequent stage. Subsequent stages may require to be given a lot number. When the plan is registered, any requirement made in the statement of compliance for the master plan ceases to apply to land in the newly registered plan.

**Disputes relating to bodies corporate**

**Section 39.** Owners, purchasers, or the body corporate can apply to the Magistrate's Court in the case of a dispute on roads, reserves or easements. The Magistrate's Court may refer the matter to the County Court because of the importance or complexity of the case.

Other cases involving alteration of the plan or damage to buildings, or the payment of insurance money under any policy taken out by a body corporate.

The appointment of an administrator by the County or Supreme Court can be sought by application from a body corporate or someone with an interest in the land.

The Court must not make an order regarding the alteration of the plan unless it is satisfied that certain conditions have been met. The Act also makes provision for the payment of an administrator's costs, and for the issue of an order authorizing the Registrar to dispense with the delivery of a certificate of title or instrument. A Court may also make an order for such costs as it sees fit in the matter of any matters raised under this section.

**Other disputes arising under this Act**

Section 39. An owner, applicant, a council or a referral authority may refer a dispute to the Administrative Appeals Tribunal for a determination. Exceptions are disputes under section 35, or as in part of section 38, or disputes under the following sections of the Planning and Environment Act 1987 - sections 149A, enforcement orders under section 114, or agreements under section 173 or relating to orders of a Court. The County Court can order that the registration of a certified plan be stopped if there have been breaches, or failure to disclose facts etc. A dispute under section 35 must be referred to the Minister, whose decision takes the place of the council or referral authority.

**Appeals against refusal or failure to decide**

Section 40. In these circumstances, an appeal can be made to the Administrative Appeals Tribunal if a council refuses or fails to certify a plan, approve an engineering plan, or issue a statement of compliance. The same applies to a referral authority, but also includes requirements for works to be done under section 44(3F).

Other grounds are that a council or referral authority requires alterations to a plan or requires an applicant to enter into an agreement under section 12(2) or section 21(1)(u).

Section 41. Repealed

**Section 42.** Delegation by

The Minister.

Section 42. This refers to delegation by the Minister of any functions, powers or duties to a chief administrator, but can also include a council. Minister or public authority.

**Regulations**

Section 43. There are extensive regulations under this Act which cover plans, powers and duties, standards, time limits, insurance requirements for bodies corporate, the standard of survey markings, and the powers and duties of the Registrar and the fees prescribed under the Act. It also covers the council's and referring authorities' requirements, powers, fees and duties.

**Repeals and savings**

Section 44. This section covers the Acts which have been repealed, but also specifies the other Acts, notably the Sistula Titles Act 1967 and the Cluster Titles Act 1974 which affect the operations and procedures of this Act.
Sub-sections (2) and (3B) refer to plans already lodged for sealing, either by a person, or an acquiring authority, and the processing.

Sub-section (3C) refers to the time limit of 5 years from the date of sealing as the validity of the plan sealing. (3E) and (3F) deal with plans, referral authority's powers and duties on plans and applications for permits which had already been lodged and were being processed when this Act came into effect.

Later sections also refer to amendments on plans with bodies corporate and lots on cluster and strata subdivisions, and the powers of the Administrative Appeals Tribunal and the Registrar in that respect.

References

Section 44A. This section sets out the definitions and interpretation of those additional plans of subdivision not already specified, which are included by the Act.

References to the Registrar under the Transfer of Land Act 1958

Section 45. This spells out the interpretation of the terms - the Register, folio/s of the Register and a certificate of title.

Strata and cluster plans

Section 46. Schedule 2 has effect with respect to registered plans within the meaning of the Strata Titles Act 1967 and the Cluster Titles Act 1974.

Schedule 1 - repealed

Schedule 2. This is an extensive list of definitions, a list of the Acts which apply to cluster and strata plans and redevelopment, folios of the Register, and certificates of title. It also deals with administrators, boundary definition, notices of restriction, updating plans, accessory plans, amendment to plans, additional powers of strata or cluster bodies corporate, enforcement of schemes of development and stage development of cluster plans.

Notes

Schedule 2 is followed by several pages of notes on the Act, adding useful comments on specific sections as they have been amended from time to time.

8.8 Other Acts to be Monitored

The Local Government Act 1958 was superseded by a new Local Government Act No.11/1989 and the Local Government (Consequential Provisions) Act No.12/1989. This latter Act makes provision for repealing some 90 Acts and amendment to 137 Acts. By the end of 1993 only a small portion of these repeals and amendments remain to be proclaimed. Close monitoring of these provisions will be necessary to determine the appropriate legislation which is current for the matters affected.

Extensive amendments to the Planning and Environment Act have occurred with the passing of the Planning and Environment (Amendment) Act No.86/1989, and some further amendments are contained in the Planning and Environment (Amendment) Act No.128/1993 which came into operation on 14 December 1993.

The Building Act 1993, No. 126 of 1993 received assent on 14 December 1993 and will operate from a date or dates to be proclaimed. This will introduce many changes in the regulation of building and building standards.