

Alpine Resorts

Background Paper



Registration of leases
Strata titles for leases



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1. Introduction

The Alpine Resorts 2020 Strategy released in June 2004 recognises the challenge of providing an attractive environment for long-term investment in each of the resorts. One of the agreed actions in that strategy is to pursue the capacity to register leases and to provide strata titles for leases. This action builds on the same commitment in the Alpine Resort Leasing Policy, which was released in March 2002.

As a part of the project to consider the registration of leases and strata titles for leases that started in May 2004, a shorter discussion paper has been released. This background paper supports that discussion paper by providing greater detail on the issues and proposals.

We invite you to review the discussion paper together with the issues covered in this background paper. You are welcome to include a written submission on the more detailed issues raised in this paper with any submission you wish to make about the more broadly expressed issues and proposals in the discussion paper. Please see page 30 for further details on how to lodge your submission.

1.1 Alpine resorts

There are six alpine resorts in Victoria: Falls Creek Alpine Resort, Lake Mountain Alpine Resort, Mount Baw Baw Alpine Resort, Mount Buller Alpine Resort, Mount Hotham Alpine Resort and Mount Stirling Alpine Resort. Land in these alpine resorts is Crown land (i.e. held in public ownership) and permanently reserved under the *Crown Land (Reserves) Act 1978*, with the exception of three small parcels of freehold land within the Mount Hotham Alpine Resort.

While the resorts occupy less than 1% of the State's public land, they attract up to 900,000 people each winter and approximately half that number outside the winter season. The resorts contribute approximately \$129 million annually and 3,700 jobs to the Victorian economy, and generate substantial commercial activity in sub-alpine towns throughout the year.

Until 1984, the alpine resorts were managed by various government agencies, each subject to different legislative regimes and policies. The formation of the Alpine Resorts Commission (ARC) in 1984, under the auspices of the *Alpine Resorts Act 1983*, brought the resorts under the control of a single coordinating authority. During its lifetime, the ARC sought to introduce consistent leasing practices across resorts.

In 1998, the *Alpine Resorts (Management) Act 1997* abolished the ARC and created the Alpine Resorts Coordinating Council (the ARCC) and separate Alpine Resort Management Boards (the Boards). The creation of the Boards enabled greater self-management by each resort. Each Board acts as the committee of management for the land in the resort and has responsibility for its development and management. The ARCC is an industry-wide advisory body, established as a forum for discussion of matters common to all resorts.

1.2 The current leasing framework

In accordance with the *Alpine Resorts (Management) Act 1997*, each Board, with the prior approval of the Minister, has the power to grant leases of any land in its resort. Because alpine resorts are based on leasehold tenure, leasing policy is a crucial tool in their ongoing maintenance, investment, economic contribution and vitality. The key points in the Alpine Resorts Leasing Policy, released in 2002, are:

- new leases to existing lessees (first right to negotiate);
- improvements (value of improvements rests with the lessee);
- length of lease term (commensurate with proposed use and investment);
- standards of occupancy (improvements maintained to contemporary standards);
- rental and valuations;
- contemporary lease conditions and consistent documentation;
- registration of leases; and
- a strata leasing regime.

The Alpine Resorts Leasing Policy implementation details set out various matters including criteria for deciding the term of lease. Lease terms of up to 51 years may be granted, although the lease may be for longer in an exceptional case.

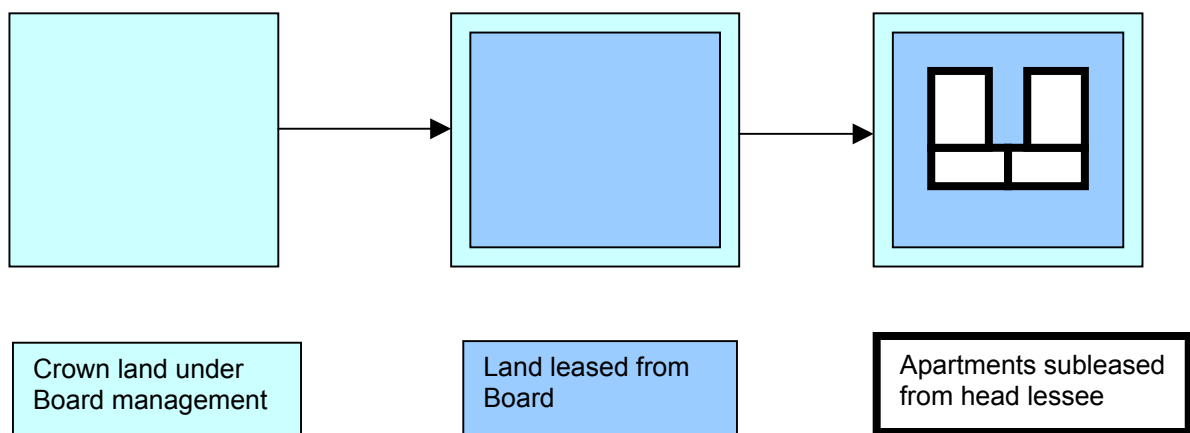
1.3 The changing nature of alpine resorts

The alpine resorts have steadily developed since the 1940s. Initially, the resorts had some commercial development and mainly relatively low-key ski lodge development. The three larger resorts — Mount Buller, Falls Creek and Mount Hotham — could now be described as mature resort villages based on tourism. Club lodges, apartments, a university campus, swimming pools and public facilities such as gyms, tennis courts and churches have been developed. These resorts are becoming year-round townships.

1.4 The changing nature of leases in alpine resorts

The nature of the leases granted and the legislative authority for the various leases has developed over time. Because of the history of different legislation and policies for each resort, different forms of alpine lease were granted before the *Alpine Resorts Act* 1983. Many of these earlier leases were long term and are still current. Greater consistency of the types of rights granted was achieved under the *Alpine Resorts Act* 1983 and now the *Alpine Resorts (Management) Act* 1997. For a more detailed history see Appendix A.

The general form of an alpine lease is suited to a straightforward use such as a ski lodge development where there is only one leaseholder (the ski club in some form) and occupation of the lodge is managed within club rules. However, some recent developments are more complex, perhaps with mixed residential and commercial use and car parking. Although the new forms of lease address the issue of apartment owners' powers by requiring sublessees to hold shares in the head lessee company, legislation covering titles and the structure of the relationship between the various parties has not kept pace. The present structure of leasing is represented in the following diagram.



The mechanisms used to deal with the rights between the lessee and sub-lessees in apartment-style developments are various agreements and company share arrangements. These result in more complex and expensive conveyancing requirements than for freehold developments; for example, the rights may be expressed in more than one document and the documents are not simple, as they do not take the usual form of transferring freehold land.

Because of this, specialised expertise must be sought to understand the transaction and to transfer the rights correctly. However, these arrangements do not provide a registered interest in the land (with limited exceptions). Other consequences have been the lack of clear identification of subleased apartments (addressed in more recent leases), a lack of clarity in the rights of parties, a lack of attractive tenure for financing purposes, and an overall lack of flexibility.

Present ownership mechanisms for apartments in alpine resort developments are:

- the apartment holder has shares in the head lessee company. The shares give the exclusive right to use the nominated apartment, but there is no sublease;
- the sublessee has shares in the head lessee company and also has a sub-lease giving the exclusive right to use the nominated apartment;
- the sublessee has a sublease from the head lessee company giving the exclusive right to use the nominated apartment, but has no shares in the head lessee company.

These ownership mechanisms may be accompanied by other agreements, such as general management agreements with subsidiary contracts for cleaning.

1.5 Moving the regulatory framework forward

Alpine resorts have much in common with other tourist destinations, such as an increasing focus on real estate, high-value residential and commercial developments, and permanent populations. Unlike other areas, however, alpine resorts are based on a leasehold tenure.

A consultation process was undertaken as part of the development of the Alpine Resorts Leasing Policy. The feedback suggested changes to the regulatory framework that recognised the growing complexity and maturity of the resorts.

The Alpine Resorts Leasing Policy states that the development of an appropriate strata leasing statutory framework will provide a better level of protection to the interests of all parties, and the development of a statutory framework for registration of alpine leases under the *Transfer of Land Act* 1958 will ensure additional confidence in the alpine resort leasehold environment. Subject to the outcomes of the investigations and the options developed, the intention is to implement the results as soon as practicable. The Alpine Resorts 2020 Strategy also recognises the challenge of pursuing the capacity to register leases and to allow for strata leasing (para 6.6.6 of that strategy).

The consultation submissions indicated a belief that the availability of these statutory frameworks would provide confidence and clarity for lessees, sub-lessees and financiers, simpler documents, reduced costs, enable leased land to be subdivided in strata and identify common property.

It also appears that issues such as good management of the apartment building, efficient and transparent dealings with interests in the apartments, and maintenance fees and other fees were of concern. The fairness of the head lessee and sub-lessee relationship was also raised. This concerns the sub-lessees who, as a group, are likely to have the greatest investment in the building, yet may have the least power to influence factors such as management and maintenance. This can be so especially where the sublessees do not own shares in the head lessee company.

2 Registration issues

2.1 Background

Victoria's Land Titles Register holds certificates of title, plans and other documents that comprise the State's official land and property records. Certificates of title show ownership details. Recordings in the Land Titles Register are generally called 'registrations'. The Government guarantees the accuracy of this record of ownership. The reliability of the Land Titles Register means that the registration of transactions is attractive to those dealing with interests in land, whether as purchaser or lender.

The legislation controlling the registration of interests in land in Victoria is the *Transfer of Land Act* 1958. This act defines a long-established regime of registering interests in land and allowing the public to search those records. There are approximately 1.75 million searches of the register records each year and 840,000 dealings and 8500 new plans of subdivision registered annually. There are 2.9 million 'live' titles.

The statute strictly limits the types of transactions that can be registered. Once a lease is registered, transfers and mortgages of the lease can be registered but the lease cannot be varied. Apart from some registered leases and sub-leases at Mt Hotham, alpine leases are not recorded in the Land Titles Register. There are approximately 400 Crown leases and 1500 subleases in the alpine resorts. See Appendix A for more details concerning the number of leases.

The *Transfer of Land Act* 1958 deals with leasing in two sets of provisions. Crown leases come under the operation of the *Transfer of Land Act* 1958 by virtue of section 8. Where that provision applies, a title is created in the Land Titles Register. It appears that the application of this provision has been interpreted in various ways over time, with the result that only Crown leases granted at Mt Hotham Alpine Resort were regarded as falling within it. This is why some Mt Hotham leases, but no others, are already registered.

There are also specific provisions for the registration of leases and subleases in sections 66-71 of the *Transfer of Land Act* 1958. These provisions are primarily aimed at leases and subleases of freehold land, not leases of Crown land. The question arose as to whether these provisions allowed subleases to be registered on Crown leases. The answer to this was understood to be "no" — until the court case of *Radwood v. The Registrar of Titles ex parte Radwood One Pty Ltd* [1983] VR 375. In this case, it was decided that subleases of registered alpine leases could

be registered. Accordingly, the registered Mt Hotham alpine leases are subject to multiple registered subleases.

2.2 Recent developments

Following further legal advice, it has been agreed with the Registrar of Titles that:

- alpine resort leases granted under the following legislation can be registered:
 - (i) *Alpine Resorts (Management) Act 1997*
 - (ii) *Crown Land (Reserves) Act 1978*
 - (iii) *Alpine Resorts Act 1983*
 - (iii) *Forests Act 1958*
 - (iv) *Mt Hotham Alpine Resorts Act 1972*;
- alpine resort leases granted under the *State Electricity Act 1958* cannot be registered;
- registration of a lease can only occur under certain conditions:
 - (i) the lease must be current;
 - (ii) the original and duplicate lease are available to be lodged at the Land Registry;
 - (iii) the lease must be in its original form; that is, the lessee, the land and the terms of the lease must be the same as originally granted;
 - (iv) the land must be clearly described so that it can be located from that description and form part of Victoria's records of land parcels (the 'cadastre');
 - (v) the lease must clearly be a lease and not some other right such as a licence.
- registration of a sublease can only occur on the same conditions with the additional requirement that the head lease must be registered before a sublease can be registered and the sublease must have at least three years to run;
- the lease or sublease cannot be amended in regard to the subject area or any terms and conditions;
- the Registrar of Titles will, as with all dealings, still examine each application on a case-by-case basis before registration.

It is expected that new or recent leases will be able to comply with these requirements without difficulty. However, older leases may strike problems because of assignments or changes to terms and conditions that have occurred over the years. A brief review of the leases at Mt Buller Alpine Resort has revealed that more than half will qualify for registration. See the flow chart in Appendix B for the conditions for registration of leases and sub-leases.

Once registered, each lease has a separate title. This is so for the registered Mt Hotham leases. At present, registered subleases cannot have a separate title. However, on a title search for a particular apartment, a search statement is produced that shows recordings affecting the relevant lease that also affect the relevant apartment. This resembles the search of a separate title (see the mock example in Appendix C). A search of the alpine lease (rather than a sublease) will show the lease details and all registered interests, including all registered mortgages and subleases. This is a more cumbersome title, but is there for anyone searching the alpine lease itself.

The ability to create a separate sublease title does not require new legislation. It is anticipated that the Registrar of Titles could create separate titles to the subleases consistently with the existing titling system. This is likely to be a new folio type, a sublease, that also shows the Vol/Fol of the head lease title so that its derivation is clear. The separate sub-lease title is likely to refer to a lot on a title plan as the land description. The sublease terms will be readily located, perhaps by adding an image of the sublease to the title plan. The title plan will be prepared by the lodging party's surveyor in a manner modelled on the current requirements for a plan of subdivision. However, there are timing issues and associated costs for producing this new form of title that have not been considered or quantified as yet.

2.3 Issues

Issue 2.3.1

Should State Electricity Commission of Victoria (SECV) leases be able to be registered?

Proposal: Yes.

The inability to register is a technical result of the history of the tenure. The ability to register SECV leases requires legislative change, possibly by indicating that the SECV leases may be regarded as falling within section 8 of the *Transfer of Land Act* 1958. If legislation deemed that the SECV leases should be regarded as falling within section 8, there would still be conditions to be met before registration could occur. As for the registration of leases granted under other acts, an SECV lease would need to be unamended, have a Crown description allocated to it, and have a suitable land description.

Issue 2.3.2

Should registration of alpine leases, subleases or dealings with them be compulsory?

Proposal: registration of new alpine leases will be compulsory;
registration of existing alpine leases should not be compulsory;
registration of any subleases should not be compulsory;
registration of any dealings with those interests should not be compulsory.

Generally, registration of dealings under the *Transfer of Land Act 1958* is voluntary. However, registration is so common it is effectively compulsory in normal conveyancing. An exception in the legislation is the first registration of a Crown grant or a Crown lease (section 8 of the *Transfer of Land Act 1958*). If the alpine lease is covered by section 8 of the *Transfer of Land Act 1958*, registration will be required. Registration of all existing leases will not be possible, as all the preconditions will not always be met. This can be left to the head lessee to consider. Registration of any sublease or registration of dealings with any alpine lease or sublease should not be compulsory, consistently with the scheme in the *Transfer of Land Act 1958*.

Issue 2.3.3

Are the provisions in the *Transfer of Land Act 1958* helpful in showing changes to registered leases and subleases?

Proposal: legislative amendment is required to obtain greater certainty and flexibility.

Once a lease or sublease is registered, there is no ability to register amendments. It would be useful to have the ability to show amendments in a similar way to amendments to registered mortgages. Variation to the terms, interest, and principal sum (but not parties or land) of a mortgage is allowed for in section 75A of the *Transfer of Land Act 1958*.

The possible amendments for leases and subleases might be the purpose, conditions, amount of rent but not parties, term of the lease (i.e. duration), or land. If amendments were allowed, the Registrar of Titles would examine such dealings on an individual basis to determine whether the variation is so fundamental that it amounts to a new lease rather than a variation.

The leasing provisions in the *Transfer of Land Act* 1958 from section 66 onwards are unclear in how they apply to Crown leases generally, including alpine leases and subleases. It should be made clear which of these provisions apply to alpine leases and subleases.

Issue 2.3.4

What can be done by those lessees and, subsequently, those sublessees who wish to obtain registration if the current lease cannot be registered because of prior amendments or difficulty with land descriptions?

Proposal: obtain a new lease.

This is already an option under the Alpine Resorts Leasing Policy implementation details, para 12.1.1, which provides that a new lease may be obtained during the term of the existing lease.

Issue 2.3.5

Are there issues with land description that need to be resolved before registration?

Proposal: yes, Crown allotment descriptions must first be allocated to the leased land by the Surveyor-General Victoria to bring the land into the State cadastre.

- As part of that process, plans accurately depicting occupation boundaries in the alpine resorts should be drawn up. It is far preferable to draw a plan for the whole of the developed area of each resort so that it defines how the lots, roads, etc, fit together and a homogeneous result is obtained. In the absence of a plan of the whole resort, a plan for an individual development may be acceptable. However, a major overall control survey would be required before defining the boundaries of the lot. The survey for Mt Buller has been completed and the plan drawn up as a draft. Survey and subsequent plan preparation will be required for both Mt Baw Baw and Falls Creek Alpine Resorts.
- In order to bring land into the State cadastre, it must first be given a Crown description, the boundaries must be unambiguously defined and shown on a plan certified by the Surveyor-General, and the plan must be lodged in the Crown Land Registry (CLR). Generally, this plan will be in the form of a Plan of Crown Allotments (an 'OP'). It is a requirement that the land be surveyed and connected to the Australia Map Grid (GDA94 datum preferred). The survey must comply with Crown survey requirements.
- It is anticipated that a whole-of-resort survey should be undertaken or arranged by the Surveyor-General. This process will need to be funded. For an individual development, the

Surveyor-General may be approached to undertake or arrange for the survey, or the survey may be undertaken by the developer's surveyor. The client of the Surveyor-General requesting the survey work normally pays for the work. A developer's surveyor should liaise with the Surveyor-General. Following the lodgement of the plan at CLR, it will be added to the State's digital map base, Vicmap Digital Property, and be generally available.

- Once a plan has been certified and lodged at the CLR, any amendment to a parcel boundary must be based on survey and defined on a new plan certified by the Surveyor-General and lodged in the CLR. A new Crown allotment number will be allocated to a parcel where dimensions have altered. The new plan will be used to alter the State cadastral map base and show that the previous allotment/s have been superseded.
- Survey requirements for allotments in alpine resorts are those specified in the *Surveyors (Cadastral Survey) Regulations 1995* plus any directives issued by the Surveyor-General. Advice can be obtained from the office of the Surveyor-General Victoria. To enable registration of an alpine resort lease, a plan to sit with a particular lease title, a 'title plan' based on the OP dimensions may also need to be prepared for Land Registry purposes. This is likely to be prepared by the developer's surveyor before lodgement of a lease for registration.
- When the lease is lodged for registration, the Registrar of Titles in conjunction with the Surveyor-General will compare the land description in the lease with the land description in the plan certified by the Surveyor-General to determine whether they define the same parcel of land. If they do not define the same parcel of land, the lease cannot be registered. A preliminary study of Mt Buller Alpine Resort leases and the known Crown information suggests that the Mt Buller leases could be allocated a Crown description that matches dimensions in the leases for approximately two-thirds of the leases.

Land description in subleases is a separate issue. Some more recent developments have shown apartments in the same format used in plans prepared under the *Subdivision Act 1988*. This is appropriate as it is a well-understood and clear convention for describing parcels of land, particularly those parcels defined by, say, walls, rather than dimensions, as is usually preferable for apartments. It is proposed that this format will be a requirement for new apartment developments. More flexibility may be available if registration of an existing sublease is all that is sought. Attempting to register a lease or a sublease will not, of itself, cause a problem with land description, although it may highlight existing discrepancies between the land described in the lease and on-ground occupation and give impetus to resolving the issue. The need to resolve any such discrepancy exists regardless of the registration issue.

Issue 2.3.6

Does registration cover the strata title issue?

Proposal: no, that is a different issue, although it has links to registration.

The exact meaning of the 'strata' leasing sought in the consultation feedback is not clear. The *Alpine Resorts (Management) Act 1997* already gives the ability to lease in strata at Falls Creek Alpine Resort for a limited purpose only (see section 9(3)(b)). This is a straightforward power to grant a lease defined by dimensions that may be below, on or above the surface of the land.

However, that power does not involve any other consequences, such as the creation of a body corporate. While it may be useful to empower the Boards generally to lease in strata, the reference to 'strata' leasing in the consultation feedback seems to be a reference to the creation of a body corporate and common property as is allowed for in the *Subdivision Act 1988*. The creation of a body corporate and common property will not occur when a lease or sublease is registered. It is a more complex issue that will require legislation to implement.

Issue 2.3.7

Does registration deal with other difficult issues such as disagreements regarding maintenance costs between parties or the relationship between the Crown and the Crown lessee failing, jeopardising the sublessees' interests?

Proposal: no, registration does not change the situation.

The relationship between the Board and the lessee is governed by the terms of the lease, any relevant legislation, and the common law. Registration does not alter the nature of the relationship. The subleases are derived from the lease and are subject to the terms of the sublease. The lease and sublease are both arrangements with commercial terms spelled out in them and which can be enforced, although that may be expensive and cumbersome.

3 Strata leasing schemes

3.1 Background

The *Subdivision Act 1988* governs the creation of separate apartment titles for freehold land. As well as requiring titles to the apartments to be created, the act allows for the creation of bodies corporate and common property. (Note: a plan of subdivision may create apartments, car parks, commercial spaces such as offices and shops, all called “lots” as well as common property. For simplicity, lots are referred to as apartments in this paper). The body corporate is a legal entity by virtue of the *Subdivision Act 1988* and is not a company under Corporations Law. It only has the powers that are set out in the *Subdivision Act 1988* and the *Subdivision (Body Corporate) Regulations 2001*.

These powers include repairing and maintaining the common property, ensuring insurance is appropriately maintained, and raising money to pay for these responsibilities. The separate legal entity of a body corporate provides a structure in which the members, being the apartment owners, can make decisions about how to manage the common property and their relationship with each other. Common property is often the grounds, driveways, exterior walls of buildings, structural components, infrastructure and amenities. It is defined on each plan of subdivision and can vary from development to development. The present scheme for bodies corporate and common property has developed over time and through various attempts to deal with apartment ownership and living (see Appendix D for a history of the issue).

Generally in Victoria, a developer on freehold land will construct an apartment development, sell the apartments, and then have no further relationship with that development. Each of the purchasers will become registered as the owner of the relevant apartment. By force of legislation and the plan description, the new apartment owner becomes a member of the body corporate and owns a share in the common property as a tenant in common with the other lot owners in a share proportional to the lot entitlement shown on the plan. Any owner may choose to lease out the apartment, but the tenant will have no role in the body corporate. The relationship between the owner and tenant is governed by the terms of the lease and relevant legislation (e.g. for freehold land, the *Residential Tenancies Act 1997*).

The Minister for Consumer Affairs has commissioned a review of the effectiveness and efficiency of this statutory scheme as it relates to the creation and operation of bodies corporate. The Future Directions paper for that review sets out issues and options to: minimise disputes

within bodies corporate; provide a low-cost, quick and expert resolution service for disputes on day-to-day matters; improve prudent financial management; protect body corporate funds; enable long-term maintenance planning for common property; improve the operation of committees; and address other matters.

The review is being undertaken because of the changing nature of bodies corporate since the creation of the regulatory framework. There are now approximately 65,000 bodies corporate in Victoria. Approximately 2000 new bodies corporate are created each year. Many more recent developments contain larger numbers of apartments and handle greater sums of money than was the case for early developments. The review recognises that body corporate and common property issues have not been completely resolved.

The *Subdivision Act* 1988 is not available to leasehold developments, and so developments in alpine resorts cannot use the legislative structure developed over time to cater for apartments. In the absence of a statutory framework, the management of the various interests is based on agreements outside the strata legislation (see section 1.4 of this paper for a description how this is done).

3.2 The current scheme of ownership of apartments in alpine resorts

For apartment-style developments, the lessee from the Board (head lessee) grants rights for the occupation of each apartment. The present requirements are for the apartment holder to have shares in the head lessee company and also to have a sublease of the apartment. The requirement to hold shares gives the apartment owner some say in how the head lessee behaves. Although some developments have had sublessees share holding shares in the head lessee company for some time, the requirement has only existed since 2002.

The present requirement for defining apartment boundaries is that the plan for sublease must meet the conditions for plans under the *Subdivision Act* 1988, so that boundaries are clear.

Whether the current scheme meets sublessee needs may not have been fully tested yet, given the long-term nature of many leases. This model effectively meets the need of the Alpine Resort Management Boards to deal with one entity per development, and does not require a formal subdivision process.

Many lessees will not require more complex provisions than the ability to register as they will not wish to sublease (e.g. continuing club lodges). A little more than two-thirds of the 400 (approx) alpine leases have no sub-leases. Some lessees and sublessees will also be satisfied with registration and will have no need for more complex strata provisions (e.g. those satisfied that their existing arrangements of sublease and shareholding have provided a well-managed building). For others, the costs of doing more than registering their interest may not be justified in light of the remaining lease term.

Regardless of any additional strata model that might become available, the current scheme of subleases and the sublessees holding shares in the head lessee company will remain as an option for new developments. Existing arrangements for developments will remain in place unless the developments voluntarily convert to any new strata model.

Issue 3.2.1

Could this model could be improved by requiring sublessees to hold the majority of the shares in the head lessee company to further address the control issue?

It might be possible to make further refinements to the lease and sublease to reflect, as necessary, such changes. This may require a new lease (minor change), but would not require legislation.

3.3 Models in other jurisdictions

The circumstances in alpine resorts are more complex than freehold, in that two more levels of parties are involved — a head lessee and sublessees. Rights in the hierarchy of interests are set out in the respective lease and subleases. There is no statutory relationship between the lessor and sublessees or the head lessee and sublessee in the one development, although a relationship has been achieved in some instances by the sublessees holding shares in the head lessee company. Consideration of the methods used in other jurisdictions to deal with strata leasing issues may be helpful.

New South Wales (NSW)

The NSW strata lease provisions in the *Strata Schemes (Leasehold Development) Act 1986* have built on the provisions in the *Strata Schemes (Freehold Development) Act 1973* (NSW).

The NSW scheme provides for the underlying owner, whether that is the Crown or the freehold registered proprietor, to grant a separate lease for each apartment. It allows for leasehold titles to be created for lot owners and the body corporate. This has some similarity to the circumstances of the Victorian alpine resorts in that there is an underlying owner entering into leasing arrangements, but it is a simpler scheme.

This is because the NSW scheme is based on the leasing of the individual apartments by the underlying owner, so it does not cover the owner (in Victoria the relevant Alpine Resort Management Board is the ‘owner’) leasing to a head lessee and the head lessee entering into subleases for the apartments. However, it has features that should be expected to apply to any form of a leasehold strata scheme. These include:

- building on the law that already exists for freehold strata, for example:
 - (i) the need for a plan showing the leased parcel boundaries, registration of the plan, and defining the effect of plan registration;
 - (ii) technical requirements for a plan showing the land and the parcel boundaries being similar to those for a freehold strata plan;
 - (iii) specifying who should consent before the plan can be registered;
 - (iv) the body corporate being created upon plan registration;
 - (iv) common property vesting in the apartment owners in shares proportional to lot entitlement;
 - (v) creation of a separate leasehold title for the common property in the name of the body corporate and a leasehold title for each apartment on the plan when registered.
- special provisions that are needed because of the leasehold situation, for example:
 - (i) the need for leases in the development to have the same termination date;
 - (ii) providing for what is to happen if a lease is determined early – in the NSW legislation the owner of the freehold becomes the statutory lessee;
 - (iii) providing for what is to happen when all leases expire.

NSW also has another form of title involving common property available to freehold owners that is not equivalent to Victorian provisions. This is the *Community Land Development Act* 1989. It enables the creation of schemes in which specific communal areas, such as recreation facilities, may be managed by an association comprising nominated, nearby, land owners. The legislation specifies that the scheme is only available to freehold owners and is not available within a subdivided building. The act is not directly helpful to the alpine resorts issue, which relates to the subdivision of buildings into apartments and common areas.

British Columbia, Canada

The Strata Property Act SBC 1998 Ch. 43. Part 12 allows for leasehold strata plans, and the strata leasehold scheme has existed for some years. Of particular interest is that it applies to the situation where the Government is the landlord, there is a developer who is willing and able to complete the development project, and buyers who are comfortable with the leasehold tenure.

However, it also provides for the situation in which the landlord acts as landlord for each of the lots, rather than to a head lessee only. Consistent with the benefits of applying familiar legislation, the BC freehold strata provisions are applied to leasehold developments, with additional leasehold provisions. The provisions have been used in a relatively limited geographic area, but have been successful in that about 6000 apartments are held on a strata lease tenure. The lease to the developer contains a model lease that applies to the apartments upon plan registration, i.e. the form of lease of apartments is controlled by the Crown from the start.

United Kingdom

Apartment living in the United Kingdom (UK) is subject to more traditional forms of entitlements, being very long-term leases and subleases (in some instances 100 years or more) rather than concepts equivalent to the strata titles legislation described above. There are about two million leaseholders in the UK (see www.lease-advice.org, the site for the Leasehold Advisory Service).

In addition to the lease document itself, relationships are governed by the *Landlord and Tenants Acts* 1985 and 1987 and, more recently, the *Commonhold and Leasehold Reform Act* 2002. An apartment lease usually relates to the walls, floors and ceilings and the space within those boundaries. The structure, common parts of the building and the land remain with the landlord, who is responsible for the maintenance and repair of the building.

The legislation sets out a wide range of rights for the apartment leaseholder. For example, leaseholders can apply to a tribunal to seek a determination of the reasonableness of service and other administrative charges. Leaseholders may use a 'right to manage' process, a complex process in the legislation to change the management of a property so that leaseholders as a group may decide the management arrangements. In summary, the relationship in the lease is subject to significant legislative structures that try to balance the rights of the parties.

Before the 2002 legislation, the scheme was described (see www.lease-advice.org) as resulting in a class of owners/occupiers considered as owners by themselves and most others, but subject to regulation by third parties of their expenditure, ability to sell, market value and, ultimately, the power to remain in the flat. The English scheme does not deal well with the issues of ownership and management in the body corporate/common property sense with which we are familiar; rather, the Australian experience with strata titles/common property appears to have been used to inform debate on the UK's 2002 reform act.

3.4 Proposals

What form of strata title scheme would be suitable for Victoria's alpine resorts?

Any new scheme must use as much familiar freehold legislation as possible (the *Subdivision Act* 1988) if it is to be efficient and promote transparent processes. This will take advantage of existing experience and will enable future changes to freehold provisions to flow through to leasehold developments. It will ensure that familiar concepts, rights and duties will apply.

All issues arising with apartment ownership will not be solved by statute, but an appropriate statutory framework will help to deal with various issues. Participation in any strata scheme that is developed will be voluntary, and the option of head lease/sub-leases and company share ownership by the sublessees will remain.

The Victorian strata title scheme found in the *Subdivision Act* 1988 has given rise to concerns about (for example) the management of disputes and the provision of enough money for the long-term maintenance of the building, particularly for large apartment complexes. However, many aspects of the scheme have been quite robust.

The current review by the Minister for Consumer Affairs (see section 3.1) may result in legislative changes, and those should be included as a matter of course in any scheme for alpine resorts. Any divergence from the general principles in the *Subdivision Act* 1988 and related legislation will erode the benefits of efficiency and transparency that are being sought. A requirement in developing any model applying strata concepts is that each Board, as lessor, should continue to deal with one responsible entity for each development, rather than with individual apartment owners. The schemes in New South Wales and British Columbia allow for subdivision into leasehold estates, but they do not deal with the head lessee/sublessee situation.

New developments or redevelopments in the alpine resorts are comparatively infrequent, perhaps 10-15 a year across all resorts. Any proposed model needs to be appropriate for new developments while also being suitable for the voluntary conversion of existing developments, so far as possible. For simplicity, new developments are considered first.

New developments

It is anticipated that any scheme would have the following features:

- the head lease must first be registered, so that there is a defined parcel of land known to the Land Titles Register that can then be subdivided;
- a plan in the form of a plan under the *Subdivision Act* 1988 showing the apartments will be lodged for registration;
- all relevant consents will need to be obtained and lodged – the head lessee consent via the application for plan registration, mortgagees, any other interests, caveators;
- upon plan registration, titles to the apartments and for the common property in the name of the body corporate will be created, with the registered proprietor (for the time being) of the apartments being the members of the body corporate and the common property vesting in these owners in shares proportional to their lot entitlement.

Issue: 3.4.1

What role can the body corporate play when the lease requires most of the responsibilities associated with a body corporate (e.g. insurance, maintenance) to be undertaken by the lessee, and the lessee passes all or some of these on to the sublessees via the sublease?

Proposal: The body corporate structure offers a simple method of linking sublessees together in their efforts to maintain and manage use of common areas and to raise money in a more direct manner than share ownership in a head lessee. It allows transfer of the sublease and the sublessee's interest in the common areas in a simple way. The body corporate's powers and duties would be very similar to those already in legislation. Some additional powers and exclusions may be needed because of the lease, rather than freehold situation and also because of the need for the Boards to deal with one entity per development. However, this will not account for how apartment owners' rights and obligations under the lease and the subleases will interact with their rights and obligations as members of the body corporate.

This can only be handled by new legislation that sets out a scheme to provide for the various issues. These provisions will be novel in that Victorian legislation does not cater for the subdivision of leasehold interests under the *Subdivision Act 1988*. They will also be new compared with other examples of legislation in that there is to be one entity per development, not multiple apartment holders that deal with the relevant Board as lessor.

Model 1

Under this model, the initial lessee of the development ceases to be involved after the apartments are transferred to the purchasers. The Board becomes the lessor of the apartments directly but will be obliged to deal with the body corporate for issues related to the development, not individual apartment owners. The body corporate comprises the apartment owners, and it and the apartment owners obtain a leasehold title rather than a sublease title. This model uses the body corporate to simplify the present situation and give greater control to apartment owners.

This is a summary of the general sequence of steps (see also the diagram for Model 1):

- a lease from the Board for the whole of the site would be registered with the Registrar of Titles;
- a plan of subdivision showing the apartments would be lodged with the Registrar of Titles for registration along with all required consents;
- upon registration of the plan, leasehold title to each of the apartments would be created in the name of the lessee. The lease conditions could attach to each individual apartment title. Alternatively, replacement leases for each apartment could be lodged with the plan when it is being registered. Those leases would start on plan registration and all terminate on the same date. They would be leases in substitution for the original lease for the whole site (as in the NSW legislation). Leasehold title to the common property would be held by the body corporate. The original lease title would be cancelled;
- the lessee transfers (via a simple form) each apartment to its purchaser, who becomes the registered proprietor of the leasehold apartment title once the transfer is registered. That purchaser's share in the leasehold common property transfers to that purchaser automatically (as occurs now for common property in freehold). Once all the apartments have been transferred, the original lessee has no further role;
- legislation will provide that in addition to the usual and any necessary additional powers of a body corporate (such as the body corporate taking over responsibilities in the leases and

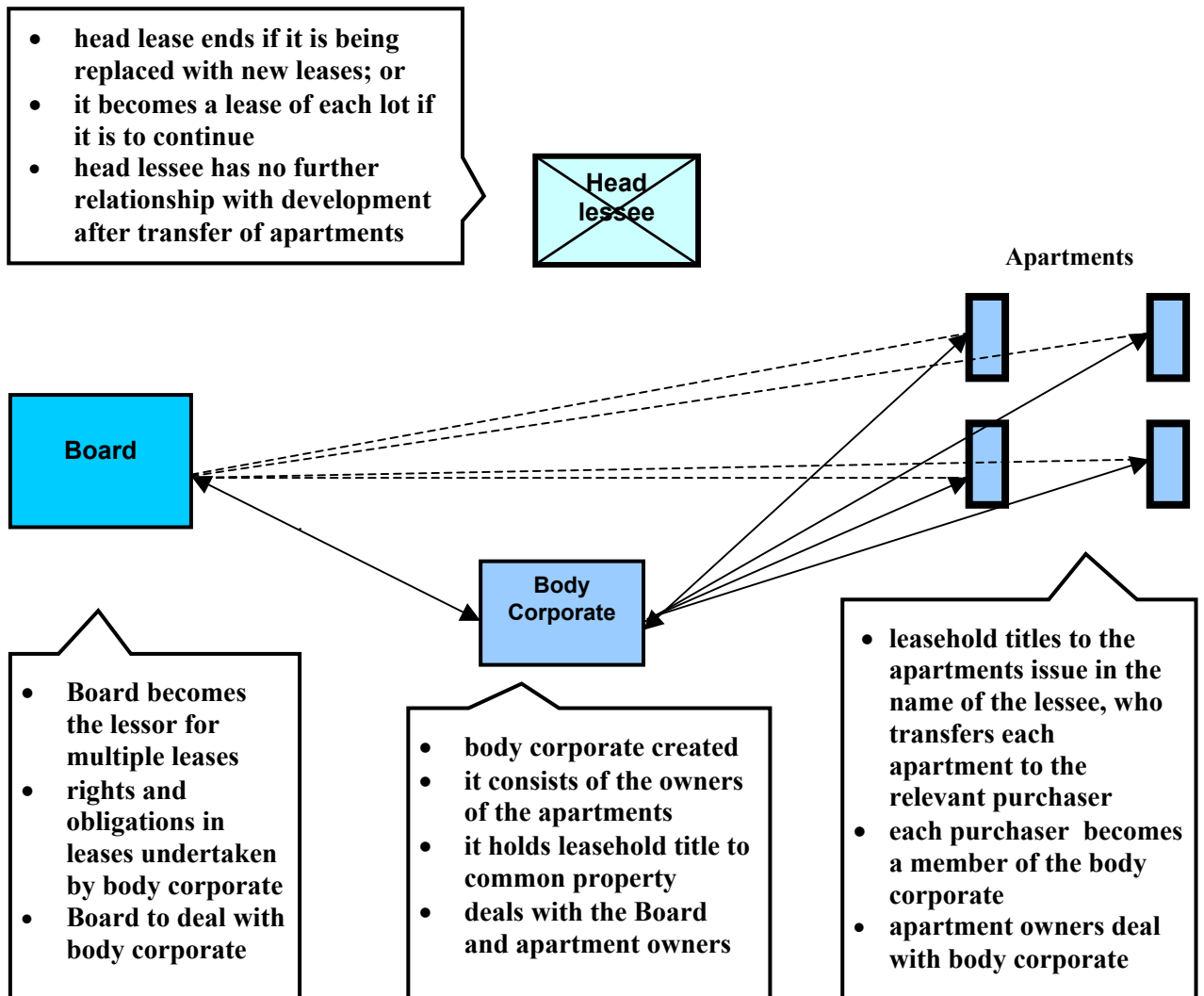
maintaining common property in accordance with the lease conditions), the body corporate is to deal with the Board on any lease issues on behalf of the lessees and vice versa.

Legislation will need to provide for how differences in obligations/powers between the lease and the present legislative body corporate powers are to be managed. For example, the lease may require insuring for public liability for greater amounts (e.g. \$20 million in the new form of lease) compared with the body corporate regulations (which only require insurance for \$10 million). In that particular instance, legislation may be required to provide that the lease obligation prevails.

If the terms of the initial lease are to continue, the legislation will need to provide that the terms of that lease apply to each of the apartment lease titles that issue.

Model 1 is similar to the New South Wales scheme. This model, in effect, collapses the head lessee/sublessee structure. It does away with the head lease. There are no sublessees, there are only lessees from the Board. The Boards will deal with the body corporate, not the lessees, directly and the lessees will deal with the Board through the body corporate only, not directly. The registered proprietors of the leases are the members of the body corporate.

Diagram of Model 1 after plan registration



Note refers to a lease

Model 2

This scheme mirrors the existing structure of the head lease and subleases while using the body corporate structure for the sublessees to operate in.

The scheme would need to provide that:

- a body corporate is created on plan registration, members of the body corporate being the sublessees, the powers and duties of the body corporate being those in current legislation with any additional necessary powers;

- the rights and obligations of the head lessee are to be undertaken by the body corporate;
- title to each sublease apartment is created upon plan registration.

This scheme requires the retention of a head lessee. The head lessee is a separate legal entity to the body corporate, even if the body corporate takes over that role in a practical sense. A separate lessee existing before and after the sublessees is necessary because the subleases are a part of the lease interest, and when they end there must be a lease interest into which they revert. This entity, the head lessee, exists before the subdivision. It will lodge the plan of subdivision creating the body corporate and sublease titles. The separate entity also needs to exist so that when the subleases end, there is still an entity in existence that can undertake the obligations in the head lease for the time, however short, that the lease continues. The body corporate (in a sublease model) does not exist until there are subleases and ceases to exist as soon as all of the subleases end. This is because it is comprised of the subleasehold proprietors.

This is a summary of the general sequence of steps (see also the diagram for Model 2):

- a lease from the Board to a company or individual is registered with the Registrar of Titles;
- a plan of subdivision showing the apartments is lodged with the Registrar of Titles for registration along with all required consents;
- upon registration, a sublease title to each of the apartments is created in the name of the lessee and, by force of legislation, the sublease conditions (as lodged with the plan) attach to each individual sublease title. Title to the common property is held by the body corporate as a sublessee. The leasehold title is not cancelled as it still exists — it is the sublease interest that is subdivided by plan registration, not the leasehold;
- the lessee transfers (via a simple form) the sublease title to each apartment purchaser, who becomes the registered proprietor of the sublease apartment title once the transfer is registered. Their share in the sublease common property transfers to them automatically (as occurs now for common property in freehold);
- legislation should provide that in addition to the usual and any necessary additional powers of a body corporate, the body corporate is to deal with the Board on any lease issues on behalf of the lessees and vice versa.

Legislation will be needed to define how differences in obligations/powers between the lease and sublease and the present legislative body corporate powers are to be managed in accordance with the sublease obligations, in a similar manner to Model 1.

Similar to Model 1, Model 2 in practical effect collapses the head lessee/sublessee structure to the body corporate/sublessee structure. The Board will deal with the body corporate. The sublessees will act through the body corporate for all management issues, fund raising, etc, and deal with the Board and responsibilities under the lease through the body corporate, of which the registered proprietors of the subleases are the only members.

A practical flaw with this scheme is that the head lessee must continue to exist for the life of the head lease, even though for practical purposes it is defunct as the body corporate exercises its powers and duties. The requirements for corporations will need to be met over that period to ensure that the head lease still exists at the end of the lease term.

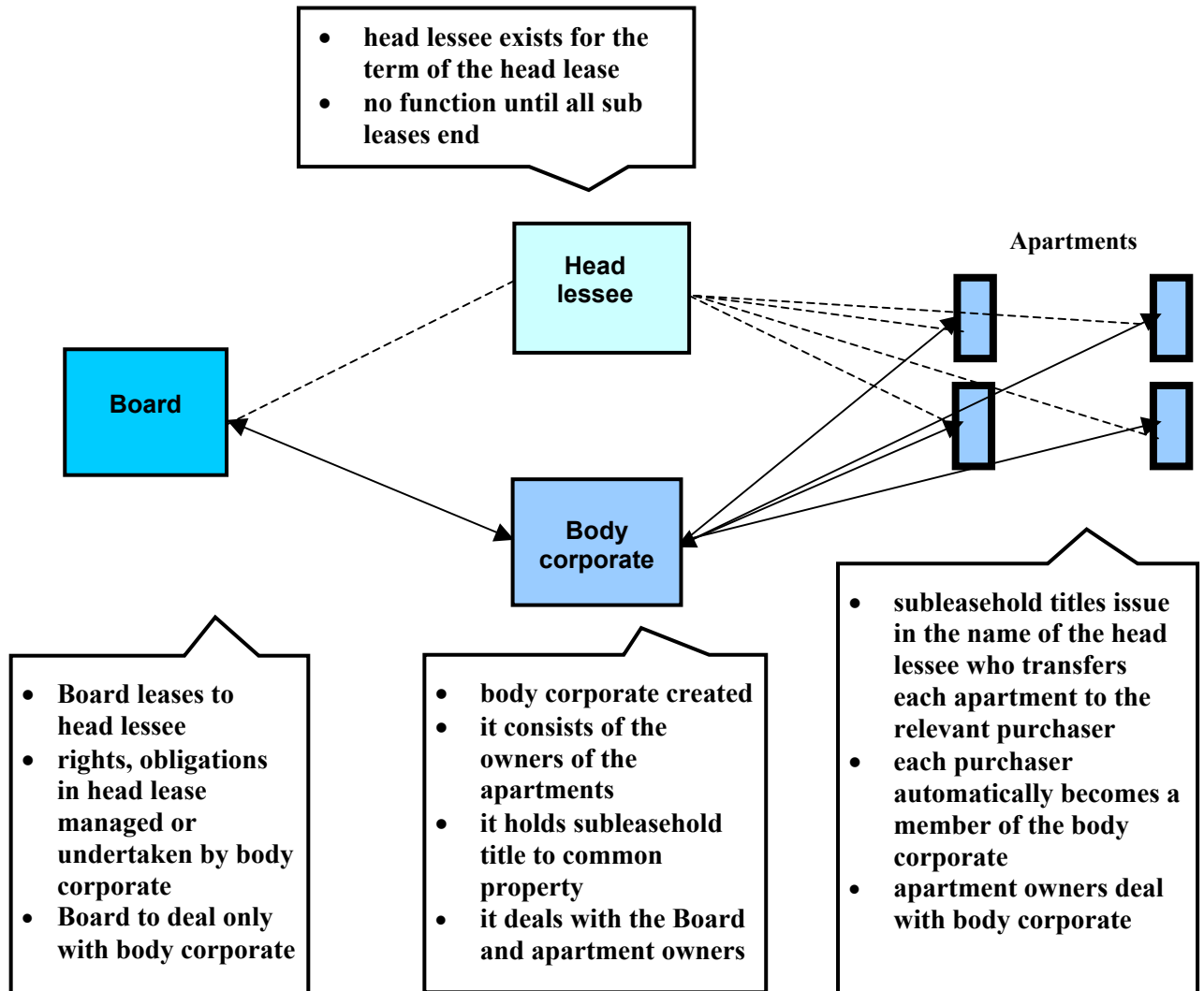
This means attending to matters such as annual reporting to the Australian Securities & Investments Commission (ASIC) and holding an annual general meeting. This will incur some expenses and may not always be undertaken over the long lifetime of the lease. In addition, ownership of the head lessee company's shares will need to be considered, possibly requiring share transfers as well as the registration of simple sublease transfers on the sale of an apartment.

Issue 3.4.2

Is it practical to expect the head lessee company to be properly maintained over a lengthy period when its functions and duties under the lease are being exercised by the body corporate?

Proposal: while the annual requirements are not necessarily onerous, they are ongoing and will need to be regularly reviewed. If for example, office holders sell their apartment and shares then new appointments and appropriate notification will be required. To expect this to be complied with in a company that may be almost functionless for decades may be a fatal flaw with Model 2.

Diagram of Model 2 after plan registration



Note:  refers to a lease

Issue 3.4.3

Which is the most suitable model?

Similarities:

- title to the apartments
- simple transfers
- both provide that the Board will deal with one entity per development

- formal plan processes are required. These are: preparation of a plan in *Subdivision Act 1988* format; plan certification; compliance statements; and registration. Formal *Subdivision Act 1988* processes will apply to changes to the plan of subdivision once it has been registered.

Differences:

- Model 1 elevates the apartment owners' interests to a lease rather than a sublease ;
- In Model 1, the original lease becomes irrelevant once the lessee has transferred the apartments, but in Model 2 the head lease must be retained throughout the term;
- Model 2 has the added complexity of retaining the head lessee but also introducing a body corporate.

The application of the provisions of the *Subdivision Act 1988* to a leasehold will impose new layers of complexity and formality. However, the process of plan preparation, lodgement, and the results of registration are well understood by the development industry. There is general community exposure and understanding of the role of a body corporate in an apartment development.

The present tenure mechanisms used in alpine resorts may assist in simplifying the practical operation of either Model 1 or 2; for example, where shares in the head lessee are held solely by the sub-lessees. In these circumstances, the control/responsibility/duties issues expressed in the lease, head lease and body corporate regulatory framework may be reconciled at a practical level relatively easily, because membership of the original head lessee and the body corporate created on plan registration are identical.

The application of the *Subdivision Act 1988* will address the issues of sound management of the building, efficient and transparent dealings with the leases and subleases, and maintenance fees in the same way that they are addressed in the freehold equivalent. By sitting within the framework of the *Subdivision Act 1988*, there will be consistency with freehold parcels.

Comparison of the current scheme and the models

	Separate registered title to Apartment must be created	Reduced conveyancing costs	Simplified documents	Formal subdivision process required	Head lessee company removed	Access to body corporate dispute resolution	Special company share/other arrangements unnecessary	Board deals with one entity only	Ability to create body corporate, common property
Current scheme Board as lessor to head lessee, sublessees hold shares in the head lessee	×	×	×	×	×	×	×	✓	×
Model 1 Board as lessor to multiple lessees, relationship managed through body corporate	✓	✓	✓	✓	✓	✓	✓	✓	✓
Model 2 Board as lessor to head lessee, sublessee/Board relationship managed through body corporate	✓	×	×	✓	×	✓	×	✓	✓

3.5 Conversion of existing developments

Conversion to either model will be voluntary. It will require extensive documentation. Because of the relatively small number of new developments and redevelopments each year, conversion provisions will be an important part of any scheme. However, conversions may be complex, because the leases may have been amended over time and there may be multiple parties whose consent will be required.

Conversion to Model 1

This is a summary of the general sequence of steps (see also the diagram for Model 1):

- a head lease from the Board is registered with the Registrar of Titles;
- a plan of subdivision in a form similar to the *Subdivision Act 1988* format (at least) showing the apartments is lodged with the Registrar of Titles along with all required documents and consents. This will include Board consent to the conversion. An issue that arises is how will all parties be satisfied that the boundaries on the plan of subdivision substantially agree with the boundaries of occupation/sublease boundaries and that all consents, including from the head lessee and sublessees, have been obtained? The Registrar will be unable to fulfil this role as there will be little information in the Registrar's records, so an opinion cannot be formed (compare with conversions of freehold stratum plans under section 98CA of the *Transfer of Land Act 1958* and following, where the Registrar has a certifying role);
- legislation will need to provide that each sublease ceases to exist on plan registration and leasehold title to each of the apartments is created. (The head lessee, all sub-lessees and others with an interest in the land need to agree to the conversion application, so while the legislation will give authority to end the sub-leases it is not a compulsory process.) It may be possible for the leasehold titles to issue in the name of the former sublessees by force of the legislation, although this will require detailed consideration. Title to the leasehold common property will be created in the name of the body corporate. The title to the leasehold in the name of the head lessee will be cancelled as all of the leased land will be subdivided into apartment and common property titles;
- legislation will substitute the body corporate for the head lessee in any contracts, e.g. building management contracts that the head lessee had entered. Legislation will also be needed to deal with other interests in the land, e.g. mortgages. After legislation has catered to these issues and the application is accepted by the Registrar of Titles, the converted development will be treated in the same way as a new development.

Conversion to Model 2

This is a summary of the general sequence of steps (see also the diagram for Model 2):

- a head lease from the Board is registered with the Registrar of Titles and a plan of subdivision in a form similar to the *Subdivision Act* 1988 format is lodged with the Registrar for registration, along with all required documents and consents. This will include Board consent. The issue of confidence in the accuracy of boundaries is provided in the same way as for the Model 1 conversion;
- legislation will provide that sublease titles to each of the apartments is created, possibly in the name of each relevant sublessee and, by force of legislation, the relevant sublease conditions attach to each individual title. Title to the sublease common property will be held by the body corporate. The title to the leasehold in the name of the head lessee is not cancelled as it continues to exist;
- legislation will substitute the body corporate for the head lessee in any contracts, e.g. building management contracts that the head lessee had entered. Legislation will need to deal with other interests in the land, e.g. mortgages.

Issue 3.5.1

Particular issues arising in conversions

Decisions will need to be made on issues such as:

- will developments need to comply with building requirements and/or planning requirements existing at the time of the original development or at the time of the conversion?
- some conversions to strata in the freehold system require the full plan of subdivision process, including Council certification and compliance statements following referral to all referral authorities, to be undertaken. This is so for company share developments in the freehold situation. However, the stratum plans (freehold) do not have to go through Council, because a plan approved by Council will previously have been lodged with the Registrar of Titles. What plan process should apply to the alpine resort development conversions?
- are there contractual arrangements that have been entered into between the parties in the development that need to end upon plan registration, not just substitute the body corporate? For example, are any developments subject to a separate contract entered into as part of setting up a satisfactory method (between apartment owners) of managing the common areas, but the new body corporate will assume that role?
- will a new head lease be required before conversions can proceed, simplifying the conversion process so that it is effectively treating the conversion as a new development?

4. Next steps

You are invited to respond

Your response to the discussion paper and/or this background paper is sought by **17 December 2004**. Lessees, sublessees, those with a right to occupy alpine apartments and interested individuals and organisations are encouraged to make a written submission. Your input is important in helping us to achieve appropriate outcomes.

Preparing and forwarding submissions

There is no set format and submissions can be made in electronic, written or printed form. Submissions might range from a short letter outlining your views in relation to some of the matters raised in the discussion paper or this supporting background paper, or a more substantial document covering a range of issues. You should give reasons for your opinions and, where possible, provide supporting evidence.

Please note the content of your submission may be made public unless your document is marked confidential. Your name and address (street or email) will not be published in either case. Submissions should be forwarded to:

Alpine Resort Leasing
Registration and Strata Project
Crown Land Management
17/570 Bourke Street
Melbourne 3000

or by email to: arcc.contact@dse.vic.gov.au

or by fax to: (03) 8636 2788

These details may also be used as contact points for the project.

A final paper will be prepared

A final report, including any recommendations, will be prepared in March 2005.

More information

Further information is available.

- Alpine Resort Leasing Policy: www.arcc.vic.gov.au
- bodies corporate generally, including the current review by Consumer Affairs Victoria: www.consumer.vic.gov.au (see Homes and Renting)
- the Alpine Resorts Planning Scheme: www.dse.vic.gov.au (see planning)
- the *Transfer of Land Act 1958*, the *Subdivision Act 1988* and body corporate regulations: www.dms.dpc.vic.gov.au

History of tenure in alpine resorts

1. Current leasing regime — *Alpine Resorts (Management) Act 1997 (AR(M)A)*

This Act came into operation in 1988 and provides for the management of alpine resorts. It repealed most of the *Alpine Resorts Act 1983 (ARA)* and abolished the Alpine Resorts Commission (ARC). The AR(M)A establishes the Alpine Resorts Coordinating Council and the Alpine Resort Management Boards.

Section 7(1) of the Act provides that, if the Minister first approves, Boards can grant a lease for any term not exceeding 99 years. Boards also have the power to grant leases of up to 21 years in their capacity as a committee of management under the CLRA.

Most of the current leases were issued by the ARC, but there are still current leases issued by the ARC's predecessors. These include leases under the *Forests Act 1958*, the *Mt Hotham Alpine Resort Act 1972* and the *State Electricity Act 1958*.

Current leasing details

Resort	1 No. of leases (head/sole)	2 No. of leases in 1 with sublease/s	3 No. of subleases per lease
Mt Buller	200	70	(=700)
Falls Creek	113	35	19,14,16,1,1,1,23,6,19,3,1,41,1 27,6,6,1,4,11,24,4,5,2,12,5,1,7, 7,4,12,4,5,7,5,5,1,15 (=320)
Mt Hotham	83	18	48,163,10,14,12,8,31,42,50,4,1 2,28,10,8,3,3,2,6,(=459)
Mt Baw Baw	25	0	
Mt Stirling	1	0	
Lake Mountain	0	0	

2. Leasing pursuant to the *Alpine Resorts Act 1983 (ARA)*

The ARA established the ARC and specified its powers. The ARC was responsible for the management of all the resorts. The ARA also amended the *Forests Act 1958*, the *Local Government Act 1958* and repealed the *Mount Hotham Alpine Resort Act 1972* to enable the ARC to undertake its role in all alpine resorts.

Crown land within alpine resorts could only be leased or dealt with in accordance with the ARA. Leases were issued for terms of:

- up to 50 years for ski lodges, public authorities and business undertakings;
- up to 99 years for high-value, substantial buildings.

3. Leasing prior to the *Alpine Resorts Act 1983*

The alpine resorts were managed by various government agencies under diverse legislative regimes with different purposes.

(a) **Mt Buller, Mt Stirling, Mt Baw Baw and Lake Mountain**

These resorts were administered by the Forest Commission Victoria and its successors under the *Forest Act 1958*, until the ARC assumed responsibility.

The ARC became responsible for Mt Buller and Mt Stirling in 1985, Mt Baw Baw in 1986 and Lake Mountain in 1987.

In 1985, tenure at Mt Buller consisted of 135 permissive occupancies and 34 leases. Permissive occupancy does not confer any interest in land and is merely a personal right of occupation. In later years, the Forests Commission granted 21-year leases for ski lodges and up to 75-year lease terms for large commercial developments.

In 1986, tenure of sites at Mt Baw Baw consisted of 20 permissive occupancies granted to ski clubs and leases granted to the lift company and two commercial operators.

At the time the ARC assumed responsibility for Mt Stirling and Lake Mountain, there were no existing leases.

(b) **Falls Creek**

Falls Creek was administered by the State Electricity Commission of Victoria, which was responsible for the management of the State's electricity and power needs under the *State Electricity Commission Act 1958*.

In 1985, tenure at Falls Creek consisted of 97 leases and 11 permissive occupancies. Lease tenure ranged from 20 years for a ski lodge to 45 years for a commercial development.

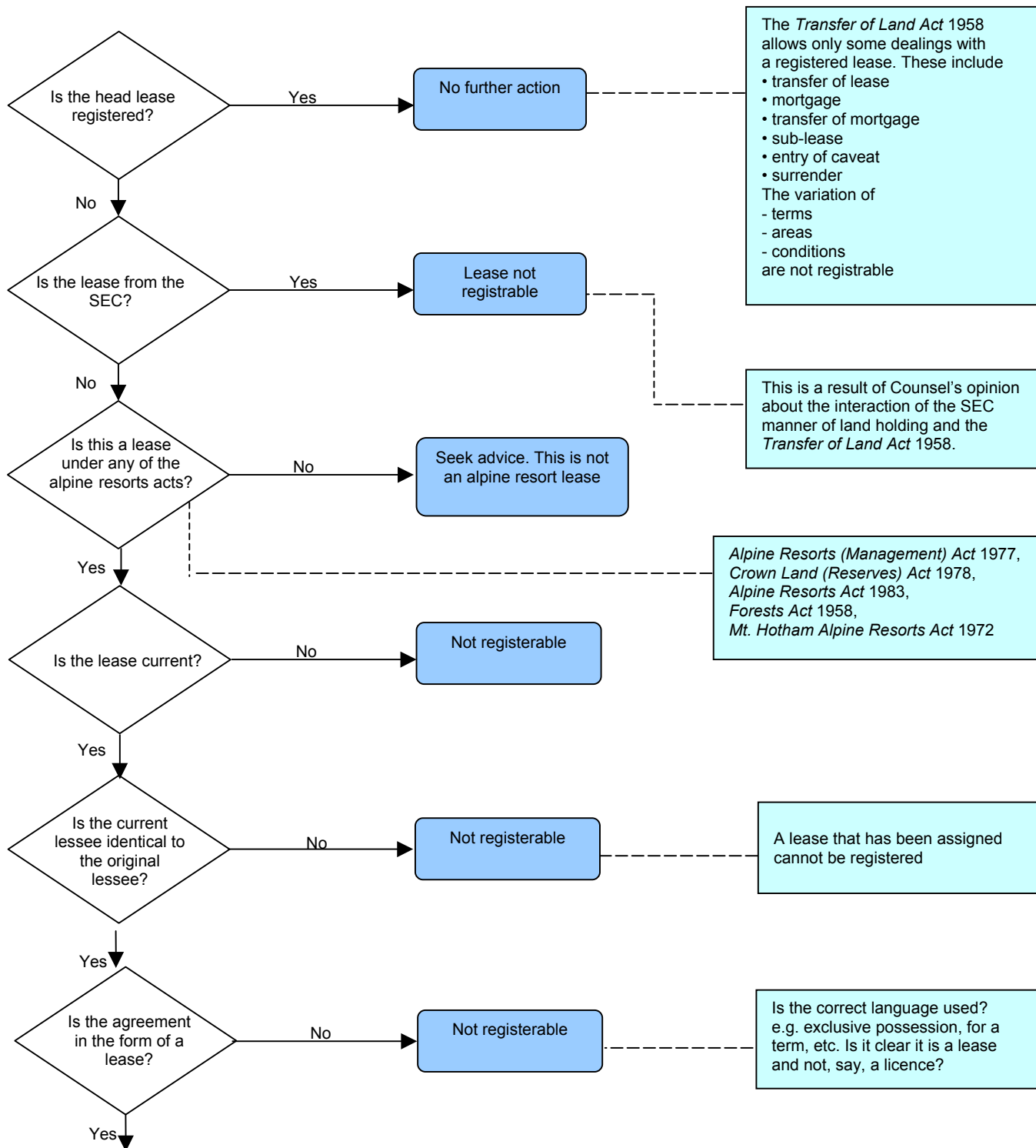
(c) **Mt Hotham**

The principal acts under which tenure was granted were the *Land Act 1958* and the *Mt Hotham Alpine Resorts Act 1972*.

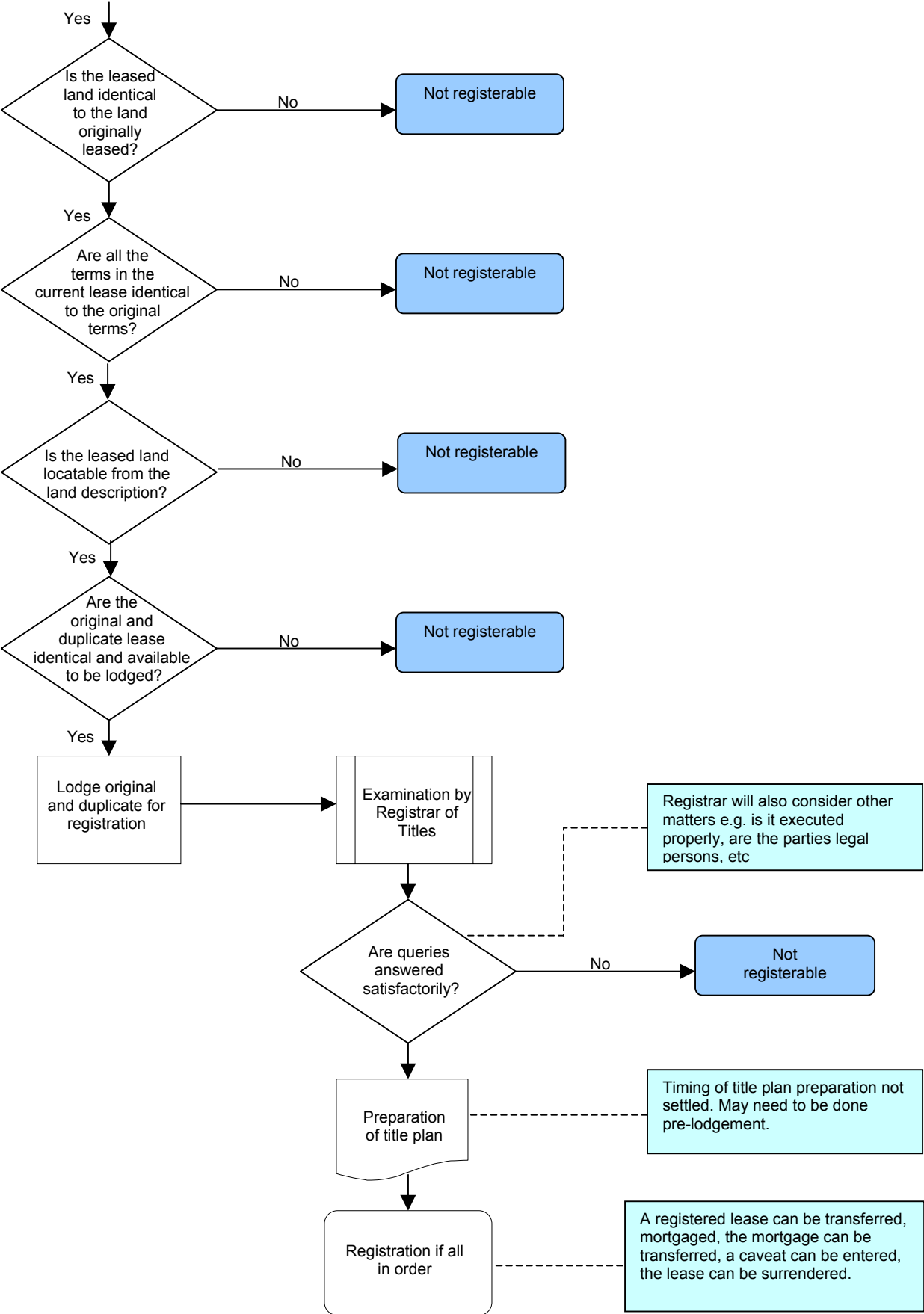
Leasing was handled by the former Department of Crown Lands and Survey. Lease terms were 20 years for ski lodges and up to 75 years for large commercial developments. Some of the leases issued by the Department of Crown Lands and Survey are registered at the Land Registry. Numerous subleases have been registered on the registered Crown leases.

In 1985, tenure at Mt Hotham consisted of two freehold sites, 74 leases and eight permissive occupancies. The leasing provisions of the *Mt Hotham Alpine Resort Act 1972* formed the basis of the leasing provisions in the *Alpine Resorts Act 1983*.

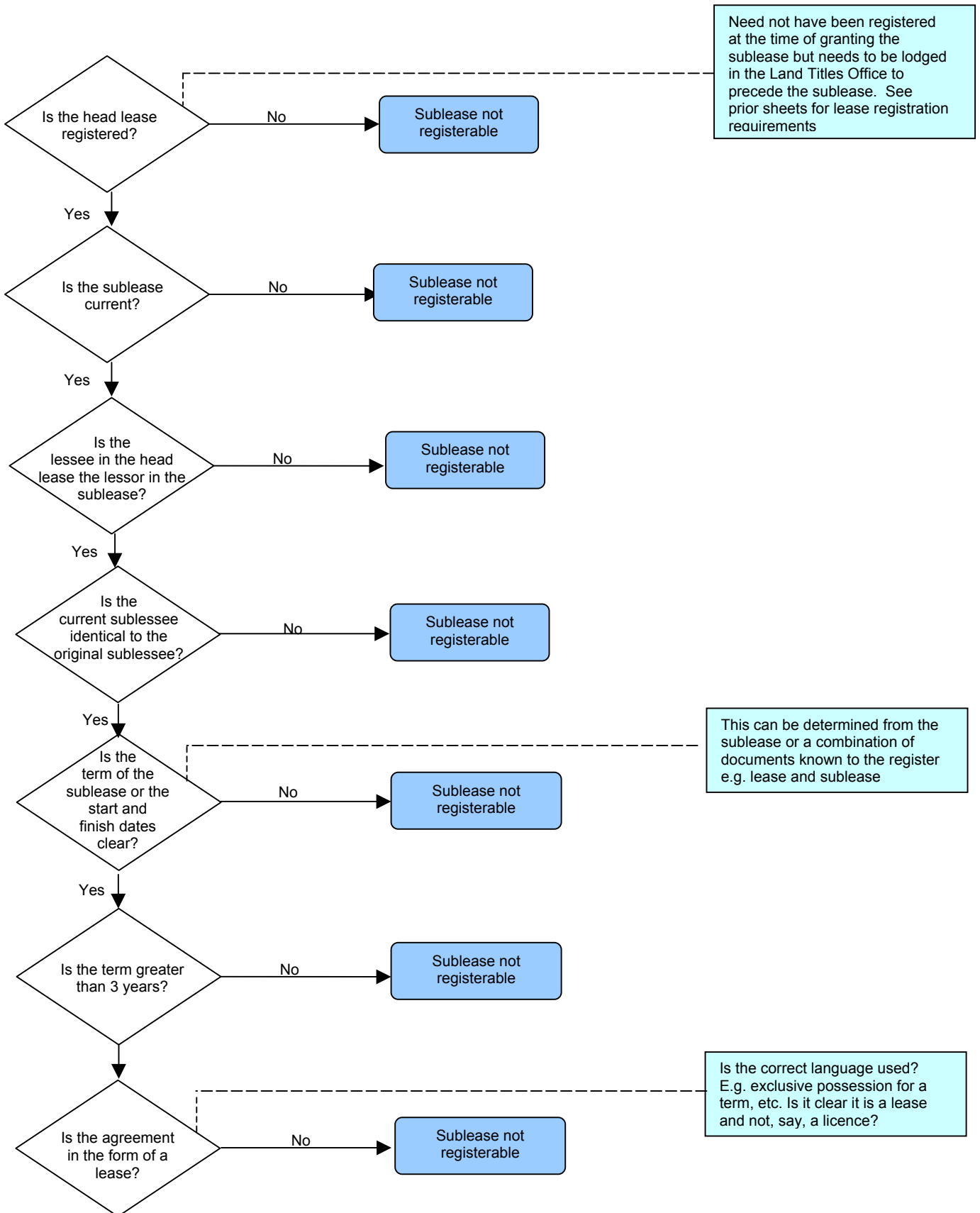
Registration of alpine leases — can I lodge my lease for registration?



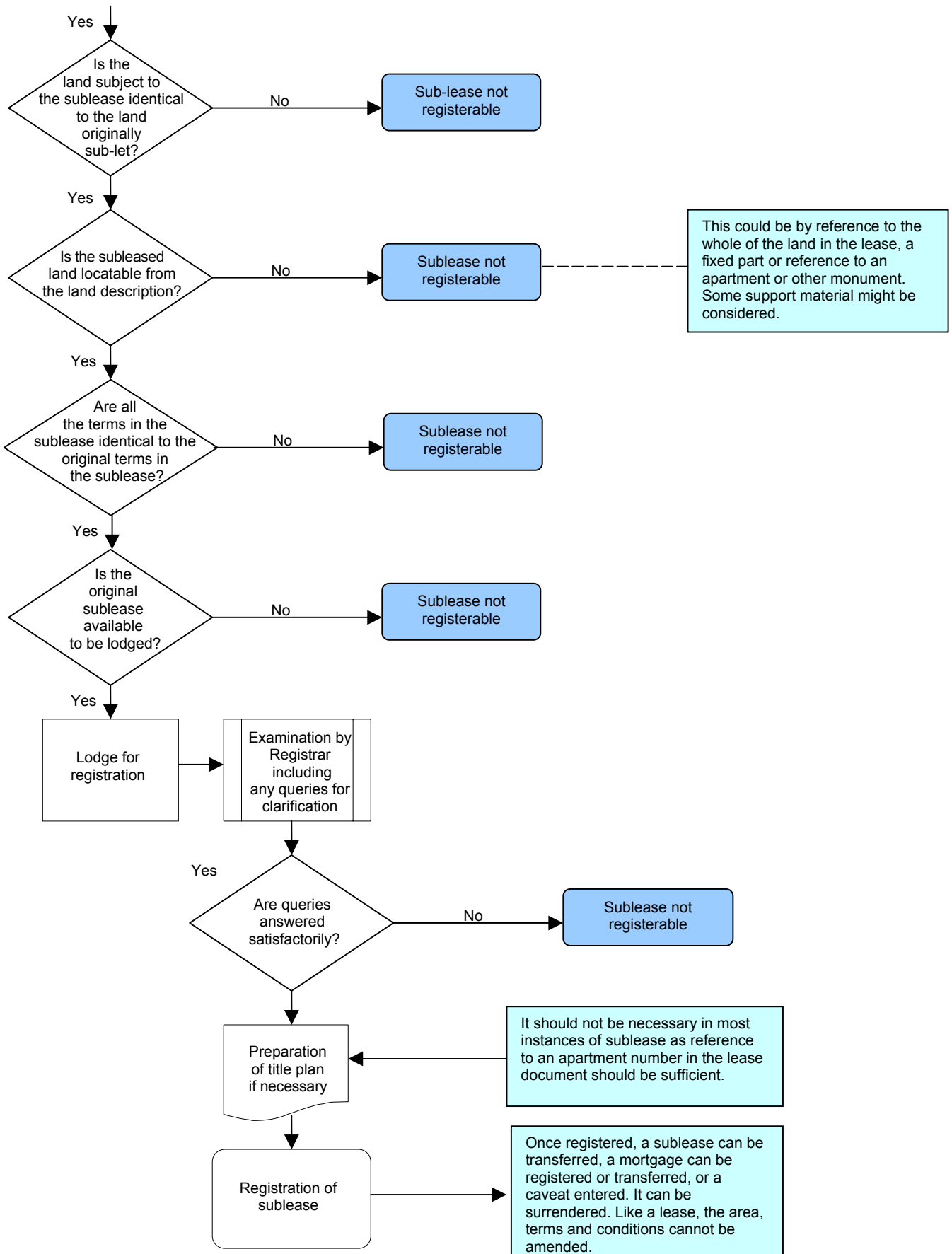
Registration of alpine leases - can I lodge my lease for registration?



Registration of alpine subleases – can I lodge my sublease for registration?



Registration of alpine subleases – can I lodge my sublease for registration?





Department of Sustainability and Environment

Folio Report

LAND VICTORIA

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THIS SEARCH STATEMENT HAS BEEN RESTRICTED TO SHOW RECORDINGS AFFECTING THE CROWN LEASE AND THE SUB LEASE OF APARTMENT 123 ONLY. ALL INTERESTS AFFECTING THE SUB LEASE ARE SHOWN IMMEDIATELY BELOW THE DETAILS GIVEN FOR THE APARTMENT 123.

ALPINE LEASE

LAND DESCRIPTION

Lot 1 on Title Plan 001111P.
Created by instrument Y000000T 01/01/3000

REGISTERED PROPRIETOR

Estate Leasehold
EXPIRY DATE 01/09/3049
Sole Proprietor
SMITH PTY LTD of 10 Jones St. Melbourne 3000
N80009K 01/02/3000

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGE R01001L 01/02/3004
COMMONWEALTH BANK AUSTRALIA LTD

Any crown lease reservations exceptions conditions limitations and powers noted on the plan or imaged folio set out under DIAGRAM LOCATION below.
For details of any other encumbrances see the plan or imaged folio set out under DIAGRAM LOCATION below.

Any encumbrances created by Section 98 Transfer of land Act 1958 or Section 24 Subdivision Act 1988 and any other encumbrances shown or entered on the plan set out under DIAGRAM LOCATION below.



Department of Sustainability and Environment

Folio Report LAND VICTORIA 2 of 2

SUB- LEASE L297124X 02/03/3000
Expiry Date 31/08/3048

APARTMENT 123
JOHN BROWN
MARY BROWN

TRANSFER OF SUB-LEASE M010001P 05/06/3007

CAVEAT L012211P 20/01/3001

BENDIGO BANK P/L
Capacity MORTGAGEE
Date of claim 20/10/3000
Lodged by
XYZ SOLICITORS
Notices to
XYZ SOLICITORS of 01 WHITE ST. WANGARATTA

DIAGRAM LOCATION

SEE TP001111P FOR FURTHER DETAILS AND BOUNDARIES

DEALING ACTIVITY IN THE LAST 105 DAYS

DEALING	MIGRATION CODE	STATUS	DATE
V010020D		Unregistered	11/11/3013
X021010A	DISCHARGE OF MRTGAGE	Unregistered	15/11/3021
X021011Y	TRANSFER OF LEASE	Unregistered	15/11/3021
Y111234B	DISCHARGE OF MORTGAGE	Unregistered	01/03/3022
Y111235X	MORTGAGE	Unregistered	01/03/3022
Y234567A	TRANSFER OF LEASE	Unregistered	28/03/3022
Z5768325J	TRANSFER OF LEASE	Unregistered	18/04/3022
Z5768326G	MORTGAGE	Unregistered	18/04/3022
Z9976982A	DISCHARGE OF MORTGAGE	Unregistered	08/08/3022
Z9976983B	TRANSFER OF SUB-LEASE	Unregistered	08/08/3022
ZA100100L	DISCHARGE OF MORTGAGAGE	Unregistered	21/08/3022
ZA100101V	TRANSFER OF SUB-LEASE	Unregistered	21/08/3022
ZA100102F	MORTGAGE	Unregistered	22/08/3022
ZC513452Y	TRANSFER OF LEASE	Unregistered	28/08/3022
ZF398159S	TRANSFER OF LEASE	Unregistered	02/10/3022
ZF398160R	MORTGAGE	Unregistered	02/10/3022
ZP610006W	CAVEAT	Unregistered	09/10/3022
ZQ300115P	TRANSFER OF LEASE	Unregistered	16/10/3022

STATEMENT END

History of strata subdivision of freehold land

Conventional subdivision of land

The subdivision of land into individual lots for separate house to be constructed on is the most straightforward form of subdivision. It does not involve subdivision into separate strata and the land owner will own above and below the surface of the land, at least within certain general confines eg the depth limit of the Crown grant. The *Subdivision Act 1988* governs both conventional and more complex subdivisions in Victoria.

Subdivision of buildings

The way in which the more complex matters of how villa units and apartments are owned is evolving over time and with the increasing number of those types of development. None of the various schemes have dealt with leasehold.

De facto 'building subdivision' or company share development — 1945

Subdividing a building on a company share basis began in approximately 1945. A building with a number of apartments is owned by a company. A purchaser buys shares in the company and those shares entitle the purchaser to occupy a particular apartment. This results in a de facto subdivision of the building, but the company remains the legal owner. No separate title is issued for individual apartments. The management of the building is governed by the company documents (memorandum and articles of association) and perhaps other agreements.

The main disadvantage is that the purchaser has no legal interest in the development and no title to the apartment. A mortgaged to secure a loan cannot be registered, so it is difficult to obtain finance. A transfer of the apartment is complex, expensive and not readily understood. A further disadvantage is the lack of a consistent, defined relationship between apartment owners and for their responsibilities for any common facilities such as stairs or lifts. It is not known how many company share developments still exist, although approximately 250 have been converted to strata subdivisions. Company share subdivisions can still be created. They can be converted to subdivision under the *Subdivision Act 1988* by lodging a certified plan and a compliance statement for registration.

Stratum subdivision — 1960

Subdivision of a building into apartments became possible after changes to the relevant legislation in 1960. Each apartment is described as a space defined by dimensions. The plan shows the floor and ceiling limits (the stratum) of each apartment as well as other dimensions.

A stratum building subdivision divides the land into the residential lots and residual land that is to be used by all the owners of the residential lots. The residual land can consist of car parking spaces, gardens, and similar areas. The residual land will often be owned by a service company. That company allows residential owners to use the residual land on payment of set amounts. The residential owners also enter into agreements about their conduct within the subdivision.

This system of subdivision is complex and, as for company share matters, conveyancing can be expensive. In addition, the physical dimensions of the apartment as it was actually built, and the dimensions on the plan do not always correspond. This can be of concern, particularly to banks when a purchaser requests a loan.

Approximately 1400 of these stratum subdivisions were registered. Many were converted to strata subdivisions under conversion provisions then in the *Strata Titles Act* 1967. Conversion of a building subdivision to a plan of subdivision under the *Subdivision Act* 1988 is now allowed for in sections 98A, 98C and following of the *Transfer of Land Act* 1958. Some of the stratum subdivisions still exist. Conversion requires the consent of all registered proprietors and a plan of subdivision under the *Subdivision Act* 1988. Council certification is not required. The Registrar of Titles must be satisfied that the boundaries of the building subdivision substantially match the boundaries on the new plan.

Strata subdivision — 1967

This form of subdivision was introduced by the *Strata Titles Act* 1967. It provided for the subdivision of a building into lots (eg units, apartments, offices, car parks) and common property. Common property might be driveways, stairs and garden areas. The boundaries of the lots were usually defined by the physical features of the building, such as walls and ceilings. This means that precise surveying of internal boundaries was unnecessary.

Upon registration of the plan of strata subdivision a body corporate was automatically created with the role of maintaining and regulating the use of the common property. The owners of the lots became the members of the body corporate in proportion to their lot entitlement, an amount nominated on the original plan. By-laws governed the activities of the body corporate and the lot owners. The by-laws could be altered by resolution of the members of the body corporate. The owners of the lots owned the common property through their membership of the body corporate.

Strata subdivision was successful commercially and readily accepted by members of the public. It was used to subdivide both multi-storey and single-storey developments. More than 37,500 strata plans were registered. A strata title is readily accepted by banks and other lending institutions.

While this form of strata subdivision was successful, it lacked flexibility. A development could not be a mixed conventional and strata development, or create multiple bodies corporate.

Cluster subdivisions

The *Cluster Titles Act* 1974 enabled residential lots to be located in clusters or groups in various parts of the subdivision and providing a greater area of common property for use by all owners of the lots. This form of subdivision was not commercially successful, apparently because there were too many restrictions. Approximately 1800 plans of cluster subdivision were registered.

***Subdivision Act* 1988**

This act resulted from a review of the prior legislation related to conventional subdivision, stratum subdivision, and strata and cluster subdivision. The act sought to achieve:

- a single kind of property title rather than the various conventional, strata or cluster titles;
- a simplified act and regulations to be readily understood by the public as well as professionals.

Flexibility offered by the act includes allowing for more than one body corporate. Like the *Strata Titles Act* 1967, bodies corporate are created upon plan registration, the registered proprietors of the nominated lots being members of the body corporate in shares proportional to their lot entitlement. The act allows for a subdivision to be conventional, a strata-type subdivision of a building consisting of one or more storeys, or a combination of these two. This means that one plan of subdivision can deal with a combination of the subdivision of land into lots suitable for houses, shops, etc, as well as strata subdivisions, say, single-storey units as well as multi-storey apartments with one or more parcels of common property.

Some tax considerations

You may wish to consider the effects of taxation. The topics and details below will not cover all issues. They are also very generally expressed. You will have to consider your own circumstances, seek advice and reach your own conclusions.

GST

Bodies corporate created under the *Subdivision Act* 1988 are regarded as an entity for GST purposes that makes 'taxable supplies' and so fall within the GST regime. The body corporate will need to register for GST when it meets the registration turnover threshold. The threshold is \$50,000 if the body corporate is a for-profit body for GST purposes, but the threshold is higher for non-profit bodies. In any case, a body corporate may choose to register for GST purposes to claim input tax credits for spending on acquisitions.

Consideration should be given to whether the cancellation of existing leases and the creation of new leases under Models 1 or 2 triggers a GST liability. The definition of 'supply' for GST purposes is wide enough to catch both the cancellation and creation of a lease.

Consideration should also be given as to whether the creation of a new lease constitutes the supply of new residential premises. In Goods & Services Tax Ruling GSTR 2003/3, the Commissioner of Taxation has expressed his opinion on the application of the GST legislation, in particular how it applies in relation to the conversion of company title to strata title. In some instances, the creation of strata title from company title can constitute the supply of new residential premises. The supply of new residential premises by an entity registered for GST purposes is generally a taxable supply.

Consideration should also be given as to whether there is a supply of commercial residential premises or commercial premises by virtue of the creation of new leases. The supply of commercial residential premises and commercial premises by an entity registered for GST is a taxable supply and therefore subject to GST.

Some exemption from the application of GST may still apply until 30 June 2005 under GST transitional provisions, although it is very unlikely that any legislation to allow strata schemes would be in operation by that date.

Land tax

In the alpine resort developments at present, land tax is levied on the head lessee on the basis of its holdings. This tax is then passed on to sub lessees as fees to be charged under the subleases and to be paid to the head lessee. This may or may not be more than the amount that would be due if the tax were assessed on the total land holding of the individual apartment 'owner' (depending on their other land holdings).

Consideration will need to be given to whether land tax will be assessed on each individual sublease or whether it will be assessed on the company's single holding, where a company is interposed between the Alpine Resort Management Board and sublessees. It is unlikely that land tax will be assessed on the sublessees in Model 2.

Land tax is levied in Victoria on an incremental basis. As the value of an entity's land holding increases, the rate of land tax also increases. This may create the practical effect that the amount of

land tax payable by the head lessee company will not necessarily be equal to the sum of all land tax that would be payable if the sublessees were assessed on the value of their individual leasehold rights. This may be so at present, and also for Model 2. Sublessees who own many properties would pay a relatively higher amount of land tax on a sublease if they were individually assessed. Sublessees who own few properties would pay a relatively lower amount of land tax on a sublease if they were individually assessed.

Capital gains tax

Capital gains tax issues can arise in conversion of the right to occupy an apartment pursuant to the ownership of shares in the company to a lease or sublease interest. This is if the right to occupy the apartment was acquired after 19 September 1985 and is not the principal place of residence. See subdivision 124-B of the *Income Tax Assessment Act 1997*. Relief from capital gains tax can be obtained in some circumstances.

Stamp duty

The grant of a new lease and the transfer of a lease are transactions that are generally not subject to duty in Victoria.

Recent amendments have been made to the *Duties Act 2000* to impose duty on transactions concerning 'land use entitlements' (see the *State Taxation Acts (Tax Reform) Act 2004*). Land use entitlements include an entitlement to occupy land that is conferred by the ownership of shares in the company. Previously, the transfer of those shares was not liable to duty in the same way as a transfer of land. However, the transfer of such shares is now subject to duty. The provisions apply where there is ownership of shares only or alternatively, ownership of shares coupled with a lease. The value that duty will be charged on is the consideration paid or the value of the shares, whichever is greater.