

# Subdivision of Mixed Use Developments | A different perspective

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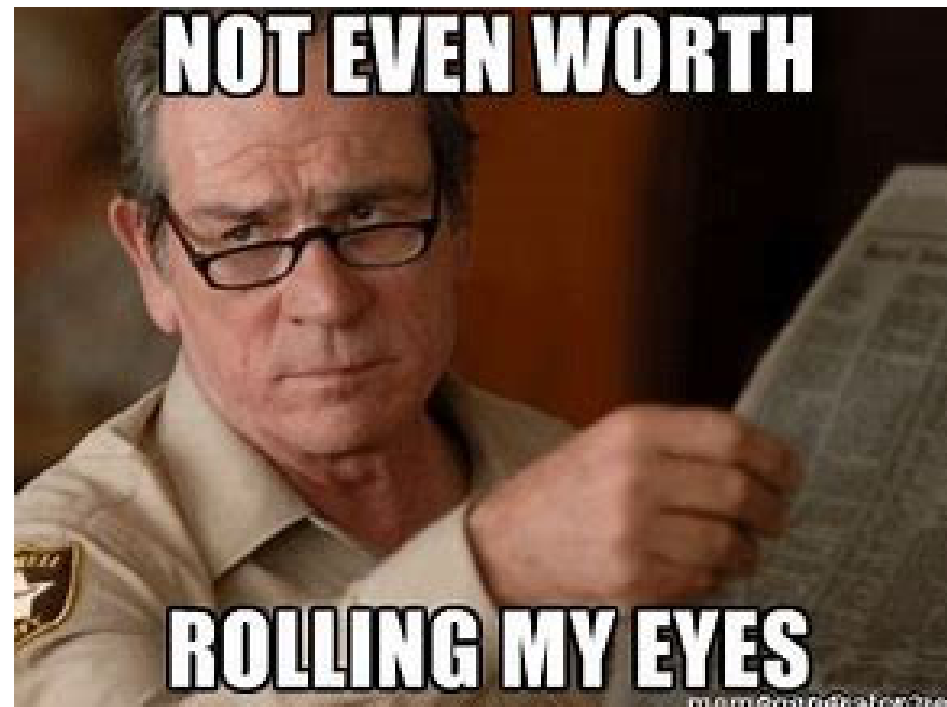
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# Mixed Use Projects



## Focus today – Volumetric Subdivision



## Why volumetric subdivision

- It is in my heritage – unashamedly a Queenslander
- Finance options
- Control/ higher value retail and commercial assets



## So why not volumetric subdivision

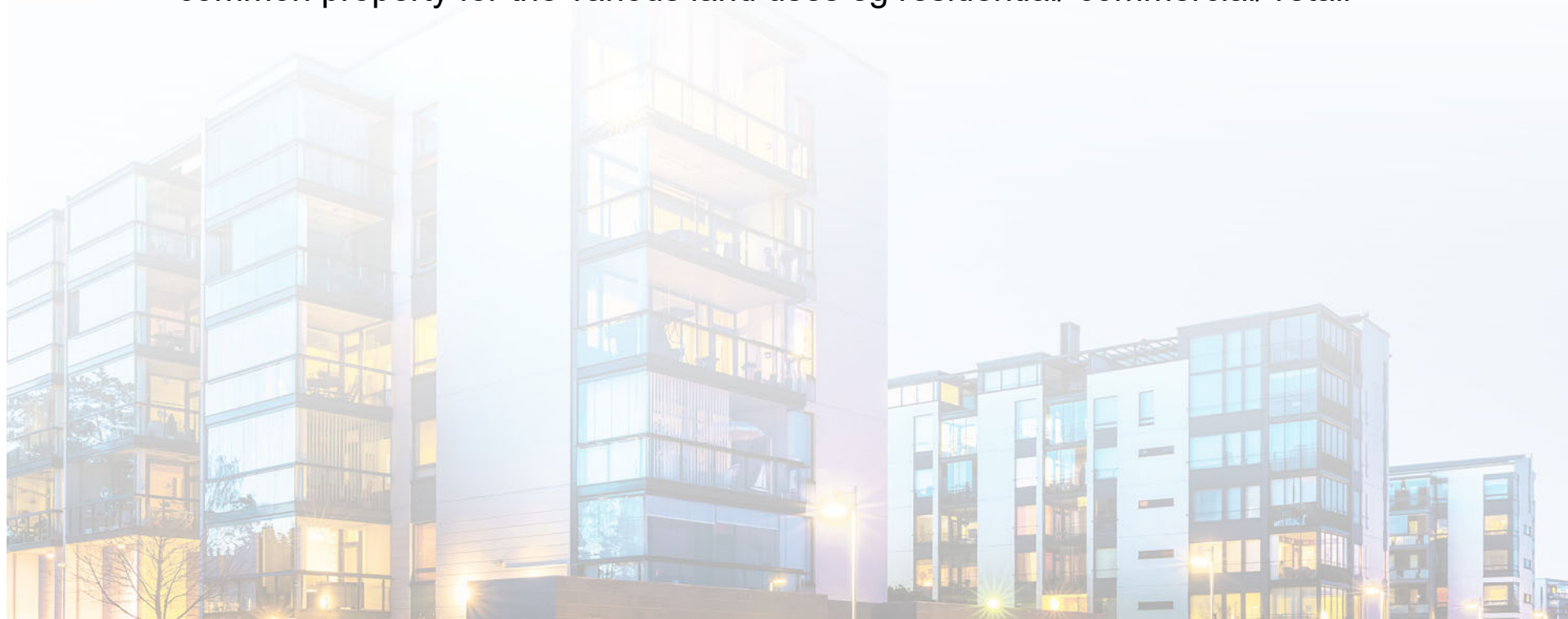
Some of the answers I have been given:

- It is not the norm
- What are you talking about
- Can we even do that in Victoria
- Go back to Brisbane
- Preference for dealing with different land uses, management of shared facilities/ services through owners corporations

“  
*If It Ain't Broke  
Don't Fix It*  
”

## Subdivision using Owner's Corporations

- From what I have seen, the most common approach to subdivisions in mixed use development appears to be by way of building subdivisions using Unlimited Owner's Corporation to provide for common property for primary thoroughfares/ share facilities, with limited Owner's Corporations to be established for lots and common property for the various land uses eg residential/ commercial/ retail



## Pros and Cons

Pros	Cons
Understood by industry	Limited options regarding construction funding/ security on big projects
Relatively simple	Lack of control by commercial/ retail lot owner over critical infrastructure/ shared access ways/ facilities
Implied easements under Subdivision Act	Complexities of calculating lot liabilities/ lot entitlements having regard to different land uses
	Future stage development/ construction – notice requirements re planning permit, building application and certification of plans of subdivision; crane swing/ anchors/ construction activities and reliance upon owners corporation rules that could be unlawful (ie lack of flexibility); reliance on owner's corporation rules and risk of unenforceability due to 'unfair discrimination' of owner/ occupier
	Owners Corporation Act Dispute Resolution Regime

# Part 10 of the *Owners Corporations Act 2006*

## OWNERS CORPORATIONS ACT 2006 - SECT 152

### Complaints

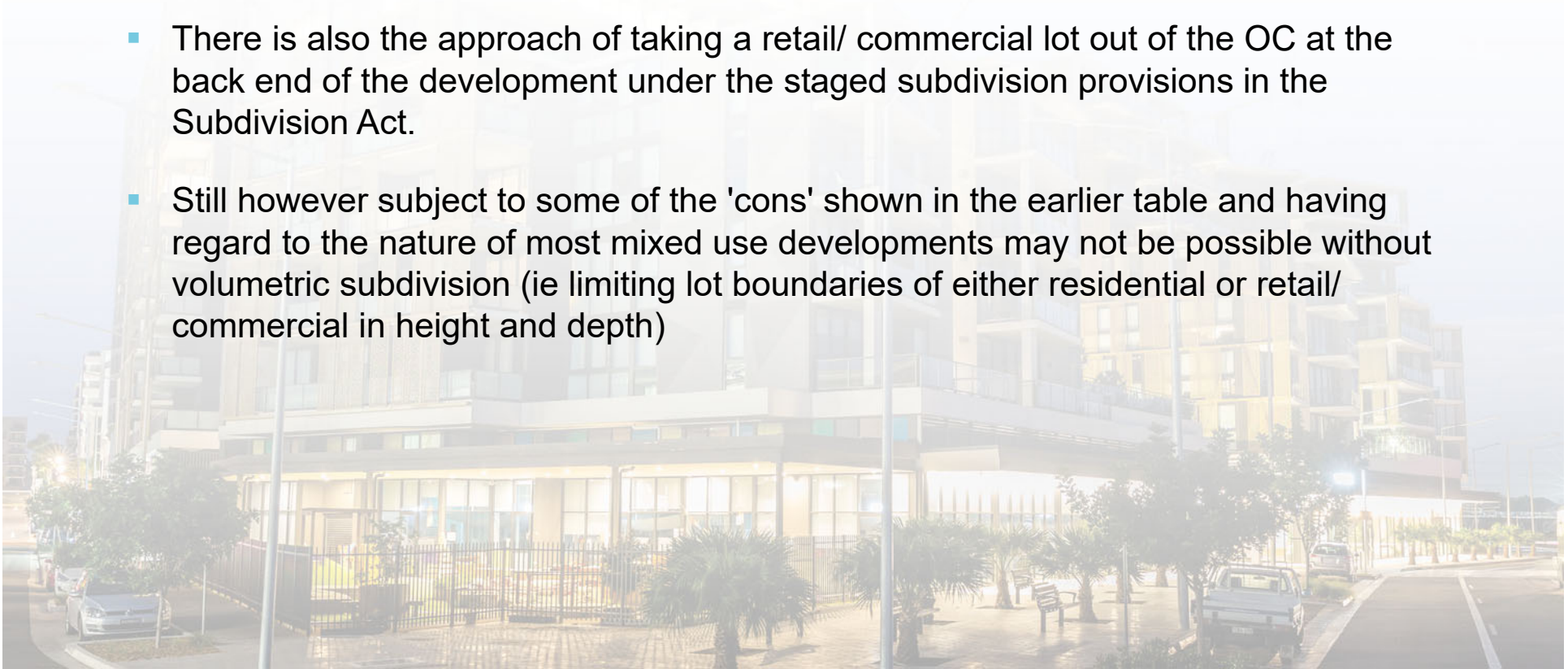
1. **A lot owner or an occupier of a lot** or a manager **may make a complaint to the owners corporation about an alleged breach by a lot owner or an occupier of a lot** or a manager **of an obligation imposed** on that person **by this Act** or the regulations **or the rules** of the owners corporation.
2. A complaint must be made in writing in the approved form.
3. An owners corporation must make a copy of the approved form available at the request of a person who wishes to make a complaint under this section.
4. A complaint cannot be made under this section in relation to a personal injury.





## Using Unlimited Owners Corporations only

- Using unlimited OC's for residential and retail/ commercial only and covering off shared services/ shared carriage ways and other administrative matters with easements and service agreement will remove Part 10 OC Act risk
- There is also the approach of taking a retail/ commercial lot out of the OC at the back end of the development under the staged subdivision provisions in the Subdivision Act.
- Still however subject to some of the 'cons' shown in the earlier table and having regard to the nature of most mixed use developments may not be possible without volumetric subdivision (ie limiting lot boundaries of either residential or retail/ commercial in height and depth)



## Volumetric Subdivision

- An alternative approach is using volumetric subdivision
- Creation of airspace lots permitted/ contemplated in Subdivision Act
- Create volumetric lots (in part) of residential areas within building that will ultimately be subdivided by a building plan of subdivision with an unlimited OC established
- Services agreement required to deal with easements and other administrative arrangements (Eg cost sharing)
- Preferred approach where focussed on maximising value of retail/ commercial assets once lots in residential towers sold



## Pros and Cons

Pros	Cons
Greater construction financing options	Not widely known/ understood by industry in Victoria
Relativity simple/ other titles (eg signage/ telco/ solar)	Shared services agreement required
Implied easements under Subdivision Act	Requirement of authority (eg under section 173 agreement where specific titling structure required – unusual)
No calculation of lot liabilities/ entitlements for retail/commercial	
All critical infrastructure/ services/ access ways can be located on title for retail/ commercial – far more control	
Retail/ commercial title 'stand alone' and not in an Owners Corporation	
Retail/ commercial title not subject to dispute resolution process under OC Act or no costs jurisdiction in VCAT	

# *Smith v National Hospitality Group Pty Ltd v Anor (Owners Corporation) [2012] VCAT 684*

## **FACTS**

- The George Public Bar in Barkly Street, St Kilda
- The George contains residences, commercial uses and entertainment venues – all members of an OC
- Entertainment 1st floor and basement
- Commercial use first floor
- Residential units are on levels 2 and above
- Professor Smith a resident didn't like loud music which there was plenty of on Friday and Saturday nights – complaint ultimately made to OC
- National Hospitality Group had a planning permit and liquor licence which permitted its operations (neither the council or liquor licensing took action against NHG when approached by Professor Smith).



## Allegation – breach of OC rule

### Relevant rule:

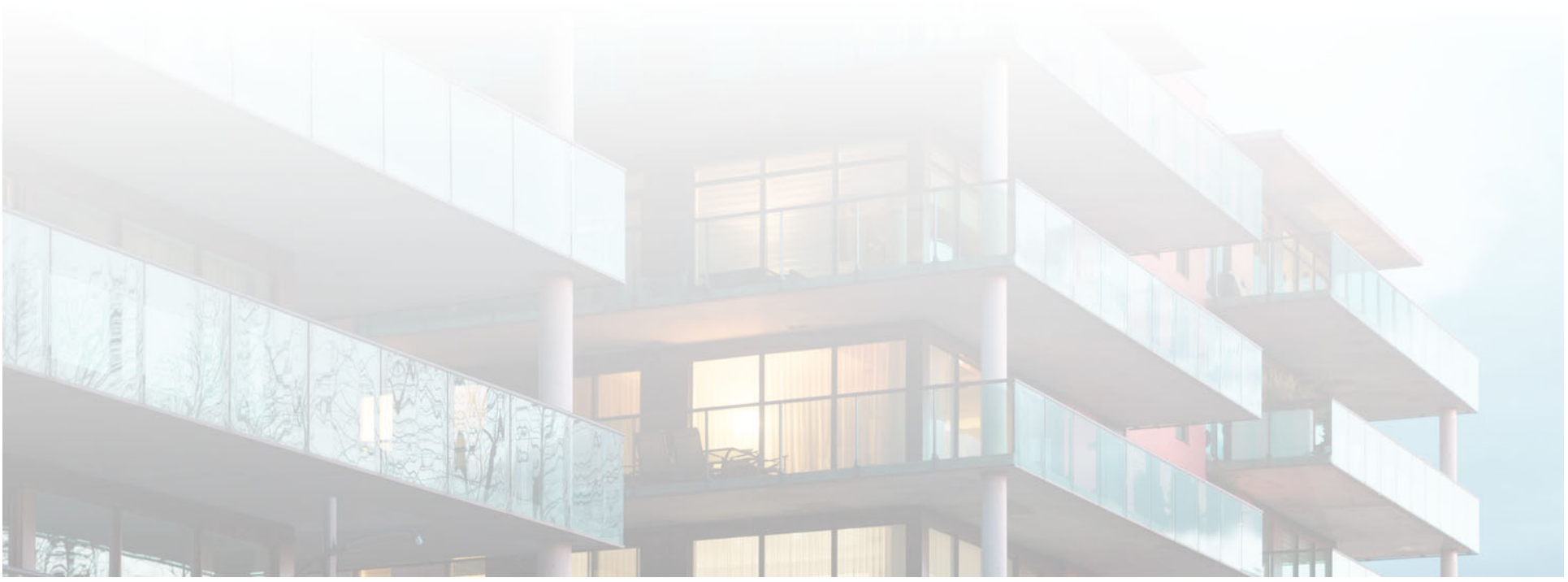
A member must not, and must ensure the occupier of the member's lot does not:

- a. Use or permit a lot affected by the Body Corporate to be used for any purpose which may be illegal or injurious to the reputation of the development or **may cause a nuisance or hazard to any other member or occupier of any lot** or the families or visitors of any such member or occupier; or
- b. **Make or permit** to be made any **undue noise** in or around the common property or **any lot affected by the Body Corporate**; or
- c. **Do** in the member's unit **any act or thing which may be or become an annoyance or nuisance** to the Body Corporate or **to any occupier of any other unit**.



## Relief sought

- "Injunctive relief to provide protection from thumping music noise"
- Sound testing and the installation of a sound delimitation system
- Relief sought based on breach of owners corporation rules and breach of nuisance laws

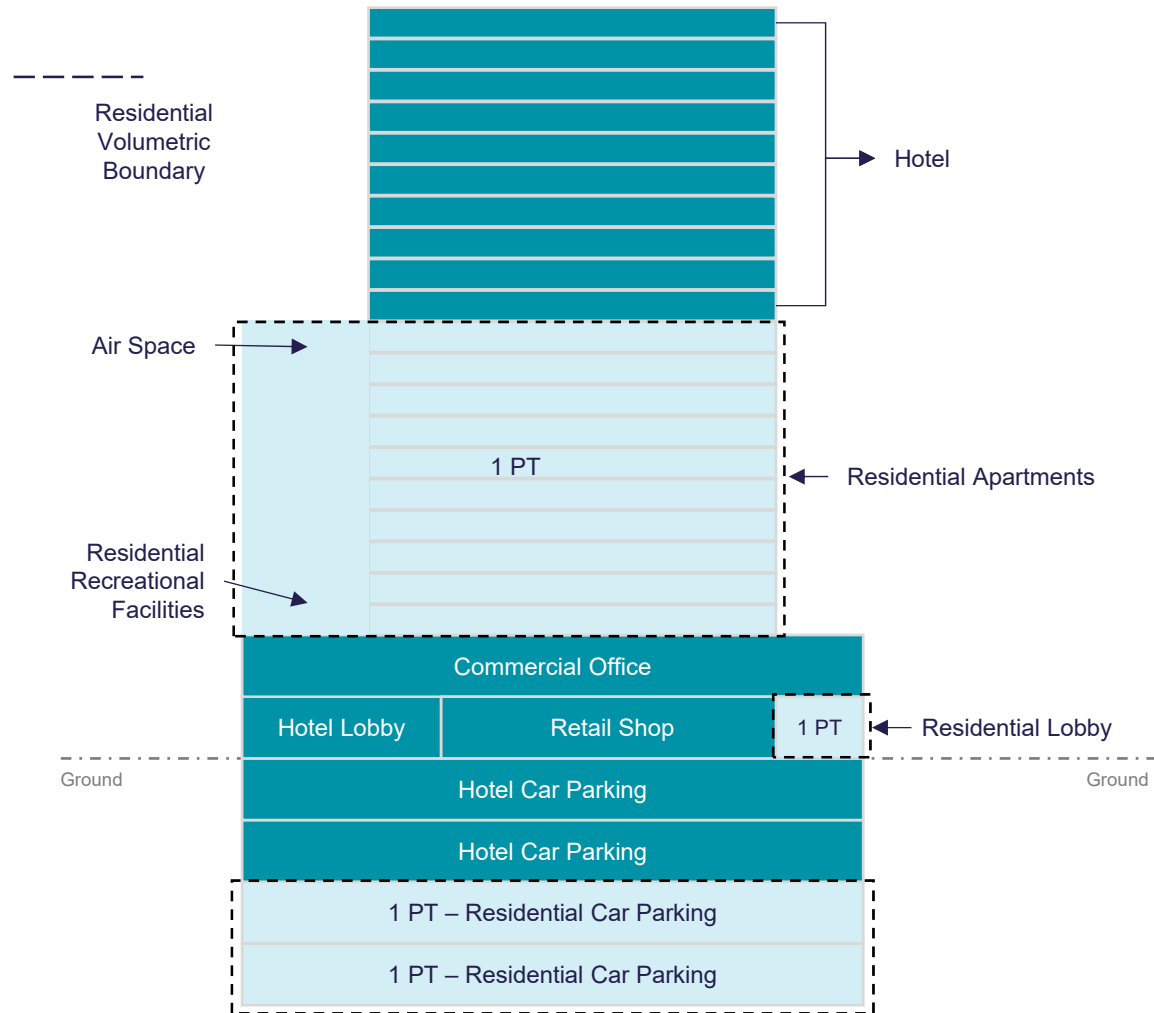


## VCAT decision

- HELD
- National Hospitality Group offered for a noise limit to be imposed upon it following the expert advice of an acoustic engineer
- National Hospitality Group was ordered to install a sound limiter as well as devices to record sound levels.
- Importantly, the VCAT member confirmed that VCAT does not have jurisdiction to determine common law allegations of nuisance.



# Quick Case Study





## Closing remarks

- Volumetric subdivision with supporting service agreements/ easements represents significant opportunity to our businesses, the businesses of our developer clients and the industry
- To make the process even more simplified, some minor regulatory changes should be encouraged (eg to allow building management statement/ strata management statements on title)



# Contact



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