

# Writing Planning Permits

MAY 2023



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## Acknowledgement of Country

The Department of Transport and Planning proudly acknowledges Victoria's Aboriginal communities and their ongoing strength in practicing the world's oldest living cultures.

We acknowledge their ability to care for Country and deep spiritual connection to it. We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices. We are committed to genuinely partner, and meaningfully engage, with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, cultural practices and broader aspirations to achieve self-determination.

We acknowledge the diversity in Victorian Aboriginal communities, and that Victoria is home to many Victorian Traditional Owner knowledge systems, languages, customs and protocol. We acknowledge the historic and ongoing leadership of Aboriginal Victorians in protesting systemic racism and their solidarity and activism in struggles for migrant and refugee rights.



### Description of artwork

Aaron (Gunaikurnai) 'Movements Between the Five Clans' 2019, acrylic on canvas.

'The tracks are going between the five clans of the Gunaikurnai and the hands are the symbols of my spirit travelling around the campsites.'

This artwork was created through programs provided by the Torch. The Torch provides art, cultural and arts industry support to Indigenous offenders and ex-offenders in Victoria. The Torch aims to reduce the rate of re-offending by encouraging the exploration of identity and culture through art programs to define new pathways upon release.



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# Glossary

<b>Application</b>	An application for a planning permit lodged under section 47 of the PE Act or an application to amend a planning permit under section 72 of the PE Act.
<b>B Act</b>	Building Act 1993.
<b>BMO</b>	Bushfire Management Overlay.
<b>DCP</b>	Development Contributions Plan approved under Part 3B of the PE Act.
<b>DELWP</b>	The former Department of Environment Land Water and Planning.
<b>DTP</b>	Department of Transport and Planning.
<b>EMP</b>	Environmental Management Plan.
<b>EPA</b>	Environment Protection Authority.
<b>EPA Guide</b>	EPA Civil construction and demolition guide (EPA publication 1834).
<b>EP Act</b>	Environment Protection Act 2017.
<b>EP Regs</b>	Environment Protection Regulations 2021.
<b>ICP</b>	Infrastructure Contributions Plan approved under Part 3AB of the PE Act.
<b>Notice and review</b>	The notice requirements of section 52(1)(a), (b) and (d), the decision requirements of section 64(1), (2) and (3) and the review rights of section 82(1) of the PE Act.
<b>Planning scheme</b>	The relevant local planning scheme.
<b>Permit</b>	A planning permit granted under Part 4 of the PE Act.
<b>Permit holder</b>	May be the land owner, operator or developer.
<b>PE Act</b>	Planning and Environment Act 1987.
<b>PE Regs</b>	Planning and Environment Regulations 2015.
<b>Practitioners Guide</b>	A Practitioners Guide to Victorian Planning Schemes, DELWP 2018.
<b>SA</b>	Subdivision Act 1988.
<b>Supreme Court</b>	Supreme Court of Victoria.
<b>VCAT</b>	Victorian Civil and Administrative Tribunal.
<b>VPP</b>	Victoria Planning Provisions.

# Introduction

This document gives guidance about how to prepare a planning permit and seeks to promote a clear and consistent approach to how permit conditions are prepared and applied in Victoria.

## What is a permit?

A planning permit is a legal document that allows a certain use, development or other matter to proceed on a specified parcel of land.<sup>1</sup>

Planning schemes regulate the use and development of land. One way they do this is by requiring that certain types of use or development can only be carried out if a planning permit is granted.

The benefit of the permit attaches to the land for which it has been granted. Although a condition may sometimes make operation of a use specific to a nominated owner or operator, usually the permit will operate irrespective of changes to the permit holder. The permit holder may be the land owner, operator or developer.

A permit is always subject to a time limit and will expire under specified circumstances.

The responsible authority can impose conditions when granting a permit.<sup>2</sup> Conditions can require the approval of plans, drawings or other documents before the use or development or a specified part of it starts.<sup>3</sup> The definition of *permit* in the *Planning and Environment Act 1987* (PE Act) includes any plans, drawings or other documents approved under a permit.<sup>4</sup>

A permitted use or development must satisfy and comply with all the conditions on the planning permit.

A planning permit creates legal rights and obligations. The rights created by a permit will be relied upon by many people, such as land owners, operators, developers, lenders and subsequent purchasers of the land, over many years. Any right, obligation or liability acquired or incurred under a permit will not be affected by any subsequent amendment of the planning scheme<sup>5</sup> or any change in ownership of the land. The PE Act<sup>6</sup> and clause 63 of the planning scheme protect an existing use created under a permit.

A planning permit creates obligations that must be complied with by the permit holder for as long as the permit is relied upon<sup>7</sup>. These obligations may be enforced by a responsible authority or any person<sup>8</sup>. For these reasons it is important to ensure that every planning permit is:

- Lawful.
- Easy to understand (clearly written, concise and unambiguous).
- Enforceable.

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<sup>1</sup> *In addition to the use and development of land, planning schemes may also provide for other matters that are included in the PE Act (see section 6). Use and development of land are the most common matters for which planning permits are granted. For this reason, this document refers to use and development of land when discussing permits and conditions, however the discussion also applies to other matters that may be allowed, unless the context indicates otherwise.*

<sup>2</sup> PE ACT s. 62

<sup>3</sup> PE ACT s. 62(2)(i)

<sup>4</sup> PE ACT s. 3(1)

<sup>5</sup> *Unless the contrary intention expressly appears: Interpretation of Legislation Act 1984 Section 28*

<sup>6</sup> PE ACT s. 6((3)

<sup>7</sup> *Benedetti v Moonee Valley City Council and Anor [2005] VSC 434.*

<sup>8</sup> PE ACT s.114

## Using this document

A model permit is included at APPENDIX 1 which sets out a logical structure for a permit.

Chapters 1 to 3 work through each component of the model permit and explain what needs to be thought about and what is best practice for preparing each part of a permit.

Chapters 4 to 7 give advice about how to write planning permit conditions in a range of common situations.

APPENDIX 2 provides a range of model conditions that can be used or adapted to address many typical situations.

Chapter 9 gives advice about changing a permit.

Chapter 10 gives advice about including notes in a permit.

The model conditions cover a wide range of matters and are constructed to incorporate the best practice principles for drafting conditions described in the document.

You are encouraged to use the model conditions wherever possible. While the model conditions cover the most common types of conditions included in permits, they do not cover all scenarios. Where a different condition is more appropriate, the model conditions will still be useful as a basis for writing an appropriate condition.

## How to use this guide

Permit No:	1/2022
Planning Scheme:	Gumnut Planning Scheme
Responsible authority:	Gumnut Shire Council

ADDRESS OF THE LAND:

**Describing the land**

**See Section 2**

What the permit allows:

**Describing what the permit allows**

**See Section 3**

The following conditions apply to this permit:

**Writing effective conditions**

**See Section 4**

**Ensuring conditions are lawful**

**See Section 5**

**How long will a permit last?**

**See Section 6**

**Approved and endorsed plans**

**See Section 7**

**Specific types of conditions**

**See Section 10**

Date issued: 10/10/22

Signature: *Gumnut Shire Council*

The permit has been amended as follows:

**Changing a permit**

**See Section 9**

**Including notes in a permit**

**See Section 8**



# 1. Structuring the permit

## 1.1 What must a planning permit include?

Form 4 in Schedule 1 of the *Planning and Environment Regulations 2015*<sup>9</sup> (PE Regs) sets out the information that must be included in a permit. The key elements include:

- Details about the permit number, planning scheme and responsible authority.
- The address of the land.
- What the permit allows.
- Any conditions that will apply.
- Any amendments to the permit.
- Important information about the permit prescribed by Form 4, including:
  - Amending the permit.
  - When the permit begins.
  - When the permit expires.
- The date issued.

Each of these elements is discussed in the following chapters.

Additional information, such as notes, a schedule of plans or information about extensions of the permit, may be included provided that it is clear this information does not form part of the permit. How to include notes and additional information is discussed in chapter 8.

## 1.2 A planning permit must stand alone

A planning permit must stand alone when interpreting its meaning and what it allows. A permit can only be interpreted by reference to its own terms and conditions and any approved plans or documents that form part of the permit.<sup>10</sup>

Anyone seeking to understand what a permit allows or the meaning of a condition should not need to refer to the permit application, the officer's report or any other extrinsic document. A condition that is vague or uncertain may be invalid. For similar reasons, what the permit allows must also be clear having regard to the planning scheme requirements at the time the permit is issued.

## 1.3 The model permit and model conditions

### 1.3.1 Using the model permit and model conditions

This document includes a model permit and model conditions. Both the model permit and model conditions apply the best practice advice in this document to help ensure that a permit is lawful, is easy to read and to understand.

The broad structure of the model permit is set out below. APPENDIX 1 includes an example of a permit that uses the structure and relevant model conditions.

APPENDIX 2 provides a range of model conditions that can be used or adapted to address many typical situations (see chapter 4.5.2 below). Specific types of model conditions are discussed in chapter 10 below.

<sup>9</sup> PE Regs r.22

<sup>10</sup> See *Mobile Ezy Pty Ltd v Boroondara CC & Ors* [2003] VCAT 688 at [100] – [107]

### 1.3.2 The model permit structure

The structure of the model permit is designed to ensure that a permit accurately describes what the permit allows and how permit conditions are to be applied.

In particular, the model permit requires the permissions being granted to be specifically listed and linked to the requirements of the planning scheme at the time the permit is issued, instead of relying on text from the application form or other documents (see chapter 3 below).

The model permit responds to the information required by Form 4 of the PE Regs but also includes some additional material. While there is no requirement to use the model permit structure, its use or the use of its features is strongly encouraged.

To promote permits that are easy to read and understand, the model permit organises permit conditions in the following order.

#### 1. Operational conditions

*Conditions that specify the operation and effect of the permit and its conditions.*

The model permit includes a condition clarifying that what the permit allows must be carried out in accordance with the requirements of any document approved under the permit. This condition is discussed further in chapter 4.2.1 below.

Other operational conditions might also be used, for example to clarify the meaning of terms used throughout a permit or to specify when a permit commences. Commencement conditions are discussed in chapter 6.1 below.

#### 2. Pre-commencement conditions

*Conditions that specify things to be done or documents to be approved before starting a use or development allowed under the permit.*

The model permit includes an amended plans condition and related secondary consent conditions, which are typically included at the beginning of a permit. These conditions are discussed further in chapters 7 and 9.4 below.

Other pre-commencement conditions also follow, including the need to prepare landscape plans and to complete landscaping works prior to starting the use. Specifying when a condition is required to be satisfied is discussed further in chapter 4.2.2 below.

#### 3. General conditions

*Conditions that specify ongoing requirements applying to a use or development.*

The model permit includes conditions that specify ongoing obligations, such as permitted operating hours, amenity standards and requirements, and limits on the scale of the use.

#### 4. Mandatory conditions

*Conditions required by the planning scheme or a referral authority.*

The model permit includes an example of a condition required by a determining referral authority.

Other examples of mandatory conditions are discussed in chapter 5.1.1 below.

#### 5. Commencement and expiry conditions

*Conditions that specify when a permit expires.*

The model permit includes a model commencement and expiry condition for use and development.

Commencement and expiry conditions are discussed further in chapters 6.1 and 6.2 below.



Figure 1: The model permit structure

# Planning permit

Permit No:	1/2022
Planning Scheme:	Gumnut Planning Scheme
Responsible authority:	Gumnut Shire Council

**ADDRESS OF THE LAND** 1 Gumnut Drive, Gumnut (Lot 1, PS 1010)

**What the permit allows:**

Planning Scheme clause no.	Description of what is allowed
Clause 32.06-6	construct more than one dwelling on a lot

**The following conditions apply to this permit:**

1. Operational conditions
2. Pre-commencement conditions
3. General conditions
4. Mandatory conditions
5. Commencement and expiry conditions

<b>Date issued:</b> 10/10/22	<b>Signature:</b> <i>Gumnut Shire Council</i>
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This permit has been amended as follows:

**Useful information**

## 2. Describing the land

Particular care should be taken when describing the address of the land in a permit to ensure that it includes all the land for which a permit is being granted.<sup>11</sup>

An application for a permit must clearly describe the land affected by the application by stating the address of the land, the title particulars of the land or including a plan showing the land, or any combination of these.<sup>12</sup>

The land affected by an application may include land in more than one ownership, for example an application for a quarry and an access road<sup>13</sup>. If a permit is granted, all the land for which the permit is granted must be included in the address, irrespective of ownership.

Alternatively, land affected by an application may only include part of a parcel of land, for example, when other permits may have been granted for other use or development elsewhere on a large parcel of land but that land is not sought to be included in a later permit. The address of the land in a permit may refer to part of the land provided it is clear what part of the land is the land to which the permit applies.

When describing the land, consider the type of permission required under relevant clauses of the planning scheme and the land affected by what the permit allows. For example, if a permit is required under clause 52.02 to create, vary or remove an easement or restriction, the land affected by the easement or restriction will need to be carefully described by reference to title details. If a permit is required to remove native vegetation on a government road in conjunction with development of adjoining land, the portion of government road affected by the permit will need to be included in the address of the land as well as the address of the adjoining land upon which the development is occurring.

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<sup>11</sup> *Pioneer Concrete (Qld) Pty Ltd v Brisbane CC (1980) 145 CLR 485*

<sup>12</sup> *PE Regs r.13*

<sup>13</sup> *Which was the situation in the Pioneer Concrete case*



## 3. Describing what the permit allows

### 3.1 Describe what is allowed not what is proposed

A description of 'what the permit allows' is a description of the matters for which the responsible authority has decided to grant the permit. It is not the same as a description of the proposal.

Simply using the description of the proposal supplied by an applicant in the planning permit application (such as use and development of the land for a five storey apartment building) to populate the field in the permit of 'what the permit allows' is inadequate and not good practice. Whilst this may be a useful description of the proposal for the purpose of giving notice of the application or inclusion in a planning officer's report, it does not accurately set out what matters the responsible authority has decided to grant a permit for. This practice also risks omitting important permissions, (such as creating or altering access to a road in a Transport Zone 2 under clause 52.29-2) or clarifying that the permit allows development under multiple provisions.

**The description of what the permit allows must set out all the matters for which a permit is required under the planning scheme as part of the proposal and for which permission is being granted.**

An application for a planning permit must clearly state each use, development or other matter for which the permit is required.<sup>14</sup> However, it is up to the responsible authority to determine under what provisions of the planning scheme a permit is required in order to give effect to the proposal in the permit application. Form 4 requires that all matters that the responsible authority has decided to grant the permit for must be included in the description of what the permit allows.

When an application requires a permit under multiple provisions, it is important to remember that, although it is presented as a single application, in fact it encompasses a series of applications each of which must be determined by the responsible authority.<sup>15</sup>

It is important that any permit issued properly reflects and records these determinations. Similarly, all matters arising under a particular provision or general provision of the planning scheme, as well as under zones and overlays, should be specified in what the permit allows.

**The best way to do this is to specify each relevant provision of the planning scheme that requires a permit, including under a zone, overlay, particular provision or general provision.**

The model permit does this by specifically referencing each clause of the planning scheme under which permission is needed at the time the permit is issued in order to enable the proposal. It is good practice to explicitly refer to each clause, rather than a description of the proposal or even a list of the names of the zone, overlay or particular provision, because:

- It ensures legal accuracy.
- It is possible to pinpoint the exact provisions of each clause at the date of issue (due to the capacity to browse planning scheme histories on the DTP website).
- It ensures that all use, development or other matters that require a permit under the planning scheme are included in the permit and nothing is accidentally omitted.<sup>16</sup>
- It ensures that all relevant matters under the planning scheme have been addressed by way of appropriate conditions.
- It ensures that irrelevant or inappropriate conditions are not included.
- The provisions of the planning scheme under which a permit has been granted are clearly identified, which may be relevant in the future when deciding questions relating to applications for review made to VCAT, enforcement, existing use rights or whether a further permit is required.
- Ambiguity and uncertainty are avoided.
- It enables effective enforcement.

<sup>14</sup> PE Act s.47(1)(a) and PE Regs r.13(c)

<sup>15</sup> *Sweetvale Pty Ltd v VCAT and Ors [2001] VSC 426*

<sup>16</sup> For example, permission to use land to sell or consume liquor under clause 52.27 in addition to permission to use land for a hotel under a zone and to develop land for a hotel under a zone

A permit should not purport to allow something for which no permit is required under the planning scheme.

For example, if the scheme requires a permit for development but no permit is required for the use, the 'what the permit allows' field should only include references to 'development', not 'use and development'.

### 3.2 How should development be described?

A development should be described by reference to the planning scheme and be consistent with the wording of each provision that requires a permit.

The following examples illustrate this principle.

#### A residential aged care facility

In a residential zone, such as the General Residential Zone, a permit is required to construct a building or construct or carry out works for a residential aged care facility. In 'the permit allows' field, the development should be described as:

Planning Scheme Clause No.	Description of what is allowed
32.08-8	Construct a building and carry out works for a residential aged care facility

Because no permit is required to use land for a residential aged care facility, what the permit allows should **not** include reference to use of the land for this purpose.

#### One dwelling on a lot less than 300 square metres

In a residential zone, such as the General Residential Zone, a permit is required to construct or extend one dwelling on a lot less than 300 square metres and to construct or extend a front fence in certain circumstances. In 'the permit allows' field, a development for one dwelling on a lot less than 300 square metres and a fence three metres high on a main road should be described as:

Planning Scheme Clause No.	Description of what is allowed
32.08-5	Construct one dwelling on a lot less than 300 square metres
32.08-5	Construct a front fence more than 2 metres high within 3 metres of a street in a Transport Zone 2

#### Two or more dwellings on a lot

In a residential zone, such as the General Residential Zone, a permit is required to construct two or more dwellings on a lot. In 'the permit allows' field, a development for five dwellings should be described as:

Planning Scheme Clause No.	Description of what is allowed
32.08-6	Construct two or more dwellings on a lot

**It is not necessary or appropriate to include the number of dwellings in what the permit allows.**

The number of dwellings permitted will be a function of what is shown on the approved plans. Alternatively, specify the number of dwellings in a condition.

### Use and development of section 2 use such as convenience shop

In most zones, a permit is required to construct a building or construct or carry out works for a use in Section 2 of the relevant clause. A permit for both use and development is required. Use the wording in the planning scheme provisions rather than the abbreviated form of simply 'use and development for...'

For example, a permit for a convenience shop in a General Residential Zone would include in 'the permit allows' field:

Planning Scheme Clause No.	Description of what is allowed
32.08-2	Use of land for a convenience shop
32.08-9	Construct a building and construct or carry out works for use of a convenience shop

### Development of section 1 use (no permit required) such as accommodation

If a permit is required for development but not for use and it is appropriate to place some limitation on how the development will be used, include this as a condition not as a limitation in what the permit allows.

For example, where a permit is required for development but no permit is required to use the development for accommodation, the responsible authority may wish to restrict the use of the permitted development to dwellings rather than any other type of accommodation. Such a restriction should be included as a condition, not in what the permit allows.

- **APPROPRIATE:** Include a condition: 'The development must only be used for the purpose of dwellings.'
- **NOT APPROPRIATE:** Include in what the permit allows: 'Development for use as dwellings'.

### 3.3 How should use be described?

The use being permitted should usually be described by a land use term rather than as a land use group wherever appropriate.

A responsible authority should have regard to clauses 73.03 and 73.04 of the planning scheme when permitting a land use.

Unless specifically intended, using a land use term rather than a land use group prevents a later shift to another use within the land use group allowed by the permit, which may result in an intensified use or in effects not associated with the land use originally approved.

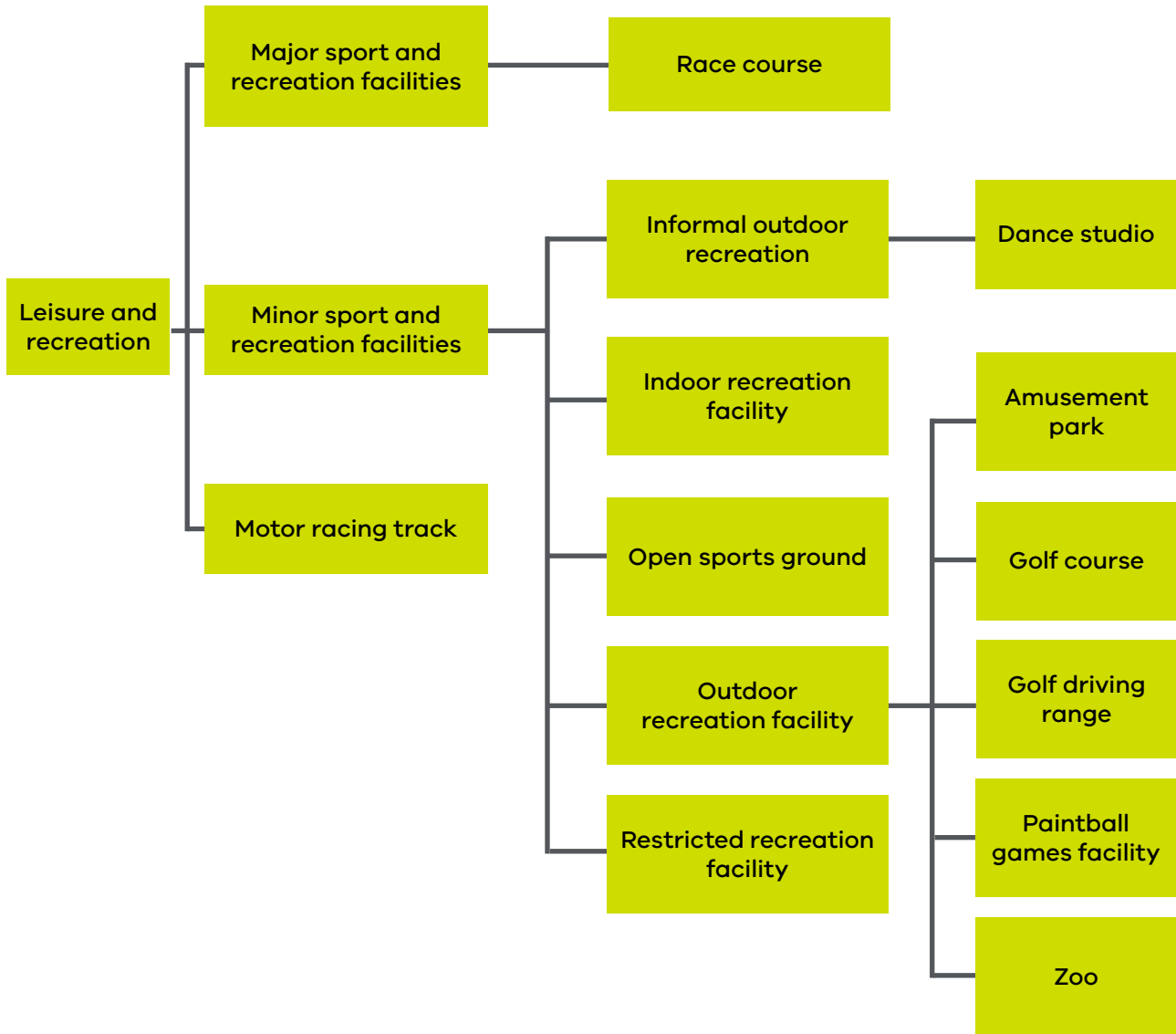
For example, 'food and drink premises' includes, among other things, a 'hotel', 'restaurant' and 'bar'. If all that is intended is restaurant, then the permit should say so – 'use of land for a restaurant'.

Sometimes it may be preferable to use the wider land use group to accommodate an acceptable change in activities and avoid the need for a subsequent application to amend the permit or for a new permit.

For example, having regard to the Leisure and recreation land use group (see below), it may be appropriate to describe the use as an 'indoor recreation facility' rather than as a 'dance studio' (a defined land use term) or 'karate school' (which is not a defined land use term). This would give the flexibility for reasonable changes to the activities the land is used for without the need to amend the permit.

This approach should only be adopted where the effects of changes within a broad category of use would have acceptable effects. For example, it would only be appropriate to describe the permitted use as 'minor sports and recreation facility', which would allow any of the other land uses included in this wider land use term, if it was intended to allow all the other land uses nested within 'minor sports and recreation facility'.

Figure 2: Leisure and recreation categories





## 4. Writing effective conditions

Conditions provide certainty to the permit holder, the community and the responsible authority about the permit holder's obligations during the life of the development or use. Conditions must therefore promote lawfulness, clarity and enforceability.

General principles for drafting conditions are:

- Ensure the condition is within power.
- Use plain English.
- Use the active voice, not the passive voice.
- Use simple words and avoid problematic expressions.
- Use technical expressions carefully and purposefully.

### 4.1 Principles for drafting conditions

An effective condition must include certain fundamental building blocks. The three basic building blocks of a condition are:

- **The WHAT:** WHAT is the obligation or requirement that must be met?
- **The WHEN:** WHEN must the obligation or requirement be met?
- **The HOW:** HOW must the obligation or requirement be satisfied?

Every condition must include a WHAT. Not every condition will include a WHEN or a HOW.

When drafting permit conditions, it is important to ensure that each of these building blocks is addressed where relevant.

There are also two other building blocks a condition may require. They are also important to understand so they can be used appropriately. They are:

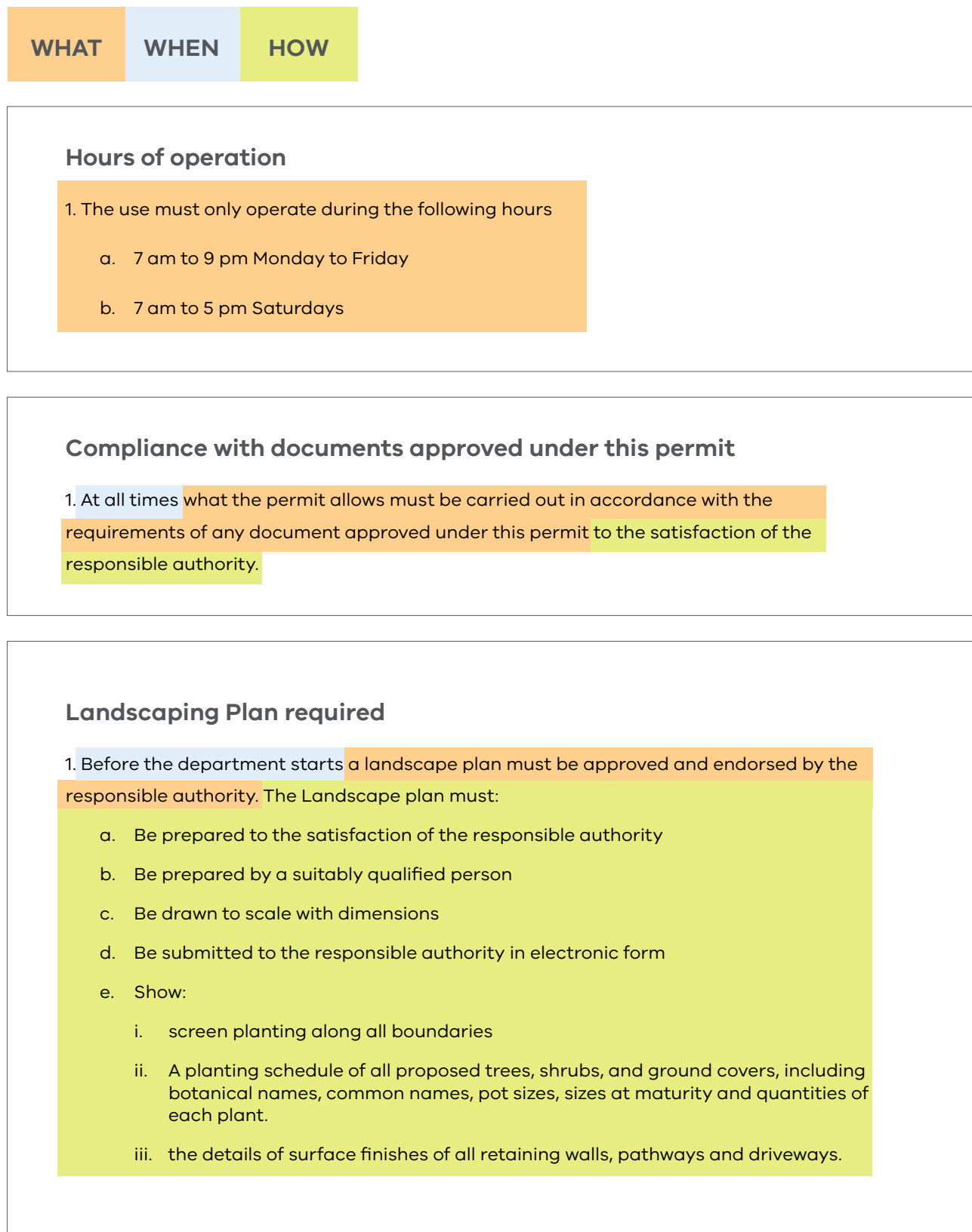
- **A STANDARD:** Some conditions will require that certain things must be done to the satisfaction of the responsible authority. This sets a STANDARD that an obligation or requirement must meet.
- **A SECONDARY CONSENT:** Some conditions will include a SECONDARY CONSENT provision, which enables aspects of a requirement to be varied.

Each of these building blocks are discussed in more detail below. Secondary consent is discussed in chapters 4.1.5 and in 9.4 below.

Being clear about how and when to apply these building blocks will help ensure the condition is valid, is clear and certain, operates effectively to achieve the intended outcomes and is enforceable.

Three examples of these building blocks in the structure of a permit condition are shown below.

Figure 3: Building blocks in the structure of a permit condition



### 4.1.1 The WHAT

Every condition must contain a WHAT. The WHAT is the obligation or other requirement a permit holder must meet<sup>17</sup>.

Conditions are imposed to achieve an outcome intended under the planning scheme and by the grant of the permit. To be effective in achieving that outcome, a condition must clearly and unambiguously express the obligations or other requirements that are being imposed.

Obligations must be expressed in clear and simple terms so that compliance can be objectively and easily ascertained.

A common type of WHAT in a condition is a requirement for the responsible authority to approve a particular type of plan or document, such as a plan of development, a landscape plan or an environmental management plan.

It is the approval of the plan that constitutes the WHAT. Preparing and submitting the plan, the details about the content of the plan and how the plan will be approved are part of the HOW. It will be approved if the plan is prepared and submitted to the responsible authority in the way specified and it contains all the content specified.

A requirement that the plan must be approved before development starts is the WHEN of the condition.

Other common obligations include:

- Operational and amenity conditions such as a restriction on hours of operation or a limit on the number of patrons.
- A requirement to meet technical standards in the construction of a development, the provision of works, services or facilities or the operation of a use or activity (such as noise limits).

**It is not necessary to repeat in every condition that when approved the plans will be endorsed and will then form part of the permit.**

The definition of permit in the PE Act includes any plans, drawings or other documents approved under a permit.<sup>18</sup>

Nor is it necessary to repeat in every condition that requires the approval and endorsement of plans or documents that the use or development must be carried out in accordance with the endorsed plans. A requirement to comply with conditions is inherent in the power to grant a permit subject to conditions.

Nevertheless, to ensure that this obligation is clear to all readers of the permit, the model permit recommends that all permits include as the second condition:<sup>19</sup>

#### Compliance with documents approved under this permit

1. At all times what the permit allows must be carried out in accordance with the requirements of any document approved under this permit to the satisfaction of the responsible authority.

#### Approval and endorsement

This condition uses the term *approved* because *approved* is the term used in the definition of permit in the PE Act:

*'permit includes any plans, drawings or other documents approved under a permit'.<sup>20</sup>*

The PE Act does not make any reference to *endorsement*. Endorsement is a mechanism to evidence that plans or documents have been approved and when they were approved. Approval is the critical action that makes those plans or documents part of the permit.

It may be appropriate to include a requirement that once plans are approved they will be endorsed. Endorsement is a common practice and a useful evidentiary means of demonstrating that plans have been approved. But it is approval that makes plans and other documents part of the permit.

For further discussion about endorsement see chapter 7 below.

17 Most conditions place an obligation on the permit holder but sometimes the requirement falls on some other person – for example see sections 62(2)(l) and (m) of the PE Act. The most common type of obligation falling on a person other than the permit holder is a requirement for the responsible authority to approve plans or documents before a use or development commences. Other examples are commencement and expiry conditions.

18 PE Act s. 3(1)

19 PE Act s. 61(1). See also section 114 which enables an enforcement order to be made if a use or development contravenes a condition in a permit.

20 PE Act s. 3(1)

## 4.1.2 The WHEN

The WHEN specifies when a condition must be satisfied or complied with. Not all conditions will need to include a WHEN.

If a condition includes a WHEN, the timing should be included at the beginning of the condition.

Consistency in commencing conditions with a WHEN makes the permit easier to read and makes it easy for users of the permit to understand when certain things must be done. It means there is less risk of a critical time by which something must be done being overlooked than if the WHEN is buried in the middle or at the end of a complex condition.

The table below gives some guidance on common expressions that can be used to specify WHEN an obligation must be satisfied.

Circumstance	Expression
When a condition must be met before starting something	<b>Use:</b> <ul style="list-style-type: none"> <li>• Before the development starts...</li> <li>• Before the use starts...</li> <li>• Before the works start...</li> <li>• Before the plan of subdivision is certified under the Subdivision Act 1988...</li> <li>• Before a statement of compliance is issued...</li> <li>• Before the vegetation removal starts...</li> <li>• Before the development is occupied...</li> </ul>
	<b>Avoid:</b> Prior to commencement .....
When a requirement must be met within a specified period of the permit being issued or amended, or something else occurring	<b>Use:</b> <ul style="list-style-type: none"> <li>• Within <b>[insert time in months or years]</b> of the issued date of this permit ...</li> <li>• Within <b>[insert time in months or years]</b> of the date of the amendment of the permit ...</li> <li>• By no later than <b>[insert specific date]</b>...</li> <li>• Within <b>[insert time in months or years]</b> of <b>[insert event]</b>...</li> </ul>
	<b>Note:</b> See chapter 6.3 below.
When a condition must be met throughout the life of the permit	<b>Use:</b> <ul style="list-style-type: none"> <li>• At all times what the permit allows must...</li> <li>• At all times the use must...</li> <li>• At any time ...</li> </ul>
	<b>Note:</b> Not necessary but can be included for emphasis – see chapter 4.2.1 above

### 4.1.3 The HOW

The HOW specifies how a condition must be satisfied or complied with. Not every condition will need to include a HOW.

For example, a condition that imposes an obligation such as, *At any time the number of patrons on-site must not exceed XXX*, will not require a HOW.

However, a condition that requires new or amended plans or documents to be approved should always include a HOW.

The HOW should address (where relevant):

- Who must prepare a required document, for example:
  - The landscape plan must be prepared by a suitably qualified person.
  - The waste management plan must be prepared by a waste management engineer or waste management planner.
  - The erosion management plan must be prepared by a geotechnical practitioner.
- Criteria for how a required document is prepared, for example:
  - The plans must be drawn to scale with dimensions.
  - The plans must be drawn at a scale of 1:50 with dimensions.

- The way in which a document must be submitted, for example:

- The plans must be submitted electronically in PDF format.
- The plan must be submitted digitally.
- Three copies of the plans in A1 format must be submitted.<sup>21</sup>

- What content the document must contain.

A permit condition may need to specify the content that a document must include before it can be approved. Depending on the circumstances, a condition may need to specify the required content in detail or simply describe changes that need to be made to a document previously submitted to a decision maker.

The content requirement for each different type of information (such as landscaping, traffic and car parking management or waste management) should be set out in separate conditions requiring separate plans to facilitate clearer information in each plan. For example, it is better to have a separate condition requiring a landscape plan rather than including landscape details in the development plans, which already contain a lot of information.

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<sup>21</sup> Increasingly responsible authorities are requiring plans and other documents to be submitted electronically. However, if hard copies of plans are acceptable, the condition should specify how many copies are required and the size – A4, A3 or A1.

The table below gives some guidance on common expressions that can be used to specify the content required to be included in a plan or document.

Circumstance	Expression	
When no changes are required to a previously submitted document	<b>Use:</b>	The <b>[insert name of plan or document]</b> must be generally in accordance with the <b>[insert name of plan or document]</b> forming part of the application.
	<b>Avoid:</b>	Don't refer to the document submitted with the application or the date the document was received by the responsible authority. A document submitted with the application may be amended before a decision is made by the responsible authority. It is better to refer to the document forming part of the application or to particularise each plan/document using reference numbers, plan numbers, revision numbers and date document was last prepared/relevant version
	<b>Note:</b>	See Generally in Accordance With at chapter 4.4.2.
When no document has previously been submitted	<b>Use:</b>	The <b>[insert name of plan or document]</b> must: <ul style="list-style-type: none"> <li>a. Show: <ul style="list-style-type: none"> <li>i. <b>[insert required details]</b>.</li> </ul> </li> </ul>
	<b>Avoid:</b>	-
	<b>Note:</b>	See chapter 6.3 below.
When changes are required to a previously submitted document	<b>Use:</b>	The <b>[insert name of plan or document]</b> must: <ul style="list-style-type: none"> <li>a. Be generally in accordance with the <b>[insert name of plan or document]</b> forming part of the application, but amended to show : <ul style="list-style-type: none"> <li>i. <b>[insert required details]</b>.</li> </ul> </li> </ul>
	<b>Avoid:</b>	-
	<b>Note:</b>	Be careful to ensure that the changes are: <ul style="list-style-type: none"> <li>• Specific</li> <li>• Unambiguous</li> <li>• Specify whether matters are to be altered (and if so, how), deleted or added.</li> </ul> <p>See Generally in Accordance With at chapter 4.4.2 below.</p>

#### 4.1.4 Applying the 'to the satisfaction of...' standard

Many requirements in conditions can be expressed to be 'to the satisfaction of the responsible authority' or other specified body<sup>22</sup> This phrase, *to the satisfaction of*, establishes a qualitative STANDARD that a requirement or obligation in a condition must meet.

There are other types of standards that can be included in a condition, which are quantitative and measurable – for example, upper level setbacks must be at least three metres, or stormwater discharges must meet specified water quality parameters. However, these are not the type of standards being referred to in the context of this discussion.

Section 62(2)(a) of the PE Act provides that a permit may include a condition that specified things are to be done to the satisfaction of the responsible authority, a Minister, public authority, municipal council or referral authority. These bodies are defined as specified bodies under section 148 of the PE Act:

*A specified person (which includes the owner, user or developer of the land directly affected by the matter or a specified body), may apply to VCAT for the review of a decision (or the failure to make a decision) of a specified body in relation to a matter if the matter must be done to the satisfaction, or must not be done without the consent or approval, of the specified body.<sup>23</sup>*

Including such a condition in a permit automatically triggers a dispute resolution mechanism under section 149 of the PE Act: The dispute resolution mechanism in section 149 covers two situations – where the approval or consent of the responsible authority is required and where something must be done to the satisfaction of the responsible authority.

**When drafting conditions that require the approval of plans by the responsible authority, it is sufficient to say that the plans must be approved by the responsible authority.**

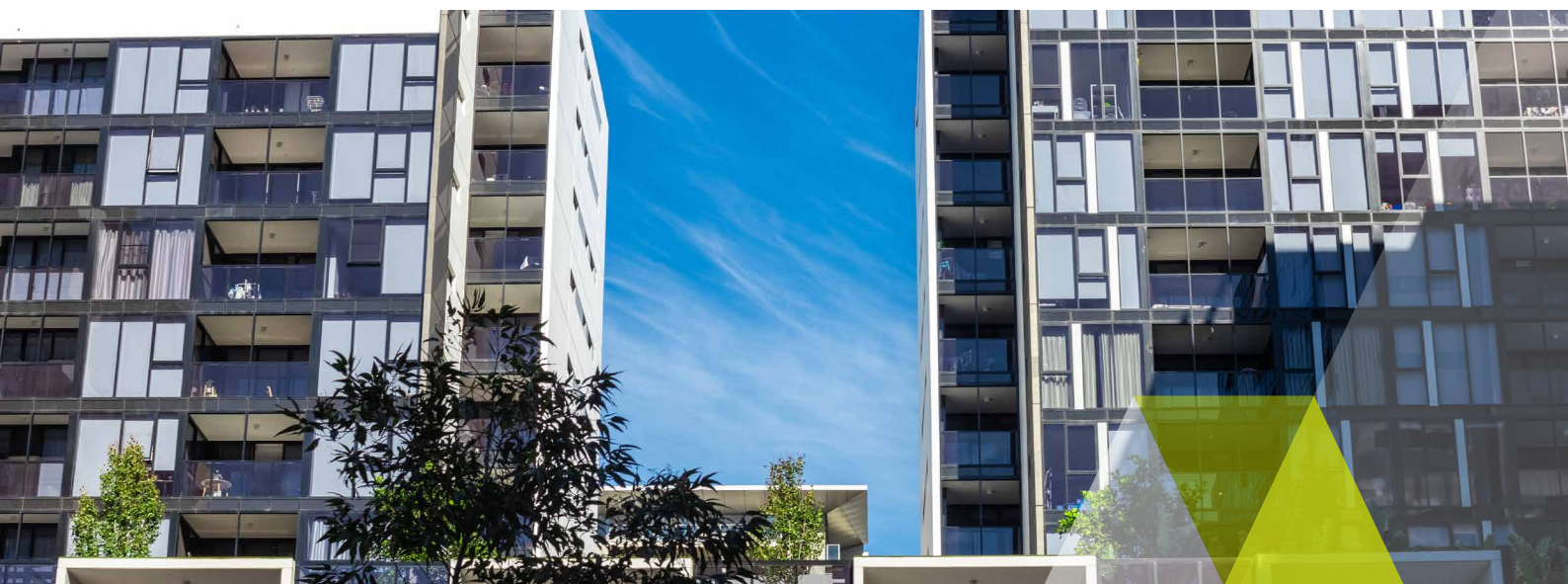
It is not necessary to say that *the plans must be approved to the satisfaction of the responsible authority*. Obviously, if the responsible authority is not satisfied with the plans, it will not approve them and there is a right of review regarding approval under section 149.

Instead, the condition needs to state that it is the format and content of the plans as set out in the condition (the HOW, not the WHAT) that must be prepared to the satisfaction of the responsible authority.<sup>24</sup> If there is a dispute about these aspects of the plans, such as whether the plans are adequate as distinct from their merits and whether they include everything that a condition requires – a dispute mechanism is also available under section 149.

22 A specified body is the responsible authority a Minister, public authority, municipal council or referral authority – see PE Act s. 148.

23 The same right of review also exists where things must be done to the satisfaction of the responsible authority or other specified body in section 173 agreements or enforcement orders.

24 The model permit and the model conditions on this subject draw this distinction.



A condition may also state that other requirements or obligations must be done to the satisfaction of the responsible authority.

Examples include:

- Implementing a plan such as a landscape plan.
- The conduct of an operation or activity.
- Avoiding an adverse effect on the amenity of adjoining land

Conditions may require something to be done to the satisfaction of a referral authority or other specified agency as well as the responsible authority. An agency other than the responsible authority should always be specified by name.

If the condition does not name a specified body (the responsible authority, a Minister, public authority, municipal council or referral authority), the dispute resolution process under section 149 of the Act will not apply.

It is not appropriate to name a person or officer or to give a phone number.

For example:

- *The drainage plan must be to the satisfaction of [Melbourne Water] and approved by the responsible authority*

The table below provides some guidance on appropriate and inappropriate drafting of conditions when expressing a STANDARD.

Expression	
	<b>Stormwater drainage plan</b>
<b>Use:</b>	<p>Before the development starts, a stormwater drainage plan must be approved and endorsed by the responsible authority. The stormwater drainage plan must:</p> <ol style="list-style-type: none"> <li>be prepared to the satisfaction of the responsible authority.</li> <li>accord with relevant Council standards for the stormwater drainage system.</li> <li>show a legal point of discharge for the disposal of stormwater from the subject land approved by Council .</li> <li>include an on-site stormwater detention system if the volume of stormwater exceeds the capacity of the legal point of discharge.</li> </ol>
<b>Avoid</b>	<p>Prior to the commencement of the development, the owner must prepare stormwater drainage design plans <u>to the satisfaction of the relevant Building Surveyor</u>. An application to Council must be made for a Legal Point of Discharge for the disposal of stormwater from the subject land and to determine the relevant Council standards for the stormwater drainage system design. An on-site storm water detention system will be required if the volume of stormwater exceeds the capacity of the legal point of discharge.</p>
<b>Note</b>	<p><i>The main requirement (the WHAT) of this condition is that a stormwater drainage plan must be approved and endorsed by the responsible authority. The condition should state this explicitly.</i></p> <p><i>The Plans should be prepared to the satisfaction of the responsible authority which is a specified body, not an individual or officer.</i></p> <p><i>The content of the stormwater drainage plan needs to be better and more clearly expressed.</i></p>



Expression	
	<b>Construction plan</b>
<b>Use:</b>	<p>Before the development starts, a detailed construction plan must be approved and endorsed by the responsible authority.</p> <p>The construction plan must:</p> <ol style="list-style-type: none"> <li>Be prepared to the satisfaction of the responsible authority.</li> <li>Be drawn to scale with dimensions.</li> <li>Be submitted to the responsible authority in electronic form.</li> <li>Show all drainage and pavement works associated with the use and/or development.</li> </ol>
<b>Avoid:</b>	<p>Within 30 days of the issue of this permit, detailed construction plans to the satisfaction of the Responsible Authority <u>must be submitted to, and approved by, Council's Infrastructure and Projects Department</u>. The plans must be drawn to scale and show all drainage and pavement works associated with the use and/or development. <u>All works constructed or carried out must be in accordance with these plans.</u></p>
<b>Note:</b>	<p><i>Plans should be prepared to the satisfaction of the responsible authority and must be approved and endorsed by the responsible authority as a specified body, not by a council department, which is not a specified body.</i></p> <p><i>It is not necessary to specify that <u>All works constructed or carried out must be in accordance with these plans</u> in individual conditions. It is preferable to include a generic condition about compliance with documents approved under the permit at the beginning of the permit conditions – see Chapter 4.2.1 above about specifying what is required to be done or the obligation to be met.</i></p>



#### 4.1.5 Applying a secondary consent provision

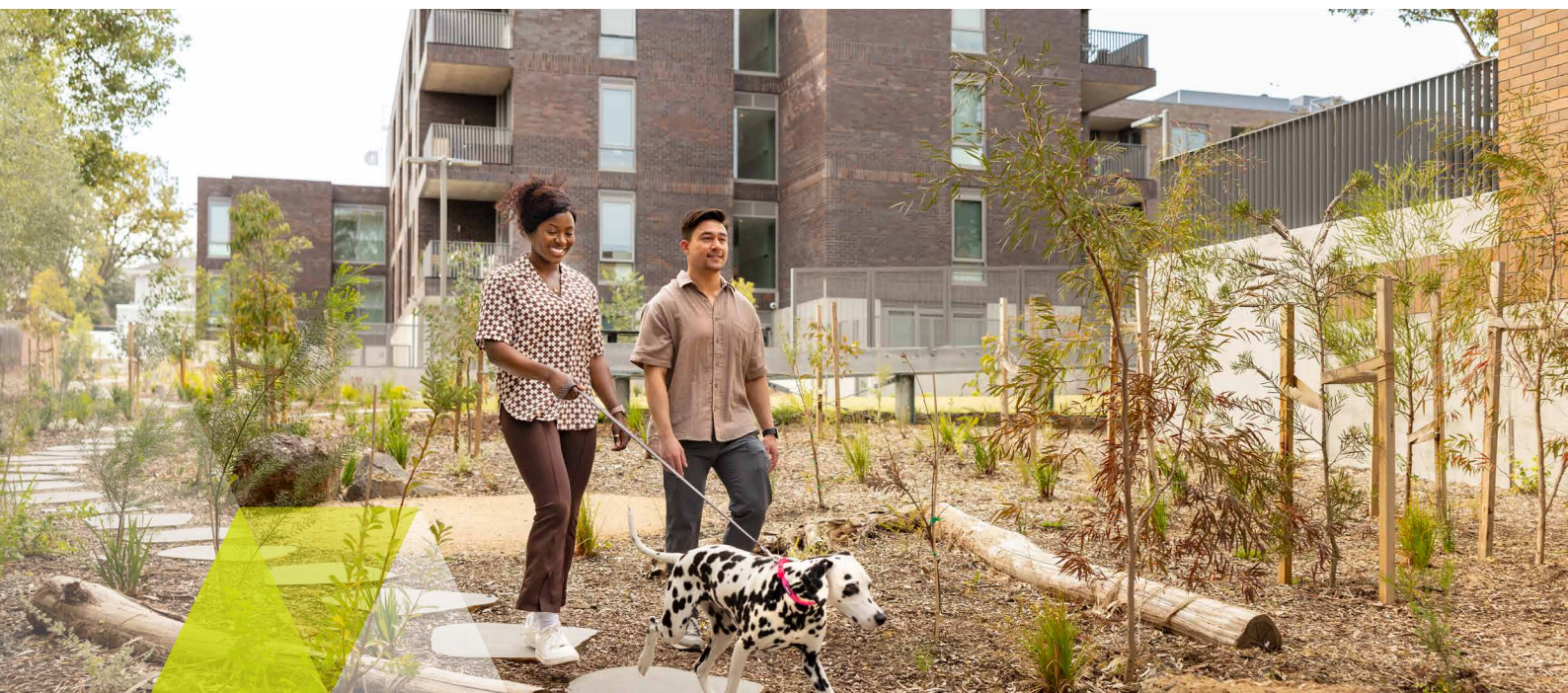
Changing a permit requirement by way of secondary consent is discussed in detail in chapter 9.4 below.

If it is appropriate to provide a secondary consent power in a condition to enable a particular requirement or obligation to be changed, the following drafting principles should be applied:

- Start the condition with the requirement or obligation that must be met, not the exception.
- Use the following consistent wording (or similar) to express a secondary consent power: *The responsible authority may consent in writing to vary these requirements.*

The table below gives some guidance on conditions that are appropriate and inappropriate when including a secondary consent provision.

Expression	
<b>Use:</b>	<p><b>Hours of operation</b></p> <p>The use must only operate during the following hours:</p> <ol style="list-style-type: none"> <li>[ ] to [ ] Monday to Friday.</li> <li>[ ] to [ ] Saturday.</li> <li>[ ] to [ ] Sunday or public holiday.</li> </ol> <p>The responsible authority may consent in writing to vary these requirements.</p>
<b>Avoid:</b>	<p><u>Except with the consent of the responsible authority</u>, the use may only be carried out within the following hours:</p> <ol style="list-style-type: none"> <li>[ ] to [ ] Monday to Friday.</li> <li>[ ] to [ ] Saturday.</li> <li>[ ] to [ ] Sunday or public holiday.</li> </ol> <p><u>Unless otherwise consented to by the responsible authority</u>, the use may operate only between the hours of (<i>insert operating hours</i>).</p>
<b>Note:</b>	Start with the requirement, not the exception.



## 4.2 Laying out the conditions

### 4.2.1 Headings

Only conditions should be numbered. Headings should not be numbered.

Headings do not form part of the permit.

Group related conditions under appropriate headings to make the permit easier to understand and to help the reader navigate the permit. Using group headings also makes the logical grouping and ordering of conditions easier when drafting the permit.

### 4.2.2 Numbering

Conditions should be numbered numerically. Sub-conditions should also be logically numbered. Each condition and sub-condition should be given its own unique number.

The model permit and conditions in the appendices illustrate the preferred approach to numbering conditions.

To avoid a condition becoming too complex, use no more than three levels of numbering in a condition.

If more than three levels are required, consider breaking the condition into separate conditions.

Do not use dot points because of imprecision when referring to individual points and to avoid potential confusion when conditions are amended and dot points are deleted or added to a condition. Use a numbering system that enables precise references such as 'condition 1(c)(iii)' rather than 'the third dot point in condition 1.1.

### 4.2.3 Incorporating amendments into a permit

How a permit may be changed and the different types of amendment are discussed in Chapter 9 below.

When a permit is amended new permissions and conditions may be included in the permit, existing permissions and conditions may be re-worded, or conditions may be deleted. Responsible authorities adopt different practices as to how they incorporate amendments into planning permits.

The following principles are recommended when amending a permit. They reflect the practice used in legislation.

- When adding a new condition or sub-condition, it is preferable to include them in the permit where they logically belong having regard to headings and the grouping of conditions in the permit. Including them at the end of the permit risks them being overlooked or not read in conjunction with other related conditions.
- When a new condition is inserted in a permit, number it using A, B, C and so on. If a new condition is inserted after condition 5, number it 5A and if several new conditions are added, number them 5A, 5B, 5C and so on. This avoids having to renumber the remaining conditions.
- A new sub-condition can usually be added at the end of an existing list of sub-conditions and numbered accordingly. If it is more logical to insert the new sub-condition into an existing list, number it using (aa), (ab), (ac) or (ba), (bb) and so on. If two new sub-conditions are inserted after condition 5(a), they would be numbered 5(a)[existing], 5(aa) [new], 5(ab), [new] 5(b) [existing].
- When deleting a condition or sub-condition, delete the words and insert [*condition deleted*] but don't change the numbering of subsequent conditions. Where the wording of existing conditions is changed, the condition should reflect the amended wording. Record the fact that the condition has been changed in the table to Form 4, with a brief description of the changes made.

Form 4 of the PE Regs requires that a table be included in the permit indicating the date and nature of amendments included in the amended permit and the name of the responsible authority that approved the amendment. The model permit at APPENDIX 1 includes this table.

## 4.3 Language to use and avoid

### 4.3.1 Some common phrases

Permit conditions should be clearly expressed and easy to understand. You can achieve this by:

- Using plain English wherever possible. Section 6 of *A Practitioner’s Guide to Victoria’s Planning Schemes*<sup>25</sup> provides useful guidance about using plain English in writing for planning schemes. That advice is equally relevant to writing planning permits.
- Using language that avoids ambiguity.

The following table gives some examples of expressions that should be generally avoided or used carefully when writing a planning permit condition.

Expression		
agreed to / agreement of	<b>Usage:</b>	Avoid or use alternative
	<b>Alternative:</b>	approved / consent of
	<b>Note:</b>	–
may	<b>Usage:</b>	Use with care
	<b>Alternative:</b>	must
	<b>Note:</b>	Only use may where a discretion is intended.
prior to	<b>Usage:</b>	Use alternative
	<b>Alternative:</b>	before
	<b>Note:</b>	Not plain English
pursuant to	<b>Usage:</b>	Use alternative
	<b>Alternative:</b>	under
	<b>Note:</b>	Not plain English
shall	<b>Usage:</b>	Never use
	<b>Alternative:</b>	must / are to
	<b>Note:</b>	Not plain English. Ambiguous: <i>shall</i> is unclear whether the obligation is mandatory or discretionary.
should	<b>Usage:</b>	Use alternative
	<b>Alternative:</b>	must
	<b>Note:</b>	Ambiguous: <i>should</i> is unclear whether the obligation is mandatory or discretionary. Use must where an obligation is to be imposed.

<sup>25</sup> *A Practitioner’s Guide to Victoria’s Planning Schemes* (DELWP, 2022).

### 4.3.2 Generally in accordance with

*Generally in accordance with* is an expression commonly used in planning schemes and in permits. The expression is not defined in the PE Act or in the planning scheme, so under clause 73 of the planning scheme, it has its ordinary meaning.

Decisions made by VCAT interpreting this expression have found that:

- General accordance is a question of fact to be judged on the facts and circumstances of each case.
- The less detail and precision there is in the primary document or documents, the more flexibility is given by the phrase 'generally in accordance with'.

**There is a difference between 'in accordance with' and 'generally in accordance with'. While 'in accordance with' only allows for some minor (insignificant) differences, 'generally in accordance with' allows for greater latitude when assessing compliance.<sup>26</sup> Consider this difference if using the expression in a condition.**

The expression is commonly used in conditions that require a plan to be approved and endorsed that is generally in accordance with a plan submitted with the application with or without modifications. The Victorian Planning Authority has published a guidance note with useful discussion on the use of 'generally in accordance with' in the context of Precinct Structure Plans.<sup>27</sup>

## 4.4 Populating the permit with conditions

### 4.4.1 General principles for including conditions

Apply the following principles when preparing conditions for inclusion in a permit<sup>28</sup>

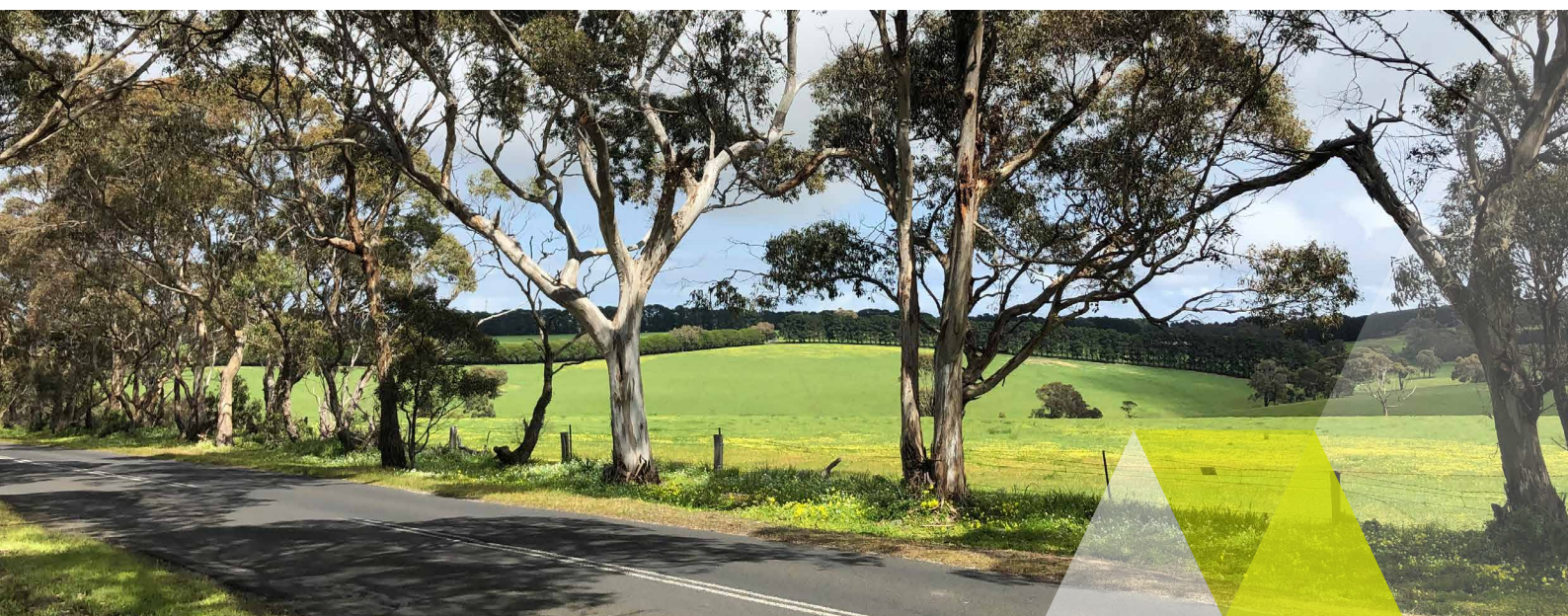
- Conditions should always be proportional and relevant to the scale and nature of the development.
- Be selective in applying conditions. Just because a condition is in a standard conditions list does not mean it should be applied to every permit. Always consider relevance – not every condition on a topic needs to be used.
- The requirements imposed by, or as a result of, a condition should not exceed what is reasonable to expect of the permit holder.
- Conditions should be enforceable from a practical perspective.
- There is no need to apply conditions that are comprehensively dealt with by other legislation or regulation (see chapter 4.5.4 below)<sup>29</sup>

<sup>26</sup> *Caydon Prahran Developments Pty Ltd v Stonnington CC* [2013] VCAT 323

<sup>27</sup> *Generally in Accordance: Discussion Note* (Victorian Planning Authority, April 2020)

<sup>28</sup> *Jolin Nominees PL v Moreland CC (Red Dot)* [2006] VCAT 467 at [54]

<sup>29</sup> *SITA Australia Pty Ltd and PWM (Lyndhurst) Pty Ltd v Greater Dandenong CC* [2007] VCAT 156 at [29] – [33]



#### 4.4.2 Using the model conditions in this document

The model conditions included in APPENDIX 1 and APPENDIX 2 incorporate the best practice principles described in this document.

The model conditions cover the many common types of conditions included in permits, but do not cover all scenarios.

Responsible authorities may have developed their own sets of conditions to meet particular circumstances in their municipalities. In particular, responsible authorities in developing areas who deal with highly complex, multi-stage residential and commercial subdivisions will often have more detailed sets of conditions than are included in the model conditions in this document.

It is not intended that responsible authorities must abandon their own sets of standard conditions. However, all responsible authorities are encouraged to review their conditions in light of the guidance and model conditions in this document.

When using the model conditions to prepare a permit:

- Think about whether the condition is required. Do not automatically include all conditions on a topic. Make sure the conditions relate to the subject matter of the permit and are proportional to what is allowed.
- Make sure appropriate modifications to the wording are made, such as replacing words in italics, intended as prompts, with relevant details.
- Do not cut and paste conditions from previous permits as it is too easy to leave included references to the wrong land or other wrong details. Duplicate conditions only from the current digital version of this document.

#### 4.4.3 Conditions relying on other documents

It is not generally appropriate for a condition to require unqualified compliance with other documents.

For example, it is not appropriate for a condition to simply require that a development comply with the Gumnut Urban Design Guidelines. Such a condition is likely to be unlawful because it is too vague and uncertain. If there are specific standards or other requirements in the document that must be complied with, then the specific standard or requirement should be included or identified in the condition.

Where a particular standard from an outside document is sought to be applied, only the relevant section of the document should be referred to. Where possible, include the standard directly in the planning permit.

A condition may require compliance with a recognised standard such as an Australian Standard provided it is accurately named and numbered, such as:

- The dimensions must achieve *Australian Standard AS2890.6-2009 Parking facilities – Off-street parking for people with disabilities*.
- All tree protection zones must comply with *Australian Standard AS 4970-2009 Protection of trees on development sites*.



#### 4.4.4 Conditions where other (non-planning) approvals apply

Other regulatory regimes can require a permission to be obtained for a land use or development proposal that also requires a permit under a planning scheme. A planning permit cannot override the requirements of another regulatory approval, or vice versa, and an operator must comply with each approval. In these situations, it is important that the permit is written so that it works together with any other approval to avoid duplication and conflict.

The circumstance that most commonly arises is where a building permit is required under the *Building Act 1993* (B Act) for proposed building work. In this situation, section 62(4) of the PE Act prohibits the imposition of any condition that is inconsistent with the *Building Act 1993* and the building regulations under that act (see chapter 5.1.2).

Some other common examples include:

- A café that requires a liquor licence under the *Liquor Control Reform Act 1998*.
- A landfill that requires a development licence and an operating licence under the *Environment Protection Act 2017*.
- An extractive industry use that requires a work authority and work plan under the *Mineral Resources (Sustainable Development) Act 1990*.

It may sometimes be appropriate for a permit to regulate detailed matters to achieve an acceptable planning outcome. Frequently, permits will include conditions requiring the adoption of detailed operational measures (such as broadband reversing beepers for machinery) as part of a management plan to ensure that amenity impacts are managed within acceptable limits.

However, where matters of detail or technicality are addressed by other regulatory approvals it is generally not appropriate for the planning permit to duplicate the regulation of these matters. In particular, where the technical expertise required to assess and enforce the particular requirement is held by another regulator (such as the EPA).

Duplication of requirements can lead to:

- An inconsistency, where an operator is unable to adopt a best practice measure because it is constrained by an outdated requirement of a planning permit condition or approved plan.
- A conflict, where an operator is unable to comply with the requirements of both approvals.
- An invalid condition, that addresses matters unrelated to the planning permissions being granted or is imposed for a non-planning purpose (see chapter 5.2 below).

Duplication can also result in unnecessary costs and delays for operators and responsible authorities when similar documents are required to be approved and enforced under separate approvals. For example, where an acoustic management plan for a quarry is required to be approved under a permit condition, but already forms part of an endorsed work plan.

The following principles have been applied by VCAT where permits have interacted with approvals under the EP Act and are generally relevant for integrating permits with other approvals:

- The PE Act seeks coordination and integration between permits and EPA licences and as a matter of good practice and sensible policy conflict should be avoided.<sup>30</sup>
- The two regimes need to work together, rather than compete or interfere with each other.<sup>31</sup>
- Planning matters are to be addressed through the planning permission process and permits, while detailed regulation of the technical aspects of a use or development should be left to EPA licences.<sup>32</sup>
- Where specific aspects of the use or development of land are controlled by an EPA licence, conditions in a permit should not attempt to control the same thing.<sup>33</sup>
- It may be appropriate for a permit condition to state that the use or development must be in accordance with a licence issued by the EPA (as amended from time to time) but the condition should refrain from referring to specific details or plans as these may change from time to time as the licence or works approval is upgraded.<sup>34</sup>
- Where the precise line is drawn between the responsibilities of the EPA and responsible authorities is a matter of fact and circumstances of each particular case.<sup>35</sup>

30 See *SITA Australia Pty Ltd and PWM (Lyndhurst) Pty Ltd v Greater Dandenong CC* [2007] VCAT 156 at [43] and [47]

31 See *Barro Group Pty Ltd v Brimbank CC & Ors* [2013] VCAT 372 at [64]

32 See *SITA* at [47] and *Barro Group* at [64]

33 See *SITA* at [29]

34 *Ibid*

35 See *Barro Group* at [65]

# 5. Ensuring conditions are lawful

## 5.1 Types of permit conditions

Some permits must include certain prescribed conditions. There are also certain conditions that must not be included on a permit. Otherwise, the permit can include any condition that the responsible authority considers appropriate to the permissions being granted provided the condition meets the tests of validity discussed in chapter 5.2 below.

### 5.1.1 Mandatory conditions

A permit must include any condition required by<sup>36</sup>

- The PE Act.
- The planning scheme.
- A determining referral authority.
- VCAT.

Under the PE Act, where the grant of a permit would authorise anything that would result in a breach of a registered restrictive covenant, the permit must include a condition stating that the permit is not to come into effect until the covenant is removed or varied.<sup>37</sup>

Some planning scheme provisions that require a mandatory condition include:

- Bushfire Management Overlay (Clause 44.06-5).
- Development Contributions Plan Overlay (Clause 45.06-1).
- Infrastructure Contributions Plan Overlay (Clause 45.10-2).
- Infrastructure Contributions Overlay (Clause 45.11-2).
- Signs (Clause 52.05-9).
- Subdivision (Clause 66.01-1).

A condition required by a determining referral authority is mandatory and must be included on the permit.<sup>38</sup>

A condition recommended by a recommending referral authority is not mandatory. It may be included on the permit at the discretion of the responsible authority. If it is not included, the recommending referral authority may lodge an application for review with VCAT.

Planning Practice Note 54 Referral and Notice Provisions<sup>39</sup> sets out more information about these types of conditions.

See chapter 10.1 below for a discussion about referral authority conditions.

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<sup>36</sup> PE Act s.62(1)

<sup>37</sup> PE Act s.62(1)(aa)

<sup>38</sup> PE Act s.62(1)(a)

<sup>39</sup> Planning Practice Note 54



### 5.1.2 Prohibited conditions

The responsible authority must not include a condition that:

- Conflicts with any condition required by the planning scheme or a determining referral authority.<sup>40</sup>
- Is inconsistent with the *Building Act 1993*, the regulations under that Act or a relevant determination of the Building Appeals Board under that Act.<sup>41</sup>
- Requires a person to pay an amount for or provide works, services or facilities except in accordance with section 62(6) of the PE Act.

A condition that requires the payment of any sort of development contribution or infrastructure levy may conflict with section 62(6). If there is conflict, the condition will be unlawful.

It is important to understand the relationship between sections 62(5) and 62(6) when considering conditions about development contributions or infrastructure levies (such as parking levies) or the provision of works, services or facilities. This relationship is discussed in more detail in chapter 10.4 below.

### 5.1.3 Discretionary Conditions

Under section 62(2) of the PE Act, a permit can include any other condition that the responsible authority thinks fit, including a condition:

- That specified things are to be done to the satisfaction of the responsible authority, a Minister, public authority, municipal council or referral authority.<sup>42</sup>
- That plans, drawings or other documents be prepared and approved before the use or development starts.<sup>43</sup>
- Requiring the land owner to enter into an agreement with the responsible authority under section 173 of the PE Act within a specified time.<sup>44</sup>
- Recommended by a recommending referral authority.<sup>45</sup>

The list of conditions in section 62(2) is not exhaustive. Any conditions that the responsible authority thinks fit may be included, however the condition must meet the common law tests of validity. These tests broadly relate to relevance, certainty and reasonableness and are discussed in chapter 5.2 below.

Section 62(5) includes further types of discretionary conditions relating to the provision of works, services and facilities.

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<sup>40</sup> PE Act s.62(1)(b)

<sup>41</sup> PE Act s.62(4)

<sup>42</sup> PE Act s.62(2)(a)

<sup>43</sup> PE Act s. 62(2)(i)

<sup>44</sup> PE Act s.62(2)(f)

<sup>45</sup> PE Act s.62(2)(ab)

Figure 4: Mandatory, discretionary and prohibited conditions under the Act

## Planning and Environment Act 1987

### Mandatory conditions

#### 62(1) – conditions that must be imposed

- (a) planning scheme and referral authority conditions.
- (aa) requirement to remove or vary restrictive covenant.

### Discretionary conditions

#### 62(2) – conditions that may be imposed

- (a) things done to the satisfaction of an authority.
- (ab) recommended by a referral authority.
- (b) requirement to cancel an existing permit.
- (c) requirement to remove buildings or restore land after completion.
- (d) staging development.
- (e) compensation under Part 5 of the Planning and Environment Act.
- (f) section 173 agreements.
- (g) covenants under Heritage Act 2017.
- (i) endorsed plans prior to commencement.
- (j) requiring amend plans.
- (l) easement under s.36 of the Subdivision Act 1988.
- (m) reserve land under s. 24A of the Subdivision Act 1988.

#### 62(5) infrastructure conditions

- (a) Implement a DCP or ICP.
- (b) pay for or provide infrastructure in accordance with a section 173 agreement.
- (c) pay for or provide necessary infrastructure on or to the land.

### Prohibited conditions

#### 62(4) – conditions that must not be included

(a), (b) and (c) conditions inconsistent with the B Act, Building Regulations 2018 and Building Appeals Board.

#### 62(6) – conditions requiring payment for, or provision of infrastructure

- (a) in accordance with 62(5), section 46N(1) or 46GV(7).
- (b & c) unless required by a referral authority, of the Act or Planning Scheme.

## 5.2 Validity of conditions

*Four basic principles have been established about the validity of conditions.*

Each condition must:

- Be related to the planning permission being granted.
- Fulfil a planning purpose.
- Be reasonable.
- Accurately convey its intended effect and avoid uncertainty and vagueness.

### 5.2.1 A condition must be related to the planning permission being granted

The correct formulation of this test of validity is whether the condition is reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised.

This test is often expressed in terms that a condition must fairly and reasonably relate to the permitted use or development. This means that there must be a connection between the approval granted and the limitation placed upon it provided the condition serves a planning purpose.

*Domus Design*<sup>46</sup> is the leading Victorian case about the validity of conditions. In this case, the Supreme Court discussed the difference between the English test in *Pyx Granite Co Ltd v Ministry of Housing and Local Government*<sup>47</sup> and *Fawcett Properties Ltd v Buckingham County Council*,<sup>48</sup> and the Australian test laid down by the High Court in *Allen Commercial Constructions Pty Ltd v The Council of the Municipality of North Sydney*.<sup>49</sup> The English test is expressed to be that a power to impose conditions “must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy” whereas in *Allen Commercial Constructions*, Walsh J said:<sup>50</sup>

*In accordance with a well-recognised rule, s.40(1) (of the Planning Ordinance) ought to be understood (quite apart from the limitation contained in its opening words) not as giving an unlimited discretion as to the conditions which may be imposed, but as **conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made.** This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in *Fawcett Properties Ltd v Buckingham County Council*, as being ‘the implementation of planning policy’, **provided that it is borne in mind that it is from the Act and from any relevant provisions of the ordinance, and not from some pre-conceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained.** (Emphasis added)*

In *Domus Design* the point made is that the English test in respect to planning permits and discretionary conditions is not the Australian test. The Australian test is wider. The words “relevant” and “related” are not interchangeable. A condition must be related to the purpose for which the function of the authority is being exercised not just the implementation of a relevant planning policy.

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46 *Melbourne Water Corporation v Domus Design Pty Ltd* [2007] VSC 114. See in particular paragraphs [40] – [[82]

47 [1958] 1 QB 554 at 572

48 [1961] AC 636

49 (1970) 123 CLR 490

50 (1970) 123 CLR 490 at 499

### 5.2.2 A condition must fulfil a planning purpose

A condition must not be imposed in order to achieve an ulterior or irrelevant planning purpose, however worthy that purpose may seem to be. It must implement a stated policy or planning purpose, which can be identified from the PE Act or planning scheme, rather than just being 'a good idea'.

The relationship between the permission granted and the condition need not be interpreted in an overly narrow or specific way. It is sufficient that the condition relates to the achievement of planning policy as set out in the PE Act or planning scheme – provided that the policy is related to the land or the use or development in question – or a legitimate planning purpose.

What constitutes a planning purpose must be determined from the PE Act or the relevant provisions of the planning scheme. For example, the disputed condition in *Domus Design*<sup>51</sup> was imposed by Melbourne Water as a determining referral authority exercising statutory powers given to it as a body charged with obligations under the *Water Act 1989* concerning waterway management and drainage. Its authority to require conditions arose because of the provisions in the PE Act relating to referral authorities, not because the condition itself implemented a planning policy. The Court held that the condition had been imposed for a planning purpose under the PE Act.

### 5.2.3 A condition must be reasonable

A condition is invalid if it is so unreasonable that no reasonable responsible authority acting reasonably would have imposed it.<sup>52</sup>

Even if a condition properly relates to the permission granted, it must meet this test of reasonableness.

More specifically, the authority may not exercise its power for an improper purpose; nor may it be guided by irrelevant considerations or fail to be guided by relevant considerations. Its decision must not be manifestly unreasonable, or excessively uncertain, or made without any supporting evidence.

Use of conditions that are superfluous or unnecessary or disproportionate could be found to be unreasonable.

### 5.2.4 A condition will be invalid if it is vague or uncertain

A condition will be invalid if it is vague or uncertain.

A permit must be written so that the permit holder and anyone else will easily understand it. A permit holder is entitled to know what obligations arise from the permit.

The permit must also represent the end of the decision-making process for the permit application. It should not leave open an uncertain future process. A condition should not defer the resolution of key issues. Before it decides on an application, a responsible authority must consider any significant impact. It should not grant a permit with a condition that requires those impacts to be assessed after the permit has issued.

A condition cannot require a planning permit to be obtained for a subsequent use or development of the land. Only a planning scheme can specify when a permit is or is not required.

## 5.3 Enforceability

Planning conditions that are not enforceable in practical terms are unlawful, but those that are merely difficult to enforce are not.

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51 The condition read: "Before certification the Plan of Subdivision must be amended to include a 40m wide drainage easement in favour of Melbourne Water."

52 Also known as 'the Wednesbury principle' see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K.B. 223

## 6. How long will a permit last?

### 6.1 Specifying commencement

#### 6.1.1 When does a permit start

It is preferable to specify a date for commencement in the permit, which should be 'the issued date of the permit'.

The PE Act provides that a permit operates from the date specified in the permit or if no date is specified, from the date of the decision of VCAT (if the permit was issued at the direction of VCAT) or on the day it was issued.<sup>53</sup>

The standard form of the permit in Form 4 does not include a 'permit date', but it includes the 'date issued'. Using the issued date of the permit puts it beyond doubt as to when a permit starts and avoids confusion. A clear commencement date is important in the context of enforcement proceedings, requests to extend the life of permits, and when defining existing use rights.

The words *this permit has no force or effect until...* should not be used unless required by the PE Act (see chapter 6.1.3 below)<sup>54</sup>

The model permit includes the commencement condition. It is good practice to specify when the permit will operate from at the outset. The model condition for commencement is:

#### **Commencement of permit**

*This permit will operate from the issued date of this permit.*

*There is a distinction between when the permit itself starts and when particular things under the permit can start, such as use, development or vegetation clearance.*

*If a permission granted is conditional on another event occurring – such as approval of amended plans or other documents or the cancellation or amendment of another permit – the permit should include a condition that the use or development or other matter authorised by it must not start until those specified events occur (see chapter 4.2.2 above).*

#### 6.1.2 Commencement when a covenant removal is required

The distinction between when the permit operates from and when a use or development or other matter permitted by the permit may commence is illustrated by the requirement in the PE Act that where the grant of the permit would authorise anything that would result in a breach of a registered restrictive covenant. In this circumstance the permit must include a condition stating that the permit is not to come into effect until the covenant is removed or varied.<sup>55</sup>

This is a mandatory condition. It is based on the principle that a permit cannot be granted that is in breach of a covenant unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.<sup>56</sup> If the permit would authorise anything that would be in breach of a covenant, the permit needs to authorise the removal or variation of the covenant or another permit authorising the removal or variation must have been granted. The effect of section 62(1)(aa) is that whilst the permit operates from the issued date and certain things can be done under it, any permissions for anything that would result in a breach of a registered restrictive covenant (such as a use or construction of a development) have no effect until the covenant is removed or varied. That does not mean though that other conditions under the permit, such as approval of plans or documents, cannot be satisfied before removal or variation as these actions by themselves will not result in a breach of the covenant.

Such a condition contrasts with a condition requiring the cancellation or amendment of another permit.

<sup>53</sup> PE Act s.67

<sup>54</sup> Such conditions have been held to be invalid, for example see *Boroondara City Council v Sixty-Fifth Eternity Pty Ltd & Ors* [2012] VSC 298 and *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1.

<sup>55</sup> PE Act s.62(1)(aa)

<sup>56</sup> PE Act s 61(4)

### 6.1.3 Commencement when cancellation or amendment of an existing permit is required

Where an existing permit on the site is to be cancelled or amended to allow a new use or development to proceed, it is recommended that the permit include a condition that the use, development or other matter must not start until the other permit is cancelled or amended.

The PE Act provides that a permit may include a condition that the permit is not to come into effect unless a specified permit is cancelled or amended.<sup>57</sup> This is a discretionary condition.

The problem with providing that the whole permit does not come into effect until another permit has been cancelled or amended is that nothing can be done under the permit until the other permit has been cancelled or amended, which may take time. For example, no plans could be approved and endorsed under the permit.

This approach enables other actions under the permit to get underway (such as, approval and endorsement of plans or entering a section 173 agreement) while an application is made to cancel or amend the other permit. Once the permit is cancelled or amended, the use, development or other matter can start.

A condition requiring the cancellation or amendment of an existing permit is a useful technique to avoid confusion if there are multiple permits with conflicting conditions. See discussion in chapter 9.5 below.

## 6.2 Specifying expiry

### 6.2.1 Expiry dates under the PE Act

Section 68 of the PE Act deals with when a permit will expire in three circumstances:

- Development.
- Use.
- Development and use.

In each case, a permit can specify when a development or use must start and, in the case of development, when the development must be completed. If the development or use does not start within the time specified or, in the case of development, by the time of completion of the development, the permit will expire.

In the absence of a stated commencement or expiry date, the default expiry dates are:

- For a permit for the development of land - the permit expires if the development is not completed within two years after the issue of the permit.<sup>58</sup>
- For a permit for the use of land - the permit expires if the use does not start within two years after the issue of the permit, or the use is discontinued for a period of two years.<sup>59</sup>
- For a permit for the development and use of land - the permit expires if the development is not completed within two years after the issue of the permit, or the use does not start within two years after the completion of the development, or the use is discontinued for a period of two years.<sup>60</sup>

Where the development involves subdivision<sup>61</sup>, different expiry conditions apply:

- A permit for subdivision will expire if the plan is not certified within two years of the issue of the permit, unless the permit contains a different provision.<sup>62</sup>
- A permit for subdivision will expire if the subdivision is not completed within five years of certification of the plan of subdivision.<sup>63</sup> There is no power for a permit to change this expiry condition and specify a different time for completion.<sup>64</sup>

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<sup>57</sup> PE Act s.62(2)(b)

<sup>58</sup> PE Act s. 68(1)

<sup>59</sup> PE Act s. 68(2). PE ACT S. 68A increases the required period of discontinuance to 10 years for permits that authorise the use of land for extractive industry.

<sup>60</sup> PE Act s.68(3)

<sup>61</sup> PE Act s.3(1) - the definition of development includes the subdivision or consolidation of land, including buildings or airspace

<sup>62</sup> PE Act s.68(1)(aa), s. 68(3A)

<sup>63</sup> PE Act s.68(1)(b)

<sup>64</sup> *TJBP Pty Ltd v Brown & Ors* [2013] VSC 173 at [29]-[38]

- The responsible authority may extend the time for commencement or completion of the subdivision in the permit under section 69 of the PE Act.<sup>65</sup>

– In the case of staged subdivision:

- > Certification of all stages of a subdivision must occur within two years of the issue of the permit, unless the permit contains a different provision.
- > The permit expires if the plan of any stage is not certified within two years of the issue of the permit, unless the permit contains a provision that enables different stages to be certified at different times.
- > The permit expires if any particular stage is not completed within 5 years of certification of that stage of the subdivision.<sup>66</sup>

– If a permit for subdivision is amended and a plan of subdivision has been previously certified, the times specified in the permit expiry conditions will require an extension of time under section 69 of the Planning and Environment Act 1987 (if appropriate) to overcome the effect of the time provisions in the Subdivision Act 1988.<sup>67</sup>

If a permit authorises the use of land for extractive industry, modified commencement and expiry requirements apply:

- Clause 52.09-5 of the planning scheme requires that a condition must be included that allows for a period of not less than five years for the use and development to start.
- Section 68A of the PE Act, increases the period of discontinuance to 10 years before a permit for extractive industry expires.

## 6.2.2 Specifying commencement and completion

**It is always preferable to specify a date for the start of both use and development in the permit and a date for completion of development. These dates should be expressed as a period of time from the issued date of the permit.**

Referring to the issued date of the permit is consistent with the wording and reference date used in the PE Act and avoids confusion. See chapter 6.1.1 above.

**Give careful consideration to the appropriate period for both starting and completion.**

The period for starting should fairly and realistically relate to the nature and complexity of the use or development allowed and accommodate the need to obtain any approvals of plans or documents under the permit. The period to complete development should allow for a suitable construction period based on the nature and scale of the development.

Where a permit is required under a particular provision in the planning scheme for things such as signs<sup>68</sup>, licensed premises<sup>69</sup> or gaming<sup>70</sup>, it is important to carefully read the planning scheme to clarify when the provision requires a permit for use or development.

When using the model conditions regarding expiry, carefully consider whether the condition needs to be modified to suit the permission being given. For example, clause 52.27 (licensed premises) states: *A permit is required to use land to sell or consume liquor....* The commencement date should therefore relate to the use, not the development.

It may sometimes also be appropriate to include multiple expiry conditions that relate specifically to the particular use or development or other permission required: for example an expiry condition for an advertising sign and an expiry condition for use/development in the same permit.

65 *Mildura RCC v Waddleton* [2016] VCAT 467 at [47] – [54]

66 *Moorabool SC v Millar & Merrigan Pty Ltd* [2010] VCAT 574

67 *Under the Subdivision Act 1988* certification of a plan is valid for 5 years from the date of certification (section 7). The council may re-certify an amended plan or certify a new plan (section 11(7)) but the certification or re-certification of a plan under subsection (7) does not extend the period specified in section 7 (section 11(9)). In *TJBP Pty Ltd v Brown & Ors* [2013] VSC 173 at [24]–[27] the Supreme Court noted that nothing in the *Subdivision Act* indicates that amending a permit for subdivision will invalidate an existing certification or otherwise deprive an existing certification of legal effect. To the contrary, section 11 provides for a variety of measures to be taken if plans of subdivision require amendment and specifies that the date of the initial certification continues to be the starting point for the period of validity in section 7.

68 Clause 52.05

69 Clause 52.27

70 Clause 52.28

### 6.2.3 Removal or variation of an easement or restriction

Where any of the circumstances mentioned in section 6A(2) of the PE Act require the certification of a plan under the *Subdivision Act 1988*, section 68(3A) (b) of the PE Act provides that the permit expires if the plan is not certified within two years of the issue of the permit, unless the permit contains a different provision.

### 6.2.4 What happens if development is not completed within time?

If any part of a development is not completed within the time specified in the permit, the whole of the permit will expire unless the permit is extended in accordance with section 69 of the PE Act. This includes any permission for use in the case of a permit for development and use, even though the use may have commenced.<sup>71</sup>

## 6.3 Permits granting retrospective permission

Sometimes a new permit will be issued or an existing permit will be amended to authorise:

- A use or development that has already commenced.
- A development that has been completed without a permit or in contravention of a permit.

A permit that grants a retrospective permission is commonly called a retrospective permit and may be issued as part of an enforcement process.

Particular care is needed when setting dates for when things must happen under a retrospective permit or an amended permit.

For example:

- In a condition requiring the approval and endorsement of plans, where a development has already been commenced or completed, there is no point in using a standard condition that provides: *'Before the development starts, amended plans to the satisfaction of the responsible authority must be approved and endorsed by the responsible authority.'* Such a condition cannot be complied with because the development has already started.

- Instead, the condition should set a specific date by which plans (amended or otherwise) must be submitted to the responsible authority. For example: *'By no later than [insert date] amended plans to the satisfaction of the responsible authority must be submitted to the responsible authority for approval.'* When approved, the responsible authority must endorse the plans.'
- Such a condition places the obligation on the permit holder to submit plans by a specified date. It does not tie the responsible authority to approving the plans by a certain date, but requires that when the plans are approved the responsible authority must endorse them.<sup>72</sup>
- Including a specific date in the condition provides more clarity for a permit holder as to when things must be done and is preferred to a condition that says: *'Within 60 days of the issued date of this permit [or amended permit],...'*
- Be careful when setting any other dates in an amended permit for retrospective permission to ensure they make sense in the circumstances. Dates can be described by reference to the issued date of the amended permit or to the amended development allowed by the amended permit, but for the sake of clarity it is preferable to include a specific date.

## 6.4 Extending the time of the permit

**Section 69 of the PE Act provides a process for the extension of time of a permit. An application for an extension of time should be made in accordance with the PE Act.**

The wording in the model conditions about expiry of permits should be used to make it clear that, in accordance with Section 69 of the PE Act, an application may be submitted to the responsible authority for an extension of the periods referred to in the condition.

Although section 69 does not prescribe an exclusive and mandatory method for the extension of a permit, in the interests of consistency it is preferable to use the process under section 69.<sup>73</sup>

The model permit includes a section to document any extensions to a permit. Although this section does not form part of Form 4, it is good practice to record within the permit document what extensions of time have been made. The practice will provide clarity to a permit holder and others about whether or not the permit has expired or been extended.

<sup>71</sup> *Dahlenburg v Hindmarsh SC (Red Dot) [2022] VCAT 669*

<sup>72</sup> *PE Act s. 149(1)(d) provides a right of review if the responsible authority fails to approve the plans.*

<sup>73</sup> *See The People of the Small Town of Hawkesdale Incorporated v Minister for Planning [2021] VSC 510*



It is not possible to extend the expiry of a permit where the use is discontinued for the requisite period of two years or 10 years in the case of use of land for extractive industry.<sup>74</sup>

Section 69(2) only enables the responsible authority to extend the time within which:

- The use or development or any stage of it is to be started.
- The development or any stage of it is to be completed.
- A plan under the *Subdivision Act 1988* is to be certified.

## 6.5 The ongoing effect of conditions

**The conditions in a permit have an ongoing effect for as long as the permit continues to be relied upon.**

In *Benedetti v Moonee Valley City Council*,<sup>75</sup> the Supreme Court considered the issue of whether a permit, once issued for a development, has an ongoing role and authority once the development is complete. This becomes particularly relevant if circumstances change so that under the planning scheme no permission is required for development that departs from the development as originally approved.

The permit in *Benedetti* included a condition that provided that the development as shown on the endorsed plans must not be altered without the written consent of the responsible authority. The dispute was about whether planning permission was required by way of amendment of plans endorsed under a permit for buildings and works that would not otherwise now require a permit under the planning scheme.

The Court held in *Benedetti* that such a condition continues to have effect while the owner of the land takes the benefit of the permit. While the development is maintained, the conditional obligation not to modify the layout or the size of the buildings persists.

In other words, if a development required a permit at the time when the permit was granted and the permit says that the development must not be altered without consent, the permit continues to operate so long as the development continues to exist. Conditions should not be regarded as 'spent' and having no further effect even if they have been complied with and a development has been completed. See chapter 6.6 below.

## 6.6 When is a condition is spent?

When amending the conditions, plans or documents approved under a permit, it may be necessary to consider whether a condition continues have an ongoing effect or if it is 'spent'.

Whether a condition can be said to be 'spent' will depend on the wording of the condition and its context. It will be a question of interpretation. However, just because a condition is complied with does not mean that the condition is 'spent' or ceases to apply.

In *Cook v Mornington Peninsula SC*<sup>76</sup> VCAT considered a similar condition to *Benedetti*. The condition provided that the development as shown on the endorsed plans must not be altered without the written consent of the responsible authority in circumstances where there was also a condition requiring specified changes to be made to plans before they were approved and endorsed under the permit. Following the initial approval and endorsement of the amended plans, the permit holder then sought to delete one of the specified changes by way of secondary consent. The responsible authority and the permit holder argued that the condition requiring specified changes was 'spent' following the initial approval and endorsement of plans. VCAT disagreed with this argument. It held that the condition requiring the specified changes was not 'spent' immediately following the initial endorsement of plans. A consideration of *Benedetti* supported VCAT's view that:<sup>77</sup>

*The important and deliberate requirements contained within Condition 1 are not exhausted or 'spent' following the initial endorsement of plans, and must be properly considered in any amendment of those plans.*

VCAT emphasised that this did not mean that the permit plans, once initially approved and endorsed, are fixed for all time. It simply added weight to the view that, absent any material change of circumstances, ongoing regard should be had to the key plan requirements in the sub-paragraphs of Condition 1 upon which the planning permission was initially granted.

This decision suggests that a change to any important or deliberate requirements in a condition requiring an amendment of plans forming part of the application would require a formal amendment to the permit by a process under section 72 of the PE Act, rather than by way of secondary consent. See the further discussion in chapter 9.4 below.

74 PE Act s.68A(1)

75 *Benedetti v Moonee Valley City Council* [2005] VSC 434

76 *Cook v Mornington Peninsula SC (Red Dot)* [2017] VCAT 1129

77 *Ibid* at [46]

## 6.7 When is a permit 'spent'?

It may sometimes be necessary to consider whether a permit is operative and capable of being amended or if it is 'spent' (as distinct from a condition under a permit being spent).

There is no general planning concept of a permit becoming 'spent' in the PE Act.

Under the PE Act, a permit may expire or may be cancelled. Otherwise, a permit will continue to operate as long as the use or development continues. If a use ceases, the permit will expire two years after the use is discontinued or ten years in the case of extractive industry.<sup>78</sup> If a development ceases, the permit may come to an end in practical terms because the permit holder is no longer taking the benefit of the permit. Otherwise, the conditions in a permit for development will have an ongoing effect so long as the permit continues to be relied upon, even if the development has been completed (see chapter 6.5 above).

Section 68 of the PE Act deals with when a permit will expire. In the case of development, a permit will expire if the development is not started or has not been completed with the specified time. However, the PE Act does not say that if a development is completed within the time specified, the permit expires or ceases to operate. To the contrary, *Benedetti* says that the permit will continue to operate and conditions will continue to have effect while the development allowed by the permit is maintained. The PE Act also envisages that a permit will have ongoing effect even when development is completed, for example with respect to enforcement provisions and opportunities under the PE Act to cancel or amend a permit.

There is therefore nothing in the PE Act which contemplates that a permit may be 'spent' as distinct from expiring under section 68 or being cancelled under sections 87 or 87A.<sup>79</sup>

## 6.8 Limited life permits

In some circumstances, a responsible authority may allow a use to operate for a limited period only. Careful consideration should be given to whether this is appropriate.

If a permit is given a limited life, it is not appropriate to specify the limited period in the words describing what the permit allows, for example: *This permit allows the use of the land for a restaurant for a period of two years.*

Instead, the time limit should be imposed as a condition of the permit. This allows for a review of the condition by VCAT under section 80 of the PE Act. It also enables the condition to be enforced under section 114 of the PE Act if the use does not cease by the specified time.

If a condition to limit the life of a permit is included, it is not good practice to include a secondary consent provision to allow the life of the permit to be extended. It is preferable to use sections 72, 87 or 87A of the PE Act to amend the permit to extend the time limit, which would allow for affected third party notice and review.

## 6.9 Specified operator

A permit attaches to the land and may be relied upon by whoever happens to be the permit holder (the owner, operator or developer) at the time. A permit is not personal to the applicant or a particular person unless there is a condition in the permit that restricts the use to a specified operator.

A condition tying the operation of a use to a particular operator will not usually be valid except where the operator has special capabilities, without which the use could not be operated satisfactorily or should not be operated. Such a condition should only be used in exceptional circumstances.

Careful consideration should be given to what happens if the specified operator ceases to use the land. For example, whether an alternative operator may be approved by secondary consent or whether the permit will expire.

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<sup>78</sup> PE Act s.68(2) and s.68(3), and s.68A

<sup>79</sup> *This is notwithstanding the reference in Mondib Group Pty Ltd v Moonee Valley CC [2021] VSC 722 at [73] that 'a permit may, in certain contexts, become spent or cease to be an operative permission, for example when a development has been completed. In those cases there would be nothing to amend.' This comment was made in passing in the context of considering the breadth of the power to amend a permit under section 72 of the Act and does not refer to the principle in Benedetti.*

# 7. Approved and endorsed plans

## 7.1 Plans form part of the permit

A permit includes any plans, drawings or other documents approved under the permit.<sup>80</sup>

The clearest way to show that a plan, drawing or document has been approved under a permit is to endorse it. Endorsement is evidence of approval. A plan endorsed under the permit is able to be identified as an approved plan forming part of the permit. Endorsement will typically involve the responsible authority stamping the plan or document and identifying that it is the ### plan approved/endorsed under permit number ###, page/sheet number ### and dating it.

Most permits refer to endorsed plans. Endorsed plans may include such things as site plans, development plans, landscape plans, environmental management plans, construction management plans, parking and traffic management plans, noise management plans, vegetation removal plans and the like.

The timing for approval and endorsement of plans will dictate when particular aspects of the use or development may commence. The timing may vary for different plans.

The following wording is common in many permits:

*Before the development starts, plans must be submitted to and approved by the responsible authority. When approved the plans will be endorsed and will form part of the permit.*

Because the definition of permit in the PE Act includes any plans, drawings or other documents approved under the permit, it is not necessary to repeat the last sentence above in every condition which requires approval of a plan or other document. It is sufficient to state that the plan or document must be approved by the responsible authority.

The model conditions about approval and endorsement of plans use the following wording:

*Before the [insert use, development or use and development as appropriate] starts, plans must be approved and endorsed by the responsible authority.*

Requiring a plan or document to be both approved and endorsed recognises that these are two separate actions. Approval is what is required under the PE Act for the plan or document to become part of the permit. Endorsement is not a statutory requirement but is evidence of approval.

The model conditions include a requirement for plans to be endorsed as well as approved because endorsement is such a common practice that makes good practical sense even though the PE Act makes no reference to endorsement.

## 7.2 Identifying plans to be approved and any changes required

Sometimes no changes will be required to the plans forming part of the application. Nevertheless, a condition should still be included in the permit identifying that these are the plans to be approved and endorsed before the development or use starts. Such a condition removes any ambiguity about what are the plans that must be approved and endorsed under the condition.

More commonly, plans forming part of the application will require some changes as part of the permit approval process. These changes will need to be clearly identified so there is no ambiguity and included in the condition that requires the approval and endorsement of plans.

See chapter 4.3.3 above for guidance on common expressions used to specify the content required to be included in a plan or document.

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80 PE Act s.3(1)

## 8. Including notes in a permit

Warnings, advice or statements of policy should not be included as conditions.

Conditions should not be included that require compliance with some other Act or regulation (such as the need for a building permit or to obtain a consent under a by-law or some other legislation).

Conditions place obligations on a permit holder, or otherwise regulate the permitted use or development. They are not a compendium of information.

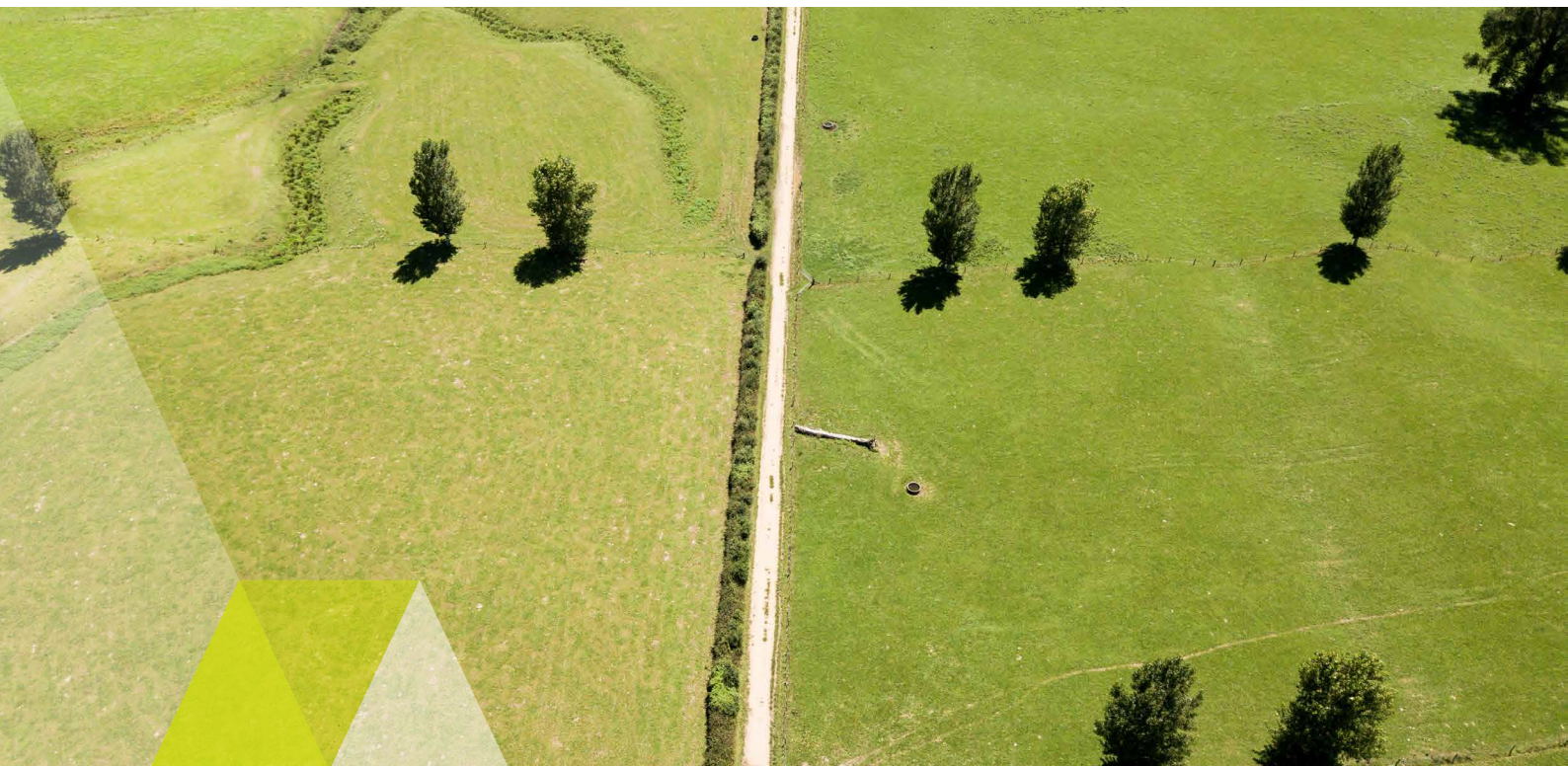
If a warning or advice of this kind is considered necessary, or it would be useful to include information about persons to contact or the like, this information can be included in notes or a covering letter. The benefit of including notes on a permit is that they remain with the permit for the duration of its life, whereas a covering letter may become detached from the permit as time passes.

If notes are included on a permit, make it clear that they are not part of the permit and are only provided for information. Notes on permits, or footnotes, do not form part of the permit and are not enforceable.

Examples of notes commonly included on permits include:

- The need for a permitted use or development to comply with any conditions of a Cultural Heritage Management Plan approved under the *Aboriginal Heritage Act 2006*.
- The need to obtain a building permit under the *Building Act 1993* for any approved buildings.

**The model permit includes a mechanism for including notes in a permit under the heading Useful Information.**



# 9. Changing a permit

## 9.1 Recording changes to a permit

If the permit is amended, details of the amendment must be included in the permit.<sup>81</sup>

It is important to keep an accurate record of any changes, so that it is always clear what the current version of the permit is and what has changed.

The model permit provides a mechanism for this in the form of a table towards the end of the permit.

Chapter 4.3.3 above describes how to incorporate the actual amendments into the permit.

## 9.2 How can a permit be changed

A permit or details in a permit can be changed using the following mechanisms:

- Section 72 – a person who is entitled to use or develop land in accordance with a permit may apply to the responsible authority for an amendment to the permit.<sup>82</sup>
- Secondary consent – under a permit a responsible authority may consent to changes to or amend matters regulated by a permit condition if this is authorised by the condition.
- Section 87 – amendment under section 87 is a remedy available in limited circumstances<sup>83</sup> to specified people<sup>84</sup> exercisable by VCAT.
- Section 87A – amendment under section 87A is a broad power of amendment only exercisable by VCAT at the request of the owner, occupier or developer of land<sup>85</sup> in respect of a permit issued at the direction of the Tribunal.

The powers to amend a permit under sections 72, 87 and 87A are statutory powers conferred by the PE Act. An application under section 72 can be made to the responsible authority. An application under sections 87 and 87A must be made to VCAT.

Secondary consent powers arise under the permit itself. An application or request for consent to change something under the permit must be made to the responsible authority or other specified body<sup>86</sup> named in the condition. Changes under a secondary consent provision in a permit condition change the matter or detail regulated by the condition. The permit itself is not changed, unlike an amendment under sections 72, 87 or 87A which amends the permit.<sup>87</sup>

## 9.3 Amending a permit under sections 72, 87 and 87A

Amending a permit under section 72 is the most common way of amending a permit.

**The power of amendment under section 72 is very broad.<sup>88</sup> The process and safeguards applying to a section 72 application mean that it is usually the most appropriate mechanism for amending a permit.**

An application must be made to the responsible authority. Division 1A of Part 4 of the PE Act sets out the procedures for a responsible authority to amend a permit. They include the giving of notice, rights of objection and review rights the same as if the application were an application for a permit.<sup>89</sup>

Because any request to amend a permit under sections 87 and 87A must be made to VCAT, this can be less straightforward than an application to the responsible authority under section 72. There are constraints on when a request may be made under section 87, although it is available to persons other than the permit holder.

81 PE Regs Form 4

82 However, under section 85(1A) of the PE Act, if the permit has been issued at the direction of VCAT, VCAT may include a condition that the permit or a specified part of the permit must not be amended by the responsible authority under Division 1A (section 72).

83 PE Act s.87(1) and (2)

84 PE Act s.87(3)

85 PE Act s. 87A

86 PE s.148 – specified body means a Minister, or the responsible authority, or a public authority, or a municipal council, or a referral authority

87 The distinction between an amendment under section 72 and a secondary consent provision was highlighted by VCAT in *Westpoint Corporation v Moreland CC (Red Dot)* [2004] VCAT 1049 at [36]

88 See *Mondib Group Pty Ltd v Moonee Valley City Council* [2021] VSC 722, in which the Court held that the power to amend a permit under section 72 does not depend on the extent of proposed changes.

89 PE Act s.73(1)

Any changes to a permit made under sections 87 or 87A by VCAT should be recorded in the permit in the same way as any amendments under section 72. Even though the wording of the table in Form 4 only refers to the name of the responsible authority that approved the amendment.

## 9.4 Secondary consent

The other mechanism for amending what is regulated by a permit condition is by way of a secondary consent contained in the condition. It is important to understand the way in which secondary consent operates and the limitations upon its use when deciding whether it is appropriate to use.

**A secondary consent mechanism is a useful means for the responsible authority to deal efficiently with modifications that do not adversely impact on other land or the interests of other people and do not conflict with other specific requirements of the permit. Otherwise changes to a permit should be made using an application under section 72.**

A power of secondary consent will usually be created by including the words in a condition 'except with the written consent of the responsible authority'. For example:

- The development and use as shown on the endorsed plans must not be altered without the written consent of the responsible authority.
- The use must only operate between the hours of 9.00am and 6.00pm except with the written consent of the responsible authority.

**Conditions that contain a secondary consent power should be carefully considered as to whether they will conflict with other conditions or are appropriate.**

For example, if amendments are required to plans before they are approved and endorsed, it may not be appropriate to allow those plans to be amended by including a secondary consent provision (as was the situation in *Cook v Mornington Peninsula SC*<sup>90</sup> discussed below). Likewise, it may not be appropriate to allow hours of operation for a use to be changed without giving notice to affected people. In each case, amendment to the permit under section 72 may be preferable to including a secondary consent provision.

**Even if a secondary consent provision is included in a condition, there is no guarantee that it can be relied upon in preference to amending the requirements of a condition under section 72.**

There is no process set out in the PE Act for seeking a secondary consent. No notice is required and there are no third party rights of review. An owner, user or developer of the land directly affected by the matter may apply to VCAT under Section 149(1)(a) of the PE Act for the review of a decision in respect of a secondary consent matter if 'a permit contains a condition that the matter ... must not be done without the consent or approval, of the specified body'.<sup>91</sup>

VCAT has developed guidance as to when it is appropriate to use secondary consent to amend a matter in a permit and when it is more appropriate to use an application under section 72 to amend a permit. *Westpoint Corporation v Moreland CC* summarised the extent of changes that can be approved under secondary consent as follows:<sup>92</sup>

*When deciding whether a use or development may be altered under a secondary consent provision in a permit, the scale of the change is not relevant per se. The change need not simply be "minor" to be allowable under a secondary consent provision provided it meets the following requirements:*

- *It does not result in a transformation of the proposal.*
- *It does not authorise something for which primary consent is required under the planning scheme.*
- *It is of no consequence having regard to the purpose of the planning control under which the permit was granted.*
- *It is not contrary to a specific requirement as distinct from an authorisation within the permit, which itself cannot be altered by consent.*

The ambit of the secondary consent process and the *Westpoint* criteria have been discussed in many cases. In *Cook v Mornington Peninsula SC*,<sup>93</sup> VCAT considered a condition that the development as shown on the endorsed plans must not be altered without the written consent of the responsible authority in circumstances where there was also a condition requiring specified changes to be made to plans before they were endorsed under the permit. The changes were made and the plans were endorsed. The applicant then sought to delete one of the specified changes by way of secondary consent. VCAT said this was not appropriate.

90 *Cook v Mornington Peninsula SC (Red Dot) [2017] VCAT 1129*

91 *Specified person and specified body are defined in section 148 of the PE Act*

92 *Westpoint Corporation v Moreland CC (Red Dot) [2005] VCAT 1049 at [38]*

93 *Cook v Mornington Peninsula SC (Red Dot) [2017] VCAT 1129*

In *Cook* VCAT discussed the *Westpoint* criteria and subsequent cases. It held that 'because there is no express recognition of a secondary consent process in the Act, the power to amend endorsed plans through a secondary consent process is not unlimited, and cannot operate inconsistently with section 72 or the PE Act generally. The limits of the facilitative function of such a process must be derived from the permit itself, including any particular wording in the [amended plans] condition, having regard to its purpose and context, and the usual tests for the validity of a permit condition.'<sup>94</sup> VCAT went on to say that where a condition required specific changes to be made to plans before they were approved and endorsed, such a condition was relevant in deciding whether it was open to amend the endorsed plans by way of secondary consent.

VCAT decided in *Cook* that the endorsed plans in that case could not be amended by secondary consent. However, it emphasised that this outcome does not prevent a change to endorsed plans by way of secondary consent, including a subsequent change to a matter required in a condition requiring amendments to plans before approval and endorsement, where the change is an inconsequential or 'minor modification' that still preserves the intent of the specific requirement.<sup>95</sup>

However, beyond that, any change to endorsed plans that has the effect of changing the intended planning outcome of a specific requirement in another condition must be dealt with through a section 72 amendment process, rather than by secondary consent.<sup>96</sup>

## 9.5 Amalgamating multiple permit

**When deciding to issue a new permit for a use or development, consider what other existing permits may affect the land and their status.**

It is not uncommon for more than one permit to have been issued for the same land. Over time, multiple permits may issue for use or different development. With multiple permits, the possibility arises for there to be inconsistency in what is allowed and between conditions. If a new application is made, the responsible authority is not legally constrained from granting a new permit, whether or not an inconsistency would arise.

However, when the permit is implemented, any inconsistency with an earlier permit may create enforcement issues. This is because:

- The conditions of an earlier permit continue to have effect and are binding while the permit holder takes the benefit of that permit.<sup>97</sup> (See chapter 6.5 above).
- The issue of a new planning permit does not itself bring about an inconsistency with an earlier permit. It is the reliance on a new permit that may bring about an inconsistency.<sup>98</sup>
- Inconsistent permits cannot be relied on simultaneously.<sup>99</sup>
- The grant of a new permit and approval and endorsement of a new plan does not automatically amend an earlier permit or any plan approved and endorsed under it.<sup>100</sup>

**To avoid problems associated with inconsistencies between permits, consider whether to include a condition requiring the cancellation or amendment of an inconsistent earlier permit. (See chapter 6.1.3 above).**

It may be sufficient to amend specific details of an earlier permit, either in conditions or approved plans using section 72, 87 or 87A of the PE Act.

Alternatively, it may be appropriate to cancel all existing permits and issue a new 'omnibus' permit to allow all aspects of the current and proposed use and development of the land. Cancellation of permits can only be done by VCAT under section 87 or 87A of the PE Act.

The concept of a permit as a comprehensive document containing all consents relevant to a piece of land and evolving over time as circumstances change, a business expands or alters and as further development occurs was discussed by VCAT in *Bestway*<sup>101</sup> and cited with approval by the Supreme Court in *Mondib*.<sup>102</sup>

For these reasons, when writing a planning permit, consider whether it is appropriate to take the opportunity to amalgamate multiple permits.

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<sup>94</sup> *Ibid* at [57]

<sup>95</sup> *Ibid* at [82].

<sup>96</sup> *Ibid* at [82].

<sup>97</sup> See *Benedetti v Moonee Valley City Council* [2005] VSC 434

<sup>98</sup> See *Bretherton v Moonee Valley CC* [2000] VCAT 1151 at [78].

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid* at [82].

<sup>101</sup> *Bestway Group Pty Ltd v Monash CC (Red Dot)* [2008] VCAT 860 at [16] and [19]

<sup>102</sup> *Mondib Group Pty Ltd v Moonee Valley City Council* [2021] VSC 722

# 10. Specific types of conditions

## 10.1 Referral authority conditions

Be careful when drafting conditions required by a referral authority. Ensure the conditions sought meet the principles for writing effective and lawful conditions in chapters 4 and 5 above.

Referral authorities play an important role in the planning system and have special status under the PE Act in respect of their conditions. (See chapter 5.1.1 above).

A condition prepared by a referral authority may not initially reflect best practice in drafting. For example, many conditions include notes within the condition itself, email addresses, phone numbers and requirements that things be done to the satisfaction of individuals or office holders rather than naming the referral authority (See discussion in chapters 4.2.4 and 8 above).

**It is acceptable to rewrite and renumber referral authority conditions and relocate matters to a note in the 'Useful Information' section, provided the meaning of the requested condition is not changed.**

Where changes are proposed to the wording of referral authority conditions to respond to best practice principles, the revised drafting should be explained to the referral authority.

The model permit suggests grouping mandatory conditions together (see chapter 1.3.2). The benefit of this is that the nature and status of these conditions are clearly evident to the permit holder.

## 10.2 Including a use condition in a permit for development

To be valid, a condition must be reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised.

This principle is sometimes expressed as being that a condition must fairly and reasonably relate to the permitted use and/ or development, although it is somewhat more complicated than this simple test. (See discussion in chapter 5.2.1 above).

Generally, this principle would mean that a condition regulating use should not be imposed on a permit allowing only development. However, careful consideration must be given to the nature of the proposed development. If the development would not be acceptable without some restrictions on the way it will be used, conditions restricting its use may be valid. For example: a permit to construct an outdoor deck to an existing hotel may justify a condition that limits the use of the deck to certain hours to protect residential amenity, but it would not justify a condition restricting the hours of operation of the hotel generally.<sup>103</sup>

## 10.3 Section 173 agreements

### 10.3.1 The power to require a section 173 agreement

Under section 173 of the PE Act, the responsible authority can negotiate an agreement with an owner of land to set out conditions or restrictions on the use or development of the land, or to achieve other planning objectives in relation to the land. A section 173 agreement is a legal contract. It can be recorded on title and enforced under the PE Act.

Section 173 agreements are discussed more fully in chapter 8 of *Using Victoria's Planning System*.<sup>104</sup>

<sup>103</sup> See *Challister v City of Caulfield* (1992) 8 AATR 22 and *Johansson v Glen Eira CC* [2005] VCAT 1242 at [8].

<sup>104</sup> *Using Victoria's Planning System DELWP 2022*



Section 62(2)(f) of the PE Act provides that the responsible authority may include in a permit a condition requiring a section 173 agreement to be entered into within a specified period or before the use or development or a specified part of it starts.

Before deciding to include a condition requiring a section 173 agreement, a responsible authority should carefully consider other mechanisms available to achieve the intended outcome. Section 173 agreements can be complex and costly to administer and are difficult to amend or end, particularly after the affected land is subdivided.

### 10.3.2 The scope of a section 173 agreement

**The scope of what may be included in a section 173 agreement is broad but not unlimited.<sup>105</sup>**

A section 173 agreement cannot authorise any use or development contrary to the planning scheme or a permit. This means that an agreement cannot provide for less restrictive provisions than those in a planning scheme or permit, such as allowing a use or development that is otherwise prohibited. However, an agreement could provide for more restrictive provisions than those in the planning scheme or a permit, such as prohibiting or placing greater restrictions on a use or development that is otherwise allowed.

Be careful before imposing a condition requiring a section 173 agreement that restricts subsequent development only to that shown on approved plans under a particular permit issued on a particular date. Legal complications can arise if it is proposed to change the development in any way from the plans approved on the particular date.

If such agreement is considered necessary, an agreement should be limited in time until the particular development is completed rather than operating in perpetuity. This avoids blighting the land with a development that may prove to be unsuitable in the future but is extremely difficult to alter.

A section 173 agreement may impose positive obligations on the owner of land, for example, to do certain works or to maintain those works into the future. However, section 173 agreements are generally not required to impose ongoing restrictions on buildings and works permits (see discussion in chapter 6.5 above, which explains the ongoing effect of conditions).

### 10.3.3 Voluntary and involuntary section 173 agreements

**If an agreement is not voluntary, a condition requiring a section 173 agreement is subject to the same tests of validity as any other permit condition.**

**A contested and invalid condition cannot be justified merely because the responsible authority requires it to be implemented under a section 173 agreement.<sup>106</sup>**

There is an important distinction between a section 173 agreement that is voluntary (willingly agreed to by an owner and the responsible authority) and one that is not. Because a section 173 agreement is a contractual arrangement, an owner may consent to do things that a responsible authority could not otherwise require by way of a condition on a permit, so long as it is lawful (for instance under the planning scheme) and falls within the ambit of section 174(2) of the PE Act.

This principle is particularly relevant in the context of development contributions (see chapter 10.4 below).

### 10.3.4 Registering a section 173 agreement

**The responsible authority is responsible for registering a section 173 agreement.<sup>100</sup>**

Section 181 of the PE Act<sup>107</sup> provides that a responsible authority must apply to the Registrar of Titles, without delay, to record an agreement relating to land other than Crown land. Therefore conditions which require a section 173 agreement do not need to specify that the owner must make application to the Registrar of Titles to have the agreement registered.

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<sup>105</sup> PE Act s. 174(2)

<sup>106</sup> *Naprelac v Baw Baw SC (Red Dot)* [2005] VCAT 956; *Harmon Group Pty Ltd v Casey CC* [2006] VCAT 629

<sup>107</sup> Which was amended in 2013

## 10.4 Development and infrastructure contributions

Do not include a requirement for a development or infrastructure contribution in a condition (by a section 173 agreement or otherwise) unless the contribution:

- Is voluntary.
- Complies with sections 62(5) and 62(6) of the PE Act.

Development or infrastructure contributions are payments for in-kind works, facilities or services provided by a developer towards the supply of infrastructure required to meet the future needs of the community.

There are several tools to collect development and infrastructure contributions, including:

### Growth Areas Infrastructure Contribution (GAIC) (since 2010)

Allows the state government to obtain funds from developers in Melbourne's greenfield growth areas to help deliver state infrastructure those suburbs. It funds community and public transport infrastructure.

### Development Contributions Plan (DCP) (since 1995)

Allows a council to obtain funds from developers to help deliver local infrastructure. It commonly funds community and transport infrastructure, such as roads.

### Infrastructure Contributions Plan (ICP) (since 2015)

Allows a council in a defined growth area to obtain funds from developers to help deliver local infrastructure. It funds similar types of infrastructure as the DCP program.

### Voluntary agreements and section 173 agreements

Section 173 of the PE Act allows a council to enter a voluntary agreement with a developer on a project by project basis.

The PE Act and planning schemes provide the framework within which development and infrastructure contributions can be required and collected. Mandatory conditions are required to be included in permits under the Development Contributions Plan Overlay, the Infrastructure Contributions Plan Overlay and the Infrastructure Contributions Overlay<sup>108</sup> to give effect to any contributions, levies or requirements set out in relevant schedules to these overlays.

Sections 62(5) and 62(6) of the PE Act provide that:

5. *In deciding to grant a permit, the responsible authority may —*
  - a. *include a condition to implement an approved development contributions plan or an approved infrastructure contributions plan; or*
  - b. *include a condition requiring specified works, services or facilities to be provided or paid for in accordance with an agreement under section 173; or*
  - c. *include a condition that specified works, services or facilities that the responsible authority considers necessary to be provided on or to the land or other land as a result of the grant of the permit be —*
    - i. *provided by the applicant; or*
    - ii. *paid for wholly by the applicant; or*
    - iii. *provided or paid for partly by the applicant where the remaining cost is to be met by any Minister, public authority or municipal council providing the works, services or facilities.*
6. *The responsible authority must not include in a permit a condition requiring a person to pay an amount for or provide works, services or facilities except —*
  - a. *in accordance with subsection (5), section 46N(1) or 46GV(7); or*
  - b. *a condition that a planning scheme requires to be included as referred to in subsection (1) (a); or*
  - c. *a condition that a determining referral authority requires to be included as referred to in subsection (1)(a).*

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<sup>108</sup> Clauses 45.06, 45.10 and 45.11 of the planning scheme

### 10.4.1 Operation of sections 62(5) and 62(6)

Supreme Court and VCAT cases concerning the operation of sections 62(5) and 62(6) have established the following principles:

- A condition under section 62(5)(a) to implement an approved development contributions plan or an approved infrastructure contributions plan is not the same as a condition to pay a levy under section 46N(1).<sup>109</sup> 'Section 62(5)(a) is not concerned with conditions required by s.46N.<sup>110</sup> It conveys a power additional to that mandated by section 46N(1).<sup>111</sup> Conditions requiring payment of a levy under sections 46N(1) or 46GV(7) are mandatory conditions that must be included because of section 62(1)(a). A condition under section 62(5) is discretionary although it must not conflict with a mandatory condition.<sup>112</sup> In *Carson Simpson*, the Court suggested that a section 62(5)(a) condition may impose a requirement for works or implement constraints upon development, consequent upon the intended outcome from a DCP, for example to provide for a setback and landscaping to buffer a proposed sewerage treatment plant.<sup>113</sup>
- A condition under section 62(5)(b) may require that specified works, services or facilities be provided or paid for in accordance with an agreement under section 173 provided it is a voluntary agreement. It is not necessary for such works, services or facilities (or payment) to accord with the apportionment set out in section 62(5)(c). However, a condition under section 62(5)(b) cannot compel a developer to pay a development contribution that is not otherwise authorised under sections 62(5) and (6) just because it is required by a section 173 agreement unless it is entirely consensual and voluntary.<sup>114</sup>
- A condition under section 62(5)(c) may require that specified works, services or facilities that the responsible authority considers necessary to be provided on or to the land or other land as a result of the grant of the permit be:
  - provided by the applicant.
  - paid for wholly by the applicant.

– provided or paid for partly by the applicant where the remaining cost is to be met by any Minister, public authority or municipal council providing the works, services or facilities.

- Section 62(5)(c) cannot be used to require a contribution to works, services or facilities where further contributions will be required from other developers. It can only be used where they will be provided or paid for solely by the applicant, or partly by the applicant where the remainder is to be paid by a relevant authority.
- Section 62(6) makes it clear that unless a condition is a mandatory condition under section 62(1)(a), or is in accordance with section 62(5), section 46N(1) or 46GV(7); or is a condition that a determining referral authority requires to be included as referred to in section 62(1)(a), no condition can be included in a permit requiring a person to pay an amount for or provide works, services or facilities.<sup>115</sup>

## 10.5 Environmental management

### 10.5.1 Environmental and construction management plans

A requirement for an environmental management plan (EMP) or a construction management plan (CMP) is a common condition included in a permit to manage environmental and off-site amenity impacts during demolition and construction of development, including subdivision.

The general environmental duty now at the centre of the *Environment Protection Act 2017* (EP Act) requires all Victorians to manage any risks to human health and the environment that their activities create. Everyone must take steps to prevent or minimise those risks, including during demolition or construction of development and subdivision.

The Environment Protection Authority (EPA) has prepared a series of comprehensive guides to help people and businesses to comply with the general environmental duty. This information and guidance is available on the EPA website.<sup>116</sup>

<sup>109</sup> *The same principle would apply to levies payable under section 46GV(7) of the PE Act*

<sup>110</sup> *Casey City Council v Carson Simpson Pty Ltd* [2007] VSC 25 at [139]

<sup>111</sup> *Casey City Council v Carson Simpson Pty Ltd* [2007] VSC 25 at [97] – [105]

<sup>112</sup> *PE Act* s.62(1)(b)

<sup>113</sup> *Casey City Council v Carson Simpson Pty Ltd* [2007] VSC 25 at [100]

<sup>114</sup> *Cameron Manor Pty Ltd v Mornington Peninsula SC (Red Dot)* [2007] VCAT 1822 at [65]–[68]; *Naprelac v Baw Baw SC* [2005] VCAT 956; *Springhaven Property Group Pty Ltd v Whittlesea CC (Red Dot)* [2005] VCAT 816 For a history of these provisions see *Cameron Manor Pty Ltd v Mornington Peninsula SC (Red Dot)* [2007] VCAT 1822 at [14]–[26]

<sup>115</sup> *The condition considered by the Supreme Court in Melbourne Water Corporation v Domus Design Pty Ltd* [2007] VSC 114 was a condition required by a determining referral authority as referred to in section 62(1)(a).

<sup>116</sup> <https://www.epa.vic.gov.au/>

The *EPA Civil construction building and demolition guide* [EPA guide<sup>117</sup>] contains comprehensive information to assist the civil construction, building and demolition industries to eliminate or reduce the risk of harm to human health and the environment through good environmental practice. In particular, Appendix 2 of the EPA guide contains a template for the preparation of an EMP.

While the EPA guide and EMP template have been prepared to respond to the general environmental duty under the EP Act, they provide a sound basis for inclusion in a condition in a planning permit where the responsible authority considers that all or some of the risks included in the template should be managed during demolition and construction of development allowed by the permit.

Using the EMP template will promote consistency between planning and environmental legislation and responsibilities. If an applicant prepares an EMP to satisfy obligations under the EP Act, the same EMP should satisfy the responsible authority and obligations under the planning permit, rather than requiring a separate document to be prepared, approved and endorsed.

The responsible authority should satisfy itself that the matters covered in the EMP template cover all the matters that it wishes to address from a planning perspective. The standard condition provides an opportunity to alter or include additional matters in an EMP under the permit which are not covered by the EPA EMP template. For example, the condition may specify alternative hours of construction, or require details of route access for construction vehicles to be included in the EMP.

Equally, if there are matters in the EPA EMP template that are not relevant to the particular permit or are not required due to particular circumstances, they should not be included in the permit condition, to ensure that conditions are both relevant and proportionate.

Using the EPA EMP template is an example of implementing the principles in the *SITA* case<sup>118</sup> and the general principles for including conditions in permits discussed in chapters 4.5.1 and 4.5.4 above, that there is no need to apply conditions that are comprehensively dealt with by other legislation or regulation.

## 10.5.2 Integrated land management plan

There will be some locations where it is only appropriate to allow a development if conditions are included about the on-going management of the land, such as construction of a dwelling in an open, potable water supply catchment area.<sup>119</sup> Conditions in such a situation may include:

- Improving the condition of waterway frontages with vegetation.
- Preventing stock access to waterways.
- Maintaining onsite wastewater treatment systems such as septic tanks.
- Preventing soil erosion.
- Using and managing nutrients wisely.
- Improving agricultural chemical use.

Such conditions may be individually imposed or they may be incorporated into an integrated land management plan. In other circumstances, a particular use of the land may require preparation of an integrated land management plan, for example certain agricultural uses in a Rural Conservation Zone. Other uses with potential for activities to cause off-site environmental impacts may also justify preparation of an integrated land management plan.

When drafting a condition requiring approval of an integrated land management plan and deciding what matters must be included in a plan, the responsible authority should consider:

- The particular characteristics of the land and the area in which the land is located.
- Any matters that the decision guidelines in the planning scheme for the use or development require to be considered.
- The risks associated with the particular use or development and techniques for addressing them.
- The planning scheme objectives for the land.

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117 EPA Publication 1834

118 *SITA Australia Pty Ltd and PWM (Lyndhurst) Pty Ltd v Greater Dandenong CC* [2007] VCAT 156

119 *Planning Practice Note 55 – Planning in Open Drinking Water Catchments provides information for responsible authorities on how model permit conditions can help protect open drinking water catchments.*

### 10.5.3 Stormwater management

The planning scheme contains comprehensive provisions to ensure that stormwater is managed in an integrated way to mitigate the impacts of stormwater runoff on the environment, property and public safety and to provide cooling, local habitat and amenity benefits. These provisions are found in:

- **Clause 19.03-3S** – which sets out a policy to embed integrated water management objectives and strategies in urban land-use planning.
- **Clause 56.07** – which deals with integrated water management for residential subdivisions. Clause 56.07-4 sets out objectives for stormwater management and standards that a stormwater management system must meet.
- **Clause 55.03-4** – which sets out permeability and stormwater management objectives and standards for two or more dwellings on a lot and residential buildings.
- **Clauses 55.07-5 and 58.03-8** – which set out integrated water and stormwater management objectives and standards for apartment developments.
- **Clause 53.18** – which applies in all other cases to an application under a provision of a zone to subdivide land, construct a building, or construct or carry out works, with certain exceptions. It also includes objectives and standards for stormwater management.

A permit application for a subdivision or development should include a stormwater management plan that shows how all relevant stormwater management objectives and standards will be met. A responsible authority must be satisfied that the stormwater management plan will meet the required objectives before deciding to grant a permit.

It is not appropriate to defer assessment of whether the stormwater management system will meet relevant objectives and standards until after a permit is granted and a stormwater management plan is submitted for approval under the permit. This approach allows no room to require changes to the layout of the subdivision or development to make the stormwater management system work properly. The assessment of the adequacy of the plan needs to be undertaken as part of the decision making process.<sup>120</sup>

Any permit that is granted for a subdivision or development should include a condition that requires the stormwater management plan, either as forming part of the application or with amendments, to be approved and endorsed. The stormwater management system should be required to be constructed, managed and maintained to the satisfaction of the responsible authority or relevant authority

If referral authorities have their own versions of conditions requiring approval of stormwater management plans that they require to be included in a permit, the responsible authority should ensure that conditions about stormwater management plans are consistent and cover all relevant aspects of the planning scheme requirements.

Planning Advisory Note 75 gives further information on the stormwater management provisions for urban development and State planning policies related to integrated water management.<sup>121</sup>

Planning Practice Note PPN39 gives further information on using the integrated water management provisions of clause 56.<sup>122</sup>

### 10.5.4 Whole farm plans

The requirement for and assessment of a whole farm plan is a specialised function of planning in those areas where they are regularly required.

A whole farm plan can be an important tool in some rural and regional locations of Victoria. In these areas, a permit may be required before undertaking certain earthworks or works in the Farming Zone, the Land Subject to Inundation Overlay, the Floodway Overlay; the Salinity Management Overlay or the Special Building Overlay. If a permit is required, a whole farm plan may be required. The reasons for this include:

- Land management, including long term sustainability and improved salinity.
- Managing the drainage system so that water flows reasonably well through the region.
- To have a shared approach to earthworks and drainage management.
- To allow floodplains to function.

A whole farm plan is a specialised, technical documents that will not always be required. However, if one is required, a model condition is included as a guide.

<sup>120</sup> This reflects the principle discussed in chapter 5.2.4 that a condition must be certain in order to be valid.

<sup>121</sup> Planning Advisory Note – Amendment VC154 – Stormwater management

<sup>122</sup> Planning Practice Note 39 – Using the integrated water management provisions of Clause 56 – Residential subdivision

### 10.5.5 Dams

In Victoria there is a comprehensive regulatory framework that ensures dams are constructed to accepted standards. Dams are controlled by the relevant water authority, which has the expertise to oversee the technical aspects of dam construction. The *S/TA*<sup>123</sup> principles, discussed in chapter 4.5.4, mean that there is no need to apply conditions that are comprehensively dealt with by other legislation or regulation, so a responsible authority does not need to draft its own conditions to specify requirements for dam construction. See chapter 4.5.1 above.

Private dams include farm dams and hydro-power and industrial water supply dams. Dam safety regulation is implemented as part of a wider licensing regime under the *Water Act 1989* dealing with the take, use, conveyance and storage of water in Victoria. The licensing authority function is delegated to five of the State's water corporations: Goulburn Murray Water; Grampians Wimmera Mallee Water; Lower Murray Water; Melbourne Water and Southern Rural Water.

These authorities issue works licences for works on a waterway, bores and dams and monitor compliance with licence conditions and safety requirements, including the construction, alteration, operation, removal and decommissioning of the works.<sup>124</sup>

The standard licence conditions require that a potentially hazardous dam is designed and constructed under the supervision of a suitably qualified engineer and has a surveillance plan and a dam safety emergency plan. Licence conditions also require that the licence holder report on the results of the surveillance program to the licensing authority as well as any significant dam safety deficiency. They require that the licence holder engage a suitably qualified engineer to propose a program to rectify such a deficiency, and carry out any remedial works identified to the satisfaction of the licensing authority.

Not all private dams require a licence. All dams constructed on a waterway (onstream) require a construction licence. Larger dams built off a waterway need a construction licence if the dam is:

- 5 metres or higher and 50 megalitres capacity or larger.
- 10 metres or higher and 20 megalitres capacity or larger.

- 15 metres or higher, regardless of capacity.
- The dam belongs to a prescribed class of dam.

When a dam requires a planning permit under the planning scheme, it will usually need to be referred to the relevant water board or water supply authority, the relevant floodplain management authority, Melbourne Water or other relevant referral authority. Even if the dam does not require a licence, those authorities will normally require appropriate conditions to govern the construction, management and maintenance of dams to their satisfaction. Such conditions should be included in any permit as mandatory conditions (in the case of a determining referral authority) or as discretionary condition (in the case of a recommending referral authority)<sup>125</sup>

### 10.5.6 Flooding – earthworks and other development

The State planning policy for floodplains (Clause 13.03) provides the broad framework for the integration of flood policy and provisions into planning schemes.

The VPP include planning controls and overlays that recognise land affected by flooding and require a permit for various earthworks and other development.

Earthworks include land forming, laser grading, and construction of levee banks, lanes, tracks, aqueducts, surface and subsurface drains and any associated structures. Inappropriate earthworks have the potential to obstruct or divert flood flows, reduce natural flood storage areas, impact on environmental values, including riparian and water quality values, and increase flood flows, flow velocities and flood damage.

As a general rule, wherever a permit for earthworks or other development on land affected by flooding requires a permit, the application will need to be referred to the relevant referral authority which will specify appropriate conditions. Those conditions should be included in any permit as mandatory conditions required under the PE Act (in the case of determining referral authorities) or as discretionary conditions (in the case of recommending referral authorities).

<sup>123</sup> *SITA Australia Pty Ltd and PWM (Lyndhurst) Pty Ltd v Greater Dandenong CC [2007] VCAT 156 at [29] – [33]*

<sup>124</sup> See the dam safety guidance notes contained on the Department of Energy, Environment and Climate Action website at <https://www.water.vic.gov.au/managing-dams-and-water-emergencies/dams/guidance-notes>

<sup>125</sup> See *Developing near dams (planning.vic.gov.au)* for guidance on dams and the planning system

Guidelines have been written specifically for floodplain managers<sup>126</sup> They provide an assessment framework and method to assist with decision making on development in flood affected areas, including detailed technical criteria.

Consequently, it is not necessary for a responsible authority to include separate conditions regarding the construction of development, based on the *SITA*<sup>127</sup> principles that there is no need to prepare conditions that are comprehensively dealt with by other legislation or regulation. Details of design or construction (such as floor levels or earthworks volumes or the like) will be addressed by the referral authority.

Where there are no referral requirements to the floodplain manager, the responsible authority may need to make its own assessments of a development proposal, in which case the guidelines above provide advice about assessment and possible conditions.

In parts of the State where earthworks are of critical importance, not just because of flooding, but for salinity or other land management reasons, a whole farm plan may also be required as a condition on a permit allowing earthworks (see chapter 10.5.4 above).

Planning Practice Notes 11 and 12<sup>128</sup> provide more information about applying the flood provisions of planning schemes and applications for permits and applying permit conditions under those provisions.

## 10.6 Bushfire planning

The State planning policy for bushfire planning (clause 13.02) provides the broad framework for planning and decision making for all land that is:

- Within a designated bushfire prone area;
- Subject to a Bushfire Management Overlay (BMO); or
- Proposed to be used or developed in a way that may create a bushfire hazard.

There are very detailed provisions in planning schemes that address the assessment of applications from a bushfire planning perspective, provide standards that apply to development, and that may require mandatory conditions in permits which are granted. The provisions include:

- Clause 44.06 – BMO.
- Clause 53.02 – General requirements and performance standards: Bushfire planning.

Clause 44.06-5 requires mandatory conditions to be included in any permit to:

- Subdivide land zoned for residential or rural residential purposes which creates a lot for a single dwelling.
- Construct a building or construct or carry out works.
- Construct a dwelling to the next lower bushfire attack level in accordance with AM1.2 in clause 53.02-3.

The mandatory conditions included in clause 44.06-5 are included in the model conditions. In addition, any permit to construct a building or construct or carry out works must also include any condition specified in a schedule to the BMO.

## 10.7 Landscaping

A condition requiring a landscape plan to be prepared and approved before development starts is common. In terms of the WHEN (see chapter 4.2.2 above), landscaping will usually be required to be completed before occupation. Ongoing maintenance to the satisfaction of the responsible authority is also usually required.

The content required for a landscaping plan can be complex and the approval process can be time consuming. Consideration should be given to the proportionality of a one-size-fits-all approach when writing such conditions. For simple proposals, less onerous conditions should be considered. Such conditions could simply specify a required number of trees or shrubs from an approved list and set requirements for their location. This would avoid the need for an applicant to prepare a plan, for it to be reviewed by council and then approved and endorsed.

<sup>126</sup> See the *Guidelines for Development in Flood Affected Areas (DELWP, 2019)*

<sup>127</sup> *SITA Australia Pty Ltd and PWM (Lyndhurst) Pty Ltd v Greater Dandenong CC [2007] VCAT 156 at [29] – [33]*

<sup>128</sup> *Planning Practice Note 11 – Applying for a planning permit under the flood provisions and Planning Practice Note 12 – Applying the flood provisions of planning schemes.*

## 10.8 Vegetation removal

### 10.8.1 Native vegetation

A requirement for a planning permit to remove native vegetation is included in:

- Clause 52.16 Native vegetation precinct plan.
- Clause 52.17 Native vegetation.

Where a permit is required under either clause, the *Guidelines for the removal, destruction or lopping of native vegetation* (DELWP 2017) (Guidelines) must be applied.<sup>129</sup> The Guidelines are an incorporated document in the VPP and all planning schemes in Victoria.

If a permit is approved, conditions in accordance with section 8 of the Guidelines must be included. These set the offset requirements, including:

- Evidence of the availability of the offset to be provided to the responsible authority.
- The offset to be secured before native vegetation is removed.
- The offset to be secured to the satisfaction of the responsible authority.

Standard offset permit conditions are provided in Appendix 9 of the *Assessor's handbook – Applications to remove, destroy or lop native vegetation* (DELWP 2018).<sup>130</sup>

The standard conditions in the Assessor's handbook are included in the model conditions in this document. The only changes are to the numbering system, which has been changed to accord with the format used in other model conditions.

The conditions in Appendix 9 of the Assessor's handbook are prefaced by the following notes:

*These standard conditions should be used when preparing a response to an application for a permit to remove, destroy or lop native vegetation submitted under Clause 52.16 or 52.17. These conditions will ensure that the biodiversity impacts are appropriately addressed. Additional conditions may be required to address impacts from the removal of native vegetation on other values.*

*Determine if the offset requirement will be to the satisfaction of the responsible authority or DELWP and insert where applicable*

Clause 52.17-3 requires a mandatory condition about expiry to be included in any permit granted to remove, destroy or lop native vegetation in accordance with a property vegetation plan.

### 10.8.2 All vegetation types

It is not just clauses 52.16 and 52.17 of the planning scheme that control vegetation removal. A permit to remove, destroy or lop vegetation may be required under:

- Clause 42.01 Environmental Significance Overlay.
- Clause 42.02 Vegetation Protection Overlay.
- Clause 42.03 Significant Landscape Overlay.
- Clause 43.01 Heritage Overlay.
- Clause 43.05 Neighbourhood Character Overlay.
- Clause 44.01 Erosion Management Overlay.
- Clause 44.02 Salinity Management Overlay.

The vegetation may be in urban or rural areas and may be native or introduced vegetation. It may commonly include vegetation on road reserves.

If a permit is granted to remove, destroy or lop vegetation under any of these provisions, conditions applicable to the removal of native vegetation under clause 52.17 may be appropriate, subject to any necessary modification. Although most of the standard conditions for clauses 52.16 and 52.17 permits may be applicable, standard conditions relating to native vegetation offsets are not applicable to the overlay clauses. The Guidelines and its offset requirements are unique to clauses 52.16 and 52.17 to address the no net loss to biodiversity objective.

Depending on the purpose of the control, the significance of the vegetation and the objectives to be achieved, appropriate conditions may also include the need for an integrated land management plan or landscape plan.

The model conditions include some additional conditions that may be appropriate.

<sup>129</sup> *Guidelines for the removal, destruction or lopping of native vegetation*

<sup>130</sup> *Assessor's handbook Applications to remove, destroy or lop native vegetation*



## 10.9 Subdivision

### 10.9.1 Telecommunications

Clause 66.01-1 requires a permit for subdivision to include mandatory conditions requiring the owner of the land to enter into agreement for the provision of telecommunication services and to provide the facilities before a statement of compliance is issued. These conditions are included in the model conditions for subdivision.

Planning Advisory Note 49 provides more information about these conditions.<sup>131</sup>

### 10.9.2 Subdivision not requiring referral

Where a permit for subdivision does not require referral (for example a boundary realignment), clause 66.01-1 requires the permit to include mandatory conditions addressing the provision of services to each lot and the setting aside of easements. These conditions are included in the model conditions for subdivision.

### 10.9.3 Bushfire management

Clause 44.06-5 of the Bushfire Management Overlay requires a permit for subdivision to contain a mandatory condition that requires the owner of the land to enter into a section 173 agreement subject to certain exceptions. The agreement must state that if a dwelling is constructed on the land without a planning permit, the bushfire protection measures set out in the plan incorporated into the agreement, must be implemented and maintained to the satisfaction of the responsible authority on a continuing basis.

The mandatory condition is included in the model conditions for subdivision.

Other mandatory conditions related to bushfire that must be included in a permit for buildings and works are discussed in chapter 10.6 above.

## 10.10 Noise

New environment protection legislation introduced by the *Environment Protection Amendment Act 2018* (the new EP legislation) commenced on 1 July 2021. The new EP legislation introduces a new approach to environmental management for Victoria, focusing on preventing pollution impacts rather than managing those impacts after they have occurred.

The EP Regs support the new environmental protection legislation by providing clarity and further detail for duty holders about how to fulfil their obligations.

The cornerstone of the new EP legislation is the *general environmental duty* which requires Victorians to understand and minimise their risks of harm to human health and the environment from pollution and waste (including noise).

The EP Regs replace the operational components of the SEPP N-1, SEPP N-2 and other noise regulations for determining what is unreasonable noise. The Environment Reference Standard sets out the environmental values, indicators and objectives of the ambient sound environment that are sought to be achieved or maintained in Victoria that a responsible authority may have regard to when determining whether noise emissions may be acceptable. The Environment Reference Standard however does not include mandatory regulatory criteria.

The *Noise limit and assessment protocol for the control of noise from commercial, industrial and trade premises and entertainment venues* (Noise Protocol),<sup>132</sup> is incorporated into the EP Regs without modification. This publication provides a protocol for determining noise limits for new and existing commercial, industrial and trade premises and entertainment venues as defined by the EP Regs. It sets the methodology for assessing the effective noise level to determine unreasonable noise under EP Regs 118, 125 and 130. The measurement procedures of this Noise Protocol are also used to determine aggravated noise under EP Regs 121, 127 and 131.

**While the obligation to comply with the noise limits in the EP Regs exists independently of a planning permit under the EP Act, the responsible authority may consider including a condition in a permit that requires noise emanating from the land to comply with the EP Regs. Such a condition creates a positive planning obligation that is enforceable under the PE Act and makes the obligation about noise clear to owners and operators.**

<sup>131</sup> Advisory Note 49 – Telecommunications Services and Facilities in Subdivisions

<sup>132</sup> 1826.4: Noise limit and assessment protocol for the control of noise from commercial, industrial and trade premises and entertainment venues <https://www.epa.vic.gov.au/about-epa/publications/1826-4>

