Practical guidance for environmental professionals on writing and interpreting conditions of approval

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OVERVIEW

Conditions are the major tool used to regulate activities approved under state and federal laws. They can impose significant costs on a development and, therefore, can be very controversial.[3] Writing, negotiating and interpreting effective conditions is a core skill required of environmental practitioners.

This seminar paper provides practical guidance for environmental professionals on writing and interpreting conditions, particularly conditions imposed under the *Planning Act 2016* (Qld) (**Planning Act**) (for the development sector) and the *Environmental Protection Act 1994* (Qld) (**EPA**) (for the mining sector). Some reference is also made to conditions at a federal level under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) as it is relevant to all sectors.

This seminar paper is aimed at both: local and State government staff who must write and enforce conditions; and environmental professionals in the private sector who must interpret what they mean. It does not attempt to describe every rule for writing and interpreting conditions; rather, it focuses on the main rules that apply in everyday situations.

It is structured in four parts with summary points in an appendix:

- What does an application apply to do and what does approval of it include?
- Assessing an application and writing conditions.
- Interpreting conditions after approval is granted to determine whether a contravention has occurred.
- Fixing mistakes and problems in conditions.

In preparing for the seminar, I was conscious that most environmental professionals, whether working for government or in the private sector, are at least somewhat familiar with conditions imposed on development approvals under the Planning Act and standard conditions applied to standard applications under the EPA[4] and the templates for model conditions.[5] Standard conditions, templates and organisational management structures mean that staff assessing applications and writing conditions do not work in isolation and do not "start from scratch". Staff, therefore, do not themselves need to be experts in creating a comprehensive, lawful set of conditions. I aim to build on this common foundation of understanding that I expect all environmental professionals have to construct a more comprehensive understanding of the main legal rules for writing and interpreting conditions in practice.

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[2] This paper was delivered previously to an EIANZ training seminar for DES on 25 July 2018.

[3] See, eg, *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53 (Williamson QC DCJ) for a recent example.

[4] For example, the standard conditions under the EPA for mining lease areas available at https://www.ehp.qld.gov.au/assets/documents/regulation/rs-es-mining-lease-projects.pdf

[5] For example, EHP, *Guideline (Mining): Model mining conditions*, ESR/2016/1936, Version 6.02, Effective: 7 March 2017, available at https://environment.des.qld.gov.au/land/mining/guidelines.html.

WHAT DOES AN APPLICATION APPLY TO DO AND WHAT DOES APPROVAL OF IT INCLUDE?

A preliminary question that seems simple but, in practice, can be complex to answer is what does an application apply to do and what does approval of it include? For most applications the answer will be obvious but these issues create a minefield for complex applications under the EPA. Similar difficulties arise for assessable development under the Planning Act where multiple forms of development (e.g. material change of use, various forms of operational works, etc) may apply to a proposal under multiple layers of planning and a variety of planning instruments (e.g. assessable development identified in the regulations, a regional plan, or a planning scheme).[6] Applicants who misunderstand or make mistakes in addressing the application requirements can also complicate and confuse the assessment of otherwise straightforward applications.

The decision in *QGC (Infrastructure) Pty Limited v Chief Executive DEHP* [2016] QLC 27 illustrates how complicated this preliminary question can become. In that case QGC appealed against conditions on an environmental authority issued under the EPA for a major petroleum pipeline involving multiple environmentally relevant activities (**ERAs**). Executive Director Anne Lenz of the then Department of Environment and Heritage Protection (**EHP**), who gave evidence for EHP in the proceedings, identified an unwritten departmental policy that:[7]

> (a) principal activities which are authorised to occur under an environmental authority are clearly identifiable in the environmental authority, along with any constraints that apply to them;
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> (b) all incidental activities (being activities that are reasonably required to carry out the authorised principal activities) are taken to be authorised to occur in conjunction with their related principal activity, save for where an incidental activity is a "specified relevant activity";
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> (c) specified relevant activities which are authorised to occur under the environmental authority are to be expressly authorised within the environmental authority; and
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> (d) where a principal activity and / or specified relevant activity is not expressly authorised, that principal activity and / or specified relevant activity is not authorised to occur under the environmental authority.

While the Land Court (comprised of Member Cochrane) expressed some criticism of this approach, I do not agree with those criticisms. In my view this unwritten departmental policy is clearly a sensible approach to take, particularly for complex applications where multiple activities are proposed. As Ms Lenz said in her evidence:[8]

> … clearly expressing what activities an environmental activity actually authorises is considered to enhance the overall usability of the authority. Users of environmental authorities regularly fall within a number of different categories. The people within those categories often have varied levels of experience and skillsets in terms of using these types of approval documents.
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> Environmental authorities for petroleum activities tend to operate over many years; often decades. As a result, while the user categories identified above will tend to remain static, the actual users within those categories will often change a number of times throughout the lifecycle of an environmental authority.

Each case ultimately turns on its own facts and the legislative framework under which an application is made. While the onus is generally on the applicant to correctly identify the relevant activities and forms of development that require approval,[9] where this is unclear or confusing care is required to decide what is being applied for or to seek clarification.

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[6] See, e.g. *Fox & Anor v Brisbane City Council & Ors* [2003] QCA 330; and *Barnes v Southern Downs Regional Council* [2010] QPEC 131.
[7] *QGC (Infrastructure) Pty Limited v Chief Executive DEHP* [2016] QLC 27 at [106]-[112].
[8] *QGC (Infrastructure) Pty Limited v Chief Executive DEHP* [2016] QLC 27 at [112].
[9] See, e.g. *QGC (Infrastructure) Pty Limited v Chief Executive DEHP* [2016] QLC 27 at [174]-[175].

There is no alternative but to clearly identify what activity or development the application applies for, including incidental activities and/or ancillary uses by reference to the categories of activities or development specified under the law the application is made.

ASSESSING AN APPLICATION AND WRITING CONDITIONS

The focus on this part is on writing conditions rather than the overall assessment against criteria set out in the various approvals under the Planning Act and the EPA. Writing conditions to regulate an activity is an inherent part of *assessing* an application to conduct the activity because it is the activity *regulated through lawful conditions* that must be assessed (not the activity without this level of lawful regulation).

The rules for lawful conditions are **very broad limits** on the ability of regulators to manage the impacts of an activity that is approved. Where possible,[10] conditions can and should be tailored to suit the particular activity in question.

As noted earlier, most staff will start with standard or model conditions for a relevant activity. The easiest, practical advice to give to staff for writing conditions is merely to stick with the standard conditions wherever possible. The need to understand and be able to apply the following rules occurs where the standard or model conditions need to be extended or adapted.

The central rules of the Planning Act: conditions must be relevant and reasonable

Section 65(1) of the Planning Act provides the central test for the legality of conditions imposed on a development approval:[11]

> **65 Permitted development conditions**
> (1) A development condition imposed on a development approval must—
> (a) be relevant to, but not be an unreasonable imposition on, the development or the use of premises as a consequence of the development; or
> (b) be reasonably required in relation to the development or the use of premises as a consequence of the development. …

In the first limb of this test, "**relevant to**" means that the condition falls within the proper limits of a government authority's functions under legislation, as imposed to maintain the proper standards in government, local development or some other legitimate sense (e.g. the provision of public land; rational development of roads; foreshore protection; preserve a rail corridor).[12] "Not an unreasonable imposition" means that the condition must not be excessive in the circumstances (i.e. reasonable).[13] Williamson QC DCJ noted in *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53 at [24] that the power of a local government to impose lawful conditions on an approval "is a broad residual discretion to be exercised for a proper planning purpose".[14] In that case his Honour found a condition requiring a balance lot not recognised in the relevant environmental significance overlay of the planning scheme to be dedicated to the local government for as public open space for environmental conservation purposes (for koalas in particular) was unreasonable and contravened s 65(1)(a) of the Planning Act.

In the second limb of this test, "**reasonably required**" means that when taking into account the fact of the development and the changes the development is likely to produce (e.g. increased traffic to a

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[10] In some cases it may not be possible to vary conditions, such as the standard conditions for a standard application under Ch 5 of the EPA.
[11] This section is on materially identical terms to the test in s 345(1) of the repealed *Sustainable Planning Act 2009* (Qld).
[12] *Lloyd v Robinson* [1962] HCA 36; (1962) 107 CLR 142; *Proctor v Brisbane City Council* (1993) 81 LGERA 398 at 404 (CA Qld); *Maroochy Shire Council v Wise* (1998) 100 LGERA 311 (CA Qld).
[13] See generally *Delfin Property Group Pty Ltd v Thuringowa City Council* [2000] QPELR 282; *DG Robertson Holdings Pty Ltd v Douglas Shire Council* [2000] QPELR 428 at [18]; and *Hammercall Pty Ltd v Gold Coast CC* [2004] QPELR 122 at [40].
[14] Similarly, see *Johnston v Banana Shire Council & Anor* [2019] QPEC 8 at [16] (Everson DCJ).

road), such condition is reasonably required by the circumstances.[15] Put in another way, the question is whether there is a relevant nexus between the use of the land and the condition sought to be imposed, that nexus being that the proposed use creates such a change in existing affairs that the condition is a reasonable response to it.[16] The change caused by a development need not be an increase in use, merely that the reserve capacity of a system (e.g. sewerage or water) is lessened.[17] Related tests are that a condition must not be imposed arbitrarily[18]; must not be intended to "cripple" a proposal, ie. designed to make the application in practice impossible[19]; and must not be so unreasonable that no reasonable planning authority could have imposed it[20].

The High Court's decision in *Cardwell Shire Council v King Ranch Australia Pty Ltd* [1984] HCA 39; 53 ALR 632 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ) provides a useful illustration of the nature of the reasonably required test. The facts of the case concerned a disputed condition attached to a development approval under the *Local Government Act 1953* (Qld), in which the council sought to require payment of a monetary contribution for repairs to a bridge. The bridge was located outside of the site of the proposed residential subdivision on a public road. The trial judge accepted that the repairs were needed in part because of the increased traffic that would result from the development. Despite this, the judge refused to allow the condition because it related to works outside of the site of the proposed subdivision. The High Court overturned this decision and stated, at [9], the test to be applied as follows:

> The statutory test that has to be applied by a local authority in deciding whether to attach conditions to its approval in a case such as the present is whether the conditions are reasonably required by the subdivision. This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into account the fact of the subdivision and the changes that the subdivision is likely to produce – for example, in a case such as the present, the increased use of the road and of the bridge – and to impose such conditions as appear to be reasonably required in those circumstances.

This decision illustrates how conditions may require work *outside* of the land being developed provided there is a reasonable link between the work and the impacts of the development.

While the two tests in s 65 of the Planning Act are stated as alternative tests,[21] in practice, decision-makers are wise to treat both tests as mandatory rather than alternatives.

Subject to the exception for infrastructure changes discussed below, as decisions on development approvals under the Planning Act, including for any conditions imposed, are subject to merits review, appeals against expensive conditions are common in the Planning and Environment Court. In these hearings, experts give evidence on what is reasonably required and the Court decides the matter anew, based on the evidence before it.[22] The decision in *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53 is a recent example of this that explains the main tests and their application by the Court. If you are not familiar with normal conditions imposed on development approvals, I recommend downloading a copy of the approval package containing the

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[15] *Cardwell Shire Council v King Ranch Australia Pty Ltd* [1984] HCA 39; 53 ALR 632 at [9].
[16] *Wootton v Woongarra Shire Council* (1985) 56 LGRA 301, Ryan J at 303 (Full Ct Qld); *Felixstowe Pty Ltd v Gladstone City Council* (1994) 85 LGERA 234 at 239 (CA Qld); *Townacre Development Pty Ltd v Thuringowa City Council* (1995) 86 LGERA 165 at 176 (CA Qld).
[17] *Wootton v Woongarra Shire Council* (1985) 56 LGRA 301 per Ryan J (Full Ct Qld).
[18] *Prices and Consumer Affairs Commissioner v Charles Moore (Aust) Ltd* [1975] 12 SASR 214 at 229.
[19] *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 at 1172.
[20] *Newbury District Council v Secretary of State for Environment* [1981] AC 578 (although this test is more applicable to judicial review proceedings than merits appeals in the Planning and Environment Court).
[21] Note *Proctor v Brisbane City Council* (1993) 81 LGERA 398.
[22] Note that, in contrast, conditions under the EPBC Act and on mining and petroleum activities approved under the EPA are only subject to judicial review, which is fundamentally different and much more limited. Expert witnesses are not called in such proceedings and the court hearing a challenge is only concerned with the legality of the decision. See, eg, *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities and Others* [2013] FCAFC 111; (2013) 215 FCR 301 at [154]-179] and [187] (Gilmour, Foster and Barker JJ).

conditions attached to the judgment in that case, which is publicly available on the eCourt's website.[23]

Unlike other conditions, conditions imposing infrastructure charges under Ch 4 of the Planning Act are not subject to merits review. Infrastructure charges are only subject to limited appeal rights, eg, if the "amount of the charge is so unreasonable that no reasonable relevant local government could have imposed the amount."[24]

The central rule of the EPA: conditions must be necessary or desirable

Sections 203-210 of the EPA set out the main tests for conditions on environmental authorities:[25]

> **203 Conditions generally**
> (1) The administering authority may only impose a condition on an environmental authority or draft environmental authority, PRCP [progressive rehabilitation and closure plan] schedule or draft PRCP schedule if—
> (a) it considers the condition is necessary or desirable; and
> (b) if the authority is for an application to which section 115 applies [i.e. a development application for a material change of use for a prescribed ERA]—the condition relates to the carrying out of the relevant prescribed ERA. …

The general rule, stated in s 203(1)(a), that conditions must be "necessary or desirable" has been relatively uncontroversial and there is little case law examining it under the EPA.[26]

A number of other Acts use similar tests for the general power to impose conditions, such as s 134(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), which allows conditions that are "necessary or convenient" for protecting, mitigating or repairing damage to a matter protected under the Act (i.e. matters of national environmental significance such as World Heritage properties). Several cases in the Federal Court have examined the condition-making power under the EPBC Act in detail.[27] For instance, Besanko J stated in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403; (2012) 187 LGERA 161; 291 ALR 314 at [58]:[28]

> It cannot be doubted that the power to impose conditions under the EPBC Act is a very wide one. The Minister may attach a condition to an approval if he or she is satisfied that it is "necessary or convenient" to do so within ss 134(1) and (2). The breadth of the power can be seen from the terms of s 134(3) which sets out examples of the types of conditions which may be imposed. Paragraph (e) authorises a condition for the preparation, approval and implementation of a plan for managing the impacts of the approved action. The concept of management is a very wide one and includes matters such as monitoring and testing, reporting, preventative measures and remedial action. One thing seems to me to be clear and that is that the power is broad enough to encompass significant additions or variations to the approved action.

While the statutory scheme of the EPA and the EPBC Act are obviously different, a similar, wide approach is likely to be taken in any case challenging the legality of conditions imposed under the EPA and the analysis of the Federal Court is likely to be helpful.

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[23] See http://apps.courts.qld.gov.au/esearching/FileDetails.aspx?Location=BRISB&Court=DISTR&Filenumber=2116/18 and download eDoc No 17.

[24] See Sch 1, Table 1, item 5, of the Planning Act. Note also s 128 of the Planning Act. For an appeal involving infrastructure charges under similar provisions in SPA, see *Wagner Investments PL v Toowoomba RC* [2019] QPEC 24.

[25] Section 207 clarifies the very wide scope of imposing conditions under the EPA. See also s 209 of the EPA regarding environmental offsets; and s 53 of the *Environmental Protection Regulations 2008*, which sets out the conditions that must to be considered for environmental management decisions under the EPA, such as considering whether to impose conditions about implementing a system for managing risks to the environment, etc.

[26] E.g. *Whale Waste Pty Ltd v. Maroochy Shire Council* [2004] QPEC 35 (Dodds DCJ).

[27] See, e.g., *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403; (2012) 187 LGERA 161; 291 ALR 314 at [58] (Besanko J); and *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities and Others* [2013] FCAFC 111; (2013) 215 FCR 301 at [154]-179] and [187] (Gilmour, Foster and Barker JJ).

[28] An appeal against this decision was dismissed and the Full Federal Court emphasised the flexibility of conditions: *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities and Others* [2013] FCAFC 111; (2013) 215 FCR 301 at [154]-179] and [187] (Gilmour, Foster and Barker JJ).

The general case law on condition-making power is also very likely to be applied in any dispute over the limits of condition-making powers under the EPA. For instance, adapting the language of *Lloyd v Robinson* [1962] HCA 36; (1962) 107 CLR 142 (Kitto, Menzies and Owen JJ) at [15], the broad power to impose conditions stated in s 203 of the EPA must be exercised "bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the [administering authority] was entrusted with the relevant discretion."

DES's model conditions for a mining activity state:[29]

> To meet the test of 'necessary or desirable' it is considered that a condition will meet this test if a demonstrable link exists to achieving the object of the EP Act.

Based on case law such as *Lloyd v Robinson*, that is fair summary of the broad power to impose conditions on approvals under the EPA in the context of the object of the Act being to protect the environment while allowing for ecologically sustainable development.[30]

Put another way, in the context of the EPA, including provisions as ss 3, 4 and 493A, a condition is likely to be lawful if it is legitimately directed to protecting Queensland's environment from the environmental harm caused by the activity the subject of approval or other legitimate purposes such as the effective and efficient administration of the Act.

Prohibited conditions

The EPA and the Planning Act prohibit certain conditions, but these prohibitions are quite limited and mostly aimed at avoiding inconsistency with other measures. For instance, s 66 of the Planning Act prohibit certain conditions being imposed, including conditions requiring a monetary payment for the establishment, operating or maintenance costs of, works to be carried out for, or land to be given for infrastructure, unless under Ch 4 (Infrastructure), Pts 2 or 3. Local governments may levy an **infrastructure charge** on landholders for supplying trunk infrastructure and impose a condition for necessary or additional trunk infrastructure that is not identified in Local Government Infrastructure Plan (LGIP) and other circumstances identified in Ch 4 of the Planning Act.[31]

Other tests for conditions

In addition to the main statutory tests in the Planning Act, the courts apply a number of other tests:

- A condition must be "**certain**". This means that the condition must be reasonably capable of sensible interpretation, but it is not necessary that the condition be written with the strictness of parliamentary drafting, nor should it be construed by an over-technical approach.[32] A condition will only be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning and not merely because it is ambiguous or leads or absurd results.[33] A related test is that if a condition provides a formula, it must impose a clear and objective standard for the application of the formula.[34]
- Ambiguity will generally be construed in a way which places the least burden on the landowner[35] (i.e. ambiguity will be resolved in favour of the person who is said to have breached the

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[29] EHP, n 5, p 1.
[30] EPA, s 3.
[31] *Gold Coast City Council v Sunland Group Limited & Anor* [2019] QCA 118 for a detailed analysis of the infrastructure change regime under the repealed *Sustainable Planning Act 2009* (Qld).
[32] See *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [33].
[33] *Fawsett Properties Ltd v Buckingham County Council* [1961] AC 636 at 678; *Corporation of the City of Adelaide v City of Salisbury & Anor* (1998) 100 LGERA 160 (SA Sup Ct).
[34] *King Gee Clothing Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 198; *Environmental Protection Authority v Genkem Pty Ltd* [1993] 79 LGERA 47 at 60 (NSWLEC); *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* (1994) 85 LGERA 408 (CA Qld); *McBain v Clifton Shire Council* (1995) 89 LGERA 372 (CA Qld).
[35] *Matijesevic v Logan City Council (No 2)* (1983) 51 LGRA 51 at 57; *Mariner Construction Pty Ltd & Ors v Maroochy Shire Council* [2000] QPEC 31; [2000] QPELR 334; *BP Australia Ltd v Caboolture Shire Council* [2004] QPEC 012 at [6] per Quirk DCJ; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [65]-[66] per Robertson DCJ.

condition). The ambiguity, however, must be a genuine one.[36] (Note: this issue is discussed further below with reference to *Swan v Santos GLNG Pty Ltd & Ors* [2017] QPEC 2).

- The condition must be "**final**". This means that the condition provides rights and obligations that are not subject to further approval by the planning authority.[37] However, conditions may impose requirements for further management plans or similar documents to be submitted for approval by the administering authority provided that the matters dealt with in the plans are incidental or ancillary to the development (e.g. a landscape management plan, stormwater management plan, etc) and do not defer the final approval of the development to a later time.[38]
- An approval is to be interpreted as a stand-alone document without reference to the application material or other documents unless they are incorporated expressly or by implication (e.g. a condition that requires an approved rehabilitation plan to be complied with).[39]

The law gives you a frame within which *you* paint the picture

In considering the main rules for lawful conditions it is important to remember that the law sets broad limits on the ability of regulators to impose conditions but within these broad limits there is enormous scope to tailor conditions to effectively and efficiently regulate the impacts of any activity according to good administrative practice. To use a metaphor: the law gives you a frame within which *you* paint the picture of what the conditions require to be done.

Your overall policy goals in writing and interpreting conditions of approval are to implement the law in an effective, efficient and equitable way.[40]

Three approaches to writing conditions: prescriptive, systems-based and outcomes-based

The then Australian Government Department of the Environment (**DoE**) released a useful description of the main approaches to writing conditions in 2016 in a policy and guidance for outcome-based conditions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).[41] The policy described and gave examples of three approaches to writing conditions that are broadly applicable under other laws (footnotes omitted):[42]

> **(i)** **Prescriptive conditions** (technology or standards based) in which the process or procedural requirements are defined within the condition and the approval holder has little choice about how to comply. See hypothetical examples below:
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> - Within 30 days of the Commencement Date, the Approval holder must erect rabbit-proof fencing on the western and southern boundaries of the Project Area in accordance with the *Standards for management—Fencing*, which provides:
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> - the minimum standard for rabbit-proof fences is 1,050mm width, 40mm mesh diameter, 1.4mm wire diameter rabbit-proof netting
> - rabbit netting should be fixed so that it reaches at least 900mm above the ground and is

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[36] Consider *Caloundra CC v Pelican Links Pty Ltd* [2004] QPEC 52; [2005] QPELR 128; *Caloundra CC v Pelican Links Pty Ltd & Anor* [2005] QCA 84; [2005] QPELR 596; and *Lucy v OCC Holdings P/L* [2008] QDC 4.

[37] *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347; *McBain v Clifton Shire Council* [1996] 2 QdR 493; *Eastern Waste Management Authority Inc v City of Tea Tree Gully* (1996) 92 LGERA 1 (SA Sup Ct (Full Ct)); *Corporation of the City of Adelaide v City of Salisbury & Anor* (1998) 100 LGERA 160 (SA Sup Ct); *Caloundra City Council v Pelican Links Pty Ltd & Anor* [2005] QCA 84; [2005] QPELR 596.

[38] *Scott v Wollongong City Council* (1992) 75 LGRA 113 at 118-119 (CA NSW); *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222 at 230 (NSWLEC); *GFW Gelatine International Ltd v Beaudesert Shire Council* [1993] QPLR 342; *Lucy v OCC Holdings P/L & Ors* [2008] QDC 004 at [23]-[25]..

[39] *Brisville Pty Ltd v BCC* [2007] QPEC 63 at [8]-[9].

[40] Based on Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Melbourne, 1998), pp 26-27.

[41] DoE (2016a), *Outcomes-based Conditions Policy* (DoE, Canberra) and DoE (2016b), *Outcomes-based Conditions Guidance* (DoE, Canberra), both available at http://environment.gov.au/epbc/publications/outcomes-based-conditions-policy-guidance

[42] DoE (2016a), n 41, pp 6-7. DoE included a fourth category of "surrogate conditions" but it is merely a variation of outcomes-based conditions that use indirect means to protect matters of national environmental significance under the EPBC Act.

either buried (to 150mm depth) or laid down and secured with pegs, rocks or timber
- support the fence to withstand stock or native animal forces.

- At all times during the Term of Approval, Ambient Air Quality tested at the Nominated Project Sites must meet the standards established under the National Environmental Protection Measure for Ambient Air Quality or their replacements.

(ii) **Systems-based conditions** (management based) which require the approval holder to develop management plans. It is often appropriate to take an outcomes-based approach to management plans. For example:

- Within 30 days of the Approval Date and prior to the Commencement Date, the Approval holder must prepare and submit for the Minister's approval, a Threatened Species Management Plan which describes how and when the following will be undertaken:

  a. Pre-clearing surveys for the Western Ground Parrot (*Pezoporus flaviventris*) and Sandplain Duck Orchid (*Paracaleana dixonii*).
  b. Actions to avoid areas of Western Ground Parrot habitat within the Project Area.
  c. Roadside surveys, to detect road-killed fauna, including Carnaby's Black Cockatoo (*Calyptorhynchus latirostris*) and the Western Ground Parrot.
  d. Reporting to the Department about Western Ground Parrots found within the Project Area.

(iii) **Outcomes-based conditions** (performance based) in which the required outcome or specific level of performance (the 'what') is written into the condition and the method to achieve the outcome (the 'how') is chosen by the approval holder. Performance indicators (criteria, measures or tests) are used to determine compliance and effectiveness both over the term of an approval and at the conclusion of the action. For example:

- At each of the Performance Dates, there will be no Net-Loss to the extent and distribution of the Existing Population of the Sandplain Duck Orchid (*Paracaleana dixonii*) within the Project Area.

DoE described the circumstances when the different approaches should be used and noted in relation to using prescriptive or systems-based conditions:[43]

> In general the following characteristics may indicate that an action or an aspect of it is likely to require prescriptive or systems-based conditions:
> - There is an inability to define a suitable outcome for the protected matter or something that directly supports the protected matter.
> - There is limited scientific understanding or consensus about the likely impacts of the action on the protected matter.
> - The action is likely to contribute to cumulative impacts or involves multiple projects or industries, making it difficult to identify responsibility for achieving the outcome.
> - There is a lack of robust baseline data about the protected matter.
> - There is a lack of knowledge about threats to the protected matter.
> - There are particular environmental risks, or the ability to adequately manage risks, that requires a higher degree of prescription.

In practice, DoE (in its past and current form) uses all three approaches in writing conditions under the EPBC Act and its approach has been criticised, for instance, in relation to conditions requiring the use of adaptive management but lacking substantive limits being set for issues such as groundwater management.[44]

DES's guideline for model mining conditions under the EPA, EM944 (March 2017) generally adopts an outcomes-based approach. It notes:[45]

> Generally the conditions do not outline 'how' the environmental authority (EA) holder must achieve the required environmental outcomes. This is referred to as outcome focused conditioning. With outcome

[43] DoE (2016a), n 41, p 9.
[44] Lee J, "Theory to practice: Adaptive management of the groundwater impacts of Australian mining projects" (2014) 31 *Environmental and Planning Law Journal* 251; and Lee J and Gardner A, "A peek around Kevin's Corner: adapting away substantive limits? (2014) 31 *Environmental and Planning Law Journal* 247.
[45] EHP, n 5, p 50.

focused conditioning, it is the responsibility of the EA holder to assess the most efficient and effective way to achieve the outcome for their own particular circumstance.

In addition to outcome-focussed conditions, in some instances 'how to' conditions may be appropriate for site-specific or project-specific reasons. While these 'how' conditions are by nature not outcome focused, they are required to ensure that a clear environmental value that has been identified can be protected.

Choosing between detailed, quantitative conditions or simple, qualitative conditions

While the DoE policy on outcomes-based conditions is a useful overview of the main approaches to writing conditions in environmental approvals, it glosses over two key difficulties with all of the approaches, which are:

- the level of detail to set out; and
- whether to set qualitative or quantitative limits and outcomes.

A common complaint about environmental law is its complexity and there is a perennial call for it to be simplified. This complaint leads in turn to a regular debate over legislators and regulators stating:

- **vague, qualitative outcomes to be achieved**: simple/vague measures that tell people what they must achieve in overall, qualitative terms (e.g. "the development must preserve the cultural heritage values of the site" or "the activity must not cause environmental nuisance") but not *how* to achieve it in detail; and/or
- **detailed, prescriptive and quantitative measures:** complex, detailed measures that tell people what they must do and the outcomes they must achieve in a prescriptive and quantifiable way (e.g. "the development must comply with the approved plan [which shows detailed technical drawings with quantitative measurements of the size, shape and location of the development]").

Condition A4 of the standard conditions under the EPA for a mining lease[46] provides an example of an outcomes-based condition that sets a vague, qualitative outcome:

Noise emissions
A4: The holder of the environmental authority must not cause unreasonable noise at a noise sensitive place.
Note 5 - To prevent causing unreasonable noise at a noise sensitive place, the following measures or similar measures can be used: – construct and maintain noise barriers and enclosures around noisy equipment or along the noise transmission path; – implement noise reduction measures at noise sensitive places; – provide and maintain low noise equipment; – carry out routine maintenance on fans to minimise bearing noise; – repair or replace defective mufflers of vehicles and plant equipment; and – limit the hours of operation to between 7am to 6pm from Monday to Saturday. Note 6 -If aircraft are used for mining related activities, operate them so as to minimise disturbance to livestock (e.g. helicopters).

In contrast, condition D1 of DES's model mining conditions provides an example of a quantitative outcomes-based condition for noise:[47]

Schedule D - Noise

Noise limits

D1 The holder of this environmental authority must ensure that noise generated by the mining activities does not cause the criteria in **Table D1 – Noise limits** to be exceeded at a sensitive place or commercial place.

[46] Available at https://www.ehp.qld.gov.au/assets/documents/regulation/rs-es-mining-lease-projects.pdf
[47] EHP, n 5, pp 10-11.

Table D1 – Noise limits

Sensitive place						
Noise level dB(A) measured as:	Monday to Saturday			Sundays and public holidays		
	7am to 6pm	6pm to 10pm	10pm to 7am	9am to 6pm	6pm to 10pm	10pm to 9am
$L_{Aeq, adj, 15 mins}$	CV = 50 AV = 5	CV = 45 AV = 5	CV = 40 AV = 0	CV = 45 AV = 5	CV = 40 AV = 5	CV = 35 AV = 0
$L_{A1, adj, 15 mins}$	CV = 55 AV = 10	CV = 50 AV = 10	CV = 45 AV = 5	CV = 50 AV = 10	CV = 45 AV = 10	CV = 40 AV = 5
Commercial place						
Noise level dB(A) measured as:	Monday to Saturday			Sundays and public holidays		
	7am to 6pm	6pm to10pm	10pm to7am	7am to 6pm	6pm to 10pm	10pm to 7am
$L_{Aeq, adj, 15 mins}$	CV = 55 AV = 10	CV = 50 AV = 10	CV = 45 AV = 5	CV = 50 AV = 10	CV = 45 AV = 10	CV = 40 AV = 5

There is no simple or final answer to the debate between setting between detailed, quantitative conditions or simple, qualitative conditions because at the heart of it lies competing and largely irreconcilable tensions:

- Detailed, prescriptive laws and conditions of approval generally have the advantage of giving certainty to the people affected by them and regulators who must implement them but also have the disadvantages of being longer and more complex.
- Shorter, less prescriptive laws and conditions of approval tend to be vague and uncertain in their operation, which makes them ripe for legal disputes about their implementation and enforcement (especially where large amounts of money are involved in implementing them such as for conditions requiring extensive rehabilitation of large, toxic and heavily disturbed sites).

The use of simple, qualitative conditions and detailed, quantitative conditions are not mutually exclusive and are often used in combination (as are the three approaches described by DoE set out above). Laws and conditions of approvals commonly include both high-level, vague and qualitative objectives and more detailed and complex measures. In writing conditions much depends on the nature of the problem that is being addressed.[48]

INTERPRETING CONDITIONS AFTER APPROVAL IS GRANTED TO DETERMINE WHETHER A CONTRAVENTION HAS OCCURRED

In considering the interpretation of conditions to determine whether a contravention has occurred, it is important to keep in perspective that, in practice, most conditions are reasonably clear and do not involve difficult questions of interpretation. Disputes over whether a condition has been contravened are usually about the *facts* and the *evidence* establishing the contravention, not difficulties over the interpretation of the conditions.

[48] See the discussion in McGrath C, "The role played by policy objectives in environmental law", Chapter 14 in Fisher DE, *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar Publishing, Cheltenham , 2016).

The construction of the proper meaning of a development permit is a matter of law.[49] Rackemann DCJ summarised the relevant principles to be applied to construe a development permit in *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 (Rackemann DCJ) at [8]-[9], as follows:[50]

> ... the construction of a development permit is undertaken having regard primarily to the terms of the approval, as it appears on its face, together with other material, such as approved plans, where they are incorporated expressly or by necessarily implication. ... [Further] Permissible extrinsic evidence may include evidence of the 'physical reality' as at the time of approval (eg. the nature of the site and, I accept, its context), if that assists in understanding the subject matter and meaning of the approval or a condition contained within it. Expert evidence may also be called to explain technical terms. The scope for extrinsic evidence is however, limited.

That is, generally the application material is only able to referred to when interpreting a development approval if it is incorporated into the development approval expressly or by implication.[51] It is common for development approvals to include a condition that the development "comply with the approved plans".

As noted earlier, in construing an approval the conditions must be reasonably capable of sensible interpretation, but it is not necessary that the condition be written with the strictness of parliamentary drafting, nor should it be construed by an over-technical approach.[52] A condition will only be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning and not merely because it is ambiguous or leads or absurd results.[53] A related test is that if a condition provides a formula, it must impose a clear and objective standard for the application of the formula.[54]

As also noted earlier, ambiguity in a condition will generally be construed in a way which places the least burden on the landowner[55] (i.e. ambiguity will be resolved in favour of the person who is said to have breached the condition). The ambiguity, however, must be a genuine one.[56] Rackemann DCJ stated in *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 at [9]:

> I accept, that the evident purpose of the condition or conditions of approval ought be considered in the construction process [analogous to contemporary approaches to statutory interpretation]. I would also not discard a construction which was otherwise tolerably clear, simply because there was another available construction which placed a lesser burden on the land owner. … That is not to say however, that the relative burden on the land owner is irrelevant in resolving residual ambiguity.

A somewhat different approach to construction of conditions under the EPA was adopted by Robertson DCJ in *Swan v Santos GLNG Pty Ltd & Ors* [2017] QPEC 2 at [139]-[140]:

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[49] *Caloundra City Council v Pelican Links Pty Ltd* [2005] QCA 084 (which concerned the proper construction of a development permit in proceedings where the jurisdiction of the Court of Appeal was relevantly limited to hearing errors of law by s 4.1.56 of IPA).

[50] Another useful summary of the law is found in *Transpacific Industries Group v Ipswich City Council* [2012] QPEC 069; (2013) QPELR 70 at [11]-[16] (Robin QC, DCJ).

[51] See further: *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2016] QCA 019; [2017] 1 Qd R 13; (2016) 212 LGERA 411; [2016] QPELR 302 (Margaret McMurdo P and Morrison JA and Atkinson J).

[52] See *Hawkins and Izzard v Permarig Pty Ltd & Brisbane City Council (No 1)* [2001] QPELR 414 at 417; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [33]; *Sunshine Coast Regional Council v Recora P/L & Anor* [2012] QPEC 8 at [9].

[53] *Fawsett Properties Ltd v Buckingham County Council* [1961] AC 636 at 678; *Corporation of the City of Adelaide v City of Salisbury & Anor* (1998) 100 LGERA 160 (SA Sup Ct).

[54] *King Gee Clothing Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 198; *Environmental Protection Authority v Genkem Pty Ltd* [1993] 79 LGERA 47 at 60 (NSWLEC); *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* (1994) 85 LGERA 408 (CA Qld); *McBain v Clifton Shire Council* (1995) 89 LGERA 372 (CA Qld).

[55] *Matijesivic v Logan City Council* [1984] 1 Qd R 599 at 605; (1983) 51 LGRA 51 at 57; *Mariner Construction Pty Ltd & Ors v Maroochy Shire Council* [2000] QPEC 31; [2000] QPELR 334; *BP Australia Ltd v Caboolture Shire Council* [2004] QPEC 012 at [6] per Quirk DCJ; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [65]-[66] per Robertson DCJ; *Transpacific Industries Group v Ipswich City Council* [2012] QPEC 069; (2013) QPELR 70 at [14] (Robin QC, DCJ).

[56] See *Caloundra CC v Pelican Links Pty Ltd* [2004] QPEC 52; [2005] QPELR 128; *Caloundra CC v Pelican Links Pty Ltd & Anor* [2005] QCA 84; [2005] QPELR 596; and *Lucy v OCC Holdings P/L* [2008] QDC 4.

> Environmental Authorities (EAs) are statutory instruments, pursuant to the *Statutory Instruments Act 1992* (ss 6, 7(2)(c), 7(3)); and by s 14 and Sch 1 of that act, s 14A(1), s 14B(1) and s 35C of the *Acts Interpretation Act* 1954 applies so that:
>
> (a) the interpretation is to be preferred that best achieves the purposes of the EA;
> (b) regard may be had to extrinsic material, provided certain circumstances exist; and
> (c) any heading to a provision of the EA forms part of that provision.
>
> Planning schemes are also statutory instruments and, in accordance with well-known principles, are to be construed purposefully, in a practical and common sense way, and broadly rather than pedantically or narrowly. In its written outline, Santos relies upon statements of principle that suggest (as indeed most of the authorities dealing with planning schemes suggest), that a practical common sense approach is appropriate to construction of statutory instruments "rather than by meticulous comparison of the language of their various provisions, such as might be appropriate in construing sections of an act of Parliament…": *Gill v Donald Humberstone & Co Ltd* [1963] 3 All ER 180 at [183].

An appeal against this decision was dismissed (other than in relation to the costs order made) and Robertson DCJ's reasoning on the principles to be applied in construing the conditions was implicitly accepted without any further analysis by the Court of Appeal.[57]

The principles stated by Robertson DCJ in *Swan v Santos GLNG* for construing the conditions of an environmental authority clearly are persuasive and would apply equally to conditions imposed on a development permit under SPA or the Planning Act; however, his Honour made no mention of the contrary, well established principle that genuine ambiguity in a condition will generally be construed in a way which places the least burden on the landowner.[58] Further cases are likely to address which approach is correct or merge them together.[59]

FIXING MISTAKES AND PROBLEMS IN CONDITIONS

Once an approval is granted, there are only limited powers to correct mistakes and problems in conditions without the consent of the approval holder.[60] It is, therefore, important to get conditions right *at the time* the approval is granted – you can't expect to fix mistakes and problems later.

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[57] *Swan v Santos GLNG Pty Ltd & Ors* [2019] QCA 6; (2019) QPELR 564 at [56] (Fraser JA with whom McMurdo JA and Henry J agreed).
[58] *Matijesevic v Logan City Council (No 2)* (1983) 51 LGRA 51 at 57; *Mariner Construction Pty Ltd & Ors v Maroochy Shire Council* [2000] QPEC 31; [2000] QPELR 334; *BP Australia Ltd v Caboolture Shire Council* [2004] QPEC 012 at [6] per Quirk DCJ; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [65]-[66] per Robertson DCJ.
[59] Similar to the approach in *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 at [8]-[9].
[60] See, eg, EPA, ss 211-215.

APPENDIX – SUMMARY OF KEY POINTS & PRACTICAL GUIDANCE

Determining what an application applies to

1. As you begin to write an application for approval (acting for a developer) or to assess it (as a regulator), clearly identify what activity or development the application applies for, including incidental activities and/or ancillary uses by reference to the categories of activities or development specified under the law the application is made under.

2. Clearly identify in the approval what activity or development is approved.

Writing the approval and attaching conditions (where standard or model conditions need to be extended or adapted)

3. The approval should clearly identify the activity that is approved and the conditions imposed upon the approval without a need to refer to the application (i.e. the approval should be a stand-alone document that either attaches or cross-references to any documents incorporated into it such as an approved plan).

4. In the context of the Planning Act, the general rules are that conditions must be:

   (a) "relevant", which means they are within the proper limits of a government authority's functions under legislation, as imposed to maintain the proper standards in government, local development or some other legitimate sense (e.g. the provision of public land; rational development of roads; foreshore protection; preserve a rail corridor); and

   (b) "reasonably required", which means that when taking into account the fact of the development and the changes the development is likely to produce (e.g. increased traffic to a road), such a condition is reasonably required by the circumstances.

5. In the context of the EPA, a condition is likely to be lawful if that is legitimately directed to protecting Queensland's environment from the environmental harm caused by the activity the subject of approval or other legitimate purposes such as the effective and efficient administration of the Act.

6. If you see an environmental impact caused by the activity you are approving, you should be able to tailor conditions to address it that meet the tests for conditions ("relevant" and "reasonably required" or "necessary and desirable") or impose similar requirements such as payment of an infrastructure charge.

7. Remember, the law sets broad limits on the ability of regulators to impose conditions but within these broad limits there is enormous scope to tailor conditions to effectively and efficiently regulate the impacts of any activity according to good administrative practice. To use a metaphor: the law gives you a frame within which you paint the picture of what the conditions require to be done.

8. An approval should provide finality (i.e. not be subject to further approval under conditions); however, conditions may impose requirements for further management plans or similar documents to be submitted for approval by the administering authority provided that the matters dealt with in the plans are incidental or ancillary to the development (e.g. a landscape management plan, stormwater management plan, etc).

9. If you wish a document such as a landscaping or rehabilitation plan to be incorporated into the conditions of an approval you should refer to it expressly into the conditions.

10. Remember your overall policy goals in writing and interpreting conditions of approval are to implement the law in an effective, efficient and equitable way.

11. Writing conditions of approval is a "Goldilocks problem": the aim is to provide sufficient detail and certainty without becoming too complex and unwieldy. Conditions of approvals must balance the advantages and disadvantages of detailed, quantitative conditions and simple, qualitative conditions. There is no single, "perfect" answer of how to do this and much depends on the facts of each case.

Interpreting conditions of approval

12. In practice, most conditions are reasonably clear and do not involve difficult questions of interpretation. Disputes over whether a condition has been contravened are usually about the *facts* and the *evidence* establishing the contravention, not difficulties over the interpretation of the conditions.

13. Generally, an approval is to be interpreted as a stand-alone document without reference to the application material or other documents unless they are incorporated expressly or by implication (e.g. a condition that requires an approved rehabilitation plan to be complied with).

14. Conditions must be reasonably capable of sensible interpretation, but it is not necessary that the condition be written with the strictness of parliamentary drafting, nor should it be construed by an over-technical approach. A condition will only be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning and not merely because it is ambiguous or leads or absurd results.

15. While in practice most conditions are clear, unambiguous and will be interpreted literally, where a condition is unclear two approaches have emerged for interpretation:

    (a) Genuine ambiguity in a condition is construed in a way which places the least burden on the landowner (i.e. ambiguity will be resolved in favour of the person who is said to have breached the condition).

    (b) Environmental Authorities (**EAs**) are construed as statutory instruments in accordance with s 14 and Sch 1 of that act, s 14A(1), s 14B(1) and s 35C of the *Acts Interpretation Act 1954* (Qld) applies so that:

        (i) the interpretation is to be preferred that best achieves the purposes of the EA;
        (ii) regard may be had to extrinsic material, provided certain circumstances exist; and
        (iii) any heading to a provision of the EA forms part of that provision.

    Which of these two approaches is correct is likely to be addressed in further cases.

Fixing mistakes and problems in conditions

16. Once an approval is granted, there are only limited powers to correct mistakes and problems in conditions without the consent of the approval holder. It is, therefore, important to get conditions right *at the time* the approval is granted – you can't expect to fix mistakes and problems later.