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GUIDELINE

**DEVELOPING  
QUALITY  
CONDITIONS  
OF  
CONSENT**

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**HCCREMS**  
HUNTER & CENTRAL COAST REGIONAL  
ENVIRONMENTAL MANAGEMENT STRATEGY

A project delivered by the Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS): a program of the Environment Division of Hunter Councils Inc.



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### Disclaimer

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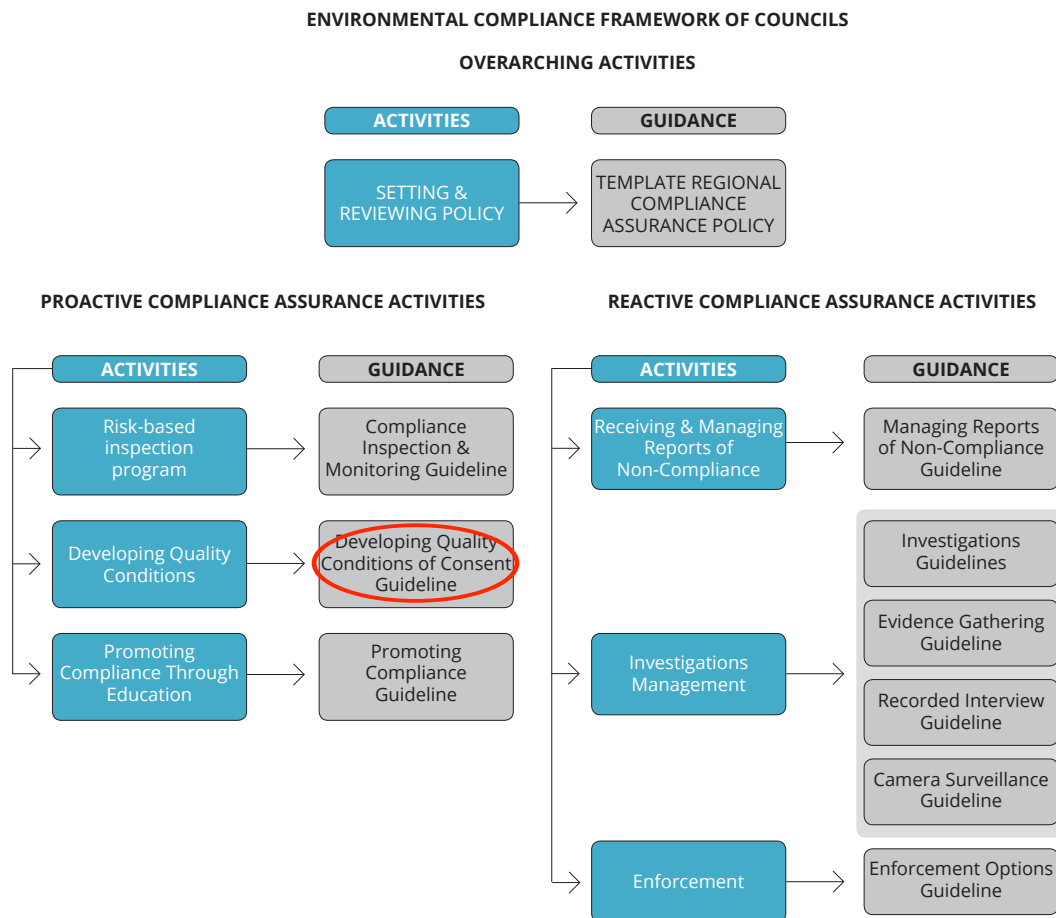
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# FOREWORD

The Developing Quality Conditions of Consent Guideline is provided as supporting guidance to the HCCREMS model Compliance Assurance Policy and is designed to provide a consistent approach to the environmental regulatory framework implemented throughout the fourteen member councils of HCCREMS.

The model Compliance Assurance Policy provides councils with a position on the use of both proactive and reactive compliance assurance activities to manage compliance of the regulated community. **Figure 1** (below) displays the relationship of this guideline to the model Compliance Assurance Policy and other guidance documents.

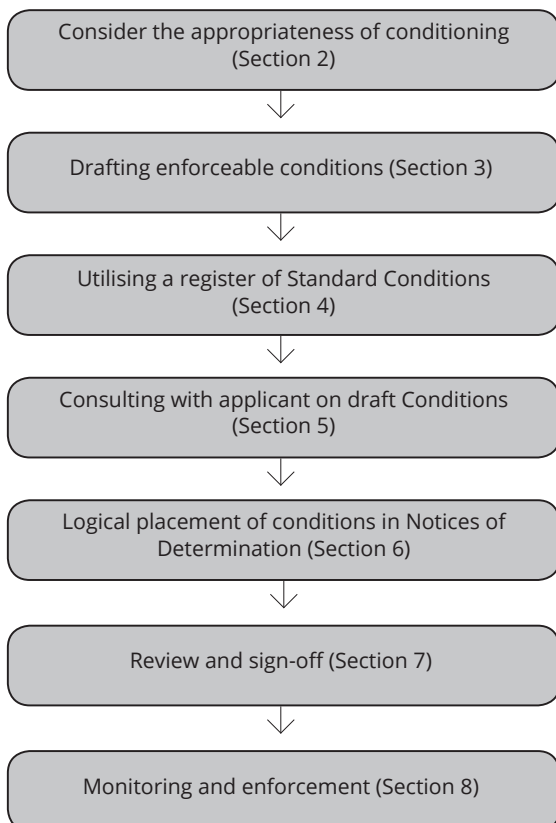


**Figure 1:**  
Regional Compliance Assurance Framework

# 1. INTRODUCTION

The Developing Quality Conditions of Consent Guideline provides practical guidance on the development of conditions of consent that are appropriate for purpose and enforceable in law. The guidance is provided to assist council officers with the development of appropriately worded conditions that meet the planning requirements, and enable compliance officers to enforce the conditions as imposed on developments.

**Figure 2** provides a summary of the process involved in developing quality conditions, and refers to sections of this Guideline where further information is available.



# 2. CONSIDER IF CONDITIONING IS APPROPRIATE

Conditions of consent are not always the solution to making a development more worthy of consent. If extensive conditioning is needed, it raises questions about the appropriateness of the development application in the first place. In these circumstances, it may be more appropriate to refuse the development, request further information and/or request a modified application that is more closely aligned with the objectives of Council.

Consideration should also be given to council's ability to monitor and enforce conditions. If mechanisms are not in place to allow appropriate enforcement of a condition, it may make it inappropriate to impose such a condition or approve a development that would rely upon such a condition. Additionally some developments may involve a private certifying authority, rather than council, in issuing a Construction Certificate. The implications of s.161 of the Environmental Planning and Assessment Regulation (providing the power for Council to impose conditions on development) mean that consideration should be given to the likelihood that this authority would interpret and enforce conditions as intended by Council.

**Figure 2:**  
Process of developing quality conditions and summary of guideline.

# 3.

## DRAFTING OF ENFORCEABLE CONDITIONS

### Legal considerations

Conditions must be within the imposing authority's legislative powers. Section 80A of the NSW Environmental Planning and Assessment Act (EP&A Act) specifies the requirements for the imposition of conditions and refers to the matters that can be conditioned. Councils should ensure they are clear on what Section 80A allows as this section includes scope to condition matters referred to in Section 79C as well as modifying existing consents that relate to the land to which the development application is for.

The courts have also determined that, for a condition to come within the relevant statutory power, it must meet the 'Newbury Test', which requires a condition to:

- Be imposed for a planning purpose;
- Fairly and reasonably relate to the development for which permission is being given; and
- Be reasonable.

The Newbury Test has been applied in a number of cases, the most notable being in the NSW Land and Environment Court *Falcomata v Ku-ring-gai Council (No 2)* [2005]. This case is referenced as a Planning Principle by the Land and Environment Court as it describes the chain of reasoning to promote consistent planning decisions.

The imposition of a condition is a power that has to be used carefully as non-compliance is an offence (s125 EP&A Act). To ensure regulatory fairness, conditions should be written in plain English. It is recommended that condition wording be SMART, that is:

- Specific.
- Measurable.
- Achievable.
- Relevant.
- Time-specific.

The Australian Environmental Law Enforcement and Regulators neTwork (AELERT) has developed a number of principles to assist with developing SMART conditions that are enforceable. These principles are summarised below. A checklist is also included in **Appendix 1**.

### Specific

A condition should be a specific instruction requiring an action to be carried out, or setting limits on what can/cannot be done. Specific instructions require wording such as 'must' 'shall' and 'will'. Words such as 'should' or 'may' render the condition unenforceable. To ensure its specificity, a condition should be as concise as possible. Conditions covering multiple requirements or issues can be overly complex making it harder to assess compliance.

A condition should be unambiguous by precisely detailing what is required in plain English. However, the writer should ensure the condition is not overly prescriptive, especially about how the outcome of the condition should be met.

**Measurable**

The writer of a condition needs to consider if it will be possible for council and the holder of the statutory document to accurately assess compliance (and non compliance) with a condition. Consideration should also be given to the ease of which non-compliance could be proven if enforcement action is necessary.

**Achievable**

Regulatory fairness requires conditions to be achievable; requiring the condition to be written in such a way as the applicant understands the requirements and how to comply with them. To ensure a condition is achievable consider if it is practical and reasonable.

Conditions should avoid imposing an unnecessary responsibility on a third party. If the condition requires consultation or involvement from an agency that does not have the resources to provide this, then the condition may become unachievable.

**Relevant**

The condition must be within the imposing authority's legislative powers. Writers should ensure council is the relevant agency with jurisdiction to impose the condition. When drafting conditions, writers should consider what the intent of the condition is and if compliance with the condition would achieve this intent. If compliance with the condition will not result in the desired outcome then the condition should be rewritten or consideration should be given to options other than conditioning.

The condition should avoid re-stating legislative requirements as the applicant is already required to adhere to relevant legislation. A clear set of conditions can

be achieved if advice and reference to important legislation is provided in a separate document such as a covering letter and reasons for conditions are clearly separated from the conditions themselves.

**Time-specific**

A condition should specify the timeframe during which the required action or limit applies. Even if the conditions are ordered under sub-headings which indicate a time frame, the condition itself should state the required time limit to ensure enforceability. Stating a time limit is particularly important if a condition is to be imposed which seeks to lapse the operation of the consent within a specified period after commencement of the consent.

## 4. STANDARD CONDITIONS

It is good practice to have a register of standard conditions for certain kinds of development and make these conditions publicly available (to increase awareness and acceptability of such conditions).

A conditions register should:

- List conditions under appropriate categories that match council's; processes (e.g. building conditions, environmental conditions, etc.);
- Note the date the condition was added to the register and the date the condition was last reviewed;
- Note the officer who developed the condition and;
- Where appropriate, note an application that applied the condition so evidence of effectiveness can be assessed.

Officers should be able to contribute conditions to the register, but it is recommended the register be maintained by either an individual or committee to ensure only quality conditions are included in the register. The standard condition register should be regularly reviewed for necessary changes such as legislative changes and to ensure it does not get too large or contain contradictory conditions.

The use of non-standard conditions should be limited and should only be used when standard conditions are not available to address the issue identified within the assessment of the development proposal (under s79C EP&A Act). Regular communication with relevant staff should occur so that it is known when, how, why and by whom non-standard conditions are used.

It may be a good idea to develop a style guide to assist with drafting conditions which may include word and phrase styles, unit measures and a list of commonly referred to documents.

Some examples of Standard Conditions of Consent lists (web links) are contained in Section 9. Councils may benefit from regional sharing and collaboration on standard conditions which would help facilitate consistency at a regional scale. Council officers should be able to, and are encourage to, tailor standard conditions to specific sites. The use of standard conditions as the template for specific conditions shall assist with ensuring they meet the SMART objectives and achieve the desired environmental outcome.

## 5. CONSULTATION

Consultation with applicants during the development of consent conditions is likely to ensure conditions are well understood and considered reasonable by the applicant, hopefully leading to a higher level of compliance with the conditions.

Consultation can occur through meetings or by providing suggested conditions to the applicant and any objectors, to determine if the response from council is adequate and appropriate. However, this process may only be practical for larger, more contentious developments due to the timeframes involved in consultation processes. Consider what requirements council places on conditioning to determine how, or if, consultation should be used on a case-by-case basis.

If, through consultation, the applicant indicates an unwillingness to accept the imposition of any condition, this does not necessarily mean that Council should refrain from imposing the condition if it is deemed fundamentally necessary through the assessment of the application.

## 6. LOGICAL PLACEMENT OF CONDITIONS

### NOTICE OF DETERMINATION

The Notice of Determination provides Council's decision on the development application and declares any conditions of approval to the applicant. The requirements of this Notice are set out by Part 6, Division 10 of the Environmental Planning and Assessment Regulation 2000. These requirements include:

- Dates of the commencement and duration of the consent (and time within which the consent lapses if not acted upon).
- Terms of conditions.
- Identification of rights of review and appeal.

Any advisory information council would like to provide should be included in a way that does not confuse the legal aspects of the Notice itself. One way of doing this is by including advice in a cover letter as opposed to in the Notice of Determination. If advices are deemed important enough to include in the Notice of Determination (for the benefit of current and future beneficiaries of the consent) they are best placed at the end of the consent with a statement explaining that they are not legally binding but simply aimed at assisting.

Examples of advisory information Council might like to provide are:

- Advice regarding councils requirements should further applications or amendments be necessary.
- Advisory notes, such as important legal requirements applicants should be aware of (e.g. relevant Acts and offences that Council may enforce).
- Post-consent processes such as need for certificates, appointment of Principle Certifying Authority etc.



## 7. REVIEW AND SIGN OFF

### CATEGORISING CONDITIONS

Categorising conditions may assist with improving clarity and therefore the understanding of conditions. It may be useful to categorise conditions into those imposed by Council and those imposed by other agencies. Council's conditions should then be ordered in the logical process that needs to be followed in acting on the consent (i.e. by timeframe). An example of the order of headings is:

1. Conditions relating to the administration of the consent (e.g. payment of fees or levies, surrender, modification or cessation of consents, restrictions or exclusions to parts or aspects, ancillary development matters).
2. Prescribed conditions (i.e. required by the Building Code or legislation).
3. Conditions to be satisfied before a construction certificate is issued.
4. Conditions to be completed before work commences.
5. Conditions to be complied with during construction.
6. Conditions to be complied with before the building is occupied or the land use or works commence operationally.
7. Conditions to be satisfied before a subdivision certificate is issued.
8. Conditions that are ongoing requirements for the 'life' of the development consent.

In addition sub-headings (e.g. 'Landscaping' or 'Road Works'), may be included in the consent to further group similar activities/ issues. Council may also wish to use this same method to organise conditions in their register of standard conditions, making the transfer and selection of conditions for Notices of Determination streamlined for determining Officers.

Conditions contained in Notices of Determination should be reviewed by a different staff member (than the one who developed the conditions) to check for clarity, errors, omissions, conflicts, contradictions or unnecessary overlaps. The review should also include basic final checks such as:

- Does the consent reference the correct person/entity?
- Is the staging of the conditions appropriate?
- Are references to other documents or standards accurate?
- Is consistent terminology including the use of 'must' or 'shall' used?

Where possible, separating the functions of writing and applying conditions, and the actual determination of the assessment will be important to ensure consistency, impartiality and fairness. Ensuring a high degree of probity in the development assessment and determination process is essential to meet the recommendations of the Independent Commission Against Corruption (refer to ICAC report in References and Further Information).

Approval processes are likely to vary between councils and may include approval by a senior officer, a development assessment panel or in some cases (e.g. for developments of high monetary value) require a Council meeting.

## 8. MONITORING AND ENFORCING COMPLIANCE WITH CONDITIONS

To ensure the conditions are achieving the desired aims, active monitoring and enforcement of the conditions is required. Where council has an active compliance inspection program operating, the listing of the conditions in the compliance activity register should occur to assist compliance officers in being aware of all activities that should be assessed when the site is visited through the compliance inspection program. More information on compliance inspections can be found in the HCCREMS Compliance Inspections and Monitoring Guideline.

The Landcom *'Best Practice in Development Assessment guidelines'* recommends a dedicated monitoring / inspection function (computer-aided where possible or relevant) to carry out site inspections, to ensure compliance with conditions of consent and construction certificate(s).

Systems for monitoring conditions of consent could be developed through a number of means and consideration of the following ideas may assist with the development of an appropriate monitoring system:

- Scheduled checks may be facilitated through the use of a 're-submit' function in Council's document management systems to re-alert the intended officer of action needed on consent.
- A compliance code could be added to the register of standard conditions which could allow sorting for sending out scheduled reminder letters (to comply with conditions).
- Current required checks by DA planners and building inspectors could be expanded to consider other issues such as environmental management.

- Random monitoring schedules could be drawn from a database of consents issued in a certain timeframe.
- Monitoring could be done by existing staff with a range of duties, specialised compliance staff or periodically employed 'auditors', external auditors/consultants.
- Although proactive checks are preferable, complaints from the community can alert council of areas that may need monitoring for compliance.
- Some conditions may require audit reports which can cut down on inspection times but, consider that staff resources are still required to review reports and follow-up where required.

As well as ensuring compliance with conditions, a monitoring system allows a quality assurance check of the conditioning process and wording itself.

### FUNDING COMPLIANCE COSTS ASSOCIATING WITH INSPECTIONS

Councils incur costs when conducting inspections to ensure compliance with conditions of consent and, as such, it is important for councils to implement cost recovery systems.

Councils seeking to impose charges to conduct inspections relating to development compliance are required to list the inspections and associated charges in the conditions themselves, as this enables council to recover the costs through provisions of the EP&A Act. It is inappropriate for councils to utilise the s608 powers under the Local Government Act to recover costs associated with monitoring compliance with development conditions, as was upheld by the Land and Environment court in the case of *Wei v Parramatta City Council* [2010].

Conditions requiring inspections and fees must also be reasonable in their terms e.g. cost, number and duration of inspections.

Councils wanting further information on the ability to recover costs for monitoring and inspecting sites to ensure they meet the conditions set, should review the HCCREMS Funding Environmental Compliance report. (<http://www.hccrems.com.au/RESOURCES/Library/Compliance/HCCREMS-Funding-Environmental-Compliance.aspx>)

# REFERENCES AND FURTHER INFORMATION

AELERT (2009), AELERT Guide to Drafting Quality Conditions (unpublished), available at: <http://www.aelert.com.au/documents/AELERT%20Guide%20to%20Drafting%20Quality%20Conditions.pdf>

City of Canada Bay list of standard conditions: [http://www.canadabay.nsw.gov.au/development\\_and\\_planning/new\\_data\\_dev/development\\_-\\_standard\\_conditions\\_of\\_consent\\_page.html](http://www.canadabay.nsw.gov.au/development_and_planning/new_data_dev/development_-_standard_conditions_of_consent_page.html)

City of Sydney list of standard conditions: <http://www.cityofsydney.nsw.gov.au/Development/documents/PlansAndPolicies/ArchiveStandardConditions121205-170906.pdf>

Environmental Planning and Assessment Act (1979) and Regulation (2000), available at: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

Falcomata v Ku-ring-gai Council (No 2) [2005] NSWLEC 459, available at: <http://www.lawlink.nsw.gov.au/lecjudgments/2005nswlec.nsf/c45212a2bef99be4ca256736001f37bd/40e09355ad94ed76ca2570650081b805?OpenDocument>

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Independent Commission Against Corruption, 2010, Development Assessment Internal Audit Tool, Available at: <http://www.icac.nsw.gov.au/publications-and-resources>

Land and Environment Court, List of Planning Principles, available at: [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_lec.nsf/pages/LEC\\_planningprinciples](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples)

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Landcom (2005), Best Practice in Development Assessment for Local Government [2nd Edition], available at: [http://www.landcom.nsw.gov.au/downloads/uploaded/Best\\_Practice\\_6771\\_b109.pdf](http://www.landcom.nsw.gov.au/downloads/uploaded/Best_Practice_6771_b109.pdf)

Planning NSW (2005), Planning Circular PS05-001: Occupation Certificates and Conditions of Development Consent [http://www.planning.nsw.gov.au/planningsystem/pdf/circulars/dipnr\\_ps05\\_001.pdf](http://www.planning.nsw.gov.au/planningsystem/pdf/circulars/dipnr_ps05_001.pdf)

Planning NSW (1999), Guiding Development Practice Notes – Conditions of Development Consent, available at: <http://www.bpb.nsw.gov.au/resources/141/Conditions%20of%20development%20consent.pdf>

Wei v Parramatta City Council [2010] NSWLEC 1046, available at: <http://www.lawlink.nsw.gov.au/lecjudgments/2010nswlec.nsf/00000000000000000000000000000000/fb267505047038b6ca2576e00025a9c6?opendocument>

HCCREMS (2010) Funding Environmental Compliance, available at <http://www.hccrems.com.au/RESOURCES/Library/Compliance/HCCREMS-Funding-Environmental-Compliance.aspx>

# APPENDIX 1. WRITING ENFORCEABLE CONDITIONS OF CONSENT CHECKLIST

## Appendix 1 Writing enforceable conditions of consent checklist

	Issues for consideration (in relation to condition being reviewed):
<p>Does the condition satisfy the "Newbury" Planning Principle:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Is it for a planning purpose?</li> <li><input type="checkbox"/> Does it fairly and reasonably relate to the proposed development?</li> <li><input type="checkbox"/> Is it reasonable?</li> </ul> <p>Further info: <a href="#">Falcomata v Ku-ring-gai Council (No 2) [2005] NSWLEC 459</a></p>	
<p>Is the condition <b>SMART</b>:</p> <p><b>Specific</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Is the condition an instruction requiring an action to be carried out, or setting limits on what can be done?</li> <li><input type="checkbox"/> Is the condition as concise as possible?</li> <li><input type="checkbox"/> Is the condition unambiguous and does it precisely detail what is required (without being overly prescriptive)?</li> </ul>	
<p><b>Measurable</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Will it be possible for officers of the agency and the holder of the statutory document to accurately assess compliance (and non compliance) with this condition?</li> </ul>	
<p><b>Achievable</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Will the recipient be able to comply with the condition?</li> <li><input type="checkbox"/> Is the condition practical and reasonable?</li> <li><input type="checkbox"/> Does the condition avoid imposing an unnecessary responsibility on a third party?</li> </ul>	
<p><b>Relevant</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Is the condition within the imposing authority's legislative powers?</li> <li><input type="checkbox"/> Will compliance with the condition achieve the intent of the condition?</li> <li><input type="checkbox"/> Does the condition avoid re-stating legislative requirements?</li> </ul>	
<p><b>Time-specific</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Is the timeframe, during which the action or limit applies, clear?</li> </ul>	

