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| Guide for Drafting Enforceable Conditions and Contingency Plans  For Cultural Heritage Management Plans,  Cultural Heritage Permits and  Aboriginal Cultural Heritage Land Management Agreements under the  *Aboriginal Heritage Act 2006* |

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Frequently used abbreviations and acronyms in this document

|  |  |
| --- | --- |
| AV | Aboriginal Victoria |
| “The Act” | The *Aboriginal Heritage Act 2006* (Vic) |
| ACHLMA | Aboriginal Cultural Heritage Land Management Agreement |
| CHP | Cultural Heritage Permit |
| CHMP | Cultural Heritage Management Plan |
| LDAD | Low Density Artefact Distribution |
| RAP | Registered Aboriginal Party |
| “The Regulations | The Aboriginal Heritage Regulations 2018 |
| “SMART” | The S.M.A.R.T. principle |
| VAHR | Victorian Aboriginal Heritage Register |

# Introduction

The *Aboriginal Heritage Act 2006* (the Act) provides blanket protection for Aboriginal cultural heritage in Victoria. Conditions and contingency plans are required to manage Aboriginal cultural heritage in cultural heritage management plans (CHMPs), cultural heritage permits (CHPs) and Aboriginal cultural heritage land management agreements (ACHLMAs). Conditions and contingency plans written in these documents confer legal obligations on the holder that are enforceable under the Act.

Writing clear and enforceable conditions and contingency plans is crucial for the successful implementation of the agreed process for managing Aboriginal cultural heritage, and to avoid unintended harm to Aboriginal cultural heritage and potential disputes about interpretation or meaning.

The *Guide for Developing Enforceable Conditions and Contingency Plans* (this guide) was developed in consultation with Registered Aboriginal Parties (RAPs) and a technical advisory group from the heritage field. It is a drafting tool for developing and assessing conditions and contingency plans to be enforceable under the Act.

## Purpose and Scope

1. This guide provides key considerations to avoid common pitfalls when writing conditions or contingency plans.
2. This guide can assist to assess enforceability by providing key criteria to test against.
3. This guide is not intended to be prescriptive or provide standardised conditions or contingency plans.
4. This guide aims to:
   1. provide considerations to support the drafting of conditions and contingency plans for CHMPs, CHPs and ACHLMAs; and
   2. improve the quality, enforceability and consistency in Aboriginal cultural heritage management.

## Conditions or Contingency Plan?

Conditions and contingency plans are used in different situations or contexts.

### Conditions:

Confer legal obligation and responsibility to the Sponsor of a CHMP or holder of a CHP and are requirements that are enforceable under legislation. They are generally used in the context of well understood cultural heritage. Conditions must be met to allow the harm specified in the statutory authorisation to occur legally. Conditions usually specify an action that must be undertaken.

### Contingency plans:

Only confer obligation and responsibility if a specific set of circumstances exist. This is usually in the event of the discovery of cultural heritage or a situation that was not foreseen during the development of the conditions.

*Contingencies often read: “if X happens, then do A, B, C”.*

## SMART Conditions and Contingency Plans

The **SMART** principle is a useful method or lens to apply when drafting or assessing conditions and contingency plans.

Table 1 outlines and provides examples for each component of SMART.

Using the SMART principle can assist with ensuring conditions and contingency plans are as clear and enforceable as possible.

Table 1: The SMART principle

|  | Description | Examples |
| --- | --- | --- |
| Specific | Conditions and contingency plans must be written to be specific, well defined and clear to anyone who may become involved with the activity.  It is important to consider how the requirement of the condition or contingency will be met; who, what, when, where and how.  Conditions must identify who must complete a task, i.e. the sponsor, the heritage advisor, the RAP, a qualified specialist with specific expertise or another relevant party. | Cross reference the condition to a relevant map or diagram in the CHMP.  For example: *‘Map 6 shows the location of temporary protective fencing to be installed at a minimum of 10 metres from the outside extent of ABC Artefact Scatter VAHR XXXX-XXXX. The temporary fencing must be erected by the Sponsor or their representative prior to the commencement of any works for this activity. This fencing may be removed after the completion of the activity.’* |
| Measurable | Conditions and contingency plans need to be measurable and quantifiable. This means the progress and final outcome of the condition or contingency plan must be trackable. | A measurable condition or contingency plan will stipulate, clearly when the outcome is achieved.  For example:  ‘*Six months after completion of the project’* is **NOT** measurable because it isn’t clear as to what constitutes ‘completion of the project’.  Whereas:  ‘*Six months from the date the planning permit is signed’*, **IS** both identifiable and measurable.  ‘If necessary’ is **NOT** a measurable term, as it does not specify what action would be considered necessary. For example, ‘*The Traditional Owner groups may attend this induction if necessary*’. To be measurable, the sentence instead might read: ‘*the Traditional Owner groups may attend this induction if they choose to participate*’. |
| Achievable/  Agreed upon/  Attainable | The requirements of a condition or contingency plan must be achievable or attainable. The methods for achieving the outcomes of a condition or contingency plan must also be agreed upon by the relevant parties. This aspect of writing a condition or contingency plan may be driven by the actions that need to be undertaken to reach the desired outcome. | In the same way conditions and contingency plans must be specific, it is important that they do not become overly prescriptive.  *For example: specifying a brand of material type limits the conditions to that single brand. Inclusion of generic terms such as: ‘or similar’ will achieve the intention of the condition.* |
| Reasonable/  Relevant | In the same way that a condition or contingency plan must be achievable, they must also be reasonable. Conditions and contingency plans must be formulated to be objectively practical and consistently written. | Do not rely on other documents, outside of the primary document, without qualifying. Refer instead to the specific section or incorporate the relevant part into the primary document itself. You could also include the full other document for guidance in the appendices.  By making cross-referencing between documents clear and precise, there is less room for confusion or ambiguity to occur. This keeps the conditions and contingency plans relevant and avoids unreasonable expectations of existing specialist knowledge. |
| Timing/  Time-bound | Conditions and contingency plans will most often require a deadline.  Conditions may also be required to be completed at particular stages of a project; prior to the commencement of the activity, or after the demolition of specified structures, for example.  It is important to specify timeframes that are anchored to an identifiabledate or time. | Avoid expression of timeframe in ‘hours’ or ‘days’ – rather, use ‘working days’.  Ask yourself, does the condition need to be completed or undertaken prior to/during/after the activity?  Include condition timeframes in terms that will avoid non-compliance. Examples are:  *‘Reburial of recovered Aboriginal cultural heritage material must occur within six months from the date the statement of compliance was signed’;*  *‘The Sponsor or their representative must report the discovery of suspected Aboriginal cultural heritage to a heritage advisor and the Registered Aboriginal Party within two working days’.*  Include conditions that specify notification to be provided to the RAP and relevant parties for commencement and completion of the activity. Communicating the satisfactory undertaking of specific conditions or activities can be useful for signalling completion of milestones, demonstrating compliance and providing closure for record keeping. |

# Conditions and Contingency Plans

The purpose of the Act is to provide for the protection of Aboriginal cultural heritage in Victoria. The Act allows for conditions to be written for the management and protection of Aboriginal cultural heritage in CHMPs, CHPs and ACHLMAs. Conditions confer a legal obligation and responsibility to the Sponsor/Permit holder/parties to an ACHLMA and are requirements enforceable under the Act.

Contingency plans are developed in relation to disputes, delays and other obstacles that may affect the conduct of the activity. The contingency plans should tell the Sponsor/Permit holder/parties of an ACHLMA what to do in the event one of these situations arises in relation to Aboriginal heritage during the conduct of the activity. Contingency plans need to be prepared to suit the activities and Aboriginal cultural heritage in question. The Aboriginal Heritage Regulations 2018 (the Regulations) require CHMPs to include contingency plans that address the matters outlined in Section 61 of the Act.

## Preparing and Organising Conditions and Contingency Plans

### To be specific and to avoid ambiguity

1. Conditions and contingency plans should be drafted using the SMART principle (Table 1).
2. When drafting conditions and contingency plans it is important to consider the intended outcome and ensure the language used provides clear direction. See Appendix 1: Avoiding Ambiguity for further guidance in ensuring conditions are unambiguous.

### Ordering conditions and contingency plans

1. The order in which conditions are to be undertaken must be clear and logical.
2. Conditions and contingency plans written in chronological order are easier to follow.
3. It is advisable to include a statement that specifies the order in which conditions must be completed.

Common topics of conditions and key considerations are discussed in Table 2.

### Consistency

Ensure language is consistent with the Act and the Regulations, for example:

1. Activity area: avoid use of “study area”. Consider clearly defining the meaning of activity area.
2. Aboriginal place, Aboriginal cultural heritage place: avoid use of “archaeological site(s)”, “site(s)”, as the Act and regulations protect Aboriginal places that may not necessarily have physical evidence.

Table 2: Common types of Conditions

| Type of Condition | Details | Considerations |
| --- | --- | --- |
| Documentation | A condition requiring a copy of the approved CHMP or CHP be kept on site, or in a location that is easy to access the document to allow quick reference to be made. | Think about the practicalities of implementing this condition.  Requiring the approved CHMP to be kept on site is broad enough to work for a variety of situations. If there is a site office, this may be referred to in the condition. An electronic or web accessible version may also be appropriate. |
| Induction Conditions | Must be specific and relevant to the CHMP/CHP/ACHLMA and must communicate specific information relevant to both the activity and the Aboriginal Cultural Heritage management information:  It is essential that an induction explains the conditions and contingency plans of the CHMP to the personnel; what is meant to be completed prior to the activity commencing; what to do if suspected Aboriginal Ancestral Remains, and/or suspected Aboriginal cultural heritage are found.  Conditions for inductions must stipulate **when** inductions will occur and **who** (specifically which organisation) will deliver them.  Inductions should be held prior to the activity or any works associated with the activity commencing.  Contractors should be informed of suspected Aboriginal cultural heritage, the fencing, signage. | Consider including:  A condition for **where** the induction will occur. Conducting an induction on site has advantages in allowing attendees to more clearly identify location and the scope of the activity area. Do consider a flexible option for the location of an induction. Limiting the condition to an onsite location may raise a non-compliance issue if bad weather or other obstacles prevent the induction from happening.  A requirement to keep a record (such as a sign-off sheet) of induction attendees and any induction materials.  Induction conditions may include the presentation of a timeline for the conditions within the broader project milestones or time frames.  An induction condition for new personnel arriving who did not attend prior to works commencing, for example, ‘*An inducted site supervisor may provide an induction for contracted staff’*.  Consider stipulating who needs to attend the induction.  Consider stipulating that Aboriginal cultural heritage finds are not to be reported to the media.  A regular time for reviewing compliance with conditions by onsite personnel, for example; reviewing the compliance checklist during toolbox or job safety meetings. |
| Compliance Inspections | Ensure conditions outlining when compliance inspections must occur are tied to a specific activity i.e. “before ground disturbing works begin” | Be careful about specifying the number of compliance inspections required. For example, if the condition says “*a compliance inspection must be undertaken*” the ‘*a*’ limits it to one.  Consider saying “as deemed necessary” if you would like to allow discretion. Refer to Appendix 1 for further information. |
| Fencing and signage | Must include specific timeframes for fencing erection and removal; specify whether the fencing must remain in place for the duration of the activity or be removed once a specific event has occurred.  Fencing conditions must include signage stating the accessibility to the area.  Conditions for signage must state that the signage must be clearly visible the outside and legible at all times. | To determine the type of fencing focus on the intended purpose e.g. what the fencing is trying to achieve and how you’re trying to achieve it.  Be careful about being too specific about the type of material used, as it might make the condition unachievable or unreasonable if this material is not available.  Consider the effect the type of fencing will have on the Aboriginal place, ground surface, cultural heritage and location. For example: will the type of fencing attract unwanted or negative attention? Is the fencing sturdy enough to withstand impacts from stock in a paddock? Who is allowed to access a fenced location?  Consider including a condition for routine or regular check of fencing and signage to ensure it remains in place for the duration of the activity.  Think about including plans to show exactly where fences need be constructed. |
| Reburial and Repatriation of artefacts | These conditions must be drafted in consultation with the RAP or relevant Traditional Owners. | Identify a stage in the project for reburial and repatriation to occur.  Be clear about the assignment of any associated costs and responsibilities  Consider the materials to be used in the reburial. This should also be in consultation with the RAP or relevant Traditional Owner groups.  Consider specifying the depth of any reburial. |
| Artefact collection (surface collection) | Conditions describing the collection of artefacts must be clear about the purpose for the collection, how and when the collection must be undertaken. | Conditions concerning artefact collections must include a methodology, that may specify:  a measurable minimum level of ground surface visibility (this may also include how this visibility will be achieved);  a search radius of artefact location when unable to re-locate previously recorded;  who must undertake the collection (e.g. a suitably qualified archaeologist);  reporting requirements to the VAHR with specific timeframes  Refer to AV’s [*Practice Note: Salvage Excavation*](http://www.vic.gov.au/aboriginalvictoria/heritage/heritage-tools-and-publications/guides-forms-and-practice-notes-for-aboriginal-heritage-management.html)on the AV website for elements to be considered when drafting a condition for the collection of artefacts. |
| Artefact relocation | In some instances, it may be appropriate to include a condition for relocating artefacts. Relocation is more appropriate when it mitigates harm to an artefact. This may be appropriate for moving isolated occurrences of surface stone artefacts off a road to a safer location beside the road. In the road example, the artefacts would incur greater harm by remaining on the road, than not. This also allows for cultural heritage to remain on country and precludes the need for storage and reburial or repatriation to be arranged. It can be a minimised harm option. This will most likely be an appropriate management option for low density artefact distributions (LDADs). | Consideration must be given to the type of cultural heritage considered for this type of management.  Consider parameters for the distance of the relocation away from its original location.  Consider specifying a timeframe for recording of the cultural heritage relocated. This must be completed with the appropriate forms completed and submitted, including spatial data, to the VAHR. |
| Salvage excavation | If areas are identified for specific levels of impact or activities, the conditions must clearly state what is permitted and specify where, it is permitted (refer to Fencing above).  Inclusion of a notification requirement on commencement and completion of salvage is imperative. i.e. stipulate that the Sponsor must notify Aboriginal Victoria (and where relevant, the RAP) upon commencement or completion of salvage  Conditions must be drafted to be consistent with the requirements of the [*Practice Note: Salvage Excavation*](http://www.vic.gov.au/aboriginalvictoria/heritage/heritage-tools-and-publications/guides-forms-and-practice-notes-for-aboriginal-heritage-management.html)on the Aboriginal Victoria website. | It is important to consider what the purpose is for undertaking a salvage excavation, and what research questions are going to be asked.  Consider including a plan or map to clearly define the area where salvage will occur.  The timeframe for undertaking the salvage must be clearly stated and reporting of commencement and the results must be included in the requirements.  The cost of undertaking the salvage and subsequent analysis of the finds should be considered and reflected in the condition.  Consider including a formal process for any time extensions if necessary. |
| Reports | Conditions relating to provision of reports must set out the methodology or format the report must take. This is to ensure the VAHR receives the information in a useful format. | Consider including a requirement for lodgement of the report in a timely manner,  It is important to include an anchoring point in time for provision or lodgement of reports. |
| Open space or areas for preservation | Areas identified for preservation, allowing specified low-impact activities or activities under specific controls, must be practical and able to be implemented. These areas are often managed by third parties not present during the development of the CHMP. It is recommended to have discussion with ongoing land owners and/or managers regarding future use and to consider these future uses when writing management conditions for these spaces or areas. It must be clear that harm to an Aboriginal Place cannot occur without statutory authority. | It is important to consider how practical the conditions imposed upon an area will be to manage. These conditions will be requirements for future land managers, therefore they must be able to comply with them.  Do the open space management conditions allow for general maintenance activities required to manage a public reserve to be undertaken?  Will the land manager want to plant trees in the open space area, or are there restrictions on the depth of impact and the methods employed for planting? |
| Buffer zones- permitted activities and size (terms such as ‘no go’ zone or restricted access) | If areas are identified for specific levels of impact or activities, the conditions must clearly state what is permitted and specify where it is permitted (refer to Fencing above).  Signage on fencing of buffer zones should be clear from the outside.  It is essential to refer to a map showing these areas. | Consider specifying the size, quality and number of signs.  See signage considerations in “fencing” and open space sections, above. |
| Compliance Checklist | The checklist must be consistent with the conditions and contingency plans in the document (CHMP/CHP/ACHLMA).  The checklist must not introduce new compliance requirements. These should all be specified in the conditions or contingency plans. | It is important to stipulate in the conditions whether compliance inspections are a requirement. See considerations in “compliance inspections” above.  Consider using photos to demonstrate compliance with conditions. |

# Appendix 1: Avoiding Ambiguity

Table 3: Common causes of ambiguity

| WORDS OR  PHRASES | REASON TO AVOID OR CONSIDER CAREFULLY | ALTERNATIVES OR COURSE OF ACTION |
| --- | --- | --- |
| ‘And’/‘Or’ | * Using **‘or’** provides for an option. * Using **‘and’** means both things listed must occur.   For example:   * 1. Fencing **and** visible signage must be erected around all registered Aboriginal places within the activity area.   vs. 🡪   * 1. Fencing **or** visible signage must be erected around all registered Aboriginal places within the activity area.   The first example is a directive and **must** occur for compliance.  The second provides an option. Either fencing or signage will suffice for compliance. | Consider your intention.  Take care with using the term ‘and/or’ in lists. |
| ‘Which’ and ‘that’ | These words can change the meaning or intent of the sentence.  For example, compare:   * 1. Indigenous trees, which have low water requirements, must be used in landscape areas.   2. Indigenous trees that have low water requirements, must be used in landscape areas.   In the first point, the “low water requirement” is a feature of the trees, as opposed to the second point where a “low water requirement” is a part of the terms for meeting the condition. | If you intend to include an extra element or requirement to meet the condition use: ‘that’  If you intend to describe a feature use: ‘which’ |
| ‘May’ and ‘must’, ‘will’ and ‘should’ | These terms do not all convey an obligation.   * **‘Must’** and **‘will’** terms clearly convey an obligation. * **‘May’** or **‘should’** implies discretional choice. | ‘Must’, ‘will’ and ‘shall’ can be used interchangeably with one another but cannot be used interchangeably with ‘may’ and ‘should’.  A question to ask when preparing conditions and contingency plans: Is a strict obligation intended?   * If obligatory, use: ‘must’ or ‘will’ * If discretionary, use: ‘may’ or ‘should’ |
| ‘If necessary’ | This phrase must be used with caution, as it is subjective and not easily measured. | Prescribe the situations or circumstances which would require a need. |
| ‘a’ | Is read as ‘one’ (singular). | Ask yourself if you mean one or many, or want discretion as to numbers. |
| Lists | It is important when listing things in a condition or contingency plan to be specific about whether the listed things are exhaustive or non-exhaustive.  **Exhaustive lists:** are complete and allow for no further items.  For example:   * 1. This condition allows for the following activities to be undertaken in Zone A: mowing, weed spraying and planting using Hamilton planters.   **Non- exhaustive lists:** are inclusive and will allow for further items.   * 1. This condition allows for low-impact activities to occur in zone A, such as hand weeding, planting shallow root-stock plants with Hamilton planters, and other landscaping activities that do not impact the ground surface below 100 millimetres. | Ask yourself the following questions:  Are only the listed things the primary concern in the condition or contingency plan?   * If so, the list is **exhaustive**. Consider whether this meets your intention.   Are there other things that could be included within the list that are not specifically stated?   * If so, the list is **non-exhaustive**. Consider whether this meets your intention. |
| Abbreviations | Readers may not be familiar with all of the acronyms or abbreviated words frequently used in cultural heritage management. The conditions and contingency plans must be accessible to anyone who reads them.  For example: *HA, Adv, Arch* | In the first instance, it is preferable to avoid using abbreviations in conditions and contingency plans.  If abbreviations are to be used, ensure there is consistency and accuracy of terms used, to avoid confusion.  Providing a list or table of abbreviations at the front of the report is a clear way to ensure all are defined and easily accessed. |
| Unnecessary use of words with similar meanings | Unnecessary words, or doubles and triplets such as: *‘preserve, maintain and care for’* can create confusion in compliance with a condition, as each can be taken as a singular element that must be established for compliance to be met. | Consider your intention and whether the words used will satisfy this.  Try to keep the language of conditions and contingency plans concise. |
| Consistent use of terminology | Using interchangeable words can cause confusion. | Try to keep language and terminology consistent throughout the document. |