



ACCC Draft Decision

Essential Services Commission (Victoria) accreditation application

23 July 2019

Version Control

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Version 1

Contents

ACCC Draft Decision	0
1. Introduction	2
1.1. Essential Services Commission (Victoria) Application	2
1.2. Background.....	2
1.3. Application requirements and assessment criteria	3
1.4. Timeframes and consultation process.....	3
1.4.1. Decision Process	3
1.4.2. Consultation process and submissions	4
1.4.3. Term and commencement date of accreditation	4
2. ACCC assessment of the ESCV application.....	4
3. Proposed conditions of accreditation.....	5
3.1. Application of pricing principles	6
3.2. Provision of information to the ACCC.....	6
4. ACCC Draft Decision	7
Attachment A: ESCV Accreditation Application	8
Attachment B: Schedule 4, Water Charge Infrastructure Rules 2010	35
Attachment C: Basin Water Charging Objectives and Principles (Schedule 2, <i>Water Act 2007</i>)	36
Attachment D – How to make a submission	39

1. Introduction

1.1. Essential Services Commission (Victoria) Application

On 12 June 2019, the Essential Services Commission (Victoria) (ESCV) submitted its application for accreditation under Part 9 of the Water Charge (Infrastructure) Rules 2010 (WCIR) for the period 17 February 2022 to 16 February 2032 (See **Attachment A**). Accreditation will allow the ESCV to approve and determine the regulated charges of Part 6 and 7 operators in that Basin State.

The ESCV is currently the accredited regulator, with the ACCC having approved its previous accreditation application for the 17 February 2012 to 16 February 2022 period.

The only Part 6 operators in Victoria currently are Goulburn-Murray Water (GMW) and Lower Murray Water (LMW). There are no Part 7 operators.

1.2. Background – Accreditation for transition

In September 2016, the ACCC submitted its Final Advice on the Water Charge Rules to the Minister for Agriculture and Water Resources. The ACCC published this advice in November 2016.

The Final Advice recommended significant changes to the regulation of the infrastructure charges of Part 6 operators. This included:

- changing the definition of who is a Part 6 operator
- abolishing the accreditation process (Part 9 of the WCIR)
- giving back the regulation of infrastructure charges for Part 6 operators to Basin States provided that the minimum standards set out in the amended rules are met.

The Final Advice also provided for transitional arrangements between the regulation of Part 6 operators under the current and proposed rules. These arrangements provided for a transition period allowing Basin State regulators to continue to regulate Part 6 operators:

- until the end of the latest regulatory period for which the regulator had determined or approved an operator's charges before the commencement date of the amended rules
- if an application for approval or determination of charges had been made before but not approved or determined by the commencement date, to the end of the regulatory period for which the application was made.

At the end of the transition period, the regulator in each Basin state (would set the infrastructure charges of these regulated businesses under state legislation provided that the state law meets the minimum standards mentioned above. Otherwise, the ACCC will be the regulator.

On 3 April 2019, the Minister amended the current water charge rules. These amendments included those set out above. The amended rules will commence on 1 July 2020.

To be the regulator for Part 6 (and Part 7) operators in Victoria for the entire transition period, the ESCV must be accredited for at least that period, (that is until 30 June 2024).¹ Without further accreditation this will not occur² and the ACCC would regulate GMW and LMW under Part 6 of the WCIR for the remainder of the transition period. After which their infrastructure charges would be regulated as noted above.

1.3. Application requirements and assessment criteria

In assessing an application for accreditation, the ACCC is required to consider whether: (a) the application is valid, and (b) whether it satisfies the requirements in Schedule 5, WCIR.

For an application to be valid, it must:

- be in writing
- include the information set out in Schedule 4, WCIR (See **Attachment B**)
- be accompanied by evidence in writing that the application has the support of the Minister, or Head of a Department responsible for that agency.³
- for the renewal of accreditation (which the ESCV application is), the application must be made at least two years before the expiration of current accreditation arrangements.⁴

Schedule 4 requires the application to contain, among other necessary information a statement as to whether the criteria in Schedule 5 are satisfied.⁵

Schedule 5 requires that certain provisions of the WCIR which allow for Basin States to regulate Part 6 and Part 7 operators (the 'applied provisions') must apply and be in force in the relevant state before lodging the formal accreditation application.⁶

Under Rule 59, the ACCC can place terms and conditions not inconsistent with the WCIR or the applied provisions, and which contribute to Basin water charging objectives and principles (See **Attachment C**) on the accredited agency as a condition of accreditation.⁷

1.4. Timeframes and consultation process

1.4.1. Decision Process

Under Rule 63, within three months of receiving an accreditation application (not including time periods where the ACCC has requested but not received further information from the operator), the ACCC must publish and consult on a draft decision and approve or refuse to approve the application.⁸

The ACCC intends to publish its final decision in relation to the application by 11 September 2019.

¹ LMW's transition periods will end on 30 June 2023. GMW's transition period will end on 30 June 2024. The ESCV's current accreditation expires on 16 June 2022.

² The ESCV's current accreditation expires on 16 June 2022.

³ Water Charge (Infrastructure) Rules 2010 (WCIR), Rule 60(1)-(2).

⁴ WCIR, Rule 69.

⁵ WCIR, Schedule 5(5).

⁶ Under rule 59(2), applied provisions means the following provisions of the WCIR: (a) Divisions 2,3 and 4 of Part 6 (b) Division 2 of Part 7 (c) Division 1 of Part 8 (d) Schedules 1 ,2 and 3.

⁷ WCIR, Rule (59(1)(c).

⁸ The ACCC can extend this decision-making period (by a month at a time) if it is unable to make a decision within this timeframe. To do so it must provide written notice to the agency, explaining why it has been unable to make its decision within the required period [Rule 64(4), WCIR].

1.4.2. Consultation process and submissions

Rule 62 requires the ACCC to publish the application and its draft decision (including the proposed conditions) and invite interested parties to make submissions to the ACCC.

The ACCC invites written submissions on this draft decision including the proposed conditions by 23 August 2019.

For information on how to make a submission, please see **Attachment D**.

1.4.3. Term and commencement date of accreditation

Rule 68 provides that the accreditation period must be for ten years from its commencement date (unless revoked by the ACCC beforehand). The ACCC proposes the commencement date of 17 February 2022 as this will allow continuity with the previous accreditation period (and was the period the ESCV proposed in its application).

2. ACCC assessment of the ESCV application

The ACCC is satisfied that the ESCV application meets the requirements under Rules 60 and 62, WCIR and that it satisfies the conditions in Schedule 5, WCIR. Table 1 below sets out why the ACCC considers that the ESCV application meets the criteria set out in Schedule 5 of the WCIR.

Schedule 5 criteria	Assessment
(1) There must be a law of the State: (a) under which the applied provisions are a law of the State; and (b) that includes provision to the effect that the applied provisions operate in the State only during such period or periods as an accreditation of arrangements under Part 9 has effect.	<p>The ACCC is satisfied this requirement is met by section 4K of the Water Industry Act 1994 (WI Act) and section 10(m) of the Essential Services Commission Act 2001 (ESC Act)</p> <p>Section 4K, WI Act: Application of Commonwealth provisions</p> <p>In respect of Basin water charges, the Commonwealth provisions apply as a law of the State.</p> <p>The Commonwealth provisions are the applied provisions under the WCIR. See: section 4J, WI Act – ‘Commonwealth provisions’).</p> <p>Section 10, ESC Act 2001: Functions of the Commission</p> <p>The functions of the Commission are—</p> <p>(m) if, under Part 1B of the Water Industry Act 1994, the Commonwealth provisions (within the meaning of that Part) are applied as a law of the State, to perform the functions conferred on the Commission as the State Agency under those provisions.</p>
(2) The functions of the State Agency must include the functions conferred on a Regulator under the applied provisions.	<p>The ACCC is satisfied this requirement is met by section 10 of the ESC Act and section 4M of the WI Act.</p>

	<p>Section 10(m), ESC Act – See above.</p> <p>Part 1B - Section 4M, WI Act: Powers of Commission</p> <p>The Commission has all the powers that are necessary to perform its functions as a State Agency under the applied Victorian provisions.</p> <p>The Commission is the Essential Services Commission (Victoria) – section 3, WI Act.</p> <p>The applied Victorian provisions are the applied provisions under the WCIR (See: Section 4J, WI Act – ‘applied Victorian provisions’ and ‘Commonwealth provisions’).</p>
<p>(3) The State Agency must not be subject to the direction or control of a Minister of the State in carrying out its functions under the applied provisions.</p>	<p>The ACCC is satisfied this requirement is met by section 12 of the <i>ESC Act</i>.</p> <p>Section 12, ESC Act: Commission not subject to direction or control</p> <p>Except as provided by or under this Act or any other Act, the Commission is not subject to the direction or control of the Minister.</p>
<p>(4) The State Agency must not be, or have a relevant interest in, a Part 6 operator or a Part 7 operator.</p>	<p>There are currently two Part 6 operators in Victoria (that is, GMW and LMW). The ACCC is satisfied that the ESCV does not have a relevant interest in these operators.</p> <p>There are no Part 7 operators in Victoria.</p>

3. Proposed conditions of accreditation

Rule 59(1) provides that the following conditions apply to any accreditation arrangement:

- that the applied provisions apply as a law of the State and are in force
- that the approval or determination of regulated charges of all Part 6 and 7 operators relating to State water resources of that state must be carried out by the accredited agency in accordance with the accredited arrangements and applied provisions.

The ACCC may also impose such terms, conditions and obligations on the accreditation provided they:

- are not inconsistent with the rules or applied provisions
- contribute to achieving Basin water charging objectives and principles as set out in schedule 2 of the *Water Act 2007*.

The ACCC proposes to:

- remove the condition imposed on the ESCV in the current accreditation period to apply the pricing principles, as published by the ACCC from time to time (as explained in section 3.1).

- maintain the condition imposed on the ESCV in the current accreditation period to provide to the ACCC information relevant to the ESCV carrying out its functions under the accredited arrangements upon request (as explained in section 3.2).

3.1. Application of pricing principles

For the current accreditation period, the ACCC imposed a condition requiring the ESCV to apply the ACCC's Pricing Principles when setting the infrastructure charges of Part 6 operators. These Pricing Principles outline the methodology the ACCC or an accredited regulator will apply in making an approval or determination. In making this condition, the ACCC considered that its application would help the ACCC and accredited regulators achieve consistency in how decisions are made, therefore contributing to Basin water charging principles.

However, for this accreditation, the ACCC proposes to remove this condition. The ACCC has not amended its Pricing Principles since releasing them in 2011. The ACCC is unlikely to update its Pricing Principles soon, given the ACCC's intention to return regulation to the Basin States.⁹ Hence the Pricing Principles may to an extent be less current and may not be appropriate in their entirety in setting GMW and LMW's future regulated charges. Therefore the Pricing Principles should no longer be mandated. Rather the Pricing Principles should be for guidance only to the extent that the regulator finds them relevant.

The ACCC also considers that removing this condition may assist with the transition of the ESCV's regulation of GMW and LMW's infrastructure charges from Part 6 to state law.

3.2. Provision of information to the ACCC

The ACCC proposes to:

- require the ESCV to provide to the ACCC, information it obtains or produces in carrying out its functions under the accredited arrangements
- allow the ACCC to nominate the information to be produced, the form of the information and when the information is to be provided.

The ACCC requires the ability to access information the ESCV produces or obtains, in order for it to:

- carry out its role to ensure that accreditation requirements are complied with
- identify and respond to contraventions of the water charge rules
- assist the ACCC in its statutory role to provide the Minister advice regarding the content of the water charge rules or any possible revocation.

While some of this information will be publicly available, some information may not be. The ACCC therefore considers that a condition on the accredited regulator to provide the ACCC this information is essential for the ACCC to carry out its roles under the WCIR.

The context in which the information is required will determine how the information contributes to the Basin water charging objectives and principles (BWCOPs). For example, if the ACCC does not have information on which to investigate a breach of a rule, it may not be able to take compliance action, which could lead to perverse pricing outcomes. This would be in conflict with objective (e) of the BWCOP. A breach of the rules where the ACCC cannot take action due to lack of information may create a barrier to trade between Basin areas and

⁹ Provided minimum standards are met. See: ACCC, *Review of the Water Charge Rules Final Advice*, September 2016, pp. 146-147.

could lead to the inefficient use of water resources and water infrastructure assets. This would be in conflict with objective (a) (i) and (ii) of the BWCOPs.

The ACCC may revoke the accreditation arrangements if the ESCV fails to comply with any conditions specified¹⁰, fails to comply with the accredited arrangements in a material respect¹¹ or the accreditation arrangements no longer satisfy schedule 5.

4. ACCC Draft Decision

The ACCC's draft decision is to approve the ESCV's application for accreditation arrangements under Part 9 of the WCIR. In accordance with ss. 92(g) and (h) of the *Water Act 2007* and rule 59(1)(c) of the WCIR, the ACCC proposes that in carrying out its functions under the accredited arrangements:

(a) The ESCV must provide to the ACCC information relevant to the ACCC carrying out its functions under the accredited arrangements upon request.

Information obtained or produced by the ESCV in carrying out functions under arrangements accredited under Part 9 of the WCIR must be provided to the ACCC on request by an ACCC officer.

The ACCC may nominate the requested information, the form in which the information is to be provided and when it is to be provided.

¹⁰ WCIR, Rule 67(1)(b).

¹¹ WCIR, Rule 67(1)(b).

Attachment A: ESCV Accreditation Application



12/06/2019

C/19/6783

Mr Rod Sims
Chairman
GPO BOX 520
MELBOURNE VIC 3001

Dear Mr Sims,

ESSENTIAL SERVICES COMMISSION (VIC) APPLICATION FOR ACCREDITATION

I am writing to apply for accreditation of arrangements for the Essential Services Commission (Victoria) to approve or determine regulated charges of Part 6 operators and Part 7 operators relating to State water resources. This letter covers attachments that contain information relevant to the application as set out in the *Water Charge (Infrastructure) Rules 2010*.

The arrangements to be accredited are set out in the *Water Legislation Amendment (Water Infrastructure Charges) Act 2011 (Vic)*, a copy of which is at Attachment A.

Attachment B addresses the criteria set out in Schedule 4 (Information to be included in an application under Part 9) of the *Water Charge (Infrastructure) Rules 2010*.

At Attachment C is evidence that the application has support of the Head of the Department with responsibility for the Essential Services Commission, the Department of Treasury and Finance. This is included to comply with rule 60 (2)(c) of the *Water Charge (Infrastructure) Rules 2010*. Also at Attachment C is a letter of support from the Head of the Department of Environment, Land, Water and Planning.

I trust this information is sufficient. Your staff can contact Angeline Bilas on angeline.bilas@esc.vic.gov.au or (03) 9032 1383 if they have any queries.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Kate Symons".

Kate Symons
Acting Chairperson

ATTACHMENT A – LEGISLATION

**Water Legislation Amendment (Water
Infrastructure Charges) Act 2011
No. 63 of 2011**

TABLE OF PROVISIONS

<i>Section</i>	<i>Page</i>
PART 1—PRELIMINARY	1
1 Purposes	1
2 Commencement	2
PART 2—AMENDMENT OF THE WATER INDUSTRY ACT 1994	3
3 New section inserted after section 4	3
4AA Parts 1A and 1B to prevail	3
4 New section inserted after section 4A	3
4AB Non application to Basin water charges	3
5 Application of Essential Services Commission Act 2001	3
6 Insertion of new Part after Part 1A	4
PART 1B—APPROVAL OR DETERMINATION OF BASIN WATER CHARGES	4
4J Interpretation	4
4K Application of Commonwealth provisions	6
4L Commission is State Agency	6
4M Powers of Commission	6
4N Cessation of effect of provisions	6
4O Power of Commission to apply for accreditation	7
4P Notification of accreditation etc.	7
4Q Recovery of Commission's costs	8
PART 3—AMENDMENT OF THE ESSENTIAL SERVICES COMMISSION ACT 2001 AND THE WATER ACT 1989	10
7 Functions of the Commission— Essential Services Commission Act 2001	10
8 Insertion of new section after section 10— Essential Services Commission Act 2001	10
10A Commission's functions in relation to particular Basin water charges	10
9 Insertion of definition in Water Act 1989	11
10 Objections to tariffs or fees— Water Act 1989	11
11 Objections to required payments— Water Act 1989	12

<i>Section</i>	<i>Page</i>
PART 4—REPEAL OF AMENDING ACT	13
12 Repeal of amending Act	13
ENDNOTES	14



Victoria

Water Legislation Amendment (Water Infrastructure Charges) Act 2011[†]

No. 63 of 2011

[Assented to 15 November 2011]

The Parliament of Victoria enacts:

PART 1—PRELIMINARY

1 Purposes

The main purposes of this Act are—

- (a) to amend the **Water Industry Act 1994**—
 - (i) to apply certain provisions of the Water Charge (Infrastructure) Rules 2010 of the Commonwealth as a law of the State to enable the Essential Services Commission, established under the **Essential Services Commission Act**

Water Legislation Amendment (Water Infrastructure Charges) Act 2011
No. 63 of 2011

Part 1—Preliminary

s. 2

2001, to approve or determine charges for the provision of certain water services in the State; and

(ii) to enable the Essential Services Commission to apply for accreditation of those arrangements by the Australian Competition and Consumer Commission; and

(b) to make related and consequential amendments to that Act and other Acts.

2 Commencement

This Act comes into operation on the day after the day on which this Act receives the Royal Assent.

**PART 2—AMENDMENT OF THE WATER INDUSTRY ACT
1994**

3 New section inserted after section 4

After section 4 of the **Water Industry Act 1994**
insert—

"4AA Parts 1A and 1B to prevail

If there is any inconsistency between a provision of Part 1A or Part 1B and a provision of the **Essential Services Commission Act 2001** or the **Water Act 1989**, the provision of Part 1A or Part 1B prevails to the extent of that inconsistency."

See:
Act No.
121/1994.
Reprint No. 6
as at
29 February
2008
and
amending
Act Nos
15/2008,
68/2009,
69/2009,
6/2010 and
29/2010.
LawToday:
www.
legislation.
vic.gov.au

4 New section inserted after section 4A

After section 4A of the **Water Industry Act 1994**
insert—

"4AB Non application to Basin water charges

- (1) This Part does not apply to any approving or determining of a Basin water charge.
- (2) In this section *Basin water charge* has the same meaning as in Part 1B."

5 Application of Essential Services Commission Act 2001

- (1) In section 4B(1)(a) of the **Water Industry Act 1994**, for "this Act" substitute "Part 1A of this Act".
- (2) Section 4B(3) of the **Water Industry Act 1994** is repealed.

6 Insertion of new Part after Part 1A

After Part 1A of the **Water Industry Act 1994**
insert—

"PART 1B—APPROVAL OR DETERMINATION OF BASIN WATER CHARGES

4J Interpretation

(1) In this Act—

accredited arrangements has the same meaning as in the Commonwealth Water Charge Rules;

applied Victorian provisions means the Commonwealth provisions as applied under section 4K;

Basin water charge means a regulated charge for a service in relation to Basin water resources provided by a Part 6 operator or Part 7 operator;

Basin water resources has the same meaning as *State water resources* has in the Commonwealth Water Charge Rules in relation to Victoria;

Commonwealth provisions has the same meaning as *applied provisions* has in rule 59(2) of the Commonwealth Water Charge Rules;

Commonwealth Water Charge Rules means the Water Charge (Infrastructure) Rules 2010 of the Commonwealth;

Part 6 operator has the same meaning as in the Commonwealth Water Charge Rules;

Part 7 operator has the same meaning as in the Commonwealth Water Charge Rules;

regulated charge has the same meaning as in the Commonwealth Water Charge Rules;

State Agency has the same meaning as in the Commonwealth Water Charge Rules.

- (2) Section 3(2) and (3) does not apply to this Part.
- (3) The **Interpretation of Legislation Act 1984** does not apply to the applied Victorian provisions.
- (4) The Acts Interpretation Act 1901 of the Commonwealth applies to the applied Victorian provisions to the same extent that that Act applies to the Commonwealth Water Charge Rules, and as if—
 - (a) that Act, as so applied, were enacted as a law of Victoria; and
 - (b) the applied Victorian provisions were an Act and each rule of the applied Victorian provisions were a section of an Act.

Note

See section 5 of the Water Act 2007 of the Commonwealth as to the application of the Acts Interpretation Act 1901 of the Commonwealth.

- (5) The following provisions apply to the applied Victorian provisions—
 - (a) any expressions used in the applied Victorian provisions have the same meaning as in the Water Act 2007 of the Commonwealth and the Water

Regulations 2008 of the
Commonwealth; and

(b) the applied Victorian provisions must be read consistently with the Water Act 2007 of the Commonwealth and must be read so as not to exceed the rule making power in section 92 of that Act and any other ancillary rule making powers in that Act.

(6) If a provision of the applied Victorian provisions would, but for subsection (4) or (5), be construed as exceeding the rule making powers referred to in subsection (5)(b), the provision is taken to have effect to the extent that it does not exceed that rule making power.

4K Application of Commonwealth provisions

In respect of Basin water charges, the Commonwealth provisions apply as a law of the State.

4L Commission is State Agency

For the purposes of rule 59(1)(b) of the Commonwealth Water Charge Rules and the applied Victorian provisions, the Commission is specified as the State Agency.

4M Powers of Commission

The Commission has all the powers that are necessary to perform its functions as a State Agency under the applied Victorian provisions.

4N Cessation of effect of provisions

Sections 4K, 4L and 4M do not have effect if this Part is not accredited arrangements.

4O Power of Commission to apply for accreditation

- (1) The Commission may apply to the Australian Competition and Consumer Commission for this Part to be accredited as accredited arrangements.
- (2) In addition to subsection (1), the Commission has the power to do anything necessary for this Part to be accredited as accredited arrangements.

4P Notification of accreditation etc.

- (1) If the Australian Competition and Consumer Commission approves this Part as accredited arrangements, within 7 days after that approval, the Commission must publish notice of that approval in the Government Gazette.
- (2) A notice under subsection (1) must include—
 - (a) publication of the Australian Competition and Consumer Commission's decision to approve the arrangements; and
 - (b) the date on which the decision of the Australian Competition and Consumer Commission came into effect.
- (3) If the Australian Competition and Consumer Commission revokes accreditation of this Part as accredited arrangements, within 7 days after that revocation, the Commission must publish notice of that revocation in the Government Gazette.

-
- (4) A notice under subsection (3) must include—
- (a) publication of the Australian Competition and Consumer Commission's decision to revoke accreditation of this Part as accredited arrangements; and
 - (b) the date on which the decision of the Australian Competition and Consumer Commission came into effect.
- (5) If accreditation of this Part as accredited arrangements ceases to have effect under the Commonwealth Water Charge Rules, within 7 days after that ceasing to have effect, the Commission must publish notice of that ceasing to have effect in the Government Gazette.
- (6) A notice under subsection (5) must include the date on which the accredited arrangements cease to have effect.

4Q Recovery of Commission's costs

- (1) The Minister administering the **Essential Services Commission Act 2001** must determine the amount to be contributed by each Part 6 operator or Part 7 operator towards the costs that are incurred or are likely to be incurred by the Commission in the exercise of its powers and the performance of its functions and duties under the applied Victorian provisions.
- (2) The amount that a Part 6 operator or Part 7 operator is to contribute under subsection (1) is payable at the intervals and in the amounts determined by the Minister administering the **Essential Services Commission Act 2001**.

-
- (3) The Minister administering the **Essential Services Commission Act 2001** must give notice in writing of any determination made by the Minister under subsection (1) or (2) to a Part 6 operator or Part 7 operator to whom the determination applies.
- (4) The Minister administering the **Essential Services Commission Act 2001** must not make a determination under subsection (1) or (2) unless the Minister has first consulted with the Minister administering this section.

_____".

**PART 3—AMENDMENT OF THE ESSENTIAL SERVICES
COMMISSION ACT 2001 AND THE WATER ACT 1989**

See:
Act No.
62/2001.
Reprint No. 3
as at
1 July 2008
and
amending
Act Nos
70/2007,
6/2010 and
40/2011.
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legislation.
vic.gov.au

**7 Functions of the Commission—Essential Services
Commission Act 2001**

In section 10 of the **Essential Services
Commission Act 2001**—

(a) in paragraph (l), for "2007." substitute
"2007;"

(b) after paragraph (l) insert—

"(m) if, under Part 1B of the **Water
Industry Act 1994**, the
Commonwealth provisions (within the
meaning of that Part) are applied as a
law of the State, to perform the
functions conferred on the Commission
as the State Agency under those
provisions."

**8 Insertion of new section after section 10—Essential
Services Commission Act 2001**

After section 10 of the **Essential Services
Commission Act 2001** insert—

**"10A Commission's functions in relation to
particular Basin water charges**

The following provisions do not apply to the
functions of the Commission referred to in
section 10(m)—

(a) sections 8, 8A and 26; and

(b) Part 4 (other than sections 37 and 38 to
the extent necessary for the operation of
Part 5); and

(c) Part 7 (other than sections 61 and 64).

Note

Parts 3, 3A and 6 do not apply to the Commission's function under section 10(m) because that function does not relate to a regulated industry."

9 Insertion of definition in Water Act 1989

Insert the following definition in section 3(1) of the **Water Act 1989**—

"Essential Services Commission means the Essential Services Commission established under the **Essential Services Commission Act 2001**;"

See:
Act No.
80/1989.
Reprint No. 10
as at
1 January
2011
and
amending
Act Nos
50/2010 and
29/2011.
LawToday:
www.
legislation.
vic.gov.au

10 Objections to tariffs or fees—Water Act 1989

After section 266(7) of the **Water Act 1989**
insert—

"(8) A person is not entitled to object under subsection (1) to a tariff or the imposing of a fee under a tariff set by an Authority, if the tariff or the fee is a Basin water charge.

(9) In this section—

Basin water charge means a regulated charge for a service in relation to Basin water resources provided by an Authority;

Basin water resources has the same meaning as *State water resources* has in the Water Charge (Infrastructure) Rules 2010 of the Commonwealth in relation to Victoria;

regulated charge has the same meaning as in the Water Charge (Infrastructure) Rules 2010 of the Commonwealth."

11 Objections to required payments—Water Act 1989

After section 271(4) of the **Water Act 1989**
insert—

"(5) A person is not entitled to object under subsection (1) to a payment the person is required to make under section 268, 269 or 270, if the payment is a Basin water charge.

(6) In this section—

Basin water charge means a regulated charge for a service in relation to Basin water resources provided by an Authority;

Basin water resources has the same meaning as *State water resources* has in the Water Charge (Infrastructure) Rules 2010 of the Commonwealth in relation to Victoria;

regulated charge has the same meaning as in the Water Charge (Infrastructure) Rules 2010 of the Commonwealth."

PART 4—REPEAL OF AMENDING ACT

12 Repeal of amending Act

This Act is **repealed** on the first anniversary of its commencement.

Note

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).

Water Legislation Amendment (Water Infrastructure Charges) Act 2011
No. 63 of 2011

Endnotes

EndnoteS

ENDNOTES

ATTACHMENT B – SCHEDULE 4 CRITERIA

4(1) The name and address of the applicant.

Essential Services Commission

Level 37
2 Lonsdale Street
Melbourne Victoria 3000

4(2) The title of the State Act under which the applicant is established or appointed.

The Essential Services Commission Act 2001 (Vic).

4(3) The title of the State Act under which the applied provisions are applied as a law of the State.

Part 1B of the Water Industry Act 1994 (Vic) (WI Act)

4(4) The public purpose for which the applicant is established or appointed.

Whereas section 8 of the *Essential Services Commission Act 2001* (Vic) sets out the Commission's purpose for regulating Victoria's "regulated industries"¹, this purpose will not apply when the Essential Services Commission (ESC) is approving or determining Basin water charges under Part 1B of the *Water Industry Act 1994* in accordance with the Rules. Section 8 of the *Essential Services Commission Act 2001* is expressly disapplied in this circumstance so as to avoid any inconsistency with the ESC's obligation to apply the *Water Charging Objectives and Principles* in Schedule 2 of the *Water Act 2007* (Cth).

10 Functions of the Commission

The functions of the Commission are—

(a) to perform such functions as are conferred by this Act and the relevant legislation under which a regulated industry operates;

¹ Section 8 of the *Essential Services Commission Act 2001* provides as follows:

8 Objective of the Commission

(1) In performing its functions and exercising its powers, the objective of the Commission is to promote the long term interests of Victorian consumers.

(2) Without derogating from subsection (1), in performing its functions and exercising its powers in relation to essential services, the Commission must in seeking to achieve the objective specified in subsection (1) have regard to the price, quality and reliability of essential services.

- (b) to advise the Minister on matters relating to the economic regulation of regulated industries, including reliability issues;
- (c) when requested by the Minister to do so, to conduct an inquiry into any systemic reliability of supply issues related to a regulated industry or other essential service specified by the Minister in the request;
- (d) to conduct inquiries and report under Part 5 on matters relating to regulated industries;
- (e) to make recommendations to the Minister as to whether an industry which provides an essential service should become a regulated industry or whether a regulated industry should continue to be a regulated industry;
- (f) to conduct public education programs—
- for the purpose of promoting its objectives under this Act and the relevant legislation; and
 - in relation to significant changes in the regulation of a regulated industry;
- (g) to advise the Minister in relation to any other matter referred to the Commission by the Minister;
- (h) to administer this Act;
- (i) to perform the functions conferred on the Commission by or under Part VI of the Transport Act 1983;
- (j) to perform the functions conferred on the Commission by the Victorian Renewable Energy Act 2006;
- (k) to perform the functions conferred on the Commission by the Victorian Energy Efficiency Target Act 2007;
- (l) to perform the functions conferred on the Commission by the Accident Towing Services Act 2007;
- (m) if, under Part 1B of the *Water Industry Act 1994*, the Commonwealth provisions (within the meaning of that Part) are applied as a law of the State, to perform the functions conferred on the Commission as the State Agency under those provisions".

4(5) A statement as to whether the criteria set out in Schedule 5 are satisfied.

The criteria and a statement setting out how they are satisfied are below.

Schedule 5 Criteria for accreditation of arrangements

5(1) There must be a law of the State:

(a) under which the applied provisions are a law of the State; and

(b) that includes provision to the effect that the applied provisions operate in the State only during such period or periods as an accreditation of arrangements under Part 9 has effect.

The "applied provisions" are a law of the State pursuant to section 4K of the *Water Industry Act 1994 (Vic)*.

Section 4K will not apply unless the ESC obtains accreditation for arrangements under Part 9 of the *Water Charge (Infrastructure) Rules 2010 (Cth)* (refer to section 4N of the *Water Industry Act 1994 (Vic)*). Therefore the applied provisions will operate in Victoria only during such period or periods as an accreditation of arrangements under Part 9 of the Rules has effect.

Further, Section 10(m) of the ESC Act provides that the Commission's functions under the applied provisions apply only where the accredited arrangements have effect.

5(2) The functions of the State Agency must include the functions conferred on a Regulator under the applied provisions.

The functions of the ESC include the functions conferred on a Regulator under the "applied provisions" as set out in the following sections.

(a) Section 10 of the *Essential Services Commission Act 2001 (Vic)*: "the functions of the Commission are- ...

(a) ... (l)....

(m) if, under Part 1B of the *Water Industry Act 1994*, the Commonwealth provisions (within the meaning of that Part) are applied as a law of the State, to perform the functions conferred on the Commission as the State Agency under those provisions".

(b) Section 4M of the *Water Industry Act 1994 (Vic)*: "the Commission has all the powers that are necessary to perform its functions as a State Agency under the applied Victorian provisions", where "applied Victorian provisions" means the applied provisions.

5(3) The State Agency must not be subject to the direction or control of a Minister of the State in carrying out its functions under the applied provisions.

Section 12 of the *Essential Services Commission Act 2001* (Vic) will apply when the ESC is carrying out its functions under the applied provisions. Section 12 provides that-

“Except as provided by or under this Act or any other Act, the Commission is not subject to the direction or control of the Minister”

There is not a provision under any of the Acts relevant to the ESC's powers and functions to approve or determine Basin water charges that would make the ESC subject to the direction or control of a Minister in carrying out its functions under the "applied provisions".

5(4) The State Agency must not be, or have a relevant interest in, a Part 6 operator or a Part 7 operator.

The ESC is not a Part 6 or Part 7 operator as it does not provide water infrastructure services. The ESC also does not have a "relevant interest" in such an operator.

4(6) The arrangements for which the applicant seeks accreditation, being arrangements for approving or determining regulated charges of Part 6 operators and Part 7 operators under the applied provisions.

The arrangements for which the Essential Services Commission is applying for accreditation are those prescribed in Part 1B of the *Water Industry Act 1994*, and in particular, section 4K of that Act.

[†] *Minister's second reading speech—*

Legislative Assembly: 12 October 2011

Legislative Council: 27 October 2011

The long title for the Bill for this Act was "A Bill for an Act to amend the **Water Industry Act 1994** to apply certain provisions of the Water Charge (Infrastructure) Rules 2010 of the Commonwealth as a law of Victoria to enable the Essential Services Commission to approve or determine charges for the provision of certain water services in the State and to make related and consequential amendments to that Act and other Acts and for other purpose

ATTACHMENT C – LETTERS OF SUPPORT



Department of Treasury and Finance

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DX210759

Mr Rod Sims
Chairman
Australian Competition and Consumer Commission
GPO BOX 520
MELBOURNE VIC 3001

Dear Mr Sims

**ESSENTIAL SERVICES COMMISSION'S APPLICATION FOR ACCREDITATION
FROM THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

The Department of Treasury and Finance supports the accreditation of Part 1B of the *Water Industry Act 1994 (Vic)* by the Australian Competition and Consumer Commission (ACCC), to enable the Essential Services Commission (ESC) to continue to undertake pricing determinations for rural water corporations in Northern Victoria in accordance with the *Water Charge (Infrastructure) Rules 2010 (Cth)*.

I am pleased that the ACCC and ESC are working cooperatively on this matter to ensure the continuation of consistent water regulation across all Victorian regions.

Yours sincerely

David Martine
Secretary

5/6/2019





Department of Environment,
Land, Water and Planning

PO Box 500, East Melbourne,
Victoria 8002 Australia
delwp.vic.gov.au

Mr Rod Sims
Chair
Australian Competition and Consumer Commission
GPO BOX 520
MELBOURNE VIC 3001

Ref SBR010373



Dear Mr Sims *Rod*

**ESSENTIAL SERVICES COMMISSION'S APPLICATION FOR ACCREDITATION OF THE
VICTORIAN LEGISLATIVE FRAMEWORK**

The Department of Environment, Land, Water and Planning (DELWP) supports the accreditation of Part 1B of the *Water Industry Act 1994* by the Australian Competition and Consumer Commission (ACCC), to enable the Essential Services Commission (ESC) to continue to undertake pricing determinations for rural water corporations in Northern Victoria in accordance with the *Water Charge (Infrastructure) Rules 2010*.

DELWP endorse the ESC continuing to act as a single economic regulator of the water sector in Victoria. I understand that DELWP has been working cooperatively with officers of the ACCC, ESC and the Department of Agriculture and Water Resources on this matter.

I look forward to receiving notice from you that the ESC has been successful in its application for the accreditation of the Victorian legislative arrangements under the *Water Charge (Infrastructure) Rules 2010*.

Yours sincerely

John Bradley
Secretary

25/5/19

Attachment B: Schedule 4, Water Charge Infrastructure Rules 2010: Information to be included in an application under Part 9

(Rule 60)

- (1) The name and address of the applicant.
- (2) The title of the State Act under which the applicant is established or appointed.
- (3) The title of the State Act under which the applied provisions are applied as a law of the State.
- (4) The public purpose for which the applicant is established or appointed.
- (5) A statement as to whether the criteria set out in Schedule 5 are satisfied.
- (6) The arrangements for which the applicant seeks accreditation, being arrangements for approving or determining regulated charges of Part 6 operators and Part 7 operators under the applied provisions.

Attachment C: Basin Water Charging Objectives and Principles (Schedule 2, *Water Act 2007*)

Part 1—Preliminary

1 Objectives and principles

This Schedule sets out:

- (a) the Basin water charging objectives; and
- (b) the Basin water charging principles.

Note 1: These objectives and principles are relevant to the formulation of water charge rules under section 92 of this Act.

Note 2: These objectives and principles are based on those set out in clauses 64 to 77 of the National Water Initiative when Part 2 of this Act commences.

Part 2—Water charging objectives

2 Water charging objectives

The *water charging objectives* are:

- (a) to promote the economically efficient and sustainable use of:
 - (i) water resources; and
 - (ii) water infrastructure assets; and
 - (iii) government resources devoted to the management of water resources; and
- (b) to ensure sufficient revenue streams to allow efficient delivery of the required services; and
- (c) to facilitate the efficient functioning of water markets (including inter-jurisdictional water markets, and in both rural and urban settings); and
- (d) to give effect to the principles of user-pays and achieve pricing transparency in respect of water storage and delivery in irrigation systems and cost recovery for water planning and management; and
- (e) to avoid perverse or unintended pricing outcomes.

Part 3—Water charging principles

3 Water storage and delivery

- (1) Pricing policies for water storage and delivery in rural systems are to be developed to facilitate efficient water use and trade in water entitlements.
- (2) Water charges are to include a consumption-based component.
- (3) Water charges are to be based on full cost recovery for water services to ensure business viability and avoid monopoly rents, including recovery of environmental externalities where feasible and practical.

- (4) Water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.
- (5) In subclause (4):

upper bound pricing means the level at which, to avoid monopoly rents, a water business should not recover more than:

 - (a) the operational, maintenance and administrative costs, externalities, taxes or tax equivalent regimes; and
 - (b) provision for the cost of asset consumption; and
 - (c) provision for the cost of capital (calculated using a weighted average cost of capital).
- (6) If full cost recovery is unlikely to be achieved and a Community Service Obligation is deemed necessary:
 - (a) the size of the subsidy is to be reported publicly; and
 - (b) where practicable, subsidies or Community Service Obligations are to be reduced or eliminated.
- (7) Pricing policies should ensure consistency across sectors and jurisdictions where entitlements are able to be traded.

4 Cost recovery for planning and management

- (1) All costs associated with water planning and management must be identified, including the costs of underpinning water markets (such as the provision of registers, accounting and measurement frameworks and performance monitoring and benchmarking).
- (2) The proportion of costs that can be attributed to water access entitlement holders is to be identified consistently with the principles set out in subclauses (3) and (4).
- (3) Water planning and management charges are to be linked as closely as possible to the costs of activities or products.
- (4) Water planning and management charges are to exclude activities undertaken for the Government (such as policy development and Ministerial or Parliamentary services).
- (5) States and Territories are to report publicly on cost recovery for water planning and management annually. The reports are to include:
 - (a) the total cost of water planning and management; and
 - (b) the proportion of the total cost of water planning and management attributed to water access entitlement holders, and the basis upon which this proportion is determined.

5 Environmental externalities

- (1) Market-based mechanisms (such as pricing to account for positive and negative environmental externalities associated with water use) are to be pursued where feasible.
- (2) The cost of environmental externalities is to be included in water charges where found to be feasible.

6 Benchmarking and efficiency reviews

- (1) Independent and public benchmarking or efficiency reviews of pricing and service quality relevant to regulated water charges is or are to be undertaken based on a nationally consistent framework.
- (2) The costs of operating these benchmarking and efficiency review systems are to be met through recovery of regulated water charges.

Attachment D – How to make a submission

In accordance with rule 62(2) and to foster an informed consultation process, we will consider all submissions received as public submissions and we will publish them on the ACCC's website. However, if the submitter claims their submission contains confidential material, where possible, the ACCC will publish a version of the submission that excludes the confidential information, subject to the considerations set out in *the ACCC-AER information policy: the collection, use and disclosure of information*.¹²

Persons wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material with an appropriate symbol or 'c-i-c'. The commercial-in-confidence version should highlight the confidential material in yellow. The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in order to allow the widest possible participation in the public inquiry.

The ACCC prefers to receive submissions in an electronic form that enables the submission text to be searched, either in PDF or Microsoft Word format.

You may email submissions and any questions you have concerning this consultation to:

water@acc.gov.au

Alternatively, you may mail your submission to:

Attention: Water section

GPO Box 520

MELBOURNE VIC 3001

¹² The ACCC-AER information policy: the collection, use and disclosure of information sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. This policy can be downloaded from the ACCC's website.