# Department of Sustainability & Environment

## Office of Water

# Water (Subdivisional Easements and Reserves) Regulations 2011

# Regulatory Impact Statement

This Regulatory Impact Statement has been prepared in accordance with the requirements of the *Subordinate Legislation Act 1994* and the *Victorian Guide to Regulation incorporating the Victorian Regulatory Change Measurement Manual*.

January 2011

**WATER (SUBSDIVISIONAL EASEMENTS AND RESERVES) REGULATIONS**

**REGULATORY IMPACT STATEMENT**

This Regulatory Impact Statement (RIS) has been prepared to fulfil the requirements of the *Subordinate Legislation Act 1994* and to facilitate public consultation on the proposed Water (Subdivisional Easements and Reserves) Regulations 2011.

In accordance with the *Victorian Guide to Regulation*, the Victorian Government seeks to ensure that proposed regulations are well-targeted, effective and appropriate, and impose the lowest possible burden on Victorian business and the community.

A prime function of the RIS process is to help members of the public comment on proposed statutory rules before they have been finalised. Such public input can provide valuable information and perspectives, and thus improve the overall quality of the regulations. The proposed Regulations are being circulated to key stakeholders and any other interested parties, and feedback is sought. A copy of the proposed Regulations is provided as an attachment to this RIS.

Public comments and submissions are now invited on the proposed Water (Subdivisional Easements and Reserves) Regulations 2011. Unless indicated otherwise, all submissions will be treated as public documents and will be made available to other parties upon request. Written comments and submissions should be forwarded by no later than **5:00pm,** 11 **February 2011** to:

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Level 11, 8 Nicholson Street
EAST MELBOURNE VIC 3001

or email: water.regulations@dse.vic.gov.au

This Regulatory Impact Statement was prepared for the Department of Sustainability and Environment by Regulatory Impact Solutions Pty Ltd.

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## ABBREVIATIONS

**CMA** – Catchment Management Authority

**MMBW** – Melbourne Metropolitan Board of Works

**MCA** – Multi-criteria Analysis

**NCP** – National Competition Policy

**Premier's Guidelines** – Subordinate Legislation Act 1994 Guidelines

**RIS** – Regulatory Impact Statement

**TLRI** – Tasmania Law Reform Institute

**the Act** – *Water Act 1989*

**the current Regulations** – Water (Subdivisional Easements and Reserves) Regulations 2001

**the proposed Regulations** – Water (Subdivisional Easements and Reserves) Regulations 2011

**VCAT** – Victorian Civil and Administrative Tribunal

**VCEC** – Victorian Competition and Efficiency Commission

**VFF** – Victorian Farmers Federation

**VLRC** – Victorian Law Reform Commission

## TERMS

**Authority** – under the *Water Act 1989* an 'authority' means a water corporation or a Catchment Management Authority.

**Easement** – a right enjoyed by a person with regard to the land of another, the exercise of which interferes with the normal rights of the owner or occupier of that other land. An easement is a form of an encumbrance on real property. Easements require the existence of at least two parties. The land of the party gaining the benefit of the easement is the dominant land (in this case the authority will have no dominant land: see easement in gross definition), while the land if the party subject to the burden is the servient estate.

**Easement in gross** – refers to an easement in which it is unnecessary to show that any other land is benefited by the easement. The benefit goes to the easement holder instead. Easements in gross are generally excluded under common law, and in Australia easements in gross are only recognised if they are permitted under the relevant legislation. Legislation creating or regulating authorities that provide essential services usually empowers the authority to hold easements in gross[1] to use the land to pass through its lines, cables or pipes.

**Fee simple** – is a form of freehold ownership. It is ordinarily the most complete ownership interest that can be had in real property. Fee simple ownership is limited by a number government powers (e.g., taxation, compulsory acquisition, police powers), and can also be limited by certain encumbrances or a condition in a deed.

**Subdivision** – the process of dividing a larger block of land into two or more smaller lots that may be disposed of separately (section 3(1) of the *Subdivision Act 1988*).

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[1] Victorian Law Reform Commission, 2010, *Easements and Covenants Consultation Paper*, VLRC, Melbourne, p. 16

# 1. SUMMARY

*Why are the regulations being remade?*

In Victorian regulations are automatically revoked following 10 years of operation.[2] This allows the government to examine whether there is still a problem that requires government intervention, and to take account of any changes or developments since the regulation was implemented. The current Water (Subdivisional Easements and Reserves) Regulations 2001 will sunset in 2011 and are being remade as the proposed Water (Subdivisional Easements and Reserves) Regulations 2011 (the proposed Regulations, see Attachment A[3]). The proposed Regulations are substantially the same as the current Regulations. This Regulatory Impact Statement (RIS) has been developed to allow the public to comment on the proposed Regulations.

*Purpose of a Regulatory Impact Statement*

In Victoria the *Subordinate Legislation Act 1994* requires that new or remade regulatory proposals that impose an appreciable economic or social burden on a sector of the public[4] be formally assessed in a RIS to ensure that the costs of the proposed Regulations are outweighed by the benefits, and that the regulatory proposal is superior to alternative approaches. Given that the proposed Regulations are part of a process under which parties – water corporations or Catchment Management Authorities (CMA) – can enter private property and undertake activities that may 'interfere' with a person's enjoyment of their property, it has been determined that the burden imposed by the proposed Regulations is 'appreciable' and therefore requires assessment in a RIS. A RIS formally assesses regulatory proposals against the requirements in the *Subordinate Legislation Act 1994* and the *Victorian Guide to Regulation*.[5]

*Subdivisions, easements and reserves*

An easement is a right enjoyed by a person with regard to land of another person without occupying it, the exercise of which can interfere with the normal rights of the owner or occupier of that land. Many easements in Victoria are created upon approval or registration of a plan of subdivision. An important point to remember is that the easements examined in this RIS are only those created as a result of subdivision. There are many other types of statutory easements, but these are not dealt with in this RIS.[6]

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[2] Section 5 of the *Subordinate Legislation Act 1994*
[3] The Exposure Draft of the proposed Regulations is attached at the end of this RIS.
[4] Section 9, ibid., and Part 6 of the Subordinate Legislation Act 1994 Guidelines
[5] Department of Treasury and Finance, 2007, 2nd ed, *Victorian Guide to Regulation incorporating: Guidelines made under the Subordinate Legislation Act 1994 and Guidelines for the Measurement of Changes in Administrative Burden*, Melbourne
[6] Tasmanian Law Reform Institute, *Law of Easements in Tasmania*, Final Report No. 12 (2010) cited in Victorian Law Reform Commission, 2010, *Easements and Covenants Consultation Paper*, VLRC, Melbourne, p. 20

Subdivision is the act of dividing land into pieces that are easier to sell or otherwise develop. The Victorian legislation simply defines ‘subdivision’ as the division of land into two or more parts that can be disposed of separately.[7] Subdivisions are usually undertaken to create smaller parcels of land for housing. They also occur for the purpose of commercial or industrial development.

A reserve is similar to an easement, however it attracts more rights. These rights are similar to the property owner’s rights, and give the authority all the rights attaching to the ‘fee simple’ of the land.

*Issue to be addressed – why is regulation required?*

Failure to maintain the infrastructure providing water services can lead to public health risks. The risks associated with a possible reduction in the quality of drinking water or a failure in wastewater disposal systems in particular are considered by the community to be unacceptable.

The proposed Regulations are required to facilitate the provision and maintenance of Victoria’s water infrastructure and sewerage systems in an efficient manner, while having regard to property owners’ rights. With respect to the latter, the proposed Regulations provide a clear framework of what activities can be undertaken by authorities.

It is important to note that the planning, subdivision, right of entry and creation of easements are managed by the Act or other legislation rather than the regulations. The problems dealt with by the regulations are therefore reasonably narrow in focus, dealing with managing activities once an authority has entered a property.

Overall, Victoria’s water sector infrastructure is one of the state’s most valuable capital assets. These assets have been built up over many years and require ongoing maintenance and monitoring. The inability to access water infrastructure and sewerage system for maintenance purposes would create both acute and long-term problems for authorities, property owners and the public.

*Objective of the regulation*

The objective of the proposed Regulations is to facilitate the effective and efficient management of water infrastructure in relation to activities carried out by authorities on easements on private property (i.e., minimising transaction costs for parties, including information, search and dispute costs). These objectives reflect the purposes of the Act, which amongst other things, seek “to provide for the integrated management of all elements of the terrestrial phase of the water cycle” (section 1(b), Purposes).

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[7] Section 3 of the *Subdivision Act 1988*

*Options that will achieve the objectives*

The RIS identifies practical alternatives to the proposed Regulations and assesses the costs and benefits of these as compared to the proposed Regulations. The scope of consideration of feasible regulatory and non-regulatory options is, however, limited by the existing powers of the Act and the limited focus of the proposed Regulations.

At a practical level, an authority must be able to gain access to a property to install and carry out certain functions related to water infrastructure. The options therefore need to consider ways that these functions can be most efficiently and effectively carried out. The viable options identified in this RIS were:

- Option A – a statutory rule as proposed by the regulations
- Option B.1 – variations to the proposed regulations (more powers)
- Option B.2 – variations to the proposed regulations (fewer powers)
- Option C – incorporation into the primary legislation, and
- Option D – non-regulatory options (codes of conduct)

A number of other existing arrangements such as compulsory acquisition[8] or a memorandum of common provisions attached to titles are currently available and as such are not considered as alternatives.

*Costs and benefits of the options*

The decision criteria established by the *Subordinate Legislation Act 1994* is that the benefits of a proposal should outweigh the costs, and that the preferred alternative is that which results in the largest net benefit.

Given the difficulty in measuring the costs and benefits of the options in monetary terms, this RIS uses the Multi-criteria Analysis (MCA) assessment tool to inform its decision on the preferred option.[9] Two criteria were chosen and weightings selected. These criteria have regard to the regulatory objectives i.e., to provide effective management of water infrastructure in a way that minimises costs for both authorities and property owners. The first criterion relates to the objective of authorities effectively and efficiently managing Victoria's water infrastructure assets on private property. The second criterion reflects an equity objective insofar as it seeks to minimise uncertainty and inconvenience for property owners, i.e., to ensure activities on their land are conducted in a fair, consistent and transparent manner.

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[8] There are two aspects of compulsory acquisition. First, an authority could acquire the land itself, in which case it could freely undertake maintenance and monitoring activities. Second, easements can be created through the compulsory acquisition process. In this case detailed rights could be included when the easement was acquired.

[9] Section 5.2.3 of the RIS describes the Multi-criteria Analysis assessment methodology.

The analysis of the alternative options using the MCA framework suggests that the proposed Regulations (Option A) are superior to the alternatives, as shown in Table 1 below. The scores contained in Table 1 are relative to the 'base case' or the regulatory situation represented in the absence of the proposed Regulations. A positive score means there are benefits relative to the base case, while a negative score means that an option imposes costs. Thus each option imposes costs and benefits, but Option A provides the highest net benefit. Accordingly, the Office of Water considers that the benefits of the preferred option in terms of the reduction in transaction costs and hence improvement in the efficiency and effectiveness of water infrastructure management exceeds the costs in terms of any infringement on landholders' rights.

**Table 1: Summary of multi-criteria options analysis compared to regulations**

| Criteria | Weight | A | B.1 | B.2 | C | D |
|---|---|---|---|---|---|---|
| Minimising transaction costs: effective and efficient management of water infrastructure | 50 | 75 | 85 | 60 | 70 | 25 |
| Effect on property owners' rights | 50 | -25 | -50 | -15 | -25 | 0 |
| ***Total*** | | **25.00** | **17.50** | **22.50** | **22.50** | **12.50** |

* Assigned scores are multiplied by the criterion weighting to obtain a score, which has been summed.

None of the alternatives examined in this RIS would be able to achieve the regulatory objectives with the level of certainty and clarity that are achieved by the proposed Regulations. That said, the scoring was relatively close between the options, aside from voluntary codes (Option D). Incorporating the proposal into the legislation (Option C) received a relatively high score because it is similar to the proposed Regulation, however the regulatory vehicle was not considered as efficient. The options permit greater powers (Option B.1) or provide fewer powers (Option B.2) trade off effectiveness and effect on property owners' rights. Implicit in assessment of the proposed Regulation (Option A) as the preferred option is that it strikes the appropriate balance between the objectives. Overall, a regulatory approach adopting statutory rules continues to be the most appropriate method of elaborating rights of authorities on matters already prescribed in section 136.

The *Victorian Regulatory Change Measurement Manual* classifies a regulatory compliances costs into administrative costs, substantive compliance costs (including delay costs), and financial costs (see <u>Attachment B</u>).[10] The proposed Regulations do not impose administrative costs (i.e., there are no reporting costs or 'red tape' costs) or financial costs on property owners (i.e., the regulations not imposes fees or require transfers of money). Therefore, substantive compliance costs are imposed on authorities (to the extent that the regulations limit the full range of activities they would like to undertake – although common law and the Act also places constraints on authorities) and for property owners (e.g., in direct costs associated with inconvenience, disruption). Given the nature of the proposed

[10] Department of Treasury and Finance, 2009, *Victorian Regulatory Change Measurement Manual*, Melbourne, December

regulations, the Victorian Government does not incur administration or enforcement costs associated with the preferred option.

*Preferred Option*

In terms of regulatory burden, the proposal does not impose administrative costs or financial costs, but does impose temporal indirect substantive compliance costs on property owners.

However, the nature of the proposal made it difficult to measure the costs and benefits in monetary terms. This is largely because the proposed Regulations deal with rights which are not readily quantifiable.

As a result, Table 2 below illustrates the key qualitative benefits and costs associated with the proposed Regulations.

**Table 2: Qualitative benefits-costs of the proposed Regulations**

| **Benefits** | **Costs** |
|---|---|
| • Inspections result in avoided costs, e.g., flooding, health and hygiene<br>• Lower negotiation costs<br>• Lower/avoided dispute costs<br>• Lower costs than other mechanisms, e.g., compulsory acquisition | • Person entering property (psychic cost)<br>• 'Infringement' of property rights beyond common law position.<br>• In case of works, inconvenience, noise, dust, temporary lack of access to affected land (ranging from several hours to a week or more) and possible loss of income earning capacity (even though site is rectified) |

*Parties affected*

Water corporations, CMAs, subdividers and ultimately non-metropolitan domestic property and business property owners are the parties affected by the proposed Regulations. A key group of the business property owners affected are Victorian irrigators.

The proposed Regulations are a part of a process under which authorities can enter a property and excavate land, remove vegetation, deposit matter, remove obstacles, gates or fences, and inspect and maintain pipelines, carriageways, and drainage. Such activities may take several hours (e.g., a simple inspection) or several days or longer (e.g., construction of a pipeline, clearing channels, major waterway maintenance).

In the planning process, the identification of easements and reserves enables the subdivider to move ahead with certainty and confidence about the supply of essential services. It also means that eventual property purchasers are aware when they buy land that it may be encumbered by an easement.

On a day-to-day basis, most property owners would be affected by the proposed Regulations when they require their sewerage systems to be unblocked. This mostly consists of removing a manhole cover and flushing the system. More generally, property owners play a 'passive' role in their interaction with regulatory authorities. They are not required to be actively involved, but may be inconvenienced in some circumstances.

*Changes in the Proposed Regulations*

The proposed Regulations are practically identical to the current Regulations (see Attachment A for a description of the proposed Regulations). The proposed Regulations have been reformatted in line with current drafting practices to enhance their clarity. The word 'vegetation' has been included in the definition of 'matter' (regulation 5) following feedback from a stakeholder in order to confirm that 'matter' includes 'vegetation'. This is a minor change and does not change the operation of the regulations, nor does it displace or override any other native vegetation regulations or legislation.

The risk of not proceeding with the proposed Regulations is that both authorities and property owners would operate with a greater level of uncertainty with respect to the types of activities that could be carried out on a property owner's land. There is also a view that section 136 of the *Water Act 1989* may not have legal effect and thus authorities may be severely limited in the activities they could undertake.

*Competition assessment*

Property developers and owners are not affected in terms of any restrictions in their ability to function in the market. Given the nature of the proposed Regulations (i.e., prescribe the activities authorities may undertake on a person's property), it is assessed that they comply with the National Competition Policy (NCP) 'competition test' as set out in the *Victorian Guide to Regulation* and do not restrict competition.

*Change in the regulatory burden*

To measure any change in the compliance burden of regulation, the *Victorian Regulatory Change Measurement Manual* states that the existing position is taken as the base line. Given that the proposed Regulations do not introduce any new administrative or substantive compliance obligations or delay costs, is it assessed that there is no change to the regulatory burden on business.

*Implementation issues*

Given that practically identical regulations have been in place for over 20 years, it is not expected that the proposed Regulations will raise any implementation issues or cause unintended consequences. It is therefore not anticipated that the proposed Regulations will require a formal review once they are in place.

*Consultation*

Consultation undertaken during the writing of this RIS found the stakeholders regard the current Regulations as having operated efficiently and effectively over the past 10 years. Stakeholders included all rural and regional water corporations and CMAs, as well as the Municipal Association of Victoria, Victorian Farmers' Federation, and the Melbourne Water Corporation. No stakeholders raised objections to the proposal, and as noted above, the only change was the inclusion of minor wording amendments to clarity the definition of 'matter'.

*Conclusion*

The key points of this Regulatory Impact Statement are that:

- the Office of Water considers that the benefits of the preferred option in terms of the reduction in transaction costs, and hence improvement in the efficiency and effectiveness of water infrastructure management, exceeds the costs in terms of any infringement on landholders' rights.
- the net benefits of the proposed Regulations are greater than those associated with any practicable alternatives
- the proposed Regulations do not impose restrictions on competition, and
- the proposed Regulations will not lead to a material change in the regulatory burden on businesses or other parties.

*Public consultation*

The primary purpose of the RIS process is to help members of the public comment on proposed Regulations before they are finalised. Public input, which draws on practical experience, can provide valuable information and perspectives, and thus improve the overall quality of regulations. Further to consultation already undertaken in the preparation of the RIS, the proposed Regulations are being circulated to stakeholders and feedback is sought.

The Office of Water, which is responsible for administering key elements of the *Water Act 1989* and associated regulations, welcomes and encourages feedback on the proposed Regulations. While comments on any aspect of the proposed Regulations are welcome, stakeholders may wish to comment on:

- whether the regulations can be streamlined or simplified in any way
- any suggested changes to the wording to improve their clarity or effectiveness
- whether the scope of activities prescribed in the regulations is appropriate
- any practical difficulties associated with the current Regulations that could be addressed, and any unintended consequences.

# 2. WHAT IS THE ISSUE TO BE ADDRESSED?

## 2.1 Background

### *2.1.1 Overview*

The supply of water, disposal of wastewater and related water management functions for a range of domestic, industrial and environmental purposes are an important part of the overall water resource management framework in Victoria. The importance of these functions is underscored by the magnitude of Victoria's water consumption, which was 4,993 gigalitres in 2004–05. The agriculture industry was the highest consumer of water, with 3281 gigalitres (66 per cent of Victoria's water consumption). The water supply, sewerage and drainage services industry was the second highest consumer of water, accounting for 793 gigalitres (16 per cent). Households were also a significant consumer of water with 405 gigalitres (8 per cent of Victoria's water consumption).[11]

Water corporations provide water supply, dispose of wastewater and carry out drainage works while CMAs provide waterway management and floodplain management works. There are 16 regional water corporations providing water supply and sewerage services to urban areas, and four rural water corporations providing water in bulk, water supply and drainage to irrigators. There are currently 10 CMAs.[12]

'Referral' authorities, as defined in the planning legislation, have to be consulted when any new subdivision proposal is submitted to a local government. These authorities, in the case of water, generally include water corporations and CMAs.

To effectively manage existing water infrastructure and the sewerage system and to provide an efficient means of planning new services, these authorities have relied on the powers made under the *Water Act 1989* (the Act) and include those specified in the current Water (Subdivisional Easements and Reserves) Regulations 2001. These regulations apply to the regional water corporations and the Melbourne Water Corporation but there is similar legislation and regulations that apply to the three metropolitan water retailers.[13]

Section 136 of the Act provides the power for authorities to create easements and reserves for the purposes of pipelines or ancillary purposes, channels, carriageways, waterway management and drainage. The current regulations detail the rights given to authorities on the creation of such subdivisional easements and reserves.

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[11] Australian Government, National Water Commission, viewed 27 July 2010: http://www.water.gov.au/WaterUse/index.aspx?Menu=Level1_4

[12] State of Victoria, Department of Sustainability and Environment, 2009, *Securing Our Natural Future: A white paper for land and biodiversity at a time of climate change*, November 2009

[13] The Melbourne water retilers operate under Water Industry Regulations 2006 (Part 4 – Subdivisional Easements and Reserves). Proposed regulation 6, 7 and 10 are identical to regulations 23, 24, and 25 in the Water Industry Regulations 2006. Proposed regulations 8 and 9 deal with drainage and waterway management and are not relevant for urban authorities.

Supply of water and removal of wastewater to domestic properties is based on a gravity system or pumped system, and the water authority would normally identify the most efficient means of supplying services to the planned subdivision. Sewers, for example, need to follow the natural drainage lines of the land and this means that the lowest point is often found at the back of the block. Consequently an authority will often create an easement to enable access to the back of the property and allow maintenance and emergency access if required.

In irrigation areas access to channels and drainage systems required for water management of land is also important to minimise any environmental damage caused following rain events or other damage (e.g., erosion caused by stock). Access also provides the ability to plant and protect vegetation as part of waterway management enhances environmental values and minimises damage.

The current Regulations describe the rights associated with easements in detail which complement the access right powers in the Act, and the exclusive land use rights conferred by the creation of reserves. A reserve can be created for all the purposes attached to an easement. This can occur in cases where authorities generally require a greater degree of access and use of a particular site.

### *2.1.2 Subdivision, easements and reserves*

Subdivision is the act of dividing land into pieces that are easier to sell or otherwise develop. The Victorian legislation simply defines ‘subdivision’ as the division of land into two or more parts which can be disposed of separately.[14] Subdivisions are usually undertaken to create smaller parcels of land for housing. They also occur for the purpose of commercial or industrial development.

An easement is a right enjoyed by a person with regard to land of another person, the exercise of which interferes with the normal rights of the owner or occupier of that land.[15] Common examples of easements are drainage, water pipe and carriageway easements. Many household properties would have easements, for example pipeline easements for the purpose of waste disposal. Easements can be created by express grant or reservation, under statute, or they may be implied. In the case of the proposed Regulations, section 136 of the *Water Act 1989 provides that* easements can be required to be created on referral of a plan of subdivision to a water authority and pursuant to the Subdivision Act 1988 the easements are created when the plan of the plan of subdivision is registered. Easements are registered on a property owner’s land title and run with the land.

Sub-section 136(1) of the Act provides that if a proposal for subdivision of land is referred to an Authority under the *Planning and Environment Act 1987*, the authority may require the creation of easements or reserves for the use of the authority in relation to pipelines, channels, carriageways, waterway management, and drainage. Sub-section 136(2) provides that the easement created under section 136 give the rights described in the regulations. Therefore the prescription of rights

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[14] Section 3 of the *Subdivision Act 1988*
[15] Municipal District of Concord v Cole (1906) 3 CLR 96; 12 ALR 87

of authorities (i.e., rights with respect to purposes specified in subsection (1)) is an integral part of the creation of the easement. Easements are registered on the servient property owner's land title and run with the land.

A recent review completed by the Tasmanian Law Reform Institute found that there are 28 different types of easements covered by standard form legislation in Australia[16] (there are also many forms of common law easements). For an easement to be created at common law there must be both dominant land, which benefits from the easement, and servient land, which is burdened by it. Utility and service easements are normally acquired in Victoria under special statutory powers that allow for the creation of easements 'in gross'. This means that it is unnecessary to show that any other land is benefited by the easement. The benefit goes to the easement holder instead – in this case the water authority or CMA. This approach provides a simple and efficient means of ensuring that essential services can be delivered where required for the benefit of individual lot owners and the wider community.[17]

Easements in gross allow the service providers to install and maintain pipes, cables and other equipment across, through, on and above land owned by others without having to purchase it or negotiate a lease or licence with every current and subsequent owner.[18] A reserve for similar purposes (e.g., drainage) gives the authority all the rights attaching to the fee simple of the land.

### *2.1.3 Broader problems addressed by the Act*

The provision of services provided by authorities is part of a broader planning process designed to address problems associated with land use and access to essential services.

Applications to subdivide land are managed by local government which refer applications to authorities, who assess, amongst other things, the provision of reticulated water and disposal of wastewater and sewerage. Effective water management may require the creation of easements or reserves in order for the authority to service the subdivision. The authority could potentially argue that the subdivision should not go ahead because it cannot be serviced, or that services should be provided in a different way. As mentioned above, if water supply and sewerage services are to be provided by the authority, the legislation gives an authority the ability to acquire an easement or reserve (section 136(1) of the Act).

In the planning process, the identification of easements and reserves enables the subdivider to move ahead with certainty and confidence about the supply of essential services. It also means that eventual property purchasers are aware when they buy land that it may be encumbered by an easement. In practical terms, it is worth highlighting that it is usually the subdividers themselves that install pipelines and other water infrastructure rather than the authority.

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[16] Cited in VLRC, ibid., p. 20
[17] VLRC, op cit, p. 32
[18] ibid.

Failure to maintain the infrastructure providing water services can lead to public health risks. A reduction in the quality of drinking water or a failure in wastewater disposal systems is considered by the community to be an unacceptable risk.

Problems in managing water in an irrigation area can result not only in impacts on the productivity of individual producers but can literally 'spill over' onto other land users. More broadly, floodplain management requires a co-ordinated and timely response capability. Environmental damage may result from poor management of water services and lack of intervention in waterway management. These are problems that without a defined framework for managing water services have potential for environmental risks.

Victoria's water sector infrastructure is one of the most valuable capital assets in the State. These assets have been built up over many years and require ongoing maintenance and monitoring. Failure to assess the overall planning implications of proposals and lack of access to maintain water infrastructure and the sewerage system creates both acute and long-term problems for authorities, property owners and the public.

It is important to realise that the proposed Regulations do not deal with the planning process, creation of easements and rights of entry – these are dealt with by the Act. The regulations manage activities on an easement once it has been created. Therefore there are no delay costs in the planning process associated with the proposed Regulations.

## 2.2 Water Corporations and Catchment Management Authorities

Under the *Water Act 1989* an 'authority' means a water corporation or a CMA.

*Water corporations*

Victoria's water businesses supply water and sewerage services to customers within their service areas. There are sixteen regional water corporations constituted under the Act. Eleven of the water corporations provide water and sewerage services throughout regional Victoria. These are Barwon Water, Central Highlands Water, Coliban Water, East Gippsland Water, Gippsland Water, Goulburn Valley Water, North East Water, South Gippsland Water, Western Water, Westernport Water, and Wannon Region Water Authority.

Melbourne Water Corporation (MWC) provides bulk water and bulk sewerage services in the Melbourne metropolitan area and manages rivers and creeks and major drainage systems in the Port Phillip and Westernport region.

Gippsland and Southern Rural Water and Goulburn Murray Rural Water provide a combination of irrigation services, domestic and stock services and some bulk water supply services in regional Victoria. Grampians Wimmera Mallee Water and Lower Murray Water provide a combination of water, sewerage, irrigation and domestic and stock services to customers in their respective service areas.

*Catchment Management Authorities*

Victoria's CMAs were established in 1997 under the *Catchment and Land Protection Act 1994* (CaLP Act).[19] CMAs have an important integrating function in the management of Victoria's land, water and biodiversity. CMAs oversee whole-of-catchment planning for the ten catchment management areas of Victoria, maintain five-year Regional Catchment Strategies, and coordinate and monitor the implementation of these strategies. CMAs work with regional communities, local government and other partners to incorporate local priorities in catchment plans and strategies. An important function is the management of waterways, floodplains and the Environmental Water Reserve.

## 2.3 Rationale for Government Intervention

Public policy usually begins from the premise that activities should be unregulated unless the market does not deliver socially efficient outcomes. That is, government intervention in markets may be justified on economic efficiency grounds, or to correct a 'market failure'. In the case of the proposed Regulations, the rationale for government intervention primarily rests on public health and environmental grounds as well as efficiency objectives, which lead to an overall improvement in community welfare and the environment.

Two market failures are discussed in this RIS regarding the proposed Regulations. First, at a higher level, the government has a role to protect the community on public health and environmental grounds associated with the quality of drinking water, sewerage and stormwater management. Second, at a more specific level, in delivering services to establish and maintain water infrastructure, governments should ensure that inconvenience or loss of enjoyment of a property owner is minimised. The first point deals with an externality (i.e., health costs imposed on third parties), while the second point deals with co-ordination problems and the need to manage such co-ordination in a manner that minimises inconvenience and other costs.

In regard to the public health market failure, in the historical context, during the nineteenth century in Victoria the majority of waste from homes (including kitchen, bathroom and laundry wastes, along with the contents of chamber pots) were emptied into open drains that flowed into street channels and on to local rivers and creeks. Waste from farms and industries also flowed into these street channels, turning Victoria's rivers and creeks into open sewers.[20] Safe drinking water was also a major issue. Diseases such as cholera, typhoid and diphtheria were rife.

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[19] Ten CMAs were established as statutory authorities under the CaLP Act. These are the Corangamite Catchment Management Authority, East Gippsland Catchment Management Authority, Glenelg Hopkins Catchment Management Authority, Goulburn Broken Catchment Management Authority, Mallee Catchment Management Authority, North Central Catchment Management Authority, North East Catchment Management Authority, Port Philip and Westernport Catchment Management Authority, West Gippsland Catchment Management Authority, and Wimmera Catchment Management Authority.

[20] Melbourne Water, A brief history of the sewerage system, viewed 1 September 2010: http://www.melbournewater.com.au/content/sewerage/melbournes_sewerage_system/melbournes_sewerage_system_-_a_brief_history.asp?bhcp=1

Today much more is known about water, sanitation and hygiene, with the World Health Organisation identifying over 20 diseases associated with poor water quality and sanitation.[21]

In 1888 a Royal Commission was carried out to solve Melbourne's waste and water problems. The Commission's findings led to the establishment of the Melbourne and Metropolitan Board of Works (MMBW) in 1892, and a system of pipes, sewers and drains were built.

The typhoid and cholera deaths in Melbourne during the nineteenth century were the result of negative externalities associated with individuals disposing of waste into the environment, while the costs were borne by the community. Collective and centralised action was required to solve these problems. Similarly, co-ordination problems (e.g., marshalling economic resources and planning networks) associated with delivering drinking water to households and business was solved by collective action through the establishment of various Board of Commissionaires of Sewers and Water Supply during the 1850s and onwards. Up until then, easements were not common but with the water and sewerage networks created from the late nineteenth century, water authorities required access to service their infrastructure.

The other market failure relates to public interest arguments. The government has created a range of access rights to land, which impacts on an individual's exclusive possession of their land. The rationale for intervention in part rests on utilitarian grounds; that is, the individual's interest is subordinate to the interests of the greater community good. For example, the creation of an easement on a person's land may be required to supply a town with water. Similarly, an authority may need to create a reserve on a person's property to drain water from surrounding areas.

While these powers and rights of access are created by the *Water Act 1989* and the *Subdivision Act 1988*, the regulations specify these rights and thus provide clarity for property owners concerning what activities may be carried out on an easement. In the absence of the regulations authorities would need to rely on an argument that the easement had been effectively created but its exact meaning would need to be determined by common law principles with respect to activities they could undertake on an individual property owner's land. A view is that regulations save time and expense (as individual documents do not need to be created), making easements easier to understand and creating more certainty as to the effect of an easement by standardising the wording.

Moreover, it is unlikely that the rights provided under common law would allow authorities to service and repair their water infrastructure, and greater powers are required than those provided by common law. As discussed in section 2.5.1, common law does not support easements in gross – these must be underpinned by legislation (or regulations).

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[21] World Health Organisation, Water Sanitation and Health, viewed 1 September 2010: http://www.who.int/water_sanitation_health/diseases/diseasefact/en/index.html

Overall, the creation of a framework that provides certainty and clarity for landowners, while allowing authorities to create and maintain water infrastructure can be justified on efficiency grounds.

## 2.4 Risks of Non-intervention

The risk of not proceeding with the proposed Regulations is that both authorities and landowners would lack certainty and clarity with respect to the rights and activities undertaken on a property owner's land. The lack of clarity in turn could lead to disputation or the erosion of property owner's right (generally there is an asymmetry between the power and knowledge of property owners and authorities, and property owners are not well placed to understand activities that may be carried out on an easement under common law).

There is also a view that section 136(1) of the Act, which deals with the creation of subdivisional easements, may effectively not function. If this were the case then authorities' ability to efficiently provide and service its water infrastructure would be significantly reduced.

## 2.5 Problems the proposed Regulations seek to address

At the outset, it should be clarified that the proposed Regulations do not 'give effect' to the power to create easements under section 136 of the Act. That is, in the absence of the proposed Regulations subdivisional easements could still be created, authorities would retain the power of entry onto properties (section 133), and common law easement rights would be likely to apply. Therefore, the problem the proposed Regulations seek to address concerns providing an efficient framework (to minimise co-ordination and transaction costs) with respect to creating and maintaining water infrastructure.

Prior to the introduction of the Act in 1986, a review was conducted into the powers and duties of authorities.[22] Generally the review found that the legislation under which authorities operated was a legacy of nineteenth century legislation which was "complex, unwieldy and fragmented". The review concluded that a complete overhaul of the legislation was required.[23] Amongst the issues identified was the need for authorities to have the right to refuse consent to the sealing of a plan of subdivision unless easements required for an authority's purposes were set aside. In the mid-1980s only the MMBW, the Dandenong Valley Authority and Rural Water Commission had such rights.[24]

A similar situation existed with respect to reserves, and the review found that all authorities should be granted these rights. The procedure for diverting rights to authorities was regarded at the time as being unworkable. It was also seen as

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[22] Department of Water Resources Victoria, *Institutional Powers and General Provisions and Duties of Authorities, Issues Paper*, Report No. 6 1986
[23] ibid., p. ii
[24] ibid., pp. 33–35

necessary to extend the purpose for reserves from sewerage and drainage to issues such as waterway management. Overall, the previous arrangements were seen to impose inefficient transaction costs on authorities and property owners.

As a result of the review section 136 was included in the Act in 1989. Subsequently the Water (Subdivisional Easements and Reserves) Regulations 1991 were made.

### *2.5.1 The nature of the problem*

Victoria's law of easements is based on English common law, overlaid with property, planning and subdivision legislation. This means that the overall law is very complex. Therefore, a key problem the proposed Regulations seek to solve is to provide clarity and certainty to parties in relation to rights and activities undertaken on an easement. The lack of clarity and uncertainty in the absence of the proposed Regulations (broadly equivalent to the position under common law) could impose inefficient transactions costs on authorities and land owners; for example, additional negotiation costs and, in the absence of a clear framework, greater legal or disputation costs.

In addition, the complexity of easement law may result in information asymmetries because property owners are less likely to know about what activities can be undertaken on their property. By including such activities in a consolidated, publicly available instrument, property owners may more readily access this information (as opposed to engaging lawyer). By providing such information, authorities have a clear understanding of the scope of activities provided by the regulations.

Therefore, if the proposed Regulations were not made, easements could be created under section 136 of the Act and in order to give meaning to the easements it would need to be argued that common law principles should be applied in order to define the purposes for which authorities could use the land.

More broadly, it is worth noting that utility providers do not need to create easements in order to exercise or enforce their rights over the use of land by current and subsequent owners. The legislation under which the providers operate may permit them to enter any land to install, maintain or repair their equipment and facilities.[25]

Victoria's legal system recognises the importance of property rights, and property is specifically mentioned in the Victorian Charter of Human Rights and Responsibilities. Given the broad access rights provided to authorities under the Act, there is a need to balance these powers by providing a framework that creates clarity and certainty. Any interference with property rights, in this case the enjoyment of real property, should be effectively managed and have appropriate

[25] VLRC, ibid., p. 34. The legislative provisions normally require utilities to provide reasonable notice and comply with other statutory restrictions on how to exercise their powers but they do not require an easement to do so.

safeguards. As noted above, the proposed Regulations provide information to property owners in a cost effective manner that clearly describes the types of activities a water authority may undertake. Prescribing such activities provides clear guidance for authorities as to those activities that are beyond their scope (i.e., the regulations provide a check).

The Act itself recognises the importance of protecting rights and provides limited protections under section 134 of the Act in relation to the right of entry on a person's property (section 133).[26] These protections are largely behavioural in terms of an authorised officers' actions (e.g., cause as little harm and inconvenience as possible, not stay on the land for any longer than is reasonably necessary, and co-operate as much as possible with the owner and occupier of the land) as opposed to defining what activities can or cannot be undertaken on a property.

### *2.5.2 The extent of the problem*

Easement and reserves data is recorded by Land Victorian but not collected on a consolidated basis. That is, data does not exist concerning the number of easements in Victoria or the number or type of easements created each year. Table 3 below, however, shows the total number of non-metropolitan subdivisions registered in Victoria over the past 5 years.

**Table 3: Registered non-metropolitan subdivisions in Victoria**

| Year | Number of subdivisions |
|---|---|
| 2005/06 | 2,974 |
| 2006/07 | 2,948 |
| 2007/08 | 2,865 |
| 2008/09 | 2,627 |
| 2009/10 | 2,586 |

Source: Land Victoria data

Taking the Land Victoria data into account and based on a survey of authorities, around 2,000 to 2,500 subdivision may be referred to authorities per annum. Regional authorities tend to have around 200 subdivisions referred to them annually, with a small number of large regional centres skewing the average upwards. Of the subdivisions in residential regional/rural areas, approximately 50–60 per cent require easements, mostly sewerage easement at the back of the property (in some rural areas it is less than 5 per cent). While difficult to estimate, these figures suggested that around 1,500 water and sewerage easements may be created annually in the non-metropolitan areas under the proposed Regulations. Therefore, over the life of the proposed Regulations it could be expected that around 15,000 subdivisional easements will be created under section 136 of the Act. Easements remain on the title until they are removed or retired.

[26] The general powers of entry under section 133 allow authorities to undertake certain activities, however it is unlikely that these powers themselves would allow an authority to, for example, install a pipe or leave it *in situ*.

Finally, consultation with stakeholders suggested the impact on irrigators from the proposed Regulations will be negligible. This is because very few easements are created under the proposed Regulations (i.e., as a result of subdivision). The vast majority of water easements in Victoria are created by 'agreement' under the *Land Acquisition and Compensation Act 1986*. Moreover, some authorities reported a trend towards 'retiring' water easements. For example, this may occur in areas subject to water buyback schemes or closing old irrigation channel systems.

## 2.6 Regulatory Framework

The regulatory framework underpinning the proposed Regulations is established by the *Water Act 1989*, with reference to the *Planning and Environment Act 1987*. Specifically, section 136 of the *Water Act 1989* deals with subdivisional easements and reserves. This section states that if a proposal for subdivision of land is 'referred' to an authority under the *Planning and Environment Act 1987*, the authority may require the creation of easements or reserves, or both, for the use of the authority for any of the following purposes: pipelines or ancillary purposes, channels, carriageways, waterway management, or drainage. This section also contains a power to prescribe 'rights' in relations to these easements or reserves. These rights are not defined in the Act but may be prescribed in statutory rules – that is, the proposed Regulations. Specifically, the proposed Regulations are made under section 324 of the *Water Act 1989*. This section provides the head of power under which regulations may be made for the purposes of the Act.[27]

More broadly, the *Water Act 1989* also provides for an authority to provide, manage, operate and protect water supply systems, including the collection, storage, treatment, transfer and distribution of water (section 163). Similar functions are set out in section 173 (sewerage), Part 10 (waterway management) and section 221 (irrigation) of the Act.

[27] Section 324 (1)(b) (Authorising provision) of the Act states that "The Governor in Council may make regulations for or with respect to any ... matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act".

# 3. OBJECTIVES OF GOVERNMENT INTERVENTION

## 3.1 Government Policy

As water is essential to the quality of life of all Victorians, there is a recognised need for the security and safeguard of Victoria's water infrastructure. The authorities' Statements of Obligations[28] support this need and as such contain obligations with respect to the management of water assets. The *Water Act 1989* further supports the need to safeguard infrastructure.[29] The essence of government water policy is that water customers are entitled to a safe, reliable supply of water and disposal of waste water and sewerage.

In addition, the Victorian Charter of Human Rights and Responsibilities states that "a person must not be deprived of his or her property other than in accordance with the law".[30] This recognises the importance of private property rights in our society and that any infringement or encumbrances on them need to be appropriately managed.

## 3.2 Objectives

The objective of the proposed Regulations is to facilitate the effective and efficient management of water infrastructure in relation to activities carried out by authorities on easements on private property (i.e., minimising transaction costs for parties, including information, search and dispute costs).

These objectives reflect the purposes of the Act, which amongst other things, seek "to provide for the integrated management of all elements of the terrestrial phase of the water cycle" (section 1(b), Purposes).

[28] These instruments are made under the *Water Act 1989* and the *Catchment and Land Protection Act 1994*.
[29] Section 1(b) of the *Water Act 1989*
[30] Section 20 of the *Charter of Human Rights and Responsibilities Act 2006*

# 4. OPTIONS TO ACHIEVE THE OBJECTIVES

## 4.1 Regulatory and Non-regulatory Options

The *Subordinate Legislation Act 1994* requires that a RIS must assess the costs and benefits of the proposed Regulations. This Act also requires that a RIS identifies practicable alternatives to the proposed Regulations and assess the costs and benefits of these compared to the proposed Regulations. A RIS is not required to identify alternatives that are not practicable or feasible. This section identifies and describes the viable non-regulatory and regulatory options for achieving the government's objectives (set out in section 3.2).

The scope of feasible regulatory and non-regulatory options is limited by the existing powers of the Act and the limited focus of the proposed Regulations. In addition, existing regulatory instruments or methods such as the greater use of compulsory acquisition or memoranda of common provisions to replicate the effect of the proposed Regulations are not considered options since they form a part of the 'base case' (see discussion below).

Section 136 of the Act establishes the general authority to create subdivisional easements or reserves with respect to certain water infrastructure. At a practical level, an authority must be able to gain access to land and carry out certain functions related to water infrastructure. The options therefore need to consider ways that these functions could most efficiently and effectively be carried out.

The viable options identified and discussed are as follows:

- Option A – a statutory rule as proposed by the regulations
- Option B.1 – variations to the proposed regulations (more powers)
- Option B.2 – variations to the proposed regulations (fewer powers)
- Option C – incorporation into the primary legislation, and
- Option D – non-regulatory options (codes of conduct)

It is worth noting that the current Regulations are practically identical to the proposed Regulations (aside from formatting changes and a minor wording change). Therefore the current Regulations are not considered as a practical alternative.

Options A, B.1 and B.2 put forward a 'statutory rule' as possible options. Briefly, a statutory rule (also known as a regulation) is a regulatory vehicle used extensively by governments to give operational effect to primary legislation. Statutory rules can be an effective policy tool. They can be used by government to achieve a range of policy objectives including: the prevention or reduction of an activity which is harmful to business, the environment or to other people; to ensure that people

engaged in some occupations possess a requisite level of knowledge and competence; and to *define rights*, entitlements or obligations.[31]

The Premier's Guidelines provide guidance regarding the matters suitable for inclusion in statutory rules. These include matters relating to prescribing processes for the enforcement of legal rights and obligations. Changing matters prescribed by regulation is relatively straightforward as compared to changing legislation. Another advantage of statutory rules is that they require formal review at least every 10 years through the RIS process.

*Option A – Statutory Rules*

The proposed Regulations set out the rights of authorities with respect to the kinds of activities they can undertake on private land on subdivisional easements. The activities are limited to five areas: pipelines, carriage ways, drainage, waterway management and water reserves.

The types of activities the proposed regulation allow in relation to pipelines include providing free and full access across encumbered land, to take and remove plant, to clear and excavate the land, to construct, use, operate and maintain pipelines or channels and to remove any matter from or deposit any matter on the land. These rights would be typically exercised in providing water to a new subdivision and removing wastewater from the properties. This regulation would mostly affect householders and businesses, along with rural properties in some instances.

The regulations also propose similar rights with respect to constructing and accessing a carriage way (i.e., roads, access tracks, etc). This right would be typically exercised to conduct routine maintenance and monitoring tasks associated with maintaining infrastructure at suitable levels of efficiency. These regulations would affect rural properties, for example, tracks alongside water channels.

With respect to drainage and water management, authorities would have the right to construct, operate, maintain and inspect works on the land. Importantly it allows the authority to remove obstacles to the flow of water on the land. This right would be typically used in an irrigation area where a channel has become blocked or to manage waterways. This could involve works to widen, deepen, or to plant vegetation alongside the waterway.

The rationale for why these powers have been selected (in not included in the Act) in part relates to the flexibility that statutory rules provide to vary or include different powers should they need arise. The current range of powers have been selected based on the experience of several decades as being effective to allow authorities to undertake their activities while not being overly onerous on property owners. As evidence of this balance, authorities have not made representations to significantly increase the powers in the proposed Regulation, while property

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[31] Paragraph 1.09, Subordinate Legislation Act 1994 Guidelines

owners have not complained that the powers infringe upon their rights or are onerous and cause inconvenience.

*Option B.1 – Variations to the statutory rules (more powers)*

In some instances, there are simply no practicable regulatory alternatives other than to alter the scope or extent of the proposed Regulations. Clause 2.04 of the Premier's Guidelines notes that in some circumstances there is no discretion other than to prescribe some matters in statutory rules.[32] However, there is scope to consider variations to the proposed Regulations and consider whether they are effective and cost efficient as compared with the regulatory proposal.

Changing the scope of activities could be a feasible option. Under this option more powers could be prescribed in the proposed Regulations. This option would include the power:

- to permanently erect fences, erection of other permanent structures or workshops.
- or to remove the requirement to replace vegetation.

This option would give authorities greater powers and a freer hand to conduct activities on a person's property and thus arguably provide greater effectiveness in carrying out their duties at a lower cost.

*Option B.2 – Variations to the statutory rules (fewer powers)*

Another possible variation of the proposed Regulations is to limit the activities that an authority could undertake on a person's property. Such a limitation could include:

- restrictions on the right to move over land during particular times, for example, removing the provision 'at all times, full and free access' and instead relying on provisions in the Act, i.e., section 13(4) power to enter land between 7.30am – 6.00pm (however, aside from the temporal aspect 'full and free access' may also refer to access that is unimpeded)
- restrictions on removing vegetation
- restrictions on the type of equipment that may be brought onto land, and
- removing the reserves powers under the regulations. Access to such land could be done on a case-by-case basis or if agreements/covenants could not be made, the land could be compulsorily acquired.

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[32] Clause 2.04 of the Subordinate Legislation Act 1994 Guidelines (the Premier's Guidelines) states when the Act requires that a thing or matter be prescribed in regulations, then it must be provided in the Regulations: "where the authorising Act dictates the form of subordinate legislation required, for example, where the authorising legislation provides for fees to be prescribed by statutory rule, there is no discretion to set those fees by another method."

*Option C – Incorporation into the primary legislation*

The *Victorian Guide to Regulation* provides that extending the coverage of existing legislation is a feasible option that may be considered.[33] It would be technically possible to incorporate the proposed Regulations into the Act. This option is similar to the proposal; however the regulatory vehicle is different.

*Option D – Non-regulatory options*

Administrative guidelines issued by each authority, or, a code of practice issued by the Department of Sustainability and Environment could provide more details about agreed procedures. These mechanisms could mirror the clauses in the proposed Regulations. Such an approach would rely on subdividers and future landowners being prepared to provide rights of entry (as provided by section 133) and voluntarily agree to other rights enunciated in the code.

A non-regulatory approach would not provide the level of certainty required for all the affected parties to exercise their responsibilities effectively and efficiently. As well as not providing certainty, a non-regulatory approach is inappropriate when rights as fundamental as access to land and carrying out of works on land are involved.

It is worth noting that mandatory guidelines or codes cannot be made under the *Water Act 1989*, however, section 4F of the *Water Industry Act 1994* provides the Essential Services Commission with the authority to develop codes for water corporations (but not CMAs) relating to customer standards, procedures, policies and practices in accordance with the codes. Therefore, any such codes would serve a guidance function and not be enforceable by the authorities.

### 4.2 Regulatory Arrangements in other Jurisdictions

The law relating to easements is a branch of property law and is centuries old. However, from the late nineteenth century reticulated water, sewerage, gas and electricity services increasingly became available in Australian cities. With the roll-out of these services, governments and utilities required access to land to build this infrastructure and to maintain it. They also required an effective legislative framework to manage these activities. Hence, all Australian jurisdictions have well-developed law relating to easements on their statute books.

The law of easements in Victoria derives from English law and is broadly similar to the law of other Australian jurisdictions. While the rules that regulate easements are largely the rules of common law, they are overlaid with property, planning and

[33] Department of Treasury and Finance, 2007, 2nd ed, *Victorian Guide to Regulation incorporating: Guidelines made under the Subordinate Legislation Act 1994 and Guidelines for the measurement of changes in administrative burden*, Melbourne, p. 5-5

subdivision legislation.[34] Key legislation relating to other Australian jurisdictions is contained in Table 4.

The ability to service water easements in other jurisdictions appears to be located across legislation (some dating from the nineteenth century) and is not easily assessable. An examination of the relevant acts suggests that by enunciating what can be done (i.e., the activities contained in the proposed Regulations), the arrangements in Victoria provide relatively greater certainty for landowners than other jurisdictions in Australia. That is, this RIS did not identify any arrangements in other jurisdiction that were less onerous and more effective than the arrangements proposed in Victoria (although a direct comparison between jurisdictions is difficult given the interaction between each jurisdiction's planning laws, compulsory acquisition and land legislation).

**Table 4: Arrangements in other jurisdictions**

| Jurisdiction | Legislation |
|---|---|
| NSW | *Conveyancing Act 1919* (Schedule 8) |
| Queensland | *Water Supply (Safety and Reliability) Act 2008* (s. 192) and operation of easements in gross. |
| Western Australia | *Transfer of Land Act 1893, Land Administration Act 1997* |
| South Australia | *Real Property Act 1886* (service easement) (s. 223LG) |
| Tasmania | *Water Management Act 1999, Land Titles Act 1980, Conveyancing and Law of Property Act 1884* |
| ACT | *Land (Planning and Environment) Act 1991* |
| NT | *Planning Act* (s. 64) |

[34] Victorian Law Reform Commission, 2010, *Easements and Covenants Consultation Paper*, VLRC, Melbourne, p. 15

# 5. COSTS AND BENEFITS OF THE OPTIONS

## 5.1 Base Case

The 'base case' describes the regulatory position that would exist in the absence of the proposed Regulations. It is necessary to establish this position in order to make a considered assessment of the incremental costs and benefits of the viable options.

If the current Regulations were not remade, the base case would be represented by a regulatory situation in which section 136 of the *Water Act 1989* operated to allow the Authority to require the creation of easements or reserves for the use of the Authority in relation to pipelines, channels, carriageways, waterway management, and drainage and possibly common law principles would apply in relation to giving meaning to the easements.[35] However, regulations are contemplated as being made by section 136(2) in order to give meaning to the easement, so in the absence of regulations there is uncertainty as to how more detailed meaning can be given to the easement as well as what that meaning would be.

Section 133 of the Act, which provides for general access rights to properties by authorised persons, would continue to operate. These access rights overlay the general common law rights. In addition, the powers under the *Land Acquisition and Compensation Act 1986* could be used to acquire easements.

Therefore in the absence of the proposed Regulations (i.e., in the absence of prescribed defined activities), authorities may have a narrower range of rights to undertake installation and maintenance activities.

## 5.2 Methodology

### *5.2.1 Assessment of costs*

In terms of impacts, no obligations or direct costs are imposed upon landowners. In that sense their role in the regulatory exchange is essentially passive. In fact, for the typical property owner in a residential setting, around 80 per cent of authorities' access onto land is to unblock sewers. In other cases for most property owners the operation of the regulations entails an authority passing over their land to inspect a pipe or channel. In some cases minor clearing or works may be required. In a minority of cases machinery and material may be brought onto land while water infrastructure is installed or maintained. To assist in exploring the nature of costs imposed on landowners, two case studies are examined in section 5.3 below, which represent 'typical' dealings between authorities and property owners.

It is worth recalling that most of the 'disruptive' work is done when the infrastructure is installed at the subdivision stage (and this is usually installed by the subdivider). Fences, vegetation, paths and the like are all restored in

[35] There is another view that section 136 of the Act may not effectively operate at all. However, for the purposes of this RIS, the base case is assumed to consist of the operation of s. 136(1) complemented by common law easement principles.

accordance with section 134(d) of the Act to a condition as close as possible to that in which they were found. The cost of the regulations, therefore, is more akin to a psychological cost of loss of enjoyment of property while water infrastructure is being maintained. Such costs will vary according the individual perceptions and nature of the works. In practice, in the vast majority of circumstances the impacts are minor and therefore direct costs are negligible.

The inherent characteristic of regulation is to modify behaviour in order to achieve certain outcomes. This can impose costs on individuals or businesses known as 'compliance costs'. In simple terms, compliance costs are the costs of complying with regulations. In the case of the proposed Regulations, rather than modifying behaviour, they form a part of a regime that imposes cost in the form of loss of, or deprived, enjoyment of property, albeit temporarily. This is equivalent to the loss of choice or the loss of an 'option'. There are various methodologies for valuing options (such as the Black and Schoeles model used in finance theory), however in the case of proposed Regulations the absence of data and property owner preferences would make estimating the value of the loss of an option (i.e., enjoyment) extremely difficult. Given the difficulties of assessing the costs and benefits in monetary terms, the Multi-criteria Analysis (MCA) approach is presented in this RIS as an alternative assessment tool.

### *5.2.3 Multi-criteria analysis*

The MCA approach is described in part 5–18 of the *Victorian Guide to Regulation.* This approach is useful where it is not possible to quantify and assign monetary values to the impacts of a proposed measure (e.g., measures that have social impacts). Furthermore, it represents a convenient way of comparing a range of alternative approaches.

This technique requires judgements about how proposals will contribute to a series of criteria that are chosen to reflect the benefits and costs associated with the proposals. A qualitative score is assigned, depending on the impact of the proposal on each of the criterion weightings, and an overall score can be derived by multiplying the score assigned to each measure by its weighting and summing the result. If a number of options are being compared, then the option with the highest score would represent the preferred approach.

Two criteria were chosen and weightings selected. These criteria have regard to the regulatory objectives i.e., to provide effective management of water infrastructure in a way that minimises costs for both authorities and property owners. The first criterion relates to the objective of authorities effectively and efficiently managing Victoria's water infrastructure assets on private property. The second criterion reflects an equity objective insofar as it seeks to minimise uncertainty and inconvenience for property owners, i.e., to ensure activities on their land are conducted in a fair, consistent and transparent manner.

The weighting for the criteria are 50 per cent each. They balance the tension between the effective and efficient management of water infrastructure and

impinging upon landowners rights. The criteria and weightings are described in Table 5 below.

**Table 5: Multi-criteria Analysis Criteria**

| Criterion | Description of criterion | Weighting |
|---|---|---|
| Minimising transaction costs: effective and efficient management of water infrastructure | A key objective of the regulations is to ensure the efficient management of Victoria's water assets in line with Authorities' service obligations.<br><br>Information/negotiation costs can be incurred if owners are unaware of their rights and obligations.<br><br>A positive score represents a benefit for authorities and landholders. | 50 |
| Effect on landholders' rights | Pipes, drains, waterways and the like occur on private property. It is essential that the interference with the enjoyment of a landowners' property is safeguarded and that property owners know what can and cannot be done on their property.<br><br>A negative score represents a cost to landholders. | 50 |

For the purposes of an MCA assessment, an assigned score of zero (0) represents the base case, while a score of plus one hundred (+100) means that the alternative fully achieves the objectives. A score of minus one hundred (–100) means that the proposal does not achieve any of the objectives. In terms of assessment using the MCA, under the base case each criterion is awarded a score of zero reflecting the default position (i.e., the regulatory position in the absence of the proposed Regulations).

### *5.2.4 Decision Criteria*

The decision criteria implied by the *Subordinate Legislation Act 1994* is that the benefits of a proposal should outweigh the costs, and that the preferred alternative is that which results in the largest net benefit.

Given the difficulty in measuring the costs and benefits of the options in monetary terms, this RIS uses the MCA assessment tool to inform its decision on the preferred option. As noted above, the option with the highest score represents the preferred approach.

The scoring in this RIS is relative to the base case, and given that the costs and benefits are not readily quantifiable in monetary terms and have been equally weighted in the MCA, a net positive score of an option for the purposes of this RIS is taken to mean that benefits outweigh the costs. Therefore the decision criteria in this RIS are that:

- a net positive MCA score means that the benefits outweigh the costs, and
- that the highest net positive score is the preferred option.

### 5.3 Costs and Benefits of Options

It is important to recognise that the majority of regulatory costs associated with subdivisions are attributable to the Act rather than the regulations. The proposed Regulations seeks to manage activities following the planning process, i.e., once the plans have been sealed. It is also important to note that current legislation and common law rights already allow authorities to undertake the activities mentioned in the proposed Regulations, but in a less certain manner. This makes assessing the incremental costs and benefits of the proposals difficult. In addition, a number of instruments that currently exist (e.g., compulsory acquisition, Memorandum of Common Provisions) could be used instead of the regulations, but given that they are part of the 'base case' they are not strictly speaking alternatives for the purposes of RIS analysis.

*Option A – The Proposed Regulations*

The proposed Regulations enumerate rights of authorities in relation to pipelines, carriage ways, drainage, for waterway management and reserves. They detail the types of activities that may be undertaken on a person's property. They provide certainty for authorities by specifying what can and cannot be done on a person's property. In addition, the specification of activities in a public document provides property owners with a clear list of what activities can be undertaken on their land.

As noted above, easements attract a body of common law with respect to what rights are available to the dominant estate. This means the property owner's rights are contained in law reports and in some cases across other jurisdictions. Common law is fluid and can have more grey areas than regulations because cases are often highly contextualised. For example, in 2007 following the decision of the *High Court in Westfield Management Ltd v Perpetual Trustees Co Ltd*, the court found that easements must be interpreted by examining the terms of the instrument (in this case an easement created by express grant). Most other evidence showing what was originally intended is excluded. This ruling represented a shift in interpretation.[36] Similarly, in *Mantec Thoroughbreds Pty Ltd v Batur* the court was called on to determine the nature and scope of an easement noted on a registered plan. The easement had been marked on a diagram in the plan with the label 'E-1' and the word 'easement'. E-1 was further described in the plan as a 'way'. The

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[36] VLRC, op cit., p. 20

dispute before the court related to the scope of the easement and particularly to which types of traffic the easement allowed over the servient land.[37]

These examples show that when details are not clear or are ambiguous, uncertainty and costly disputes can arise. The proposed Regulations seek to provide clarity for all parties and thus avoid these situations.

In this regard, the Victorian Law Reform Commission (VLRC) has noted that the number of easements created by ambiguous or inadequately drafted instruments could be reduced in Victoria by introducing legislation which sets out standard wording. Statutory standard form easements are useful because they save time and expense in conveyancing, make easements easier to understand, anticipate issues that may arise in the operation of the easement, and create more certainty as to the effect of the easements by standardising the wording.

Similarly, the Tasmania Law Reform Institute (TLRI) recommended that steps be taken to extend and modernise statutory standard form easements in Tasmania. It made this recommendation partly on the basis that easements drafted in simple, modern language would assist in the early resolution of easement disputes.[38] The proposed Regulations appear to address the problems of ambiguity and uncertainty associated with easements in Victoria identified by the VLRC and TLRI.

Under the base case, it would appear to be in the commercial interests of a property developer to negotiate with a water authority to ensure adequate drainage and other water management services are provided, to attract buyers of land in the subdivision. It could, however, be argued that the regulations could help to reduce transaction costs for authorities and property developers, by allowing them to rely on the regulations to govern access, rather than having to undertake bilateral negotiations. Thus, there may be an efficiency argument for the regulations.

The costs of the regulations to a property owner could include any restrictions to land use and amenity created by the need for access to the property by the water authority. In the vast majority of cases this would include simple inspections or maintenance of water infrastructure and would impose only a negligible notional cost. In cases where digging or machinery is required, costs imposed would include loss of amenity or inconvenience. This is usually only temporary as authorities are responsible for returning the property to as close as practicable to its original condition (e.g., replacing paths, vegetation, fences). Data was not available concerning time costs (delay or inconvenience) or loss of business attributable to the operation of the regulations, however, stakeholder advice suggests that such costs are rare (e.g., businesses are rarely required to close while activities on easements are being undertaken).

The case studies below are presented to illustrate the practical operation and likely costs of the proposed Regulations as represented by two ‘typical’ scenarios.

**Case Study 1: Inspection and unplanned works in a residential area**

[37] ibid., p. 22

[38] ibid., p. 20–21

The most common reason why an authority is likely to require entry onto a subdivisional easement is for a routine inspection or unplanned works (e.g., a blocked sewerage pipe). In the case of routine inspections, section 133 of the Act requires that a letter be sent to the property owner to advise them of the proposed activities. Authorities may enter an easement without prior written notice in the case of an emergency or where owner consent is provided.

An owner is not required to be in attendance while the inspection is being conducted and has no other obligations. Following notification in writing, it is usual practice as a courtesy for the water authority to knock on the door of the property owner to let them know about the inspection/works.

A basic inspection would consist of removing an inspection cover and examining the pipes for blockages or damage. If no faults are revealed, this activity usually takes less than an hour and does not require digging or bringing equipment onto the property.

If the inspection reveals, for example, a pipe section that needs replacing, a section of the easement will need to be excavated. For minor works shovels or jack hammers may be employed. In some cases the water mains may need to be turned off. These activities would usually take less than a day. When the pipe is replaced, the trench is filled in and if necessary vegetation or fencing replaced.

The experience and perception of costs amongst property owners will vary. For example, if a property owner is absent during the inspection, the costs would be negligible (akin to the costs imposed by a gas or electricity meter reading). However, the experience will differ for a property owner who is home during excavation works where their water as been turned off. In such cases, the property owner does not incur any direct costs or is required to satisfy obligations, but may suffer temporary noise and inconvenience costs.

The authorities have mentioned that property owners are usually very welcoming in cases of sewerage blockages or where other faults need to be rectified. In the case of routine inspections, property owners recognise and accept the reason for entry into their property. One officer from a water authority noted that as long as the water authority employee cleans up after the job, there is rarely, if ever, a problem with property owners.

**Case Study 2: Inspection of a channel/pipeline in a rural area**

A major task of rural water corporations is monitoring and maintaining water channels, pipelines and drainage areas. It is important to note that very few water easements are subdivisional easements covered by the proposed Regulations. The vast majority are easements created under the *Land Acquisition and Compensation Act 1986* or are on Crown land.

Inspection of a channel would entail an officer from the water authority travelling beside the channel to check for blockages or erosion, as well as examining water gates and valves. Some authorities conduct such inspections annually.

These activities do not require the primary producer to be present, nor do they disrupt pastoral or agricultural activities. Water corporations consulted noted that such inspections and maintenance do not cause any loss of income or require primary producers to halt production.

The general view was that these activities are not regarded as intrusive by primary producers and in many cases are thought of positively. This is because primary producers perceive a benefit of well-maintained irrigation channels and waterways so that they can obtain a reliable source of water. Well-maintained drainage can prevented flooding or saturation. Therefore, these activities do not impose any direct costs or obligations on primary producers, and 'inconvenience' costs are negligible.

The costs imposed upon authorities may be categorised as substantive compliance costs, however given the interaction of the Act representing the base case, incremental costs are difficult to establish.

To assist in evaluating the costs and benefits of this option an MCA assessment was undertaken. In terms of the 'effective and efficient' criterion, the proposed Regulations provide a clear framework by prescribing matter under the Act. The regulations define access and activity rights in a manner that delivers the government's objectives. The powers provided by the proposed Regulations are greater than those provided by common law and therefore would allow authorities to undertake activities in a more effective and efficient manner. With respect to costs, the proposed Regulations do not impose specific obligations on property owners. The proposed Regulation are also published in the statute books and 'search costs' are reasonably low because these are publicly available. Statutory rules are flexible and relatively low cost compared with primary legislation. The proposed Regulations also provide an element of certainty for property owners as they are not required to negotiate with authorities. The types of activities an authority can undertake on a property are far clearer than under the position represented by the common law. Therefore, the proposed Regulations avoid case-by-case negotiation and tailored agreements. Consequently a score of 75 is assigned to this criterion.

However, given that the rights of the authority under this option are greater than the base case, additional notional 'intrusion' costs may be incurred by property owners. Therefore a negative score of 25 is assigned to this criterion.

Taken together, the MCA assessment for this option results in a score of +**25.00**.

**Table 6: Multi-criteria Analysis Assessment of proposed Regulations**

| Criteria | Weighting | Assigned Score | Weighted Score |
|---|---|---|---|
| Effective and efficient management of water infrastructure | 50 | 75 | 37.50 |
| Effect on landholders' rights | 50 | -25 | -12.50 |
| ***Total*** | **100%** | | **+25.00** |

*Option B.1 – Variation of the Proposed Regulations (more powers)*

At the outset, it is important to note that Options B.1 and B.2 (below) are discussed in general terms, and the RIS has not attempted to quantify the specific costs and benefits attributable to particular powers.

Under this option more powers could be prescribed in the proposed regulations. For example, the power to permanently erect fences, erection of other permanent structures or workshops or to remove the requirement to replace vegetation. This option would give authorities greater powers and a less restrictive ability to conduct activities on a person's property.

A greater range of rights would arguably allow authorities to undertake activities in a more effective manner compared with the proposed Regulations. Therefore a higher score of 85 is assigned to this criterion. The trade off, however, is that this option would infringe upon property owners' rights to a greater extent than the proposed Regulations. A score of -50 is assigned to this criterion. This score is negative relative to the base case because of the greater infringement on property owners' rights compared with the common law position. The MCA assessment for this option results in a net score of +**17.50**.

**Table 7: Multi-criteria Analysis Assessment of statutory rules (more powers)**

| Criteria | Weighting | Assigned Score | Weighted Score |
|---|---|---|---|
| Effective and efficient management of water infrastructure | 50 | 85 | 42.50 |
| Effect on landholders' rights | 50 | -50 | -25.00 |
| ***Total*** | **100%** | | **+17.50** |

*Option B.2 – Variation of the Proposed Regulations (fewer powers)*

Another possible variation of the proposed Regulations is to limit the activities that an authority could undertake on a person's property. Such a limitation could include restrictions on the right to move over land during particular times, restrictions on removing vegetation, restrictions on the type of equipment that may be brought onto land, or generally being more prescriptive to limit the current powers. This option would be more in line with the common law powers (and base case).

Fewer powers would impinge upon the ability of authorities to efficiently and effectively undertake their activities in relation to water and sewerage infrastructure. The range of activities would still be greater than the base case and could be reasonably effective (but less so than under options A and B.1). A score of 60 is assigned to this criterion. There is also a danger that if the powers proved inadequate authorities could resort to more costly and onerous solutions such as compulsory acquisition.

A greater range of rights provided to authorities compared to the common law position would also infringe on property owners' rights and therefore a score of -15 is assigned to this criterion. This results in an overall MCA score of +**22.50**.

**Table 8: Multi-criteria Analysis Assessment of statutory rules (fewer powers)**

| Criteria | Weighting | Assigned Score | Weighted Score |
|---|---|---|---|
| Effective and efficient management of water infrastructure | 50 | 60 | 30.00 |
| Effect on landholders' rights | 50 | -15 | -7.50 |
| ***Total*** | **100%** | | **+22.50** |

*Option C – Extending the coverage of the act to incorporate the regulations*

The *Victorian Guide to Regulation* provides that extending the coverage of existing legislation is a feasible option that may be considered.[39] It would be technically possible to incorporate the proposed Regulations into the Act.

It is well-established that the benefit of statutory rules as a regulatory instrument is their administrative efficiency and flexibility. For example, if the department decided to change a number of rights or clarify wording, this could be done by amending the regulations, which is a relatively straightforward and timely process. However if these requirements were incorporated in the Act, then any change would require a parliamentary amendment. For minor administrative matters, this is a time-consuming and a relatively complex procedure. The lack of flexibility

[39] Department of Treasury and Finance, 2007, 2nd ed, *Victorian Guide to Regulation incorporating: Guidelines made under the Subordinate Legislation Act 1994 and Guidelines for the measurement of changes in administrative burden*, Melbourne, p. 5-5

and timeliness may also impose unreasonable constraints on authorities or property owners.

The Premier's Guidelines also provide guidance as to the types of matters appropriate for inclusion in regulations rather than in Acts or in instruments which are not of a legislative character. The guidelines note that significant matters should not be included in subordinate legislation, although that subordinate legislation may deal with the same issue in terms of enforcement or related matters of administration or implementation. The guidelines also note, amongst other things, that subordinate legislation is more appropriate when prescribing processes for the enforcement of legal rights and obligations.

The scoring of this option is similar to Option A (the proposed Regulation). This is because it represents essentially the same option but delivered by a different regulatory vehicle. Legislation is less timely and more costly to provide compare to statutory rules. Consequently, the effective and efficient management of water infrastructure is assigned a score of 70, while effect on rights for property owners received a score of -25. Overall, the MCA results in a net score of +**22.50** for this option.

**Table 9: Multi-criteria Analysis Assessment of incorporation into the Act**

| **Criteria** | **Weighting** | **Assigned Score** | **Weighted Score** |
|---|---|---|---|
| Effective and efficient management of water infrastructure | 50 | 70 | 35.00 |
| Effect on landholders' rights | 50 | -25 | -12.50 |
| ***Total*** | **100%** | | **+22.50** |

*Option D – Non-regulatory options (codes of conduct)*

In the absence of regulations, guidelines or a non-mandatory code of practice could be formulated to clarify and provide guidance to section 136 of Act. In this regard, the Victorian Farmers Federation (VFF) and Victorian Water Industry Association have developed the *Pipelines Easement Guidelines*, which sets out information for water corporations and landowners about their rights and obligations with respect to pipeline easements. Key elements of the guidelines include entry to private land and land owners' rights. An important aspect of the guidelines is that authorities should provide written notice to enter properties at an appropriate time (this is also currently covered under section 133(2) of the Act).

Building on the current arrangement, this option would provide greater clarity and consistency compared with the situation represented by the base case to enable authorities to manage water infrastructure effectively and efficiently. The main drawback however, relates to enforceability of the code(s). Consequently this criterion is assigned a score of 25. Protection of rights would also be more consistent and, if well-designed, could provide a reasonable level of protection and given that compliance would be largely voluntary (over and above common law rights), impingement would be quite small. However, given the operation of the

Act and existing codes/charters the effect on landholders' rights would be minimal, approximating the base case. Therefore a score of zero is assigned to this criterion. The MCA assessment of this options results in a net score of **+12.50**.

**Table 10: Multi-criteria Analysis Assessment of Codes/Guidelines**

| Criteria | Weighting | Assigned Score | Weighted Score |
|---|---|---|---|
| Effective and efficient management of water infrastructure | 50 | 25 | 12.50 |
| Effect on landholders' rights | 50 | 0 | 0.00 |
| ***Total*** | **100%** | | **+12.50** |

## 6. ASSESSMENT OF COMPETITION IMPACTS

At the Council of Australian Governments (COAG) meeting in April 1995 (reaffirmed in April 2007), all Australian governments agreed to implement the National Competition Policy (NCP). As part of the *Competition Principles Agreement*, all governments, including Victoria, agreed to review legislation containing restrictions on competition under the following principle. The guiding principle is that legislation (including acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:

(a) The benefits of the restriction to the community as a whole outweigh the costs, and

(b) The objectives of the regulation can only be achieved by restricting competition.

The NCP 'competition test' was used to assess the proposed Regulations against any possible restrictions on competition. In essence, the test asks whether the proposed Regulations:

- allow only one participant to supply a product or service
- will require producers to sell to a single participant
- limit the number of producers of goods and services to less than four
- limit the output of an industry or individual producers
- discourage entry by new persons into an occupation or prompt exit by existing providers
- impose restrictions on firms entering or exiting a market
- introduce controls that reduce the number of participants in a market
- affect the ability of businesses to innovate, adopt new technology, or respond to the changing demands of consumers
- impose higher costs on a particular class or type of products or services
- lock consumers into particular service providers, or make it more difficult for them to move between service providers, and/or
- impose restrictions that reduce range or price or service quality options that are available in the marketplace.

The proposed Regulations affect property developers and property owners in relation to authorities conducting certain activities on land to install and maintain water infrastructure. Property owners are not affected in terms of any restrictions in their ability to function as a business or in a market. The proposed Regulations are designed to streamline processes for access and maintenance in order to minimise any disruptions to business.

Given that the proposed Regulations predominantly prescribe rights regarding the types of activities authorities may undertake on a person's property, it is assessed that the proposed Regulations meet the NCP 'competition test' as set out in the *Victorian Guide to Regulation* and do not restrict competition.

# 7. THE PREFERRED OPTION

## 7.1 Assessment of Options

The objective of the proposed Regulations is to facilitate the effective and efficient management of water infrastructure in relation to activities carried out by authorities on easements on private property (i.e., minimising transaction costs for parties, including information, search and dispute costs). The proposed Regulations enable the subdivision process to be managed in the most efficient manner and ensure that property owners have a clear idea of what activities may be undertaken on their property.

The decision criteria implied by the *Subordinate Legislation Act 1994* is that the benefits of a proposal should outweigh the costs, and that the preferred alternative is that which results in the largest net benefit.

Given the narrow scope of the proposed Regulations and the difficulty in measuring the costs and benefits of the options in monetary terms, an MCA assessment was carried out in this RIS to inform its decision on the preferred option. The scoring in this RIS is relative to the base case, and given that the costs and benefits are not readily quantifiable in monetary terms and have been equally weighted in the MCA, a net positive score of an option for the purposes of this RIS can be considered to mean that benefits outweigh the costs. Therefore the decision criterion in this RIS is that:

- a net positive MCA score means that the benefits outweigh the costs, and
- that the highest net positive score is the preferred option.

Assessment of the options using the MCA framework suggests that the proposed Regulations (Option A – the proposed Regulations has the highest score) are superior to the alternative options to achieve the objectives, as shown in Table 11 below. Accordingly, the Office of Water considers that the benefits of the preferred option in terms of the reduction in transaction costs and hence improvement in the efficiency and effectiveness of water infrastructure management exceeds the costs in terms of any infringement on landholders' rights.

**Table 11: Summary of Multi-criteria Analysis Compared to Regulations**

| Criteria | Weight | A | B.1 | B.2 | C | D |
|---|---|---|---|---|---|---|
| Efficiency and effectiveness | 50 | 75 | 85 | 60 | 70 | 25 |
| Effect on property owners' rights | 50 | -25 | -50 | -15 | -25 | 0 |
| ***Total*** | | **25.00** | **17.50** | **22.50** | **22.50** | **12.50** |

* Assigned scores are multiplied by the criterion weighting to obtain a score, which has been summed.

None of the alternatives examined in this RIS would be able to achieve the regulatory objectives with the level of certainty and clarity that are achieved by the proposed Regulations. That said, the scoring was relatively close between the options aside from voluntary codes (Option D). Incorporating the proposal into the

legislation (Option C) received a relatively high score because it is similar to the proposed Regulation, however the regulatory vehicle was not considered as efficient. Incorporating fewer powers also receives a relatively high score. The options permit greater powers (Option B.1) or provide fewer powers (Option B.2) trades off effectiveness and safeguarding property owners' rights. Implicit in assessment of the proposed Regulation (Option A) as the preferred option is that it strikes the appropriate balance between the objectives. Overall, a regulatory approach adopting statutory rules continues to be the most appropriate method of elaborating rights of authorities on matters already prescribed in section 136.

The operation of the proposed Regulations as part of the broader planning process delivers benefits to all participants in the water management process. The incremental benefits associated with the proposed Regulations mostly accrue to authorities by extending their rights on what activities they may undertake on a property. This in turn permits authorities to deliver their services in a more efficient manner, and indirect benefits are also captures by the community.

Property owners benefit from a regulatory regime that ensures disruptions arising from rights of access to their property are minimised. The regulations also provide clarity and should therefore avoid dispute costs. Property owners in irrigation areas also derive significant benefits from the water management practices that ensure the efficient provision of water services.

The authorities and local government benefit from orderly and transparent planning processes that enable them to allocate their resources efficiently.

The *Victorian Regulatory Change Measurement Manual* classifies a regulatory compliances costs into administrative costs, substantive compliance costs (including delay costs), and financial costs (see Attachment B). The proposed Regulations do not impose administrative costs (i.e., there are no reporting costs or 'red tape' costs) or financial costs on property owners (i.e., the regulations do not imposes fees or require transfers of money). Therefore, substantive compliance costs are imposed on authorities (to the extent that the regulations limited the full range of activities they may wish to undertake – although common law and the Act also places constraints on authorities) and for property owners (e.g., in direct costs associated with inconvenience, disruption). Given the nature of the proposed Regulations, the Victorian Government does not incur administration or enforcement costs associated with the preferred option.

As noted above, the nature of the proposal made it difficult to measure the costs and benefits in monetary terms. This is because the proposed Regulations deal with rights which are not readily quantifiable. In terms of regulatory burden, the proposal does not impose administrative costs, financial costs and only imposes indirect temporal substantive compliance costs on property owners. That said, Table 12 below illustrates the key qualitative benefits and costs associated with the proposed Regulations.

**Table 12: Qualitative benefits-costs of the proposed Regulations**

| Benefits | Costs |
|---|---|
| • Inspections result in avoided costs, e.g., flooding, health and hygiene<br>• Lower negotiation costs<br>• Lower/avoided dispute costs<br>• Lower costs than other mechanisms, e.g., compulsory acquisition | • Person entering property (psychic/inconvenience cost)<br>• 'Infringement' of property rights beyond common law position.<br>• In case of works, inconvenience, noise, dust, temporary lack of access to affected land (ranging from several hours to a week or more) and possible loss of income earning capacity (even though site is rectified) |

Given the nature of the costs and benefits above, another approach might be to ask the hypothetical question, what would a property owner be willing to pay to avoid flooding, health or hygiene problems? In the vast majority of cases the regulatory exchange consists of simple inspection of pipes, channels, drainage, etc which imposes a negligible cost on regulatees. These costs are implicitly weighed against the inconvenience of avoiding blocked sewerage, flooding, and water loss or environmental damage in the case of irrigators. Further, perhaps evidence that property owners consider the 'infringement cost' are worth incurring in order to avoid more serious events is that authorities have received no complaints directly associated with the operation of the current Regulations. That is, the cost of complaining is considerably outweighed by the perceived benefits of the proposed Regulations.

Given the foregoing analysis, the key points of this Regulatory Impact Statement are that:

- the Office of Water considers that the benefits of the preferred option in terms of the reduction in transaction costs, and hence improvement in the efficiency and effectiveness of water infrastructure management, exceeds the costs in terms of any infringement on landholders' rights
- the net benefits of the proposed Regulations are greater than those associated with any practicable alternatives
- the proposed Regulations do not impose restrictions on competition, and
- the proposed Regulations will not lead to a material change in the regulatory burden on businesses or other parties.

## 7.2 Description of the affect of the proposed Regulations

The current Regulations were remade in 2001 with only two minor changes to definitions contained in the 1991 regulations (e.g., 'manhole cover' changed to 'access point'). The proposed Regulations are practically identical to the current Regulations (see Attachment A for a description of the proposed Regulations). The proposed Regulations have been reformatted in line with current drafting practices to enhance their clarity, and the word 'vegetation' has been included in the definition of 'matter' (regulation 5) following feedback from a stakeholder to avoid any ambiguity that matter includes vegetation. This is a minor change and does not change the operation of the regulations, nor does it displace or override any other native vegetation regulations or legislation.

The proposed Regulations set out the rights of authorities with respect to easements in five main areas.

*Regulation 5 – Right of an authority in respect of easements acquired for pipelines or ancillary purposes and channels*

Regulation 5 allows an authority to have free and full access across encumbered land, to take and remove plant, to clear and excavate the land, to construct, use, operate and maintain pipelines or channels and to remove any matter from or deposit any matter on the land. These rights would be typically exercised in providing water to a new subdivision and removing wastewater from the properties. These works cover pipelines and channels and ancillary works. This includes pipelines, inspection openings, underground pumps and metering for channels, bridges, culverts and subways. The definition of 'ancillary works' is referred to in section 136 of the Act, rather than the regulations.

*Regulation 6 – Rights of an Authority in respect of easement acquired for carriageway purposes*

Regulation 6 gives the right for an authority to construct and contain any roads or access tracks required to service its pipeline, channel, ancillary and waterway management works. This right would be typically exercised to conduct routine maintenance and monitoring tasks associated with maintaining infrastructure at suitable levels of efficiency.

*Regulation 7 – Rights of an Authority in respect of easements acquired for the purposes of drainage*

This regulation grants to the authority the right to construct, operate, maintain and inspect drainage works on the land. Importantly it allows the authority to remove obstacles to the flow of water on the land. This right would be typically used in an irrigation area where a channel has become blocked.

*Regulation 8 – Rights of an Authority in respect of easements acquired for the purposes of waterway management*

Regulation 8 gives an authority the right to conduct a range of waterway management functions including protection and enhancement of waterways and the management of vegetation on the land. Construction of waterway works and subsequent operation and maintenance of such works are provided for by this provision.

This right would be typically exercised to ensure a natural waterway is able to flow without causing environmental damage. This could involve works to widen, deepen, or to plant vegetation alongside the waterway.

*Regulation 9 – Rights on the creation of a reserve*

This regulation enables the authority to assume all the rights of a landowner to pursue the purposes set out in section 136. This right is used less frequently than others and would be used where land at a higher elevation may require a pumping station and/or storage tank to bring water to users.

## 7.3 Groups Affected

Water corporations, CMAs, subdividers and ultimately domestic property and business property owners are affected by the proposed regulations. In terms of impacts, this RIS assesses that they are generally minor and affect very few Victorians overall. Most of what could be considered the most 'disrupting' work (e.g., digging and installation) occurs at the subdivisional stage when the land has not yet been occupied by the eventual property owner, while the vast majority of entry onto a personal property in residential areas is to unblock sewerage pipes. Presumably property owners welcome such visits.

While there is no precise data on the number of rural subdivisional easements, a key group of property owners affected are Victorian irrigators. Typically, operation of the regulations would include inspections of water channels, drainage systems, or waterways. In most instances, inspections might occur annually and consist of an officer from an authority entering the property and inspecting the channel for blockages, erosion or vegetation. The costs to the property owner might include receiving advice from the authority that an inspection or works will occur (although these costs are attributable to the Act) and 'psychic'/inconvenience costs of having a person enter their property (these costs depend on individual preferences and may not always be negative). The benefits include more efficiently operating water infrastructure and avoided costs associated with flooding or contamination (e.g., sewerage spillovers).

In practical terms, the proposed Regulations are a part of a process under which authorities can enter a property and excavate land, remove vegetation, deposit matter, remove obstacles, gates or fences, and inspect and maintain pipelines, carriageways, and drainage. Such activities may take several hours (e.g., a simple

inspection) or several days or longer (e.g., construction of a pipeline, clearing channels, major waterway maintenance).

The impact on a property owner will consequently vary. Some landowners may feel that their rights have been infringed by having a person enter their property, while others may be inconvenienced by temporarily having a 'work site' on their property. Consultation with authorities suggests, however, that the vast majority of property owners accept the need for such activities particularly as they tend to be for the purpose of fixing a problem and hence the 'psychic' costs or loss of option costs are considered low.

As a general point, authorities seek to place the property owner on a similar footing as they were prior to any works (section 134(d) of the Act). While not part of the regulations, physical damage to the property is rectified, for example, vegetation is replaced, fences repaired, excavations filled.

Given the nature of the proposed Regulations it is expected that they would have a negligible impact on the small business sector. Moreover, given that the proposed Regulations do not impose direct compliance, administrative, or delay costs, this RIS finds that they do not disproportionally impact on small business.

## 7A. CHANGE IN REGULATORY BURDEN

In December 2009 the Department of Treasury and Finance released the *Victorian Regulatory Change Measurement Manual*.[40] All legally enforceable obligations imposed by State Government Ministers, courts, departments, regulatory agencies and local governments in Victoria should be measured. These obligations must relate to the substantive compliance costs, administrative costs and delay costs of regulation. These costs are described in Attachment B.

A Regulatory Change Measurement is required where there is *prima facie* evidence that the change in regulatory burden is likely to be material. A regulatory change is material if:

- the change in administrative burden experienced by the affected sector is greater than $250,000 per annum; or

- the change in the sum of compliance costs (including administrative and substantive compliance costs) and costs of delays, experienced by the affected population, is greater than $500,000 per annum.

Given that the proposed Regulations do not introduce any new administrative obligations, compliance obligations, or delay costs, there is no change to the regulatory burden.

Therefore, in accordance with and for the purposes of the *Victorian Guide to Regulation* and *Victorian Regulatory Change Measurement Manual*, it has been determined that the proposed Water (Subdivisional Easements and Reserves) Regulations 2011 will not lead to a material change in the compliance burden on business, not-for-profit organisations, economic (income generating) activities of private individuals, and government services in Victoria.

[40] Department of Treasury and Finance, 2009, *Victorian Regulatory Change Measurement Manual*, Melbourne, December

## 8. IMPLEMENTATION AND ENFORCEMENT ISSUES

Given that similar regulations have been in place for over 20 years, it is not expected that the proposed Regulations will raise any implementation or transitional issues or cause unintended consequences. No new systems or procedures, nor stakeholder education is required. The proposed Regulations contain no penalties but are enforceable under the *Water Act 1989.*

There have been no complaints directly concerned with the operation of the current Regulations. Almost all issues relate to building structures over easements (which is not permitted under section 148 of the Act). This issue is not part of the regulations. Of those authorities that received complaints/queries concerning building structures over easements, the average number was in the order of 5 to 10 per annum.

Information obtained from authorities suggests that almost all disputes/issues are resolved with the property owner face-to-face, while more complex disputes may be handled by an authority's internal dispute resolution mechanisms. If this is not successful complainants have recourse to the Energy and Water Ombudsman or the Victorian Civil and Administrative Tribunal (VCAT). Disputes reaching the ombudsman or VCAT are rare, and as noted, none have directly related to the current Regulations.

More generally, the proposed Regulations themselves, amongst other things, form a part of a monitoring and inspection regime (i.e., to ensure that water infrastructure is operating efficiently). However, there are no formal arrangements in place to monitor authorities' adherence to the activities undertaken under the proposed Regulations. That said, the system largely relies on complaints based compliance and authorities are require to submit details of such complaints to the Essential Services Commission and report complaints in their annual reports. No such complaints have been reported in the annual reports in relation to the regulations.

## 9. CONSULTATION

To initiate the remaking of the current Regulations, all water corporations and CMAs were contacted to seek their views and inputs on ways to improve the regulations. Eleven responses were received. A further round of consultation was undertaken in October 2010 with the authorities to gather information concerning the nature and extent of the issues dealt with by the proposed Regulations. A number of phone calls were also made to clarify earlier comments or seek further information. All respondents agreed that the current Regulations had worked effectively over the past 10 years. A number of authorities took the opportunity to raise other issues (broader policy or administrative issues), and the only minor suggestion of a wording change (inclusion of the word 'vegetation' in the definition of 'matter' to clarify that matter included vegetation) was incorporated into the proposed Regulations.

The Victorian Farmers Federation (VFF) and Victorian Water Industry Association have developed the *Pipelines Easement Guidelines*, which sets out information for water corporations and landowners about their rights and obligations with respect to pipeline easements. Key elements of the guidelines include entry to private land and land owners' rights. An important aspect of the guidelines is that authorities should provide written notice to enter properties at an appropriate time (this is also currently covered under section 133(2) of the Act). Authorities should also cause as little damage, harm or inconvenience as possible, while leaving the land in the same state as prior to entry. Overall, the VFF did not raise any specific concerns regarding the proposed Regulations.

The Municipal Association of Victoria raised some issues in relation to the 'retirement' of easements (but these are not directly relevant to the proposed Regulations).

Officers from the Victorian Law Reform Commission provided useful background information to the current *Easements and Covenants Consultation Paper*, along with clarifying other matters in relation to easements.

This RIS will be publicly available on the DSE's website at (www.dse.vic.gov.au) and will be advertised in the herald sun on 12 January 2011 and the Victorian Government Gazette. Copies of this RIS have been forwarded to key stakeholders inviting comments.

This RIS represents another step in the consultation process and the Office of Water welcomes comments or suggestions with respect to the nature, extent, and likely impacts of the proposed Regulations, and any variations that may improve the overall quality of the proposed Regulations. The summary section at the beginning of this RIS contains focussed questions on which stakeholders may wish to make comment.

The *Subordinate Legislation Act 1994* requires that the public be given at least 28 days to provide comments or submissions regarding the proposed Regulations. Given that the proposed Regulations are being remade with minimal changes this period is considered adequate. Consequently the consultation period for this RIS will be 28 days, with written comments required by no later than **5.00pm, 11 February 2011**.

* * * * *

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*Subdivision Act 1988*

*Subordinate Legislation Act 1994*

Subordinate Legislation Act 1994 Guidelines

*Water Act 1989*

*Water Industry Act 1994*

# 10. ATTACHMENTS

Attachment A

## DESCRIPTION OF PROPOSED STATUTORY RULE

*Machinery regulations – Regulations 1 to 5*

**Regulation 1** states the objective of the regulations, which is to prescribe the rights of an authority upon the creation of an easement or reserve for the use of the Authority when land is subdivided.

**Regulation 2** establishes the authorising provision under which the regulations are made. This head of power resides in section 324 of the *Water Act 1989*.

**Regulation 3** provides the commencement date on which the regulations come into operation. This date has been set at 19 March 2011.

**Regulation 4** revokes the Water (Subdivisional Easements and Reserves) Regulations 2001.

**Regulation 5** contains definitions for the purposes of the regulations. This regulation defines 'Act', 'bank', 'change', 'channel work', 'construct', 'drainage works', 'excavate', 'inspect', 'maintain', 'matter', 'plant', 'pipeline works', 'soil', 'subway', 'water management works', and 'weir'. As noted in the RIS, the only change in the proposed Regulations is the inclusion of vegetation in the definition of matter to avoid uncertainty. This is a minor change and does not change the operation of the regulations.

*Regulations dealing with rights – Regulations 6 to 10*

Section 136 of the *Water Act 1989* deals with the creation of rights with respect to easements and reserves in subdivisions. This section provides that if a proposal for subdivision of land is referred to an Authority under the *Planning and Environment Act 1987*, the Authority may require the creation of easements or reserves, or both, for the use of the Authority for:

- pipelines or ancillary purposes and channels
- carriageways
- waterway management, and
- drainage.

The creation of an easement or a reserve gives the Authority for whose use it is created the rights prescribed in relation to an easement or reserve created for that purpose. These rights are prescribed in regulations 6 to 10 of the regulations.

**Regulation 6** deals with rights of an Authority for pipelines or ancillary purposes and channels. Specifically, it creates rights over the land burdened by the easement in relation to pipelines or ancillary purposes or for the purpose of channels. The following rights are provided to the Authority:

- at all times, full and free access to enter upon and pass over the land (with or without plant)
- to take onto and remove plant from the land
- to clear and excavate the land
- to construct pipeline works or channel works on, over or under the land
- to use and operate pipeline works or channel works on the land
- to inspect, maintain or change pipeline works or channel works on the land (including a change in their size or number)
- to remove any matter from or deposit any matter on the land.

**Regulation 7** deals with rights of an Authority for carriageway purposes. The creation of an easement for the purpose of carriageways gives the Authority the right to:

- construct and maintain a road or access track on the land
- at all times, full and free access to enter upon and pass over the land (with or without plant)
- to take onto and remove plant from the land
- to clear and excavate the land
- to remove any matter from or deposit any matter on the land.

**Regulation 8** deals with rights of an Authority for the purposes of drainage. These rights over the land burdened by the easement provide the Authority with the following rights:

- to construct drainage works on the land
- to use and operate drainage works on the land
- to remove obstacles to the flow of water on the land
- to inspect, maintain or change drainage works on the land (including a change in their size or number)
- at all times, full and free access to enter upon and pass over the land (with or without plant)
- to take onto and remove plant from the land
- to clear and excavate the land
- to remove any matter from or deposit any matter on the land.

**Regulation 9** concerns rights of an Authority for the purposes of waterway management. It provides the Authority with the following rights in relation to land burdened by the easement for the purposes of waterway management:

- to protect and enhance any waterway on the land
- to plant, maintain and remove vegetation on the land
- to construct, maintain or remove fences or gates to protect vegetation on the land
- to construct waterway management works on the land
- to use and operate waterway management works on the land
- to inspect, maintain or change the waterway management works on the land (including a change in their size or number)
- to construct and maintain any weir or bank on the land
- at all times, full and free access to enter upon and pass over the land (with or without plant)
- to take onto and remove plant from the land
- to clear and excavate the land
- to remove any matter from or deposit any matter on the land
- construct and maintain a road or access track on the land.

**Regulation 10** provides an Authority with all the rights attaching to the fee simple of the land constituting the reserve in relation to the creation of a reserve under section 136 of the Act.

Attachment B

## CLASSIFICATION OF COSTS

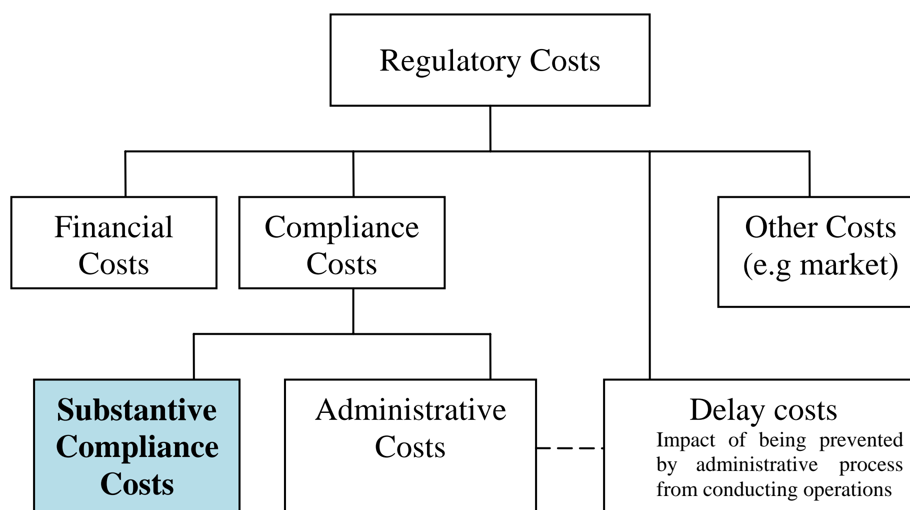
The *Victorian Guide to Regulation* places regulatory costs into three broad categories. Figure 1 below shows these as financial costs, compliance costs and market costs.
**Financial costs** are the result of a concrete and direct obligation to transfer a sum of money to the government or relevant authority. Such costs include administrative charges, taxes and fees.

**Compliance costs** can be divided into 'substantive compliance costs' and 'administrative costs'. 'Substantive compliance' costs are those costs that directly lead to the regulated outcomes being sought. These costs are often associated with content-specific regulation and include modifying behaviour or undertaking specified training in order to meet government regulatory requirements. These costs are the subject of this RIS.

'Administrative costs', often referred to as red tape, are those costs incurred by business to *demonstrate* compliance with the regulation or to allow government to administer the regulation. Administrative costs can include those costs associated with familiarisation with administrative requirements, record keeping and reporting, including inspection and enforcement of regulation. If the processing of a licence or approval is delayed, then this can impose costs. 'Delay costs' are the expenses and loss of income incurred by a regulated entity through an application delay and/or an approval delay.

**Market costs** are those costs that arise from the impact that regulation has on market structure or consumption patterns. These costs are often associated with licensing of certain activities, prescribing qualifications or limiting access to a certain profession or industry in some other way. When barriers to entry are created, this can allow incumbents to charge higher prices and can result in reduced service levels and stifle innovation. Given the narrow focus of the regulations, it is not expected that they will impose market costs.

**Figure 1: Victorian Guide to Regulation – Categories of Regulatory costs**



STATUTORY RULES

S.R. No. /2011

# Water (Subdivisional Easements and Reserves) Regulations 2011

The Governor in Council makes the following Regulations:

Dated: XX XX 2011

Responsible Minister:

PETER WALSH

Minister for Water

MATTHEW MCBEATH

Clerk of the Executive Council

## 1 Objective

The objective of these Regulations is to prescribe the rights of an Authority upon the creation of an easement or reserve for the use of the Authority when land is subdivided.

## 2 Authorising provision

These Regulations are made under section 324 of the **Water Act 1989**.

## 3 Commencement

These Regulations come into operation on 19 March 2011.

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## 4 Revocation

The Water (Subdivisional Easements and Reserves) Regulations 2001 are **revoked**.

## 5 Definitions

In these Regulations—

***the Act*** means the **Water Act 1989**;

***bank*** includes groyne;

***change*** includes alter, cut off, add to, replace, remove and reconstruct;

***channel works*** include—

(a) channels and ancillary works; and

(b) the following related works—

(i) bridges;

(ii) siphons;

(iii) inlets;

(iv) outlets;

(v) regulators;

(vi) controlling, metering and communication;

(vii) power and telemetry devices;

(viii) buried cables;

(ix) culverts;

(x) subways;

(xi) pipes;

(xii) fittings;

(xiii) drains;

(xiv) drop structures;

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***construct*** includes erect, lay, place, build or fabricate;

***drainage works*** include—

(a) drains and ancillary works, culverts and spillways; and

(b) the following related works—

(i) drop structures;

(ii) control gates;

(iii) controlling, metering and communication;

(iv) power and telemetry devices;

(v) buried cables;

(vi) pipes;

(vii) fittings and escapes;

***excavate*** includes dig or cut;

***inspect*** includes patrol;

***maintain*** includes cleanse, flush, repair, and if necessary, remove;

***matter*** includes timber, soil and vegetation;

***plant*** includes machines, vehicles, equipment and materials;

***pipeline works*** include—

(a) pipelines and ancillary works; and

(b) the following related works—

(i) marker posts;

(ii) valves;

(iii) valve chambers;

(iv) housings;

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(v) controlling, metering and communication;

(vi) power and telemetry devices;

(vii) buried cables;

(viii) vertical surgepipes;

(ix) air vessels;

(x) fittings;

(xi) connections;

(xii) anti-corrosion equipment;

(xiii) hatches;

(xiv) access points;

(xv) inspection openings and pits;

(xvi) cleaning pits;

(xvii) scouring devices;

(xviii) drains;

(xix) underground pumps;

(xx) underground and above-ground storage tanks;

***soil*** includes earth, stone and gravel;

***subway*** means an underground access way or underground conduit;

***waterway management works*** include—

(a) drainage systems or drainage works; and

(b) related subways; and

(c) any other works related to waterway management functions;

***weir*** includes dam or levee.

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**6 Rights of an Authority for pipelines or ancillary purposes and channels**

(1) This regulation applies if an easement is required to be created under section 136(1) of the Act for the purposes of pipelines or ancillary purposes or for the purposes of channels.

(2) For the purposes of section 136(2) of the Act, the following rights are prescribed in relation to land burdened by the easement to which this regulation applies-

(a) at all times, full and free access to enter upon and pass over the land (with or without plant);

(b) to take onto and remove plant from the land;

(c) to clear and excavate the land;

(d) to construct pipeline works or channel works on, over or under the land;

(e) to use and operate pipeline works or channel works on the land;

(f) to inspect, maintain or change pipeline works or channel works on the land (including a change in their size or number);

(g) to remove any matter from or deposit any matter on the land.

**7 Rights of an Authority for carriageway purposes**

(1) This regulation applies if an easement is required to be created under 136(1) of the Act for the purpose of carriageways.

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(2) For the purposes of section 136(2) of the Act, the following rights are prescribed in relation to land burdened by the easement to which this regulation applies—

(a) to construct and maintain a road or access track on the land;

(b) at all times, full and free access to enter upon and pass over the land (with or without plant);

(c) to take onto and remove plant from the land;

(d) to clear and excavate the land;

(e) to remove any matter from or deposit any matter on the land.

**8 Rights of an Authority for the purposes of drainage**

(1) This regulation applies if an easement is required to be created under 136(1) of the Act for the purpose of drainage.

(2) For the purposes of section 136(2) of the Act, the following rights are prescribed in relation to land burdened by the easement to which this regulation applies—

(a) to construct drainage works on the land;

(b) to use and operate drainage works on the land;

(c) to remove obstacles to the flow of water on the land;

(d) to inspect, maintain or change drainage works on the land (including a change in their size or number);

(e) at all times, full and free access to enter upon and pass over the land (with or without plant);

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(f) to take onto and remove plant from the land;

(g) to clear and excavate the land;

(h) to remove any matter from or deposit any matter on the land.

**9 Rights of an Authority for the purposes of waterway management**

(1) This regulation applies if an easement is required to be created under 136(1) of the Act for the purpose of waterway management.

(2) For the purposes of section 136(2) of the Act, the following rights are prescribed in relation to land burdened by the easement to which this regulation applies —

(a) to protect and enhance any waterway on the land;

(b) to plant, maintain and remove vegetation on the land;

(c) to construct, maintain or remove fences or gates to protect vegetation on the land;

(d) to construct waterway management works on the land;

(e) to use and operate waterway management works on the land;

(f) to inspect, maintain or change the waterway management works on the land (including a change in their size or number);

(g) to construct and maintain any weir or bank on the land;

(h) at all times, full and free access to enter upon and pass over the land (with or without plant);

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(i) to take onto and remove plant from the land;

(j) to clear and excavate the land;

(k) to remove any matter from or deposit any matter on the land;

(l) to construct and maintain a road or access track on the land.

**10 Rights on the creation of a reserve**

(1) This regulation applies if a reserve is required to be created for a purpose specified in section 136(1) of the Act.

(2) For the purposes of section 136(2) of the Act, the rights prescribed are all the rights attaching to the fee simple of the land constituting the reserve to which this regulation applies.

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