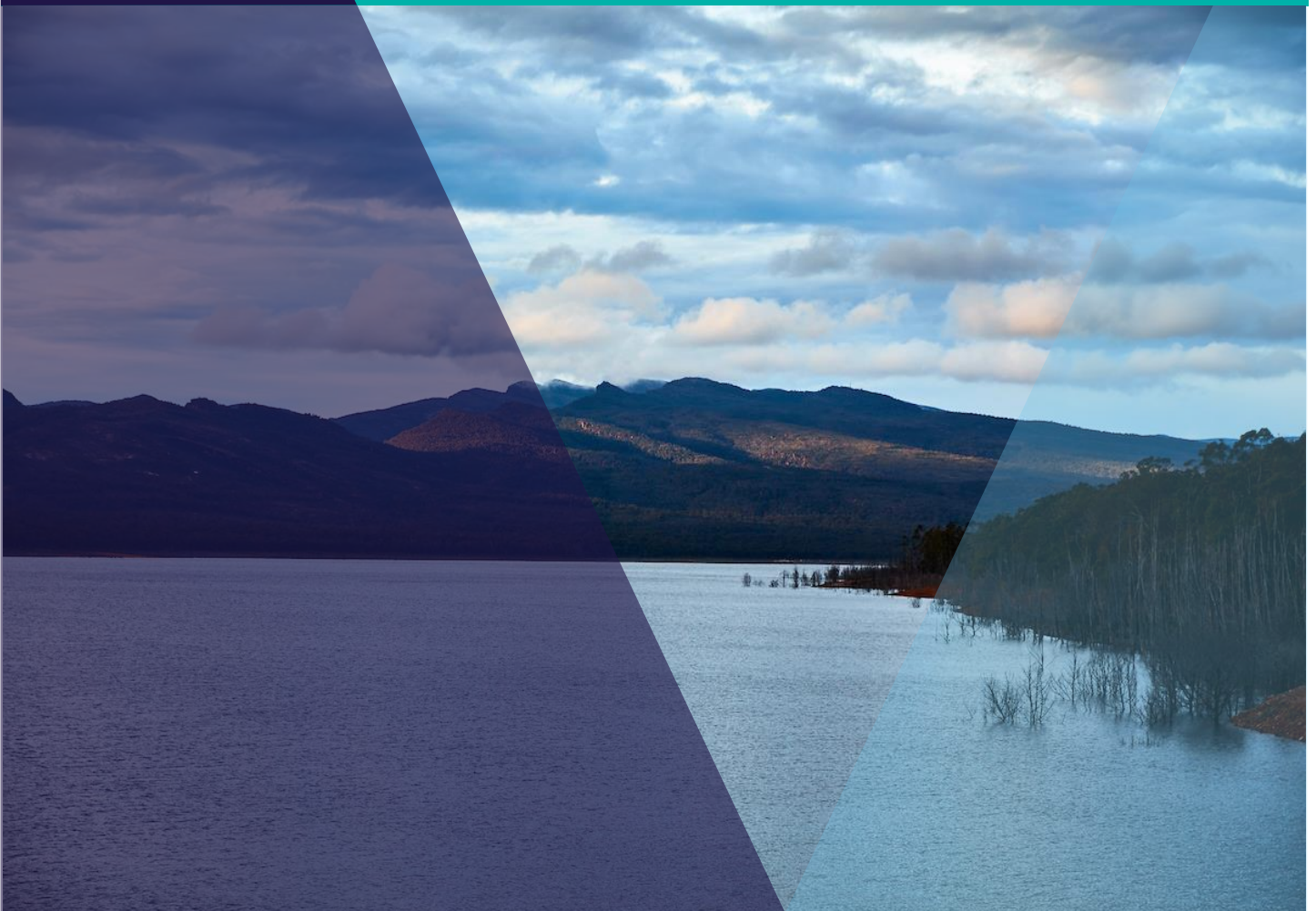




Regulatory Impact Statement

Water (General) Regulations 2021

October 2020



© Craig Moodie Photography PTY LTD 2016

Photo credit

DEWLP gallery

Acknowledgment

We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it. We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

We are committed to genuinely partner, and meaningfully engage, with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader aspirations in the 21st century and beyond.



© The State of Victoria Department of Environment, Land, Water and Planning 2019



This work is licensed under a Creative Commons Attribution 4.0 International licence. You are free to re-use the work under that licence, on the condition that you credit the State of Victoria as author. The licence does not apply to any images, photographs or branding, including the Victorian Coat of Arms, the Victorian Government logo and the

Department of Environment, Land, Water and Planning (DELWP) logo. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>

ISBN 978-1-76077-795-1 (pdf)

Disclaimer

This publication may be of assistance to you but the State of Victoria and its employees do not guarantee that the publication is without flaw of any kind or is wholly appropriate for your particular purposes and therefore disclaims all liability for any error, loss or other consequence which may arise from you relying on any information in this publication.

Accessibility

If you would like to receive this publication in an alternative format, please telephone the DELWP Customer Service Centre on 136186, email customer.service@delwp.vic.gov.au or via the National Relay Service on 133 677 www.relayservice.com.au. This document is also available on the internet at www.engage.vic.gov.au.

Regulatory Impact Statement

Water (General) Regulations 2021

October 2020

Author

This report was prepared by Regulatory Impact Solutions in 2019 and updated by DELWP in 2020.

Contents

Context.....	1
What's proposed?	2
Summary of impacts of proposed Regulations.....	3
Competition and small business.....	4
How will the proposed Regulations be implemented?	4
Evaluation.....	4
1. Background and Purpose	5
1.1 The Water Act 1989.....	5
1.2 The process for remaking sunseting Regulations.....	6
1.3 Structure of this document.....	7
2. Subdivisional easements and reserves	8
2.1 Context	8
2.2 Why is the Government considering action? (problem analysis)	9
2.3 What outcomes is the Government aiming to achieve? (objectives of action)	10
2.4 What are the possible different courses of action that could be taken? (identify feasible options).....	10
2.4.1 Base case.....	10
2.4.2 Proposed approach	11
2.4.3 Alternative options.....	12
2.4.4 Common Law	12
2.5 What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)	12
2.5.1 General impacts of easements and reserves.....	12
2.5.2 Impacts of the alternative option – property specific easement rights.....	13
2.5.3 Impacts of the proposed Regulations.....	14
3. Transfer of land – notices of disposition	15
3.1 Context	15
3.2 Why is the Government considering action? (problem analysis)	15
3.3 What outcomes is the Government aiming to achieve? (objectives of action)	16
3.4 What are the possible different courses of action that could be taken? (identify feasible options).....	16
3.5 What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)	18
4. Register of interests of board members	20
4.1 Context	20
4.2 Why is the Government considering action? (problem analysis)	22
4.2.1 Ensuring all relevant interests are disclosed	22
4.2.2 Inspection of the registers	22
4.3 What outcomes is the Government aiming to achieve? (objectives of action)	23

4.4 What are the possible different courses of action that could be taken? (identify feasible options).....	23
4.5 What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)	24
5. Long service leave	26
5.1 Context	26
5.2 Why is the Government considering action? (problem analysis)	26
5.3 What outcomes is the Government aiming to achieve? (objectives of action)	27
5.4 What are the possible different courses of action that could be taken? (identify feasible options).....	28
5.4.1 Options as to the entitlements	28
6. Preferred options	30
6.1 Summary of proposed Regulations and impacts.....	30
6.2 Competition and small business	30
6.3 How will the preferred option be put into place? (implementation plan)	31
6.4 When (and how) will the Government evaluate the effectiveness of the preferred option in meeting the objectives? (evaluation strategy)	31

Context

The *Water Act 1989* (the Act) is the primary legislation governing water in Victoria. Amongst other things, it provides the legal framework for water management and use across the State, which includes the protection of public and private rights to water, providing for the integrated management of all elements of the water cycle, regulates the sustainable use of water resources, encouraging community involvement in the making and implementation of arrangements relating to the use and management of water resources, fostering responsible and efficient water services suited to various needs and various consumers, and providing for the protection of catchment conditions.

The Act establishes Victoria's 19 water corporations that provide a range of essential services including the provision of water supply and sewerage services, water delivery for irrigation and domestic and stock purposes and the provision of drainage and salinity mitigation services.¹

The Act also provides for certain activities of catchment management authorities (CMAs).² CMAs oversee whole-of-catchment planning for the ten catchment management areas of Victoria. CMAs have an important integrating function in the management of Victoria's land, water and biodiversity, which includes the management of waterways, floodplains and the Environmental Water Reserve. Despite the CMAs being established under the *Catchment and Land Protection Act 1994*, they also have significant water and catchment functions, provided for under the Water Act.

There are nine sets of Regulations made under the Water Act currently in effect. Under the *Subordinate Legislation Act 1994*, all regulations sunset (i.e., lapse) ten years after they are made. This is to ensure that the need for continued regulation is regularly re-examined and regulations remain fit for purpose. Four of the Regulations made under the Water Act are due to sunset during 2021.

Two of these Regulations, the Water (Notice of Disposition) Regulations 2010 and the Water (Register of Interests) Regulations 2010 were due to sunset on 27 July 2020. They were remade and exempted under section 8 of the Subordinate Legislation Act 1994 on 21 July 2020, with effect from 22 July 2020 for a limited term so that they could be included as part of this regulation consolidation project. The remade Regulations have been slightly updated to reflect current drafting conventions. Some other minor changes have been included which reflect feedback from stakeholders in the water sector, received as part of the early RIS feedback process. Accordingly, some of the changes proposed in this document are already reflected in re-made Regulations and in the draft Water (General) Regulations 2021 which has been distributed for comment alongside this RIS.

The four Regulations under review are:

Table 1: Sunsetting Regulations

Regulation	Sunset date
Water (Subdivisional Easements and Reserves) Regulations 2011	15 March 2021
Water (Notice of Disposition) Regulations 2010 remade as Water (Notice of Disposition) Regulations 2020	27 July 2020 remade and due to expire 3 August 2021
Water (Register of Interests) Regulations 2010 remade as Water (Register of Interests) Regulations 2020	27 July 2020 remade and due to expire 3 August 2021
Water (Long Service Leave) Regulations 2011	3 August 2021

¹ Section 85.

² CMAs were established in 1997 under the *Catchment and Land Protection Act 1994*.

These Regulations (referred to collectively as “the current Regulations”) regulate a number of administrative matters pertaining to Victoria’s 19 water corporations and 10 CMAs, namely they:

- prescribe the rights of an Authority (a water corporation or a CMA) upon the creation of an easement or reserve for the use of the Authority when land is subdivided
- prescribe the form of the notice of disposition of interests in land that must be provided to water corporation upon disposition of property
- prescribe the form of returns and provide for applications relating to the register of interests of board members of water corporations under section 113 of the Water Act
- provide for the calculation and portability of long service leave entitlements for employees of water corporations.

The Department of Environment, Land, Water and Planning (DELWP) proposes to amalgamate the four sets of regulations into a single set to remove the administrative burden for preparation of multiple sets of regulations into the future. A single set of consolidated regulations will also make it easier for users to refer to and find relevant regulations. The new set of regulations—Water (General) Regulations 2021—will commence no later than 15 March 2021.

The remaking process provides an opportunity to revisit whether regulations are still needed, and if so, whether there are ways to improve them. In preparing the new regulations, DELWP has reviewed each of the current Regulations to determine whether the content is still appropriate and to propose any amendments to remove outdated regulations or to reflect any changes in government policy since the current regulations were made.

What’s proposed?

Subdivisional easements and reserves

The proposed Regulations retain the current arrangements in prescribing the rights of water corporations and CMAs under subdivisional easements and reserves created under the Act. Easements and reserves in relation to subdivisions are necessary to ensure that water corporations and CMAs are able to fulfil their statutory responsibilities to provide water-related services and activities, such as water supply, catchment, drainage and sewerage. In the absence of any regulations, easements and reserves would still exist and continue to be created in relation to proposed subdivisions, although exactly what water corporations and CMAs have the authority to do under those easements and reserves would not be defined. Use of easements and reserves would need to involve negotiation with each property owner, or rely on uncertain common law principles where there is disagreement. Prescribing the rights in relation to easements and reserves provides a more efficient way to enable water corporations and CMAs to use the easements and reserves. No changes to the current arrangements are proposed.

Notice of Disposition

The proposed Regulations will continue to prescribe the form of notice to be used for parties required to submit a Notice of Disposition of Land under the Act. A form must be prescribed to give effect to important sections of the Act – the absence of which can affect a vendor’s ongoing liabilities in relation to a property after sale. More generally, the forms ensure that water corporations are informed about changes in ownership of properties over which they have a relevant interest. The proposed forms have been updated from the forms in the Water (Notice of Disposition) Regulations 2010 to provide more relevant information and, where possible, align the required information to similar information required in Notices of Acquisition (which are generated at the same time). It is proposed that these changes continue.

Board governance – disclosure and register of interests

The proposed Regulations will continue to prescribe the forms to be used for board members of water corporations (and other nominated senior officers) when disclosing relevant financial and personal interests, and also the form to be used by a person wishing to access the register of board members’ disclosed interests. These forms are required to be completed under the Act, with the prescribed forms only requiring the minimum information necessary to give effect to the provisions in the Act. No change is proposed for these forms compared to the version in the Water (Notice of Interests) Regulations 2020, which included removing the requirement to have disclosure declarations witnessed. It is proposed that these changes continue. This will allow a more efficient process to complete the disclosures.

Long Service Leave

The proposed Regulations continue to prescribe how long service leave of water corporation employees will be calculated and how it can be taken. The entitlement to long service leave is created under the Act, however, in the absence of specific regulations, the Act is unclear on how leave is to be calculated (e.g., what counts as continuous service) and how leave is to be taken. The proposed Regulations therefore provide certainty in planning for long service leave for both water corporations and their employees. The proposed arrangements for long service leave are largely identical to the current arrangements, with the following proposed changes:

- Change 1 – remove the requirement to have served a minimum of three years with another water corporation for long service leave rights to be eligible for portability. The proposal will include any amount of service with a water corporation as portable, in line with the Victorian public sector.
- Change 2 – remove a reference to ‘1 March 1975’ in the current regulations. This reference referred to an historical date in relation to prior employment in previous water corporations. Consultation has revealed that this no longer applies to any employees.

Summary of impacts of proposed Regulations

The following table summarises the proposed Regulations and their impacts.

Table 2: Summary of impacts of the proposed Regulations

Proposed regulation	Costs	Benefits
Prescribing the rights that attach to subdivisational easements and reserves created under the Water Act.	A very small number of easements may be granted rights that exceed what would otherwise apply under common law principles or negotiated between parties	Provides clarity and certainty of rights, and supports water corporations and CMAs being able to effectively perform their duties Reduces costs of negotiation between parties and/or cost of disputes over the scope of easement rights.
Continue to prescribe the requirements to provide a notice of disposition similar to the current arrangements, but with an updated standard form.	Incremental costs of completing and submitting notices of disposition is estimated at \$600,000 to \$1.2 million per year	Water corporations are informed when transfers take place and are better able to manage relationships with customers by being informed of property transfers, which also assists in better financial management.
Prescribing the forms to be used for board members (and other nominated officers) to disclose relevant interests upon appointment and annually, and a form to be used for persons seeking to inspect the register of disclosed interests. The requirement to have disclosures witnessed has been removed.	Completing the returns upon appointment and annually is estimated to have a time cost of around \$92,000 over the next ten years. However, the obligation to complete the returns is in the Act, and therefore not directly attributable to the proposed Regulations	Provide a consistent approach to disclosures required under the Act, and assist with compliance and promote good governance
Prescribe the methods for the calculating and taking of long service leave for water corporation employees	There is a small administrative cost in calculating long service leave for employees (although the cost is likely to be lower than under the current regulations). The cost of removing the 3-year minimum service requirement for portability is estimated to cost water corporations	Aligning long service leave benefits with the Victoria public sector will provide a benefit to certain employees and remove any distortions created by the differences in long service long treatment.

around \$1 million (nominal) over the next 10-years.

Competition and small business

The Regulations related to notice of disposition and the register of interests of board members do not affect small businesses or competition in general.

The Regulations that prescribe the rights related to the creation of easement and reserves 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 do not restrict competition in any market.

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 disproportionately impact on small business.

How will the proposed Regulations be implemented?

The proposed Regulations largely continue the current arrangements. As such, no specific implementation plan or transitional arrangements are necessary. The department will work with water corporations to ensure that the (relatively minor) changes included in the new Regulations are reflected in updated processes upon commencement.

Evaluation

The proposed regulations are generally of a minor nature and will not be formally reviewed until they are next remade. However, a number of possible reforms to the regulations that were not considered practicable because there was no authorising power in the Act could be considered if the Act were to be amended.

1. Background and Purpose

1.1 The Water Act 1989

The *Water Act 1989* (the Act) is the primary legislation governing water in Victoria. Amongst other things, it protects all public and private rights to water, provides for the integrated management of all elements of the water cycle, regulates the sustainable use of water resources, maximises community involvement in the making and implementation of arrangements relating to the use and management of water resources, fosters responsible and efficient water services suited to various needs and various consumers, and provides for the protection of catchment conditions.

The Act establishes Victoria's 19 water corporations that provide a range of essential services including the provision of water supply and sewerage services, water delivery for irrigation and domestic and stock purposes and the provision of drainage and salinity mitigation services.³

The Act also provides for certain activities of catchment management authorities (CMAs).⁴ 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. An important function is the management of waterways, floodplains and the Environmental Water Reserve. Most of the functions of CMAs are governed by the *Catchment and Land Protection Act 1994*, however, some elements of the Water Act involve CMAs in relation to easements and reserves.

There are nine sets of Regulations made under the Water Act currently in effect. Under the *Subordinate Legislation Act 1994*, all regulations sunset (i.e., lapse) ten years after they are made. This is to ensure that the need for continued regulation is regularly re-examined and regulations remain fit for purpose. Four of the Regulations made under the Water Act are due to sunset during 2021.

Two of these Regulations, the Water (Register of Interests) Regulations 2010 and the Water (Notice of Disposition) Regulations 2010 were due to sunset on 27 July 2020. They were remade and exempted under section 8 of the Subordinate Legislation Act 1994 on 21 July 2020, with effect from 22 July 2020 for a limited term so that they could be included as part of this regulation consolidation project. The remade Regulations have been slightly updated to reflect current drafting conventions. Some other minor changes have been included which reflect feedback from stakeholders in the water sector received as part of the early RIS feedback process. Accordingly, some of the changes proposed in this document are already reflected in re-made Regulations and in the draft Water (General) Regulations 2021 which has been distributed for comment alongside this RIS.

The four Regulations under review are:

Table 3: Sunsetting Regulations

Regulation	Sunset date
Water (Subdivisional Easements and Reserves) Regulations 2011	15 March 2021
Water (Notice of Disposition) Regulations 2010 remade as Water (Notice of Disposition) Regulations 2020	27 July 2020 remade and due to expire 3 August 2021
Water (Register of Interests) Regulations 2010 remade as Water (Register of Interests) Regulations 2020	27 July 2020 remade and due to expire 3 August 2021
Water (Long Service Leave) Regulations 2011	3 August 2021

³ Section 85.

⁴ CMAs were established in 1997 under the *Catchment and Land Protection Act 1994*.

These Regulations (referred to collectively as “the current Regulations”) regulate a number of administrative matters pertaining to Victoria’s 19 water corporations and 10 CMAs, namely they:

- prescribe the rights of an Authority (a water corporation or a CMA) upon the creation of an easement or reserve for the use of the Authority when land is subdivided
- prescribe the form of the notice of disposition of interests in land that must be provided to water corporation upon disposition of property
- prescribe the form of returns and provide for applications relating to the register of interests of board members of water corporations under section 113 of the Water Act
- provide for the calculation and portability of long service leave entitlements for employees of water corporations.

DELWP proposes to amalgamate the four sets of regulations into a single set to remove the administrative burden for preparation of multiple sets of regulations into the future. A single set of consolidated regulations will also make it easier for users to refer to and find relevant regulations. The new set of regulations—Water (General) Regulations 2021—will commence no later than 15 March 2021.

1.2 The process for remaking sunseting Regulations.

The remaking process provides an opportunity to revisit whether regulations are still needed, and if so, whether there are ways to improve them. In preparing the new regulations, DELWP has reviewed each of the current Regulations to determine whether the content is still appropriate and to propose any amendments to remove outdated regulations or to reflect any changes in government policy since the current regulations were made.

Before regulations are made, the Subordinate Legislation Act requires:



In developing the proposed new Regulations, DELWP has consulted with water corporations, Catchment Management Authorities (CMAs), VicWater, Industrial Relations Victoria (IRV) and Australian Institute of Conveyancers – Victorian Division. The views and information held by these stakeholders has informed consideration of changes to the Regulations.

To assist parties to review and comment on the proposed Regulations, the Subordinate Legislation Act requires the preparation of a Regulatory Impact Statement (RIS) to be made available with the proposed Regulations.

The overall aim of a RIS is to ensure that regulation is only implemented where there is a justified need; only the most efficient forms of regulation are adopted; and there is an adequate level of public consultation in the development of regulatory measures. As required by the Subordinate Legislation Act, the assessment framework of this RIS:

- examines the nature and extent of the problem to be addressed
- states the objectives of the proposed Regulations
- explains the effects on various stakeholders
- assesses the costs and benefits of the proposed Regulations, and compares their impacts to other feasible alternatives.

The Commissioner for Better Regulation provides an independent assessment of RISs, which are assessed against the *Victorian Guide to Regulation* (VGR). The Commissioner has determined that this RIS meets the requirements of the Subordinate Legislation Act.

DELWP has now prepared the proposed Regulations for interested parties to review. Interested parties may make written submissions to DELWP about the proposed Regulations before a final decision is made on whether to formally make them, and whether any changes are needed.

Following consideration of all submissions received in response to the proposed Regulations, a notice of decision and statement of reasons will be published. Once the Regulations are made, copies of all submissions are provided to the Parliament’s Scrutiny of Acts and Regulations Committee (SARC). SARC examines these submissions to check that DELWP has considered the views of stakeholders.

1.3 Structure of this document

Chapters 2 to 5 set out the required RIS assessment framework for each of the 4 areas covered by the proposed Regulations:

Table 4: Outline of matters in this RIS

Matter	Chapter	Page
Easements and reserves	2	8
Transfer of land	3	15
Register of interest of board members	4	19
Long Service Leave of employees of water corporations	5	24

Each chapter considers:

- Why is the Government considering action? (problem analysis)
- What outcomes is the Government aiming to achieve? (objectives of action)
- What are the possible different courses of action that could be taken? (identify feasible options)
- What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)

Chapter 6 (page30) consolidates the preferred outcomes of Chapters 2 to 5 and addresses:

- What are the characteristics of the preferred option, including small business and competition impacts? (summarise the preferred option)
- How will the preferred option be put into place? (implementation plan)
- When (and how) will the Government evaluate the effectiveness of the preferred option in meeting the objectives? (evaluation strategy)

2. Subdivisional easements and reserves

2.1 Context

The *Water Act 1989* provides for an Authority⁵ to provide, manage, operate and protect water supply systems, including the collection, storage, treatment, transfer and distribution of water.⁶ Similar functions are set out in relation to sewerage, waterway management and irrigation.⁷

Supply of water and removal of wastewater to domestic properties is usually based on a gravity system or pumped system, and the water corporations 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. Inevitably, in order to perform their functions, water corporations will need a legal right to access and use land to effectively manage existing water infrastructure and the sewerage system and to provide an efficient means of planning new services. 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). Easements and reserves can sometimes be used by CMAs as well as water corporations to provide the ability to plant and protect vegetation as part of waterway management to enhance environmental values and minimise damage.

The Act provides power for an Authority to purchase or compulsorily acquire any land which is, or may be, required by the Authority for or in connection with, or as incidental to the performance of its functions or the achievement of its objects.⁸

However, more commonly, an Authority will often create an easement to enable access to the property and allow maintenance and emergency access if required. 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. 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. For a new subdivision area, the proportion of the proposed lots that would require an easement depends on the proposed layout of lots and water infrastructure, but it is likely that some form of easement will be required for most lots in the subdivision. For a subdivision of an existing property into only two or three new titles, new easements will in most cases not be required.

Easements are required to ensure OH&S standards to provide a safe working space for maintenance and access purposes. They are also required to protect the Authority's assets and any proposed structures to be built within the vicinity. Easements highlight to owners/builders that an asset may exist in a property and consequently requires due diligence to be undertaken prior to proceeding with a design and construction of new structures.

Easements can be created by express grant or reservation, under statute, or they may be implied. Easements are registered on the servient property owner's land title and run with the land. 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. A reserve for similar purposes (e.g., drainage) gives the authority all the rights attaching to the fee simple of the land.

A subdivision is the act of dividing land into pieces that are easier to sell or otherwise develop. Subdivisions are usually undertaken to create smaller parcels of land for housing. They also occur for the purpose of commercial or industrial development. 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.

⁵ In this Chapter, an Authority refers to water corporations and Catchment Management Authorities.

⁶ Section 163.

⁷ See sections 173, 221 and Part 10.

⁸ Section 130.

If water supply and sewerage services are to be provided by the water corporation for a proposed subdivision, the legislation gives an Authority the ability to acquire an easement or reserve, or both, for the purposes of pipelines or ancillary purposes, channels, carriageways, waterway management, or drainage.⁹

2.2 Why is the Government considering action? (problem analysis)

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.

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 to health.

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.

Therefore, 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. Also, 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.

A further 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.

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.

While section 136 of the Act allows an Authority to create easements and reserves as part of the approval process for a proposed subdivision, it does not stipulate the specific rights that are created by that easement or reserve. Instead, the Act provides that the creation of an easement or a reserve gives the Authority the rights prescribed in relation to an easement or reserve created for that purpose.

In the absence of any regulations prescribing those rights, 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.¹⁰ 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). Moreover, it is unlikely that the rights provided under common law would allow authorities to service and repair their water infrastructure, as greater powers are required than those provided by common law.

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.

⁹ Section 136(1).

¹⁰ There is also a view that section 136(1) of the Act, which deals with the creation of subdivisional easements, may effectively not function without regulations setting out the rights of the easements and reserves. If this were the case then authorities' ability to efficiently provide and service its water infrastructure would be significantly reduced. Authorities would need to negotiate easements with each property owner.

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.

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.¹¹

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. Prescribing the rights in regulations would therefore save time and expense (as individual documents do not need to be created, possibly by using expensive legal services), making easements easier to understand and creating more certainty as to the effect of an easement by standardising the wording. It would also ensure the rights are consistent across properties and are fairer.

Based on information provided by water corporations, there are 10,000 to 20,000 subdivisions referred to them in total each year. About 30 per cent of these will require an easement (to at least some of the properties) in favour of the water corporation and less than 5 per cent will require the creation of a reserve for purposes under the Act. Water corporations expect this to remain relatively stable over the next ten years.

2.3 What outcomes is the Government aiming to achieve? (objectives of action)

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. 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 safeguards.

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." This recognises the importance of private property rights in our society and that any infringement or encumbrances on them need to be appropriately managed.

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). This is considered necessary in order to achieve the water policy goals noted above.

2.4 What are the possible different courses of action that could be taken? (identify feasible options)

2.4.1 Base case

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.

There is another view that section 136 of the Act may not effectively operate at all without regulation. However, for the purposes of this RIS, the base case is assumed to consist of the operation of section 136 complemented by common law easement principles.

This means that, where a subdivisional easement is created under the Water Act, any disputes that arise in relation to whether activities of a water corporation or CMA are allowed according to the easement would be determined through a legal process on a case-by-case basis. As noted above, the application of common law principles to these easements is complex, and could be problematical when relied on to provide for rights for water corporations and CMAs.

In practice, where rights in relation to subdivisional easements and reserves are not defined in regulation, the water corporation or CMA would need to reach agreement with the property owner about what activities the

¹¹ This approach may run into further problem, as common law does not support easements in gross – these must be underpinned by legislation (or regulations), further limiting the performance of the Authority's functions.

easement allowed. This might involve negotiation between the parties, or where this is not achieved, application to the courts to determine on common law principles. This would not only be time consuming, but has uncertain outcomes for the water corporation or CMA in its ability to fulfil its statutory functions, and would appear to undermine the purpose of creating the easement at all.

2.4.2 Proposed approach

The proposed Regulations continue the same rights as the current Regulations. These are summarised below:

Table 5: Proposed rights of easements

Rights for each easement purpose	Carriageways	Pipelines and channels	Drainage	Waterway management
At all times, full and free access to enter upon and pass over the land (with or without plant)	✓	✓	✓	✓
Take onto and remove plant from the land	✓	✓	✓	✓
Clear and excavate the land	✓	✓	✓	✓
Remove any matter from or deposit any matter on the land	✓	✓	✓	✓
Construct and maintain a road or access track on the land	✓			✓
Construct pipeline works or channel works on, over or under the land		✓		
Use and operate pipeline works or channel works on the land		✓		
Inspect, maintain or change pipeline works or channel works on the land (including a change in their size or number)		✓		
Construct drainage works on the land			✓	
Use and operate drainage works on the land			✓	
Remove obstacles to the flow of water on the land			✓	
Inspect, maintain or change drainage works on the land (including a change in their size or number)			✓	
Protect and enhance any waterway on the land				✓
Plant, maintain and remove vegetation on the land				✓
Construct, maintain or remove fences or gates to protect vegetation on the land				✓
Construct waterway management works on the land				✓
Use and operate waterway management works on the land				✓
Inspect, maintain or change the waterway management works on the land (including a change in their size or number)				✓
Construct and maintain any weir or bank on the land				✓

For the creation of a reserve, the rights proposed to be prescribed are all the rights attaching to the fee simple¹² of the land constituting the reserve to which this regulation applies.

The proposed articulation of rights is not necessarily what would be reached by agreement between parties in every case, or as determined by a court if relying on common law easement principles, however it provides a reasonable scope of rights that will allow water corporations and CMA to fulfil their duties, while significantly improving the process for determining rights and increasing certainty.

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).

2.4.3 Alternative options

Given that no non-regulatory options were identified (see 2.4.4 below), an option considered was to streamline the current regulations to make them 'fit for purpose' for individual properties. For example, the regulations could list a range of rights for the water corporations and when a property is subdivided the water corporation could select the type of rights it considered would be required for the property. The rights attached to each easement would effectively be tailored to the property.

The current regulations contain four types of easements – these create rights of an Authority for: pipelines or ancillary purposes and channels; carriageway purposes; the purposes of drainage; and for the purposes of waterway management. A number of these rights are common to all easements¹³, and could be consolidated into a 'menu' of rights to be selected and attached to particularly properties. This could remove the need for the four types of easements specified in the current regulations.

Another option could be to increase the number of easements categories in the regulations. This option was not considered superior to the proposed current categories and little benefit, if any, could be expected. (Section 136 of the Water Act, however, limits any such rights for the purposes of pipelines or ancillary purposes; channels; carriageways; waterway management; and drainage.)

2.4.4 Common Law

Reliance on common law principles was considered, but not assessed as a feasible alternative option.

The law covering easements is highly complex and has developed over a long period of time: there are common law implied easement, prescriptive easements; easements of necessity; intended easements, and the Rule in *Wheeldon v Burrows* (1879). These doctrines were generally developed during a period where planning legislation did not exist. For example, it still may be possible to create common law easements in some instances; but these are likely to be costly, give rise to inconsistencies, and cause disputes. While some of these doctrines could be re-examined as potential options, the current regulatory regime is considered up-to-date and efficient for water corporations and landowners – it prescribes and limits the activities a water corporation may undertake on an easement, while defining and protecting the rights of the landowner.

2.5 What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)

2.5.1 General impacts of easements and reserves

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. Indeed, in most cases subdivided land cannot be sold unless there is adequate water infrastructure servicing the subdivided land.

The existence of easements, and how the rights attached to them are used, directly affects the ability of land owners to enjoy their property. The most relevant impacts are disruptions (where a water corporation or CMA may need to undertake work either on the property or by accessing the property) and limitations on building over easements.

¹² Fee simple is a type of title to property involving a permanent and absolute tenure in land with freedom to dispose of it at will.

¹³ For example: i) at all times, full and free access to enter upon and pass over the land (with or without plant); ii) to take onto and remove plant from the land; iii) to clear and excavate the land; iv) to remove any matter from or deposit any matter on the land.

In case of works, the impacts of the easement to land owners (or occupiers) is inconvenience, noise, dust, or temporary lack of access to affected land (ranging from several hours to a week or more). Most of what could be considered the most disruptive work (e.g., digging and installation) occurs at the subdivisional stage when the land has not yet been occupied by the eventual property owner,¹⁴ while the vast majority of entry onto a personal property in residential areas is to unblock sewerage pipes. Presence of any easement may also affect the freedom to build on the property; a structure cannot be built over an easement that exists in favour of an Authority or for the purposes of waste supply, sewerage or drainage purposes.¹⁵

Because of these potential impacts, a property with an easement over part of it is, other things being equal, worth less than a property without an easement. For a proposed subdivision, any 'cost' of creating an easement or reserve would be reflected in the sales price a subdivider or developer is able to achieve when selling the subdivided property. The buyer of the property would be no worse off, but the subdivider may receive less. This difference in value may be only small, particularly where the likely use of that easement that causes any real disruption to the property owner is very small. As noted, for new subdivisions, most of the disruptive work is undertaken when the infrastructure is initially installed at the subdivision stage, meaning there is in practical terms only limited actual disruption likely.

However, in practical terms, the easements and reserves are not ultimately for the private benefit of the Authorities, but used by the Authorities in order to deliver water services and provide sewerage services to properties, usually including the property over which the easement has been created. It is expected that potential buyers of a new property would place a positive value on knowing that arrangements have been made to properly plan suitable services to their property, including management of health risks, the ability for an Authority to respond to emergencies or faults, and regular maintenance. Presumably property owners welcome such visits, and would place a value of purchasing a property knowing it will be adequately serviced for its water-related needs.

On balance, the creation of an easement or reserve may improve the value of affected properties.

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 those regulated. 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.

Consultation with Authorities suggests 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.

2.5.2 Impacts of the alternative option – property specific easement rights

Attaching specific rights to an easement from a list or schedule of rights prescribed in the regulations may provide the opportunity to streamline the rights and allow water corporations to select specific rights it requires for a particular property.

While such a proposal would probably be as effective as the proposed regulations, it would not likely be as cost-efficient. Assuming that there are 4,500 subdivisions annually that require easements, water corporations would incur more than \$100,000 additional administrative costs¹⁶ (assuming that it takes 15 minute per property to enter the number and type of easement rights) compared to the proposal. Moreover, in the future if the water corporation sought more rights in relation to a property this could be difficult and costly if the owner disputes it. In any case, the proposed regulations are short and clear and would receive little benefit from streamlining or consolidation the current rights.

Therefore, the ratio of costs to benefits suggests that the proposed Regulations are superior to this alternative.

¹⁴ Initial water-related infrastructure in new subdivisions is often put in place by developers.

¹⁵ Section 148(1). An Authority may consent to structures over easements in some cases.

¹⁶ Assuming: Administrative burden = 4,500 easements x 15 minutes x \$100 per hour = \$112,500.

2.5.3 Impacts of the proposed Regulations

The proposed Regulations do not create the subdivisional easements and reserves (these are created through processes in the Act). The impact of the proposed Regulations is limited only to *how* the easements are used, compared to the base case.

Under the base case, it would be in the commercial interests of a property developer to negotiate with a water corporation to ensure adequate drainage and other water management services are provided, to attract buyers of land in the subdivision. However, when easements are used by water corporations or CMAs after the subdivided land is sold, the individual land owner may (in some situations) stop the use of that easement by arguing the planned activities exceed the rights granted by the easement. This would lead to legal disputes, unless the water corporation or CMA negotiates an agreed position with the land owner in each case. This would be time consuming and lead to uncertainty.

The proposed Regulations help to reduce transaction costs for Authorities, property developers and land owners, by allowing them to rely on the Regulations to govern access, rather than having to undertake bilateral negotiations. Thus, the proposed Regulations increase efficiency.

Water corporations, CMAs, subdividers and ultimately domestic property and business property owners are affected by the proposed Regulations. All parties will benefit from clarity and certainty of prescribing the rights that attach to subdivisional easements and reserves, and transaction costs will also be lower (i.e., reduced costs of disputes or of bilateral negotiations).

Some land owners may be adversely affected by prescribing rights that may be wider than what might be negotiated directly for that property.¹⁷ The proposed articulation of rights is not necessarily what would be reached by agreement between parties in every case, or as determined by a court if relying on common law easement principles, however it provides a reasonable scope of rights that will allow water corporations and CMA to fulfil their duties, while significantly improving the process for determining rights and increasing certainty.

In practice, there are most probably only a small number of parties that would be adversely affected by the proposed Regulations (i.e., that the rights in the proposed Regulations will lead to a greater disturbance cost than under the base case). In terms of additional burden imposed by the Regulations, this RIS assesses that these—the inconvenience/disruption of parties having access to a property and implications for where buildings can be located—are expected to be minor and affect very few Victorians overall. The department believes this burden will be more than offset by the positive benefits of the proposed Regulations by improving clarity and certainty around easement rights and reducing negotiation and dispute costs. Therefore, the department considers that the proposed Regulations, by prescribing the rights for subdivisional easements and reserves, provide a net benefit over the base case.

Water corporations and CMAs were asked about the effectiveness of the current Regulations. In general, they considered that the rights set out in the current Regulations suit their needs and see no reasons for change. Water corporations believe that the rights set out in the current Regulations are adequate to effectively undertake activities, and that all current rights are needed in order to effectively carry out their functions.

Consultation question: Stakeholders, particularly those who own property that is subject to a subdivisional easement, may wish to comment on whether the rights set out in the proposed Regulations (see Table 5 above) are clear and reasonable.

¹⁷ Conversely, some land owners may be better off where the prescribed rights are more narrowly defined than what they otherwise may have allowed, given a possible unequal negotiating power of water corporations.

3. Transfer of land – notices of disposition

3.1 Context

Water corporations require certain information for the purpose of levying water rates. When a property is sold or transferred, any outstanding charges are incurred by the purchaser.¹⁸ Therefore, it is important for water corporations to be informed about a sale of a property that is subject to water charges, and the details of the purchaser.

A transfer of property is, from the point of view of the seller, a 'disposition'. From the point of view of the buyer, it is generally referred to as an acquisition.

There are a number of other government bodies that are also required to be informed when land is transferred. For example:

- A notice of acquisition is required to be provided to the relevant local council within one month of purchase.¹⁹
- For land tax purposes, when a buyer acquires land in Victoria, they must tell the State Revenue Office (SRO). In practice, this is achieved by lodging a notice of acquisition with Land Use Victoria and the relevant local council.²⁰ Land Use Victoria has the power to pass on the information to the SRO.²¹

In practice, these notices are provided by conveyancers when completing other required forms in order to complete the transfer of property. The PEXA²² enables these notices to be managed electronically for most transfers.

The Water Act provides a mechanism for a similar notice—a notice of disposition—to be provided to water corporations.

3.2 Why is the Government considering action? (problem analysis)

Like local councils, the SRO and Land Use Victoria, it is critical that water corporations be informed of transfers of land.

Ideally, water corporations would be informed through the same mechanism used by local councils and the SRO—which have coordinated the requirements of their notices of acquisition to be identical.

However, there is no ability for water corporations to be informed about a transfer outside of the provisions of the Water Act. There are no powers in the other legislation that allows local councils, SRO or Land Use Victoria to share information about the notices it receives.

Section 159 of the Water Act allows for notices of disposition to be provided to water corporations. These are only required where regulations are made that prescribe:

- who is required to provide the notice
- to whom the notice is required to be made
- in what period the notice must be provided
- in what form the notice must be and containing which particulars.

Under the base case, no notices of disposition would be required, as no persons would be prescribed as needing to give notice. Not only would this make it difficult for water corporations to know about changes in ownership, but a failure to provide a notice of disposition could cause unintended problems in the liability of land owners due to other sections of the Act that presume a notice of disposition is provided.²³

¹⁸ Section 275 - A person who becomes the owner of a property must pay to the Authority at the time the person becomes the owner of the property any amount that is, under section 274(4A), a charge on that property.

¹⁹ Section 231 of the *Local Government Act 1989* and Local Government (General) Regulations 2015 (reg. 15).

²⁰ See *Land Tax Act 2005* and the Land Tax Regulations (which refer to requirements in the Local Government Regulations).

²¹ Section 103(3) of the *Land Tax Act 2005*.

²² 'PEXA' stands for Property Exchange Australia and is the only Electronic Lodgment Network (ELN) used nationwide for preparation of electronic dealings and verification of lodgment acceptability, electronic settlement of real property transactions including payment of settlement monies, duties, taxes and any other disbursements, and electronic lodgment of dealings to the appropriate Land Registry.

²³ For example, section 273B imposes obligations on a property owner after they have disposed of the property, until the notice of disposition has been provided to the water corporation.

Water corporations receive around 121,000 notices of disposition each year. Water corporations indicated that compliance rates vary from poor to very good, depending on the area. Some compliance rates are as low as 30 per cent for some water corporations, while others report over 95 per cent compliance.²⁴ Overall compliance is estimated around 60-70 per cent. This appears consistent with the compliance of notice of dispositions that were previously required by local councils.²⁵

In practice, some water corporations rely on the submission of notices of acquisitions in lieu of a notice of disposition. While notices of acquisition are not required to be provided to water corporations under legislation, the water corporations advise that conveyancers in some areas routinely forward a copy of a notice of acquisition as part of the overall conveyance process to water corporations. It may be that this is simply done as a matter of convenience or may stem from a misunderstanding about the regulatory requirements requiring these types of notices to be provided to the different entities.

3.3 What outcomes is the Government aiming to achieve? (objectives of action)

The objective of the proposed Regulations is for water corporations to be informed when land is disposed of, and the details of the transaction.

3.4 What are the possible different courses of action that could be taken? (identify feasible options)

Within the Water Act, power only exists to prescribe requirements for notices of disposition of land. All other bodies now exclusively require notices of acquisition only:

- The previous *Land Tax Act 1958* used to include a notice of disposition, but this was removed in 1998.
- The *Local Government Act 1989* used to require notices of disposition to be provided only. In 2003, the requirement for notices of acquisition were introduced and the requirement for a seller to provide a notice of disposition was replaced. The accompanying RIS to the Local Government (General) Regulation 2015 reasoned that as both notice of disposition and notice of acquisition were used, this was duplicative, so discontinued the need to prescribe for notices of disposition. It was noted that notices of acquisition generally provided more complete and accurate information about the new owner, and were therefore superior.

Section 159 of the Water Act provides for notices in relation to disposition of land. There is no ability under the Act to use other means. The feasible options are therefore limited to what content should be required in the notices.

The proposed Regulations cannot seek to streamline the process for providing notices by allowing the same notice of acquisition used under the Local Government (General) Regulations 2015, as this would not meet the requirements of the Water Act.²⁶

Option 1—same as current Regulations

Option 1 is to continue the current arrangements unchanged.

The current Regulations require that the notice of disposition be given:

- by the person disposing of land (where the land is subject to water tariffs by a water corporation under section 259 of the Act)
- to the relevant water corporation
- within 1 month of the disposition of the land
- using the form of notice set out in the Regulations.

The current prescribed form of notice is a relatively detailed notice with information about the seller and purchaser, the conveyancer/legal agent, details about the property, and details of the contract (contract date and possession date).

²⁴ Compliance rates are assessed relative to the number of notices of acquisition.

²⁵ See 2015 Regulatory Impact Statement prepared for the Local Government Regulations.

²⁶ While section 159 also allows the person required to give the notice to be prescribed, which could theoretically be prescribed as the person acquiring the land, other parts of the Act (such as section 273B) presume that the notice of disposition under section 159 has been provided by the person that has disposed of the property. To avoid frustrating other parts of the Act, the Regulations must prescribe the person disposing of the property as the person required to provide the notice of disposition under section 159.

Option 2—an updated form of notice

Option 2 prescribes the same essential requirements; however, the prescribed form of notice would be revised.

The department has consulted with water corporations on the design of the prescribed form. The form is based on the State Revenue Office form Notice of Acquisition of an Interest in Land with information categories nominated by a VicWater working group. While the draft form contains substantially similar information to the current Notice of Disposition form, changes include simplified 'Description of Property' codes, email and telephone details, and date of birth. These changes have already been implemented in the Water (Notice of Disposition) Regulations 2020.

Option 3—an updated form of notice with expanded scope of those required to provide notice

A further opportunity for change identified by the department would be to expand the scope of property to which section 159 applies to include property serviced by agreement (i.e., where the tariffs are not based on section 259 of the Act, but arise from other provisions such as section 124(7)) where a service is provided under an agreement, and possibly also to properties that may not be customers of the relevant water corporation but for which the water corporation's water infrastructure runs through the land. Preliminary consultation with water corporations suggests that while it is important that water corporations are informed when such property is transferred, the information sought is best provided in the Information Statement which is part of the transfer process. The overall result of an expanded Notice of Disposition may be to add a cost and impose a burden onto some stakeholders (transferors) for little additional value. The Department is interested in further feedback from interested stakeholders on this option.

Other (non-feasible) options

Clearly, in the longer term, a superior option would be to amend legislation to allow notices of acquisition submitted to other bodies to be shared with water corporations. A number of stakeholders have raised this option. However, this is not a feasible option at this time as it cannot be achieved by regulation alone, it requires an amendment to the Act. Also, the consequences of removing the notice of disposition on the operation of other parts of the Act (and potentially other legislation) would need to be carefully worked through.

Table 6: Notice of Disposition form information

Options	1 – Current Regulation	2 – Modified form	3 – Modified form plus other persons with water infrastructure, but not be customers
Notice of Disposition given by the person disposing of land (where the land is subject to water tariffs by a water corporation under section 259 of the Act)	✓	✓	✓
Notice of disposition be given to the relevant water corporation	✓	✓	✓
Within 1 month of the disposition of the land	✓	✓	✓
Using the form of notice set out in the Regulations	✓	✓	✓
Simplified 'Description of Property' codes	✗	✓	✓
Email and telephone details	✗	✓	✓
Date of birth	✗	✓	✓
Where the tariffs are not based on section 259 of the Act, but arise from other provisions such as section 124(7)) and properties that may not be customers of the relevant water corporation but for	✗	✗	✓

which the water corporation's water infrastructure runs through the land.

3.5 What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)

The relevant criteria in assessing costs and benefits of the above options is to ensure that water corporations are provided with relevant information about dispositions, in a way that minimises the compliance burden.

All of the feasible options identified above are designed to ensure that a minimum level of information is provided to water corporations, however option 2 provides more useful and relevant information than option 1, and option 3 expands coverage (and hence access to greater information that is useful to water corporations).

The cost of preparing and submitting notices of disposition is difficult to estimate separately. This is because the relevant information required to be included in the notice, and the distribution of notices and other documents to various parties, is generally part of an overall conveyancing process that has overlapping tasks.

For example, the department understands that the collating of information to be included in a notice of disposition can take about 20 to 30 minutes for an administrative person employed by a conveyancer to enter a property's transaction details into a standard conveyancing package. To create a notice of disposition, it is simply a matter of hitting a button and the package creates the notice of disposition automatically (a pre-populated form from the property data). However, the data inputted is also used for the production of other forms (such as notices of acquisition). Indeed, in the absence of needing to provide a notice of disposition, virtually all the same data would still be inputted into the transaction file for that property.

The department understands that around 90 per cent of notices of disposition are completed and submitted electronically, and that this is likely to increase to apply to nearly all notices within the next few years. This highlights that the *incremental* costs of requiring a notice of disposition to be prepared and submitted are very small.

Based on preliminary discussions with conveyancers, the department understands that the costs of staff time to enter data and submit notices and other documents at the conclusions of a conveyance is around \$150 on average per transaction. Of this, the department understands that around \$10 per transaction could be considered as being additional costs attributable to the need to provide a notice of disposition. With around 121,000 notices of disposition provided each year, this would be a total incremental cost of \$1.2 million per year.

The department considers that the option to revise the standard form used for notices of disposition (option 2) is likely to provide some savings in the costs per transaction, as the form would be more closely aligned to that information already required in a notice of acquisition, and therefore have a smaller incremental cost. This has not been separately quantified, but could reduce the incremental costs of notices of acquisition by up to half. However, by changing the prescribed form for notices of disposition, there will be one-off costs to the industry associated with updating standard conveyance packages (including updating electronic systems) to reflect the changes. The costs of this are not known. However, the revised prescribed form is considered by water corporations to provide more useful information, and therefore, in the longer term, is considered a superior approach. This is the Department's preferred position subject to feedback from stakeholders on Option 3 below.

Option 3 would achieve the same benefits and reduced ongoing costs as option 2, but also expands the scope of properties required to provide notice of disposition to those that are supplied water services by agreement, and those that have water infrastructure. Preliminary feedback from water corporations suggests there could be around 7,000 additional properties each year that would be required to provide a notice of disposition (around 5,500 due to services under agreement, and 1,500 due to water infrastructure), although some water corporations were unable to estimate how many properties may be affected. That said, of those that would become obliged to provide notices of disposition due to being serviced by agreement, water corporations noted that most of these would likely already provide a notice of disposition on the basis that they are customers and the conveyancers would not distinguish between water charges under section 259 of the Act or some other section. Therefore, the incremental cost of including these additional properties is likely to be small while the likelihood that water corporations are informed of property transfers is increased. On the other hand, as noted above, as the information is generally already provided to water corporations,

the overall result of an expanded Notice of Disposition may be to add additional cost and therefore be a burden to some stakeholders (transferors) for little additional value.

For these reasons Option 2 is proposed. The Department is interested to receive feedback on this or the other alternative options from stakeholders.

Consultation question: Stakeholders may wish to comment on whether it is desirable to formally expand the obligation to provide a notice of disposition of land to properties serviced by agreement and/or also to those that have water infrastructure of a water corporation running through the land.

4. Register of interests of board members

4.1 Context

Each of Victoria's 19 water corporations is established under the Water Act as a body corporate with perpetual succession.²⁷ Each water corporation has a board of directors, appointed by the Minister,²⁸ responsible for the strategic planning of the water corporation, and the management of the affairs of the corporation.²⁹

In appointing members to the water corporation boards, the Minister must ensure that each person has qualifications and experience that are relevant to the operations of the water corporation.³⁰ Board members are appointed for a period of up to 4 years,³¹ with the prospect of being reappointed for a further term.

The decision-making processes of the Board means that members have access to information that may be of particular benefit to individual persons or entities, such as engagement of private companies and contractors. A board member may have an interest in the decision other than as a board member, or have other duties in other positions they hold, that give rise to a conflict when performing their function as a board member. The existence of a conflict of interest or conflict of duties means that decisions may not be made in the best interests of the water corporation, or (in some cases) involve improper use of resources. Conflicts of interest may be direct or indirect and involve financial or non-financial benefit. Conflicts of interest may also be real or have the potential to become real, or may be perceived by an outsider to be an improper influence of the decision making of the board.

The Acting Victorian Auditor General recently commented on the risks of conflicts of interest of local council members, which are comparable to board members of water corporations:

All councillors and council employees have private interests. However, these private interests can at times conflict, or be perceived to conflict, with the performance of their public duties. Effective management of conflicts of interest is vital to maintain public trust and ensure that council decisions are in the public interest and free from inappropriate influence and personal gain. IBAC [the Independent Broad-based Anti-Corruption Commission], LGI [the Local Government Inspector] and VO [Victorian Ombudsman] investigation reports frequently reference poorly managed or undeclared conflicts of interest.³²

Members of boards of water corporations are subject to the *Public Administration Act 2004* (PAA). Under the PAA, the stated duties of directors of public entities included acting at all times honestly, with integrity, and in good faith in the best interests of the public entity.³³ A director of a public entity must not improperly use his or her position, or any information acquired by him or her by reason of his or her position, to gain an advantage for himself or herself or another person. These are duties on the board member themselves, and do not necessarily require related interests to be disclosed.

Under the PAA, board members are also subject to the Code of Conduct for Directors of Victorian Public Entities published by the Victorian Public Sector Commission.³⁴ Under the Code, the Board must manage any conflicts of interest and duty in the public interest. Depending on the nature of the conflict, the Board may recommend that directors restrict their involvement in a matter, step down from the position they hold on a temporary or permanent basis or relinquish their private interest. If the Board determines that a conflict is material, it makes sure that affected Directors do not participate in the matter at all. The Code provides:

Directors follow Board policy on managing conflicts of interest and duty. Wherever possible, they avoid any real, potential or perceived conflicts. They declare any financial or other outside interests in an annual declaration of private interests. They update this declaration when they are appointed to a new role, their circumstances change or before they consider particular matters. At the start of each Board meeting, Directors confirm that their entries in the register of interests are complete and correct. They also disclose any interests that relate to particular agenda items.

²⁷ Section 85.

²⁸ Section 95. The Board also includes the managing director of the water corporation, who is appointed by the Board (sec. 99).

²⁹ Section 95.

³⁰ Section 97.

³¹ Section 98.

³² VAGO, 2019, Fraud and Corruption Control—Local Government: Performance Audit <https://www.audit.vic.gov.au/report/fraud-and-corruption-control-local-government?section=33279--4-maintaining-public-trust>

³³ Section 79 of the PAA.

³⁴ Current version effective March 2016.

Directors who have a material conflict of interest or duty in a matter, as determined by the Board, leave the room while the matter is being considered. They do not discuss or take part in any decisions on the matter.³⁵

The board of directors of water corporations are not subject to directors duties under the Corporations Act. Instead, the Water Act provides for a number of controls to manage the risks of conflicts of interest.

Section 113 and section 114 of the Act require each board member to submit a return to the managing director within 30 days of their appointment to the board, and further returns each year before 31 July, disclosing:

- the name of the company or body in which he or she has held an office (at the time of appointment or in the return period), whether as director or otherwise
- the name or description of any company, partnership, association or other body in which he or she holds a beneficial interest which exceeds \$2,000 in value
- the address or description of any land in any district of the water corporation or in a district which adjoins a district of the water corporation in which he or she has any beneficial interest other than by way of security for any debt
- a concise description of any trust in which he or she holds a beneficial interest; or of which he or she is a trustee and in which a relative holds a beneficial interest
- (for the annual return) particulars of any gift of \$2,000 or more in value received by him or her from a person other than a relative
- any other substantial interest, whether of a pecuniary nature or not, of the person, or of a relative of which interest the person is aware and which the person ought reasonably to consider might appear to raise a material conflict between his or her private interest and his or her public duty as a member or nominated officer.

It is not just the board members affected by the requirement. The board of each water corporation may determine that nominated senior officers of the corporation must also provide these returns.³⁶

Each water corporation must maintain a register of the interests of members of the board of directors and nominated officers, and enter in the register all the information given in the returns.³⁷ The register may be inspected at the principal office of the water corporation during normal office. A water corporation must allow a person to inspect the register if that person applies, in writing and in accordance with the regulations, to the water corporation to do so.

There are also other controls in the Act. Section 109 requires each board member who has a pecuniary interest in any matter in which the water corporation is concerned to disclose the nature of the interest to the chairperson of the water corporation before a meeting to discuss the matter is held, or disclose the nature of the interest immediately before the consideration of that matter at a meeting of the board (or committee). Where a board member discloses a pecuniary interest in a matter being considered by the board, they must not move or second a motion on a question relating to the matter, and must leave the meeting while any vote is taken on a question relating to the matter.

Serious consequences attach where a Board member fails to comply with the Act. Section 101 provides for the Minister to remove any Board member that fails to disclose any interest under section 109 unless they have reasonable cause to do so. A Board member who is found guilty, by the courts, of an offence against section 109 will be unable to be appointed as a member of the Board for 7 years unless the conviction is successfully appealed.

Disclosure of related interests at board meetings is linked to compliance requirements under the Accounting Standards. Australian Accounting Standards Board AASB 124 Related Party Disclosures requires each water corporation to disclose in their annual reports any related-party transactions for the reporting period. Related party transactions include any transactions where key management personnel (which includes all Board members) have a relevant interest. The scope of interests is narrower than all types of conflicts of interest, and applies only to disclosure of transactions. The Standard itself does not require board members to disclose related interests.

³⁵ Page 15 of the Code.

³⁶ Section 113(3).

³⁷ Section 115.

In dealing with information accessed in their board role, a board member (or a person who has been a board member) must not make improper use of information acquired by virtue of that person's position as a member to gain directly or indirectly any pecuniary advantage for himself or herself or for any other person, or with intent to cause detriment to the water corporation, whether or not detriment was caused.³⁸

4.2 Why is the Government considering action? (problem analysis)

4.2.1 Ensuring all relevant interests are disclosed

The obligation under the Act to provide returns of disclosure of interests are expressed as being “returns in the prescribed form”. Without prescribing the relevant forms in the Regulations, a gap will exist that creates uncertainty to board members of their obligation to provide the returns continues. The absence of a prescribed form may lead to disclosures being incomplete, and subject to an individual’s understanding and assessment of what constitutes a relevant interest that should be disclosed or reliance on advice from the relevant corporation which may be inconsistent with that of other corporations.

Most water corporations use the current prescribed form, although a number (at least 3) use a different form that still captures the required information. For example, one water corporation uses a longer form for board members as part of its AASB Related Party Disclosure form.

Feedback from water corporations indicates that the forms are actively used by water corporations to identify and manage conflicts of interest, and this is used in addition to the processes for disclosing related interests at board meetings. Disclosure at board meetings appears to be the more relevant way issues are identified. At least one water corporation indicated that the declaration returns are not particularly relevant for identifying and managing conflicts (instead relying on disclosure at meetings), however another water corporation indicated that the list of declared interests from the annual returns was shared among all board members as an important way to manage conflicts.

All water corporations update the register of interests following identification of a related interest at board meetings (or if identified in any other way).

Board members are required to complete a return upon their first appointment and then each year before 31 July. There are currently 149 appointed board members.

The returns are also required to be completed by nominated senior officers within the water corporations. Some water corporations do not require any employees to use these returns (instead using other internal processes to identify and manage conflicts of interest), while other water corporations use the same returns for any senior employee with financial delegation over a certain threshold. Feedback from water corporations indicates that there are currently around 300 employees across all water corporations that are required to complete these returns. The extension of this requirement to staff other than board members varies across water corporations—most water corporations either do not require other staff to complete the returns or require them to be completed by only a few additional staff; a small number of water corporations have extended the requirements to a much larger group of staff. There are two water corporations that account for around 190 non-board staff required to complete the disclosure returns.

4.2.2 Inspection of the registers

While interests disclosed in the primary and ordinary returns are to be included on a register that is to be made available for inspection, the Act requires that the water corporation must otherwise keep the information on the register confidential.

Under that Act, a water corporation must take all reasonable steps to make sure that a person who has not applied does not have access to, and is not permitted to inspect, the register or any return. A person must not publish any information derived from the register unless that information is a fair and accurate summary or copy of the information derived from the register.

A person employed by a water corporation must not, whether before or after he or she ceases to be employed, make a record of, divulge or communicate to any person any information in relation to a matter dealt with by this section that is gained by or conveyed to him or her during his or her employment with the water corporation, or make use of that information for any purpose other than the discharge of his or her official duties under the Act.

Therefore, the only means to facilitate a person inspecting the register is for that person to meet the requirement of the Act to apply in writing and “in accordance with the regulations”.

³⁸ Section 108.

Regulations are needed to enable applicants to inspect the registers to be made and for water corporations to adequately deal with those applications.

Water corporations have indicated that over recent years, there have been no requests by a member of the public to review the register. It is expected that for most water corporations, there have been no requests over the past ten years.

4.3 What outcomes is the Government aiming to achieve? (objectives of action)

The objective of the proposed Regulations is to give effect to the section of the Act that is intended to manage conflicts of interest in the context of board decisions, and to improve transparency and good governance.

4.4 What are the possible different courses of action that could be taken? (identify feasible options)

Under the base case, no form would be prescribed. This does not remove the need for board members and nominate employees from having to submit the declaration returns upon appointment and then each year, and the information required to be included in the return is as set out in the Act.

The primary option is to prescribe the form of return to be the same as the current form updated in the re-made Regulation in 2020. The Act already specifies the information that must be included in the return (see section 114), and the power to prescribe the return only goes to the form of the return, not the content. The current form captures the information required to comply with section 114, and does not require disclosure of any additional information. It may be possible to extend the list of information required in the form, but any new information would be restricted to matters relating strictly to conflict of interests. The department is not proposing to require any additional information at this time.

The prescribed form in the Water (Register of Interests) Regulations 2010 required that it be signed and witnessed. It can be time consuming to have the form witnessed by another person (although often the returns are completed at the first board meeting and there are no special requirements on who can witness the form). The requirement for the form to be witnessed was removed in the Water (Register of Interests) Regulations 2020. Other minor changes included updating the forms to reflect current drafting conventions. These changes are reflected in the proposed Water (General) Regulations 2021.

The current forms are substantially the same as those required for members of CMAs, which are required under section 18K of the *Catchment and Land Protection Act 1994* and are prescribed in the Catchment and Land Protection (Register of Interests) Regulations 2016. The forms are also very similar to those required under the *Local Government Act 1989* for councillors.

There are handling and storage costs for the water corporations in receiving the returns and transferring the information to the Register. Water corporations indicated that the need to obtain a witness signature can make it more difficult to manage the forms electronically. Some water corporations indicated that they would prefer that this process is electronic that can allow the signatory to 'agree' that the information is true and correct via an electronic acceptance based on electronic security, audit and information governance controls. There would be no need for witnesses, and this reform would be consistent with other reforms contained within and put in place by the *Electronic Transactions Act 2000*, *Evidence Act 2008* as well as the Public Records Office (Victoria) position on digitised signatures.

Other than the option to remove the need for a witness signature, water corporations indicated that the current forms are efficient and fit for purpose. A number of water corporations queried the value in having the annual returns after the initial primary return (as after the initial return, disclosures were more generally identified at board meetings), however this is a requirement of the Act and the Regulations cannot remove the need to make the returns.

The form for application to inspect register appears to be the minimum information necessary to meet the requirements of the Act. Noting that the form does not appear to have been used more than perhaps a few times over the past ten years, the department considers this is still fit for purpose in relation to the intent of the Act and no changes are warranted. Any alternative options would involve requiring an application to provide more information, but further information on the form is not needed by the Act, nor is considered necessary to allow access.

4.5 What are the expected impacts (benefits and costs) of feasible options and what is the preferred option? (impact analysis)

The relevant criteria when considering options is to facilitate compliance with the Act (which requires the various forms to be completed) at minimum compliance burden.

Primary forms are only required to be completed upon first appointment. They are not required if a person is re-appointed to the same board.

It is assumed that, given many board members often are re-appointment for at least a second term, and given the status of current board positions, that over the next ten years, all current board positions will most likely be replaced once on average. For nominated executive employees, staff turnover suggests these positions could (on average) be replaced 2 or 3 times over the next ten years.

This suggests the following number of returns that will need to be completed under the proposed Regulations:

Table 7: Number of returns to be completed over the next ten years

Group	Number of positions	Number of times primary return completed	Number of times annual return completed	Total number of returns completed
Board members	149	149	1490	1639
Nominated employees	300	900	3000	3900
TOTAL	449	1049	4490	5539

The cost of completing these returns is estimated at follows:

$$\text{Cost} = \text{time to complete form} \times \text{value of time} \times \text{number of returns completed}$$

Based on discussions with a sample of water corporation officers familiar with the process for completing returns, it is estimated that each return takes about 10 minutes. The time value of board members and other nominated officers is assumed at \$100/hr.³⁹

This suggests the total cost of completing the returns is:

$$10 \text{ minutes} \times \$1.66 \text{ per minute} \times 5539 \text{ returns}$$

This gives a total cost of around \$92,000 in total over ten years. (This is the nominal cost over the ten years, not discounted for time.)

As noted above, the obligation to complete the return is under the Act, and the proposed prescribed form does not require a person to provide any information beyond what is already required under section 114 of the Act. Therefore, by prescribing the form of the return in the proposed Regulations, the Regulations assist in complying with the Act without adding to costs.

However, the additional requirement to obtain a witness signature did create an additional burden not attributable to the requirements in the Act. It is estimated that the additional time to have the return witnessed by another person is a further 5 minutes. Based on the above methodology, this would add to costs of completing forms of around \$46,000 over ten years. There would also be addition burden on the witnesses, although this is likely to be much smaller.

Witnessing of the return is not a requirement of the Act, and therefore an additional and unnecessary burden. Requiring a witness does not add any significant value or benefit from the point of view of collecting information about the interests of board members. As this imposed a cost burden (albeit small) with no obvious advantage, the department recommended removing this requirement in the form when the Regulation was re-made in 2020. The preferred option, reflected in the proposed Regulations, no longer requires a witness signature.

³⁹ This may not be the full hourly earning rate for board members or senior staff, as it is recognised that in many cases, the returns would be completed while also doing other tasks (e.g., attending a board meeting).

Prescribing a form for a person seeking to inspect the register of interests has not been costed, as the provision in the Act is rarely, if ever, used. It is noted that the proposed prescribed form requires the minimum information necessary to respond to a request, and on balance is likely to assist in the efficiency of providing access rather than creating a barrier to access.

5. Long service leave

5.1 Context

The Water Act provides for a water corporation to employ, on terms and conditions determined by the water corporation, such officers and employees as it considers necessary for the carrying out of its functions.

An officer who has been employed by a water corporation for 10 years is entitled, in accordance with the regulations, to be granted 3 months long service leave with pay in respect of that 10 years' service and 1½ months' long service leave with pay in respect of each additional 5 years of completed service.⁴⁰

Long service leave is unique to Australia and New Zealand. Victoria was among the first states to formally introduce the concept in the 1860s, at the time being leave for public officials who had served a number of years to return to Britain—then a journey taking five weeks each way.

It was not until the 1950s that the concept of rewarding long service for all employees more generally began to become formally recognised. At the time, it was considered reasonable that after 15 years' continuous service, an employee should have time for rest and respite. While access to long service leave provided incentive to remain with a single employer, the leave itself was not primarily about employee retention. By making long service leave an entitlement available to everyone, it became part of the industrial relations "furniture"—bargains on pay and other conditions reached between employer, employees and unions were made on the basis that long service leave was available to everyone after an appropriate length of service.

The entitlement to long service leave has been codified in legislation and industrial instruments, evolving over time to reflect changes in the workplace and community expectations. Today, long service leave is legislated in all Australian states and territories, and although there are some differences between states, and sometimes between different industries, all states provide for an entitlement to extended paid leave after "long and faithful" service.

Long service leave entitlements for water corporation staff are governed by a number of instruments including federal awards, employment agreements and the long service leave regulations made under the Water Act. The relationship between these instruments varies across the water industry.

The numerous pre-modern employment awards apply employment entitlements differently ranging from the *Victorian Water Industry Award 1999* which provides that employees covered by the award will be entitled to long service leave in accordance with the provisions of long service leave regulations made under the Water Act. Other pre-modern awards contain specific long service leave entitlements or are silent on these entitlements.

Long service leave entitlements are also covered in employment agreements. As these agreements are negotiated between the employers and employees (through their representatives) entitlements vary from corporation to corporation, with many agreements incorporating the regulations to give certainty to the breadth of entitlements.

Consultation with Industrial Relations Victoria has confirmed the necessity for the regulations as part of the long service leave framework, in view of the dependence on the regulations in pre-modern awards.

5.2 Why is the Government considering action? (problem analysis)

Employees of water corporations are not covered by the minimum long service provisions set out in the *Long Service Leave Act 2018*.⁴¹

Employees of water corporations are entitled to long service leave under the Water Act. Section 119(3) of the Act provides that an officer who has been employed by a water corporation for 10 years is entitled to be granted 3 months' long service leave with pay in respect of that 10 years' service and 1½ months' long service leave with pay in respect of each additional 5 years of completed service.

⁴⁰ Section 119.

⁴¹ Section 5 of the *Long Service Leave Act 2018* states that that Act does not apply to employees entitled to long service leave under a Victorian Act other than that Act. Water corporation employees are entitled to long service leave under the Water Act.

However, the Act does not provide enough detail or definition around this entitlement. For example, there is a lack of clarity on a number of important aspects that usually arise in relation to the taking of the accrued leave such as:

- What amounts to continuous service and employment for the purposes of calculating the entitlement (e.g., breaks in service, taking other leave (with or without pay));
- Treatment of service where work has changed between part-time and full-time work;
- When the leave may be taken—anytime as ‘of right’ to the employee, or when convenient for both parties;
- The rate of pay that applies when leave is taken;
- Treatment of public holidays that occur when a person is on long service leave; and,
- Ability to take long service leave as a cash payment rather than paid leave (e.g., upon retirement or termination).

Instead, the Act provides that the granting of long service leave shall be “in accordance with the regulations”.

Regulations are therefore necessary to enable long service leave to be available to employees of water corporations. Without a clear statement of how the entitlement is to be granted, there would be uncertainty about what an employee is entitled to. This would be time consuming to determine for both water corporations and employees wishing to take long service leave.

In addition to regulations being needed to give practical effect to the entitlement created by the Act, the water corporations’ industrial award also makes reference to the long service leave provided under the Regulations, so failure to continue to prescribe the mechanism to determine long service leave entitlements in the Regulations would undermine the overall remuneration outcomes reflected in the award.

Further, the Act refers to being employed “by a water corporation” for 10 or more years. The long service leave arrangements in the current Regulations provide for portability of entitlement when an employee moves between different water corporations. This, in part, reflects the reality that the water corporations exist as government entities and future governments could change the legal status or identity of the current water corporations. Some employees are also redeployed to other water corporations due to the nature of works requirements. Hence portability has been automatic for any transfer of employment between Victoria’s water corporations. The current Regulations have also made allowance for water corporations and other public sector bodies to reach agreements about mutual recognition of past service of employees transferring between entities.

There are currently around 5,360 full-time equivalent staff members working for water corporations. Approximately 11 per cent of staff take long service leave per year. Water corporations pay around \$7.5 million per annum in long service leave payments.⁴² There is no trend emerging in accrued but unused long service leave entitlements, although a number of water corporations commented that employees tend to take long service leave as they approach retirement. Consultation suggests that only a small number (around 400 staff, or less than 8 per cent) of employees go on to work at other water corporations (this is more likely to occur in the metropolitan area).

5.3 What outcomes is the Government aiming to achieve? (objectives of action)

The objective of the proposed Regulations is to provide for long service leave arrangements for water corporation employees such that:

- Employees and water corporations are clear about what the entitlement is (avoiding uncertainty and disputes);
- Ensure the entitlement to long service leave by water corporation employees is reasonable from the point of view of other comparable arrangements.

⁴² This includes long service leave termination payments.

5.4 What are the possible different courses of action that could be taken? (identify feasible options)

5.4.1 Options as to the entitlements

A RIS is required to examine ‘other *practicable* means of achieving those objectives’ (emphasis added).⁴³ In this case, there are very few ‘practicable means’ to consider alternative options. Options are highly constrained by a number of factors, namely: the Water Act requires these details to be prescribed; the matters in the regulations linked to industrial instruments (e.g., enterprise agreements) and change could trigger unintended consequences elsewhere; and generally these matters are handled through the industrial relations framework and are not contained in regulations (although, local government employees and Victoria Police have similar arrangements). Therefore, analysis focused on improving, where possible, the current regulations.

The proposed Regulations are largely similar to the current Regulations, with a number of exceptions noted below. They set out the meaning of ceasing employment due to age or ill health; they prescribe the minimum length of long service leave (i.e., not less than one day); they prevent an employee from engaging in other employment without prior approval from the water corporation; and they prescribe a number of meanings (e.g., ‘current pay’ including ‘date of accrual to the employee of their entitlement, normal weekly number of hours, and ordinary time rate of pay’). The regulations also clarify that public holidays and annual leave during long service leave do not count as part of the long service leave, and a period of service must not contain leave already taken or in respect of which an employee has already been paid. There are a number of regulations that prescribe the computation of the period of service (including if an employee converts from part-time to fulltime or vice versa, pay taken without leave, etc), and regulations that deal with prior employment by other water corporations and transfer of entitlements between water corporations.

These regulations are broadly consistent with other long services leave arrangements, such as those in the *Long Service Leave Act 2018* or the public sector award. Some things are different (e.g., water corporation long service leave cannot be pro-rated after 7 years because of provisions in the Act), but other entitlements in the regulations provide greater flexibility in terms of portability of long service leave benefits.

In preparing this RIS, considerable consultation was undertaken with water corporations concerning long service leave. Minor drafting amendments will modernise these provisions (e.g., removal of reference to employment prior to 1 March 1975, which is no longer relevant for any staff). The most substantial change removes the requirement for employees to accrue three years’ service before it can be included as service with a new water corporation employer (previously, if service was under three years, then it could not be included as part of the employee’s current entitlement).

Given that non-regulatory options are problematic, feasible alternative options are limited to making the provisions more or less generous than the current arrangements. It is noted that the current arrangements have not been highlighted as too excessive or inadequate.

A change in the provisions may provide greater benefit to some workers, but this would be at the expense of the water corporation, which in turn would seek to recover greater costs through higher water charges – in an economic sense, this represents a transfer: whatever change is made, the market will readjust to return to the same overall equilibrium.

Costs and benefits

Broadly, there are no sector-wide costs or benefits associated with this proposal as it amounts to a ‘transfer’ rather than a cost. Even though water corporations pay around \$7.5 million per annum in long service leave payments, this is a requirement under the Act; not the regulations – the regulations simply prescribe certain conditions around the legislative requirement.

In the hypothetical base case, water corporations and employees would need to agree on how the entitlement is calculated, or else litigate or dispute the issue. Therefore, the Regulations provide certainty, and reduce negotiation and dispute costs.

Given that consideration of alternative options was largely constrained, removing a redundant provision in the regulations (i.e., the reference to service since 1 March 1975) and removing the requirement to have serviced with another water corporation or eligible body for a minimum of three years (for that service to be recognised as previous service) will provide a small improvement over the current arrangements. It makes them more consistent with other long services leave arrangements, such as those in the *Long Service Leave*

⁴³ SLA, section 10(1)(c)

Act 2018 or the public sector award, which is of benefit to current and prospective employees in the sector. The additional cost to water corporations is expected to be around \$10,000 per additional eligible employee in years when they take long service leave⁴⁴ (staff tend not to take their full long service leave entitlement at once). Given that there are around 430 employees working for water corporations who previously worked for other water corporations, it is assumed that removing the minimum three-year service requirement will increase eligibility by 25 per cent. This would mean that an additional 108 staff would be eligible for long service leave, costing an estimated total for all water corporations of around \$1 million over the next 10 years. The actual figure is likely to be lower given that the proposed Regulations provide for transfer of entitlements between water corporations (regulation 27).

Consultation question: Stakeholders may wish to comment on any particular provisions that should be changed, or on whether they think that overall the long service leave arrangements for water corporation employees are consistent with community expectations.

⁴⁴ A survey conducted for this RIS calculated that the average cost of long service leave per annum per employee is \$9,884. These figures are indicative only.

6. Preferred options

6.1 Summary of proposed Regulations and impacts

The following table summarises the proposed Regulations and their impacts.

Table 8: Summary of impacts of the proposed Regulations

Proposed regulation	Costs	Benefits
Prescribing the rights that attach to subdivisional easements and reserves created under the Water Act	A very small number of easements may be granted rights that exceed what would otherwise apply under common law principles or negotiated between parties	Provides clarity and certainty of rights, and supports water corporations and CMAs being able to effectively perform their duties Reduces costs of negotiation between parties and/or cost of disputes over the scope of easement rights
Continue to prescribe the requirements to provide a notice of disposition similar to the current arrangements,	Incremental costs of completing and submission of notices of disposition is estimated at \$600,000 to \$1.2 million per year	Water corporations are informed when transfers take place and are better able to manage relationships with customers by being informed of property transfers, which assists in better financial management.
Prescribing the forms to be used for board members (and other nominated officers) to disclose relevant interests upon appointment and annually, and a form to be used for persons seeking to inspect the register of disclosed interests. The current requirement to have disclosures witnessed has been removed.	Completing the returns upon appointment and annually is estimated to have a time cost of around \$92,000 over the next ten years. However, the obligation to complete the returns is in the Act, and therefore not directly attributable to the proposed Regulations	Provide a consistent approach to disclosures required under the Act, and assist with compliance
Prescribe the methods for the calculating and taking of long service leave for water corporation employees	There is a small administrative cost in calculating long service leave for employees (although this currently is likely to be lower than under the current regulations). The cost of removing the 3-year minimum service requirement for portability is estimated to cost water corporations (in aggregate) around \$1 million over the next 10-years.	Aligning long service leave benefits with the Victoria public sector will provide a benefit to certain employees and remove any distortions created by the differences in long service long treatment.

6.2 Competition and small business

The Regulations related to long service leave, notice of disposition and the register of interests of board members do not affect small businesses or competition in general. The long services leave requirements mostly derived from the Act, and these regulations are in part designed to reduce any distortions that may arise across sectors. (More broadly, long service leave is a universal requirement across all employment categories, so the water sector is not disadvantaged by these requirements.)

The Regulations that prescribe the rights related to the creation of easement and reserves affect property developers and property owners in relation to authorities conducting certain activities to 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 do not restrict competition in any market.

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 disproportionately impact on small business.

6.3 How will the preferred option be put into place? (implementation plan)

The proposed Regulations largely continue the current arrangements. As such, no specific implementation plan or transitional arrangements are necessary. Although, to communicate the changes to stakeholders, DELWP will undertake the following:

Table 9: Implementation arrangements

Proposed regulations	Actions to be taken
Rights for subdivisional easements and reserves	The department will notify water corporations and CMAs that the regulations have been remade, continuing the current arrangements.
Updated standard form for notices of disposition,	The Department will work with Water Corporations and the conveyancing sector to update the standard form for notices of disposition. This has occurred under the Water (Notice of Disposition of Land) Regulations 2020.
Prescribed forms for providing disclosure of interests	Once the proposed Regulations are made, the department will notify all water corporations of the changed forms. This has occurred under the Water (Register of Interests) Regulations 2020.
Long service leave for employees of water corporations	The department will write to all water corporations to outline the changes to the Regulations. Water corporations may need to update internal processes and systems to ensure long service leave calculations align with the proposed changes .

6.4 When (and how) will the Government evaluate the effectiveness of the preferred option in meeting the objectives? (evaluation strategy)

The proposed regulations are generally of a minor nature and will not be formally reviewed until they are next remade. The department will continue to engage with stakeholders on a regular basis to discuss the effectiveness of the Regulations and any suggestions for change. Existing, on-going relationships with key stakeholders (e.g. Water Corporations) will serve to ensure that regular feedback is provided on the effectiveness of the prescribed forms and on the long service leave changes.

However, a number of possible reforms to the regulations that were not considered practicable because there was no authorising power in the Act could be considered if the Act were to be amended.

Information that would be useful to evaluate the regulations would include:

- The number of employers who have worked for less than 3 years and have commenced work at a new water corporation
- The number of complaints, if any, water corporations receive in relation to their easement powers
- Any issues raised by property owners or water corporations in relation to the range, nature and number of easements.

- Information on compliance with the notice of disposition requirements, and any input or suggestions concerning a more streamlined approach in the future (e.g., providing notice of acquisition information to water corporations).

