



# ACCC Final Decision

## Essential Services Commission (Victoria) accreditation application

4 September 2019

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### Version Control

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## 1. Final Decision and Reasons

The ACCC's final decision (**Attachment A**) is to approve the Essential Services Commission's (Victoria) (ESCV) application for accreditation under Part 9 of the Water Charge (Infrastructure) Rules 2010 (WCIR).<sup>1</sup> The reasons for this are that we are satisfied that the:

- ESCV's application meets the requirements under Rules 60 and 69 of the WCIR.
- arrangements are in accordance with the criteria set out in the conditions in Schedule 5 of the WCIR.<sup>2</sup> Our reasons for this view are the same as the assessment in the Draft Decision (see **Attachment B**).

The accreditation is subject to a condition that the ESCV must provide to the ACCC information relevant to the ACCC carrying out its functions under the accredited arrangements upon request.

The accreditation is for the period 17 February 2022 to 16 June 2032. This follows the requirement under Rule 68 of the WCIR for the accreditation period to be ten years from its commencement date, provides for continuity with the current period of accreditation and matches the accreditation period proposed in the ESCV's application.

## 2. Introduction

### 2.1. The Essential Services Commission (Victoria) Application

On 12 June 2019, the ESCV submitted its application for accreditation under Part 9 of the WCIR for the period 17 February 2022 to 16 February 2032.<sup>3</sup> Accreditation allows the ESCV to approve and determine the regulated charges of Part 6 and 7 operators in Victoria.

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

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

### 2.2. The ESCV's Accreditation for Transition

On 3 April 2019, the Minister for Agriculture and Water Resources, the Hon. David Littleproud, amended the water charge rules with a commencement date of 1 July 2020. These amended rules, the *Water Charge Rules 2010*, removes the power of the ACCC to accredit State regulators because under these amended rules only the ACCC can regulate the charges of Part 6 and 7 operators.

However, transitional arrangements provide that where the regulator was accredited before the amended rules commence, it may continue as the regulator for Part 6 and 7 infrastructure operators until the end of a transition period provided it remains accredited for that period. This transition period is either the end of the current regulatory period or if the

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<sup>1</sup> The ESCV's accreditation application was submitted to the ACCC on 12 June 2019.

<sup>2</sup> WCIR, Rule 63(2).

<sup>3</sup> For a copy of the ESCV's application, see: <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/escv-application-for-accreditation-2019-under-the-water-charge-infrastructure-rules-2010/application>.

infrastructure operator put in a pricing proposal to the regulator before the commencement date but it has not been approved by that date, then the end of the period to which the pricing proposal relates.<sup>4</sup>

The ESCV is currently accredited until 16 February 2022, whereas the transition periods for LMW (30 June 2023) and GMW (30 June 2024) will expire after this date.<sup>5</sup> If the ESCV's accreditation is not extended, then the ACCC will be the regulator for these operators after 16 February 2022 until the end of each operator's transition period. At the end of the transition period, the Basin State regulator will set the infrastructure charges for regulated businesses provided the State law meets the requirements of the new water charge rules (otherwise the ACCC will be the regulator). On this basis, it is expected that the ESCV will regulate LMW and GMW under State law from 1 July 2023 and 1 July 2024 respectively.

## 2.3. Timeframes

The ACCC is required to make a decision on an accreditation application within three months of receiving it (not including time periods where the ACCC has requested but not received further information from Basin State regulator).<sup>6</sup> The ACCC can extend this decision-making period by one month at a time if it is unable to make a decision within this timeframe.<sup>7</sup>

## 3. ACCC assessment of the ESCV application

### 3.1. Application requirements and assessment criteria

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

For an application to be valid, it must:

- be in writing
- include the information set out in Schedule 4 of the WCIR (See **Attachment C**)
- be accompanied by evidence in writing that the application has the support of the Minister or head of a Department responsible for that agency<sup>8</sup>
- in this case of an accreditation renewal be made at least two years before the expiration of current accreditation arrangements.<sup>9</sup>

Schedule 4 requires the application to contain, among other necessary information a statement as to whether the criteria in Schedule 5 are satisfied.<sup>10</sup>

Schedule 5 requires that certain provisions of the WCIR, which allow for Basin States to regulate Part 6 and Part 7 operators (the 'applied provisions') must apply and be in force in the relevant State before lodging the formal accreditation application.<sup>11</sup>

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<sup>4</sup> WCR, Rule 81(3)

<sup>5</sup> LMW's transition periods will end on 30 June 2023. GMW's transition period will end on 30 June 2024.

<sup>6</sup> Water Charge (Infrastructure) Rules 2010, Rule 63.

<sup>7</sup> To extend its decision-making period, it must provide a written notice to the agency, explaining why it has been unable to make its decision within the required period. WCIR, Rule 64(4).

<sup>8</sup> WCIR, Rule 60(1)-(2).

<sup>9</sup> WCIR, Rule 69.

<sup>10</sup> WCIR, Schedule 4(5).

<sup>11</sup> Under rule 59(2), applied provisions means the following provisions of the WCIR: (a) Divisions 2,3 and 4 of Part 6 (b) Division 2 of Part 7 (c) Division 1 of Part 8 (d) Schedules 1 ,2 and 3.

## 3.2. ACCC draft decision on accreditation

On 23 July 2019, the ACCC published its Draft Decision which recommended approving the ESCV's accreditation application. This Draft Decision was subject to a condition that the ESCV gives the ACCC information obtained or produced by the ESCV in carrying out its functions under the accreditation arrangements upon request by an ACCC officer. However, the ACCC proposed removing a condition, which is part of the ESCV's current accreditation arrangements, to apply the ACCC's Pricing Principles when determining the regulated charges of a Part 6 or 7 operator.

In its Draft Decision, the ACCC set out its decision that the ESCV's application was valid and satisfied the requirements in Schedule 5 of the WCIR and therefore that the ESCV's accreditation application should be approved.

## 3.3. Stakeholder Consultation and Final Decision

In the Draft Decision, the ACCC invited written submissions in response to its proposals set out in 3.2 above. The ACCC received no stakeholder submissions in relation to its Draft Decision. In this Final Decision, the ACCC therefore confirms its decision from the Draft Decision to approve the ESCV's application for the 17 February 2022 to 16 February 2032 period for the reasons noted in section 1 and adopting the reasons from the Draft Decision.

## 4. Conditions of accreditation

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

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

It also allows the ACCC to impose such terms, conditions and obligations on the accreditation provided they:

- are not inconsistent with the WCIR or applied provisions
- contribute to achieving Basin water charging objectives and principles as set out in Schedule 2 of the *Water Act 2007* (see **Attachment D**).

The ACCC proposes to:

- maintain the condition imposed on the ESCV in the current accreditation period to provide to the ACCC information relevant to the ESCV carrying out its functions under the accredited arrangements on request (as explained in section 4.1)
- remove the condition imposed on the ESCV in the current accreditation period to apply the ACCC's Pricing Principles (as explained in section 4.2).

### 4.1. Provision of information to the ACCC

In its Draft Decision, the ACCC proposed to maintain a condition of the ESCV's current accreditation in order to:

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

The ACCC stated that it required this condition to (among other things):

- identify and respond to contraventions of the water charge rules
- assist the ACCC in its statutory roles to provide the Minister advice regarding the content of the water charge rules or any possible revocation.

The ACCC noted that although some of the information it needed to undertake these tasks was publicly available, much was not. It stated that an inability to access this information could lead to a situation where it might be unable to undertake its abovementioned roles.

The ACCC did not receive any submissions in response to this proposal in its Draft Decision. Therefore, for the reasons set out in that Draft Decision, the ACCC has decided to maintain this condition as part of the ACCC's Final Decision on accreditation.

## 4.2. Application of pricing principles

In its Draft Decision the ACCC proposed removing the condition of the ESCV's current accreditation arrangements which required the ESCV to apply the ACCC's Pricing Principles when setting the charges of Part 6 operators. These Pricing Principles outline the methodology that the ACCC or an accredited regulator must apply in making an approval or determination.

In making its Draft Decision on this matter, the ACCC considered:

- that the Pricing Principles may not be current and therefore may not be entirely appropriate for setting GMW and LMW's charges. The ACCC has not updated its Pricing Principles since their release in 2011 and is unlikely to update them anytime soon, given the intention to largely return regulation of bulk water charges to Basin States under State law.<sup>12</sup>
- that removing this condition may assist with the transition to regulation under State law.

The ACCC did not receive any submissions in response to this proposal in its Draft Decision. Therefore for the reasons set out in the Draft Decision, the ACCC's Final Decision is to not include the requirement for the ESCV to apply the ACCC's Pricing Principles when setting the charges of Part 6 operators as part of the ESCV's accreditation.

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<sup>12</sup> Provided minimum standards are met. See: ACCC, Review of the Water Charge Rules Final Advice, September 2016, pp. 146-147.

## Attachment A: ACCC Final Decision – the ESCV Accreditation

The ACCC's Final Decision is to approve the ESCV's application for accreditation arrangements under Part 9 of the Water Charge (Infrastructure) Rules 2010. In accordance with the ESCV's proposal and Rule 68 of the WCIR, the accreditation period will be from 17 February 2022 to 16 February 2032.

The ESCV's accreditation will be subject to the following condition (under ss. 92(3)(g)-(h)) of the *Water Act 2007* and Rule 59(1)(c) of the WCIR.

In carrying out its functions under the accredited arrangements:

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

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

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

## Attachment B: ACCC Assessment of ESCV Application (Draft Decision)

The ACCC is satisfied that the ESCV application meets the requirements under Rules 60 and 69, of the WCIR and that it satisfies the conditions in Schedule 5, of the WCIR. Table 1 below sets out why the ACCC considers that the ESCV application meets the criteria set out in Schedule 5 of the WCIR.

**Table: Assessment of ESCV accreditation application against the conditions in Schedule 5 of the Water Charge Infrastructure Rules 2010**

Schedule 5 criteria	Assessment
<p>(1) There must be a law of the State: (a) under which the applied provisions are a law of the State; and (b) that includes provision to the effect that the applied provisions operate in the State only during such period or periods as an accreditation of arrangements under Part 9 has effect.</p>	<p>The ACCC is satisfied this requirement is met by section 4K of the Water Industry Act 1994 (WI Act) and section 10(m) of the Essential Services Commission Act 2001 (ESC Act)</p> <p><b>Section 4K, WI Act: Application of Commonwealth provisions</b></p> <p>In respect of Basin water charges, the Commonwealth provisions apply as a law of the State.</p> <p>The Commonwealth provisions are the applied provisions under the WCIR. See: section 4J, WI Act – ‘Commonwealth provisions’.</p> <p><b>Section 10, ESC Act 2001: Functions of the Commission</b></p> <p>The functions of the Commission are—</p> <p>(m) if, under Part 1B of the Water Industry Act 1994, the Commonwealth provisions (within the meaning of that Part) are applied as a law of the State, to perform the functions conferred on the Commission as the State Agency under those provisions.</p>
<p>(2) The functions of the State Agency must include the functions conferred on a Regulator under the applied provisions.</p>	<p>The ACCC is satisfied this requirement is met by section 10 of the ESC Act and section 4M of the WI Act.</p> <p><b>Section 10(m), ESC Act – See above.</b></p> <p><b>Part 1B - Section 4M, WI Act: Powers of Commission</b></p> <p>The Commission has all the powers that are necessary to perform its functions as a State Agency under the applied Victorian provisions.</p> <p>The Commission is the Essential Services Commission (Victoria) – section 3, WI Act.</p> <p>The applied Victorian provisions are the</p>



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

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

(Rule 60)

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

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

## Part 1—Preliminary

### 1 Objectives and principles

This Schedule sets out:

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

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

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

## Part 2—Water charging objectives

### 2 Water charging objectives

The *water charging objectives* are:

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

## Part 3—Water charging principles

### 3 Water storage and delivery

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

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

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

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

#### **4 Cost recovery for planning and management**

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

#### **5 Environmental externalities**

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

#### **6 Benchmarking and efficiency reviews**

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