VICTORIAN WATER
INDUSTRY ASSOCIATION INC.

"INNOVATION, COOPERATION AND SUSTAINABILITY"

WATER INDUSTRY RESPONSE – MARCH 2011
ESSENTIAL SERVICES COMMISSION -
NEW CUSTOMER CONTRIBUTIONS

EXPLANATORY PAPER/DRAFT GUIDELINE
of
December 2010

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1 INDUSTRY WIDE RESPONSE

1.1 Most Victorian water businesses will respond individually to the "Explanatory Paper" and the "Draft Guideline" both dated December 2010. The purpose of these comments, to be incorporated commonly through numerous of those water business submissions is to highlight for the ESC a series of key, extremely serious, concerns held effectively through all water businesses in Victoria.

1.2 This latest iteration of the Draft Guideline together with the Explanatory Paper represents, by their words and proposed application, changes to the current Price Determination for all water businesses. A contrary intention may be stated in the Explanatory Paper and the Draft Guideline, however, the various changes are clear.

1.3 This response incorporates in a number of places, recommended approaches that could be adopted in any final Guideline; key recommendations are set out in Part 8.

1.4 The consequences of a number of the interpretations offered of the Price Determination in the Draft Guideline and Explanatory Paper are dramatic, representing a shift in interpretation and outcome, for a number of case examples. This, when the industry is effectively halfway through the current Price Determination period.

1.5 The Draft Guideline attempts to take on a much more legalistic style with the inherent problem being that the Price Determinations were clearly not drafted in a manner which invites legalistic interpretations which might be applied to interpreting a statute or subordinate regulation. Existing deficiencies in terminology and format within the Price Determinations are exacerbated by this approach.

1.6 The combination of the Explanatory Paper and the Draft Guideline will create difficulties in interpretation.

1.7 Many of the interpretations to be applied by the Commission or its officers are advanced in the Explanatory Paper and not the Draft Guideline, however it is only a Guideline that water businesses are bound to follow.

1.8 New concepts such as "*high level principles"* and "*contiguous*" developments appear in the Explanatory Paper. It is unclear what status these apparently guiding words in the Explanatory Paper will have. For example, the high level principles would appear destined to guide the Commission's interpretation of the Price Determination yet they are not part of the Price Determination (and in part are contrary to it) and are not guidelines issued pursuant to the Price Determination.

1.9 Both documents require detailed review as to the use of inconsistent words and terminology. By way of example, the undefined expression "*shared assets*" is used when the reference, presumably, is intended to be to shared distribution assets.

2 SCHEDULED CHARGES

2.1 Currently the Price Determinations state:

> "*The scheduled charge applies on a per lot basis, **and** may be levied on any connection of a new customer that is, or can be, individually metered.*"

2.2 These words did not appear in the previous Price Determinations, however, appear to be a rewording of very similar words appearing in the August 2006 Guideline which defined a "***per lot charge***" as follows:

> "*"**Per lot charge**" means a charge for any connection that is separately titled **or** is, or can be, individually metered"*.

This earlier definition was and remains consistent with the ability of water businesses to levy Developer Charges as provided under the Water Industry Regulatory Order ("**WIRO**") and *Water Act 1989* and *Water Industry Act 1994.* It is also consistent with the ability of Water businesses to require separate and multiple meters to land in a single certificate of title.

2.3 The position adopted in the Explanatory Paper and Draft Guideline via a new definition of "*lot*" means that New Customer Contributions ("**NCCs**") may only be levied for separate lots on a plan of subdivision (that is, separate titles) and not any other form of development.

2.4 No person, either internal to the ESC or external, can advise what the reason was for the change from . . . ***or*** . . . to . . . ***and*** . . . nor is there any response or advice as to who made that decision and when that decision was made.

2.5 There is every prospect that the substitution of . . . ***or*** . . . with . . . ***and*** . . . may simply be a grammatical or typographical error. Unfortunately, however, when applied in the manner set out in the Explanatory Paper and Draft Guideline it has dramatic consequences.

2.6 A whole series of developments which are currently subject to the application of Developer Charges (including under the current Price Determination) are now (apparently) no longer to be the subject of Developer Charges. This would include:

- Un-subdivided retirement villages;
- shopping centres;
- multilevel commercial buildings (un-subdivided);
- student accommodation;
- hotels;
- new industrial developments.

2.7 This will result in significant lost revenue.

2.8 For example, assume a "*per lot*" NCC of $1,000. In a retirement village with 300 dwellings, if the developer chooses to subdivide (for various technical or tax reasons), the developer pays $300,000. If the developer chooses not to subdivide, the developer pays $1,000. The outcome is blatantly inequitable as the demand outcomes created by the identical developments are, indeed, identical.

2.9 Consider another example, a new shopping centre, on a single lot, the size of Chadstone, will pay a single $1,000 NCC under the Draft Guideline.

2.10 Developer charges are defined under the WIRO as charges which regional water businesses may levy under Part 13, Division 6 of the *Water Act 1989* and metropolitan licensees may levy under Sections 27, 28 and 29 of the *Water Industry Act 1994*.

2.11 Such Developer Charges divide into two groups, namely situations where water businesses institute Developer Charges against existing property owners, often

referred to as backlog schemes. These are dealt with in the Price Determinations under paragraph 4.4 of the various Schedules 4.

2.12 The other type of Developer Charges are where a developer seeks to subdivide land, or seeks to undertake a new development of land that does not involve a subdivision. These are supposed to be dealt with by paragraph 4.3 of Schedule 4 of the Price Determinations, however, under the new definition of lot advanced, all un-subdivided developments, although expressly defined as "*Developer Charges*" under the WIRO, are now to be excluded.

2.13 In fairness to the latest Draft Guideline the mistaken use of "***and***" not "***or***" actually appears in the Price Determinations. In practise, water businesses have, under the current Price Determinations continued to impose Developer Charges on un-subdivided developments, in accordance with the WIRO, past practise and equity. Water businesses have applied a common sense definition of lot, analogous to "***property***" as appearing in both the *Water Act 1989* and *Water Industry Act 1994.*

2.14 Also, in fairness, since the time of the implementation of the various Price Determinations, there has been a heavy concentration on the most common form of development which gives rise to NCCs, namely subdivisions. Water businesses, however, always remained cognisant of the other forms of development and there was care taken, in submissions and feedback given to the ESC, leading up to the 2006 Guideline, to specifically include the reference to the ability to apply NCCs to "*any connection of a new customer that is, **or** can be, individually metered.*".

2.15 In an effort to bolster the interpretation being offered by ESC personnel, a new definition of "*per lot*" is sought to be introduced via the Draft Guideline. That definition has been "borrowed" from Schedule 3 of a small number of the Price Determinations relating to the ability to levy service availability tariffs. The "*per lot*" definitional problem which has been created already in Schedule 3 for those water businesses is about to be recreated by the adoption of this definition. To our knowledge, no effort has been made to discover who first suggested, or why that particular definition of "*Lot*" that found its way into Schedule 3 of just a few of the Water businesses.

2.16 It is important to note that the legal basis of the power to charge is found in either the *Water Act 1989* or the *Water Industry Act 1994,* does not now and has never

contained any constraint based on a lot on a plan of subdivision or any other title based limitation. The reference is to "*property*" and it has been and remains possible to require multiple water meters for any one property under the two statutes.

2.17 One rationale which has been offered for the use of the word "*and*" rather than "*or*" is the fact that separately titled car parks, which should not be metered, could be the subject of an NCC. In short, this is a problem that does not really exist. If any water business had in the past, in error, sought to levy such a charge it would effectively be beyond power. Further, the ESC Guideline in relation to the Price Determination could easily state that the application of NCCs in such a case would not be supported by the ESC.

2.18 We do not think it likely that the change of the word "***or***" to "***and***" (which may simply be a typographical error) was intended to have such dramatic consequences, including the apparent loss of an ability to apply those Developer Charges to un-subdivided developments contemplated in both the *Water Act 1989* and the *Water Industry Act 1994* and so defined under the WIRO.

2.19 The Explanatory Paper and Draft Guidelines, further extending the new restraints introduced by the new proposed definition of "*Lot*" also state no NCC can be levied in respect of Owners Corporation land. This is in part suggested because such land does not have a title, which is incorrect. Often a title is not issued but it can be called for and does exist. Also as such a separate title, it may contain a swimming pool, administration buildings, other serviced buildings and the master meter for an "*owners corporation*" Development.

2.20 Clause 5 of all of the Price Determinations allows the ESC to amend the Price Determination if it is satisfied that there is a manifest or material error in the determination or such an amendment is desirable to avoid an unintended consequence. It appears plausible that the use of the word "***and***" instead of "***or***" was simply an error with, in turn, quite dramatic and certainly undesirable consequences.

2.21 The Draft Guideline effectively refuses to contemplate the use of Clause 5 in this most significant case yet when dealing with brought forward costs (under the third last of the dot points in Clause 4.3 of the various Schedules 4) to avoid an (asserted) unintended consequence, the word "***and***" is to be deleted and substituted with the word "***or***".

2.22 Alternatively, provided the Draft Guideline, once adopted, does not adopt the inappropriate definition of "*Lot*", water businesses can continue to apply Developer Charges to un-subdivided developments in accordance with the intention of the WIRO. A guideline comment excluding titled car parks from NCC's (and tariffs) is all that is required.

2.23 It has been suggested that the firm position of ESC personnel on the issue of subdivisions being the only form of development upon which Developer Charges can be levied is based on legal advice, however, this legal advice has not been provided to any of the water businesses.

2.24 It is also suggested in the Draft Guideline the potential "*loss*" of Developer Charges on un-subdivided developments may be recovered when they are subdivided at a later date, however, this comment is practically and legally wrong because:

- no hotel, un-subdivided retirement village or like development is ever likely to subdivide; and
- as the right to levy the charge relates to the demand increase caused by the development, the demand will be the same when (if ever) the property is subdivided. Therefore, the ability to impose the charge at that time is highly questionable.

NB: There is a flawed reference to "Strata" subdivision in the Explanatory Paper. The Strata Titles Act 1958 has long been repealed and further "strata" subdivisions relate mainly to building only subdivisions.

3 RETICULATION ASSETS AND SHARED DISTRIBUTION ASSETS

3.1 The Draft Guideline offers an interpretation of "*Shared Distribution Assets*" which ignores:

- both the clear words of the Price Determination; and
- a course of conduct by the ESC in a number of specific determinations made during this Price Determination period.

3.2 The Draft Guideline seeks to add a number of additional criteria to the definition of "*Reticulation Asset*" under the current Price Determination. For example:

3.2.1 it deletes the words…."*and are not required to be up-sized to support other future developments…"* from a broader definition in the Price Determination that states:

> "*Reticulation Assets are infrastructure assets that are specifically provided in relation to prescribed services for one development and are not required to be up-sized to support other future developments*".

3.2.2 the Price Determination states quite clearly that:

> *"…a water main that is 150mm or less in diameter and a sewerage main that is 225mm or less in diameter, and all associated assets that relate to these sized assets* ***are generally considered to be Reticulation Assets*** *although there may be some situations where these sizes are inappropriate*". *Our emphasis.

The Draft Guideline seeks to reverse the interpretation of these words by stating that:

> *"…the size thresholds set out in the determinations are for guidance only.*"

3.2.3 the Draft Guideline seeks to introduce a concept of "*minimum servicing solution*". A concept not appearing, in any form, in the Price Determinations.

3.2.3.1 There is already recognition in the Price Determinations that in certain cases the particular sizes specified may be inappropriate. It does not justify a Draft Guideline which effectively reverses the onus to a position where the absolute minimum servicing solution is the starting point. Invariably, developers will seek to argue that their development can be serviced (in accordance with appropriate design criteria) by a solution or modified (cheaper) technical solution. A range of questions, such as how the particular Reticulation Asset must fit in with the broader infrastructure are potentially excluded from

this proposition by the Draft Guideline. It is not simply the "*minimum cost effective servicing solution*".

3.2.3.2 There are examples working in both ways where the relevant sizes might be inappropriate. The case of the "*rectangular stadium*" is an example where a much larger asset constituted a Reticulation Asset because it was "….*required to service their development and connect to [WATER BUSINESS] Water network*."

3.2.3.3 There are other cases where water businesses have agreed that the sizes specified represent materially more than "*incidental*" capacity for the particular development and the water business has treated the asset as a "*shared distribution asset*".

3.3 The Draft Guideline places an obligation on the water business to provide the developer with an explanation to:

> "*Explain to the developer its design criteria, particularly with reference to explaining the minimum cost effective servicing solution required, taking into account the whole of life costs".*

3.4 Significantly, a failure by the water business to "explain" is to be utilised by the Commission as a key decision making factor in relation to any request to the Commission for review. In short, if the water business fails to explain, inconsistent with the Price Determination, the clear implication is that the Commission will decide in favour of the developer.

3.5 This approach is wrong in terms of the exercise of an administrative decision making power, however, and significantly, the inclusion of the proposition in the Draft Guideline is contrary to the Price Determination.

3.6 The Draft Guideline, both in Part 3 regarding Reticulation Assets, ignores two significant paragraphs appearing in Schedule 4.3 of the Price Determination. Those paragraphs read:

> *"If a developer is required to provide Reticulation Assets that exceed the requirements of their development in a material respect, a developer can*

only be required to contribute to the costs of the reticulations assets an amount that reflects the requirements of their development.

The balance of the costs of the Reticulation Assets in such a case is to be recovered from future developers."

Further the 2008 Water Price Review, Final Decision, Regional and Rural Businesses Water Plan 2008-2013 and Melbourne Water's Drainage and Waterways Plan 2008-13 states:

> *"…the Commission considers that the most appropriate way forward is for the current approach to continue to apply in the majority of cases. This being that the developer is responsible for funding all reticulation sized pipes and associated assets required for their development.*
>
> *In cases where it can be established that the a developer is required to provide reticulation assets that exceed the requirements of their development in a material respect,* ***the developer can only be required to contribute to the costs of the reticulation assets an amount that reflects the requirements of their development. The balance of the costs of the reticulation assets in such a case may be recovered via contributions from subsequent customers connecting to the reticulation assets in question."*** *Our emphasis.

3.7 There is clear provision for the developer to pay for that part of the cost of the particular Reticulation Asset reflecting the requirements of their development. The balance must be paid for by the water business and potentially recovered from future developers.

3.8 The Commission, during the period of the current Price Determinations has made a number of determinations consistent with the above proposition.

3.9 The net result of the attempts in Part 3 of the Draft Guideline to put forward a series of new or modified definitions or interpretations from that appearing in the Price Determination will substantially increase the likelihood of challenge from developers and substantially increase confusion in the interpretation of what constitutes a Reticulation Asset.

4 SHARED DISTRIBUTION ASSETS – NON SCHEDULED CHARGES

4.1 There are a number of inherent conceptual and grammatical problems with this part of the existing Price Determinations. These were detailed in VicWater's previous submission to the guidelines proposed earlier in 2010, relating particularly to the arbitrary nature of the nil/40%/70% concept and lack of consistency around the categories of:

- logically sequenced network expansion;
- short to medium term planning horizon;
- long term planning horizon;

and the inter-relationship between those concepts.

4.2 The latest Draft Guideline, in part, represents an attempt to grapple with those inconsistencies.

4.3 Nowhere in the Price Determinations does it state that the water business may only recover the brought forward component of the shared distribution assets "*in place of a scheduled charge*" (quote from Draft Guideline). The Price Determination states:

> *"if at any time during the regulatory period, [BLANK] Water may levy a charge greater than the scheduled charge."*

4.4 The Price Determination then goes on to define non-scheduled charges and excludes various components from the application of that charge. It does not exclude the scheduled charge, either at all or in respect of any particular first or other stage.

4.5 The use of the word "*adjacent*" to define the "*logically sequenced network expansion*" is unduly restrictive and will, in certain circumstances, create an inappropriate outcome for developers and in other circumstances an inappropriate outcome for the water businesses.

4.6 Adjacent effectively means immediately abutting or contiguous or the like. There are quite likely to be situations where there might be two or three other land parcels or other barriers (eg. road, river, railway) between the existing water or

sewerage network and a particular development site, however, that development site may be quite logically sequenced in respect of the network.

4.7 To the contrary, simply because a parcel of land is adjacent to the network does not mean it is necessarily the next logically sequenced property for expansion. In relation to sewerage it could be located within a different "*uphill*" catchment, or the current network of the water business may be at capacity with substantial upgrade required before the "*next door*" property can be developed.

4.8 The attempt to grammatically define "*logically sequenced*" is unduly restrictive. It does not allow the Price Determination to be applied logically and equitably. Its inclusion is arguably unnecessary.

4.9 The proposed use of Clause 5 of the Price Determinations to substitute the word "*and*" for "*or*" is questionable. It changes the existing Price Determination in that:

- Until now, for a development where the shared asset was not logically sequenced, a non-scheduled charge could be applied. That is, even if expansion of the network into the particular locality was reasonably expected to occur in the next five years.

- Under the new amended Price Determination, development which is not logically sequenced, but still could reasonably be expected to be required within five years, can no longer be the subject of a non-scheduled charge.

There is no doubt that this constitutes a significant change to the Price Determination albeit the attempt to address the gap in the existing paragraph 4.3 is acknowledged.

4.10 It is unclear where this leaves the second and third dot points in relation to logically sequencing and planning horizon. The "*but*" in the second dot point effectively reads as "*or*". The "*and*" in the third dot point is to remain as "*and*". The key point is the three dot points either with or without the proposed amendment do not cover all of the potential iterations for consideration.

4.11 Industry feedback on whether the change from "or" to "and" in the context of the NIL brought forward component has real, practical consequences will be required.

4.12 Once again, this Part of the Draft Guideline introduces a concept that the water businesses must charge only the "*minimum cost effective servicing solution*" (contrary to the Price Determination) and again advances the proposition that if the water businesses fail to adequately explain the design criteria, etc., then this will impact (later) in relation to any Commission determination.

5 DISPUTE RESOLUTION

5.1 The need for some clarity and transparency around the method by which the Commission determines "*disputes*" is acknowledged.

5.2 There are, however, a number of deficiencies in the methodology proposed. These are detailed further below.

5.3 As a relatively simple proposition, however, where a request has been made to the Commission to determine a dispute and an approach whereby:

(1) Both the developer and the water business should be asked to provide an appropriate written submission and exchange those submissions between themselves, at the same time.

(2) Either the developer or the water business should (with the Commission's consent) be entitled to provide additional information in response to matters raised in the submission of the other party.

(3) The Commission is entitled to call for further submissions from either or both of the parties or indeed hold a meeting or meetings (with both the parties present) to gather further information.

5.4 Clause 4.2(c) makes it clear that the Commission can decide the matter "…*in its absolute discretion*". The Commission is still obliged, however, to make its decision in accordance with sound principles, key amongst which is that the Commission should not apply rules arbitrarily, it must exercise its discretion in each particular case.

5.5 In relation to the proposed dispute resolution process we note as follows:

- A proposal that a dispute might initially be determined by officers of the ESC rather than the Commission itself, would not appear to be a decision of the Commission. That is, unless there has been some delegation of that Commission's power to those officers.

- The combination of the Explanatory Paper and the Draft Guideline leads inevitably to the conclusion that if the water business fails to adequately explain to a developer how a particular charge is calculated or applied, failed to publish various criteria on its website or does not have a development servicing plan, all of these may variously lead to a determination in favour of the developer against the water business. It should be recalled that a number of these so-called "*obligations*" on the water businesses are now to be imposed by the proposed Draft Guideline and not by the Price Determination.

- It is suggested that decisions made by the Commission will need to be exercised on the basis of whether the water businesses' decision to charge is consistent with the Price Determination.

5.6 In summary, the desire to create some process of transparency around the Commission's determination process is supported. The introduction of what appear to be arbitrary and not necessarily relevant criteria to that decision making (eg. explanation of charges or publication on websites) are not matters which ought to be considered conclusive factors in that decision making.

6 HIGH LEVEL PRINCIPLES

6.1 Feedback from water businesses relating to the high level principles include questions about whether those principles are more, less or of the same importance, as the Price Determination itself.

6.2 Plainly, the high level principles are only detailed in the Explanatory Paper and not even part of the Draft Guideline, therefore, they cannot take precedence. There are some of those high level principles which create concern, however.

6.3 It is asserted that the charges contained within the Price Determinations are the maximum charges allowable. At best this could only be described as "*generally*" the case. There is the clear potential under, for example, paragraph 4.2 of Schedule 4 of the various Price Determinations for at least a different and quite potentially a higher charge to be levied.

6.4 These high level principles (which will invariably influence ESC officer and potentially Commission decision making) advance this new proposition of the:

"least cost servicing solution".

This high level principle is then reflected in the Draft Guideline through reference to the phrase "*minimum cost servicing solution*" in relation to a number of aspects. Nowhere in the Price Determination does this concept appear.

7 NEW DEFINITIONS

7.1 The introduction of a new definition of "*Shared Network Asset*" is unnecessary. Further, the adoption of size for human entry is of no apparent assistance.

7.2 It is suggested that the term "Development Servicing Plan" is amended to "Network Servicing Plan", to better reflect the meaning that these plans show the water businesses incremental network expansion as opposed to stages of proposed development.

7.3 The definition of *Development Servicing Plan* (suggested reference 'Network Servicing Plan') by reference to the three categories of brought forward financing might be improved, as follows:

> *"**Development Servicing Plan"** (Network Servicing Plan) means a plan setting out the water businesses' logical sequencing of its water and sewerage service network to service potential development over the short, medium and long term."*

8 RECOMMENDATIONS

8.1 Set out below are a small number of key recommendations in respect of the various suggestions or concerns expressed elsewhere in this paper.

Scheduled Charges

8.2 VicWater would strongly support the use of the relevant provision in each of the Price Determinations to rectify what is considered to be a material error which has unintended consequences. That is, in paragraph 4.3 of Schedule 4 of the various Price Determinations modify the wording so as to state:

> *"The Scheduled Charge applies on a per lot basis, ~~and~~ **or** may be levied on any connection of a new customer that is, or can be, individually metered"*

8.3 ***Part 2 Scheduled Charges*** of the Draft Guideline should be amended as set out below.

8.4 Although there is no need to apply the definition of "lot" as being limited to an individual title or lot on a plan of subdivision, if the “and” becomes “or” then the new definition of lot can be included.

8.5 The reference to "common property" not being capable of attracting a scheduled charge should be deleted.

8.6 Additional paragraphs could be added to the guideline to the following effect:

- *where a scheduled charge is intended to be levied against an un-subdivided development such as un-subdivided student accommodation or a retirement village or like development the scheduled charge may only be levied against the particular dwelling, unit or separate tenancy which can be individually metered for a prescribed service. The scheduled charge to be applied will generally be that which applies to the smallest lot on a plan of subdivision unless special circumstances apply;*

- *a scheduled charge must not be applied to any separate lot on a plan of subdivision such as a car park, boat berth or storage facility which is not* provided *with a separate prescribed service*.

8.7 Paragraph 2.4 should be deleted.

8.8 Paragraph 2.5 could be amended to read:

> *For new developments or subdivisions, a separate scheduled charge can be applied* to each *prescribed service that is provided to each newly created lot or part of the property which is or can be, individually metered".*

8.9 As it is not correct to state that common property does not have a certificate of title any common property which receives a prescribed service may attract a scheduled charge.

8.10 Finally the following proposed clause could be incorporated in any Guidelines excluding NCC’s in the case of mere increases in capacity or usage. That is a scheduled charge only applies to those developments which have been subdivided or are analogous to a subdivision (eg retirement village; student accommodation).

"Generally where a property which is the subject of an existing prescribed service increases its demand for the particular prescribed service no new scheduled charge may be levied against that development unless exceptional circumstances apply and the consent of the Commission is first obtained".

Reticulation Assets

8.11 VicWater's recommendations in the Draft Guideline in paragraph 3 regarding Reticulation Assets are quite specific.

8.12 In paragraph 3.2 the words in the brackets ...(*and is a shared distribution asset*)...are unnecessary and should be deleted. The second sentence relating to the thresholds as mainly for guidance only should be deleted.

8.13 In paragraph 3.3 there are a number of assets which are not reticulation assets but are also not shared distribution assets. The words in the bracket in paragraph 3.3 can be deleted without impacting the intent of the paragraph.

8.14 The various other locations assets in paragraph 3 which refer to the minimum servicing solution should be amended consistent with the Price Determination to something like:

"The servicing solution which does not exceed the needs of the development in a material respect".

Shared Distribution Assets

8.15 Paragraph 4.2(a) could be amended to read:

"*A development will form part of the "logically sequenced network expansion" if it is in a location both close to the existing network and an area appropriately anticipated by the water business as requiring services within the short to medium term. This will generally include land which is adjacent to or contiguous with the existing network unless there is sound reason for that land not to be logically sequenced, for example being located in a different catchment or where the existing infrastructure is near or at capacity*".

8.16 Any Development Servicing Plan (suggested reference Network Servicing Plan) prepared by the water business will aid the interpretation of what constitutes "logically sequenced network expansion".

8.17 Until the replacement "and" with "or" that is proposed in the draft Explanatory Paper for brought forward costs is resolved, it is unclear whether the proposed 4.2(b) is correct. If the change is not applied 4.2(b) should be deleted.

8.18 Generally the water businesses are comfortable with the definitions of short to medium term and long term planning as adopted in the Draft Guideline.

8.19 The ongoing references to "minimum cost effective servicing solution" should be removed and replaced as noted in the preceding recommendations regarding reticulation assets.

8.20 Water businesses are generally comfortable with the concept of Development Servicing Plans (suggested reference 'Network Serving Plan') with the only recommended additions being:

- 4.6(a) should be amended to make it clear that the relevant "planning assumptions" are... "*planning assumptions in respect of the provision of prescribed services*"...Otherwise the development community and other stakeholders will read this to be a reference to urban and regional "town" planning.

- It is strongly recommended the Development Servicing Plans (Network Servicing Plans) be reviewed every second year (biennial) or when there is a significant change in circumstances such as a change of Government or change of Urban Growth Boundaries.

8.21 The definition of *Development Servicing Plan (*suggested reference 'Network Servicing Plan')" by reference to the three categories of brought forward financing might be improved, as follows:

> *"Development Servicing Plan" (Network Servicing Plan) means a plan setting out the water businesses' logical sequencing of its water and sewerage service network to service potential development over the short, medium and long term."*

Dispute Resolution

8.22 It is suggested that the reference to the failure to adequately explain the calculation of particular charges at paragraph 5.2(a) should be deleted.

8.23 It is suggested that the reference to publication on a particular website under paragraph 5.2(c) should be deleted.

8.24 It is suggested that the proposition set out in 5.3 of this paper be utilised as the basis for the decision making process, namely:

(1) Both the developer and the water business should be asked to provide an appropriate written submission and exchange those submissions between themselves, at the same time.

(2) Either the developer or the water business should (with the Commission's consent) be entitled to provide additional information in response to matters raised in the submission of the other party.

(3) The Commission is entitled to call for further submissions from either or both of the parties or hold a meeting or meetings (with both the parties present) to gather further information.

8.25 If the proposition to incorporate an interim stage whereby effectively officers, provide a preliminary response which if the developer and the water business agree this may be signed off by the Director of Local Government and Water. Provided the appropriate delegation is in place to the Director (from the Commission) this interim step is supported.

Interpretation

8.26 The new definition for "*shared network asset"* is not supported however if it is incorporated then there should be no reference to size for human entry as the part of the definition.

Draft Explanatory Paper

8.27 If it is considered necessary to maintain an Explanatory Paper at all with the new Guideline then it is recommended that the Explanatory Paper be modified consistently with the recommendations set out above for the proposed Guideline.

8.28 Further and specifically in respect of the Explanatory Paper it is recommended as follows:

8.28.1 The reference to the high level principles is deleted.

8.28.2 Modifications to be made to Part 4 regarding scheduled charges to allow developer charges for un-subdivided developments, as noted above.

8.28.3 Once the decision is made about whether or not the proposed amendments to the determination in respect of brought forward charges (ie the deletion of **and** the substitution of **or**) then appropriate amendments to be made.

8.28.4 In relation to Development Servicing Plans (suggested reference 'Network Servicing Plans') it is noted there are actually three categories but only two where non-scheduled charges actually apply. Amendment to that effect is suggested.

8.28.5 The same modifications to "planning assumptions" is noted in respect of the proposed Guideline.

8.28.6 A change to review of the Development Servicing Plan (Network Servicing Plan) to biennial or when there is a significant change in circumstances such as a change in government or change of Urban Growth Boundaries.

8.28.7 The deletion of the various references to minimum servicing solution.

8.28.8 In paragraph 8.3 there is reference to the option for VCAT for developers however, with respect, it does not add much and might sensibly be deleted.

9 CONCLUSIONS

9.1 One of the inevitable conclusions, reading the Explanatory Paper, Draft Guideline and case studies together, is that the Draft Guideline, assisted by the Explanatory Paper start to take on a greater precedence than the Price Determinations.

9.2 There are elements of the Draft Guideline and certainly the Explanatory Paper which suggest that the Price Determination will be interpreted both contrary to its current content and contrary to the manner in which the current Price Determinations have been applied to date.

9.3 We understand that the ESC officers are already offering interpretations of the current Price Determination consistent with the Draft Guideline, albeit that it has not been adopted by the Commission.

9.4 Whilst a number of water businesses welcome the introduction of a guideline to provide some appropriate guidance around some key issues (for example what constitutes short to medium or long term development) this Draft Guideline combined with the Explanatory Paper create new and different regulation to which water businesses apparently must adhere.

9.5 It is respectfully suggested that unless the proposed guideline is modified to serve more appropriate "*guidance*" purposes, not inconsistent with the Price Determinations it would be better not to proceed with a guideline at all. Rather to direct attention to quality consultation leading up to the next Price Determinations.

9.6 The current Price Determination is not a document which is inherently flawed, however, it does have a number of technical and grammatical drafting inconsistencies. Significantly, the development community and water businesses have, in the overwhelming majority, come to terms with its application when applying Developer Charges to new developments.

9.7 Water businesses believe there are not such a dramatic series of problems with the application of the Price Determinations that justify a guideline which is so detailed and legalistic in form that, with respect, itself creates difficulties possibly more or different to those it seeks to address.