

Melbourne Water's ways (or how Victoria avoided water price regulation and no one noticed)

The Victorian Government are signatories to COAG agreements on water pricing, agreements that resulted in the “independent regulation” of Victorian Water authorities by the Victorian Essential Services Commission¹. National competition (water reform) payments to Victoria in 2004-06 amounted to \$187.7 million, not including GST payment from the Federal government. The first regulatory period commenced on 1 July 2005. Melbourne Water, a corporation fully owned by the Victorian State government is part of the “regulated water industry”. The regulatory framework in which Melbourne Water operates is set out below:

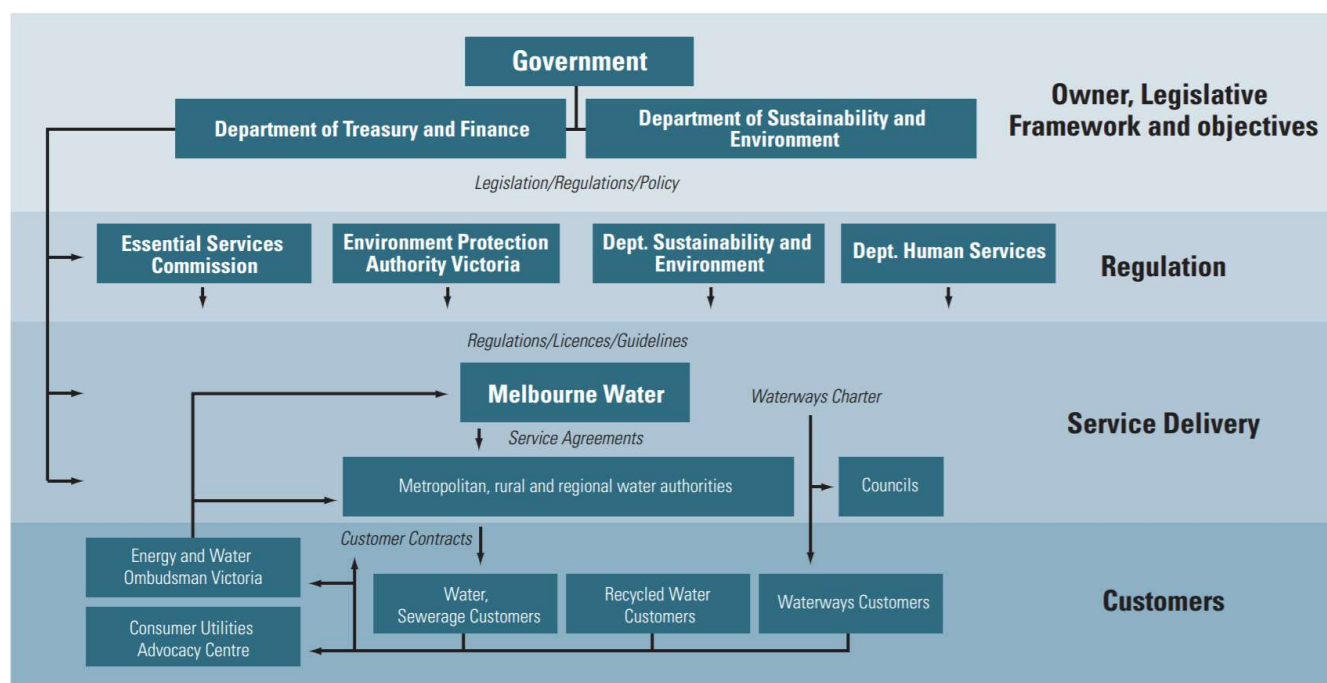


Figure 1. Owner, Legislative Framework, (Melbourne Water 2005/06 Annual Report)

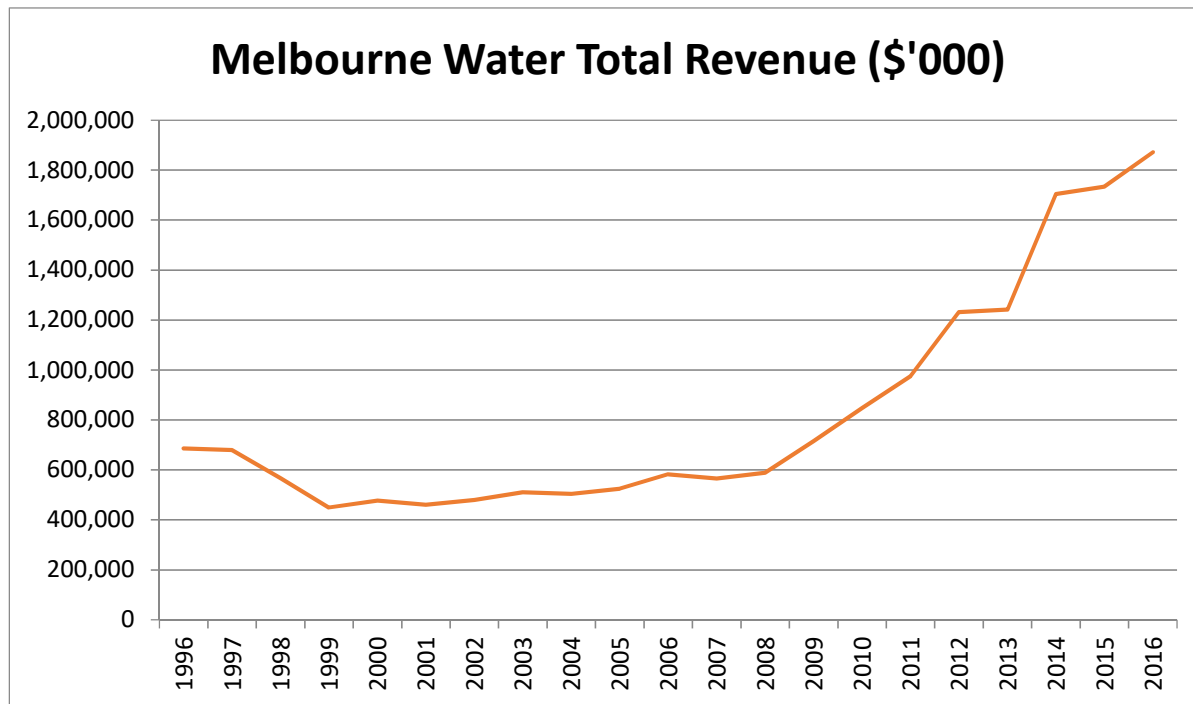
Melbourne Water’s ability to impose charges are controlled both by legislation: the Water Industry Act (1994), the Water Act (1989), and prior to 1 July 2007, the Melbourne Metropolitan and Board of Works Act 1958 and Melbourne Corporation Act 1990. Since 2005 the prices Melbourne Water can impose for its services has been controlled by the Essential Services Commission acting under the Essential Services Act (2003) and the Water Industry Act (1994), and more recently the Water Act (1989).

Over the period of regulation, Melbourne Water’s total revenue has increased from approximately \$500 million in 2003/04 to \$1.871 billion in 2015/16 (see graph below). Total cash payments to the Victorian Government (dividends, taxes and other payments) over the same period increased from \$123.1 million to \$262.9 million. It appears that regulation of Melbourne Water’s service pricing has failed to bring

¹ Third Tranche Assessment on Victoria’s Implementation of the National Competition Policy Volume One: Main Report 26 March 2001.

<http://ncp.ncc.gov.au/docs/Victoria%27s%20third%20tranche%20report%20on%20implementing%20the%20NCP%2C%20March%202001%2C%20Volume%20One%20-%20Main%20report.pdf>. Under COAG agreements Victoria had agreed to phase-out the lucrative rates-based drainage charges.

about cost savings or any of the desired outcomes that regulation promised.



In the 1990's Melbourne Water became predominantly a wholesaler of water and sewerage services to the 3 retail water providers, these organizations having previously been divisions of Melbourne Water and its predecessor the Melbourne and Metropolitan Board of Works (MMBW). Its waterway management functions were also removed and transferred to "Melbourne Parks and Waterways", and subsequently to the State. Melbourne Water's one remaining retail service was its "metropolitan drainage" service. Despite local Councils having all drains vested in them by the Local Government Act (1989), Melbourne Water has traditionally imposed a single drainage tariff on properties in areas of metropolitan Melbourne, for "main" drainage works. That is, main outfall drains to which Council drains connect. In metropolitan Melbourne, Melbourne Water has claimed that it is only responsible for drainage in catchments greater than 60Ha.

Prior to regulation, in addition to imposing a single drainage tariff on households, Melbourne Water also imposed upfront charges on developers for the development of new drainage infrastructure relating to property developments.

In reviewing Melbourne Water's drainage tariffs in 2005, the ESC noted that:

"Under current arrangements, all of Melbourne Water's capital costs associated with installing new drainage infrastructure are recovered from developers through upfront payment. Metropolitan residential and non-residential customers pay an annual fixed charge to recover the costs associated with the operation, maintenance and renewal of Melbourne Water's infrastructure, and for the recovery of costs associated with Melbourne Water's waterway services"

In 2005 the Commission did not approve Melbourne Water's drainage pricing proposal because Melbourne Water failed to submit sufficient information to justify the charge. The Commission also noted that it was concerned that Melbourne Water's proposed pricing should conform to the Water

Industry Regulatory pricing principles, which amongst other things included the prevention of monopolistic rent seeking.

Note in the above excerpt that the ESC mentions that there is a single fixed charge for drainage and waterway services. This is confirmed by Melbourne Water's Annual Report prior to 2004, that only mentions a single annual fixed "drainage charge" being applied to metropolitan Melbourne.

Excerpt from 2003/04 Annual Report:

	Note	2004 \$000	2003 \$000
2 Revenue			
Revenue from operating activities			
Water usage charges		158,822	164,464
Sewage disposal charges		172,332	166,030
Drainage rates		119,266	111,606
		450,420	442,100

Beginning around 2005 Melbourne Water's "Drainage" charges were slowly re-branded as "Waterway" charges (being "waterway and drainage" charges in the interim), so that the revenue previously recorded against "drainage" is now recorded against "waterways" (see 2015/16 excerpt below):

Excerpt from 2015/16 Melbourne Water Annual report:

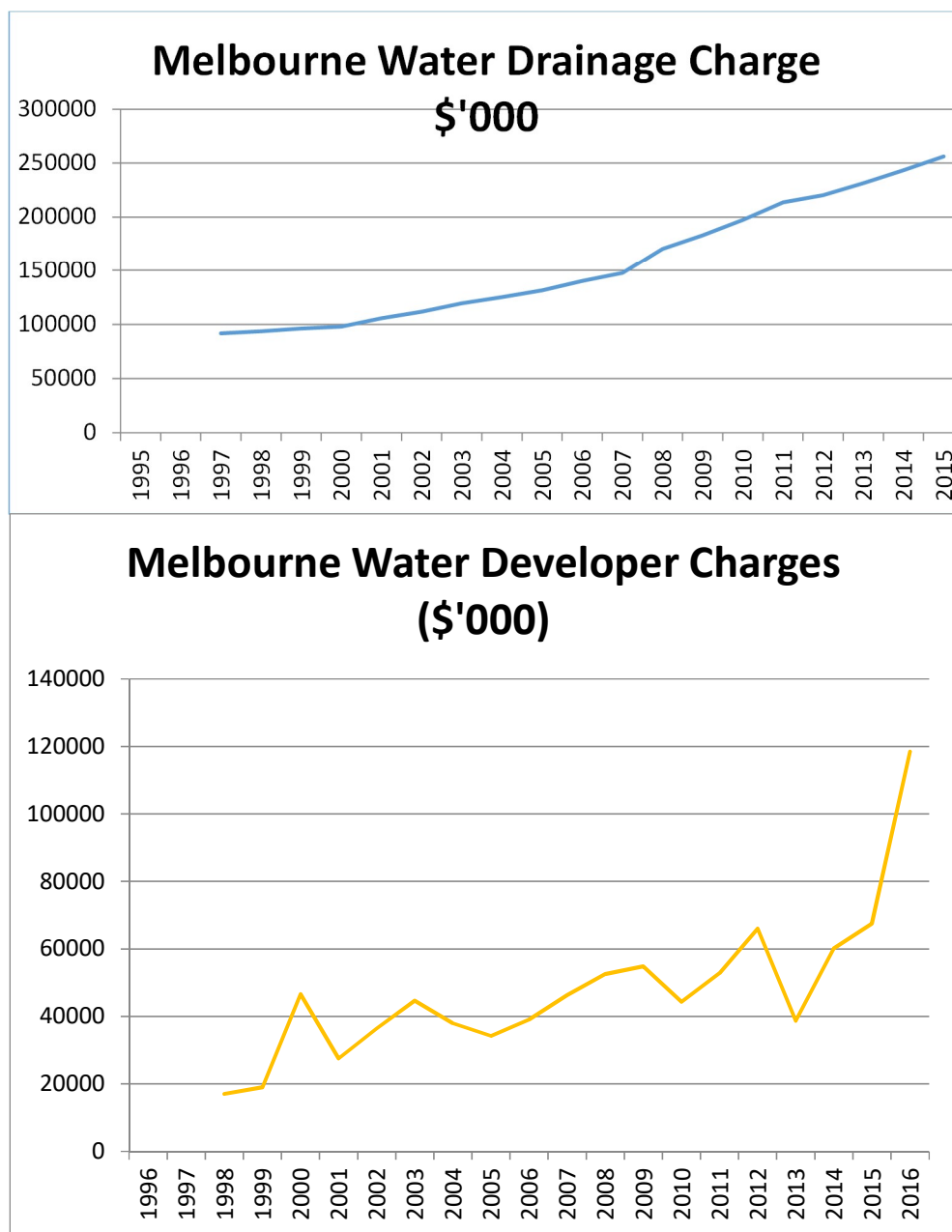
Financial Statements
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3 Revenue

	2016 \$000	2015 \$000
(a) Revenue		
Sales revenue		
Bulk water services	964,153	876,209
Bulk sewerage services	532,295	523,161
Waterways charges	256,264	242,461
Government Water Rebate*	(78,500)	(72,514)
Total sales revenue	1,674,212	1,569,317

Over the period of regulation, drainage (now termed "waterway") charges imposed on households have

more than doubled from \$119 million in 2003/4 to \$256 million in 2015/16, despite proportionally larger increases in direct costs on developers for drainage infrastructure (see graphs below).



This paper will detail how in 2005 the Victorian Government started a process by which a new “waterway” charge was introduced, without consultation or proper legislative process. Currently this new “waterway” charge extracts in excess of \$250 million per annum from households and businesses in Melbourne and surrounding rural areas. It is acknowledged by Melbourne Water and the ESC that many of the property owners being charged receive no drainage services, and many of those in rural areas receive no services at all (water, sewerage or drainage).

The concerns raised around this new charge fall into two major categories, which will be discussed in more detail in the following sections. The first is the process that was adopted to impose the new

“waterway” charges.

Melbourne Water currently represents that the ‘waterway’ charge relies entirely upon an Order in Council of 2005 for its validity. It is claimed this Order greatly extended Melbourne Water’s operational area.

This is despite a Subordinate Instrument being an inappropriate mechanism for introducing charges of such magnitude. It appears that neither a Regulatory Impact Statement nor a Legislative Impact Statement has ever been produced that detailed the vastly increased and expanded charges being imposed by Melbourne Water.

The way in which a map of an “expanded metropolis” created by the Order of 2005 was subsequently inserted into legislation as representing Melbourne Water’s pre-existing “Waterway Management District” is also highly disturbing.

The second category of concern is around the actual services being provided, services for which the ESC is setting prices. Despite the ESC only having the power to set prices for “Metropolitan Drainage” services² (see below), it is acknowledged by both the ESC and Melbourne Water that the “waterway” services are unrelated to drainage. Many of the “services” for which Melbourne Water claims it is imposing “waterway” charges do not even appear to be functions of Melbourne Water, and are “public good” functions of the State.

Prescribed Services and Declared Services

The following services supplied by or within the regulated water industry are specified as prescribed services in respect of which the Commission has the power to regulate price and are declared services in respect of which the Commission has the power to regulate standards and conditions of service and supply:

- (a) retail water services;*
- (b) retail recycled water services;*
- (c) retail sewerage services;*
- (d) storage operator and bulk water services;*
- (e) bulk sewerage services;*
- (f) bulk recycled water services;*
- (g) metropolitan drainage services;*
- (h) irrigation drainage services;*
- (i) connection services;*
- (j) services to which developer charges apply; and*
- k) diversion services.*

Figure 2 Prescribed Services as specified in WIRO (2003)

The Essential Services Commission, the Victorian “independent” regulator, appears to have been more than willing to set prices for services for which it has absolutely no power to set prices, and has approved their application to areas for which no authority exists for prices to be applied. That these charges are being imposed on properties that receive no water, sewerage or drainage services, is truly a perverse outcome of “independent” regulation. Doubly so, give the COAG agreement to user-pays pricing, and the ESC’s charter to prevent monopolistic rent seeking!

² See Water Industry Regulatory Order “prescribed services’ see VGG g51 18 December 2003, page 3262 <http://www.gazette.vic.gov.au/gazette/Gazettes2003/GG2003G051.pdf#page=2>

1. PROCESS

Melbourne Water's "waterway" charge was created via the following process:

- 1) Apr- May 2005: An attempt is made to declare new a "waterway management district" over the "metropolis" under provisions of the Water Act (but contrary to the provisions of that Act, and s32 of the Interpretation of Legislation Act 1986).
- 2) June-Sept 2005: Melbourne Water places numerous maps in the Central Plan Office. These maps were not created by any legislation. This included map Legl/05-406 which was labelled "Melbourne Water Drainage and Waterway Boundary" "Order in Council 2005"³, which also has a shaded area and a red line surrounding Melbourne and near- Melbourne rural areas.
- 3) August 2005: The Water Act and MMBW Act are amended by the Environment, Water (miscellaneous Amendment) Act⁴ which exempted sections of these Acts from s 32 of the Interpretation of Legislation Act. Section 32 is a safe guard designed to prevented subordinate instruments and Acts from incorporating documents by reference⁵. The reason for these amendments are not made clear to Parliament.
- 4) 18 November 2005: A Subordinate Instrument under Section 3 of the MMBW Act is published⁶ which referenced the unpublished maps outlined in (1). The Order only appears to be transferring a few drains to Melbourne Water. The maps were referenced as indicating an "expanded metropolis" under the MMBW Act, and only applied Part X of the MMBW Act to the area included. Importantly the maps did not delineate Melbourne Water's "Waterway Management" District as defined by Schedule 12 and other provision of the Water Act (1989). The "expanded" area was an area shaded red. The incorrect labelling and red line on map Legl/05-406 (outlined above) only become relevant subsequently⁷.

³ Advice from the Surveyor General is that maps are not checked when they are placed in the Central Plan Office.

⁴ Clauses 15 & 16 of the Environment, Water, Misc Amendments Act (2005), see explanatory memorandum for Bill: http://www5.austlii.edu.au/au/legis/vic/bill_em/eawlab2005592/eawlab2005592.html.

⁵ This exemption may have been contrary to law, and Parliament was not informed of a prior attempt to expand the metropolis in April and May 2005, or that maps had already been placed in the Central Plan Office.

⁶ <http://www.gazette.vic.gov.au/gazette/Gazettes2005/GG2005S224.pdf#page=1> This Order was published on the last sitting day of Parliament in 2005, at the end of the week when Parliament sat at a regional location. Note that this Order appeared to do little more than transfer a few drains. The "key" map (Legl/05-406) is of the "expanded" area only (ie does not include any of metropolitan Melbourne), and contained both a title and boundary of a "drainage area" which were not relevant to the Order and not incorporated just by being present on the map see s32 (14) of the ILAA (1984). Note also that in April 2005 an Order attempting to create a new waterway management district over the "metropolis" under s 96(7) and 104 (3) of the Water Act had been published, contrary to the provision of the Water Act(1989) and the ILA (1984). See VGG 14 April 2005 p735-736, a similar Order was published on 5 May 2005, <http://www.gazette.vic.gov.au/gazette/Gazettes2005/GG2005G015.pdf>

⁷ The exemption from s32 may not be valid, or may have been made for an improper purpose (ie to mislead Parliament). The non-compliance with s32 potentially made the Order void and of no effect. See Victorian Constitutional Committee,

- 5) 1 July 2007: The Water (Governance) Act 2006 incorporates map Legl/05-406 into s 122H of the Water Act as Melbourne Water's pre-existing "Waterway Management District"⁸. It states that the area is delineated by the red line.
- 6) In 2008 the ESC imposed "Waterway" charges across the "expanded" area, despite not having the power to do so⁹. The 2008 decision applied "Waterway-only" charges to 47,000 rural properties that it acknowledged received no drainage services¹⁰. Combined "waterway and drainage" charges (rather than just the single "Metropolitan drainage" charge) were also applied across the metropolitan area.¹¹ One charge had become two.
- 7) In 2016 the ESC, acting on Melbourne Water's advice, expanded the scope of "Waterway Management" services to include "community liveability assets". This appears to include the purchase of land for bicycle paths and other public purposes. It signals the likely dramatic increase in the charge in future¹². There was no legislative amendment relating to this expansion of scope. These "services" are not "metropolitan drainage" services for which the ESC has the power to set prices.

The above process is summarized below:

Second Report on the Operation of s32 of the Interpretation of Legislation Act 1985/7:

<http://www.parliament.vic.gov.au/papers/govpub/VPARL1985-87No106.pdf>.

⁸ Water Governance Bill 2006 explanatory memorandum:

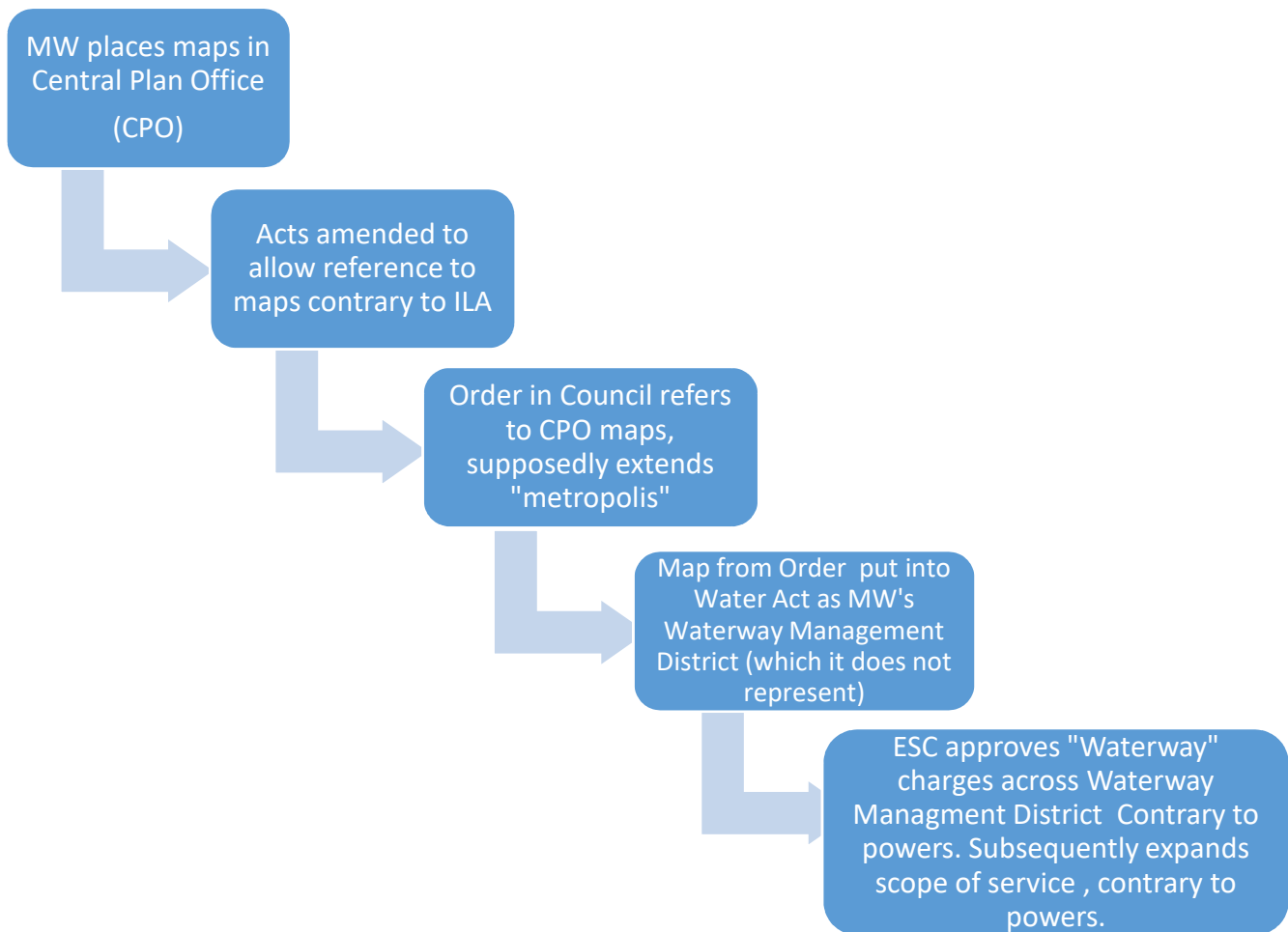
http://www.austlii.edu.au/au/legis/vic/bill_em/wb2006187/wb2006187.html. Advice from the Parliamentary Papers Office in 2009 was that map Legl/05-406 was not laid on the table with the Bill. Parliament never saw the map, nor were they ever asked to approve it as an "expanded" waterway management district. The stated intention of the Water (Governance) Bill was just to transfer existing functions from the MMBW Act to the Water Act, and repeal the MMBW Act.

⁹ The "expansion" of MW area is always referred to as having been brought about by the Order of November 2005 and not by the incorporation of the map into the Water Act on 1 July 2007. This was probably necessary in order to backdate charges to 2005 (although these charges were backdated to July 2005, not November 2005).

¹⁰ See Essential Services Commission 2008 Final Water Price Review Melbourne Water Draft Decision May 2008. At Page 28 stated that rural customers only receive "Waterway" services. Note that the 2005 review noted that portions of the Yaloak catchment (ie Koo Wee Rup flood protection area), in the Shire of Baw Baw, South Gippsland and Bass were the only areas in which "waterway-only" charges were imposed. In the 2008 decision these charges are mentioned as being "Special Drainage Charges". Other documents published by Melbourne Water support the contention that what was being imposed in the "extended" area, including parts of the Macedon Ranges, was a flood protection charge. An expansion of the "metropolis" could not have extended the area for this service or for this charge. This indicates that the intention of the incorporation of map Legl/05-406 was indeed to expand the "Waterway Management District" and charges under Div 4 Part 10 of the Water Act, completely contrary to law.

¹¹ In the 2008/09 Melbourne Water Sustainability Report at page 11, Melbourne Water states that it had "rolled out tree planting, weed removal and flood protection services into more parts of the urban and rural fringe. We've worked closely with these communities to work out what needs to be done in our new areas of responsibility, and starting from 2008/09, these programs will be supported by the waterways and drainage charge". At page 31 it states it is a "new" charge.

¹² Melbourne Water Corporation. "Potential contributions to the liveability of Melbourne", John Collins Consulting 2013 (obtained under FOI from Melbourne Water). It also appears the ESC relied upon Melbourne Water's own advice for the legitimacy of "Community liveability" in 2016.



In addition to legislation, the imposition of charges by regulated entities such as Melbourne Water is controlled by instruments such as a “Statements of Obligations” issued by the Minister. The SOO outlines obligations with which Melbourne Water must comply, including the type of plan it must submit to the ESC and the date of submission. The ESC’s power to set prices is set out in the “Water Industry Regulatory Order”, issued by the Governor in Council. In addition to stipulating the “prescribed services” for which the ESC has the power to set prices, the WIRO also stated that the ESC could only consider a “Water Plan” produced in accordance with a SOO issued to a regulated entity. The first WIRO was issued in December 2003, and the first SOO to Melbourne Water in July 2004. There were numerous attempts to amend these documents subsequently¹³.

More unusual amongst the instruments issued to facilitate the imposition of “waterway” charges by Melbourne Water is the Statement of Obligations (SOO) issued by Minister Thwaites and published in

¹³ One of the issues to amending the WIRO being that an RIS was required.

the Government Gazette in December 2007¹⁴, 5 months after he had resigned from Parliament. Another is the subsequent SOO issued by Minister Holding 12 days before the ESC handed down its final 2008 pricing decision. This 2008 SOO, issued under the wrong section of the Water Industry Act¹⁵, altered the submission date and type of plan Melbourne Water was required to submit to the ESC, despite Melbourne Water having already submitted the Plan to the ESC 6 months earlier.

The 2008 SOO replaced the requirement for a “Water Plan” with a “Waterway and Water Plan”¹⁶ and changed the submission date from November 2007 (the date the plan was submitted) to 17 December 2007¹⁷. This appears to have been aimed at avoiding the inconvenience of the December 2007 notice by Thwaites having been published after the Water Plan had already been submitted to the ESC (meaning it was the 2004 SOO that was in force), and the definition contained in that 2004 SOO:

“Waterway and Drainage Services” means services provided by Melbourne Water within its drainage area at the commencement of this Statement with respect to:

- a) managing floodplains, as a delegate of the Minister, under Division 4, Part 10 of the **Water Act, 1989**, and
- b) managing drainage and waterways, under the Melbourne and Metropolitan Board of Works Act, 1958, and
- c) managing diversions from waterways as a delegate of the Minister, under Parts 4 & 5 of the **Water Act 1989**.

The 2004 SOO specified that “waterway and drainage” charges could only be applied to Melbourne Water’s drainage area at the commencement of that statement – that is, a point in time prior to the alleged “expansion” of the area in November 2005. Therefore, in November 2007 Melbourne Water was prohibited from creating a plan that included the “expanded” area, and the ESC was prohibited from considering such a plan. However, this did not appear to stop the ESC from setting prices for “waterway” charges across the “extended” area. A diagram of the various SOOs and other relevant documents is provided in Figure 2.

¹⁴ Page 2866: <http://www.gazette.vic.gov.au/gazette/Gazettes2007/GG2007G049.pdf#page=52> It appears to be the only instrument published by Mr Thwaites subsequent to him leaving Parliament.

¹⁵ The SOO was issued under S8 of the WIA, which only applies to licensees. Melbourne Water has stated that it did not have a license under the WIA (although note the Water Industry Regulations RIS 2006 stated that they did have such a licence). It is possible MW were required to have one, but did not. The Order is likely invalid. See page 1272; <http://www.gazette.vic.gov.au/gazette/Gazettes2008/GG2008G024.pdf#page=41> This document states that the Water Plan submitted to the ESC on 17 December 2007 is to be taken as the Waterway and Water Plan. This conflicts with the ESC’s 2008 price determination that states the plan was submitted in November 2007.

¹⁶ The SOO issued 12 days before the final decision stated that it is the “Waterway and Water” plan of 17 December 2007, and not the one submitted in November, that should be the basis for the decision. <http://www.gazette.vic.gov.au/gazette/Gazettes2008/GG2008G044.pdf#page=32>

¹⁷ Interestingly this date also appears to be immediately subsequent to COAG NWI approval of payments for 2004-06.

Figure 2: Timeline of Statement of Obligations issued Jul 2004 - Jul 2008



Under the Water Industry Regulatory Order issued to the ESC in 2003, the only relevant charge for which it had the power to set prices was a "Metropolitan Drainage Service" defined as a service in relation to a function under Part X of the Melbourne and Metropolitan Board of Works Act 1958¹⁸, that is, only the service described in (b) of the definition of a "Waterway and Drainage" as set out in the 2004 SOO¹⁹. Despite this, the ESC set prices for "Drainage" and "Waterway" charges (ie two separate charges) across Melbourne and "Waterway-only" charges across the "expanded" area.

It is therefore necessary to understand each of the services that make up "Drainage and Waterway" services as outlined in the definition published in the 2004 SOO, to demonstrate that the type of service for which the ESC has been setting prices since 2008, and for which Melbourne Water has been collecting revenue, are not "metropolitan drainage services" or even "metropolitan waterway and drainage services". They are not charges for which the ESC has the power to set prices, nor Melbourne Water the power to impose them.

¹⁸ Note that in *Williamson v Melbourne Water* (VCAT 2012) Melbourne Water submitted that the MMBW Act had been repealed on 1 July 2007 without continuing effect. This would mean that Melbourne Water had no functions under Part X of the MMBW Act in 2008, and as a result the ESC did not have the power to set prices for "Metropolitan Drainage Services".

¹⁹ This SOO possibly remained in force until 2014.

2. SERVICES

1. Metropolitan Drainage Services

“Managing Storm Water Flooding Risks in Melbourne”, published by the Victorian Auditor General in July 2005²⁰, provides good background to Melbourne Water’s “waterway and drainage” functions. It outlines how both Melbourne Water and local Councils²¹ have responsibility for storm water management (ie “Drainage and Waterways”), within Metropolitan Melbourne²².

The report notes that:

Melbourne has a 2-tiered system of responsibility for managing waterways and drainage. Melbourne Water Corporation (Melbourne Water) manages the main drains and waterways with funding from a specific drainage and river improvement rate paid by the owners of rateable properties. Local government (councils) provide services at the local street and property drain level, funded by council rates.

And further that:

Before the late 1970s, drainage systems needed to accommodate water only from storms with a 5-year Average Recurrence Interval (ARI7). Since then, drainage systems in new land developments have been required to accommodate a much larger stormwater flow of up to a 100-year ARI. This is achieved by using above-ground features such as local roads and open drainage reserves to carry excess stormwater away from urban development, in addition to underground 5-year ARI pipes.

The Report provides a useful diagram of the drains and waterways that make up a drainage system (Figure 2):

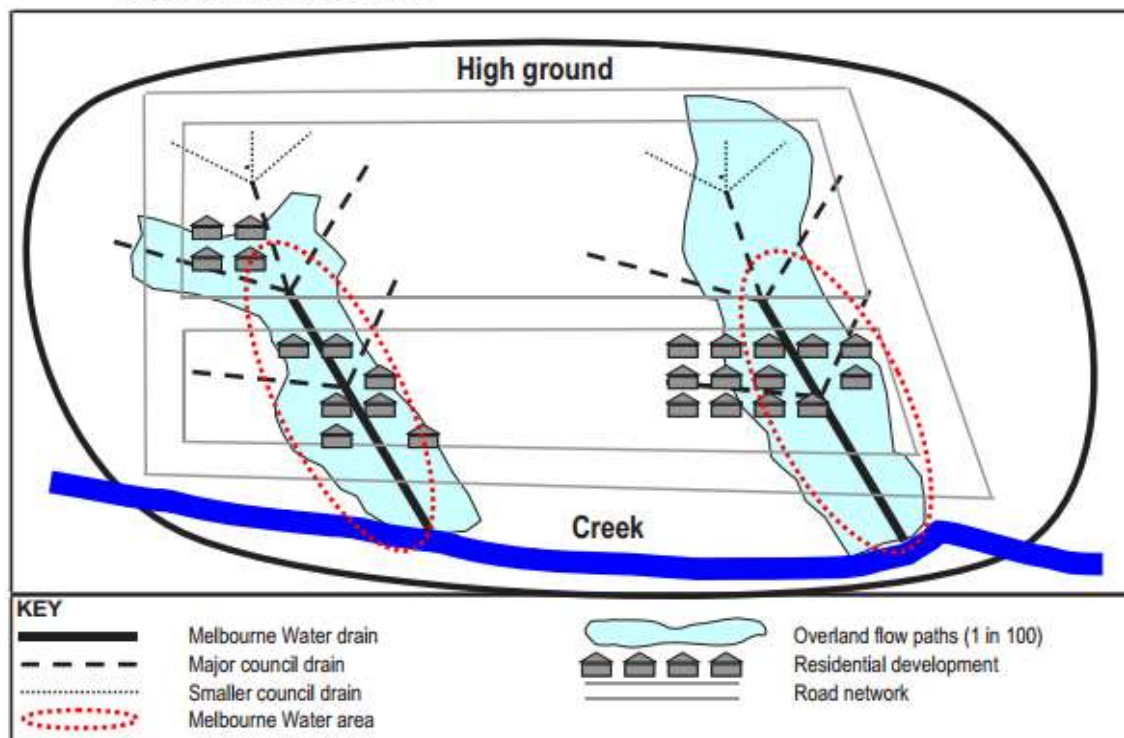
²⁰ <http://www.audit.vic.gov.au/publications/2005/20050719-Stormwater-Flooding-Risks-in-Melbourne.pdf>

²¹ S198 of the Local Government Act (1989) vested all sewers and drains in Councils. Councils are also authorities under the Water Act. The vesting in 1989 coincides with the Water Act (1989) and the repeal of the Drainage of Land Act 1975. It is also important to recognize that the former MMBW was a Board of local councils. With the corporatization of Melbourne Water in the 1990’s, MW may have technically lost its drainage functions. The original 1890 MMBW Act recognized Councils’ responsibility for storm water.

²² Outside of Melbourne Water’s area local Council are responsible for regional drainage, see “protecting Our Bays and Waterways, partnership agreement between EPA, MAV and Melbourne Water for urban storm water management 2004? <http://trove.nla.gov.au/work/20079409?selectedversion=NBD40436279> The Minister is the “authority” for floodplain management under the Water Act (if not delegated to a CMA).

Figure 2 – “Waterway and Drainage” Functions.

FIGURE 2C: TYPICAL COMPONENTS OF A DRAINAGE SYSTEM DEVELOPED BEFORE THE LATE 1970s



Source: Victorian Auditor-General's Office.

This diagram points to the responsibilities of both Councils and Melbourne Water in the operation of drainage systems and that “waterway and drainage” functions are for the purposes of drainage. That is, that the

“waterway” functions are not conservation functions, they are drainage functions.

In fact, drainage functions to the extent that they widen, deepen or modify rivers and creeks are the opposite of conservation. This is demonstrated by the numerous concrete drains scattered around the metropolitan area that were once Melbourne’s waterways²³. Prior to the 1970’s “waterway management” had predominantly involved the concreting and culverting of natural creeks and waterways.

Melbourne Water’s “metropolitan drainage and river improvement” functions have their origins in the

²³ It is also demonstrated by Melbourne Water’s claimed inability to carry out drainage works in the Koo Wee Rup flood protection area, due to claimed environmental issues. This recognizes that drainage functions are often incompatible with conservation requirements.

1923 “Metropolitan Drainage and Rivers Act”. This Act allowed the imposition of a “Drainage Rate” on Melbourne rate payers in the MMBW’s “metropolis”²⁴ (ie “Melbourne and its suburbs”, as defined in the original 1890 MMBW Act). This rate was for the construction of main drains and river improvement works as set out above²⁵. This is the “Metropolitan Drainage Charge” for which the ESC had the power to set prices under the Water Industry Regulatory Order²⁶. There is no such thing as a stand-alone “waterway” charge devoid of the actual provision of a drainage service.

In Orders in Council published in the VGG in April and May 2005, by which it was attempted to initially expand the “metropolis” (under the provisions of the Water Act²⁷) it was stated that the extension of Melbourne Water’s drainage area was aimed at making it responsible for ‘waterway, regional drainage and floodplain management functions throughout the Port Phillip and Westernport catchment’²⁸. Melbourne Water has claimed this same result for the 2005 Order under the MMBW Act²⁹, which expanded the “metropolis”. However, the “Metropolis” only defined Melbourne Water’s drainage area³⁰ for **metropolitan** “Waterway and Drainage” services (as opposed to “rural drainage” under the Water Act). It is apparent that there has therefore been a major misunderstanding or misrepresentation as to what a “waterway and drainage” service involves.

In the 1990’s³¹ Melbourne Water gained the power to impose “Waterway and Drainage” charges directly on developers. These are the “developer charges” (also known as “Waterway and Drainage” charges)³². for which the ESC also has the power to regulate prices (“developer” charges being separately listed as a “prescribed service” in the WIRO). In 2005 the Auditor General, in commenting on the mooted expansion to Melbourne Water’s area stated:

Since much of this new area is predominately rural in nature, the impact on drainage infrastructure development is not expected to be significant in the short-term. Urban expansion will however increase over time.

Therefore, because the majority of existing drainage infrastructure is in the metropolitan area, and because developers pay for all new infrastructure, the expansion of Melbourne Water’s drainage area into surrounding rural areas should have had little or no impact on generalized drainage charges in those areas. That is, even if the area in which charges could be imposed had been expanded, they should not have resulted in the level of generalized charges on households that have been imposed³³

²⁴ Which only applied to those waterways specified in a schedule to the Act.

²⁵ There were issues in the 1920’s where certain Council would build drains to their boundaries and discharge water into adjoining municipalities. This is what led to the MMBW being given responsibility for water draining across more than one municipality. However there is considerable confusion in the terminology because under the original MMBW Act a “drain” was actually a sewer and the MMBW Act had no stormwater management functions under the original 1890 MMBW Act.

²⁶ Refer also to the Office of Regulator General’s previous pricing Order for Metropolitan drainage services, which specifically excluded “Special drainage” charges. The Office of Regulator General was the predecessor of the ESC.

²⁷ But completely contrary to those provisions.

²⁸ Which are not functions under the MMBW Act (1958).

²⁹ See “Extension of Waterway Service Mornington Peninsular progress report 2006.

[http://wikifoundryattachments.com/FL16nOMa8\\$X2bR23UqFZCQ==660242](http://wikifoundryattachments.com/FL16nOMa8$X2bR23UqFZCQ==660242)

³⁰ Its area for “special drainage” charges was specified in Section 3 (7) of the MMBW Act (1958). This was the waterway management district of the former authorities as set out in Schedule 12 of the Water and the transition provisions of the Water Act (1989)

³¹ Actual charging may have commenced earlier, and according to the Auditor General’s Report possibly in the 1980’s when Melbourne Water lost its planning functions.

³² See Principles for the Provision of Waterway and Drainage services: <https://www.melbournewater.com.au/Planning-and-building/Applications/Documents/Principles-for-provision-of-waterway-and-drainage-services-for-urban-growth.pdf>

³³ The ESC indicated in 2005 that “expanded” areas should not be responsible for upkeep of drainage infrastructure in prior areas.

To further confuse things, Melbourne Water has also claimed (since the mid 1920's) that it is only responsible for drainage of catchments greater than 60 Ha (150 acres) although it is not clear on what legislation this claim is based³⁴. This claim surfaced again in the 2013 Parliamentary Inquiry into Rural Drainage in Victoria, as relating to Melbourne Water's current drainage functions³⁵. It is very hard to reconcile Melbourne Water's claim that it gained responsible for the "whole catchment" in 2005, with its claim that it is only responsible for sub-catchments greater than 60Ha in size. In addition, Melbourne Water states that it transfers to Councils assets relating to Drainage Developer Schemes within a catchment of less than 60 Ha, so that Councils are responsible for the ongoing maintenance of these assets³⁶. It would therefore appear Melbourne Water is only responsible for ongoing maintenance of drainage infrastructure in larger catchments.

Perplexingly, Melbourne Water has also claimed it was its "Waterway Management District" and not its "Drainage Area" that was expanded in 2005³⁷ and that it is not responsible for drainage in the "expanded areas".

The "waterway and drainage" services detailed by the Auditor General in 2005, do not appear to be the services for which Melbourne Water is currently imposing "waterway and drainage" charges. Much confusion appears to have been created about the scope and nature of Melbourne Water's "Metropolitan Drainage Services" versus other, historically unrelated services such as "Waterway Management", "Floodplain Management", and general waterway conservation.

While it is necessary to understand what "Waterway Management" and these other "services" are, it should also be borne in mind that:

it is only the "metropolitan drainage service" charge for which the ESC has the power to set prices and, as such, it is the only generalized charge that Melbourne Water can legally impose³⁸.

³⁴ It is possibly via a 1920's agreement with local Councils.

³⁵ On Page 4 of DSE's submission to the Inquiry:

https://www.parliament.vic.gov.au/images/stories/committees/enrc/Drainage/72_DSE.pdf

Full report :

www.parliament.vic.gov.au/images/stories/committees/enrc/Drainage/Final_report/FINAL_DRAINAGE_REPORT_20_June_2013.pdf

³⁶ See MW 2014/15 Annual Report page 87. https://www.melbournewater.com.au/aboutus/reportsandpublications/Annual-Report/Documents/Annual_Report_2015_WEB.pdf

³⁷ Personal communication with author, 2008. However note that Melbourne Water is currently operating Drainage Schemes in the expanded area seemingly contrary to the claim that its drainage area was not expanded in 2005. Note that "Waterway Management Districts" were defined and declared by the provisions of the Water Act, and that it was contrary to these provisions for a WMD to be declared in an area of interest of another authority. This would include areas of interest for SRW, Western Water and PPWCMA. One particular "area of interest" was the declared water catchment of the Rosslynne Reservoir upstream of the reservoir, which was supposedly included in Melbourne Water's "expanded" area in 2005. It could not have been included under provisions of the MMBW Act (1958) and was contrary to the provisions of the Water Act (1989).

³⁸ Although note that since the repeal of the MMBW Act there is no such thing as a "metropolitan drainage service" or "metropolitan Drainage Charge". The Water Act relates to "rural" drainage. The map in s122H of the Water Act – Legl/05-406 is also likely invalid. It does not include any of Melbourne.

2. Waterway Management.

As stated above “Metropolitan drainage” related to specific powers under the MMBW Act and the power to impose charges created by the original 1923 Act. These functions were not generalized “floodplain management” functions but were applied to metropolitan areas undergoing land development. Local Councils in Melbourne were responsible for all drains, with Melbourne Water responsible for main outfall drains (within the metropolitan area)³⁹. As the Order of November 2005 could not override the Local Government Act (1989), Councils remain responsible for drainage in the “extended” area – something which is not disputed by Melbourne Water (hence the need to claim the services are “waterway” and not “drainage” services?).

While the MMBW may have had some more generalized drainage powers under the Drainage of Land Act (1975), this Act was superseded by the Water Act (1989)⁴⁰

In 1992 the MMBW was amalgamated with other small water authorities to become Melbourne Water Corporation, the initial moves towards the increasing corporatization of the organization. As part of this merger Melbourne Water became responsible for the “Waterway Management District” of former authorities, most particularly that of the Dandenong Valley Authority. The “Waterway Management Districts” for which Melbourne Water was responsible were set out in Schedule 12 of the Water Act (1989) (and remained listed there until the repeal of the Schedule on 1 July 2007). The area includes Paterson Lakes, Koo Wee Rup and the Longwary Flood protection areas. These were all declared flood-prone areas.

Note that in 2005 Melbourne Water’s “Waterway Management District” was only the area of the Dandenong Valley and Westernport Authority and not the area claimed as the “existing” area on the map of the “metropolis” (ie map Legl/05-406).

The charges Melbourne Water imposed in these flood prone areas were “Special Drainage” charges, which corresponded with the “precept” charges of the former DVA and were subsequently charges under Division 4 Part 10 of the Water Act (“Floodplain Management”). The savings and transitional provisions in Schedule 14 of the Water Act preserved the Dandenong Valley Authority’s declared flood zones etc (declared under both the Dandenong Valley Act and the Drainage of Land Act)⁴¹. Melbourne Water acted as successor in law to these former authorities.

Amendments to allow Melbourne Water to impose charges in the areas of the former DVA⁴², were made by the MMBW (Amendment) Act 1997, and the Water Act (Further Amendment) Act 1997. The former created “special” drainage charges, while the latter changed the definition of a “tariff” in the MMBW Act to include charges under Division 4 Part 10 of the Water Act (Floodplain Management) -

³⁹ Council are also “Authorities under the Water Act (1989)

⁴⁰ And the Local Government Act which vested all drains in local Councils.

⁴¹ see the Water Act immediately prior to amendments made by Water Governance Act on 1 July 2007 ie version as of 27 June 2007)

⁴² Melbourne Water had from 1991 to 1997 used a complex formula for impose charges equivalent to the former “precept” charge in the “waterway management district” of the former authority. This was contrary to the provision of the MMBW Act which only allowed the imposition of a single drainage charge and not a variable charge. The 1997 Act was therefore retrospective and validated these past charges. The changes of 1997 allowed a separate charge to be imposed in the DVA’s former area, as set out in Section 3 (7) of the MMBW Act, and for both drainage and special charges to be imposed in Paterson Lakes.

see below. These “Special Drainage” charges were imposed in “Special Drainage” areas (ie areas that had been declared to be flood-prone).

"tariff" means a scale of charges by reference to which a fee is imposed by the Board on the owner of a property for works or services provided by the Board under this Part or, as a delegate of the Minister, under Division 4 of Part 10 of the Water Act 1989;'.

The Office of Regulator General, the predecessor to the ESC, had set prices for “Metropolitan Drainage” but not for “Special Drainage” services. This was because Special Drainage charges were set in consultation with a community committee and the costs were directly related to the expenditure⁴³. This is why the ESC had the power to set prices for “Metropolitan Drainage” but not for the rural “Special Drainage Charges” under the provisions of the Water Act. This point appears to have been lost on the Commission, which has been merrily setting price for “drainage” “waterway management” and “special drainage” since 2008.

As was pointed out to Melbourne Water’s independent “Paterson Lakes Review” in 2012, “waterway management”, “special drainage” and “precept” are all just different names for the same charge. The complaint from residents that it was inappropriate to impose both “waterway management” and “special drainage” charges was therefore entirely justified.

Prior to 2008, Melbourne Water’s “Special Drainage” charges were only applied in areas of the former Dandenong Valley Authority, the 2005 ESC pricing decision outlining the “special drainage” areas to which the “Special area” charges applied. This included Koo Wee Rup, Paterson Lakes and Quiet Lakes. It was also noted that parts of the Yaloak catchment in the Shires of Baw Baw, Bass and Gippsland (ie within the Koo Wee Rup catchment area) were the only areas in which “waterway-only” charges were imposed:

13.1.3 Area-specific drainage charges

Melbourne Water advised the Commission On 30 May 2005 of a number of special drainage charges that it currently applies in certain parts of its area:

- *in the Yaloak catchment certain customers in the Shires of Baw Baw, South Gippsland and Bass Coast receive only waterway management services and not general drainage and flood protection services. These customers currently pay a drainage rate that is approximately half the rate applying in the general metropolitan area*
- *in the Koo-Wee-Rup-Longwarry Flood Protection District of the Yaloak catchment customers pay a rate that is approximately three to five times greater than the general drainage rate. This reflects the intensity of the drainage system and expenditure levels in the area which is a former marshland that has been extensively drained for grazing and cropping*
- *in the Patterson Lakes area Melbourne Water provides special flood protection and other works on behalf of landowners including canal, beach and jetty maintenance.*


The Commission understands that most expenditure is of an operating nature and annual expenditure is budgeted to be equal to revenue.

That these “special drainage” charges for flood protection works in flood prone areas are the same

⁴³ These requirements appear to derive from the Drainage of Land Act (1975)/ DVA Act (1981) incorporated into the Water Act (1989)

charges Melbourne Water imposed in the “extended area” following the ESC’s 2008 pricing decision is made clear by the 2008/09 “scale of charges” published by Melbourne Water in the newspaper⁴⁴:

Figure 3: Published tariff schedule for “Waterway and Drainage” charges 2008/09




2008/09 WATERWAYS AND DRAINAGE FEES

Waterways and drainage fees applying within the waterway management district of Melbourne Water are collected by retail water businesses on its behalf. The revenue allows Melbourne Water to undertake works to improve flood protection and stormwater quality, improve drainage infrastructure and protect our waterways and bays.

The Board of Melbourne Water Corporation has resolved to set the following waterways and drainage fees for the financial year 2008/09, applying to all ratesable properties located within its waterway management district. Fees are based on the 1990 Net Annual Value (NAV) or Site Value (SV) of the property, subject to a minimum.

Part A - General Fees	Rate in \$ NAV	Minimum Fee
All properties located within the area designated as the Urban Growth Boundary, except those specified in Part B		
• Residential properties	0.8252c	\$62.08
• Non-residential properties	0.8664c	\$81.36
Part B - Special Area Fees		
1. All properties included in the waterway management district as a result of extending Melbourne Water's operating area in November 2005 (including all properties within the Shire of Mornington Peninsula), except those specified in 2		
• Residential properties	0c	\$62.08
• Non-residential properties	0c	\$81.36
2. All properties located outside the area designated as the Urban Growth Boundary, except those specified in 3	0c	\$38.88
3. All properties in the following parts of the area of the former Dandenong Valley and Western Port Authority as at 5 November 1991, which up to 1997, were subject to a special drainage and river improvement rate:		
• Koo Wee Rup - Longwarry Flood Protection District		
- Division A	3.600c	\$56.40
- Division B	2.000c	\$56.40
Part C - Extra Fees at Patterson Lakes	Rate in \$ SV	Minimum Fee
Tidal Waterways properties	0.4269c	\$0.00
Quiet Lakes properties	0.3513c	\$0.00

Note: For more information on the State Government's Urban Growth Boundary, please visit www.dse.vic.gov.au/melbourne203Online.



For more information about Melbourne Water visit melbournewater.com.au

This notice specifically states that the “waterway and drainage” fee is a “special area” fee, in the same class as that imposed in Koo Wee Rup and Paterson Lakes. However, it is being imposed in areas that are not flood prone or within any flood declared area. Such charges are contrary to law, including for

⁴⁴ Herald Sun 2009.

the reason that the ESC does not have the power to set prices for these services.

The above advertisement also makes the ESC's decision to impose both "waterway" charges and "special drainage" charges in Patterson lakes between 2008-2012 seem all the more irrational, given that it was recognized, as evidenced above, that this is the same charge, under a different name.

Furthermore, the scale of fees outline above, includes Mornington Peninsular, despite this area not being in the "extended area" on map Legl/05-406⁴⁵ (see attached map). Melbourne Water has published numerous maps that purport to represent map Legl/05-406 but to the extent they include Mornington Peninsular in the "expanded area" do not represent it. Melbourne Water has also explicitly stated in numerous documents that its area was expanded by the Order of November 2005 to include the Mornington Peninsular, a claim that lacks any veracity what so ever.

Also note the mention of the "Urban Growth Boundary" in the above notice as defining the boundaries for various charges. The UGB is not mentioned in any legislation or instrument relevant to the drainage charge, including the Order in Council of November 2005. The UGB was not created until 2002, and could not have been applicable to Melbourne Water's drainage area charges. Melbourne Water has confirmed that its drainage area did not change between 1991 and the supposed expansion in 2005 (which suggests that there was a major legislative impediment to the further expansion of the "metropolis").

All of the above suggests that what Melbourne Water is claiming is that its "Waterway Management District" was extended by the Order of November 2005, despite the MMBW Act not having the power to do this. The "existing" area marked on map Legl/05-406 was not Melbourne Water's existing "Waterway Management District" which, as outlined above, only included the area of the former Dandenong Valley Authority and other former authorities. It is therefore not known on what basis this map was then incorporated into s122H of the Water Act as representing Melbourne Water's then existing "Waterway Management" district.

There are two further issues surrounding these "Waterway Management" charges. The first is that due to changes made to the definition of "serviced property" in the Water Act by the Water (Waterway Management Tariffs) Act of 1999⁴⁶, "waterway management" (ie flood protection) charges could only be imposed on properties that directly benefited from a service⁴⁷. This prohibition applied to Melbourne Water. The other issue is that as recently as 2004 Melbourne Water claimed its floodplain management functions over the "metropolis" relied upon a delegation from the Minister made in 1995. This agreement makes clear that it is the Minister⁴⁸ who is the Authority under the Water Act for floodplain management functions and that Melbourne Water is providing these services to the Minister. That is, this is not a function for which Melbourne Water can impose a generalized charge on households and businesses. This agreement also stated that it terminated on the repeal of the MMBW Act (1958), ie on 1 July 2007⁴⁹.

⁴⁵ Note the Auditor General's report reproduces the correct map.

⁴⁶ The second reading speech of this Act (Minister Broad) outlines that "waterway management" services involve the building and maintenance of levee banks in flood prone areas and notes they were functions of CMAs. See Second Reading Speech (Council) 19 December 1999, page 551 <http://hansard.parliament.vic.gov.au/isysquery/5cf30d74-f0f2-4714-9818-19856de4f5ec/8/doc/>.

⁴⁷ The definition of properties that "benefit" being clearly defined in the former Drainage of Land Act (1975)

⁴⁸ The Minister for Conservation?

⁴⁹ It also terminated on the issuing of a licence to Melbourne Water under the Water Industry Act, confirming that the intent was for such licenses to apply to Melbourne Water.

In summary, there is absolutely no legal basis for the imposition of a generalized “waterway management” charge. The Order of November 2005 could not have extended the area for this charge, and the ESC has absolutely no power to set prices for this service.

3. Diversion Services and Environmental effects of Water Supply

Various authorities have conservation-related functions under bulk entitlements and as managers of irrigation and diversion services (as well as under “the EPA’s “Waters of Victoria”). All these functions constitute costs of the services provided, and are not “services” in and of themselves for which separate charges can be imposed.

It is relevant to note that under Bulk Entitlements issued for the Rosslynne Reservoir⁵⁰ that it is Southern Rural Water that is responsible for the environmental effects of water supply in the vicinity of the Reservoir. That is, the area upstream of the reservoir and downstream to Keilor. These obligations relate to the maintenance of the “bed and bank” of streams, the measurement and management of stream flows and other functions such as the conducting of fish surveys and protection of aquatic life.

The above are “services” Melbourne Water has claimed form part of its “waterway” functions, in the “expanded area” which includes the areas around Rosslynne Reservoir. The Order under the MMBW Act could not have transferred these functions from Southern Rural Water to Melbourne Water, nor are they “waterway” services for which a charge can be imposed.

4. Recreation, Leisure and Tourism function of Waterways

Melbourne Water does not have any conservation or public good functions separate from its responsibilities to manage the environmental impacts of its water supply and water/sewerage discharge. It does not have a conservation function or any public good functions. This is because the public good functions of the former MMBW were specifically removed from Melbourne Water. This was implemented in the 1990’s by firstly removing the “Parks and Waterway” division of the former MMBW to form a separate organization known as “Melbourne Parks and Waterways”. On the abolition of this organization, all public good functions reverted to the State and all waterways were declared Crown Land under s 175A⁵¹ of the Water Industry Act. This was cemented by changes to the Parks Victoria Act and other Acts in 2000.

The list of waterways to which the “waterway and drainage” function had previously applied (listed in a Schedule to the MMBW Act), were removed from the Act, with s175 of the Water Industry Act specifying that Melbourne Water retained its former functions over waterways in the “metropolis”.

⁵⁰ Note that SRW, Melbourne Water and Western Water all have bulk entitlements from the Rosslynne Reservoir, but only SRW is responsible for waterways in the area. Melbourne Water is entitled to approximately 10% of the Water in the Reservoir, so that any increase in flow into the Reservoir increases the volume of water Melbourne Water has available to sell to diverters downstream below Keilor. Melbourne Water was made responsible for diversions below the confluence of the Deep and Jackson’s Creek by Order of the Minister in 1999. Beginning in 1999 Melbourne Water provided funds to the Port Phillip and Western Port CMA for “streamside management” grants and other works on waterways in the upper Maribyrnong. To the extent this work increases flows and quality of water in the reservoir, it is of direct benefit to Melbourne Water (and Western Water)

⁵¹ See s 175A of the Water Industry Act prior to changes made by the Water (Governance) Act in 2006/07. See also s271 and s60 of the MMBW Act prior to s 175A of the Water Industry Act.

Section 271 (the section which vested waterways in Melbourne Water) was also removed from the MMBW Act. This effectively negated any expansion to the “metropolis” and ensured that Melbourne Water could not gain control of any additional waterways, nor expand its drainage area other than by the issuing of a new license under the Water Industry Act (1994).

s. 6

Parks Victoria became a service provider to the State for these former MMBW functions⁵². These functions, which were the responsibility of the Minister but for which Parks Victoria could provide services are set out in s 7 of the Parks Victoria Act (1998):

7 Functions of Parks Victoria

(1) The functions of Parks Victoria are—

- (a) to provide services to the State and its agencies for, or with respect to, the management of parks, reserves and other land under the control of the State;
- (ab) to provide services to the State and its agencies for, or with respect to, the management of waterways land (within the meaning of the **Water Industry Act 1994**) for the purposes of conservation, recreation, leisure, tourism or water transport;
- (b) with the approval of the Minister, to provide services to the owner of any other land used for public purposes for, or with respect to, the management of that land;

S. 7(1)(ab) inserted by No. 66/2000 s. 42.

The MMBW had formerly imposed a “metropolitan improvement” charge for its planning functions, the conservation of waterways, and the management and purchase of parkland and open space. This subsequently became a tax under s139 of the Water Industry Act (1994). The tax collected was paid into a government Parks and Waterway Trust Fund (later known as the Parks Reserves Fund) and recorded in Consolidated Revenue, the latter being a requirement of s89 of the Victorian Constitution Act (1975). Monies from this Trust account can be paid to Parks Victoria for the “conservation”, “leisure”, “tourism or “water transport” function that can be delegated to it. Because these are all functions that were removed from Melbourne Water, Melbourne Water no longer has any of these functions.

In a 2016 Parliamentary inquiry, this was confirmed by evidence given by Secretary of the DELWP to the Public Accounts and Estimates Committee in 2015⁵³

“As some of you may be aware, the Parks and Reserves Trust Account receives money from the metropolitan parks improvement rate, which is collected through the water sector — through Melbourne Water — and that makes payments for the management and control of open spaces, parks and waterways in the metropolitan area..”

Outside of the metropolitan area, local Councils are responsible for drainage and for local parks and open space, while Parks Victoria is responsible for State and National Parks. Councils are responsible for the recreational and leisure use of Council owned land and some Crown land. DELWP (formerly DSE) is responsible for Crown land and waterways (most of the latter being permanently reserved Crown Land). Melbourne Water does not control any of the land associated with waterways in these

⁵² Water Industry (Amendment) Act 2000. <http://www.austlii.edu.au/au/legis/vic/bill/wib2000295/>

⁵³ Public Accounts and Estimates Committee 16 February 2016, page 20: https://www.parliament.vic.gov.au/images/stories/committees/paec/finance_performance_outcomes/2013-15/PH/DELWP_-_201314_201415_Outcomes_PH_16022016_-_VERIFIED.pdf . Concerns were raised by the Committee about the ways in which money from the “Parks and Reserves Trust Fund” was being allocated and spent. From year to year there has generally been excess funds in the reserve.

rural area, and does not have any functions relating to the conservation of waterways. The Order of November 2005 could not have vested waterways in Melbourne Water, or given it control over them. Melbourne Water has repeatedly refused requests to explain exactly which “waterways” in the extended area it believes it is responsible for. The implications from its claim that its area was extended to include “all” waterways in the extended area (which would include heritage rivers, and waterways on roads and private land) lacks any credibility or legal reality.

As explained above, Southern Rural Water is responsible for the “bed and bank” of waterways (ie the part of the waterway over which water normally flows) in the vicinity of Rosslynne Reservoir and for fish surveys and maintaining the hydraulic capacity. DELWP (formerly DSE) is responsible for the riparian zone and vegetation that adjoins waterways in rural areas. The Port Phillip and Westernport Catchment Management Authority, is responsible for the administration of grant monies for streamside management grants and grants to local community groups and Councils. The PPWCMA is also responsible for planning and education around river health, and is involved in water quality monitoring⁵⁴ It is also responsible for land management including weed reduction programs.

As will be outlined next, Melbourne Water claims that its “waterway” functions involve conservation works on waterways and that they include “community liveability” functions such as placing park benches along waterways, or purchasing land for recreation and leisure purposes. Melbourne Water does not have these functions, and its representations lack credibility.

What “Waterway” services are Melbourne Water actually charging for?

Melbourne Water publishes regular updates as to its “Waterway Management” activities, the activities for which the “Drainage” and “Waterway” charges are being imposed. This provides important insight into the types of services for which Melbourne Water believes it can impose charges. In particular, the updates for part of the “extended” area in which waterway-only charges are imposed indicate what types of services Melbourne Water believes are “waterway” services.

As outlined in section 1, in the expanded areas these services should relate to no more than the maintenance of the drains listed in the Order of November 2005. However, a review of the update for Macedon Ranges Shire (ie an area that supposedly only receives “waterway” services) demonstrates that Melbourne Water has a very different idea as to what this service involves.

The 2011/12 Macedon Ranges update:

<http://pandora.nla.gov.au/pan/144115/20140114-1612/2012.pdf>

⁵⁴ See Victorian Water Quality monitoring network – Port Phillip and Western Port Catchment (200?): <http://data.water.vic.gov.au/WebDocs/SW/PortPhillip.pdf>

Outlines the following expenditures:

Grant	Who we gave it to	Number of grants Approved last year	Funding approved in The area (ex-GST)
Stream Frontage Management program ⁵⁵	Private landowners	101	\$289,752
Corridors of Green	Public land managers	5	\$12,419
Community grants	Community groups	9	\$13,394

The “waterway” charges which are supposedly for the provision of drainage services appear instead to involve the giving of money away to unknown private individuals and to local Councils and community groups. In 2015/16 Melbourne Water stated it had provided \$8.6 million in grants to the community and government and noted:

“We also provided more than \$4.7M in grants through our River Health Incentives Program to farmers, community groups and land management agencies to protect and improve our waterways and water quality. These grants, issued under the four program areas of Rural Land, Community, Corridors of Green and Stream Frontage Management, have achieved the :

- *Purchase and planting of over 400,000 plants.*
- *Establishment of 37.5km of streamside vegetation.*
- *Management of 169km of streamside vegetation.*
- *Installation of 75.6km of stock exclusion fencing”*

Interestingly, in the notes to Melbourne Water’s 2005/06 Annual Report (page 65) it records that it itself received government grants for “River Health Improvement Programs” and for the Maribyrnong River environmental flow study”, clearly indicating that these are Government-funded public goods, rather than commercial activities. It is therefore unclear on what basis households and businesses are being charged or on what basis the ESC is setting prices for these “services”.

In 2010 Melbourne Water represented that “waterway” services included payments to “Water Watch”⁵⁶. Water Watch is a community organization established in 1993 funded by various government agencies (including DEWLP). It is a group of volunteers that monitor river health, and describes itself as follow:

For more than 23 years, the Victorian Waterwatch Program has been connecting local communities with waterway health and sustainable water management issues. Through the Waterwatch Program, citizen scientists are supported and encouraged to become actively involved in local waterway monitoring and onground activities.

Note also the following statement at the bottom of page 77 of Melbourne Water’s 2011/12 Annual Report:

⁵⁵ Note that under the Conservation Forest and Land Act (1987) the entering into land management agreements for the management of private land is a non-delegable function of the Secretary for Conservation, not the Minister for Water. Catchment and Land Protection Act(1994) also applicable.

⁵⁶ Joseph v Melbourne Water & anor, VCAT 2010.

*Government grants Government grants of \$3.6M (2010-11: \$3.2M) were recognised as other income by the Corporation during 2011-12 for various projects including the \$10M stormwater project and Water Watch program.

“Water Watch” does not appear to be a commercial activity of Melbourne Water for which it can impose charges, nor a “Metropolitan Drainage” service for which prices can be set by the ESC.

According to Melbourne Water literature, all of the above “conservation functions” are “waterway” services, which are being billed to Melbourne property owner’s water bills via the “waterway” charge. This includes grants made to Local Government, who are themselves responsible for local drainage and which have the capacity to recover such costs via general and special Council rates, under the Local Government Act (1989). In addition, most of these “services” appear to be functions of the State (that can be delegated to DELWP, Parks Victoria or the PPWCMA) and not functions of Melbourne Water.

In 2016 the ESC approved \$15million+ in additional “community liveability” costs as forming part of its approval of Melbourne Water’s “waterway” services. These services appear to involve the purchase of land for open space and related land management, which are again functions of the State. The setting of prices for “community liveability assets” by the ESC appears to set a very dangerous precedent for future Melbourne Water charges, given the indications that these “community liveability” services are likely to rapidly increase in costs over the years to come⁵⁷. The fact that Melbourne Water does not have these functions, and that the ESC has no power to set prices for them, seems to have been lost on everyone.

Conclusions

As the above discussion demonstrates, Melbourne Water’s “waterway and drainage” costs should amount to no more than the maintenance of existing “main” drains in metropolitan Melbourne and, in the “extended” area, should cover only the costs of ongoing maintenance of new drains in catchments larger than 60 hectares. These expenses cannot amount to anything like the \$250million per annum Melbourne Water is currently charging.

Even the above charges are potentially contrary to law as it is highly likely that legislative changes made in 2006 invalidated them, given that there is no such thing as a “metropolitan” drainage charge under the Water Act. A “Metropolitan Drainage Service” is the only service for which the ESC has the power to set prices.

Furthermore, the Order of November 2005 only applied Part X of the MMBW Act to the area so included, and that Order remains in force and effect. Similarly, the “Metropolitan Drainage” charge as outlined in both the Statement of Obligations issued to Melbourne Water and as described in the Water Industry Regulatory Order defined a “Metropolitan Drainage” service as a function under Part X of the MMBW Act. At VCAT in 2012 in *Williamson v Melbourne Water*, Melbourne Water submitted that the MMBW Act (1958) was repealed in 2007 without lasting effect. This would mean that there is no longer the power to impose charges for this service.

⁵⁷ Melbourne Water Corporation. “Potential contributions to the liveability of Melbourne”, John Collins Consulting 2013 (obtained under FOI from Melbourne Water), It also appears the ESC relied upon Melbourne Water’s own advice for the legitimacy of “Community liveability” in 2016.

Subsequent changes made to the Water Industry Regulatory Order in 2012 (when the prior Order was revoked and a new one issued by Minister Walsh) are also potentially invalid, given that the exemption from the required RIS was based on the claim that a drainage function under Part X of the MMBW Act was the same as that under Part 10 of the Water Act – something that is clearly refuted by the definition contained in the 2004 Statement of Obligations.

There is strong circumstantial evidence that Parliament was misled in 2006, given that it was represented that what was being incorporated by reference was a map of Melbourne Water's existing "waterway management" district. Likewise Parliament was never informed of the reason for exempting both the MMBW Act and Water Act from s32 of the Interpretation of Legislation Act, despite an attempt having already been made to expand Melbourne Water's operational area in April 2005. That both Acts were exempted suggests that in 2005 there was already the intention to place a map of the "metropolis" into the Water Act, as is also suggested by the title and delineation on the map - irrelevant to the 2005 Order - but necessary for the 2007 incorporation to look credible.

The result is that a potentially invalid map has been incorporated into legislation. It is only on the basis of this map, numerous invalid regulatory instruments, and the ESC acting beyond its power, that "waterway" charges have been imposed across all of Melbourne and an "expanded" area since 2008. The circumstances surrounding the 2007 & 2008 Statement of Obligations were exceptionally odd and suggest an attempt to avoid proper process. One wonders what the ESC made of these instruments at the time?

There is unequivocal evidence that a separate and new "waterway" charge was created, contrary to law, in 2008. The types of services for which this charge is being imposed are not "waterway and drainage" functions, or services for which a generalized service charge can be legally imposed. The actual "services" that are supposedly being provided appear to be functions of the State already paid for via the Parks and Waterways tax, or are other "public goods" and the responsibilities of other government agencies.

At no stage has any Regulatory or Legislative Impact Statement or consultation occurred on the economic impact of the vastly expanded charges. One presumes these requirements were avoided by claiming that the changes to legislation or regulatory instruments would have little or no economic effect. This may be why it was left to the ESC in 2008 to implement this new charge.

Of greatest concern is the fact that by incorporating map Legl/05-406 into the Water Act in 2007 as representing Melbourne Water's existing "Waterway Management District", drainage charges, which had previously been a debt due, became a lien on properties. This has meant that at no stage is Melbourne Water required to justify these charges in a court of law. Not only is this incompatible with the notion of customer rights, but it also raises issues around the unlawful seizure of private property and s20 of the Charter of Human Rights and Responsibilities Act (2006). While a lien may be appropriate where actual drainage services that benefit a property have been provided, they are totally inappropriate when the service is as vague and nebulous as Melbourne Water's "waterway" services. That the supposed delivery of "public goods" and the imposition of the resultant "service fees" contrary to law, can result in the seizure of private property by a State-owned corporation is extremely alarming. That such should occur via the Water (Governance) Act 2006, introduced only a few months after the assent of the Charter, shows with what little regard such rights were held by the former Labor Government.

Other Water Authorities, such as Western Water, have played a major part in customer habituation to this charge, given that it is the retail Water Authorities and Western Water which have been billing “customers” (on Melbourne Water’s behalf) for services they do not receive, seemingly contrary to law⁵⁸. These authorities, like the ESC, have failed to question Melbourne Water, or demand evidence of the legitimacy of the charge.

Melbourne Water appears to have created a massive fund, for which it is largely unaccountable. It is highly disturbing that the claimed legitimate distribution of these funds is the donation of money to unknown private individuals. Without proper reporting and accountability, this may potentially leave Melbourne Water open to corrupt practices.

Rather than regulate prices, the ESC has aided a process that has seen the imposition of “waterway” charges and has set prices for these services contrary to its own powers. The prices it is approving, the area over which it is approving them, and the types of services for which the charges are being imposed, appear to have no basis in law. In 2015/16 Melbourne Water collected more than \$250million in “Waterway and Drainage” charges from across Melbourne and surrounding rural areas, adding to a total in excess of \$2.4 billion in these charges collected since 2008.

Rather than drainage charges or Melbourne Water’s payments to the Victorian Government stabilizing as a result of regulation, both have increased enormously. It is also apparent that there has been a cost-shifting of certain State functions to Melbourne Water.

Through the processes outlined in this paper, it appears Melbourne Water and the Victoria Government have cleverly avoided the revenue implications of price regulation. Next to no one has noticed.

⁵⁸ Under the MMBW Act, Melbourne Water could only enter into agreements for collection of drainage charges by the 3 retail water authorities. The types of services for which customers are being billed by Western Water are unrelated to Metropolitan Drainage” and it is acknowledged that customers being build do not receive Melbourne Water drainage services. It is highly likely that it is contrary to law for the Retail Water Authorities and Western Water in particular, to bill customers who are not connected to their services and receive no services from them (ie non-“customers”). It is believed the Retail Authorities’ licenses restricted them to the collection of a drainage rate, and the Parks charge and did not allow the collection of “waterway” charges.