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Consumer
Commission

Review of Water Charge Rules

Issues Paper

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Australian Competition and Consumer Commission
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Glossary

Basin State	means New South Wales, Victoria, Queensland, South Australia, or the Australian Capital Territory.
bulk water charge	a charge payable for the storage of water for, and the delivery of water to: <ul style="list-style-type: none"> • infrastructure operators • other operators of reticulated water systems • other persons (including private diverters and environmental water holders)
bulk water supplier	a person who imposes a bulk water charge for a bulk water service
infrastructure operator	any person or entity who owns or operates infrastructure for one or more of the following purposes: <ul style="list-style-type: none"> (i) the storage of water (ii) the delivery of water (iii) the drainage of water for the purpose of providing a service to another person
irrigation infrastructure operator (IIO)	any person or entity who owns or operates water service infrastructure for the purpose of delivering water to another person for the primary purpose of being used for irrigation
irrigation network	a network of carriers (typically open channels, pipes and/or natural waterways) used to convey water from a water source through customer service points to customer properties—an irrigation network may be either a gravity-fed network (typically using channels and / or natural waterways) or a pressurised network (using pipes)
irrigation network charge	a charge levied by an IIO in relation to their irrigation network
irrigation right	a right that a person has against an IIO to receive water which is not a water access right or a water delivery right—an irrigation right can usually be transformed into a water access entitlement
private diverter	an irrigator that extracts water directly from a natural watercourse (either a regulated or unregulated river)

regulated water charge	<p>includes a water charge to which any of the three sets of water charge rules applies:</p> <ul style="list-style-type: none"> • Water Charge (Infrastructure) Rules • Water Charge (Planning and Management Information) Rules • Water Charge (Termination Fees) Rules <p>See section 91 of the Act for a full definition.</p>
termination	when a person terminates or surrenders the whole or part of a right of access to the IIO's network, typically by terminating water delivery right
termination fee	a fee that may be imposed by an IIO when an irrigator terminates
total network access charge (TNAC)	<p>the amount on which the termination fee multiple is applied in order to calculate a maximum termination fee. The total network access charge is the sum of all amounts that would have been payable for access to an operator's irrigation network by an irrigator in respect of a full financial year if termination or surrender had not occurred, excluding:</p> <ul style="list-style-type: none"> • any amount calculated by reference to the amount of water actually delivered to the terminating irrigator (that is, variable irrigation network charges) • any amount in respect of a service for the storage of water • connection/disconnection fees • any amount that exceeds the cost of providing irrigators with access to an operator's irrigation network • fees under ACCC approved contracts
transformation	the process by which an irrigator permanently transforms their entitlement to water under an irrigation right against an IIO into a water access entitlement held by the irrigator (or anybody else other than the IIO), thereby reducing the share component of the operator's water access entitlement
water access entitlement	perpetual or ongoing entitlement, by or under a law of a state, to exclusive access to a share of the water resources of a water resource plan area

water access entitlement trade	the change of ownership and / or location of a water access entitlement (including through the establishment of a tagging arrangement)
water access right	any right conferred by or under a law of a state to hold and / or take water from a water resource, and includes: <ul style="list-style-type: none"> • stock and domestic rights, • riparian rights, • a water access entitlement, • a water allocation
water allocation	the specific volume of water allocated to water access entitlements in a given water accounting period
water allocation trade	the change of ownership and / or location of a particular volume of water allocation
Water Charge (Infrastructure) Rules 2010 (WCIR)	water charge rules for fees and charges payable to an infrastructure operator for: <ul style="list-style-type: none"> • bulk water charges • access to the irrigation infrastructure operator's network or services provided in relation to that access • matters specified in regulations made for the purposes of s. 91(1)(d) of the Water Act 2007
Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)	rules relating to charges for water planning and water management activities in the Murray-Darling Basin and requiring the publication of information on the details of the charge and the process for determining the charge
Water Charge (Termination Fees) Rules 2009 (WCTFR)	water charge rules for fees or charges payable to an IIO in relation to terminating access to an operator's irrigation network (or services relating to such termination), or surrendering a right to delivery of water through the operator's irrigation network
water delivery right	a right to have water delivered by an infrastructure operator—a water delivery right typically represents some or all of the holder's right of access to an irrigation network (there may also be a right to drainage), and can be terminated
Water Market Rules 2009 (WMR)	rules dealing with actions or omissions of an IIO that prevent or unreasonably delay transformation arrangements or trade

water service infrastructure	infrastructure for one or more of the following purposes: <ul style="list-style-type: none">(i) the storage of water(ii) the delivery of water(iii) the drainage of water for the purpose of providing a service to another person
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List of abbreviations

ESCV	Essential Services Commission of Victoria
GL	Gigalitre (one billion litres)
IPART	Independent Pricing and Regulatory Tribunal (NSW)
MDB	Murray-Darling Basin
MDBA	Murray-Darling Basin Authority
ML	Megalitre (one million litres)
NOW	NSW Office of Water
NSP	Network Service Plan
NWI	National Water Initiative
WCIR	Water Charge (Infrastructure) Rules 2010
WCPMIR	Water Charge (Planning and Management Information) Rules 2010
WCTFR	Water Charge (Termination Fees) Rules 2009
WMI	Western Murray Irrigation Limited
WMR	Water Market Rules 2009
WPM	Water Planning and Management
WTR	Water Trading Rules

1. Introduction

During 2014, an independent panel of experts reviewed the *Water Act 2007* (the Act) and made a number of recommendations. These included a recommendation for the Australian Competition and Consumer Commission (ACCC), in consultation with industry and Basin State governments, to review the water charge rules made under the Act.¹ There are three sets of water charge rules:

- Water Charge (Infrastructure) Rules 2010 (WCIR)
- Water Charge (Termination Fees) Rules 2009 (WCTFR)
- Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)

This paper sets out some background information about the Act Review and the Panel's recommendations in section 3.2.

On 17 December 2014, the Minister requested that the ACCC undertake a review of the water charge rules and, where appropriate, provide advice on possible amendments to the water charge rules.

The review will consider a wide range of issues, as required by the terms of reference (see below), including:

- the consistency of water charging regimes across the MDB
- the appropriateness of the tiered regulatory approach in the WCIR
- ensuring the WCIR are able to appropriately regulate charges imposed by intergovernmental entities such as the Murray-Darling Basin Authority
- the interaction between the WCIR and third party access regimes
- options for improving the effectiveness of the WCPMIR
- the clarity of drafting in the rules, and the potential for their combination into one instrument.

1.1 Terms of reference

The Minister's terms of reference specifically request the ACCC to provide advice on the merits of amending the rules in response to the matters set out by the Panel in recommendation 11, including assessing:

- opportunities to reduce cost to industry and government
- the continuing appropriateness of tiered regulation of infrastructure operators and the potential for streamlining or eliminating regulation, including whether to remove the current requirements for member owned operators under Part 5 of the WCIR
- the current process for accreditation of Basin States' regulators, the effectiveness in applying water charging regimes by different regulators, and the form and content of charge determinations by all regulators

¹ [Report of the Independent Review of the Water Act 2007](#), Recommendation 11.

- opportunities for advancing the consistent application of the water charging objectives and principles, including options to rank objectives and define terms
- lessons learned from other sectors in relation to appeal mechanisms
- opportunities to combine the water charge rules and Water Market Rules in one instrument
- consistency with the Australian Government’s deregulation objectives
- the effectiveness of the WCPMIR, the extent to which their effectiveness could be enhanced and the likely impacts if they were to be repealed.

The Minister also requested the ACCC’s advice on any other opportunities for amending the rules to improve regulatory clarity or efficiency or to reduce regulatory burden while maintaining effective standards. A copy of the Minister’s request and the complete terms of reference for the review are included at **Appendix A**.

1.2 Consultation process and timeline

The ACCC has prepared this issues paper as part of its consultation process. This paper:

- outlines the rationale for the water charge rules
- discusses concerns and issues with the water charge rules, including those raised during the review of the Act
- invites interested parties to respond to questions about these and any other relevant issues, and otherwise contribute to the ACCC’s review.

Consulting with stakeholders is an important part of the ACCC’s process in developing its water charge rules advice for the government. This issues paper begins that consultation process by seeking submissions from stakeholders, including:

- Basin State governments and regulators
- infrastructure operators
- irrigators and other water users
- industry groups
- water market intermediaries
- other interested parties.

The ACCC is seeking written submissions in response to this issues paper—see section 1.3 below on how to make a submission.

The ACCC will make available further opportunities to contribute to the development of its water charge rules advice before the draft and final advice. Specifically, table 1.1 sets out the proposed timeline for the ACCC’s consultation process. The ACCC is planning a series of public forums in irrigation communities across the Basin during July and August—details will be posted on the ACCC’s website in coming weeks.

Table 1.1 Proposed times for the ACCC’s consultation process

Item	Date
Submissions due in response to the issues paper	29 June 2015
Further stakeholder consultation, including public forums	July / August 2015
Draft advice (including draft rule amendments)	September / October 2015
Submissions due in response to the draft advice (including draft rule amendments)	November 2015
Final advice (including proposed rule amendments) to the Minister	December 2015

1.3 How to make a submission

The ACCC welcomes submissions regarding the review of the water charges rules.

Sections 5 to 8 of this issues paper contain numbered questions on various aspects of the water charge rules. Where submissions address one or more of the specific questions in this paper, your submission should note the relevant question number(s).

The ACCC is also interested in stakeholder views on issues related to the water charge rules not otherwise covered in this issues paper or the subject of a particular question.

Wherever possible, you should support your responses to the questions or comments with evidence and data.

The ACCC will be required to consider the costs and benefits of the various policy proposals being considered, and to outline the likely net benefit of its preferred approach, in its advice to the Minister. You can assist the ACCC to ensure that its assessment is well-informed by providing information in your submission, where appropriate, on the costs and benefits to you or your business of existing rule requirements and on the anticipated costs and benefits of specific new policy proposals.

Submissions need to be provided to the ACCC no later than **Monday, 29 June 2015**.

Submissions received in response to this issues paper will inform the ACCC’s advice to the Minister.

The treatment of confidential information is considered in section 1.4.

We request that you email your submissions. The ACCC encourages interested parties to make submissions either in Microsoft Word or in PDF (OCR- readable text format – that is, they should be direct conversions from the word processing program, rather than scanned copies in which the text cannot be searched).

Please ensure your submission clearly indicates your name and the date of your submission.

Submissions should be sent to:

Email: waterchargerules@accc.gov.au

or by mail to the following address:

Review of the water charge rules
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001

1.4 Treatment of confidential information

To foster an informed and consultative process, all submissions will be considered as public submissions and published on the ACCC's website. However if a submitter claims that their submission contains confidential information, the ACCC will publish a version of the submission which excludes the confidential information.

Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The commercial-in-confidence version should highlight the confidential material in yellow. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in order to allow the widest possible participation in the public inquiry.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. This policy can be downloaded from the ACCC's website.

2 Structure of the issues paper

This issues paper has the following structure:

Section 3 - Legislative framework

This section provides information on the legislative framework applicable to the water charge rules, including the interaction between this review process and the Government's response to the recommendations of the Act Review.

Section 4 - General issues

This section describes the general issues relevant to all the water charge rules.

Section 5 – Water Charge (Infrastructure) Rules 2010

Section 6 – Water Charge (Termination Fees) Rules 2009

Section 7 – Water Charge (Planning and Management Information) Rules 2010

Sections 5 to 7 describe the purpose of, and rationale, for each of the three sets of water charge rules. Each section includes an outline of the key aspects of the rules, together with an overview of issues identified to-date by the ACCC or stakeholders that may impact on the effectiveness of the rules.

Sections 4 to 7 contain numbered questions. We are seeking specific feedback in response to the questions in each section, although comments on other aspects of the water charge rules are also welcome.

Where appropriate throughout section 4 to 7, the relevant item(s) of the terms of reference (at Attachment A) are noted. Some items in the terms of reference (in particular items 2(f) and 3) are relevant to all sections and are not individually noted.

3 Legislative framework

3.1 Development of the water charge rules

The *Water Act 2007* has an objective of enabling the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest. This includes by promoting the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.

Section 92 of the *Water Act 2007* (the Act) allows the Minister to make water charge rules that:

- relate to ‘regulated water charges’ as defined in section 91 of the Act
- deal with particular matters as set out in section 92(3) of the Act
- contribute to achieving the Basin water charging objectives and principles, as set out in schedule 2 of the Act²

If the Minister chooses to make, amend or repeal the water charge rules, they are required to seek the ACCC’s advice.

The Minister first sought ACCC advice on making water charge rules in December 2007. The ACCC’s earlier advice on the water charge rules is available on the ACCC website.³

To date, three sets of water charge rules have been made:

- Water Charge (Infrastructure) Rules 2010 (WCIR)⁴
- Water Charge (Termination Fees) Rules 2009 (WCTFR)⁵
- Water Charge (Planning and Management Information) Rules 2010 (WCPMIR).⁶

The ACCC has also provided advice on, and the Minister has made, the Water Market Rules 2009 (WMR) relating to the transformation of an irrigator’s irrigation right into a statutory water access entitlement.

Water trading rules (WTR) have also been made as part of the Murray-Darling Basin Plan 2012 following ACCC advice to the Murray-Darling Basin Authority (MDBA).⁷

Under the Act, the ACCC is the ‘appropriate enforcement agency’ for the water charge rules and the water market rules.⁸ The ACCC has produced a range of guidance

² See section 4.2 of this paper for more on the Basin Water Charging Objectives and Principles.

³ Please see: <http://www.accc.gov.au/regulated-infrastructure/water/water-projects>

⁴ Available at: <http://www.comlaw.gov.au/Details/F2011L00058>

⁵ Available at: <http://www.comlaw.gov.au/Details/F2013C00160>

⁶ Available at: <http://www.comlaw.gov.au/Details/F2010L02133>

⁷ Please see part 12 of the Murray-Darling Basin Plan 2012, available at:

<http://www.comlaw.gov.au/Details/F2012L02240>

⁸ *Water Act 2007 (Cth)*, s. 137. The MDBA enforce the WTR.

material for infrastructure operators, irrigators and governments on the water charge rules. This material is available on the ACCC's website.⁹

3.2 Review and possible amendment of the *Water Act 2007*

In May 2014 the Commonwealth Government announced that the Act would be reviewed by an independent expert panel (the Panel). The Act Review focused on the operation of the Act and the extent to which the objects of the Act were being achieved.

In the course of the Act Review, the Panel received submissions from stakeholders on a wide range of matters, including issues that related to the requirements and operation of the water charge rules.

In particular, stakeholders expressed concerns regarding:

- differences in charge regimes across the MDB
- the degree of discretion available to a regulator under the WCIR
- the lack of explicit definitions for, and prioritisation of, Basin water charging objectives and principles
- the accreditation arrangements for Basin State regulators
- the compliance costs associated with the water charge rules
- the efficacy of the WCPMIR
- the merits of tiered regulation under the WCIR.

Generally, the Panel considered that those issues relating to the water charge rules were outside the scope of the Act Review's terms of reference. Nonetheless, the Panel was concerned to ensure that appropriate consideration was given to stakeholders' concerns.

The final report of the Act Review, tabled in Parliament in December 2014, recommended that the ACCC conduct a review of the water charge rules. The Commonwealth Government's interim response to the Act Review accepted this recommendation and, as described in section 1, the Minister has asked that the ACCC undertake this review and provide advice on possible amendments to the water charge rules.

The Commonwealth Government is currently preparing its final response to the Act Review which will address the Panel's other recommendations. Some of these recommendations are for amendments to definitions in the Act that affect the operation of the water charge rules or matters to which the water charge rules may relate. Where possible, the ACCC's advice will consider what, if any, amendments to the water charge rules should be made if these recommendations are accepted and implemented.

⁹ Please see: <http://www.accc.gov.au/regulated-infrastructure/water/water-guides>

4 General matters

The terms of reference require the ACCC to consider a number of matters that apply to all three sets of water charge rules. This section sets out some information relevant to these overarching issues, which you should keep in mind when considering your responses to the specific questions in the later chapters of this paper. It also asks some questions about matters relevant to the overall effectiveness of the water charge rules, including the approach the ACCC has taken to providing guidance on, and enforcing compliance with, the requirements of the water charge rules.

4.1 Opportunities to reduce cost to industry and governments

This section relates to the Panel’s recommendation, incorporated in the preamble to item 2 in the terms of reference at Appendix A, to assess opportunities to reduce cost to industry and governments.

The Australian Government has committed to reducing the regulatory burden (while maintaining effective standards) for individuals, businesses and community organisations.¹⁰ New policy options must be carefully assessed, with likely impacts costed and a range of viable alternatives considered in a transparent and accountable way against a default position of no new regulation. The requirement to assess likely impacts applies equally to proposals to repeal or amend existing requirements, as well as to proposals to impose new regulation.

As discussed in section 1.3, the ACCC will consider the costs and benefits of the various policy proposals being considered, and to outline the likely net benefit of its preferred approach, in its advice to the Minister.

The objects of the Act include ‘promot[ing] the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes;’ and ‘achiev[ing] efficient and cost-effective water management and administrative practices in relation to Basin water resources.’

In reviewing the water charge rules, the ACCC is interested to identify opportunities to simplify and clarify the requirements of the rules in a way that will reduce unnecessary regulatory burden while still achieving effective regulation that promotes the objects of the Act.

1. Can you identify areas where you believe there is significant scope to simplify or shorten the water charge rules while still achieving effective regulation?
2. Can you identify options for amending the water charge rules requirements in the water charge rules where the costs of compliance outweigh the benefits achieved? Could the benefits be achieved through a different approach to regulation?

¹⁰ See Australian Government, *The Australian Government Guide to Regulation*, Commonwealth of Australia, Department of Prime Minister and Cabinet, 2014.

4.2 The Basin Water Charging Objectives and Principles

The water charge rules are required to contribute to achieving the Basin water charge objectives and principles (BWCOP) set out in Schedule 2 of the Act.¹¹

These objectives and principles are based on those set out in clauses 64 to 77 of the National Water Initiative, an intergovernmental agreement signed by all states and territories, and the Commonwealth.

The water charging *objectives* are

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

There are 16 water charging *principles*, divided into four groupings:

- water storage and delivery
- cost recovery for planning and management
- environmental externalities
- benchmarking and efficiency reviews. but are not ordered.

The BWCOP are reproduced in full in **Appendix B** to this paper.

Generally, the ACCC is interested in stakeholder views on how the water charge rules can better contribute to achieving the BWCOP. Section 5.6.3 of this Issues Paper considers the BWCOP specifically in the context of the approval or determination of charges by a regulator under Part 6 of the WCIR. In particular, section 5.6.3 considers how regulators interpret and prioritise the BWCOP.

3. How could the water charge rules more effectively contribute to achieving the Basin water charging objectives and principles?

¹¹ *Water Act 2007 (Cth)*, s. 92(1)(c).

4.3 Drafting amendments to improve clarity

This section relates to item 3 in the terms of reference at Appendix A.

Legislative drafting that is difficult to understand can increase the burden on regulated entities and can create uncertainty for regulators. The ACCC has produced a range of guidance material seeking to explain its interpretation of the rules and how the requirements can be satisfied (see section 4.4). However, there may be some areas where the rules could be re-drafted to improve clarity. If done carefully, such an exercise decrease the regulatory burden imposed on regulated entities.

4. Are there any particular provisions of the water charge rules that are not clearly drafted, unnecessarily complex or otherwise ambiguous? How could this drafting be improved?

4.3.1 Combining the water charge rules and water market rules

This section relates to item 2(e) in the terms of reference at Appendix A.

The three sets of water charge rules, and the WMR were all made at different times over the course of 2009 and 2010. The rules share a number of common terms and in some cases, charges regulated under one set of rules may be referred to in another set of rules (for example, termination fees).

The WCIR apply to all infrastructure operators, while the WMR and WCTFR apply to Irrigation Infrastructure Operators (IIOs). An IIO is an infrastructure operator that delivers water primarily for the purpose of irrigation.¹² The WCPMIR apply to persons determining a water planning and management charge (which could include Basin State departments or certain infrastructure operators in their capacity as delegates of a Minister).

The terms of reference require the ACCC to consider whether the water charge rules should be combined into a single instrument, and / or combining the water market rules with the water charge rules.

This may offer opportunities to:

- improve understanding of these rules and how they interact
- reduce the compliance burden for regulated entities
- ensure that there are no ‘regulatory gaps’
- eliminate redundant transition clauses.

Care would need to be taken to ensure that the rules that are not otherwise the subject of review and proposed amendment are not substantively amended during such a process.

5. What do you think are the advantages and disadvantages of combining the water charge rules into one set of rules and / or combining the water market rules with the water charge rules?

¹² *Water Act 2007 (Cth)*, s. 7.

4.4 ACCC guidance material

This section relates to item 2(g) in the terms of reference at Appendix A.

The ACCC has published a number of guides to assist operators, irrigators and Basin State Governments to understand their rights and obligations under the water charge rules. These are available on the ACCC's website.¹³ The ACCC seeks feedback on the form, content and usefulness of these guides, and whether any further information on the rule requirements might be useful.

6. Is the ACCC's guidance material useful? In what ways could it be improved?

4.5 Enforcement and compliance approach

As noted in section 3.1, the ACCC is the responsible enforcement agency for the water charge rules and water market rules. The ACCC uses the information that it collects through routine monitoring, specific information requests and the complaints and inquiries it receives to monitor compliance with the rules.

The ACCC pursues an approach to compliance and enforcement of the rules designed to educate regulated water stakeholders and other water users about their rights and obligations under the rules. This can foster a culture of compliance among regulated water stakeholders, minimising the risk that their policies or practices may cause harm to water users and other consumers through conduct contrary to the rules.

Where the ACCC identifies policies or practices of regulated water stakeholders that are at risk of breaching the rules and may cause harm to water users, the ACCC's approach to enforcing compliance is focused on remedying detriment and achieving proportionate and sensible outcomes through a model of cooperative stakeholder engagement.¹⁴

7. What are your views on how the ACCC has used its enforcement powers in relation to the water charge rules?

8. How could the ACCC improve its approach to achieving compliance with the water charge rules?

4.6 Future reviews of the water charge rules

Under the Act, if the Minister seeks to make, amend or repeal the water charge rules or water market rules, they must first obtain the advice of the ACCC.¹⁵ As noted in section 1, the ACCC's current review was initiated by the Minister in response to a recommendation to Government following an independent review of the Act.

¹³ These guides are available at: <http://acc.gov.au/regulated-infrastructure/water/water-guides>

¹⁴ The principles adopted by the ACCC to achieve compliance, and tools available to it, are set out in the *ACCC Enforcement Guide – Water Market and Water Charge Rules* available on the ACCC website: <http://www.acc.gov.au/regulated-infrastructure/water/water-guides>.

¹⁵ *Water Act 2007 (Cth)*, s. 93.

The water charge rules do not contain provisions requiring future reviews of the rules or specifying dates by when future reviews of the rules should occur. However, the Minister can request advice from the ACCC at any time.

If the water charge rules remain in their current form, each set of rules will sunset 10 years after they were made: in the case of the WCTFR (and WMR) this will occur in 2019 and in the case of the WCIR and the WCPMIR this will occur in 2020. The imminent repeal of the rules at this time may be an appropriate time for a future review of the operation of, and need for, water charge rules.

9. What are the advantages and disadvantages of indicating in advance the timing and scope of future reviews of the water charge rules?

5 Water Charge (Infrastructure) Rules 2010

5.1 Background

Throughout the Murray-Darling Basin (MDB), water storage and delivery infrastructure involve large and lumpy capital investments in long-lived assets such as dams, weirs and channels. This infrastructure is used to capture, store and deliver water to a range of users.

Services related to the storage and delivery of water that is primarily stored or delivered on-river tend to be provided by larger infrastructure operators owned by Basin State governments. These infrastructure operators deliver water to a range of customers, including environmental water holders, private diverters, and other infrastructure operators. These other infrastructure operators deliver water through gravity-fed and / or pressurised networks operating primarily off-river.

The most common type of other infrastructure operators are irrigation infrastructure operators (IIOs), who deliver water for the primary purpose of being used for irrigation. There are a range of different governance and ownership arrangements for IIOs in the MDB. In Queensland and Victoria, irrigation water delivery activities are generally vertically integrated into a larger infrastructure operator that also provides bulk water services.¹⁶ IIOs in NSW and SA are typically member owned—see section 5.2 for a further discussion of infrastructure operators' ownership structures.

The assets of an infrastructure operator tend to have few alternative uses and the investment, once made, is largely sunk. These characteristics can serve as a barrier to entry (and exit) deterring new entrants from entering the market and creating competition.

These natural monopoly characteristics mean that direct competition is unlikely to develop between infrastructure operators. In the absence of competition, infrastructure operators hold market power, which can result in prices, quality, service levels or innovation diverging from competitive levels. As customers are not able to change service providers without incurring substantial costs, these infrastructure operators may have the ability to engage in discriminatory behaviour against customers, certain customer types or potential customers. This may undermine the efficient use of water resources and water infrastructure.

Ownership and governance arrangements of infrastructure operators are also relevant. Boards of member owned operators are typically directly accountable to member customers. This accountability creates incentives for member owned operators to pursue efficiency in respect of these aspects of service delivery. However, these operators still hold market power as a result of their natural monopoly infrastructure.

¹⁶ The Queensland Government is currently implementing local management arrangements under which Sunwater will transfer ownership and operation of its eight irrigation areas to a corporate entity run by local irrigators. The new entities are likely to meet the definition of IIO under the Act and, where they operate within the MDB such as with the St George irrigation scheme, will be subject to regulation under the WCR.

Pricing discrimination by infrastructure operators is considered further in sections 5.2 and 5.3. The potential for monopoly pricing by infrastructure operators is considered in section 5.6.

Water charges send signals about the efficiency of water storage and delivery infrastructure throughout the MDB. Differences in charging practices throughout the MDB have the potential to distort these signals. In turn, they can distort the water market. Distortions to the water market will result in less efficient water use and investment in water-related infrastructure.

When larger infrastructure operators were generally regulated by state-based regulators, the nature of that regulation varied across the MDB. Further, member owned IIOs in NSW and SA were not subject to any substantive state government or independent economic regulation.

The impact of differences in charging arrangements between infrastructure operators is considered further in section 5.10.

The following sections set out the requirements of the WCIR and invite stakeholder views on alternative regulatory responses and / or opportunities to improve the effectiveness of the WCIR.

5.2 Tiered regulation of infrastructure operators

This section relates to item 2(a) in the terms of reference at Appendix A.

The WCIR provides a tiered approach to regulating infrastructure operators throughout the MDB. An infrastructure operator's requirements under the WCIR will depend upon their size and ownership.

The criteria used to determine the size and ownership of infrastructure operators are discussed below, followed by an overview of the WCIR's tiered approach to regulation.

The size of an infrastructure operator is established by reference to the volume of 'managed water resources' in respect of which the operator provides infrastructure services. More specifically, it is necessary to establish:

the sum of the maximum volume of water from managed water resources in respect of which the operator provides infrastructure services in relation to:

- water access entitlements held by the operator (otherwise than for the purpose of providing infrastructure services to customers who hold water access entitlements to that water) and
- water access entitlements held by its customers and
- water access entitlements held by the owner (not being the operator) of the water service infrastructure operated by the operator¹⁷

The ownership of an infrastructure operator determines whether it is considered 'member owned' or not. An infrastructure operator is considered to be 'member

¹⁷ See WCIR, rules 16, 23 and 45.

owned' if the majority of its customers are 'related customers'.¹⁸ A customer is a 'related customer' if:

- (a) The customer is a beneficiary of a trust of which the infrastructure operator is a trustee; or
- (b) Where the infrastructure operator is a company within the meaning of the *Corporations Act 2001*, the customer is—
 - i. a related body corporate within the meaning of that Act in relation to the infrastructure operator; or
 - ii. a member of the company; or
- (c) where the infrastructure operator is a body corporate incorporated under a law of a State or of the Commonwealth (other than the *Corporations Act 2001*), the customer is a member of the body corporate; or
- (d) the customer has any other legal or equitable interest in the infrastructure operator.¹⁹

As noted in section 5.1, at the time the rules were made, member owned infrastructure operators were considered less likely to take advantage of their market power to the detriment of their customers. However, being member owned may not always prevent an operator from imposing charges so as to favour one group of customers over another. As such, member owned operators are not subject to the requirements of Part 6 (approval or determination of charges) of the WCIR unless they make a distribution to all of their members (related customers) (see Part 7).

10. How do you think the WCIR could be amended to improve the clarity of the criteria used to determine infrastructure operators' size and ownership?
11. Do you think the differential treatment of member owned operators is still appropriate?
12. Do you think member owned operators have sufficient regard to the interests of all their customers, particularly smaller customers, when determining their charges and tariff structures?

As noted above, the size and ownership of an infrastructure operator will determine what parts of the WCIR apply to it.

The specific requirements of each part of the WCIR are considered in detail in sections 5.3 to 5.7 below. In summary:

- Part 3 of the WCIR—prohibits certain forms of price discrimination by member owned operators (see section 5.3).
- Part 4 of the WCIR—requires all infrastructure operators to provide and publish information in relation to their schedule of charges (see section 5.4).

¹⁸ See WCIR, rule 5.

¹⁹ See WCIR, rule 6.

- Part 5 of the WCIR—imposes requirements on certain infrastructure operators in relation to network planning and customer consultation (see section 5.5).
- Part 6 of the WCIR—requires certain infrastructure operator’s charges to be approved or determined by a regulator (see section 5.6).
- Part 7 of the WCIR—requires a member owned infrastructure operator’s charges to be approved or determined by a regulator if it makes a distribution to all its related customers (see section 5.7).

The table below summarises the application of these parts of the WCIR.

Ownership	Member owned operators				Non-member owned operators				
	Size (GL)	< 10	10 – 125	125 – 250	250+	< 10	10 – 125	125 – 250	250+
Part 3		✓	✓	✓	✓				
Part 4		✓*	✓	✓	✓	✓*	✓	✓	✓
Part 5				✓	✓			✓	
Part 6									✓
Part 7			✓^	✓^	✓^				

* Exempt from the requirement to publish.

^ Only applies if triggered by the making of a relevant distribution.

13. What are the advantages and disadvantages of the tiered regulatory approach in the WCIR? Do you think the criteria are set appropriately?

5.3 Non-discrimination requirements (Part 3)

Part 3 of the WCIR requires that a member owned infrastructure operator must not set charges for a class of infrastructure services at different levels for an irrigation right holder compared to a customer that does not hold an irrigation right. This prohibition only applies if the difference in charges is greater than the difference between the actual costs necessarily incurred in providing the services. This ensures that infrastructure operators cannot price discriminate between customers who have transformed their irrigation right but retained their right to have water delivered (that is, they have not terminated their water delivery right) and other customers who have not transformed.

As noted in section 5.1, infrastructure operators that are not member owned also enjoy a degree of market power but arguably face fewer restrictions (through accountability to their customers) on the exercise of that power. Currently, the non-discrimination requirements of the WCIR only apply to member owned operators.

14. Are there other types of price discrimination that are of concern (including by infrastructure operators that are not member owned)?

15. Are there non-regulatory measures that should be considered to address the potential for detrimental price discrimination by infrastructure operators?

5.4 Schedule of charges (Part 4)

In order to improve pricing transparency and enable customers and potential customers to make comparisons across infrastructure operators, the WCIR require all infrastructure operators to produce a schedule of charges. Infrastructure operators are prohibited from imposing a regulated charge²⁰ relating to an infrastructure service unless that charge is listed in their schedule of charges and a copy of the schedule of charges has been given to the customer.

16. Are there any non-regulatory measures that could ensure the provision of accurate and timely information about infrastructure operators' regulated charges?

5.4.1 Information to be included on a schedule of charges

An infrastructure operator must ensure its schedule of charges:

- specifies all regulated charges
- allows a customer to be able to determine what they owe for a specific time period for the type of services they receive
- includes details of any discounts or surcharges that apply, and the circumstances in which they apply.

A schedule of charges issued by an IIO must also:

- include a statement setting out the process for determining the amount of the regulated charges
- separately show the components of those charges attributable to:
 - the storage of water in connection with infrastructure services provided through the IIO's irrigation network
 - bulk water charges imposed on the IIO by another infrastructure operator
 - connecting or disconnecting a customer to water service infrastructure
 - the holding of, or management of, a water access entitlement by the IIO.²¹

There is no prescribed template for a schedule of charges. As such, infrastructure operators differ considerably in how they refer to their schedule of charges,²² as well as in the format and level of detail that they include. This can make comparison of charges and approaches to charging across infrastructure operators more difficult.

²⁰ The WCIR define a regulated charge as a subset of 'regulated water charges' as defined in section 91 of the Act. More specifically, it means a charge of a kind referred to in paragraph 91(1)(a), (b) or (d) of the Act, but does not include:

(a) a fee to which rule 13 of the *Water Market Rules 2009* applies; or

(b) a fee to which rule 6 or 8 of the *Water Charge (Termination Fees) Rules 2010* applies.

²¹ WCIR, rule 4.

²² Of the 19 IIOs included in the ACCC's Water Monitoring Report, there are 14 different terms used to describe their 2013-14 schedule of charges.

17. Are the schedules of charges produced by infrastructure operators sufficiently clear and detailed to meet the needs of customers and potential customers?
18. Would a prescribed template enable easier comparison across infrastructure operators? Would it assist infrastructure operators to comply with the pricing transparency requirements of the WCIR?

5.4.2 Publication requirements

An infrastructure operator's schedule of charges must be given to customers 10 business days prior to the services being provided. Similarly, an infrastructure operator must provide an updated schedule of charges to customers at least 10 business days before any proposed change to infrastructure charges take effect.²³

Broadly, if an infrastructure operator and its customers hold over 10 GL of water access entitlements, the infrastructure operator must also publish its schedule of charges. Publication must occur within the same timeframes set out above, and can be:

- on the publicly accessible part of the operator's website, or
- in one or more newspapers circulating generally in their area of operations, or
- in the Australian Government Gazette.²⁴

Infrastructure operators must also make their schedule of charges available to any person making a written request for details of their regulated charges.²⁵

Infrastructure operators are not required to provide their schedule of charges to the ACCC or any other central information point directly.

19. Are the publication requirements in relation to schedule of charges appropriate?

5.4.3 Exemptions from the publication requirements

Where an infrastructure operator has entered into, or proposed to enter into, a contract to provide infrastructure services to a customer at an agreed charge specified in the contract, the infrastructure operator would ordinarily be required to include the agreed regulated charge in their schedule of charges. However, where the customer (or the customer and the infrastructure operator) believe on reasonable grounds that such disclosure would have a material and adverse effect for the customer (or the customer and the infrastructure operator), they can apply to the ACCC for an exemption from the publication requirement.²⁶

20. In what circumstances should an infrastructure operator be exempt from the obligation to include all their regulated charges in their schedule of charges? What procedural requirements should they be required to meet?

²³ WCIR, rule 7.

²⁴ WCIR, rule 15.

²⁵ WCIR, rule 16.

²⁶ WCIR, rule 9.

5.5 Network Service Plans (Part 5)

This section relates to item 2(a) in the terms of reference at Appendix A.

Under the WCIR, a Part 5 operator is defined as including member owned operators servicing more than 125 GL, and other infrastructure operators (that are not member owned) servicing between 125 and 250 GL of water held under water access entitlements. There are currently five Part 5 operators:

- SunWater
- Coleambally Irrigation Cooperative Limited
- Murray Irrigation Limited
- Murrumbidgee Irrigation
- Central Irrigation Trust.

Although the WCIR do not require the charges of Part 5 operators to be approved or determined by a regulator, they do impose certain requirements in relation to network planning and customer consultation.

These requirements are intended to ensure customers are provided with information on how operators determine the level of service and investment, and the associated expenditure and charges by infrastructure operators. This will lead to improved pricing transparency and more informed decision-making.

At least once every five years, a Part 5 operator must develop a network service plan (NSP) that provides details of the operator's plans relating to its water service infrastructure over the forthcoming five year period.

Prior to developing their NSP, Part 5 operators must prepare a network consultation paper (NCP) to facilitate consultation with their customers.²⁷

The NSP must contain:²⁸

- details of the operator's plans for the levels of service it intends to provide for customers in each year of the 5 year period
- details of the operator's plans for works, other than minor works, for the maintenance, improvement, enhancement or expansion of the water service infrastructure in each year of the 5 year period
- estimates of capital and recurrent expenditure relating to the water service infrastructure in each year of the 5 year period and estimates of revenue, including revenue from regulated charges, required for that expenditure
- plans for the financing of capital and recurrent works during each year of the 5 year period
- details of any grants or subsidies that have been or may be received or applied for, together with details of conditions to which grants or subsidies may be subject
- estimates of the regulated charges during each year of the 5 year period stated without an inflation factor but identifying the inflation index published by the Australian

²⁷ WCIR, rule 18 sets out the specific consultation requirements.

²⁸ WCIR, rule 19.

Bureau of Statistics that the operator will apply to those estimates during each year of the period.

Part 5 operators must give, or cause to be given, a copy of the NSP to each customer, along with a summary of the consultation undertaken in preparing the NSP.²⁹

Part 5 operators must also submit a copy of their NSP to the ACCC who will provide it to a qualified engineer for comment and advice on the prudence and efficiency of the plan.³⁰ The ACCC will then provide any comment or advice from the engineer to the operator. Within 20 business days after receiving the comment or advice, the operator must give a copy to each of its customers.

A Part 5 operator must also prepare an information statement each year and provide this to customers when providing its schedule of charges. The information statement must explain:

- any changes to the regulated charges contained in the NSP
- the operator's actual and anticipated revenue from regulated charges
- details of and reasons for any adjustments made in respect of the charges set out in the NSP for that year
- an explanation of the reasons for differences in regulated charges imposed on irrigation right holders versus other customers (referred to in section 5.3 above).

During the Water Act Review some operators expressed concerns about the significant information and consultation requirements associated with NSPs, and the costs that this can entail for Part 5 operators.

21. What are the advantages and disadvantages of requiring Part 5 operators to publish their NCP and NSP online, instead of the current requirement to ensure all customers are aware of and can access these documents?
22. What do you think the advantages and disadvantages of removing the requirements for Part 5 operators in relation to NCPs and NSPs are?
23. Are there alternative ways to ensure an operator's customers are aware of, and have input into, planned water infrastructure investment, other than the NCP and NSP provisions of the WCIR?

²⁹ The WCIR are not prescriptive on how infrastructure operators must give the NSP to customers. Operators have the discretion to use alternative communication methods available to them, including:

- postal mail
- electronic mail sent as:
 - a fax or
 - an email with the NSP in an attachment or with a hyperlink to a webpage that contains the NSP.

Infrastructure operators must ensure that all customers receive the NSP in accordance with the WCIR. It is the operator's responsibility to ensure that each and every customer is provided with the NSP. An operator may provide customers with different options for receiving the NSP.

³⁰ See: ACCC, [A guide to the water charge infrastructure rules: tier 2 requirements](#), June 2011, p. 19.

³⁰ WCIR, rule 18.

5.6 Approval or determination of regulated charges (Part 6)

Under the WCIR, a Part 6 operator is defined as an infrastructure operator that is not member owned and that services greater than 250 GL of water held under water access entitlements.³¹ After an initial transition period, a Part 6 operator is required to have its regulated charges approved or determined by the ACCC or an accredited Basin State regulator.

The WCIR for Part 6 operators address the potential misuse of market power that can occur by natural monopoly infrastructure operators (as outlined in section 5.1).

24. What other measures could be used to address the potential misuse of market power by large infrastructure operators, beside the approval or determination of regulated charges under the WCIR? What are the advantages and disadvantages of these measures?

5.6.1 Procedural requirements

This section relates to item 2(b) in the terms of reference for the review at Appendix A.

Specific procedural requirements for the approval and determination of Part 6 operators' charges are set out in Part 6 and Schedules 1 and 2 of the WCIR. Schedule 1 of the WCIR in particular, sets out requirements for applications by a Part 6 operator, covering:

- consultation
- regulatory and legislative obligations
- infrastructure service standards
- revenue
- regulatory asset base
- rate of return
- renewals annuity (if relevant)
- capital expenditure
- operating expenditure
- tax
- demand or consumption
- current and proposed regulated charges

The ACCC has also produced guidelines in relation to applications under Part 6.³²

Under the WCIR, a regulator has 13 months from the time an application is received from a Part 6 operator to make a decision as to the approval or determination of a Part 6

³¹ WCIR, rule 23.

³² ACCC, [A guide to the water charge infrastructure rules: pricing application for part 6 operators](#), October 2011.

operator's regulated charges. However there is no statutory deadline for an operator to lodge their application.³³

25. Are there ways to reduce the regulatory burden of information requirements relevant to a Part 6 operator without compromising the regulator's ability to properly approve or determine the operator's regulated charges?
26. Should the WCIR impose different time limits on the regulator in relation to regulated water charge approvals or determinations?
27. Should the WCIR impose a statutory deadline by when a Part 6 operator must lodge its application?

5.6.2 Length of the regulatory period

The length of the regulatory period is set out in rules 3 and 24 of the WCIR.

Under rule 3, the regulatory period for a Part 6 operator is:

- a period of three years for the initial determination period; or
- a period of four years commencing immediately after the end of the initial determination period referred above and each further period of four years; or
- if the regulator has approved another period under rule 24, that other period.

Under rule 24, a Part 6 operator that supplies urban water services can apply to align the regulatory period of the approval / determination under Part 6 of the WCIR with the regulatory period applying to the determination of charges for their urban water services.³⁴

28. Are the provisions relating to regulatory periods set out in the WCIR appropriate?

Public submissions to the Act Review noted the value in the regulator having the power, under the WCIR, to vary the regulatory period as it would allow the regulator to deal with specific circumstances facing operators. The Panel recommended that the Act be amended to allow the regulator to amend the regulatory period for a Part 6 operator. The Government is currently considering its response to this recommendation. An amendment to the Act would enable a consequential amendment to the WCIR.

5.6.3 Basis for approving or determining regulated charges

This section relates to item 2(c) in the terms of reference at Appendix A.

Under rule 29 of the WCIR, the regulator must not approve the regulated charges set out in an application by a Part 6 operator unless it is satisfied:

³³ WCIR, rule 30.

³⁴ In June 2013, the Essential Services Commission of Victoria (an accredited Basin State regulator) approved an application from Lower Murray Water for a five year regulatory period (1 July 2013 to 30 June 2018) to align it with the regulatory period for LMW's urban water services (regulated under Victorian law).

- The determination of the Part 6 operator’s asset base used to calculate the charges is in accordance with Schedule 2 of the rules; and
- That:
 - the Part 6 operator’s total forecast revenue (from all sources) for the regulatory period is reasonably likely to meet the prudent and efficient costs of providing infrastructure services in that regulatory period; and
 - the forecast revenue from regulated charges is reasonably likely to meet that part of the prudent and efficient costs of providing infrastructure services that is not met from other revenue.

These tests were designed, in part, to ensure that a Part 6 operator’s revenue from sources such as government grants or contributions, or from charges that are not regulated charges, can be taken into account.

The regulator must also have regard to whether the regulated charges would contribute to achieving the Basin water charging objectives and principles (BWCOP) set out in Schedule 2 of the Act (and reproduced in Appendix B to this paper).³⁵ The interaction between the BWCOP and the water charge rules generally is discussed in section 4.2.

A number of submissions to the Act Review noted issues associated with the interpretation of the BWCOP by different regulators and the relative importance given to them by regulators.

An accredited regulator (as a condition of their accreditation) must also take account of the ACCC’s pricing principles³⁶ when approving or determining charges (see section 5.9 for further discussion of accreditation arrangements).³⁷ The ACCC’s pricing principles are not a part of the WCIR; rather, they are guidelines that seek to:

- achieve consistency of approach where different regulators are responsible for price approvals or determinations across Basin States
- provide greater certainty to regulated operators about the approach that the regulator will adopt in approving or determining charges.

Following the provision of its advice to the Minister in December 2015, the ACCC intends to revise its pricing principles in consultation with Basin State regulators, infrastructure operators, irrigator groups and other interested parties.

29. Are the tests set out in rule 29 sufficiently clear to regulators and operators?

30. What are the advantages and disadvantages of the ACCC’s pricing principles defining the terms used in the BWCOP and / or ordering them into a hierarchy to guide the discretion of regulators and provide greater certainty to industry participants?

³⁵ WCIR, rule 29(4).

³⁶ ACCC, [Pricing principles for price approvals and determinations under the Water Charge \(Infrastructure\) Rules 2010](#), July 2010.

³⁷ See the ACCC’s [final decision on the accreditation of the Essential Services Commission of Victoria](#).

5.6.4 Annual review of regulated charges

A Part 6 operator must apply to the regulator for approval or determination of its regulated charges in respect of the second and each subsequent year of the regulatory period (an ‘annual review’).

An application provided by a Part 6 operator must include:

- the operator’s forecast of demand for, or consumption of, infrastructure services for the year to which the application relates
- the operator’s estimate of demand or consumption during the current year
- information about how the forecast and estimate were calculated
- proposed regulated charges in respect of the year to which the application relates.³⁸

The Regulator must not approve changes to the regulated charges decided in the original determination unless it is satisfied that it is reasonably necessary to vary those charges having regard to:

- changes in demand or consumption forecasts
- price stability.³⁹

The Regulator has three months in which to make a decision based on the application received and after considering any public submissions. The regulator may approve regulated charges for the year to which the application relates.

Submissions to the Act Review expressed the view that a regulator should not be able to vary regulated charges during a regulatory period.

31. Are the provisions regarding the annual review of regulated charges for Part 6 operators appropriate?

32. Are there better alternatives (to the annual review process in the WCIR) for updating regulated charges when demand or consumption forecasts change?

5.6.5 Variations of determinations

A Part 6 operator may request a variation of a determination if:

- an event occurs during the regulatory period that materially and adversely affects the operator’s water service infrastructure or otherwise materially and adversely affects the operator’s business; and
- the operator could not reasonably have foreseen the event.

The operator must provide details of the event and the attempts made by the operator to rectify the adverse circumstances. The regulator must not vary a prior approval or determination unless it is satisfied of the above points, and:

- that the amount required is likely to exceed \$15 million or 5% of the value of the operator’s regulatory asset base as at the beginning of the regulatory period; and

³⁸ WCIR, rule 34(2).

³⁹ WCIR, rule 37.

- that the total expenditure during the remaining part of the regulatory period will exceed the total forecast expenditure for that remaining part; and
- the operator has demonstrated that it is not able to reduce its expenditure without materially and adversely affecting the reliability and safety of its water service infrastructure or its ability to comply with relevant regulatory or legislative obligations.⁴⁰

Submissions to the Act Review expressed concern regarding the limited circumstances that could prompt a variation of a determination.

33. Are the requirements that must be met before an approval or determination of regulated charges can be varied set appropriately?

5.7 Distributions (Part 7)

Part 7 of the WCIR applies to a member owned infrastructure operator servicing more than 10 GL of water held under water access entitlements that has made a distribution to all of its ‘related customers’.⁴¹ An infrastructure operator meeting this definition is known as a Part 7 operator. It should be noted that this definition does not extend to where distributions are made without distinction between related customers and other customers or only to some of an operator’s related customers but not others.

For the purposes of the rules, there is a distribution if an operator has:

- declared a dividend for all its related customers
- distributed profits, or any part of its profits, whether in the form of dividends or otherwise, to all its related customers
- distributed its reserves, or any part of its reserves, to all its related customers
- issued bonus shares to all its related customers.

A Part 7 operator must have its regulated charges approved or determined by the ACCC or an accredited regulator. Specific procedural requirements are set out in Schedule 3 of the WCIR. Since the WCIR came into effect, the ACCC has not identified any infrastructure operators that have met the definition of a Part 7 operator.

Currently, only member owned operators can meet the definition of Part 7 operator. However, an infrastructure operator that is not member owned may nevertheless still have minority of customers that are ‘related customers’. Distributions by such an

⁴⁰ WCIR, rule 43.

⁴¹ WCIR rule 6 states that:

- In these Rules, a customer of an infrastructure operator is a related customer if:
- (a) The customer is a beneficiary of a trust of which the infrastructure operator is a trustee; or
 - (b) Where the infrastructure operator is a company within the meaning of the *Corporations Act 2001*, the customer is—
 - i. a related body corporate within the meaning of that Act in relation to the infrastructure operator; or
 - ii. a member of the company; or
 - (c) where the infrastructure operator is a body corporate incorporated under a law of a State or of the Commonwealth (other than the *Corporations Act 2001*), the customer is a member of the body corporate; or
 - (d) the customer has any other legal or equitable interest in the infrastructure operator.

infrastructure operator to its related customers would not trigger the application of Part 7 of the WCIR.

34. Should the requirement in the definition of Part 7 operator that the operator is member owned be removed?
35. Should the definition of a Part 7 operator extend to an infrastructure operator that makes a distribution to some (but not all) of its related customers?
36. Are there examples of non-financial distributions that might provide material benefit to related customers?

5.8 Appeal mechanisms under the WCIR and lessons learnt from other sectors

This section relates to item 2(d) in the terms of reference at Appendix A.

Under the WCIR, decisions made by the ACCC, including on price approvals or determinations of regulated charges in Part 6 and 7, are potentially subject to judicial review under the *Administrative Decisions Judicial Review Act 1977* (Cth) (ADJR Act). Judicial review enables a person aggrieved by an administrative decision to seek review by a court of the lawfulness of that decision.

In order to seek judicial review, it is necessary to establish a specific ground of review.⁴² Common circumstances giving grounds for review include:

- not giving a stakeholder an appropriate opportunity to present their views
- incorrectly interpreting relevant legislation
- not taking into account something the law requires to be considered.

If the court finds that there are grounds for review and that the decision was not a lawful one, it may set aside that decision. Normally, the court will then ask the original decision-maker to make the decision again.

To date, no person has applied for judicial review of a decision under the WCIR.

There are a range of approaches to appeal mechanisms across infrastructure sectors. Some are like the rural water sector in the MDB, and have judicial review. Others have merits review as an additional appeal mechanism.⁴³ There are also various forms of merits review, such as limited merits review in the electricity and gas sectors.⁴⁴

Other ways of providing for review of decisions can be through an internal review by the original decision maker or the creation of an ombudsman type role to consider the decision made.

⁴² Section 5 of the ADJR Act lists the grounds of judicial review.

⁴³ Generally, merits review focuses on considering the merits of the decision i.e. what the right decision should be. A reviewer puts themselves 'in the shoes' of the original decision maker, considers all the evidence afresh and decides whether or not a different decision should be made.

⁴⁴ The limited merits review regime was introduced under the National Electricity Law (NEL) on 1 January 2008 and under the National Gas Law (NGL) on 1 July 2008, with the Australian Competition Tribunal⁴⁴ (the Tribunal) the nominated body to conduct the reviews.

Currently, the regulatory framework of the WCIR only provides for judicial review. . This is similar to the telecommunications sector.

At present, the Act does not provide for rules to be made regarding merits review or alternative review mechanisms to apply to a regulator's decision made under the WCIR.⁴⁵

37. What models for review of administrative decisions have been successfully adopted in other infrastructure sectors? What are the arguments for and against applying these models to the water sector under the WCIR?

38. Who should have the ability to appeal a decision under the WCIR?

5.9 Accreditation of Basin State regulators (Part 9)

This section relates to items 2(b) and 2(c) in the terms of reference at Appendix A.

The WCIR allow for the accreditation of a Basin State regulator where the ACCC is satisfied that the accreditation arrangements meet the criteria set out in schedule 5 of the WCIR, namely:

- (1) There must be a law of the State:
 - (a) under which the applied provisions are a law of the State; and
 - (b) that includes provision to the effect that the applied provisions operate in the State only during such period or periods as an accreditation of arrangements under Part 9 has effect.
- (2) The functions of the State Agency must include the functions conferred on a Regulator under the applied provisions.
- (3) The State Agency must not be subject to the direction or control of a Minister of the State in carrying out its functions under the applied provisions.
- (4) The State Agency must not be, or have a relevant interest in, a Part 6 operator or a Part 7 operator.

Basin State regulators who are approved by the ACCC as an accredited regulator must apply the WCIR to the approval or determination of charges (for operators subject to Parts 6 or 7) within their state. Unless the ACCC applies qualifications, accreditation applies for ten years.

At the time of writing, only the Essential Services Commission of Victoria (ESCV) has applied for and received accreditation. The ESCV makes determinations under Part 6 for Goulburn-Murray Water (GMW) and Lower Murray Water (LMW). In seeking accreditation, the state of Victoria needed to amend its legislation to allow the ESCV to operate as required under the WCIR.

Some submissions to the Act Review considered that accreditation was overly difficult to obtain under the WCIR.

39. What are the advantages and disadvantages of accrediting Basin State regulators?

⁴⁵ See: ACCC's final advice to the Minister on the Accreditation under the water infrastructure charge rules, February 2010, p.12

40. Do you think the current procedure for accrediting Basin State regulators under the WCIR could be improved?

Other submissions expressed concern that the ACCC and accredited regulators may not always apply and interpret the WCIR in the same way, leading to different regulatory outcomes. In particular, stakeholders noted the differences in approach taken by the ESCV to its determinations of GMW and LMW compared to the ACCC's determination for State Water. These concerns are discussed in section 5.10.

5.10 Differences in charging arrangements and their impacts

This section relates to items 2(b) and 2(c) in the terms of reference at Appendix A.

As noted by the Panel, the intention of the Act was to ensure that water charges are set on a consistent basis, rather than a requirement that charges be consistent *per se*.⁴⁶ Consistency in charging practices is seen as necessary in order to address pricing distortions and facilitate the efficient functioning of water markets.

As noted in section 5.2, the WCIR currently take a tiered approach, with the form of regulation and the specific requirements applying to an operator determined by the ownership and size of an infrastructure operator. The vast majority of infrastructure operators in the MDB are free to design their tariff structures and charging arrangements as they see fit. These will take into account differences in operators' technology, scale, levels of service, infrastructure age, business models, input cost, and owners' requirements. The only limitations on such infrastructure operators are the minimal and limited non-discrimination requirements in the WCIR. There is no general requirement for these infrastructure operators' charging arrangements to be consistent with (or to give effect to) the BWCOP.⁴⁷

Where charges are approved or determined under Part 6 (or Part 7), the WCIR will be applied by accredited Basin State regulators as well as by the ACCC. Where the WCIR allow a degree of discretion for a regulator, regulators can and do exercise that discretion in different ways.

As such, charging arrangements in the Basin vary considerably for both bulk water charges (imposed by bulk water suppliers on a valley-by-valley basis) and irrigation network charges (imposed by IIOs).

There are still significant differences in the water charging regimes applying throughout the MDB. Tariff structures, and the way in which government water planning and management charges and bulk water charges, are passed on to irrigators, vary considerably within and between Basin States.

- In Victoria, bulk water charges are 100 per cent fixed (that is, they do not vary with the volume of water delivered), while bulk water charges in New South Wales and Queensland are both fixed and variable. Bulk water charges are not levied in South Australia.

⁴⁶ [Report of the Independent Review of the Water Act 2007](#), p. 6.

⁴⁷ See also section 4.2 in relation to the BWCOP and the water charge rules generally.

- Nearly all IIOs employ fixed charges levied on the volume of water delivery right held and variable charges on the amount of water used. Some IIOs also impose account or connection fees, casual water use charges or a tiered tariff structure. The relative weighting between these charges varies across IIOs and over time.

These differences are likely to influence irrigators' decisions to use, carry over and trade their water and may affect the efficiency of water use across the MDB. There can be reasonable grounds for differences in infrastructure operators' charging arrangements, several of which are noted above.

41. Under what circumstances could differences in charging arrangements between infrastructure operators distort an irrigator's decisions regarding water use or trade?
42. Are there examples of infrastructure operator charging practices imposing a barrier to trade?
43. What measures could be taken to address any distortions arising from different infrastructure operator charging practices?
44. Should there be a general requirement for all infrastructure operators' charging arrangements to be consistent with the Basin water charging objectives and principles?

5.11 Commercially negotiated charges and third party access regimes

The WCIR are not intended to exclude or limit the operation of any law of a State.⁴⁸ This includes any Basin State-based third party access regimes.⁴⁹ Some jurisdictions have developed, or are developing, third party access regimes in relation to water infrastructure services.

Generally, charges for these infrastructure services would be considered 'regulated charges' and therefore subject to the WCIR. Where a price for these services is negotiated or arbitrated between an access seeker and infrastructure operator, this may give rise to requirements under the WCIR.

For all infrastructure operators, the charge would need to be disclosed in their schedule of charges and (for infrastructure operator subject to Part 5) as part of their NSP. However the existing provisions enable an infrastructure operator and / or their customer to obtain an exemption from this requirement (see section 5.4.3).

For an infrastructure operator subject to Part 6, the charge would have to be approved or determined by the ACCC or accredited Basin State regulator.

Further, revenue from the negotiated / arbitrated charge would need to be taken into account when approving / determining charges for other customers. Where an access

⁴⁸ *Water Act 2007 (Cth)*, s. 250B.

⁴⁹ A third party access regime seeks to facilitate third party access to certain services provided by means of significant infrastructure facilities.

seeker was not previously a customer of the infrastructure operator, this could lead to a lowering of those charges. However, where the access seeker was already a customer of the infrastructure operator, a negotiated / arbitrated charge lower than the charge previously paid could lead to a revenue shortfall. This shortfall would need to be recovered from other customers, to ensure the infrastructure operator's revenue is still reasonably likely to meet the prudent and efficient costs of providing infrastructure services.

This process would also apply to any commercially negotiated charging arrangement, not just those arising from the application of an access regime.

45. Is there merit in the WCIR explicitly recognising that they do not seek to preclude the operation of third party access regimes?
46. What, if any, modification to the test in WCIR rule 29 should be made to accommodate commercially negotiated / arbitrated charges?
47. Do the WCIR otherwise need to be amended to accommodate third-party access regimes in relation to water service infrastructure?

5.12 Regulation of MDBA or Border Rivers Commission charges

During the Act Review, several stakeholders expressed a concern that the activities of the MDBA were not subject to the same scrutiny as those of operators subject to price approvals / determinations under Part 6.⁵⁰

Much of the water service infrastructure in the Murray and Murrumbidgee systems is operated by, and funded through, the MDBA, pursuant to the Murray-Darling Basin Agreement (MDB Agreement).

While there is scope in the Act for the MDBA to impose user charges to recover its costs, the MDBA does not currently impose such charges.⁵¹ Rather, the MDBA's infrastructure (and WPM) costs are funded through contributions from the Commonwealth and Basin State governments. These contributions are recovered from water users by Basin States in different ways and to different extents.

Similarly, the Border Rivers Commission (BRC) is responsible for the operation of infrastructure servicing NSW and Queensland, and is jointly funded by those States, rather than through user charges.

Should the MDBA or BRC elect to impose charges directly, those charges would ordinarily be subject to the WCIR. The specific regulatory requirements that would apply would be determined by the same criteria currently applied to all infrastructure operators (explained in section 5.2).

⁵⁰ Note that the MDBA has recently published the results of an efficiency review of its River Murray Operations, available at: <http://www.mdba.gov.au/media-pubs/research-reports/reviewing-the-efficiency-of-river-murray-operations>.

⁵¹ Water Act 2007 (Cth), s. 212.

48. Are there any features unique to the MDBA or BRC that would complicate the application of the WCIR to charges imposed by these entities?

5.13 Transparency of cost pass-throughs

The charges applied by infrastructure operators may incorporate charges imposed on the infrastructure operator in relation to water access entitlements held on behalf of its customers. These include bulk water charges imposed by other infrastructure operators, and water planning and management (WPM) charges.

The WCIR require IIOs to separately show the components of those charges attributable to bulk water charges or the holding of, or management of, water access entitlements by the IIO. However, there is no clear requirement for infrastructure operators to directly pass on bulk water charges and WPM charges that it incurs because it holds water access entitlements on behalf of its customers. As such, infrastructure operator practices vary considerably.

In some instances, these charges are represented as a single, separate fixed or variable ‘government fee’. In other instances, WPM and bulk water charges are included in an infrastructure operator’s ‘access’ or ‘usage’ fee.

Some IIOs in NSW receive a rebate from Water NSW (formerly known as State Water). IIOs generally use this rebate in one of two ways:

- to pay for all or a portion of WPM and bulk water charges imposed on conveyance water
- to pay for a portion of the total fixed bulk water charges incurred by the IIO.

Other infrastructure operators incorporate WPM and bulk water charges into the tiered tariff structures that they levy on customers to recover the costs they incur in relation to their own irrigation network.

In all these cases, the total WPM and bulk water charges payable to an infrastructure operator by the customer are not easily comparable to the WPM and bulk water charges actually imposed on the infrastructure operator. Such charging practices can reduce price transparency and make it difficult for customers to compare the charges they incur with those of other infrastructure operators. This is particularly relevant when a customer is considering the merits of transformation or termination.

49. Should the WCIR regulate how WPM and bulk water charges incurred by infrastructure operators are passed on to customers?

6 Water Charge (Termination Fees) Rules 2009

6.1 Background

Termination fees refer to fees payable to an IIO by an irrigator when they terminate or surrender the whole or part of a right of access to the IIO's network.

The Minister for Water made the Water Charge (Termination Fees) Rules 2009 (WCTFR), regulating the circumstances in which IIOs could charge termination fees and capping the maximum termination fee payable.⁵² The WCTFR were intended to give effect to relevant Basin water charging objectives and principles, including:

- promoting the economically efficient and sustainable use of water infrastructure assets
- ensuring sufficient revenue streams to allow efficient delivery of the required services; and
- facilitating the efficient functioning of water markets.

At this time, in addition to charging high termination fees that acted as barriers to trade, it was common for IIOs to impose compulsory requirements to terminate water delivery rights upon transfer of water from an irrigation district. High termination fees and compulsory termination distorted markets by reducing the quantity of water traded and—by insulating the IIO from the financial effects of water trade—dampening the signal that network rationalisation was required. If termination fees were set too high, irrigators would remain connected to the network even if it was otherwise more efficient for them to trade water and terminate access.

On the other hand, prohibiting termination fees altogether or setting maximum termination fees too low risked leaving IIOs with insufficient revenue to provide services to remaining customers, undermining investment in water infrastructure. IIOs have made significant investments in their irrigation networks and face ongoing costs to maintain the infrastructure. Many of these costs are fixed—that is, they are incurred by the operator whether or not an irrigator chooses to terminate access. Allowing IIOs to impose termination fees permits them to recover these fixed costs.

The Panel reviewing the Water Act received no submissions on the WCTFR, which it considered indicated that the rules may be operating effectively.⁵³

The following sections set out the requirements of the WCTFR and invite stakeholder views on alternative regulatory responses and / or opportunities to improve the effectiveness of the WCTFR.

⁵² Prior to the making of the WCTFR, termination fees charged by IIOs were governed by principles and commitments adopted by Basin States in *Schedule E to the MDB Agreement - protocol on access, exit and termination fees*. While *Schedule E* required, among other things, that IIOs adopt a termination fee of no more than 15 times the actual access fee or the shadow access fee and prohibited exit fees, it relied upon Basin States to enforce the obligations applying to IIOs and it did not account for the different approaches to termination and to termination fees adopted in different Basin States.

⁵³ [Report of the Independent Review of the Water Act 2007](#), p.48

6.2 Method of calculating termination fees

The WCTFR calculate the maximum applicable termination fee by reference to the total network access charge (TNAC). TNAC refers to all fixed charges payable by an irrigator to an operator in the financial year in which notice is given or in which termination takes effect. However, TNAC excludes charges levied by reference to the amount of water actually delivered, bulk water storage fees, connection and disconnection fees, and fees that exceed recurrent and capital cost recovery by the operator related to the right of access

The WCTFR cap the termination fee at, in most cases, 10 times the TNAC unless a lesser sum is provided for in a contract or arrangement between the IIO and the irrigator (in which case, the lesser fee applies); or the ACCC has approved an additional termination fee under rule 8.

Where the irrigator terminates only part of their right of access, the termination fee payable is calculated by reference to the proportion of the access right that is terminated.

Because the TNAC is determined with reference to the actual fees payable by the irrigator, the WCTFR do not allow use of a shadow access fee for calculating the termination fee. A shadow access fee is the fixed access fee that would be charged if fixed access fees were set to recover all fixed costs and no variable costs (i.e. if variable access fees were set at a level to recover all variable costs and no fixed costs) of the operator.

50. Is the definition of the TNAC used in the WCTFR clear and appropriate?

51. Do you think the approach to termination fees could be modified in order to improve the operation of markets?

6.3 Circumstances in which a termination fee can be imposed

The WCTFR prohibit an IIO from charging a termination fee except in circumstances authorised by the rules.

The WCTFR provide that a person does not terminate or surrender their right of access to the network if they merely transfer or assign the whole or part of their right of access to another person. This means that an IIO cannot charge a termination fee simply because someone trades their right of access (for example, by trading their water delivery right).

An irrigator may elect to terminate or surrender their right of access to the IIO's irrigation network by giving written notice to the IIO. An IIO may impose a termination fee without written notice from the irrigator only where the IIO terminates the irrigator's right of access due to the irrigator breaching their obligations under their contractual right of access. However, an operator is not permitted to impose a termination fee on an irrigator if:

- the irrigator is not liable to pay ongoing access fees and is not liable to pay a termination fee under any contract with the operator; or

- the operator does not separate out fees for the storage of water from the access fees charged to the irrigator.

IIOs are free to waive or discount the termination fees payable by irrigators at any time, including to facilitate or encourage appropriate network modernisation and rationalisation.

52. Do you have any concerns about the limits on when a termination fee can be imposed under the WCTFR?

53. Do the WCTFR inhibit IIOs from making efficient network augmentation or rationalisation decisions? If so, how?

6.4 Approval of additional termination fees

Rule 8 provides for an IIO to apply to the ACCC for approval of an additional termination fee (within three months of a contract for works being entered into between the irrigator and the IIO with respect to capital expenditure). The ACCC has only been approached once in relation to an additional termination fee, however the application was not valid (in part because the relevant capital works had commenced some years before the contract was entered into) and the infrastructure operator declined to re-submit the application.

54. Are the application requirements for approval of an additional termination fee appropriate?

7 Water Charge (Planning and Management Information) Rules 2010

7.1 Background

The Minister made the Water Charge (Planning and Management Information) Rules 2010 (the WCPMIR) to advance the objective of pricing transparency by requiring persons determining charges for water planning and water management (WPM) activities⁵⁴ to publish information about the charges.⁵⁵

Pricing transparency was one of a number of objectives and principles for WPM that States and Territories had committed to implementing under the National Water Initiative (NWI) and that were incorporated into the Basin water charging objectives and principles (BWCOP) in Schedule 2 of the Act (which the water charge rules are required to contribute to achieving, and which are reproduced in Appendix B of this issues paper). Other BWCOP relevant to cost recovery for planning and management included giving effect to the principles of user pays, identifying and publishing information on the costs of WPM activities and linking charges to the costs of WPM activities or products.

Different approaches by Basin State governments to cost recovery for WPM activities may, if significant, distort water markets. This can result in inefficient decisions regarding the use of water, water infrastructure and government resources allocated to managing water. This is because water users in some Basin States would not face the full cost of their water use decisions. Water charge rules for WPM charges were intended to assist Basin States to adopt more consistent approaches to cost recovery for WPM.

At the time the WCPMIR were made (and still today), Basin States took different approaches to funding their WPM activities. Sometimes, these activities were funded out of general revenue and at other times by seeking to recover costs from water users. This took the form of applying charges ranging from broad-based levies to specific transaction fees. Some charges were subject to formal regulatory price-setting processes but the basis on which other charges were set was often unclear, especially the link between charges and the costs of WPM activities. In other cases, Basin States did not directly charge water users for WPM activities.

⁵⁴ WPM activities cover a broad range of activities, delivered by or on behalf of government, to plan for and manage water resources, to support sustainable water use and to maintain the health of natural ecosystems: for example, administering water entitlement registers, developing water sharing plans, monitoring and evaluating water quality and river health levels, building environmental works to mitigate the impacts of consumptive water use (e.g. fish ladders). The Act does not define WPM charges or WPM activities. The Act and the WCPMIR therefore rely upon the ordinary meaning of these terms; further guidance on defining and identifying WPM activities and WPM charges can be found in the ACCC Guide to the WCPMIR.

The guide adopts the definition and method for classifying water planning and water management activities set out in the National Water Initiative Pricing Principles. These pricing principles, developed jointly by the Australian, State and territory governments, were endorsed by the Natural Resource Management Ministerial Council in April 2010.

⁵⁵ Explanatory Statement, Water Charge (Planning and Management Information) Rules 2010.

Some stakeholders wanted the Minister to make rules where the Commonwealth would set WPM charges but there were policy and legal issues with the Commonwealth Government directing state governments as to costs they should recover from water users through charges. Further, WPM activities were often undertaken by a range of departments and agencies or delegated to government-owned corporations, and the activities could be state-wide, not clearly related or limited to areas within the MDB, or relate to urban water supply activities.

Some challenges to developing an appropriate and consistently applicable approach to regulating WPM charges were:

- the requirement for a charge to be imposed for the rules to apply
- the inability of the rules to require a charge be imposed
- the limited geographic jurisdiction of the Act, and
- the lack of information about the extent to which existing WPM charges recovered the costs of WPM activities.

For these reasons, the Minister made WCPMIR that sought to build the consistency and scope of information available to water users and policy makers about existing (and new) WPM charges imposed by Basin States and the extent to which those charges recovered the costs of WPM activities.

7.2 The scope of the WCPMIR and the utility of published information

This section relates to item 2(g) in the terms of reference at Appendix A.

The WCPMIR aim to improve the consistency, scope and availability of information about WPM charges across Basin States.

Since the WCPMIR came into effect, a number of Basin States have successfully published information on their WPM charges in compliance with the WCPMIR.⁵⁶ Other Basin States have not published information that meets the requirements of the WCPMIR, and have said that the costs involved in identifying and publishing the required information outweigh the benefits of doing so.

In its report, the Panel noted that stakeholders identified issues with the WCPMIR including concerns about:

- the effectiveness of the rules, arising from the limited ability of the WCPMIR to advance consistent approaches to cost recovery (because they focus only on information requirements, cannot require Basin States to charge for WPM activities and have not set rules for how WPM charges must be determined)
- the limited usefulness of the information published under the WCPMIR to water users and to policy makers, leading to calls for repeal

⁵⁶ See information on WPM charges published by [NSW](#), [SA](#) and, in Victoria, by [GMW](#), [LMW](#), [Coliban](#) and [DELWP](#).

- the cost of identifying and publishing information on WPM charges that is required by the WCPMIR and questions as to whether these outweigh the benefits of producing the information.

55. Should Basin States be required to publish information about their WPM charges?
56. Have you accessed and used the information published on WPM charges under the WCPMIR by Basin States? If so, was the information useful to you and how did you use the information?
57. What are the compliance costs associated with the WCPMIR?
58. What changes to the WCPMIR could be made to enhance their effectiveness? How could the obligations in the WCPMIR be reduced, expanded or amended to make them more effective?
59. Should some or all of the WCPMIR be repealed? Please explain the reasons for your views.

7.3 Requirements about information to be published

This section relates to item 2(g) in the terms of reference at Appendix A.

The WCPMIR require a person who determines a WPM charge (usually a Minister or another government executive or a delegate of that person) to publish information on that charge including (among other details):⁵⁷

- the name and amount of the charge (or information necessary to determine the amount)
- who must pay the charge and to whom
- the details of the activities to which the charge relates including when the activities are being carried out, the costs of the activities and the relationship between the costs of the activities and the calculation of the charge
- information about the process for determining the charge, including cost allocation principles and whether the charge was the subject of consultation, review or audit, and
- other information, if applicable, such as the water resource or class of water access right to which the charge applies.

60. Is the level of detail of information required to be published under the WCPMIR about WPM charges appropriate?
61. Are there specific requirements to publish information in the WCPMIR that are unnecessary, onerous, unreasonable or unduly costly?

7.4 Requirements as to timing and place of publication

This section relates to item 2(g) in the terms of reference at Appendix A.

⁵⁷ The information set out here summarises the requirements of the WCPMIR. You can obtain a full version of the WCPMIR at: <http://www.comlaw.gov.au/Details/F2010L02133>

The introduction of a new WPM charge or amendment of a material characteristic of an existing WPM charge triggers the requirement to publish the information, either on the internet or in the Australian Government Gazette, and to place a notice advising of information being available in a newspaper circulating generally in the area in which persons liable to pay the WPM charge reside or carry on business. The information must be available before the WPM charge or the amendment comes into effect and must be provided to any person on request.

62. Are there specific requirements as to the timing and place of publication of information that are unnecessary, onerous, unreasonable or unduly costly?

Appendix A—Request for advice and terms of reference

Review of Commonwealth water charge rules

Context

The government engaged an independent panel of experts to review the Commonwealth Water Act. The Independent Review of the *Water Act 2007* (the Review) found that significant progress has been made in improving Australia's water management since the Act commenced in 2008, but that further work was required to assess and address stakeholder concerns about the reporting burden imposed under the Act.

The government accepts recommendation 11 of the Review regarding a review of the Water Charge (Infrastructure) Rules, the Water Charge (Termination Fees) Rules and the Water Charge (Planning and Management Information) Rules. The review is to be undertaken by the Australian Competition and Consumer Commission in consultation with the industry and Basin State governments.

Terms of Reference

- 1) The Australian Competition and Consumer Commission (ACCC) is requested to provide advice on possible amendments to the Water Charge (Infrastructure) Rules 2010, Water Charge (Planning and Management Information) Rules 2010 and Water Charge (Termination Fees) Rules 2009, in accordance with section 93 and section 98 of the Water Act 2007.
- 2) The advice should address the merits of amending the rules in response to matters raised in the Report of the Independent Review of the Water 2007, as tabled on 19 December 2014; specifically, recommendation 11 in the report, proposing that the rules be reviewed to assess opportunities to reduce cost to industry and governments. Matters to consider include:
 - a. the continuing appropriateness of tiered regulation of infrastructure operators and the potential for streamlining or eliminating regulation, including whether to remove the current requirements for member owned operators under Part 5 of the Water Charge (Infrastructure) Rules
 - b. the current process for accreditation of Basin States' regulators, the effectiveness in applying water charging regimes by different regulators, and the form and content of charge determinations by all regulators
 - c. opportunities for advancing the consistent application of the water charging objectives and principles, including options to rank objectives and define terms
 - d. lessons learned from other sectors in relation to appeal mechanisms
 - e. opportunities to combine the water charge rules and Water Market Rules in one instrument
 - f. consistency with the Australian Government's deregulation objectives

- g. the effectiveness of the Water Charge (Planning and Management Information) Rules, the extent to which their effectiveness could be enhanced and the likely impacts if they were to be repealed.
- 3) The ACCC's advice is also requested on other opportunities for amending the rules to improve regulatory clarity or efficiency, or to reduce regulatory burdens while maintaining effective standards.
 - 4) The ACCC should undertake the relevant consultation required by s93 and s98 of the Act and Water Regulations 2008.
 - 5) In preparing advice and draft amendments in response to this request, the ACCC should take into account the views of the Water Act Review Panel, as expressed in their report, the submissions made to the Water Act Review and any further matters raised during the ACCC's consultations.
 - 6) The ACCC should provide this advice, including draft rule amendments, by the end of December 2015.

Where appropriate throughout sections 4 to 7, the relevant item(s) of the terms of reference (at Attachment A) are noted. Some items in the terms of reference (in particular items 2(f) and 3) are relevant to all sections and are not individually noted.

Appendix B—Basin water charging objectives and principles (BWCOP)

Part 1—Preliminary

1 Objectives and principles

This Schedule sets out:

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

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

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

Part 2—Water charging objectives

2 Water charging objectives

The *water charging objectives* are:

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

Part 3—Water charging principles

3 Water storage and delivery

- (1) Pricing policies for water storage and delivery in rural systems are to be developed to facilitate efficient water use and trade in water entitlements.
- (2) Water charges are to include a consumption-based component.

- (3) Water charges are to be based on full cost recovery for water services to ensure business viability and avoid monopoly rents, including recovery of environmental externalities where feasible and practical.
- (4) Water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.
- (5) In subclause (4):

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

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

4 Cost recovery for planning and management

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

5 Environmental externalities

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

6 Benchmarking and efficiency reviews

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