

Review of Water Charge Rules

Draft Advice

November 2015

Australian Competition and Consumer Commission  
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Water Charge Rules Review:

Draft Advice

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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:   * 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 charge** | a charge of a kind referred to in paragraph 91(a), (b) or (d) of the Act but does not include:   * fees in relation to transformation applications (to which rule 13 of the water market rules applies) * a termination fee |
| **infrastructure operator** | any person or entity who owns or operates infrastructure for one or more of the following purposes:   1. the storage of water 2. the delivery of water 3. the drainage of water   for the purpose of providing a service to another person |
| **infrastructure service** | access, or a service provided in relation to access, to water service infrastructure and includes the storage, delivery, drainage and taking of water |
| **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 |
| **planning and management charge** | a charge for water planning and water management activities |
| **private diverter** | an irrigator that extracts water directly from a natural watercourse (either a regulated or unregulated river) |
| **regulated water charge** | includes an:   * infrastructure charge * planning and management charge * termination fee   See section 91 of the Act for a full definition. |
| **termination** | when a person terminates or surrenders the whole or part of a right of access to the infrastructure operator’s network, typically by terminating water delivery right |
| **termination fee** | a fee that may be imposed by an infrastructure operator when a customer terminates their right of access |
| **total network access charge (TNAC)** | 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:   * 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:   * 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:   * 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:   1. the storage of water 2. the delivery of water 3. the drainage of water   for the purpose of providing a service to another person |

# Abbreviations

|  |  |
| --- | --- |
| ACCC | Australian Competition and Consumer Commission |
| ACL | Australian Consumer Law |
| The Act | The *Water Act 2007 (cth)* |
| ABARES | Australian Bureau of Agricultural and Resource Economics and Sciences |
| ADJR Act | *Administrative Decisions Judicial Review Act 1977* (Cth) |
| The Bill | SA *Water Industry (Third Party Access) Amendment Bill 2015* |
| BRC | Border Rivers Commission |
| BWCOP | Basin Water Charging Objectives and Principles |
| CCA | *Competition and Consumer Act 2010 (cth)* |
| CICL | Coleambally Irrigation Cooperative Limited |
| CIT | Central Irrigation Trust |
| DPI | NSW Department of Primary Industries – Office of Water |
| ESCV | Essential Services Commission of Victoria |
| EWON | Energy and Water Ombudsman of NSW (EWON) |
| EWOOSA | Energy and Water Ombudsman of SA |
| EWOQ | Energy and Water Ombudsman of Queensland |
| EWOV | Energy and Water Ombudsman of Victoria |
| GL | Gigalitre (one billion litres) |
| GMW | Goulburn-Murray Water |
| IPART | Independent Pricing and Regulatory Tribunal (NSW) |
| IIO | Irrigation infrastructure operator |
| LMW | Lower Murray Water |
| MDB | Murray-Darling Basin |
| MDBA | Murray-Darling Basin Authority |
| MI | Murrumbidgee Irrigation Limited |
| MIL | Murray Irrigation Limited |
| MJA | Marsden Jacob Associates |
| ML | Megalitre (one million litres) |
| NCP | Network Consultation Plan |
| NER | National Electricity Rules |
| NIC | National Irrigators’ Council |
| NSP | Network Service Plan |
| NSW | New South Wales |
| NSWIC | NSW Irrigators’ Council |
| NWI | National Water Initiative |
| OBPR | Office of Best Practice Regulation |
| PVWUA | Peel Valley Water Users Association |
| QFF | Queensland Farmers’ Federation |
| SA | South Australia |
| SDL | Sustainable Diversion Limit |
| The Panel | The Independent Expert Panel Reviewing the Water Act |
| RAB | Regulatory Asset Base |
| RMO | River Murray Operations |
| TNAC | Total Network Access Charge |
| VFF | Victorian Farmers’ Federation |
| WAE | Water access entitlement |
| WWSDWUA | Wah Wah Stock and Domestic Water Users Association |
| WCIR | Water Charge (Infrastructure) Rules 2010 |
| WCPMIR | Water Charge (Planning and Management Information) Rules 2010 |
| WCTFR | Water Charge (Termination Fees) Rules 2009 |
| WIRO | Water Industry Regulatory Order |
| WMI | Western Murray Irrigation |
| WMR | Water Market Rules 2009 |
| WPM | Water Planning and Management |
| WTR | Water Trading Rules |

# Summary

At the request of the Minister, the ACCC is reviewing the three sets of water charge rules made under section 92 of the Water Act 2007 (the Act). The three sets of water charge rules are:

* the Water Charge (Infrastructure) Rules 2010 (WCIR)— set requirements relating to the charges payable to infrastructure operators for infrastructure services
* the Water Charge (Termination Fees) Rules 2009 (WCTFR)—regulate the maximum amount of termination fee payable to an operator when a customer terminates access to water service infrastructure; and
* the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)— place information requirements on persons determining charges for planning and management activities.

The rules have now been in place for around five years and were introduced at the time of significant reform within the Murray-Darling Basin. As charging practices and water markets in the Murray-Darling Basin continue to evolve, it is timely that the rules are reviewed to ensure they remain fit for purpose.

This Draft Advice and the proposed water charge rules [proposed water charge rules](https://www.accc.gov.au/water-charge-rules-review/draft-advice)[[1]](#footnote-1) reflect the findings of the ACCC’s review of the water charge rules to date.

The proposed amendments set out in the Draft Advice seek to achieve a number of outcomes, set out below.

## Streamlining the application of the rules and ensuring a consistent approach

The water charge rules currently apply differently to infrastructure operators depending upon their size, ownership status and the purpose for which they deliver water. The ACCC considers that in most cases, these distinctions are no longer necessary and their removal can help ensure a consistent approach to the regulation of infrastructure charges across the Murray-Darling Basin.

For example, the Draft Advice proposes amendments to ensure the non-discrimination provisions of the rules apply to all infrastructure operators rather than just those that are member-owned. This, in turn, ensures that all irrigators and other water users benefit from a consistent level of protection against this form of monopoly power.

The Draft Advice also calls for the three sets of water charge rules to be combined into one instrument with a single set of defined terms. This will assist stakeholders in understanding their legislative requirements.

## Improving pricing transparency and customer engagement

For certain operators, the water charge rules currently take a very prescriptive approach to ensuring those infrastructure operators provide for customer involvement in charge related decisions. This is in the form of detailed Network Service Plans (NSPs). The Draft Advice calls for the removal of these requirements so long as other pricing transparency arrangements are put in place. These include specific requirements for how the cost of certain charges should be passed through by infrastructure operators to their customers, as well as a requirement for infrastructure operators to explain (in their schedule of charges) their processes for determining charges. Operators will also be required to clearly explain how termination fees are calculated.

These provisions improve customers’ access to information to better inform their decisions, as well as their ability to participate in price-setting processes where possible, without undue regulatory burden.

## Ensuring charge approvals and determinations where necessary

The water charge rules currently require an infrastructure operator’s charges to be approved or determined by a regulator if it is a large (>250 gigalitres (GL)) and non-member owned. The Draft Advice signals a move away from charge determinations under the rules where this role can and will be performed at the Basin State level. Instead, the Commonwealth water charge rules should focus on ensuring a consistent regulatory approach where this is most relevant at the Basin scale.

In particular, the Draft Advice seeks to reduce the overall regulatory burden and improve regulatory outcomes by shifting the focus of the water charge rules on to the structure and application of infrastructure charges (rather than the level of operators’ revenue requirements) to better address the threat of water market distortions. This will be primarily achieved by proposed non-discrimination rules which will work to prevent distortions on individual decision-making caused by charging arrangements that unfairly preference some customers over others; as well as restrictions on infrastructure operators levying of infrastructure charges in relation to trade which unfairly increase the costs of participating in water markets.

The rules nevertheless need to retain provisions for charge approvals and determinations where there is no meaningful competitive pressure on infrastructure operators such that there is a risk of excess monopoly returns, and regulation at the Basin State level is not feasible. For example, amendments have been proposed to enable the ACCC to approve or determine infrastructure charges that the Murray-Darling Basin Authority may levy in the future. Under this approach, accreditation arrangements are no longer necessary.

## Addressing discriminatory infrastructure charging practices

The ACCC recognises that most infrastructure operators have a degree of monopoly power over their customers. As such, customers are at risk of discriminatory charging arrangements that favour some customers over others.

The Draft Advice calls for a strengthening of the non-discrimination requirements to prevent discrimination in charging practices on certain grounds such as a customer’s relative size (which is usually correlated with their bargaining power), the purpose they use their water for, associations between a customer’s water access rights and location-related rights (which are often used as a proxy for determining whether a person belongs to a certain class of persons such as ‘non-water user’) and whether they hold or have traded a water access right, irrigation right or water delivery right. Amendments are also proposed to better address the potential for infrastructure operators to unduly discriminate between customers through their distributions, or inflate termination fees for smaller customers through the structure of their tariffs.

This will, in turn reduce the potential for infrastructure charges to distort the water trading decisions of irrigators and other water users, while still allowing infrastructure operators to recover their prudent and efficient costs.

## Improving the interaction of the rules with other relevant legislation

The ACCC acknowledges that the water sector is subject to a range of industry-specific as well as general legislative requirements, and has sought opportunities throughout the review to ensure the water charge rules interact appropriately with these other legislative requirements. In particular, the Draft Advice acknowledges the roles of infrastructure access undertakings and regimes under Part IIIA of the *Competition and Consumer Act 2010*. As such, the Draft Advice proposes a limited exemption from the non-discrimination requirements of the rules for infrastructure charges pursuant to an access arrangement or third party access regime under Part IIIA.

The Draft Advice also recognises that the water charge rules are not the best instrument for ensuring that National Water Initiative commitments on cost recovery for water planning and management activities are met. As a result, the disclosure requirements in relation to planning and management charges have been simplified.

## Facilitating the efficient functioning of water markets

The Draft Advice acknowledges the strong interaction between regulated water charges and tradeable water rights. The majority of regulated water charges (in dollar terms) are imposed with reference to the volume of tradeable water right held or used by a person. As such, it is imperative that the water charge rules properly consider the interaction between charges and water markets.

The Draft Advice proposes restrictions on the levying of infrastructure charges when or because water is or has been traded. It also proposes modifications in relation to termination fees to better complement water delivery right markets. Improved pricing transparency will also facilitate more informed water trading decisions by irrigators and other users.

The Draft Advice and draft rule amendments have been developed based on extensive stakeholder consultation, including written submissions to the ACCC’s Issues Paper, public forums and targeted stakeholder meetings. Where relevant the ACCC has also taken into account the views put forward in the 2014 review of the Act. The ACCC has also drawn the information gathered through five years of monitoring regulated water charges and compliance with the water charge rules.

The Draft Advice also reflects a range of concerns expressed by stakeholders during consultation, on issues outside the scope of the water charge rules. These include concerns about the transparency of water markets, unbundling of water rights, the effect of the Basin Plan and water quality concerns. Where appropriate, the ACCC has made recommendations (but no rule advice) in relation to these matters.

Further feedback on this Draft Advice is welcomed by the ACCC, as set out in sections 1.2 and 1.3. The ACCC will also be meeting directly with key stakeholders over the coming months.

The ACCC will use this feedback to refine its advice and the proposed rule amendments before handing its Final Advice to the Minister in March 201

# Introduction

During 2014, an independent panel of experts reviewed the Water Act 2007 (the Act) and made a number of recommendations and conclusions. These included recommendation 11, that the Australian Competition and Consumer Commission (ACCC), in consultation with industry and Basin State governments, review the three sets of water charge rules that have been made under the Act:

* Water Charge (Infrastructure) Rules 2010 (WCIR)[[2]](#footnote-2)
* Water Charge (Termination Fees) Rules 2009 (WCTFR)[[3]](#footnote-3)
* Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)[[4]](#footnote-4)

In its interim response to the review of the Act, the Government accepted this recommendation (see section 3.2 for other recommendations and conclusions).

## Terms of reference

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 is considering a wide range of issues relating to these rules, as required by the terms of reference, including:

* the consistency of water charging regimes across the Murray-Darling Basin (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 (MDBA)
* 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.

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 Independent Expert Panel (the Panel) in recommendation 11.[[5]](#footnote-5)

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.

Table 1.1 below notes which sections in the ACCC’s Draft Advice are relevant to particular Water Charge Rules Review Terms of Reference.

Table 1.1: Relation of ACCC Draft Advice to Water Charge Review Terms of Reference

|  |  |
| --- | --- |
| Term of Reference | Relevant Section of the Draft Advice |
| 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. | 3.2 |
| 2 Preamble: 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. | 4.1 |
| 2(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. | 5.2, 5.3, 5.5 |
| 2(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. | 5.6.1, 5.9, 5.10, 5.12, 5.13 |
| 2(c) Opportunities for advancing the consistent application of the water charging objectives and principles, including options to rank objectives and define terms. | 4.2  5.6.3, 5.9, 5.10 |
| 2(d) Lessons learned from other sectors in relation to appeal mechanisms. | 5.8 |
| 2(e) Opportunities to combine the water charge rules and Water Market Rules in one instrument. | 4.3.1 |
| 2(f) Consistency with the Australian Government’s deregulation objectives. | All issues throughout chapters 4-9, but especially  5.5, 5.6, |
| 2(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. | 4.4  7.2, 7.3, 7.4 |
| 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. | All issues throughout chapters 4-9, but especially  4.3, 4.5, 4.6  5.3, 5.4, 5.5, 5.6, 5.7, 5.11, 5.13  6.2, 6.3, 6.4 |

A copy of the Minister’s request for advice and the complete terms of reference for the review are included at **Appendix A**.

## Consultation process and timeline

The ACCC has engaged in extensive consultation with stakeholders in the process of developing its advice.

On 4 May 2015, the ACCC released an Issues Paper[[6]](#footnote-6) to facilitate stakeholder input to the advice. The Issues Paper:

* outlined the rationale for the water charge rules
* discussed concerns and issues with these rules, including those raised during the Water Act Review, and
* invited interested parties to respond to questions about these and any other relevant issues.

Stakeholder submissions were due on 29 June 2015. The ACCC received 28 public submissions from a range of stakeholders. These submissions are available on the ACCC website.[[7]](#footnote-7) The ACCC also received one confidential submission.

During July and August, the ACCC held public forums in a number of regional areas throughout the Murray-Darling Basin. Public forums were held in: Mildura (27 July), Renmark (28 July), Shepparton (3 August), Deniliquin (3 August), Griffith (4 August), St George (5 August), Tamworth (24 August) and Dubbo (25 August). These public forums were an opportunity to discuss water charging arrangements and contribute to the ACCC’s advice on possible amendments to the water charge rules.

Throughout the consultation process, the ACCC has held meetings with various industry stakeholders, including: infrastructure operators, irrigators, Basin State governments and regulators, industry groups and other stakeholders. The purpose of this consultation was to engage with stakeholders early in the review process and to inform the drafting of the Issues Paper and the Draft Advice.

The Water Regulations 2008 set out consultation requirements in relation to proposals to amend the water charge rules.[[8]](#footnote-8) These include requirements to consult with relevant minister for each Basin State, infrastructure operators and the broader public.

The original terms of reference requested the ACCC’s final advice by the end of December 2015. The Minister has extended this period to the end of March 2016 to ensure irrigators and other stakeholders have sufficient time to respond to this Draft Advice.

The ACCC invites interested parties to provide their views and comments on these documents in the format outlined in section 1.3 below. The closing date for submissions is Friday, 5 February **2016.**

The ACCC will also undertake further consultation directly with stakeholders between November 2015 and February 2016 before providing its final advice to the Minister in March 2016.

## How to make a submission

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

In particular, chapters 4 to 8 of the Draft Advice contain numbered ‘rule advices’ (for proposed amendments to the water charge rules) and ‘recommendations’ for other actions.

Where submissions address one or more of these specific rule advices and recommendations, your submission should note the relevant number(s).

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

The ACCC is required to consider the costs and benefits of the various policy proposals being considered 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 **Friday, 5 February 2016**.

Submissions received in response to the Draft Advice 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](mailto: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

## 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.[[9]](#footnote-9)

## Structure of the Draft Advice

Generally, the Draft Advice follows the same structure as the Issues Paper (including heading numbering for chapters 3 to 7. Whereas the Issues Paper contained numbered questions to guide stakeholder feedback, the Draft Advice contains numbered ‘rule advice’ and ‘recommendations’:

* Rule advice: the ACCC’s proposed amendments to the water charge rules to address the issues identified (where rule amendments are considered the preferred course of action)
* Recommendations: the ACCC’s view on some other course of action that should be taken in order to address the issues identified

We are seeking specific feedback in response to the rule advice and recommendations contained in this Draft Advice.

The Draft Advice contains the following chapters:

**Chapter 2—Overview of water charging arrangements**

This chapter seeks to provide an overview of water charging arrangements in the Murray-Darling Basin. In particular, the interrelationships between types of:

* infrastructure operators and other charging entities
* infrastructure services
* customers
* regulated water charges, and
* tradeable water rights

**Chapter 3—Legislative framework**

This chapter 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 Water Act Review.

**Chapter 4—General issues**

**Chapter 5—Water Charge (Infrastructure) Rules 2010**

**Chapter 6—Water Charge (Termination Fees) Rules 2009**

**Chapter 7—Water Charge (Planning and Management Information) Rules 2010**

Chapters 4 to 7 describe the key issues considered by the review in relation to each of the three sets of water charge rules, and for the rules generally. Each section within these chapters includes:

* background information
* a summary of stakeholder views
* discussion of options, and
* where relevant, rule advice and / or recommendations.

**Chapter 8—Other issues of concern**

This chapter discusses issues raised by stakeholders, particularly at the public forums, which fall outside the scope of the water charge rules review. Some recommendations are made in relation to these issues.

**Chapter 9—Assessment of the change in regulatory cost under the proposed amendments to the water charge rules**

Where the ACCC has made rule advice (proposing amendments to the water charge rules), it has estimated the change in the regulatory cost of the proposed amendments. This chapter sets out the methodology the ACCC has used as well as the estimated change in regulatory cost for the proposed amendments.

**Appendices**

**A – Request for advice and terms of reference**

**B – Basin water charging objectives and principles**

**C – ACCC draft rule advice and recommendations**

# Water charging arrangements

The water charge rules, and this review, relate to regulated water charges (as defined in section 91 of the Act). These charges are imposed at various stages of the rural water supply chain. This chapter provides an overview of:

* participants in the rural water supply chain
* tradeable water rights
* regulated water charges

before summarising the inter-relationships between these.

## Rural water supply chain participants

#### Government departments and authorities involved in planning and management

Government departments and water authorities undertake water planning and management (WPM) activities to plan for and manage water resources. These activities include:

* managing water access entitlements
* managing trade registers
* making water allocation decisions
* water monitoring
* environmental works to minimise the negative impacts of consumptive use.

Governments may recover some or all of these costs through planning and management charges. These charges may be levied on infrastructure operators or on water users directly.

#### Infrastructure operators

Infrastructure operators are those entities that own or operate infrastructure for the purpose of:

* storing water
* delivering water
* draining water

for the purpose of providing a service to another person.

This infrastructure can include dams, weirs, channels, pipes and associated equipment, and is collectively referred to as the IO’s ***water service infrastructure***.

An IO provides ***infrastructure services*** to its customers in the form of access, or service provided in relation to access, to water service infrastructure. This includes services for the storage, delivery, drainage and taking of water.

In some cases, this draft advice refers to a particular sub-set of IOs that deliver water for the primary purpose of being used for irrigation: this type of IO is an IIO and its water service infrastructure is considered an ***irrigation network***.

An IO’s customers can include irrigators, environmental water holders, commercial operations, or other infrastructure operators (including urban water supply networks).

The infrastructure services that an IO provides can be considered either ‘on-river’ or ‘off-river’:

* ***On-river infrastructure services*** include harvesting and storing water through infrastructure such as dams, lakes, weirs and reservoirs, and delivering water, primarily through natural watercourses, to a point of extraction on a natural watercourse; or
* ***Off-river infrastructure services*** include the delivery of water from the natural watercourse through a network consisting of channels and / or pipes (which can be gravity-fed or pressurised) to a customer’s extraction point.[[10]](#footnote-10)

On-river infrastructure services are sometimes referred to as ‘bulk water services’. IOs providing these services are sometimes referred to as ‘bulk water suppliers’, and the charges are sometimes referred to as ‘bulk water charges’.

Similarly, IOs providing off-river infrastructure services are often referred to as ‘irrigation infrastructure operators (IIOs)’ and the charges they impose have been referred to as ‘irrigation network charges’. IIOs typically only provide off-river infrastructure services, however this is not always the case.

However, the terms ‘bulk water service’, ‘bulk water supplier’ and ‘irrigation infrastructure operator’ (IIO) are defined in the Act and Regulations, but in a way that may not apply to some customers or some services referred to by the terms ‘on-river’ and ‘off-river’ infrastructure services. For this reason, this advice will avoid using the terms ‘bulk water service’, ‘bulk water supplier’ and ‘ ‘IIO’ and will in general simply refer to ‘infrastructure operators’. Where necessary, the Draft Advice will differentiate between IOs providing on-river infrastructure services, IOs providing off-river infrastructure services and IOs that provide both on-river and off-river infrastructure services.

Similarly, charges that an infrastructure operator imposes for on-river and off-river infrastructure services are referred to respectively as ‘on-river infrastructure charges’ and ‘off-river infrastructure charges’.

#### Water users

The overwhelming majority of water use in the Murray-Darling Basin (MDB) is for irrigation.[[11]](#footnote-11)

Irrigators can be located either on-river (and are therefore considered ‘private diverters’) or off-river and rely on channels / pipes for the delivery of water to their property.

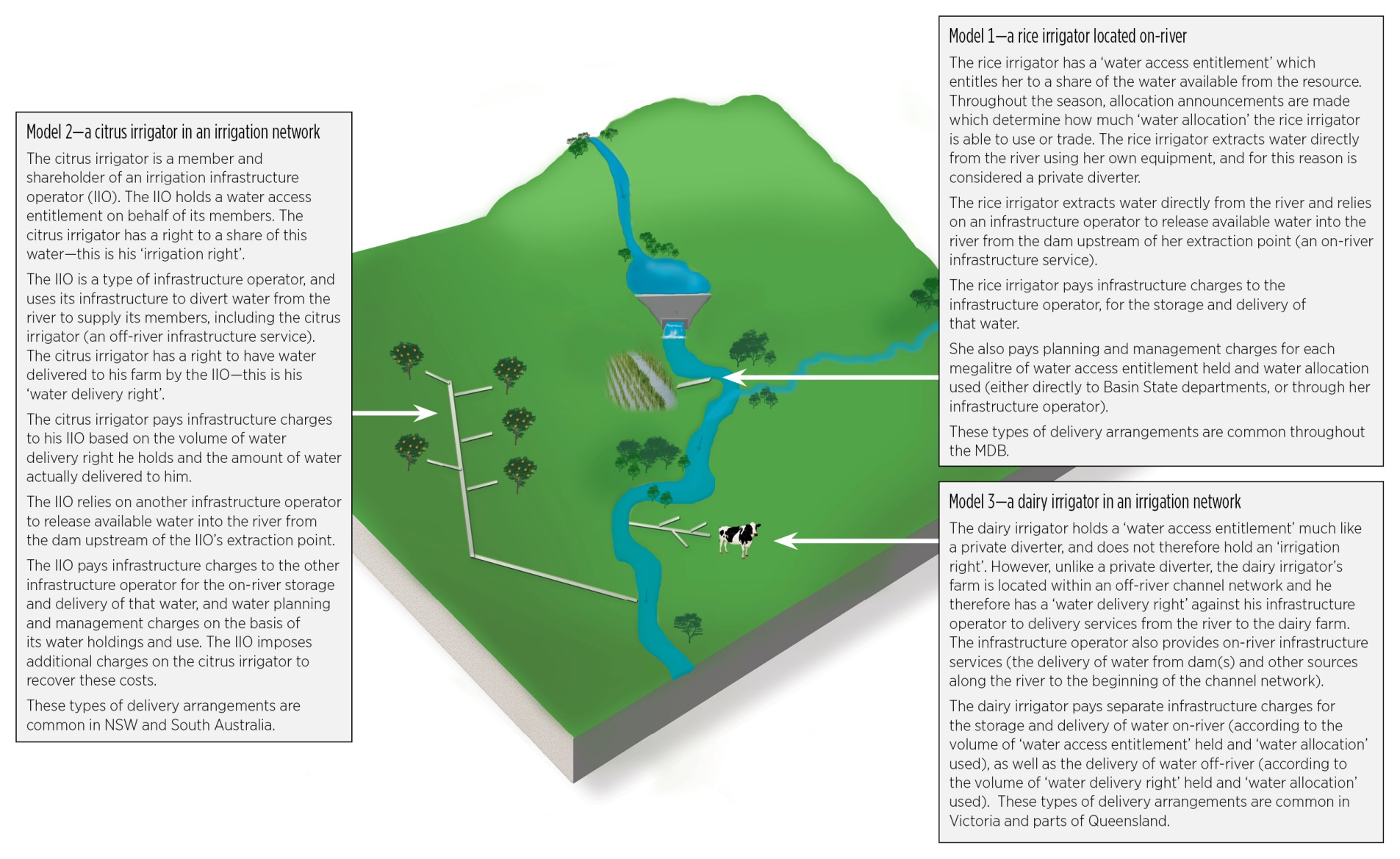
In recent years, the proportion of water held and used by environmental water holders has increased significantly. Other water users include:

* rural stock and domestic users
* manufacturing and processing operations
* commercial plantations (e.g. forestry)
* mining operations
* operators of urban water supply networks.[[12]](#footnote-12)

Just like irrigators, these other water users require infrastructure services for the storage and delivery of water access rights that they hold. Typically, they will incur the same types of charges as irrigators where they use the same infrastructure services.

Figure 2.1 below provides a pictorial representation of the rural water supply chain for three irrigators with different infrastructure service needs.

Figure 2.1 Rural water users



## Types of tradeable water rights

Water markets in the Murray-Darling Basin (MDB) enable the following types of rights to be traded between different water users and different locations:

* Water access right—a statutory right to hold / take water (includes *water access entitlement* and *water allocation*).
* Irrigation right—a right that a person holds against an IIO to receive water (which is not a water access right or a water delivery right).
* Water delivery right—a right to have water delivered by an infrastructure operator.

Water markets across the MDB have differing levels of maturity. Some markets are well-established and have high trade volumes (for example, trade of water allocation) and other markets are relatively new (for example, trade of water delivery right).

More detail on each of these types of tradeable water rights is provided in the following sections.

### Water access rights

The term ‘water access right’ includes:

* water access entitlement (WAE)—a perpetual or ongoing entitlement to exclusive access to a share of a water resource. Trade of a WAE is sometimes referred to as a 'permanent trade'. It is also possible to lease a WAE.
* water allocation—a specific volume of water allocated to a WAE in a given water accounting period. Trade of a water allocation is sometimes referred to as a 'temporary trade'.[[13]](#footnote-13)

When water access rights are traded, the Basin Plan water trading rules (WTR) require the seller to notify the approval authority or registration authority in writing of the price agreed for the trade.[[14]](#footnote-14) These trade prices are not regulated water charges but instead represent the value of the water access right in question.

Similarly, infrastructure charges imposed by IOs are not charges for the physical water or water access rights, but are instead charges for infrastructure services (see section 2.3.2). However, infrastructure operators often use the volume of a water access right held or used by a customer as a proxy for that customer’s consumption of infrastructure services and therefore their liability for infrastructure charges (see section 2.3).

Box 2.1 Case study—a private diverter with a NSW with a WAE

|  |
| --- |
| Ella Howard owns a farm near the town of Gundagai in NSW which she primarily uses to grow wheat, barley and hay. Ella relies on the water available in the Murrumbidgee catchment to water her crops.  Ella holds a WAE issued under NSW water management law. This is in the form of a NSW water access licence with a ‘share component’ of 100 megalitres (ML). This provides Ella with an ongoing right to a specified proportion of water available in the Murrumbidgee regulated river water source. The amount of water allocation that Ella has access to in a particular water year depends on the announced allocation made by NSW Department of Primary Industries (DPI) -Water (formerly NSW Office of Water) for the Murrumbidgee regulated river water source. If the announced allocation is 100 per cent, Ella’s account will be credited with 100 ML of water allocation.  Ella’s farm is located near the Murrumbidgee River, so Ella uses her own equipment to extract the available water from the river for use on her farm. WaterNSW (formerly known as State Water) is responsible for delivering water in the Murrumbidgee and manages Burrinjuck and Blowering dams for this purpose. Ella pays infrastructure charges to WaterNSW for the storage and delivery of her water.  In a particular year the announced allocation is 70 per cent. This means that Ella can extract, trade or carryover 70 ML of water allocation.  Ella is considering selling her water to reduce debt. Ella has the following options available to her:   * Sell her entire WAE. The perpetual right to 100 ML of water will pass on to the purchaser. Ella will no longer be entitled to water allocations announced in future years. * Sell a portion of her WAE (for example 50 ML). Ella’s perpetual right under the WAE will reduce to 50 ML. Ella will be entitled to receive 50 ML in future years when the announced allocation is 100 per cent. * Sell her entire water allocation for this year (70 ML). Ella will not be able to use her WAE to receive water this year. However, she will be entitled to any water allocations announced in future years. * Sell a portion of her water allocation for this year (for example 30 ML of the 70 ML available in that particular year). Ella can divert the remaining 40 ML for use on her farm this year.   In each of these scenarios, once Ella finds a buyer she would need to obtain approval for the trade from the relevant NSW approval authority. |

### Irrigation rights and transformation

Irrigators who hold irrigation rights can transform these rights into a WAE held in their own name. This allows the irrigator to sell or lease some or all of their WAE or water allocation, without seeking IIO approval. The irrigator can also use the WAE as a form of security in obtaining finance and gaining greater control over carryover decisions.

Alternatively, an irrigator can transform their irrigation right into a WAE held in the name of another person. This can be done as part of a trade of water for use outside of the IIO's irrigation network. In either case, this process is known as transformation and is regulated by the Water Market Rules 2009 (WMR).

Box 2.2 below sets out a simplified example of the process of transformation.

Box 2.2 Transformation process

|  |
| --- |
| An IIO holds 3000 ML of WAE and its customers hold an entitlement to this water in the form of irrigation rights against the IIO. Irrigators A and B both hold 100 ML of irrigation right, while other customers hold a combined total of 2800 ML of irrigation right.  Irrigator A wishes to transform all of their irrigation right without selling their water. Figure 2.2 below shows that irrigator A transforms all of their irrigation right and is issued with a 100 ML WAE.  Irrigator B wishes to transform all of their irrigation right and immediately sell it to another person. Figure 2.2 below shows that irrigator B transforms all of their irrigation right and the purchaser is issued with 100 ML of WAE. The WAE held by the IIO has been reduced by 100 ML from each respective transformation, leaving the IIO with 2800 ML of WAE. The volume of irrigation right held against the IIO has also been reduced from 3000 ML to 2800 ML.  Figure 2.2 Transformation process |

Box 2.3 Case study – an IIO customer with irrigation right

|  |
| --- |
| Harry Smith owns a farm near the town of Leeton NSW, which he uses to grow rice. Harry is a member and shareholder of Murrumbidgee Irrigation Limited (MI).  Harry does not hold a WAE. The WAE is held by MI and entitles MI to an ongoing right to a specified proportion of water available in the Murrumbidgee regulated river water source.  Each of MI’s members is entitled to a share of this water specified under their water entitlement contract with MI. MI has issued Harry an Entitlement Certificate which specifies that Harry has a right to a share of 100 ML of water from MI’s WAE. This is Harry’s ‘irrigation right’. If NSW DPI-Water announces 100 per cent water allocation Harry is entitled to receive 100 ML of water. If NSW DPI-Water only announces 50 per cent water allocation, Harry will only be entitled to receive 50 ML of water. However, the exercise of this irrigation right is subject to the terms and conditions of Harry’s water entitlement contract with MI.  Harry does not have an individual right to extract water from the Murrumbidgee River himself. Rather, Harry has entered into a water delivery contract with MI, which obliges MI to use its infrastructure to extract water from the Murrumbidgee River and deliver it to Harry’s farm (this is an off-river infrastructure service). The delivery contract specifies Harry’s share of the capacity of MI’s network (expressed in the units of water delivery rights).  Harry pays infrastructure charges to MI based on the number of units of water delivery right held, the volume of water actually delivered and other factors such as the number of connections to the irrigation network.  MI pays infrastructure charges to WaterNSW for the storage and delivery of water to its point of extraction on the Murrumbidgee River (this is an on-river infrastructure service). MI also incurs water planning and management charges collected by WaterNSW on behalf of NSW DPI-Water. MI imposes charges on Harry to recover these WaterNSW and NSW DPI-Water costs.  In a particular year, the announced allocation is 70 per cent. MI has informed Harry that under his water entitlement contract, he is entitled to receive 70 ML of water.  Harry is considering selling his water to upgrade his on-farm infrastructure. Harry has the following options available to him:   * sell some or all of his ongoing irrigation right (for example 100 ML) to another member of MI. Harry must obtain MI’s approval for this internal (‘permanent’) trade. * sell some or all of his share of MI’s internal water allocation (for example, 70 ML) to another member of MI or a person outside MI’s irrigation network. This trade requires the approval of both MI and the relevant Basin State approval authorities. * sell some or all of his ongoing irrigation right (for example 100 ML) to a person outside MI’s irrigation network. Harry must apply to MI to ‘transform’ his irrigation right into a separately held WAE to be held by a person outside MI’s irrigation network.   Even though Harry has sold some or all of his water, Harry may wish not to make any changes to his water delivery contract with MI. In these circumstances, Harry will continue to pay the same fixed infrastructure charges to MI. If Harry decides to reduce his right of access to MI’s infrastructure, Harry would have to apply to MI to terminate a specified number of units of water delivery rights and pay a corresponding termination fee (see section 2.2.3). |

### Water delivery rights and termination

Many irrigators in the MDB use the services of an infrastructure operator to deliver their water from the watercourse extraction point specified on the WAE (held by the irrigator or the operator) to their property. This is an off-river infrastructure service. For this purpose, these irrigators have a contractual and / or statutory right of access to the operator's infrastructure which typically includes the right to the delivery of water through the infrastructure (a water delivery right)[[15]](#footnote-15) and may also include a right to the drainage of water.

An irrigator may decide to modify their right of access. For example an irrigator that sells a WAE and switches to dryland farming may no longer require water to be delivered to their property. As such, they may no longer require access to the operator’s infrastructure and wish to cease paying ongoing fixed infrastructure charges to the operator. In such circumstances, the customer may want to terminate their right of access and the operator may impose a termination fee (see section 2.3.3).

Alternatively, instead of terminating their right of access an irrigator may want to sell water delivery rights to other irrigators located in the area serviced by their infrastructure operator. From 1 July 2014, the WTR prohibit IIOs[[16]](#footnote-16) placing unreasonable restrictions on the trade of water delivery rights. The WTR are enforced by the Murray-Darling Basin Authority (MDBA).

## Types of regulated water charges

Regulated water charges can be characterised as either ***volumetric*** or ***non-volumetric***, based on how they are levied.

A ***volumetric charge*** is one which is set according to the volume of a right or physical amount of water. It can in turn be a:

* ***fixed volumetric charge***: a charge which is based on the volume of a water right[[17]](#footnote-17) held;
* ***variable volumetric charge***: instead of referencing the volume of a water right *held*, a variable volumetric charge references the volume of the right that is utilised in a particular manner, for example, the volume of physical water delivered, the volume of water allocation traded, the volume of water carried over, etc.[[18]](#footnote-18)

For example, an infrastructure operator may levy a fixed volumetric charge based on the volume of a customer’s water access entitlement (WAE), irrigation right or water delivery right holdings; and a variable volumetric charge based on the volume of water *delivered* to the customer under their water allocation or irrigation right.

A ***non-volumetric charge*** is one that does not reference a volume of a water right.

For example, a customer may incur a non-volumetric charge which is levied:

* per account (regardless of the volume of water right they hold)
* per outlet or meter
* based on the size of their landholdings
* when they undertake a transaction (for example, a trade application fee)
* as a flat charge on all customers with a particular characteristic.

The three broad types of regulated water charges covered by the water charge rules are set out in the sections that follow.

### Planning and management charges

Planning and management charges are determined by Basin State ministers, water departments and water authorities to recover the costs of WPM activities.

Volumetric planning and management charges are usually levied on the basis of WAE held or water allocation used.

Non-volumetric planning and management charges can be a mix of:

* broad based levies which apply directly or indirectly on water users to fund a specific set of WPM activities and
* transaction fees, including include fees for applications for the trade, transfer or variation of water access rights or lodgement of a transaction with a water registry.

These charges are paid by infrastructure operators and water users. Where planning and management charges are imposed on an IO, the charges (or the costs incurred by the IO because of these charges) are typically passed on to their customers.

Planning and management charges are currently regulated by the WCPMIR, and are discussed in Chapter 7.

### Infrastructure charges

Infrastructure charges are the charges infrastructure operators impose for access to their water service infrastructure, and services provided in relation to that access—collectively referred to as ‘infrastructure services’.

#### Infrastructure charges for on-river infrastructure services

Infrastructure operators that provide on-river infrastructure services impose infrastructure charges to recover the costs associated with:

* water harvesting and storage[[19]](#footnote-19); and
* water transportation and delivery.[[20]](#footnote-20)

Although these costs relate to water service infrastructure, infrastructure charges for on-river infrastructure services generally take the form of:

* fixed volumetric infrastructure charges levied on the volume of WAE held by the customer
* variable volumetric infrastructure charges levied according to the amount of water allocation delivered to a customer’s extraction point
* non-volumetric charges levied per account or per meter / outlet

Infrastructure operators rely overwhelmingly on volumetric charges to obtain their required revenue; however, the amount of revenues recovered via fixed volumetric charges relative to revenues from variable volumetric charges differs considerably across operators.

#### Infrastructure charges for off-river infrastructure services

IOs that provide off-river infrastructure services—usually for the delivery of water from a natural water course through channels / pipes to a customer—impose infrastructure charges to recover their costs. These costs are associated with:

* the day to day operation of their infrastructure;
* maintaining and renewing their infrastructure; and
* meeting overheads.

Charges for off-river infrastructure services generally take the form of:

* fixed volumetric charges levied on the volume of water delivery right held by the customer
* variable volumetric charges levied on the volume of water delivered to the customer (under a water access right or irrigation right) up to the volume of water delivery right held (with higher charges applying to volumes delivered over this amount)[[21]](#footnote-21)
* non-volumetric charges levied per account, per meter / outlet or with reference to landholdings.

As is the case for infrastructure operators who provide on-river infrastructure services, infrastructure operators providing off-river infrastructure services also rely on volumetric charges to obtain their required revenue. Again their relative reliance on fixed and variable volumetric charges may differ considerably.

Infrastructure operators that only provide off-river infrastructure services may levy other charges on their customers to pass through, or recover the cost of, infrastructure charges for on-river infrastructure services, or planning and management charges, that they have incurred on behalf of their customers (see section 5.13).

In some cases, infrastructure operators may also collect infrastructure charges or planning and management charges on behalf of other entities.

Infrastructure charges are currently regulated by the *Water Charge (Infrastructure) Rules 2010*, discussed in Chapter 5.

### Termination fees

Infrastructure operators face costs for operating their infrastructure. Many of these costs are ongoing—that is, they are incurred by the operator whether or not a particular irrigator chooses to terminate access. The imposition of a termination fee on an irrigator that is terminating their right of access ensures a contribution from exiting irrigators for the ongoing fixed costs of operating the infrastructure. This provides a degree of revenue certainty for infrastructure operators. Revenue from termination fees can be used to limit future increases in charges for those customers who maintain their connection or to fund network rationalisation to lower ongoing costs.

The level of termination fees and the circumstances in which they can be charged are currently regulated by the Water Charge (Termination Fees) Rules 2009 (WCTFR), discussed in Chapter 6.

## Summary of water charging arrangements

The regulated water charges that apply to a person will depend upon the nature of their activities and the type of tradeable water right they hold or use. Regulated water charges are ultimately borne by water users, either directly or indirectly.

Figure 2.3 below provides an overview of the relationship between the types of regulated water charges and the entities imposing / paying them.

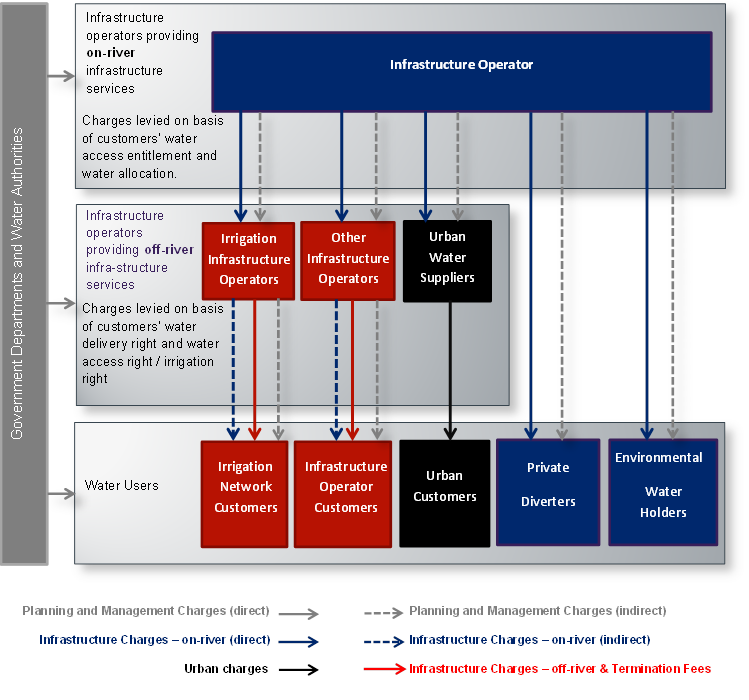
Planning and management charges can apply directly to water users as well as to infrastructure operators. Infrastructure operators typically pass such charges on to their customers alongside the charges they impose to fund their own activities (these are shown as grey lines in figure 2.3).

Infrastructure charges are imposed by infrastructure operators on to their customers. The figure below distinguishes between infrastructure charges for on-river infrastructure services (shown as dark blue lines) and off-river infrastructure services (shown as red lines in figure 2.3).

Some infrastructure operators are vertically integrated. That is, they provide both on-river and off-river infrastructure services (this is not shown in figure 2.3). Separate charges should be levied for these two types of infrastructure services.

It should also be noted that the regulation of charges under the Water Act does not extend to charges in respect of urban water supply activities beyond the point at which water has been removed from a Basin water resource (shown as black lines in figure 2.3).[[22]](#footnote-22)

Figure 2.3 Overview of regulated water charge arrangements



# Legislative framework

## Development of the water charge rules

The *Water Act 2007* (the Act) has an objective of enabling the Commonwealth, in conjunction with the Basin States, to manage Murray-Darling Basin (MDB) 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 Act allows the relevant 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 Act (see section 4.2 and appendix B)

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.[[23]](#footnote-23)

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

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

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 (WAE).

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).[[24]](#footnote-24)

Under the Act, the ACCC is the ‘appropriate enforcement agency’ for the water charge rules and the WMR.[[25]](#footnote-25) The ACCC has produced a range of guidance material for infrastructure operators, irrigators and governments on the water charge rules (this is further considered in section 0).[[26]](#footnote-26)

## Water Act Review recommendations and conclusions

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.

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 Report of the Independent Review of the Water Act 2007, 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 Report accepted this recommendation and, as described in Chapter 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 Report of the Independent Review of the Water Act 2007, 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.

In particular, the Report of the Independent Review of the Water Act 2007 recommended that:

minor technical amendments be made to the definitions in the Act for ‘bulk water charge’, ‘infrastructure operators’ and ‘irrigation infrastructure operators’ to remove ambiguity for stakeholders.[[27]](#footnote-27)

The ACCC acknowledges that any amendments to these definitions are not intended to alter the meaning of these terms, but rather reduce or eliminate the scope for confusion or uncertainty among stakeholders, which will in turn assist with the efficient operation of the water charge rules.

The Panel also recommended that:

section 212 be amended so that the Murray–Darling Basin Authority’s powers to charge fees for services are restricted to regulated water charges as defined by Part 4 of the Act and that these charges are regulated by rules equivalent to those that apply to an infrastructure operator that is a Part 6 operator as defined by the Water Charge (Infrastructure) Rules.[[28]](#footnote-28)

The regulation of any future MDBA charges is considered in more detail in section 5.12.

Furthermore, the Panel recommended that:

section 92(4) of the Act be amended to give regulators applying the Water Charge (Infrastructure) Rules the discretion to determine or vary regulatory periods, so long as the regulatory periods are longer than those already provided for in the rules.[[29]](#footnote-29)

Section 5.6.2 includes rule advice setting out proposed amendments to the rules in the event that this recommendation is adopted and the necessary amendments to the Act are made.

Where relevant, the Draft Advice also references other recommendations and conclusions of the Panel, consistent with item 5 in the Terms of Reference for the review of the water charge rules. These references are set out in table 3.1 below.

Table 3.1 – Review of the Water Act 2007: recommendations and conclusions referenced in the Draft Advice

|  |  |  |
| --- | --- | --- |
| Recommendation / Conclusion | Subject matter | Relevant section of the Draft Advice |
| Recommendation 9 | The regulation of water market intermediaries | 8.1.1 |
| Recommendation 18 | Inter-agency working group on water information reporting | 4.5 |
| Recommendation 19 | The prescription of types of enforceable undertakings | 4.5 |
| Conclusion 4.3 | Interoperability and efficiency of Basin State water registers | 8.1.1 |
| Conclusion 4.6 | Electronic access to water charge information | 5.4.2 |
| Conclusion 7.2 | Water information: reporting requirements | 4.5 |
| Conclusion 8.1 | Enforcement | 4.5 |
| Conclusion 9.1 | Murray-Darling Basin Authority: Transparency of Basin Plan and River Murray Operations functions | 5.12 |
| Conclusion 9.3 | Murray-Darling Basin Authority: River Murray Operations budget and costs | 5.12 |

# 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 the ACCC’s Draft Advice and recommendations on these overarching issues.

## Opportunities to reduce cost to industry and governments

#### Background

The terms of reference for the ACCC’s review of the water charge rules include requirements to consider the Commonwealth Government’s deregulation objectives and to identify opportunities for amending the rules to improve regulatory clarity or efficiency, or to reduce regulatory burdens while maintaining effective standards.

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.

In the Issues Paper, the ACCC specifically asked stakeholders to identify areas where they thought the rules could be simplified or shortened, and where the costs of compliance outweigh the benefits achieved by the water charge rules.

#### Stakeholder feedback

Stakeholders provided a range of examples where they felt the regulatory burden of the water charge rules should be reduced. These are cited in the relevant sections throughout the Draft Advice. In particular, stakeholders expressed strong concerns regarding the regulatory burden of requirements relating to publishing schedules of charges (see section 5.4), Network Service Plans (see section 5.5) and in relation to planning and management charges (see chapter 7).

The ACCC also received feedback from stakeholders on the regulatory burden imposed by its requests for information as part of the ACCC’s statutory water monitoring role. The ACCC’s approach to compliance and enforcement is considered in section 4.5.

#### Discussion

The ACCC has taken into account stakeholder views throughout the Draft Advice. Where rule advice proposes an amendment to the water charge rules, the ACCC has estimated the change in the regulatory burden of the change. The methodology used by the ACCC, which is consistent with the Office of Best Practice Regulation (OBPR), is set out in chapter 9, along with estimates of the likely change in regulatory burden.

The ACCC welcomes stakeholder feedback on these estimates.

## The Basin Water Charging Objectives and Principles

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

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

* to promote the economically efficient and sustainable use of:

1. water resources; and
2. water infrastructure assets; and
3. government resources devoted to the management of water resources; and

* to ensure sufficient revenue streams to allow efficient delivery of the required services; and
* to facilitate the efficient functioning of water markets (including inter-jurisdictional water markets, and in both rural and urban settings); and
* 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
* 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.

The terms of reference for the review of the water charge rules specifically requests the ACCC to provide advice on the merits of several matters raised by the Independent Panel’s review of the Water Act, one of which was opportunities for advancing the consistent application of the BWCOP, including options to rank objectives and define terms. Neither the objectives nor principles are currently ordered or ranked in any way.

In its Issues Paper, the ACCC sought feedback on ways that the water charge rules could more effectively contribute to achieving the BWCOP (Question 3).

#### Stakeholder feedback

Several submissions to the Water Act review recommended that the Act be amended to provide a hierarchy in BWCOP in order to indicate which objectives should be given greater weight in charge determinations.

Frontier Economics, in its submission to the Act Review, suggested “increasing clarity around specifying primary objectives and subsidiary objectives [in the Act] to provide increased guidance to the regulator to ensure the underlying intent of [the] Act is reflected in regulatory decisions”.[[30]](#footnote-30) Frontier did not explicitly state which objectives should be the primary objectives, but its arguments suggest that ‘facilitating the efficient functioning of the inter-jurisdictional water market’ would be primary.

WaterNSW’s submission[[31]](#footnote-31) to the ACCC’s Issues Paper stated that the Act imposes “conflicting objectives on the regulator” and provides “no legislative guidance” to assist interpretation. WaterNSW’s submission continued:

*The* Water Act 2007*, or at the very least the WCIR should define terms used in the BWCOP and order them into a hierarchy. This will foster consistent charging arrangements, promote investment and trade.[[32]](#footnote-32)*

WaterNSW recommended that the WCIR be amended such that the primary objective is “promoting economic efficiency and supporting infrastructure development, without resulting in pricing outcomes that distort market activity”. In WaterNSW’s view, it is necessary to amend the WCIR to include this ranking, as “if this was done via the ACCC pricing principles, it would further promote the ad-hoc administrative economic regulatory arrangements that are currently in place in the rural water sector. Further, there is a risk that the ACCC guidelines may be inconsistent with the policy intent of the *Water Act 2007*...”[[33]](#footnote-33)

The ACCC notes that even where stakeholders agree on the need for a primary objective, they may disagree on what that objective should be. Further, the role of guidance material should be to offer the regulator’s interpretation of the legislative requirements, and the ACCC agrees with WaterNSW that this should not be inconsistent with the policy intent of the Act. However, the ACCC also notes the objects of the Act are broadly defined, and that the proposed “primary objective” suggested by WaterNSW may have elements that are not contemplated in the Objectives and Principles, such as the concept of “supporting infrastructure development”.

In contrast, the Victorian Farmers’ Federation (VFF) [[34]](#footnote-34) did “not support ranking pricing principles into a hierarchy as this provides less flexibility for the regulator to take account of local circumstances.” The VFF pointed out that significant restructuring has occurred across the Murray Darling Basin in recent years, and that “the Murray Darling Basin Plan is in the early days of implementation.” These changes have meant that infrastructure operators’ customer bases are changing, which may result in a need to alter charging arrangements. Therefore, in the view of the VFF, “there needs to be flexibility to adapt regulatory responses to the impacts of these changes”.[[35]](#footnote-35)

Daniel Mongan, an irrigator in Goulburn-Murray Water (GMW)’s irrigation network, commented that “[t]he pricing principles are currently too broad and subject to interpretation by the Water Corporations. The terms themselves should be defined more accurately and examples of expectations provided”.[[36]](#footnote-36) Mr Mongan added that the rules could more effectively contribute to achieving the Objectives and Principles by “adopting a more explicit cost reflective pricing approach to regulation”.[[37]](#footnote-37)

Peter Beex, a Victorian irrigator in GMW’s area, submitted that Objective (d) (user pays and achieving pricing transparency) needs to be emphasised, and cited examples of lack of clarity in GMW’s pricing structure. [[38]](#footnote-38) Mr Beex pointed out that a lack of pricing transparency could result in cross-subsidisation and cited examples where, in his view, some valleys in GMW’s network were subsidising other valleys. This submission emphasises the important link between pricing transparency and implementing user-pays.

The Queensland Farmers’ Federation (QFF) submitted that the water charge rules are “adequately drafted” to address the Objectives and Principles.[[39]](#footnote-39)

The Independent Pricing and Regulatory Tribunal (IPART) indirectly addressed the question of how the water charge rules could more effectively contribute to achieving the BWCOP in recommending that the WCIR allow the regulator to determine the “user-share of costs to be recovered from regulated prices”.[[40]](#footnote-40) The “user share” is “the proportion of total costs of a given activity that should be borne by water users (i.e., water entitlement holders)”. If the regulator determines such a share (as IPART does under NSW water management law), this means that the regulator allocates costs between water access entitlement (WAE) holders and Government. In IPART’s view, permitting the regulator “to determine the user share of costs is consistent with the Basin waster charging objectives”.[[41]](#footnote-41)

The Murray Darling Basin Authority (MDBA) raised various issues about the difficulties of applying the BWCOP in the case of charging or other cost recovery arrangements for on-river infrastructure services provided by River Murray Operations (RMO). These issues are discussed in detail in section 5.12. MDBA pointed out that, although RMO does not currently impose infrastructure charges, relevant Basin State governments recover some proportion of RMO costs via “indirect water charges”. MDBA noted the severe lack of pricing transparency in these arrangements, and commented that “these different arrangements [of each Basin State] appear to be at odds with the intent of the National Water Initiative in achieving a level playing field for water users”.[[42]](#footnote-42) MDBA also submitted that movement towards upper-bound pricing[[43]](#footnote-43) was “unrealistic” for RMO infrastructure, because assets such as these “were never intended to be cost recovered” and because of the wide range of services these assets now provide.[[44]](#footnote-44)

The ACCC received a significant amount of feedback on the implementation of the BWCOP through the WCIR in the specific case of infrastructure charges for Peel Valley water users. This is discussed in detail below. The ACCC also received stakeholder feedback relating specifically to the Principle of achieving consistency in pricing policies.[[45]](#footnote-45) This feedback is discussed in section 5.10.

#### Discussion

Considerations of how to improve the consistent application of the BWCOP and whether there is a need to rank them, acknowledge that the individual objectives and principles may not always be mutually reinforcing. For example, there may be significant costs involved in fully implementing the objective of user pays, and it is possible that the costs would outweigh the benefits. If this occurred, full implementation of the user pays principle could come at a cost to economic efficiency.

Furthermore, transitioning towards the objective of user pays and the principle of full cost recovery raises difficult questions of how to deal with legacy issues and the costs of adjustments. Principles (3) and (4) under Section 3 (water storage and delivery), in particular, acknowledge some of these practical issues by directly including feasibility considerations (emphasis added):

1. *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.*
2. *Water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.*

Given the costs of fully achieving all the objectives and principles, as well as the possibility of conflict or tension between them, there is a need to balance efforts to achieve any single objective or principle with a consideration of the BWCOP as a whole. This means that there is no single objective or principle which takes precedence over others, which precludes ranking or otherwise providing a hierarchy. However, the ACCC acknowledges that the lack of a clear hierarchy can create uncertainty in cases where one objective or principle appears to be in opposition to another. The ACCC therefore recognises the importance of adequate guidance material on the interpretation of the BWCOP, and how they should be balanced.

The ACCC considers that infrastructure charging for on-river infrastructure services is one example of an area where it has proved difficult to apply the BWCOP. This has been the case particularly in relation to implementing ‘user-pays’ and achieving pricing transparency for the operation of large storages which contribute to general water availability and/or improve reliability for water access entitlements and provide other services such as carryover. Box 4.1 presents a case study of how issues with implementing the BWCOP have arisen in relation to on-river infrastructure charges in the Peel valley in NSW. Examples where full user pays and/or full pricing transparency has yet to be implemented in relation to on-river infrastructure services include:

* no direct charges for carryover
* water users who forfeit water do not pay variable charges relating to storage services received
* lack of clarity and clear charging structure in relation to water for the environment, particularly in relation to infrastructure services provided for environmental flows mandated by water resource plans but having the characteristics of held environmental water (for example, the ability to order water,)

Moreover, infrastructure operators who provide on-river infrastructure services may also provide a range of other services for which there is no clear charging structure, for example recreational services and amenity values.

Box 4.1: On-river infrastructure charges in the Peel Valley

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| One prominent example raised by stakeholders of the need to have adequate guidance on the interpretation and balancing of the BWCOP are the charges payable for on-river infrastructure services in the Peel Valley in NSW. The Peel Valley Water Users Association (PVWUA), in both their submission and via the ACCC’s public forum in Tamworth, argued that the current infrastructure charges for the Peel Valley, levied by WaterNSW and determined by the ACCC, ignore the principle of “avoid[ing] perverse or unintended pricing outcomes” because they are high relative to charges paid by water users in adjacent valleys (for example, Namoi).[[46]](#footnote-46) The Hon. Kevin Andrews, State MP for Tamworth contended at the Tamworth public forum that Chaffey Dam, which provides water storage for certain Peel water users, was never built for cost recovery, and outlined the legacy issues involved with moving towards full cost recovery.[[47]](#footnote-47)  Stakeholders attending the Tamworth public forum also submitted that the principle of user pays was not achieved in the charging arrangements for the Peel because, in their view, a significant proportion of flows through the Peel River (whether from Chaffey Dam or from non-regulated tributary inflow[[48]](#footnote-48)) were used by downstream water users, such as irrigators in the Namoi Valley, who are not required to pay infrastructure charges in relation to water service infrastructure in the Peel Valley. [[49]](#footnote-49) In contrast, a letter received by the ACCC from the Split Rock Water Users Association[[50]](#footnote-50) (located in the Namoi Valley) raised strong objections to the prospect of paying infrastructure charges relating to Peel Valley infrastructure, arguing that Namoi water users already pay charges in relation to other storages but did not use the Chaffey Dam or associated Peel Valley infrastructure. Another stakeholder also pointed out that recreational users of Chaffey Dam are not required to pay infrastructure charges, which in their view is also inconsistent with the user-pays objective.[[51]](#footnote-51) These differing perspectives highlight the practical difficulties that can arise in identifying who exactly is a “user” of infrastructure services. In particular, the demarcation of geographical areas such as valleys for charging purposes is an important parameter that can have significant consequences for the incidence of charges (i.e. who pays for which infrastructure services). This issue is discussed further in section 5.10.2.  The ACCC acknowledges the high on-river infrastructure charges levied in the Peel valley relative to other valleys in NSW, and the impacts on stakeholders required to pay these charges. In its 2014 final decision on State Water’s (now WaterNSW) infrastructure charges, the ACCC decided to implement a 10 per cent cap on real annual price increases in the Peel valley. In making this decision, the ACCC considered that:  *“…continuing a cap on annual price increases in the Peel valley, and a NSW Government subsidy to support this, would best meet the Basin water charging objectives and principles. This approach averts a price shock and the perverse pricing outcome that would occur if prices moved immediately to full cost recovery over the 2014-17 period, and recognises the need for community service obligations (subsidies) where full cost recovery is unlikely to be achieved, as set out in the BWCOPs”.[[52]](#footnote-52)*  This decision by the ACCC is consistent with the view taken by IPART, who previously regulated WaterNSW’s infrastructure charges and will resume that role in the future as the accredited regulator under the WCIR. In 2006, IPART stated that:  *“[i]n some instances (e.g. North Coast, South Coast and Peel), the Tribunal considers that cost reflectivity will never be achieved. In such instance[s], it considers State Water should review the future of these services and consult with government in those cases where it considers that the service could be recognised as a community service obligation”.[[53]](#footnote-53)*  It is clear from these decisions that there is general acceptance that moving to full cost recovery (‘upper bound pricing’) for Peel valley is not practicable, particularly in the near future. It remains open for the NSW Government to consider whether, and what level, of community service obligation is warranted in response.  However, stakeholders in the Peel have submitted that even the current level of cost recovery has produced infrastructure charges in that valley which are unduly burdensome. This concern has been raised both in relation to the actual level of charges levied on Peel users, and the relative level of charges compared to those levied in other valleys.  As discussed in section 5.10.2, the ACCC considers the current valley-based approach to pricing on-river infrastructure services in NSW to be appropriate. As such, the ACCC does not consider that relative differences in infrastructure charges should necessarily be cause for concern. The ACCC emphasises that infrastructure charges do not represent charges for water as an input or a commodity, but are set to recover the costs of operating and maintaining water service infrastructure. Where these costs differ across valleys, infrastructure charges should likewise differ.  In relation to the absolute level of infrastructure charges levied in the Peel valley, as detailed above some stakeholders have submitted that legacy issues have resulted in charges for current users being higher. Much of the current infrastructure cost can be related to decisions made prior to NWI commitments by Basin States (particularly the commitment to move towards full cost recovery), and as such may not have given full consideration as to the amount of costs that would be recovered from future users. The ACCC notes the previous decision by IPART to adopt a ‘line-in-the-sand’ approach to write down all pre 1 July 1997 assets to zero value, for pricing purposes,[[54]](#footnote-54) which has had the effect of lessening the impact of such legacy issues on current infrastructure charges. The high current level of charges are largely the result not of legacy capital costs, but rather of high operating costs in per user terms of operating Chaffey Dam and providing associated infrastructure services.[[55]](#footnote-55)  The ACCC notes that one potential option to decrease charges faced by individual users is to expand the user base from which costs are recovered. There may be users who pay relatively less of the total share of costs recovered from users than is consistent with the principle of user pays. An example of such a user could be a person who avoids payment of variable infrastructure charges by forfeiture of water, in a context where variable charges are used to recover fixed costs (as is the case in NSW). There may also be other categories of users that do not pay the full cost of the infrastructure services they use. The ACCC considers that it may be appropriate for WaterNSW to reassess its charging structure with a view to identifying whether all users are appropriately charged for the infrastructure services they receive.  In addition to the above, the ACCC notes that, to the extent that different users in the Peel valley are being charged differently for the same class of infrastructure services, the ACCC’s proposed non-discrimination rules could address key forms of such discrimination. This should help ensure that some users are not unfairly advantaged over others.  The ACCC also recognises the concerns submitted by water users in the Peel Valley about lack of pricing transparency about water charges, in terms of ‘who is paying’ and ‘what are users paying for’. These concerns are discussed in section 5.13 of this paper; however, it is appropriate to note here that the ACCC’s proposed pass through rules and other pricing transparency reforms should improve clarity on these issues for Peel users. |

The discussion above has used examples relating to on-river infrastructure services, but issues of balancing and interpretation of the BWCOP are relevant to infrastructure charges for both on-river and off-river infrastructure services. To ensure the full implementation of user pays via the water charge rules would require the regulator to approve or determine the charges of each and every infrastructure operator; however, the ACCC does not consider this to be appropriate. First, considerable cost would be incurred in undertaking the approvals/determinations, much of which would ultimately be borne by the operator and its customers. Second, it is not clear that the benefit gained would outweigh the cost, meaning that the outcome may detract from the objective of promoting economic efficiency and sustainability in the rural water sector.

The ACCC considers that a more appropriate course is for the water charge rules to promote the BWCOP as a whole by enhancing pricing transparency and prohibiting key forms of pricing discrimination. In order to promote consistency in operators’ approaches to setting charges, the ACCC considers that such requirements should apply to all infrastructure operators, regardless of the mix of infrastructure services (e.g. on-river versus off-river, or both) a particular operator provides.

Clarity on how charges are determined, what infrastructure services they relate to, and by whom they are payable will assist customers, operators and the regulator in evaluating progress towards the user pays and economic efficiency objectives, and the principle of full cost recovery. Specific rule advice and recommendations to enhance pricing transparency are discussed in sections 5.4 and 5.13.

Pricing discrimination arises in cases where an operator systematically sets charges with reference to a particular underlying characteristic (such as the class of user, or according to the purpose for which water is used), such that a particular person or group pays more (or less) than if charges were allocated according to the principle of user pays. The ACCC acknowledges that, due to the costs involved, it is not feasible to ensure that no price discrimination can occur (or, put differently, that the principle of user pays is fully implemented), but has made rule advice to prohibit direct price discrimination on certain grounds, and to prohibit charges which have the effect of discriminating against certain people and distorting water use and trading decisions. This is discussed in section 5.3.

On balance, the ACCC believes that any additional clarity that could be obtained by ordering or prescribing a hierarchy within the BWCOP, either in the water charge rules or otherwise, would be outweighed by the loss of flexibility for regulators to respond to circumstances specific to particular infrastructure operators and their customers. However, the ACCC also acknowledges the importance of guidance material on the interpretation of the BWCOP, and how they should be applied. In particular, the ACCC agrees with stakeholders in the Peel valley that interpretation of the term ‘perverse or unintended pricing outcomes’ requires further guidance.

#### Draft recommendations

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| Recommendation ‑  The ACCC will review its guidance materials and work with Basin State regulators and other industry stakeholders to develop more practical and detailed guidance on the interpretation of, and the interaction between, the Basin Water Charging Objectives and Principles.  This will include:   * interpretation of key terms such as “perverse or unintended pricing outcomes”; * improved identification of and links between the infrastructure services provided and how infrastructure charges are determined to recover the costs of service provision; and * cost allocation and the basis for determining charging areas (for example, where charging areas are based on geographic areas) should be assessed. |

## Drafting amendments to improve clarity

#### Background

As noted in the Issues Paper, 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 0). However, there may be some areas where the rules could be re-drafted to improve clarity. If done carefully, such an exercise should decrease the regulatory burden imposed on regulated entities.

The Issues Paper asked stakeholders to identify if there were any particular provisions of the water charge rules that are not clearly drafted, unnecessarily complex or otherwise ambiguous (Question 4).

#### Stakeholder feedback

Daniel Mongan, an irrigator in Goulburn-Murray Water (GMW)’s Central Goulburn Irrigation District, submitted that the water charge rules are “generally too broad and need to become more specific in order to achieve the outcomes sought by the ACCC and Federal Government”.[[56]](#footnote-56) However, stakeholder submissions in response to the Issues Paper did not identify any specific areas of the water charge rules that should be re-drafted to improve clarity that are not otherwise considered throughout this Draft Advice (for example, ambiguity about the publication requirements in relation to Schedules of Charges, considered in section 5.54).

However, at the public forums held by the ACCC, several stakeholders commented on the difficulty that they had clearly understanding the current drafting of the rules.

#### Discussion

As noted above, a number of key areas of the rules will be re-drafted as a consequence of the proposed advice (if adopted), which provides an opportunity to improve the clarity of the rules. This is particularly the case in relation to requirements for an infrastructure operator’s schedule of charges (see section 0) and the calculation of termination fees (see section 6.2).

### Combining the water charge rules and water market rules

#### Background

The three sets of water charge rules, and the Water Market Rules 2009 (WMR) were made at different times between 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 currently apply only to IIOs. 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 combined with the WMR.

#### Stakeholder feedback

The majority of stakeholder submissions on this topic were in favour of combining the three sets of water charge rules into one instrument,[[57]](#footnote-57) while Waterfind supported combining the water charge rules and the WMR.[[58]](#footnote-58) The NSW Government contended that combining the WCTFR and the WMR would be efficient as they both apply to IIOs, but retaining the WCIR and WCPMIR as separate instruments. The NSW Government added that it would “create less confusion for stakeholders”.[[59]](#footnote-59) The National Irrigators’ Council (NIC) noted that there “are advantages in having all the Rules incorporated into one set of Rules; however, the cost of doing so should not outweigh the logic and convenience of a single set of rules”.[[60]](#footnote-60) Queensland Farmers’ Federation (QFF) identified that there would be “value in having one set of rules”, but recommended that the ACCC review the need for the rules in whole or part and stated that there would not be “significant benefit in a Queensland context from combining the water market and water charge rules”.[[61]](#footnote-61)

When discussed at the Public Forums, stakeholders were generally supportive of the notion to combine the water charge rules into one instrument.

#### Discussion

As noted in the Issues Paper, the ACCC considers that combining separate sets of rules into one instrument 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.

While the WCTFR currently apply only to IIOs, the proposed extension of these rules to apply to all infrastructure operators (see section 6.1) means there would be little merit in combining the WCTFR with the WMR, as proposed by the NSW Government. The ACCC notes in any case that the WMR are more closely related to the WTR than the water charge rules.

The ACCC notes that the Act refers simply to ‘water charge rules’ and does not require separate sets of rules for different types of regulated water charges.[[62]](#footnote-62) The ACCC considers this review of the water charge rules provides a good opportunity to combine the three sets of water charge rules that were made in succession in 2009 and 2010 into one legislative instrument. However, the ACCC is also mindful that this should be done in such a way that it does not inadvertently change the scope of the rules or what is required by the rules.

As such, the ACCC advises that the three sets of water charge rules be combined by:

* incorporating the provisions of the current WCTFR as a new Part (Part 10) of the WCIR
* combining most of the pricing transparency requirements of the WCPMIR into the pricing transparency requirements in Part 4 of the WCIR
* retaining the existing part and section numbers of the WCIR; and
* renaming the WCIR so they are simply referred to as the Water Charge Rules

In developing its Draft Advice, the ACCC considered the extent of any overlap or duplication in the definitions used in the three sets of water charge rules. For example, the WCIR and WCPMIR both use the term ‘regulated charge’, but refer to very different sub-categories of regulated water charges as defined by section 91 of the Act. As part of combining the three sets of water charge rules, definitions in the water charge rules should also be revised to remove duplication and inconsistencies in order to improve clarity.

In particular, the ACCC advises that the terms ‘infrastructure charge’, ‘planning and management charge’[[63]](#footnote-63) and ‘termination fee’ be defined to refer to the specific types of regulated water charges currently regulated by the WCIR, WPMIR and WCTFR respectively.

The ACCC considers the definition of ‘infrastructure charge’ to be particularly important as it may help dispel the widely held notion that such charges are for the water stored and delivered through the infrastructure.

#### Draft rule advice

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| Rule advice ‑  The three sets of water charge rules (WCIR, WCTFR and WCPMIR) should be combined into a single instrument by incorporating the relevant provisions of the WCTFR and WCPMIR into the WCIR and renaming this as the Water Charge Rules. The water market rules should not be combined with the water charge rules.  This rule advice affects all three sets of water charge rules (WCIR, WCTFR and WCPMIR).  Rule advice ‑  The proposed single set of water charge rules should apply to ‘regulated water charges’ as set out in the Act and Regulations, with separate definitions for: ***infrastructure charge*** – corresponding with the definition of ‘regulated charge’ in the WCIR***planning and management charge*** – corresponding with the definition of ‘regulated charge’ in the WCPMIR***termination fee*** – corresponding with a charge allowed for under the current WCTFR rule 6 or rule 8 This rule advice is reflected throughout the proposed water charge rules, and terms are defined in Part 1, Rule 3. |

## ACCC guidance material & ACCC WCIR pricing principles

#### Background

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, including the *Pricing principles for price approvals & determinations under the water charge (infrastructure) rules* (Pricing Principles). These are available on the ACCC’s website.[[64]](#footnote-64)

In the Issues Paper, the ACCC sought feedback on the form, content and usefulness of these guides, and asked whether any further information on the rule requirements might be useful.

#### Stakeholder feedback

A small number of stakeholders provided feedback on the ACCC’s guidance materials in written submissions.[[65]](#footnote-65) Some stakeholders commented that the ACCC’s guidance was overly complex in some areas. For example, the NIC submitted that “NIC finds the ACCC’s guidance material useful in some instances and overly complex or caveated to the point where it is less useful in others. NIC values the ACCC’s willingness to engage in face to face conversation the most useful form of guidance offered by the ACCC.”[[66]](#footnote-66) Coleambally Irrigation Cooperative Limited (CICL) submitted a similar view: that the guidance material “is useful but remains complex” and the ACCC’s willingness to engage face to face “helps bridge the complexity and is greatly appreciated by CICL”.[[67]](#footnote-67) Murrumbidgee Irrigation submitted that the guidance material provides a “useful means to assist in understanding legislative requirements and expand on some aspects of the [water charge rules]”, however where there are differences between the guidance material and the legislation, enforcement action should not preference information contained the guides.[[68]](#footnote-68)

Daniel Mongan, an irrigator in Goulburn-Murray Water (GMW)’s irrigation network, submitted that “[t]he ACCC’s guidance materials are generally lengthy and highly legalistic, with the primary audience set as the accredited bodies and the regulated entities...It would be reasonable to assume that few customers actually understand how their prices are set, let alone the role that the ACCC plays in their approval.”[[69]](#footnote-69) Mr Mongan suggested that the ACCC produce “simple brochures that explain the role of economic regulation and the ACCC” to irrigators or by “using existing networks of ACCC accredited bodies and Water Corporations”.[[70]](#footnote-70) In contrast, the Queensland Farmers’ Federation commented that the ACCC guidance materials are “useful and necessary to interpret the rules”.[[71]](#footnote-71) The ACCC also received verbal feedback confirming the usefulness of existing guidance materials in consultation discussions with various Basin State government departments.

Some stakeholders provided suggestions on how guidance could be made of greater relevance, including through reducing complexity and by complementing written materials with targeted, face-to-face conversations.[[72]](#footnote-72) The ACCC has noted these comments, which will help inform our approach to revising existing guides and developing new guidance materials.

#### Discussion

Following a decision by the Minister on any amendments to the water charge rules, the ACCC will revise its existing guidance material or prepare new material, as required. In doing so, we will consider format and content and will consult with stakeholders affected by the changes, including Basin State regulators, infrastructure operators and irrigators, to ensure that future guidance is clear and concise and meets their needs.

While the rule advice set out in sections 5.5 and 5.6 will, if implemented, limit the scope for the ACCC Pricing Principles to directly affect the approval or determination of infrastructure charges, the ACCC still intends to thoroughly review the Pricing Principles to ensure they reflect regulatory best practice. The Pricing Principles will still guide any ACCC determinations for Part 6 or Part 7 operators, and deal with the interpretation of BWCOP drawn directly from the NWI committed to by the Commonwealth and all Basin States. Recognising the significant experience of Basin State economic regulators in the rural water sector, the ACCC will consult closely with Basin State regulators during its review of the Pricing Principles. In particular, the ACCC hopes this can assist in the development of nationally consistent approaches to regulatory issues in the rural water sector.

Under the Commonwealth Government’s new Regulator Performance Framework,[[73]](#footnote-73) the ACCC will also report publicly on how it has sought to ensure that ‘communication with regulated entities (and other stakeholder groups) is clear, targeted and effective.’[[74]](#footnote-74)

#### Draft recommendations

|  |
| --- |
| Recommendation ‑  Future reviews of the ACCC’s Pricing Principles will be undertaken in close consultation with industry stakeholders, and the ACCC will work with Basin State economic regulators to ensure the Pricing Principles reflect regulatory best practice. The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector. |

## Enforcement and compliance approach

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 and take follow-up investigative and enforcement action, where appropriate.

In the Act review report, the Panel commented on enforcement approaches, noting that ‘a sensible and cooperative approach to monitoring and compliance activities should be applied by regulators under the Act’,[[75]](#footnote-75) and made one recommendation relating to enforcement powers in the Act.[[76]](#footnote-76)

In the Issues Paper, the ACCC sought feedback from stakeholders on its use of its enforcement powers and on how it could improve its approach to achieving compliance with the water charge rules.

#### Stakeholder feedback

A number of submissions from infrastructure operators and peak industry bodies commented on the ACCC’s enforcement and compliance approach, with several submissions proposing that the ACCC take an ‘exception-based approach’ to compliance monitoring[[77]](#footnote-77), and that the ACCC should focus on a ‘collaborative approach’ to educating stakeholders about their obligations, with penalties being applied as a last resort.[[78]](#footnote-78) Others recommended moving towards an ombudsman-type system for investigating and resolving complaints, disputes or compliance issues.

WMI, in its submission to the Act Review, expressed the view that the ACCC has taken an unnecessarily zealous approach to enforcing compliance, sometimes on insignificant or minor rule requirements or matters.[[79]](#footnote-79) These views were in contrast to others that complained about the lack of responsiveness shown by some operators to compliance concerns raised by their customers.

Daniel Mongan submitted his concerns with a ‘cooperative approach’ to enforcement, stating that “it lacks transparency and potentially places a bias on supporting the regulated entities, rather than their customers”.[[80]](#footnote-80)

The National Irrigators’ Council (NIC) submitted that it was important to apply the rules on a consistent basis and that the ACCC should “take into account whether non-compliance was a consequence of inappropriate intent, poor systems or a lack of understanding; the scale of the breach and whether the offending IIO has previously breached the [rules] before deciding to impose fines”.[[81]](#footnote-81)

Coleambally Irrigation Cooperative Limited (CICL) submitted that in the one compliance matter raised with CICL in recent years, CICL was of the view that the ACCC “pursued the matter appropriately and intelligently”. CICL added that the ACCC “should avoid making an ‘example’ of an IIO unless that IIO’s transgression has been deliberate and / or the IIO has been under the notice of the Commission previously”.[[82]](#footnote-82)

Murray Irrigation Limited (MIL) commented that the ACCC’s approach to compliance in relation to private operators and State governments is uneven. MIL stated that “in [their] experience, where private IIOs have erred in compliance with a rule, the ACCC has acted immediately and [publically]; however, State governments are still able to be non-compliant without any repercussions”.

In discussion at several public forums,[[83]](#footnote-83) a number of operators, especially smaller operators who had been subject to investigation by the ACCC on compliance issues, noted the time involved and the costs they faced in responding to such investigations, with a concern that any penalties imposed were effectively passed on to operators’ customers.[[84]](#footnote-84)

Peter Beex’s submission raised the concern that the ACCC had not taken action in response to a specific issue of concern to him.[[85]](#footnote-85)

#### Discussion

The ACCC’s approach to monitoring and enforcing compliance is outlined in its *Guide to compliance and enforcement of the water market rules and water charge rules* (2009; revised 2011). This document sets out the process that the ACCC will follow and the factors that the ACCC will consider when investigating complaints about operators and concerns about compliance with the water charge rules.[[86]](#footnote-86) The approach outlined is designed to educate regulated water stakeholders and other water users about their rights and obligations under the rules and to minimise compliance costs.

The ACCC reports on the compliance and enforcement activities it has undertaken in its annual water monitoring report. Additionally, it will sometimes issue media releases or publish newspaper articles or other targeted information about the outcomes of specific investigations it has undertaken. Generally, these publications are designed to educate stakeholders and to deter others from engaging in similar, non-compliant conduct and are not principally designed to punish the subject of the investigation. Additionally, under the Regulator Performance Framework, the ACCC will now report annually on its measures to demonstrate that its compliance and monitoring approaches are streamlined and coordinated.

Where the ACCC identifies policies or practices of regulated entities 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.[[87]](#footnote-87) It believes that this approach can help foster a culture of compliance among regulated entities, minimising the risk that their policies or practices may cause harm to water users and other consumers through conduct contrary to the rules. This is consistent with the preferred approach outlined in operator submissions.

In its report, the Panel noted that, since the water charge and market rules were made, the ACCC had used its formal enforcement powers against two operators (in relation to 5 instances of non-compliance) and had resolved a number of other cases administratively where breaches of the rules were likely but were considered minor or resulting from a genuine misunderstanding of the rules. It also noted feedback from industry that the ACCC had modified its approach over time to take a more educative role in compliance matters, including through the provision of targeted guidance to operators (especially smaller operators).

Noting stakeholder concerns as to the financial impacts on customers of penalties, the ACCC has not generally sought to impose monetary penalties on operators where non-compliance has been detected (only issuing three infringement notices totalling $66,000 to Murrumbidgee Irrigation Limited (MI) in 2011 in circumstances of multiple breaches of the WCTFR).

The ACCC recognises that responding to specific information requests and investigation of complaints and compliance concerns imposes costs on operators (and ultimately customers), regardless of whether non-compliance is identified or penalties are sought. However, these costs form part of the (reasonable) costs of doing business. In specific investigations, the ACCC will generally allow operators’ requests for extensions of time to respond or provide information to mitigate the burden of response. The risk that compliance costs will be excessive will also be mitigated at a high level by the operation of the Commonwealth Government’s Regulator Performance Framework and through the government’s ongoing commitment to reducing regulatory burden.

More generally, the ACCC collects data from infrastructure operators annually as part of its monitoring role under the Act. The ACCC recognises the costs incurred by operators in responding to its requests for information. The ACCC also agrees with the conclusion of the Independent Expert Panel (the Panel) for the Review of the Act that “Australian Government agencies should ensure that data collected under the Act is collected in the right form at the right time for the right purpose and used to create information that is of value, while minimising regulatory burdens and any duplication of requests imposed on data providers”.[[88]](#footnote-88) The ACCC takes regular steps to refine, reduce and improve its annual requests for information, while bearing in mind the transitional costs imposed on operators when information requests are altered. The ACCC is also participating in the Interagency Working Group on Review of Water Information Reporting Burdens, chaired by the Bureau of Meteorology, which was formed based on Recommendation 18 of the Panel’s report.[[89]](#footnote-89)

The ACCC cannot always investigate complaints and respond to the concerns raised with it by individual irrigators, and resources are allocated according to strategic priorities (identified as part of a risk-based approach to enforcement, adopted to meet the requirements of the Regulator Performance Framework). Further, concerns raised often do not fall within the jurisdiction of the ACCC.

For these reasons, the ACCC has proposed the rule advice to expand the private right of action in the WCIR to apply more generally to the water charge rules, enabling individuals to bring legal action to recover loss or damage resulting from a breach. Section 8.3 also contains a recommendation that Basin States consider expanding the jurisdiction of their ombudsman schemes (where not already provided for) to include capacity to review complaints relating to State water management law.

#### Draft rule advice

|  |
| --- |
| Rule advice ‑  The private right of action (to recover loss or damage resulting from a breach of the rules) which currently applies to the water charge (infrastructure) rules should be extended to apply to the water charge rules more generally.  This rule advice is implemented in Rule 57 of the proposed water charge rules.  Recommendation ‑  The ACCC will continue to monitor the necessity and benefit of asking for particular compliance information through these processes and, in specific investigations, will continue to consider requests for extensions of time to respond to the ACCC where resourcing is a concern.  Recommendation ‑  The ACCC will continue to work closely with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from the ACCC’s review. |

## Future reviews of the water charge rules

The ACCC’s current review was initiated by the Minister in response to a recommendation to the Commonwealth Government following an independent review of the Act.

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

#### Stakeholder feedback

State Water (now WaterNSW) submitted to the Act Review its concerns about the process for creating, amending and revoking the rules, as set out in the Act.[[90]](#footnote-90) State Water submitted that its preferred approach to address its concerns would be for “the Act [to] be amended to include a clear and transparent rule change process”, which includes, among other suggested features, the ability for rule change applications to be made to, and assessed by, an independent body against “objective” criteria to be defined in the Act. The ACCC notes that this is a suggestion that would be outside the scope of the water charge rules review. State Water suggested that failing the implementation of its preferred solution, an independent body should review the WCIR “as soon as possible and every four to five years thereafter” and that these review dates “should be legislated”. State Water also noted generally that “[r]egulations should be reviewed periodically to test their continued relevance”.

The Issues Paper sought feedback from stakeholders on the advantages and disadvantages of indicating in advance the timing and scope of future reviews of the water charge rules. Only four submissions commented on this issue. Central Irrigation Trust (CIT) proposed a review of the rules in 15 years.[[91]](#footnote-91) The Queensland Farmers’ Federation (QFF)[[92]](#footnote-92) and National Irrigators’ Council (NIC)[[93]](#footnote-93) supported transparency of the timing and scope of reviews, noting that they provided an opportunity to engage with industry but needed to be justified (due to resources required). NIC, CIT and Coleambally Irrigation Cooperative Limited (CICL) commented generally on the number of reviews in the water sector. [[94]](#footnote-94)

#### Discussion

A key principle in the *Australian Government guide to regulation* is that all regulation should be periodically reviewed to test its continuing relevance. Reviews provide an opportunity to consider whether regulation remains relevant, effective and efficient, and for stakeholders to comment on any issues with the operation and implementation of the rules.

Because reviews can be time-consuming and resource-intensive for government and for participating stakeholders, it is important that they are undertaken at an appropriate time and, where possible, are coordinated with other relevant processes and milestones to maximise their effectiveness. However, it can be difficult to anticipate the optimum timing of a review ahead of implementation of the legislative instrument.

As this review illustrates, the current framework provides discretion to coordinate processes or to respond to issues as they arise. Under the Act, if the Minister seeks to make, amend or repeal the water charge rules or WMR, they must first obtain the advice of the ACCC.[[95]](#footnote-95)

The *Legislative Instruments Act* 2003 sets out rules relating to sunsetting, with legislative instruments ordinarily automatically repealed on the 1 April or 1 October falling on or after the tenth anniversary of registration of the instrument. The proposal to consolidate the three sets of water charge rules into the water charge (infrastructure) rules means that, unless that instrument is exempted, the rules will sunset on 1 April 2021. Review of the water charge rules prior to this date may therefore be appropriate but can be assessed closer to that time.

# Water Charge (Infrastructure) Rules 2010

## Background

#### Rationale for the WCIR – regulating charges for water infrastructure levied by monopolistic operators

The WCIR set requirements relating to the fee and charges payable to infrastructure operators for infrastructure services.

Throughout the Murray-Darling Basin (MDB), water service infrastructure involves 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 then deliver water through gravity-fed and / or pressurised networks operating primarily off-river.

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.

Water infrastructure 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.

It is important to understand that the infrastructure charges regulated by the WCIR are levied in order to recover (at least partially) capital and operational costs incurred in relation to building, maintaining, and managing the delivery of water through infrastructure. Contrary to the views held by some stakeholders, regulated water infrastructure charges do not equate to payments for the consumption or use of water directly.[[96]](#footnote-96) Rather, such charges relate to the provision of infrastructure that enables holders of water access rights and irrigation rights to receive water they are able to access under those rights. This includes water service infrastructure used to provide on-river infrastructure services (such as dams and weirs) and purpose-built infrastructure that is used to provide off-river infrastructure services (primarily to deliver water to irrigators). As such, charges for water infrastructure vary considerably across the MDB.

Fundamentally, these differences are caused by differences in the types of infrastructure and infrastructure services provided, and it is appropriate that these differences should be reflected in different infrastructure charges. Further, infrastructure charges differ due to factors such as the number of customers who receive services relating to particular infrastructure, and the degree to which infrastructure operators recover their costs from users.

Prior to the introduction of the WCIR, larger infrastructure operators were generally regulated by state-based regulators, although the nature of that regulation varied across the MDB. Further, member-owned operators in NSW and SA were not subject to any substantive state government or independent economic regulation. Under the WCIR, larger infrastructure operators are regulated either by the ACCC or by state regulators, where the state regulator is accredited by the ACCC under the WCIR. Accredited state regulators are required to act consistently with the ACCC’s Pricing Principles as a condition of their accreditation. Infrastructure charges of member-owned operators in NSW and SA, as well as SunWater in Queensland, are subject to more light-handed regulation under the WCIR. All IIOs in the MDB are also subject to the Water Charge Termination Fees Rules (discussed in Chapter 6).

#### Infrastructure operator ownership and governance arrangements

There are a range of different governance and ownership arrangements for operators in the MDB. In Queensland and Victoria, irrigation water delivery activities are generally vertically integrated into a larger infrastructure operator that also provides on-river infrastructure services.[[97]](#footnote-97) Infrastructure operators in NSW and SA are typically member-owned (see section 5.2).

Ownership and governance arrangements of infrastructure operators may affect an operator’s ability or willingness to exercise its monopoly power in certain contexts. For example, where boards of member-owned operators are directly accountable to member customers, this accountability may help create 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, and governance structures may not be a sufficient deterrent against the exercise of monopoly power in all cases. In particular, pricing discrimination by infrastructure operators in favour of particular customer groups or classes remains a significant concern. Pricing discrimination is considered further in sections 5.2 and 5.3. The potential for monopoly pricing by infrastructure operators is considered in section 5.6. The impact of differences in charging arrangements between infrastructure operators is considered further in section 5.10.

## Tiered regulation of infrastructure operators

Different parts of the WCIR apply to different operators, based on the operator’s ownership structure (whether they are ‘member-owned’ or not) and its size (in terms of the volume of Basin water resources that the operator provides infrastructure services in relation to), as follows:

* Part 3 non-discrimination requirements apply to all *member-owned* operators
* Part 4 requirements relating to the operator’s Schedule of Charges generally apply to all operators, except that only IIOs are required to provide a statement as per Rule 4(d), and operators less than 10 gigalitres (GL) in size are exempt from schedule of charge publication requirements.
* Part 5 Network Service Plan (NSP) requirements apply to member-owned operators larger than 125 GL and non-member-owned operators between 125 GL and 250 GL
* Part 6 price approval/determination requirements apply to non-member-owned operators over 250 GL in size.

The table 5.1 below summarises the application of these parts of the WCIR.

Table 5.1: Existing structure of application 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.

In its Issues Paper, the ACCC sought stakeholders’ views on the advantages and disadvantages of the current tiered regulatory approach in the WCIR (question 13). More particularly, the ACCC asked whether the distinction between member-owned and non-member-owned operators is still appropriate (question 11), and whether member-owned operators have sufficient regard to the interests of *all* their customers, particularly smaller customers, when determining their charges and tariff structures (question 12).

#### Stakeholder feedback

The ACCC received a range of views on the current tiered application of the WCIR; however, there was general support for a lighter approach such as is currently applied in regulation of member-owned operators, as opposed to requirements imposed on certain non-member-owned operators via Part 6 of the WCIR.

Central Irrigation Trust (CIT) supported the distinction between member and non-member-owned infrastructure operators noting that “each group of operators have very different accountability to their customers and owners”.[[98]](#footnote-98) Murrumbidgee Irrigation Limited (MI) submitted that “it remains appropriate that member-owned operators be subject to less burdensome regulation because they are controlled by their shareholder customers, and this ensures a natural check and balance against operators taking advantage of their market power”.[[99]](#footnote-99) MIL submitted that differential treatment for member-owned operators is justified because of the internal governance arrangements for example, customers’ ability to influence the decisions of the company through constitutional rights and annual general meetings.[[100]](#footnote-100) Western Murray Irrigation (WMI) submitted that, “[a]s a member-owned IIO, WMI is always focused on trying to keep all costs (especially compliance) to a minimum”.[[101]](#footnote-101) National Irrigators’ Council (NIC) stated that “[t]ier [t]hree regulatory requirements protect irrigators and IIOs from monopoly pricing regimes. It is only fair that bulk water providers be regulated and subjected to a transparent pricing determination regime”.[[102]](#footnote-102)

CIT[[103]](#footnote-103), MIL[[104]](#footnote-104) and NIC[[105]](#footnote-105) submitted that all member-owned operators should be treated equally under the tier one rules; that is, they did not support different tiers of regulation for member-owned operators based on their size. Similarly, Coleambally Irrigation Cooperative Limited (CICL) submitted that “the only differentiation that should exist between IIOs is that between those that are publically versus privately owned”.[[106]](#footnote-106) Many of these submissions also referred to the Part 5 requirements (see section 5.5).

Irrigator groups such as the Victorian Farmers’ Federation (VFF)[[107]](#footnote-107) and the Queensland Farmers Federation (QFF)[[108]](#footnote-108) supported the existing tiered approach. The VFF supported a “higher level of regulation” for non-member owned infrastructure operators. [[109]](#footnote-109) In both cases, the support appeared to be for the outcome that smaller operators, whether member-owned or not, should *not* be subject to a full price determination by a regulator, such as is currently applied to Part 6 operators. Coliban Water submitted its view that its rural services should not be subject to Part 6 of the water charge rules, arguing that it meets the obligations of a Part 6 operator “in principle” because its charges are determined by the Essential Services Commission of Victoria. Coliban Water added that it “supports cost based regulation being applied at an entity level, rather than a service level, and the intent of the tiered approach to minimise the regulatory burden for smaller infrastructure operators”. [[110]](#footnote-110)

Waterfind submitted that differential treatment of member-owned operators has produced “positive benefits”, identifying the non-discrimination requirements as one example. However, Waterfind also submitted its concerns about certain charging arrangements that have arisen as a result of some infrastructure operators’ charges not being subject to Part 6. Waterfind suggested that rather than a full price approval or determination for all these operators’ charges, transaction fees (for applications to obtain, vary or trade water access rights or lodgement of a transaction with a water registry) and “potentially” other water planning and management charges should be subject to regulatory approval.[[111]](#footnote-111)

Daniel Mongan suggested that in order to improve the clarity of criteria used to determine infrastructure operators’ size and ownership, the ACCC could list the entities regulated by the water charge rules with “catch all” rules for new entrants.[[112]](#footnote-112)

#### Discussion

In making its initial advice on the formation of the WCIR, the ACCC considered that member-owned infrastructure operators were less likely to take advantage of their market power to the detriment of their customers. In particular, the ACCC identified that the rationale for applying different levels of regulation to infrastructure operators based on their ownership structure is that member-owned operators: [[113]](#footnote-113)

* are less likely than non-member-owned operators to exercise their market power to extract monopoly rents from their customers;
* are accountable to their members;
* are more likely to pursue efficiencies in the level of prices, services and investment for their member customers; and
* tend to be not for profit because of governance/constitutional arrangements of the way they operate their business.

However, in its initial advice, the ACCC also identified certain concerns regarding member-owned operators, such as:[[114]](#footnote-114)

* the incentive to discriminate against non-member and non-irrigation right customers (Parts 3 and 7); [[115]](#footnote-115) and
* transparency around infrastructure investment and the price setting process (Parts 4 and 5).

In relation to government-owned infrastructure operators, the ACCC took the view that its regulatory approach should in general treat government-owned entities as if they were private (non-member-owned) firms. This general view assumes that the government owned firm would face the same incentives and operate in a manner similar to the privately owned firm.[[116]](#footnote-116)

Since the commencement of the rules, the ACCC has observed that while member ownership of an operator may limit incentives to charge prices that result in monopoly profits at an aggregate level (for example, because the operator is not-for-profit), there remain concerns about use of monopoly power to discriminate in favour of certain customer groups. For example, operators may have incentive to discriminate against customers who trade water out of irrigation districts, or against customers who transform their right to receive water under an irrigation right into a water access entitlement (WAE). Further, the use of tiered pricing structures may benefit large users over small users in a way that is not commensurate with underlying differences in costs of service provision to these users.

The ACCC is concerned that, due to the monopoly power exerted over customers of an infrastructure operator, and the significant barriers to exit, customers that are discriminated against may not have sufficient recourse to remedy their situation. This is particularly the case in relation to discrimination against small customers in member-owned networks where voting rights are based on size of holdings (whether water access right, irrigation right or water delivery right).

However, the ACCC also recognises that stakeholders have generally been of the view that a ‘heavy-handed’ approach is generally not necessary, except in relation to the largest, non-member-owned operators. In particular, the ACCC recognises concerns raised by larger member-owned operator and non-member-owned operators currently subject to Part 5 rule requirements. The ACCC considers that rule requirements of Part 5 can largely be repealed without compromising effective standards, as long as there are sufficient protections for customers in cases where the operator has clear incentives to engage in discriminatory pricing. This issue is discussed in section 5.5.

In balancing these several concerns, the ACCC is of the view that the most appropriate outcome is to streamline the application of the WCIR by removing references to the ownership structure of an operator in determining the application of rules. Further, the ACCC advises that full charge approval / determination be applied only to the infrastructure charges of certain infrastructure operators who provide on-river infrastructure services (see section 5.6 and 2.1). The streamlined approach, together with strengthened non-discrimination provisions (see section 5.3) and pricing transparency provisions (see section 5.4), will provide an appropriate level of regulation while significantly decreasing the regulatory burden faced by many operators. This advice is made on the basis that concerns relating to the exercise of monopoly power, such as discrimination between certain types or classes of customers, appears to apply equally or even more so to member-owned operators than non-member-owned operators in certain cases.

The intent of the proposed new structure of the water charge rules is that operators are subject to a more consistent set of requirements, and that those requirements should not subject operators to undue regulatory burden. The behaviour that the enhanced non-discrimination and pricing transparency provisions seek to preclude is not unique to operators based on their status as a member-owned operator (or non-member owned operator). Moreover, since the test for whether an infrastructure operator is member-owned relates to whether the majority of the operator’s customers are related customers,[[117]](#footnote-117) it is possible for the structure of an operator’s demand or customer base to change such that under this test, a non-member owned operator becomes a member-owned operator and vice versa. It is important to ensure that application of the rules does not suddenly alter due to such factors as an operator’s changing customer base or demand profile.

This new structure reflecting the rule advice through this Chapter is summarised in Table 5.2, using the categories relevant to the current application to enable clear comparison with the existing structure, which was summarised in Table 5.1 above.

Table 5.2: Proposed new structure for application of rules in relation to infrastructure charges

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Ownership | All infrastructure operators (regardless of ownership) | | | |
| Size (GL) | < 10 | 10 –125 | 125 –250 | 250+ |
| Part 3 | ✓ | | | |
| Part 4 | ✓ | | | |
| Part 5 | repeal | | | |
| Part 6 | Limited application, with an exemptions process (see section 5.6 for more detail). | | | |
| Part 7 | Limited application, with an exemptions process (see section 5.7 for more detail). | | | |

## Non-discrimination requirements (Part 3)

Currently under Part 3 a member-owned operator (of any size) is prevented from charging a different infrastructure charge to a customer based on whether or not that customer holds an irrigation right against the operator. However, this rule does not prevent differential charging where this difference reflects actual cost differences.

The purpose of this rule is “to ensure that price signals received by irrigators and operators are consistent with the economically efficient use of water resources and infrastructure”,[[118]](#footnote-118) and to prevent price discrimination against transformed customers that may deter transformation of irrigation rights.[[119]](#footnote-119) The current rule seeks to ensure that any differences in prices between irrigation right and non-irrigation right holders only reflects the difference in the costs of providing infrastructure services to each of those customers or groups of customers.[[120]](#footnote-120)

Currently, Part 3 non-discrimination requirements only apply to member-owned operators. In its Issues Paper, the ACCC identified that infrastructure operators that are not member-owned also enjoy a degree of market power but may arguably face fewer restrictions (through accountability to their customers) on the exercise of that power than member-owned operators.

The ACCC sought feedback in its Issues Paper on whether there were other forms of discrimination that are of concern (question 14), including discrimination by non-member-owned operators. Further, the ACCC asked whether there were non-regulatory measures that could address the potential for price discrimination by infrastructure operators (question 15).

#### Stakeholder feedback

While there were few submissions that commented directly on the operation Part 3, member-owned operators broadly commented that they have incentives to provide outcomes that are in the interests of their members, and that there are mechanisms in place for the operators to be accountable to their members. For example, CIT broadly commented that the current non-discrimination requirements are “adequate”.[[121]](#footnote-121) National Irrigators’ Council (NIC) submitted that member-owned operators are accountable to their members and that the “drive for industry innovation and regional investment” acts to deter unreasonable charges or price distortion practices. [[122]](#footnote-122) NIC submitted (within the context of consistency in water charging) that IIOs should be able to set their pricing policies to meet “particular circumstances” with the knowledge that a customer has recourse to the ACCC if the customer considers the prices to be unreasonable.[[123]](#footnote-123) NIC also noted that the schedule of charges requirements and the Part 3 rules “act as a deterrent for price discrimination”.[[124]](#footnote-124) Murrumbidgee Irrigation Limited (MI) added that customers can challenge prices through unique member-owned avenues or through the ACCC.[[125]](#footnote-125) Such arguments suggest there is no need for rules to specifically address price discrimination; however the ACCC notes that there is little benefit to a customer having recourse to the ACCC if there are no legislative protections against the pricing discrimination in question.

The Queensland Farmers Federation (QFF) questioned the need for “regulation to prohibit price discrimination of any form”. The QFF argued that it is important to maintain the current approach of allowing infrastructure operators to “design their tariff structures and charging arrangements as they see fit” and that it is necessary to allow for differences between schemes and operators.[[126]](#footnote-126)

However, submissions and comments made by stakeholders attending the ACCC’s public forums did raise concerns about operators unfairly providing preferential treatment to some customers over others.

Sally Jones, an irrigator in the Murrumbidgee Irrigation Area, expressed concerns about the quality of water delivered to downstream irrigators. Ms. Jones identified that one of the reasons for the lack of attention to water quality issues could be “because upstream water users are the majority shareholders”.[[127]](#footnote-127) The Wah Wah Stock and Domestic Water Users Association (WWSDWUA) raised a similar point in highlighting that WWSDWUA have “a small number of votes and therefore [have] no representation on the MI board”.[[128]](#footnote-128)

Several stakeholders raised concerns about selective discounting of termination fees. These are discussed in detail in section 6.2. In terms of price discrimination, the ACCC notes that use of discounting can be an alternative to directly discriminating against particular groups of customers by charging a different price for the same service.

Ruth Angel, an irrigator in Goulburn-Murray Water (GMW)’s irrigation district, contended that “environmental flows are prioritised” and that “environment flows are not paid for and [the environmental water holder] does not have to pay storage costs or per megalitre”.[[129]](#footnote-129) Ms. Angel added that “[t]he environment should pay a fairer share for storage, water use and channel maintenance”.[[130]](#footnote-130) This submission raises the important point that environmental water users, where they are receiving the same class of infrastructure service as an irrigator, should pay the same infrastructure charges for those services. However, this should not preclude an operator developing different types of services that may be demanded by different customers.

Waterfind identified particular concerns about fees imposed by some member-owned infrastructure operators for temporary water allocation traded out. Waterfind contended that these transactions fees create a barrier to trade because member-owned operators are able to set their own arrangements for these fees.[[131]](#footnote-131) Such transaction fees, where they go beyond the reasonable administration costs of processing the trade, amount to discrimination against a customer who trades their water allocation out of the operator’s network.

Similarly, the Murray-Darling Basin Authority (MDBA) submitted its view that “charging arrangements have the potential to distort the market and discriminate between water users”.[[132]](#footnote-132) The MDBA stated that it is considering the scope of the Basin water trading rules to extend to discriminatory charging arrangements that could “influence a water user’s decision to trade, and they type of trade they undertake”. The MDBA submitted its view that additional or higher charges should not apply to water that is traded into a state or district than would be payable for water associated with “local entitlements”, except where the difference relates to the marginal cost of administering the trade. The MDBA further noted that the marginal cost of administering a trade may be different for each trade authority approval because there is wide variation in the number of trades in each state.

Coleambally Irrigation Cooperative Limited (CICL) submitted that it supports the ACCC overseeing the charges IIOs levy on non-member customers, but also noted that the ACCC should be aware of the differences between dividends and member benefits.[[133]](#footnote-133) This position appears to support the rationale for the current non-discrimination rule, which is that operators could face incentives to discriminate against non-members in favour of members.

Finally, MI made a technical comment on the current Rule 10, that the current drafting of Part 3 is in “broader terms than its policy intent would require” and recommended that the provision should be re-drafted to reflect the intent.[[134]](#footnote-134) The ACCC notes in response to MI’s comment, care will be taken when amending Part 3 requirements, including Rule 10, to ensure the drafting matches the policy intent.

#### Discussion

The policy intent of the current non-discrimination provision is to ensure that price signals received by irrigators and operators are consistent with the economically efficient use of water resources and infrastructure.[[135]](#footnote-135) Specifically, the provision seeks to prevent member-owned operators from discriminating against customers that do not hold an irrigation right, by imposing different (higher) charges compared to the regulated charges imposed on customers that do hold irrigation right, except where the difference reflects the cost differential incurred to provide the service. Such price discrimination could act as a barrier to transformation and trade, and detract from progress towards implementing the principle of user-pays.[[136]](#footnote-136) In short, there was a need to provide some protection to a discrete sub-set of customers from the exercise of market power by member-owned (monopoly) operators. This rationale remains valid. However, the existing clause is limited in scope and application.

As outlined above, there were few submissions to the Issues Paper that commented directly on Part 3. However, stakeholders did raise concerns about circumstances in which operators have incentives to discriminate against some customers in favour of others.

Further, over the last five years as part of ongoing engagement with the water market through the ACCC’s monitoring, compliance and enforcement roles in the water sector, the ACCC has identified several other forms of price discrimination that are of concern. The ACCC also considers that operators’ governance arrangements can act to reinforce price discrimination, for example where voting rights are distributed within member-owned operators based on particular irrigator attributes such as the volume of water holdings.

The ACCC has identified additional cases where the interests of a sub-set of customers may not align with the interests of the infrastructure operator more generally, or the interests of customers with a controlling interest in a member-owned operator. Specifically, operators may have incentives in the following circumstances to discriminate against:

* smaller customers in favour of larger customers, for example by applying tiered tariff structures that are based on the volume of a water access right, irrigation right or water delivery right held or used by the customer[[137]](#footnote-137)
* customers to deter participation in water markets, particularly to deter sale of water access rights “out of” the area serviced by the infrastructure operator , for example by imposing trade applications fees far in excess of trade processing costs, levying infrastructure charges at the point of trade, or prohibiting trade altogether in order to provide lower prices to other customers;
* customers based on the purpose for which water is used, for example via a tariff structure under which irrigators pay for costs incurred by the infrastructure operator as a result of environmental water users, or conversely charging an environmental water user a different (higher) charge for the same infrastructure service provided to irrigators.
* customers based on their holdings of location-related rights, or based on whether customers have established a link between location-related rights[[138]](#footnote-138) and water access rights that they hold – i.e. a person’s status as a ‘non-water user’.

The rationale for each proposed proscribed grounds for price discrimination is outlined below.

##### The size of the irrigator’s water access entitlement (WAE), water allocation, irrigation right or water delivery right holdings

The ACCC maintains that the rationale for the protection currently forming Rule 10 of the WCIR remains valid, but that it should be extended to apply to all infrastructure operators. The ACCC believes that the current intent of Rule 10 is appropriate as it ensures that individual customers (that do not hold an irrigation right) are protected from selective discriminatory pricing on that basis.

The ACCC proposes the rules extend this protection to apply to all tradeable water rights. The intent of this provision is to prohibit discrimination against customers on the basis of the size of a customer’s holdings, or use of, tradeable water rights, by prohibiting different charges being applied that do not reflect differences in the costs of providing the service. For example, where a tiered declining block tariff structure is in place, customers with smaller water holdings are subject to higher average charges per ML than larger customers. When the purpose of the tiered tariff structure is not related to economies of scale, and therefore cannot be justified by reference to cost differentials, it can mean that customers with smaller water holdings effectively subsidise customers with larger water holdings.

MI and Murray Irrigation Limited (MIL) currently have tiered tariff structures that have the effect that charges per ML of water access entitlement (WAE) or water delivery right decrease with a larger volume of WAE or water delivery right. Deloitte Aurecon, in its review report of MIL’s Network Service Plan commissioned by the ACCC, commented on MIL’s tiered tariff structure to pass through government charges.[[139]](#footnote-139) Deloitte Aurecon noted that although the tiered structure provides some benefits in terms of stability when actual deliveries are higher or lower than forecast it disadvantages smaller customers because charges are not cost-reflective at lower levels. Deloitte Aurecon identified these smaller customers as being small landholders or customers with perennial requirements for permanent plantings. Deloitte Aurecon added that the tiered structure benefits larger rice farmers who take either no water or a large volume at one point in time. Similarly, Deloitte Aurecon identified that the tiered tariff structure of MI is “overly complex”, and recommended that MI should “strongly consider the benefits to customers of a simplified tariff structure”.[[140]](#footnote-140)

The ACCC is concerned that the interaction between tiered tariff structures and governance arrangements where voting rights are based on size of irrigation right or water delivery right holdings may produce a situation where smaller customers are disadvantaged in favour of larger customers, but have little or no ability to influence pricing decisions. The ACCC notes the feedback received from several stakeholders that are smaller customers of member-owned operators who feel they have little or no representation even though their operator is member-owned.[[141]](#footnote-141) In such cases, relocating outside of the operator’s network altogether (which is likely to involve considerable costs such as payment of termination fees, and/or transformation of irrigation rights), may be the only recourse for these customers to avoid being subject to this exercise of monopoly power. This also applies in the case of non-member operators, where all customers (including those with small holdings of tradeable water rights) arguably face greater challenges when attempting to have input into the operator’s pricing decisions. Therefore, the ACCC considers that operators should be prevented from exercising monopoly power in this manner via the proposed rule advice.

The ACCC notes that a customer’s holding or use of land, particularly of irrigated land, is a reasonable proxy for the size of a customer’s water access right holdings and/or water use. Therefore, in implementing this rule advice, the ACCC considers that an operator should be precluded from being able to circumvent the rule by levying differential charges according to the volume of land held, occupied, or irrigated.

It is not the intent that this rule should prevent an operator from having casual usage charges for where a customer wishes to receive delivery of water but does not have water delivery right sufficient to provide for that delivery.

##### The purpose for which water has been or will be used by a customer, and dealings with location-related rights

The intent of this proposed provision is to prohibit operators from discriminating against customers based on the purpose for which the water relating to a right has been, or will be, used.[[142]](#footnote-142) For example, an environmental water user that receives the same class of infrastructure service as an irrigator should pay the same infrastructure charges; not more and not less. The fact that the environmental water user is using water for environmental purposes rather than irrigation should not affect the charges payable for a particular class of service.

This proposed provision does not seek to preclude operators from imposing a different charge that is specific to the way in which the water will be used, where the operator can demonstrate that it provides an additional service based on the purpose for which the water is being used. There are examples where operators impose different charges that relate to the purpose for which the water relating to a right will be used. MI lists on its Schedule of Charges a ‘rice monitoring fee’ that is imposed on irrigators who use their water to grow rice.[[143]](#footnote-143) MI details on its website information regarding the additional services that MI provides to rice growers in their irrigation network. This should not be viewed as a discriminatory pricing arrangement based on the purpose for which water is used; rather it is an example of a class of service that is only relevant for certain water users.

A related issue is discriminatory charges which disadvantage ‘non water users’—that is, users whose water access rights are not directly attached to land or which are not associated with a location-related right such as a water use approval. In particular, given that non-irrigators (especially environmental water holders) may be classed as ‘non-water users’, there is a need to prohibit price discrimination based on a customer’s status as a non-water user (or similar) in order to prevent operators from using such pricing as an alternative means of discriminating based on the purpose for which water is used.

##### Whether a person has traded, or transforms water access right, water delivery right or irrigation right

This proposed provision would prohibit discrimination against customers who have traded or transformed a tradeable water right. A person should be free to adjust their holdings of tradeable water rights without facing additional or higher charges based on the fact they have participated in water markets.

However, note that if a person trades their water delivery right such that their water delivery right holdings are not commensurate with the amount of water delivered through the operator’s infrastructure, this rule should not prevent the operator’s ability to charge “casual usage charges” in relation to deliveries of water that are in excess of water delivery right held.

##### Application of the non-discrimination provisions to all infrastructure operators

The ACCC recommends that the proposed non-discrimination rules should apply to all infrastructure operators, regardless of the volume of WAE held and ownership structure. The rationale for extending the application of Part 3 to all infrastructure operators is as follows:

* Discriminatory charging practices can distort water use and water trading decisions; therefore, it is appropriate to provide customers with protections against such practices. These protections should be available regardless of the ownership structure of an operator, and in particular should not change over time as ownership structures change.
* Given that, under Rule 5 of the WCIR, an operator is a “member-owned operator” if the majority of its customers are related customers, there may be a situation where a member-owned operator receives sufficient new demand from an unrelated customer such that it would no longer meet the definition of a member-owned operator under the WCIR. This operator would still have member and non-member customers, and it is important to ensure that customers of this operator are still afforded the protections of this rule. A similar argument applies to an operator who has never been a member-owned operator but nevertheless has some customers who are members and others who are not.
* The proposed approach to tiered regulation is to take a consistent regulatory approach to all infrastructure operators regardless of their size and ownership structure (see section 5.2). The additional non-discrimination clauses are not issues specific to member-owned operators, and should likewise be applied to all infrastructure operators.
* Application of the non-discrimination provisions to all infrastructure operators contributes to achieving consistency in water charging arrangements. The non-discrimination clauses (in addition to the proposed changes to improve pricing transparency) are an alternative way to pursue a consistent level of protection for all water users as compared to the Commonwealth or an accredited Basin State regulator approving or determining charges for an expanded range of infrastructure operators.
* Streamlining the application of the rules to apply to all infrastructure operators is consistent with stakeholder feedback to simplify the regulatory framework.[[144]](#footnote-144)

##### Non-discrimination rules to apply to discounts

Where the non-discrimination rules prohibit the imposition of different charges for the same service, the rules should make clear that this also applies to imposition of a different *effective* charges via the use of a discount of a regulated charge. This ensures that the intent of these rules may not be subverted via operators discounting charges based on the same proscribed grounds for price discrimination outlined above.

##### Non-discrimination provisions will not apply where the difference in the charge reflects the difference in the costs of providing the infrastructure service

Rule 10 currently provides that where a difference in charges reflects a difference in the actual costs necessarily incurred in providing that service, different charges for the same service do not constitute price discrimination (i.e. is not a breach of the rule). It is recommended that this provision be maintained and extended to apply to the above proscribed grounds for price discrimination.

##### Infrastructure service “of the same class”

The existing Rule 10 and the recommended subrules employ the concept of an infrastructure service being “of the same class”. The ACCC’s existing guidelines on these rules[[145]](#footnote-145) define an infrastructure service of the same class to be of the “same quality or standards, the same characteristics and the same features”. Examples provided in the guidelines include a service provided in the same region/district, using the same type of infrastructure, and other delivery standards which define the infrastructure service.

There may be cases where a purpose-specific service is provided by an operator. For example, some operators in NSW currently offer a rice monitoring service. [[146]](#footnote-146) Similarly, a service could be provided to stock and domestic water users to supply water that is treated to a particular standard. The proposed rules do not aim to limit the development of differentiated services by an operator. However, an operator should not attempt to characterise charging a different fee for the *same* service as the provision of two different classes of service. Where an operator claims to be providing two different classes of service, it should be able to clearly distinguish between services with reference to factors such as:

* The particular infrastructure used to deliver the service (for example, delivery through a specific sub-section of the operator’s network)
* Water quality standards (for example, salinity level, turbidity, dissolved oxygen content, nutrient levels, maximum or minimum temperature, heavy metals content, etc.)
* Delivery standards (for example, whether the service can be accessed ‘on demand’)
* Pressure standards (for services provided through pressurised networks)
* Priority of access to water service infrastructure in relation to which the service is being provided
* Where relevant, the reliability or security of the WAE to which the service relates

Further, in developing differentiated services, in principle the operator should not *require* a customer or group of customers to adopt a particular service purely with reference to one of the bases referred to in the non-discrimination rules, nor *deny* access to a service on that basis. For example, consider an environmental water holder who holds WAE and water delivery right of the same kinds as other customers (e.g. irrigators). If the operator develops a specific service for the environmental water user (e.g. to facilitate multi-site watering via use of the operator’s infrastructure), the operator should not in offering that service *require* the environmental water user to use *only* that service and preclude it from using regular water delivery services offered to other customers.

The ACCC also considers that an operator should not necessarily be required to offer a particular service to all users who may wish to use that service, but that the four proscribed grounds for price discrimination set out above should not be used to require that a customer obtain a particular infrastructure service, or deny access to a particular infrastructure service. This approach ensures that the intent of the non-discrimination rules cannot be subverted via differentiation of service provision.

The ACCC considers that where an operator restricts availability of its infrastructure services with reference to the attributes which form the basis for the non-discrimination rules, that operator should not be able to impose a charge for this service. This approach will provide an appropriate disincentive for the operator to form charging arrangements that are inconsistent with intent of the proposed non-discrimination provisions.

There are several situations where this approach could prove problematic. The first is in relation to services provided to stock and domestic water users. In some cases, operators are required under State water management law to provide a service to stock and domestic users; for example, an operator may be required to provide this service to these users, and they may be prohibited from providing this service to other users. The rules need to take this into account, and allow for the operator to levy an infrastructure charge for a stock and domestic infrastructure service even though it may limit the availability of this class of infrastructure service to stock and domestic users only. Note that the operator should still be prohibited from charging a *different* charge to different customers for this class of infrastructure service contrary to the non-discrimination rules.

Similarly, an infrastructure operator may offer different on-river infrastructure services for different classes of WAEs, or for WAEs in different water resources.

As defined in section 2.1, ‘on-river infrastructure services’ include harvesting and storing water through infrastructure such as dams, lakes, weirs and reservoirs, and delivering water, primarily through natural watercourses, to a point of extraction on a natural watercourse.

For example, access to carryover may only be available to holders of low reliability WAE in a particular valley. The ACCC acknowledges that in some cases, the level or type of infrastructure services in respect of a particular type of WAE in practice form the basis upon which different types of WAEs may be distinguished from one another. Accordingly, the rules should not prevent limits on the availability of on-river infrastructure services which reference the priority or reliability of a class of WAE, or by reference to the water resource of a WAE.

However, the ACCC does not consider that this rationale applies in relation to off-river infrastructure services, particularly since off-river infrastructure services generally relate to delivery and drainage of water allocation rather than storage, and since water allocation made to a particular type of WAE is in general tradeable to a person who holds a different type of WAE (or none at all). An infrastructure operator should be free to develop differentiated types of off-river infrastructure services, but it is not clear that there is any need to restrict access to off-river infrastructure services according to the priority or reliability of a WAE held by a customer, or the water resource to which the WAE relates.

##### The application of an infrastructure charge on, or as a condition of, the trade, transfer or termination of a tradeable water right.

The ACCC considers that the rules should also be extended to prohibit infrastructure charges imposed by an operator on, or as a condition of, trade of a tradeable water right that are beyond the operator’s actual administrative costs necessarily incurred.

Waterfind submitted concerns relating to operator’s charging of transaction fees to trade out water allocation from the operator’s area of operation forming a barrier to trade.[[147]](#footnote-147) The ACCC agrees that charges should not be used to discriminate against customers who participate in trade, but acknowledges that an operator should be able to recover the reasonable administration costs of processing a trade.

Transaction fees that apply to an application to trade a WAE or an application to change or vary a water access right, that are imposed by an operator *on behalf of government*, are planning and management charges (see section 2.3 and 7.2). The proposed non-discrimination clauses would not apply to these types of charges. However, where an infrastructure operator imposes their own trade application charges, these are considered infrastructure charges and the proposed rule would apply.

##### WaterNSW charge on water allocation traded out of NSW

The ACCC commissioned Marsden Jacob Associates (MJA) to:

* identify circumstances under which the structure of regulated charges may distort trade decisions or act as a barrier to trade; and
* suggest regulatory approaches to amend the water charge rules to ensure that charge structures do not have adverse impacts on trade.

In completing that report[[148]](#footnote-148), MJA noted that WaterNSW requires payment of its variable water usage charge for all allocation assignments[[149]](#footnote-149) involving a buyer licence not linked to a NSW Works Approval and for the charge to be included with the transfer fee on application.[[150]](#footnote-150)

MJA identified that this charge has led to dual pricing for NSW water allocation in the southern Murray-Darling Basin (MDB), with NSW sellers listing their (NSW) water allocations at a $5-$7 discount in Victorian and SA markets. MJA concluded that NSW sellers would be better off selling water within NSW where there is a relatively higher price on offer. The proposed rule would prohibit WaterNSW from imposing this charge on water traded out of NSW.

WaterNSW imposes this charge on water allocation traded interstate to recover revenue due to its charge structure, which has a high reliance on revenues gained from variable charges. [[151]](#footnote-151) Other distortions may arise if WaterNSW is unable to recover this revenue.

The ACCC acknowledges that it is important that operators are able to recover their prudent and efficient costs. Therefore the intent of the rule is not to preclude infrastructure operators from imposing these charges to recover revenue necessary to cover these costs. The issue is *when* an infrastructure operator imposes such charges. The ACCC therefore recommends that operators consider alternative charging structures that would achieve this objective, without distorting water use and trade decisions. For example, the ACCC considers that levying variable charges at the time water is allocated, rather than when water is used, could be an option that allows operators to continue to levy charges in a manner that takes into account water availability (which is a key rationale for the current reliance on variable charges), but in a manner that does not distort decision-making.[[152]](#footnote-152) The ACCC is of the view that this approach could strike the appropriate balance between ensuring that infrastructure operators are able to recover prudent and efficient costs while still ensuring that water users face appropriate incentives to trade their water.

The ACCC considers that there could be other ancillary benefits of this approach to levying variable infrastructure charges at the time water is allocated including creating incentives for greater participation in water markets. For example, in a given season when an irrigator decides that they do not wish to use the water allocated against their licence, the irrigator has a number of options including trade, carryover (subject to their arrangements) and forfeiture. When variable infrastructure charges are levied with respect to water use, an irrigator can avoid paying those charges by forfeiting their water. If water charges were instead levied at the point at which water is allocated to a licence, then those charges would be incurred by the irrigator regardless of whether they trade or forfeit their water. This may provide incentives for irrigators to sell their water allocations, rather than forfeiting water.

However, the ACCC notes that the proposed amendments to the water charge rules seek to ensure that all infrastructure operators’ infrastructure charges are non-discriminatory and not unreasonably imposed on, or as a condition of, trade. It is ultimately the decision of the infrastructure operator (and regulator, where charges are approved or determined) to make decisions about their water charges within these bounds by balancing the needs of their customers and the infrastructure operator.

##### Effect on termination fees

As detailed above, the ACCC proposes that the non-discrimination rules apply to ‘infrastructure charges’, which does not include termination fees. However, calculation of termination fees is based on certain infrastructure charges payable to an infrastructure operator (see section 6.2).

To the extent that the proposed non-discrimination rules prevent differences in fixed infrastructure charges levied on water delivery right (which form the basis for termination fees), the proposed non-discrimination rules will assist in mitigating differences in the maximum termination fees payable by different groups of customers. However, an operator remains free to discount a termination fee or charge a termination fee below the maximum amount permitted by the rules, on any basis.

See also section 6.3, which discusses circumstances in which a termination fee can be imposed.

##### Effect on planning and management charges

Part 3 does not apply to planning and management charges (see section 7.1).

##### Interaction with third-party access regimes and commercially negotiated charges

See section 5.11.

##### Summary of proposed non-discrimination rules

The rules should prohibit certain forms of price discrimination. The proposed additional provisions would prevent an operator from imposing a *different* infrastructure charge, or applying a *discount* to aninfrastructure charge for the same class of infrastructure service on the basis of:

the holding, volume or use of a tradeable water right or separate location related rights

the purpose for which the customer has or will be using the water to be stored or delivered by the water service infrastructure;

the fact that water access right, water delivery right[[153]](#footnote-153) or irrigation right has been traded[[154]](#footnote-154) (including ‘temporary trade’ out of the operators area). This should extend to charges imposed by an operator on, or as a result of, trade of such a right, that are beyond the operators actual costs necessarily incurred;

whether there is an association between a separate location-related right and a water access right; and

the area of land owned, occupied or irrigated (including charging differences because no land is owned, occupied or irrigated).

It is important to note that the proposed provisions would not prevent an operator from imposing a variable charge, levied per ML of water used or delivered. However, they would prevent an operator imposing a different infrastructure charge or rate per ML of water used / delivered where, for example, a lower charge applied to volumes over a certain amount, or the rate of a charge varied with the total amount of water used / delivered.

As is currently the case in Rule 10, a difference in charges that reflects differences in actual costs necessarily incurred should not constitute price discrimination (i.e. is not a breach of the enhanced non-discrimination provisions).

To ensure the efficacy of these provisions, the rules should also prohibit an infrastructure operator from limiting the availability of an infrastructure services on any of the proscribed bases, with the following caveats:

* The rule on limiting the availability of an infrastructure service on the basis of the purpose for which water has been, or will be used by a customer, should not apply to an infrastructure service that is limited to customers using water for a stock and domestic purposes
* The rule on limiting the availability of an infrastructure service on the basis of a person’s holding, or use of a tradeable water right should not apply to the extent that the availability of an on-river infrastructure service is limited by reference to the priority or reliability of a class of WAE, or by reference to the water resource of a WAE.

The rules should also prohibit the application of an infrastructure charge on, or as a condition of, the trade, transfer or termination of a tradeable water right. Such a charge is an unnecessary barrier to trade and can distort irrigator decision-making.

The proposed non-discrimination rules should also not prevent an infrastructure operator from levying casual usage charges. For example, operators would be free to impose a higher per ML charge of volumes delivered over the volume of a person’s water delivery right.

However, when an infrastructure operator provides a casual usage service, it should not limit the availability of that service with reference to one of the proscribed bases or charge different casual usage charges to different customers on one or more of the proscribed bases.

#### Draft rule advice

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| --- |
| Rule advice ‑  The rules should be amended such that Part 3 applies to all infrastructure operators instead of only to member-owned operators.  This rule advice is implemented in Rule 10 of the proposed water charge rules.  Rule advice ‑  The rules should be amended to expand the current protections in rule 10 to also prohibit price discrimination (including through discounting) based on:   1. The purpose for which water has been, is, or will be, used; 2. Whether a tradeable water right has been traded or transformed (includes water delivery right, water allocation, water access entitlement, irrigation right); 3. The holding, volume or use of a tradeable water right or separate location related right; 4. Whether there is an association between a separate location-related right and a water access right; or 5. The area of land owned, occupied or irrigated.   ***Note:*** the water charge rules should continue to allow, but not require, the operator to differentiate charges based on underlying costs or levels of access / service.  ***Note:*** these provisions should not remove the requirement for a person to hold water delivery right if they are to have water delivered to them by an infrastructure operator without incurring higher charges (e.g. casual usage charges).  ***Note***: Location-related right means any of the following:   1. Water delivery right; or 2. Works approval; or 3. Water use approval   This rule should be a civil penalty provision.  This rule advice is implemented in Rule 10(1) of the proposed water charge rules.  Rule advice ‑  The rules should be amended to expand the current protections in Part 3 to also prohibit an operator from levying an infrastructure charge for a class of infrastructure service where the operator limits the availability of the class of infrastructure service based on:   1. The purpose for which water has been, is, or will be, used; 2. Whether a tradeable water right (includes water delivery right, water allocation, water access entitlement, irrigation right) has been traded or transformed; 3. The holding, volume or use of a tradeable water right or separate location related right; 4. Whether there is an association between a separate location-related right and a water access right; or 5. The area of land owned, occupied or irrigated.   However, (a) should not apply to an infrastructure service that is limited to customers using water for a stock or domestic purposes.  Also, (c) should not apply to the extent that the availability of an on-river infrastructure service is limited by reference to the priority or reliability of a class of water access entitlement, or by reference to the water resource of a water access entitlement  ***Note:*** These provisions should not remove the requirement for a person to hold water delivery right if they are to have water delivered to them by an infrastructure operator (without incurring casual usage charges).  ***Note:***The water charge rules should continue to allow, but not require, the operator to differentiate pricing based on underlying costs.  ***Note***: Location-related right means any of the following:   1. Water delivery right; or 2. Works approval; or 3. Water use approval   This rule should be a civil penalty provision.  This rule advice is implemented in Rule 10(2) of the proposed water charge rules.  Rule advice ‑  The rules should be amended to prohibit an infrastructure operator from imposing, or demanding payment of, an infrastructure charge: upon an application to trade, transfer or terminate a tradeable water right (including where the application is not made to the infrastructure operator);as a condition of the infrastructure operator granting its consent or approval to a trade, transfer or termination of a tradeable water rightwhen or because a tradeable water right has been traded or transformed;because a customer has undertaken, or intends to undertake, a trade, transfer or termination of a tradeable water right; other than where that infrastructure charge reflects the administrative costs necessarily incurred in processing the trade, transfer or termination.  This rule should be a civil penalty provision.  This rule advice is implemented in Rule 10A of the proposed water charge rules. |

## Schedule of Charges (Part 4)

### Information to be included on a Schedule of Charges

In order to improve pricing transparency and enable customers and potential customers to make comparisons across infrastructure operators, the WCIR currently require all infrastructure operators to produce a Schedule of Charges (“Schedule”). Infrastructure operators are prohibited from imposing a regulated charge[[155]](#footnote-155) relating to an infrastructure service unless that charge is listed in their Schedule and a copy of the Schedule has been given to the customer. Rule 4 provides the definition of what must be included for a document to be a Schedule of Charges that complies with the Rules:

All regulated charges the infrastructure operator may levy in respect of an infrastructure service provided by the infrastructure operator

Details of the regulated charges sufficient to enable a customer to determine its liability

Details of discounts or surcharges applicable to regulated charges

If the Schedule is issued by an IIO and regulated charges are of the type referred to in s91(1)(a) of the Act,[[156]](#footnote-156) the Schedule of Charges must include a statement which sets out the process for determining the amount of those regulated charges, showing separately components attributable to:

* Storage
* Bulk water charges (equivalent to charges for on-river infrastructure services)
* Connecting or disconnecting a customer
* Holding of, or management of, a water access entitlement (WAE) by the IIO.

The WCPMIR also require a person who determines a planning and management charge (usually a Minister or another government executive or a delegate of that person) to publish certain information on that charge (see also section 7.3).

In its Issues Paper, the ACCC sought feedback on whether there are there any non-regulatory measures that could ensure the provision of accurate and timely information about infrastructure operators’ regulated charges (Question 16), and whether the Schedules of Charges produced by infrastructure operators are sufficiently clear and detailed to meet the needs of customers and potential customers (Question 17). The ACCC also asked whether a prescribed template would enable easier comparison across infrastructure operators, or assist infrastructure operators to comply with the pricing transparency requirements of the WCIR (Question 18).The ACCC also sought stakeholders’ views on the level of detail of information required to be published under the WCPMIR about planning and management charges.

#### Stakeholder feedback

A number of submissions to the Act Review raised concerns over ‘government charges’ specifically in relation to open and transparent price determination of Murray-Darling Basin Authority (MDBA) river operation charges.[[157]](#footnote-157) These submissions and associated issues are considered in more depth in section 5.12.

Eight submissions to the ACCC’s Issues Paper made comments relating to information to be included on a Schedule of Charges. Further, some submissions also made comments on other aspects relating to the Schedule of Charges such as publication requirements and transparency of ‘pass through’ charges. These are discussed in sections 5.4.2 and 5.13, respectively.

Central Irrigation Trust (CIT) provided that they have not encountered any customer or potential customer who has been unhappy with their Schedule and does not believe that a prescribed template would add any value.[[158]](#footnote-158) CIT also provided that “[t]here are many factors that a new investor considers when deciding to purchase in an area” and from CIT’s experience water charges are not a high priority.

Murray Irrigation Limited (MIL) did not support a mandatory template but provided that the Schedule of Charges is “a good mechanism to allow customers to compare rates and charges across [operators]”. MIL suggested that improving the consistency of language used by operators in relation to their schedules of charges would be beneficial. In MIL’s view, this would improve customers’ ability to compare fees and charges for services and produces “without the cost or administrative burden of further regulation”.[[159]](#footnote-159)

Murrumbidgee Irrigation Limited (MI) submitted that a prescribed template for the Schedule of Charges is unnecessary and believe it would increase the regulatory burden, diminish innovation in charging structures and “reduce the ability of operators to adjust their charges and match charges more closely to costs”.[[160]](#footnote-160) Western Murray Irrigation (WMI) similarly did not support the introduction of a Schedule of Charges template, stating that, in their experience, doing so would add complexity and cost to customers without improving their understanding of charges.[[161]](#footnote-161)

The National Irrigators’ Council (NIC) supported the current Schedule of Charges requirements. NIC did not support a template, emphasising that “no two irrigator customer groups, IIOs or water catchments are the same and service levels within IIOs also vary”.[[162]](#footnote-162) However, NIC did support “more uniformity in terminology” and recommended that the ACCC produce a glossary of terms.

Waterfind submitted that a prescribed template combining both WCIR and WPM (planning and management) charges “would provide clarity to water users and assist infrastructure operators to comply with the pricing transparency requirements”. Waterfind added that “bigger operators” typically already provide information in a “sufficient manner” as compared to smaller member-owned operators where the information is published in an “opaque way if at all, making it difficult for potential new entrants to obtain the necessary information”. Waterfind provided further that a prescribed Schedule of Charges template would standardise reporting requirements and “enable clearer due diligence processes to be undertaken by a potential new entrant to the irrigation network”.[[163]](#footnote-163)

Peter Beex, an irrigator in Goulburn-Murray Water (GMW)’s Cobram East network in the Victorian Murray raised a number of issues relating specifically to GMW’s Schedule of Charges.[[164]](#footnote-164) Mr Beex submitted that GMW customers receive a ”pricelist” (Schedule of Charges) specifying all the regulated charges but they do “not know which individual charge applies to them” and “GMW does not allow customers to be able to determine what they owe for a specific time period for the type of service received”. Mr Beex added that a “customers’ knowledge is the only determinate for understanding which fee is applicable to them. Future customers would not be able to determine which fees are applicable to them”.

Mr Beex noted that GMW’s Schedule “does not include a statement setting out the process for determining the amount of the regulated charges” and that the ‘Your Fees Explained’ document is not sent to customers with the Schedule but rather can be downloaded from the GMW website. He noted the descriptions included in ‘Your Fees Explained’ do not show how fees are calculated. Mr Beex recommended that a Schedule of Charges should provide cost information, including installation costs and repairs / maintenance costs. He further considered that a template providing a cost analysis “per channel length” charged would allow for greater transparency for customers.

Mr Beex submitted that a template “to ensure user pay[s] objectives are ticked off firstly and thoroughly is necessary” and would provide greater transparency.

Daniel Mongan, an irrigator in GMW’s Central Goulburn network, submitted that to “improve clarity for customers and reduce costs for the organisation” customers should receive a “concise list” of the charges that apply in their area, as compared to “a list of approximately 300 tariffs (for GMW customers) [that] makes what should be something quite simple, very complex”.[[165]](#footnote-165) Mr Mongan suggested that a document with the full list of all charges could be published on the website and a link supplied to customers or made available on request.

The ACCC also commissioned the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) to survey irrigators to examine their experiences of water trading and issues associated with the water charge rules. A summary of the ABARES survey results in relation to questions about pricing transparency and operators’ schedules of charges is presented in Box 5.1.

Box 5.1 Irrigators views on schedule of charges in the ABARES survey

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| The ACCC commissioned ABARES to survey irrigators throughout the Murray-Darling Basin in relation to their experiences with water trading and issues associated with the water charge rules. ABARES conducted this survey as a supplement to its 2014-15 survey of irrigation farms in the Murray-Darling Basin and prepared a summary report for the ACCC, which is available from the ACCC’s website.[[166]](#footnote-166)  ABARES surveyed 270 farms across the MDB. The responses were grouped and compared for four main regions: Northern Basin, Goulburn-Broken, Murrumbidgee and Murray, and then collated for the Murray-Darling Basin as a whole.  Irrigators were surveyed about whether they had received a schedule of charges and the clarity of information. Irrigators were also surveyed about the type of information that they consider important to be included on a schedule of charges and whether they were happy with the level of engagement (i.e. consultation and the ability to provide input and feedback if desired) from their infrastructure operator about changes to future fees and charges.  ABARES key findings from the survey in relation to the schedule of charges are summarised below.   1. Most irrigators recalled receiving a schedule of charges in the last twelve months.[[167]](#footnote-167) 2. Of those irrigators that had received a schedule of charges:  * A significant minority of respondents (18 per cent) did not think the schedule of charges clearly set out the difference between charges payable for access to their operator’s infrastructure and charges incurred by their operator and passed onto the irrigator. * Over a third of respondents did not think the schedule of charges provided sufficient information to calculate the charges payable to terminate some or all of their water delivery right.[[168]](#footnote-168)  1. Irrigators indicated that the following information is important to be included on a schedule of charges:  * the circumstances in which the charge is payable (48 percent of respondents across the Murray-Darling Basin (MDB) as a whole) * the type of right that the charge relates to (62 percent) * how often the charge is payable (50 percent) * whether the charge would be included in the calculation of a termination fee (42 percent) * details of any applicable discount or surcharge relating to the charges (44 percent) * charges that are incurred by the operator and passed on to customers (44 percent) * administrative charges for trades (53 percent) and * details of the process for determining the level of charges (48 percent).   Across the MDB as a whole, respondents indicated that two most important pieces of information that should be shown on an operator’s schedule of charges are “the type of right that the charge relates to” and “administrative charges for trades”. Responses in the Goulburn-Broken, Murrumbidgee and Murray regions were generally consistent with approximately 50 per cent of irrigators indicating that most of these items are important to be included in a schedule of charges. This is in contrast to the Northern Basin, where the response to whether these items were important to be included on the schedule of charges varied between 6 and 23 per cent.   1. About half of irrigators surveyed indicated they are happy with the level of engagement (i.e. consultation and the ability to provide input and feedback if desired) from their infrastructure operator about changes to future fees and charges. However, 16 per cent are dissatisfied, with the remaining irrigators responding that they are neither satisfied nor dissatisfied.[[169]](#footnote-169) |

#### Discussion

##### Application of Schedule of Charges rule

Currently, the WCIR, in conjunction with the WCPMIR, require the publication of different types of information about charges, at different times, depending on whether the charges are infrastructure charges or planning and management charges. Information requirements also differ depending on whether infrastructure charges or planning and management charges are imposed by an infrastructure operator, IIO or some other entity.

All these charges are ultimately payable by irrigators and other water users. The ACCC considers that the Water Charge Rules as a whole should, as much as possible, streamline these information requirements to ensure pricing transparency and better informed decisions. The ACCC has also made rule advice 4-A that the water charge rules should be amalgamated into a single instrument. In view of these considerations, there is merit in having Schedule of Charges requirements apply to both infrastructure operators (who may determine both infrastructure charges and planning and management charges) and other persons who determine planning and management charges on behalf of government.

In terms of the application to infrastructure operators, the ACCC considers that the Schedule of Charge requirements should be standardised across all operators and should not differ based on the operator’s size or ownership status. This will ensure that all customers are provided with the same access to information regardless of the size or ownership status of their operator. It will also streamline the application of the rules, making it simpler for operators to understand the rule requirements. The Schedule of Charges requirements should also apply to entities other than infrastructure operators who determine planning and management charges.

##### Information to be included about infrastructure charges and planning and management charges

The current rule requirements governing what information should be provided are phrased in terms of *outcomes*. For example, under the current rules, an operator must “include details of the regulated charges sufficient to enable a customer…to determine the customer’s liability…”[[170]](#footnote-170) In practice, to achieve this outcome, an operator must provide a range of information such as the amount of the charge, who is required to pay the charge, what type or class of right the charge is levied on, etc.

However, the rules currently do not explicitly state what information must be provided for the operator to comply with the rule requirements or to satisfy the regulator. This creates uncertainty for the operator, and is also likely to result in considerable difference in the level and type of information provided across operators, which provides less transparency for irrigators and other customers. Moreover, the way the rule requirements are currently stated may lead to difficulties in ensuring compliance with these provisions, which could result in further costs for operators.

Accordingly, the ACCC recommends a more direct approach, under which the rules will clearly specify what is required to achieve the intended outcomes. In setting out the information requirements, the ACCC recommends that the specific requirements for each charge (set out below) should be closely based on a subset of the current requirements in Rule 4 of the WCPMIR. The ACCC considers that the current drafting of the WCIR already requires substantially similar information in relation to information to be provided infrastructure operators, but by employing the approach of Rule 4 of the WCPMIR, the information requirements for infrastructure operators (and other entities who determine planning and management charges) will be much clearer.

However, the amended rules should make clear that entities will no longer be required to publish information about water planning and management activities related to planning and management charges, and the costs of those activities. The publication of cost information was a commitment made by Basin States under the Intergovernmental Agreement on the National Water Initiative (NWI).[[171]](#footnote-171) The ACCC considers that the water charge rules are not well suited to ensuring that this commitment is met. This issue is discussed further in Chapter 7.

##### Information statements

One aim of the current Schedule of Charges requirements, in conjunction with the Network Service Plan (NSP) requirements of WCIR Part 5, is that customers be able to understand, and participate in, the operator’s processes for setting charges. The ACCC recognises feedback from stakeholders that Part 5 requirements place too great a cost on operators in an attempt to achieve these (and other) ends. Also, the ACCC considers that the current information requirement specified in Rule 4(b), which requires the infrastructure operator to “include details of the regulated charges sufficient to enable a customer…to determine the customer’s liability under the regulated charges…” does not provide sufficient clarity for an operator to know whether the rule requirement has been fulfilled.

The ACCC further notes that it is not always clear whether, and how, a customer can seek to participate in the operator’s processes for setting charges.

Accordingly, the ACCC advises that an operator should be required to include on its Schedule of Charges a statement setting out the process(es) by which:

1. the infrastructure operator determined the regulated water charges contained in the Schedule of Charges (this should be at the general level, rather than for each individual charge);
2. a customer may participate in the infrastructure operator’s processes for determining the regulated water charges in the Schedule of Charges;
3. a customer can make an enquiry or resolve a dispute with the infrastructure operator in relation to regulated water charges.

An entity other than an infrastructure operator who determines planning and management charges should also be subject to similar requirements.

##### Prescribed template

The ACCC has accepted feedback from a majority of stakeholders that a prescribed template for the Schedule of Charges would not provide a net benefit for operators and their customers. Waterfind was the main stakeholder who supported a prescribed template, on the grounds that a template would both be useful to customers (both existing and potential new customers) and helpful for operators in achieving compliance with the rules.[[172]](#footnote-172) The ACCC also notes the NIC recommendation for the ACCC to produce a glossary of terms.[[173]](#footnote-173) The ACCC considers that the concerns of Waterfind, the NIC and other stakeholders with similar views can better be addressed via guidance material than a specific rule requirement.

The ACCC will produce an example Schedule of Charges template in its guidance material that operators *may* use. In producing this guidance template, the ACCC can provide a list or glossary of suggested terms that an operator may also use when forming its own Schedule of Charges.

#### Draft rule advice

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| Rule advice ‑  Schedule of charge requirements for infrastructure operators:  The rules should require an infrastructure operator to produce a schedule of charges containing the following information for each infrastructure charge or planning and management charge that it proposes to levy:   1. the name of the charge; 2. the circumstances in which the charge is incurred including:    1. the class of persons by whom the charge is payable;    2. if applicable, the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;    3. if applicable, the class of water access right, water delivery right or irrigation right to which the charge relates; 3. the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine the amount; 4. when the charge is payable and, if payable by instalments, the number of instalments and intervals at which they are payable; 5. for an infrastructure charge - a description of the class of infrastructure service to which the charge relates 6. for a planning and management charges determined by the infrastructure operator, the legislative, contractual or other authority for the regulated charge and the agency or person to whom the charge is payable; 7. for directly attributable charges, shared charges and distribution loss shared charges:    1. the name and amount of any infrastructure charges or water planning and management charges that contributed to an amount of the charge being recovered;    2. the name of the entities levying charge on the operator; and    3. how the infrastructure charge(s) levied by the operator to recover the amount of a directly attributable charge, shared charge or distribution loss shared charge was determined. 8. if a charge is collected on behalf of another person, the name of that person; 9. any other information the person determining the charge considers necessary or desirable to explain the regulated charge. 10. If the operator levies a fee for physically connecting, or physically disconnecting a customer to or from the operator’s water service infrastructure that varies based on the actual costs incurred in performing the connection or disconnection, the operator is not required to state the amount of the connection or disconnection fee on its Schedule of Charges, but must describe the general basis for calculating such a fee.   The Schedule of Charges should also include:   1. the effective date of the Schedule of Charges; 2. a statement setting out the process(es) by which: 3. the infrastructure operator determined the regulated water charges contained in the Schedule of Charges (this should be at the general level, rather than for each individual charge); 4. a customer may participate in the infrastructure operator’s processes for determining the regulated water charges in the Schedule of Charges; 5. a customer can make an enquiry or resolve a dispute with the infrastructure operator in relation to regulated water charges.   *See also* Rule advice 5-K *and* Rule advice 5-Y.  This rule advice is implemented in Rule 11 of the proposed water charge rules.  Rule advice ‑  Schedule of charge requirements for entities other than infrastructure operators:  The rules should require that a person (other than an infrastructure operator) determining a planning and management charge must include on its Schedule of Charges the following information for each planning and management charge:   1. the name of the charge; 2. the circumstances in which the charge is incurred including:    1. the class of persons by whom the charge is payable;    2. if applicable, the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;    3. if applicable, the class of water access right, water delivery right or irrigation right to which the charge relates; 3. the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine the amount; 4. when the charge is payable and, if payable by instalments, the number of instalments and intervals at which they are payable; 5. the legislative, contractual or other authority for the charge; 6. the agency or person to whom the charge is payable; and 7. any other information the person determining the charge considers necessary or desirable to explain the regulated charge.   The Schedule of Charges should also include:   1. the effective date of the Schedule of Charges; 2. a statement setting out the process(es) by which: 3. the person determined the charges contained in the Schedule of Charges (this should be at the general level, rather than for each individual charge); 4. a customer may participate in the processes for determining the regulated water charges in the Schedule of Charges; 5. a customer can make an enquiry or resolve a dispute in relation to regulated water charges.   *See also section 5.4.3 and* Rule advice 5-Y.  This rule advice is implemented in Rule 11 of the proposed water charge rules. |

### Publication requirements

Under the current Part 4 of the WCIR, Rules 11-15 require a Schedule of Charges (“Schedule”) to be provided to customers. An infrastructure operator is currently required to:

* provide its Schedule to existing customers and new customers (rule 11)
* provide a revised Schedule when changes occur (rule 12(1))
* provide its Schedule at least 10 business days before charges or changes to the Schedule come into effect (subrules 7(a) and 12(2))
* provide its Schedule when it receives a request in writing (rule 13)
* if the infrastructure operator provides infrastructure services in relation to at least 10 gigalitres (GL) of managed water resources, publish its Schedule on their business’ internet site, or in a local newspaper or in the Gazette (rule 15).

Rule 7 in Part 2 of the WCIR prevents an infrastructure operator from imposing a regulated charge[[174]](#footnote-174) unless it has provided its current Schedule to customers:

* 10 business days before the service is provided, for customers who were existing customers by 3 months after the rules commenced (that is, before the end of the “transitional period” for the commencement of the WCIR); or
* Before the service is provided, for new customers.

The effect of this rule in most cases is that an operator must provide its Schedule of Charges to customers 10 business days before the Schedule comes into effect.

#### Stakeholder feedback

Three submissions to the Act Review—from MIL[[175]](#footnote-175), NIC[[176]](#footnote-176) and the NSW Irrigators’ Council (NSWIC)[[177]](#footnote-177)—directly raised concerns about the WCIR’s publication requirements. In their view, the WCIR require physical postage of the Schedule of Charges, as well as information required by Part 5 of the WCIR (the Network Consultation Paper (NCP), Network Services Plan (NSP) and Information Statement). MIL, NIC and NSWIC noted that a requirement to post hard copies of documents to customers increases the administrative burden for the operator and adds complexity for customers. MIL, NIC and NSWIC recommended that language in the relevant parts of the WCIR in relation to providing information be changed from ‘provide’ to ‘make available’. NIC added that this could be facilitated by publishing on a website and informing customers how to access the information, noting that it is less expensive to send a one page letter (informing customers where information can be accessed) than a multi-page booklet such as the Network Service Plan.

Nine submissions to the ACCC’s Issues Paper also raised concerns with the current publication requirements:

* MI suggested amending the rules to permit notices to be published on a website and noted the language used in the Water Trading Rules (WTR) relating to information to be provided by IIOs.[[178]](#footnote-178) MI submitted that this approach would “reduce the recovery of additional costs with little or no benefit for customer members”.
* WMI submitted that requiring information to be posted to customers is “counter-productive as it results in an increase in costs”. WMI supported amending the current publication requirements to allow Schedule of Charges to be uploaded on the operator’s website.[[179]](#footnote-179)
* MIL stated it had been “advised by the ACCC that where the WCR require information to be provided to customers, the operator needs to have 100 percent coverage of all of its customers. In the case of MIL, where it cannot be guaranteed that all customers have email this requires all customers to be provided with a hard copy.”[[180]](#footnote-180) MIL recommended that the WCIR “be amended to allow publication of information and notice of publication with an option [for a customer] to request a hard copy”. MIL’s view was that these amended requirements should be considered “adequate to meet the needs of provision of information to customers”. MIL supported the requirement to publish information about fees and charges to promote transparency in the water market and irrigation industry but urged the ACCC to reconsider its interpretation of the WCIR and (in MIL’s view) the requirement to physically deliver information to customers. In relation to subrules 7(a) and 12(2),[[181]](#footnote-181) MIL suggested allowing “IIOs to update their fees to recover government charges without meeting the 10 day business day requirement for notice where a change to the schedule of charges is solely linked to the government charge component”.
* CIT submitted that in its view, the publication requirements are “adequate” and that there is “no evidence to require changes”.[[182]](#footnote-182)
* Eagle Creek Pumping Syndicate submitted that the requirement to publish current fees and charges in the local paper when members are informed directly is “ridiculous” and that the information “should be private members’ business solely”.[[183]](#footnote-183)
* NIC “supports the requirement for IIOs to provide customers with a schedule of charges and the need for the publication of the schedule if the IIO owns or manages more than 10GL equivalent water entitlements”. [[184]](#footnote-184) NIC noted its view that “unless an IIO could guarantee that 100 per cent of customers had access to email or computer, this information must be physically mailed to all customers” and one member estimated this to be $5,000 in postage fees alone. NIC recommended that “the ACCC allow IIOs to publish the schedule of charges and advise customers of its existence rather than physically providing hard copies to all customers”.
* Peter Beex, an irrigator from Victoria, submitted that “Infrastructure Operators should have to send copies of the schedule of charges to the ACCC or the Essential Services Commission of Victoria (ESCV)”, and that additionally larger infrastructure operators (whose prices are determined for a 3-4 year period in advance) should be required to forward all other relevant documentation for pricing 3-4 years in advance.[[185]](#footnote-185)
* Coliban Water submitted that it is constrained in its ability to comply with the publication requirements in the water charge rules because those requirements differ for their rural charges and urban services.[[186]](#footnote-186)
* SunWater submitted its view that the requirement to notify customers annually in writing and within 10 business days of the start of the financial year offers “little value add”.[[187]](#footnote-187) SunWater also noted that the need for it to publish this information is ‘negated’ by the publication of its five year price path by the Queensland Competition Authority. SunWater suggested that alternative forms of communication, such as publishing on a website, should be considered.

#### Discussion

The intent of Rule 7 and the Part 4 provisions is that an operator’s Schedule of Charges (“Schedule”) should be provided to the operator’s customers, so that customers are given all relevant information needed to determine their liabilities in respect to regulated charges. Further, this information should in general be available to customers *before* the charges actually commence. Information about an operator’s charging arrangements should also be readily available to other interested parties (for example, prospective customers). These publication requirements contribute to the Basin Water Charging Objectives and Principles (BWCOP) by making market information readily available to market participants and by promoting pricing transparency for water storage and delivery services.

The ACCC notes that the current publication requirements in the WCIR do not explicitly require operators to mail hard copies of documents to customers. The ACCC is of the view that, while mailing of documentation may be an option used by some operators, it is not generally necessary to be compliant with the Rules.

However, the ACCC notes concerns raised by stakeholders about the current wording of these provisions, and is of the view that several amendments could be made to streamline the information provision requirements and decrease regulatory burden for operators, while maintaining effective pricing transparency and providing information to customers and other interested parties.

In relation to requirements to provide information to the operator’s customers, the ACCC considers that amendments should be made to provide clarity for operators about what constitutes sufficient provision of information to customers. It would be relatively simple to redraft the current Schedule of Charges publishing requirements in relation to providing information to customers, to improve the clarity and to ensure that infrastructure operators provide adequate information to customers in a way that involves the least cost for the infrastructure operator. The amended provisions should require infrastructure operators to make available information to customers in a manner that is readily ascertainable and accessible.

In relation to requirements to provide information publicly, Rule 15[[188]](#footnote-188) currently requires that where an infrastructure operator provides infrastructure services in relation to more than 10GL of managed water resources,[[189]](#footnote-189) that operator must (in addition to providing their Schedule of Charges to customers) publish their Schedule, either on their website, in a local newspaper on in the *Gazette*. Given feedback from IIOs through submissions to the ACCC’s Issues Paper and via public forums, the ACCC considers that this requirement can be streamlined to:

* Require all infrastructure operators who have a business website to publish their Schedule on their website, at the same time they are required to provide their Schedule to their customers; and
* Maintain the current requirement for all infrastructure operators to provide a copy of their Schedule upon receiving a request.

Further, the rules should make clear that an electronic copy of the Schedule of Charges may be provided where this is possible. This amendment is consistent with the conclusion of the Independent Expert Panel (the Panel) for the Review of the Act, that “[r]egulators should recognise the efficiency and desirability of electronic communication when developing and applying regulation”.[[190]](#footnote-190)

In relation to the additional requirements for Part 5 operators, consistent with the ACCC’s rule advice in section 5.5 (to repeal Part 5 of the WCIR), the ACCC is of the view that publication requirements in relation to Part 5 should be amended or repealed accordingly.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to require all infrastructure operators who have a website to publish their schedule of charges on a page on their website that is easily and publicly accessible (not only operators servicing over >10Gl of water access entitlement).  This rule advice is implemented in Rule 11 of the proposed water charge rules.  Rule advice ‑  The rules should be amended to remove requirements to publish a schedule of charges in a local newspaper or in the Gazette.  *See also* Rule advice 5-L.  This rule advice is implemented in the repeal of current WCIR Rule 15(1)(b) and (c).    Rule advice ‑  The rules should be amended to change the timeframe for when a Schedule of Charges must be provided:   * For an infrastructure operator which provides infrastructure services that must be used for the storage or delivery of water relating to:   + a class of water access right**[[191]](#footnote-191)** or   + water sharing arrangements between Basin States;   the Schedule of Charges must be sent to its customers and published on its website (if it has a website) 25 business days before the Schedule of Charges comes into effect.   * For all other infrastructure operators, the Schedule of Charges must be sent to its customers and published on its website (if it has a website) 10 business days before the Schedule of Charges comes into effect. * For a person other an infrastructure operator, who determines ‘planning and management charges’ the Schedule of Charges must be published on its website 25 business days before the Schedule of Charges comes into effect.   An infrastructure operator should not be required to ensure that a customer has ***received*** the Schedule of Charges within the timeframe specified in the rules. Instead, the operator must have sent its schedule (by post, fax, email, SMS or other means), within the required timeframe. An infrastructure operator does not need to notify all customers via the same means.  This rule advice is implemented in Rule 11 of the proposed water charge rules. |

### Exemptions from the publication requirements

Rule 9 of the WCIR currently provides that where an infrastructure operator and a customer have entered or propose to enter into a written contract for the provision of infrastructure services to the customer at agreed charges specified in the contract and believe, on reasonable grounds, that disclosure of details would have a material and adverse effect for the operator and customer or customer, the operator and the customer jointly or the customer may apply in writing to the ACCC for an exemption from requirements to include its infrastructure charges for those services in its Schedule of Charges.

In its final advice on the WCIR, the ACCC considered this exemption provision to be adequate to ensure commercial disadvantage does not arise as a result of the publication requirement. In other circumstances, the benefits of increased transparency in water infrastructure markets outweighs the commercial sensitivity felt by parties to contracts.[[192]](#footnote-192)

#### Stakeholder feedback

In its Issues Paper, the ACCC sought stakeholders’ views on the operation of the exemption provisions, in particular, on the circumstances in which an exemption should apply, and on what procedural requirements should be met in order for an exemption to be granted. The ACCC received two submission on this issue. CIT submitted that the current rule is “satisfactory”.[[193]](#footnote-193) Murrumbidgee Irrigation (MI) submitted that it commonly provides services to customers under a “standard charging regime set by a standard form customer contract”, however some individual arrangements are entered into for some services in separate commercial contracts.[[194]](#footnote-194)

MI provided two examples where it may enter into separate commercial contracts: leases that grant hydroelectric power station operators access to an irrigation network or the use of infrastructure by government entities for the delivery of water for environmental or other purposes. MI stated that an operator should only be required to publish charges from its standard form contract and that there should not be a requirement to publish charges under one-off arrangements, particularly when those charges are confidential. MI added that:

*“[t]he basic common law requirement of certainty in contracts is quite sufficient to ensure that operators publish their schedule of charges in advance and are known with certainty by the person paying the charge. The agreement of the principal (i.e. the entity receiving the service) and the contractor (i.e. the operator) should be sufficient to exempt charges from the publication requirement under the Rules”.*

#### Discussion

The ACCC maintains the view that the disclosure of infrastructure charges is essential to the objective of pricing transparency. The discussion in section 5.3 noted the potential for infrastructure operators to discriminate in the charges they levy on different types of customers. Pricing transparency is essential to ensuring customers are aware not only of the charges they will incur but also the charges levied by the infrastructure operator for the same or similar infrastructure services.

The ACCC has identified that the following improvements could be made to this rule:

##### Allowing for applications on the grounds of a material and adverse effect on the operator only

Currently, the ability to apply for an exemption requires that there is a material and adverse effect to the customer(s) of the operator. Rule 9(2) provides for the case where there is a material and adverse effect on *both* the operator and the customer and Rule 9(2) provides for the case where the material and adverse effect is on the customer only.

The proposed amendment provides for the additional situation where *only* the operator would incur the negative effects of publication. The ACCC considers that it may be reasonable for the operator to be afforded the protection of Rule 9 even though no detriment is occurring for the customer. In this case, the ACCC considers that the operator should be able to apply in writing to the ACCC for an exemption. The current provisions for granting the exemption should be retained and applied to this case.

##### An infrastructure operator should be required to provide notice that it has been granted an exemption

Currently, subrule 9(12) requires the ACCC to publish notice of an exemption on its website; thus, information about when an exemption is granted is already in the public domain. However, the ACCC remains concerned that operators’ customers should have readily available access to this information. In particular, the ACCC considers that the current subrule 9(12) does not necessarily facilitate the desired level of transparency for customers of an operator or water market participants more broadly.

Therefore, the ACCC considers that it is appropriate for operators to declare on their Schedule of Charges when they have been granted an exemption under Rule 9. This amendment provides improved transparency for customers of the operator, while still preserving the intent of Rule 9 to protect from commercial disadvantage in the stated circumstances. The ACCC considers that, where an operator has been granted an exemption under Rule 9, inclusion of a link to the ACCC’s public notice as published on its website on the operator’s Schedule of Charges would be sufficient to satisfy this amended rule requirement.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to allow for an application for an exemption from the publication requirements in a situation where publication would have a ‘material and adverse effect’ on only the operator.  This rule advice is implemented in Rule 9 of the proposed water charge rules.  Rule advice ‑  The rules should be amended to require infrastructure operators who have received an exemption under Rule 9 to include notice of the exemption on their Schedule of Charges. The infrastructure operator must include on its Schedule of Charges:   * the name of the entity (or entities) that is the subject of the exemption; * the time period of the arrangement; * the nature of the infrastructure service and / or access to which the charge exempt from disclosure relates.   Rule 55 should be amended to allow the ACCC to publish the name of the parties who are the subject of the exemption, and the type of infrastructure service to which the exemption relates.  This rule advice is implemented in Rule 9(13A) and rule 55 of the proposed water charge rules. |

## Network Service Plans (Part 5)

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

SunWater;

Coleambally Irrigation Cooperative Limited (CICL);

Murray Irrigation Limited (MIL);

Murrumbidgee Irrigation Limited (MI); and

Central Irrigation Trust (CIT).

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:

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.

In developing their NSP, Part 5 operators must prepare a Network Consultation Paper (NCP) to facilitate consultation with their customers.[[195]](#footnote-195)

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.[[196]](#footnote-196)

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 prudency and efficiency of the NSP.[[197]](#footnote-197) 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 of the advice to each of its customers.

A Part 5 operator must also prepare an information statement[[198]](#footnote-198) each year and provide this to customers when providing its Schedule of Charges.

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.

During the 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. In its Issues Paper, the ACCC sought feedback about the advantages and disadvantages of current Part 5 requirements and whether there are alternative ways to ensure an operator’s customers are aware of, and can have input into, water infrastructure investment planning and decision making.

#### Stakeholder feedback

Stakeholders raised significant concerns in relation to the regulatory burden of Part 5, via submissions to the Act Review, submissions to the ACCC’s Issues Paper, in meetings with ACCC staff and at public forums. Many stakeholders questioned what, if any, additional benefits are being achieved through the Part 5 requirements as distinct from those activities already undertaken by member-owned operators or under state-based processes.

##### Consultation requirements

Part 5 infrastructure operators and peak industry bodies, in both submissions to the Issues Paper and the Act Review, submitted that they received a low response rate (of less than one per cent for some operators) to the NCPs sent as part of the first NSP process in 2012.[[199]](#footnote-199) NIC provided that the NSP “process is overly proscriptive, overly onerous, and expensive and has largely been ignored by IIO customers”.[[200]](#footnote-200) Stakeholders attributed the low response rates to:

the level of detail on business planning provided in the NCP being beyond what customers are interested in or require and/or[[201]](#footnote-201)

customers having already being engaged on these issues.[[202]](#footnote-202)

Some Part 5 operators submitted that their customers had directly questioned the value of the process. CIT stated that the single response it received on its NSP, commented “negatively on the need for the NCP process and the costs associated”.[[203]](#footnote-203) MI identified that its customers had questioned the value in five year forecasts “which cannot be relied on due to changing external factors” and that customers did not consider that the documents represent “value for money” especially when customer charges reflect the costs of producing and sending the NSP and NCP.[[204]](#footnote-204) Southern Riverina Irrigators expressed their concern about the costs associated with the NSP and NCP in its submission to the Act Review. The costs which are borne by customers, stating that they did not see the need for these “additional, complex documents”.[[205]](#footnote-205)

Member-owned operators identified that the NCP duplicates consultation processes that they already use to engage with their customers.[[206]](#footnote-206) CICL submitted that the requirement relating to how customers are to be engaged are excessive and they “reflect a lack of understanding of the nature of the relationship between IIO and their customers.”[[207]](#footnote-207) In relation to price discrimination provisions, NIC submitted that “most member owned IIOs are accountable to their customers and shareholders to an extent replicated in very few other customer groups.”[[208]](#footnote-208) Operators submitted specific examples of the opportunities that their customers have to provide feedback to member-owned operators, including:

election of the Board and management by the customers[[209]](#footnote-209)

customer focus groups[[210]](#footnote-210)

regular meetings[[211]](#footnote-211)

annual customer surveys[[212]](#footnote-212)

the operator’s customer charter[[213]](#footnote-213)

annual general meetings[[214]](#footnote-214)

These operators further submitted that when a customer is dissatisfied with the feedback or engagement with their operator, there are accountability mechanisms within member-owned operators through which the customer can seek recourse.[[215]](#footnote-215) MIL contended that its accountability mechanisms are “more flexible” and “less burdensome” than the Part 5 requirements.[[216]](#footnote-216) CICL submitted that opportunities to express dissatisfaction are greater in member-owned businesses than most other companies because their business is conducted in small communities and CEOs cannot “hide” from their customers.[[217]](#footnote-217)

SunWater, currently the only non-member-owned Part 5 operator, submitted that the Part 5 requirements duplicate consultation processes recommended as part of the Queensland Competition Authority’s 2012 water price review of SunWater’s irrigation charges.[[218]](#footnote-218), [[219]](#footnote-219) SunWater submitted that the NSP, sent to customers to meet the WCIR requirements, “confused” customers (because the of significant consultation process that had just been completed as part of the QCA2012 water price review), resulted in additional costs and provided no added value to customers. However, the Queensland Farmers Federation (QFF) commented that “[t]he network service plans, in particular, are providing a useful annual record of cost performance for discussion with customers. These plans should also help target issues that need to be addressed in future price reviews”. [[220]](#footnote-220) This support for Queensland NSPs notwithstanding, QFF also questioned “whether it is necessary to continue with the regulations under Parts 3 to 5 [of the WCIR]”.[[221]](#footnote-221)

The Southern Riverina Irrigators (SRI), in its submission to the Act Review, submitted in relation to MIL that “[a]s a non-listed public company, Murray Irrigation is required to produce comprehensive annual reports and hold open annual general meetings. The Company also hosts regular customer meetings across the region. There is ample opportunity for customers and shareholders to question the Company’s strategic direction or fees and prices and shareholders can and do hold the Board to account. SRI does not see the need for additional, complex, documents to be distributed at an expense that is ultimately borne by the customer.”[[222]](#footnote-222)

##### Benefits versus compliance costs

Some submissions questioned whether the benefits of the NSP process outweighed the costs.[[223]](#footnote-223) CIT estimated that the development of the NSP and associated consultation costs is in excess of $50,000 per annum and believe “there is little benefit gained by the customers in the process for the cost involved”.[[224]](#footnote-224) During the ACCC’s public forum in Deniliquin, NSW, a representative from MIL stated that the 2012 NSP had cost MIL around $100,000 to complete.[[225]](#footnote-225) NIC stated that “the cost of developing the NSPs and of communicating in the method mandated by the ACCC was estimated by the IIOs to have been in excess of $150,000”. [[226]](#footnote-226)

Some submissions further stated that the operator, rather than the regulator, should make decisions related to the frequency of, and employing expert advice on, business planning.[[227]](#footnote-227)

Related to this, other submissions questioned the value provided by the independent engineer reports. In particular, one submission commented on the limited extent to which the report could provide a value in improving the business and that some of the suggestions had proven to be incorrect.[[228]](#footnote-228) The National Irrigators’ Council (NIC) and CIT commented on the size of engineers reports sent to Part 5 operators (79 pages), as compared to the average NSP length (14 pages).[[229]](#footnote-229) NIC also noted that the reports provided to each operator were almost identical, despite the IIOs’ different NSP.[[230]](#footnote-230) The NIC added that often the consultants employed by the ACCC to review the NSP have more financial and engineering staff than the IIOs themselves.[[231]](#footnote-231) The NIC also noted that the five-year outlook of the NSP requires Part 5 operators to estimate the impact on its own charges from charges that the operator passes through to its customers “without having the benefit of any advice” regarding what these other entities will do.[[232]](#footnote-232) The NIC added that “in all cases, the ACCC found that the charges being levied by the IIOs were reasonable; that their provisioning for capital replacement was appropriate and that their financial arrangements generally met the required levels of probity”. [[233]](#footnote-233)

##### Suggested alternatives to Part 5

CIT called for the removal of Part 5 and for those operators to only be subject to the general ‘tier 1’ requirements.[[234]](#footnote-234) CIT[[235]](#footnote-235) and MIL[[236]](#footnote-236) also submitted that if Part 5 is retained, the rules should be changed to allow publication of NSP and NCP on the internet, which would be consistent with other government submission processes. MI, NIC and MIL specified that member-owned operators should not be subject to Part 5.[[237]](#footnote-237) MI submitted that removing Part 5 “would remove significant compliance costs for operators”. MI added that, if Part 5 were retained, the requirements could be simplified through the publication of:

“a standard customer charter (outlining service standards and targets);

an information statement (outlining changes in the Schedule of Charges from the previous year);

annual infrastructure plans (providing transparency of the capital investment to be funded by the charges); and

annual performance reporting (against relevant industry benchmarks previously established by the National Water Commission).”

MI further submitted that these proposed changes to publication requirements would “provide customers (and other parties) with the ability to review the prudency of the charges proposed against the respective service standards and infrastructure investment plans of member-owned operators.” [[238]](#footnote-238)

CICL submitted that instead of the NSP and NCP process, the ACCC could approach IIOs for further explanation of charges where “there is a significant unexplained increase in charges or the pricing path from year to year”.[[239]](#footnote-239) CICL further submitted that this would reduce red tape and the ACCC’s reliance on external engineering and financial consultants. NIC provided a similar view, and added that IIOs should also justify their pricing if the ACCC received complaints. NIC also submitted that the number of financial and engineering consultants is often more than the engineer and account staff available to the IIOs.[[240]](#footnote-240)

#### Discussion

The ACCC notes the considerable support for repeal of Part 5 received from stakeholders. If Part 5 were to be repealed, current Part 5 operators would remain subject to the general requirements detailed in Parts 2, 3, 4, and 7 of the WCIR. Repealing Part 5 would significantly reduce the regulatory requirements and associated compliance costs of the current Part 5 operators. However, a key consideration is to balance the reduction in compliance burden obtained via the repeal of Part 5 against the maintenance of effective standards[[241]](#footnote-241) for these infrastructure operators.

The policy intent of Part 5 specifically was to provide increased transparency around infrastructure investment and price-setting processes and allow for customer participation in these processes, while taking into account governance arrangements and the size of the operator.[[242]](#footnote-242)

The ACCC considers that the original policy intent of Part 5 remains relevant. Transparency of, and customer participation in, infrastructure investment planning and decision-making and price-setting processes remain important for customers’ own decision-making and for promoting the economically efficient and sustainable use of water resources and water service infrastructure.

However, the ACCC notes stakeholders’ views that the compliance costs of Part 5 outweigh the benefits obtained. The ACCC considers that effective standards *can* be maintained, through proposed amendments to the non-discrimination provisions (see section 5.3) and pricing transparency provisions (see section 5.4), rather than the current Part 5 requirements, at significantly lower compliance costs.

The ACCC maintains that customers should be able to understand the process by which infrastructure charges imposed by their operator are decided. Accordingly, the ACCC recommends that infrastructure operators should be required to detail the process for determining their charges when providing their Schedule of Charges to customers. This ensures that customers are informed, at a high level, about the process that the operator has undertaken for determining charges.

While an operator will not be required to directly detail infrastructure investment projects, to the extent that the cost of these projects are being recovered through regulated charges this should factor into the explanation of the process followed by the infrastructure operator when determining its charges that would need to be included on the Schedule of Charges. This requirement will provide customers with an understanding for the reason for changes in charges, without providing the level of prescriptive detail that was required in the NCP or NSP.

These enhanced pricing transparency requirements (see section 5.4) are not a perfect substitute for the NCP, which provided customers with information about the options and alternatives for maintaining the water service infrastructure, or the NSP, which provides a complete five year plan related to the water service infrastructure. However, they provide a basis for customers who are interested in that level of planning to seek out that further information from the operator.

There is also value in ensuring that alongside information provision about the process for determining charges, customers are informed about avenues through which they can provide input into the decision-making process and also make enquiries and/or complaints about matters relating to information on the operator’s Schedule of Charges. This approach has the advantage over the NCP in that it provides the operator with discretion in the way that it engages with its customers, therefore allowing the operator to find a solution that suits their business and customers.

The ACCC further considers that its proposed enhanced non-discrimination provisions (see section 5.3) will provide additional protections for customers, and thereby mitigate against the possibility of adverse effects caused by repeal of the Part 5 provisions designed to enhance customer involvement in the operator’s decision-making processes (in particular, the NCP requirements). To the extent that customers are protected from certain forms of discriminatory pricing by the rules, the need for customers to participate in decision-making processes in order to avoid such outcomes is alleviated. Moreover, the ACCC proposes that all infrastructure operators – not just Part 5 operators – should be subject to the enhanced non-discrimination rules, ensuring that all customers are afforded these protections, regardless of their operator’s size or ownership status.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to repeal the Part 5 (Network Service Plan) requirements if the rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions, are also accepted.  This rule advice is implemented in the repeal of Part 5 of the current WCIR and related provisions referencing Part 5 operators. |

## Approval or determination of regulated charges (Part 6)

Part 6 of the WCIR provides for the ongoing determination or approval of regulated charges of Part 6 operators by an independent regulator. The regulator is the ACCC by default, unless an eligible state regulator applies for, and is granted, accreditation under Part 9 of the WCIR. For the relevant operators, Part 6 addresses the potential misuse of market power that can occur by natural monopoly infrastructure operators (see section 5.1).

Under the WCIR, a Part 6 operator is defined as an infrastructure operator that is not member-owned and that services greater than 250 gigalitres (GL) of water held under water access entitlements (WAE).[[243]](#footnote-243) 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 current Part 6 operators are:

Lower Murray Water (LMW) – regulated by the Essential Services Commission of Victoria (ESCV)

Goulburn-Murray Water (GMW) – regulated by ESCV

WaterNSW (formerly State Water) – regulated by the ACCC (although the Independent Pricing and Regulatory Tribunal (IPART) has been accredited from 1 June 2016).

The ACCC considers that there is a need to move away from the use of ownership status as the criteria for the application of Part 6 (and also in other sections of the WCIR, as detailed elsewhere). There are several reasons for this:

There appears to be a strong rationale for determining the prices of operators who provide on-river infrastructure services for the storage and/or delivery of water on-river (in contrast to the delivery of water ‘off-river’, to a customer through pipes / channels). This is where monopoly power is strongest, as holders of a particular WAE have no ‘escape’ from receiving the services of this operator while they retain that right. This is in contrast to operators who provide network services:[[244]](#footnote-244) in this case a customer may in most cases transfer the location of access of their WAE to a location outside of the network (either to a different network or become a “private diverter”). Given this rationale, it is important that regulation be applied to operators providing on-river infrastructure services regardless of their ownership structure. This would ensure, for example, that if a hypothetical structural separation of GMW into ‘bulk’ and a number of related ‘retail’ entities occurred, the infrastructure charges of the ‘bulk’ entity would still need to be determined or approved, even though the majority (by volume) of its customers may be related customers.

There is a strong view from stakeholders that the WCIR need to provide for the approval or determination by an independent regulator of charges imposed by the Murray-Darling Basin Authority (MDBA), should the MDBA impose charges (see section 5.12).[[245]](#footnote-245) It is arguable that the MDBA is in fact member-owned, given that it is owned by the Basin States, who could also be its “customers” if MDBA was to impose charges. Accordingly, it is not clear that the rules in their current form would necessarily result in Part 6 applying to MDBA. A similar concern is also warranted in relation to the Border Rivers Commission (BRC).

Given these concerns, the ACCC recommends that the application of Part 6 not refer to the membership status of an operator.

In addition to the above, the ACCC notes feedback from stakeholders[[246]](#footnote-246) about the significant regulatory burden imposed by having multiple regulators, particularly in the context of the perceived current lack of consistency in relation to pricing outcomes for Part 6 operators (see section 5.10.3). The ACCC also received submissions which pointed out that most Basin States already provide for the direct price regulation of certain infrastructure operators (including all current Part 6 operators) under state water management law and argued that direct determination of these operators’ charges under the WCIR adds little value beyond that already achieved under state-based frameworks.

The Queensland Farmers’ Federation submitted that “the current water charge rules provide an adequate framework to guide pricing reform in Queensland irrigation schemes into the future. However, it is questioned whether it is necessary now to have such a framework defined in regulation.”[[247]](#footnote-247) WaterNSW submitted that “[s]erious consideration should in fact be given to the repeal of the WCIR…This would leave the pre-existing state based regulation that had already seen the implementation of the National Water Initiative in NSW…”[[248]](#footnote-248)

The National Irrigators’ Council[[249]](#footnote-249) and Murray Irrigation Limited[[250]](#footnote-250) submitted that “[s]tates that were already regulated now have an additional layer of bureaucracy…while [s]tates that have not been regulated in the past are still not captured”. National Irrigators’ Council also noted that different arrangements for regulating fees and charges “had been developed by states over time to suit the infrastructure and industries in that specific [s]tate. The intent to have consistency pricing regimes is good, however, the reality is that each [s]tate still has unique circumstances and management systems in place”.

Coliban Water noted that if its rural services were to be subject to Part 6, the cost associated with the duplication in regulation would outweigh the benefits because their current price regulation “is already broadly consistent with the goals of national regulation”.[[251]](#footnote-251) The NSW Irrigators’ Council submitted to the Act Review that having two regulators determining bulk water charges in NSW (IPART and the ACCC) has “added complexity”, which “raises costs and confusion for bulk water users in NSW”. Southern Riverina Irrigators submitted a similar view.[[252]](#footnote-252)

Conversely, Waterfind submitted that “after the positive changes water charge and water market rules have brought to irrigation districts across the Murray-Darling Basin so far, it would be prudent for the ACCC to consider an extension of its current duties of oversight”, acknowledging that this would require an amendment to the Act. Waterfind added that “to provide all Australian irrigation water users equal rights to use and trade their entitlements and allocations, Waterfind believes expanding the reach of water charge and water market rules, and consequently the ACCC’s authority, outside the Basin would benefit the Australian irrigation industry and water markets greatly”.[[253]](#footnote-253)

Further, in submissions relating to appeal mechanisms under Part 6, some stakeholders advocated that state-based appeal mechanisms should apply (see section 5.8). It appears that there is a considerable level of support to retain state independence and state-specific regulation of Part 6 operators. The regulatory burden of both State and Commonwealth regulatory frameworks applying to Part 6 operators should also be acknowledged.

The current accreditation arrangements of the WCIR reflect the continued role of Basin States in rural water policy, planning and administration. This situation contrasts with other sectors such as gas and electricity, where State functions have largely been referred to the Commonwealth. The ACCC notes that there are currently no indications that Basin State are likely to further transfer the regulation of rural water charges or other water-related functions to the Commonwealth, and that Basin States maintain considerable expertise which is highly valuable for the management of the Murray-Darling Basin (MDB) and the rural water sector more broadly.[[254]](#footnote-254)

Moreover, the provision for Basin State regulators to be accredited under Part 9 of the WCIR affords considerable discretion to accredited regulators, meaning that the potential consistency gains accruing from directly determining operators’ charges at a Commonwealth level are limited. Although the requirement for accredited regulators to act consistently with the ACCC’s Pricing Principles promotes consistency, the ACCC considers that there is sufficient discretion for regulators under the rules and Pricing Principles that this requirement will not necessarily result in a markedly greater level of consistency than would be achieved in a context where regulators voluntarily worked to develop a nationally coherent approach.

Given this context and the concerns raised by stakeholders, the ACCC has reconsidered whether the current application of Part 6 and accreditation arrangements constitute the best mechanism for integrating the functions of State and Commonwealth regulators. The ACCC considers that it is appropriate that the Commonwealth’s role be redirected away from determining an operator’s overall revenue requirement (since this role can be performed just as effectively under state water management law), and towards providing consistent protections and promoting pricing transparency for customers of infrastructure operators throughout the Basin. Accordingly, the ACCC considers that the most appropriate way to reduce the regulatory burden of Part 6 is to re-craft the application of Part 6 as both:

a framework for the regulation of infrastructure operators that would allow Basin States to voluntarily transfer regulatory functions to the Commonwealth at a later date; and

a regulatory ‘fall-back’ where state water management law does not provide for the State regulator to directly approve or determine the infrastructure charges of infrastructure operators providing on-river infrastructure services. This could occur where:

* 1. a Basin State does not have in place a mechanism for direct approval or determination of a particular operator’s infrastructure charges; or
  2. a Basin State does not have adequate jurisdiction over an infrastructure operator because that operator provides services across multiple jurisdictions (e.g. MDBA, BRC).

This approach recognises that customers of providers of on-river infrastructure services have less opportunity and ability to change service providers than do customers of other infrastructure operators, and that on-river infrastructure services for the storage and delivery of water generally remain ‘bundled’ with water access rights. To implement this approach, the ACCC recommends that the application of Part 6 be amended to apply based on the following:

Where:

1. holders of a class of water access rights must obtain infrastructure services from an infrastructure operator in order to have water relating to that water access right stored or delivered; or
2. a person must obtain infrastructure services from an infrastructure operator in relation to the storage or delivery of water to give effect to an arrangement for the sharing of water between more than one Basin State; and
3. the infrastructure operator is not required to have all its infrastructure charges approved or determined by a single State agency under State water management law;

that infrastructure operator should be a Part 6 operator.

The ACCC recognises that this approach will require guidance on terms such as “class of water access rights”. The ACCC generally considers a ‘class of water access right’ to defined by reference to the following characteristics:

* 1. the water resource to which the right relates
  2. the SDL resource unit
  3. its priority or reliability
  4. the form of take

*Note:* ‘form of take’ is defined in section 1.07 of the Basin Plan.

* 1. access to carryover arrangements (where applicable)
  2. tradeability.

Under this proposal, Basin States would be responsible for the approval or determination of the infrastructure charges of current Part 6 operators in the first instance. This would have the effect that LMW, GMW and WaterNSW would have their charges approved or determined under Basin State regulatory processes rather than under Part 6 of the water charge rules once their current regulatory period expires. However, the infrastructure charges and water planning and management charges set by these operators would still need to comply with the other rule requirements—in particular, the non-discrimination rules and the pricing transparency requirements.

Based on current circumstances, the ACCC considers that upon the commencement of the amended rules, there will be no infrastructure operators that would immediately meet the new conditions for the application of Part 6. The ACCC considers that this outcome is appropriate in that:

* the costs of the current Part 6 operators will still be subject to scrutiny by state-based regulators under the relevant Basin State regulatory process, and that the state-based regulators have a high degree of experience and expertise in performing such functions;
* the charges of the current Part 6 operators will still need to be consistent with the other water charge rule requirements, the same as all other infrastructure operators in the MDB. This will ensure a level of consistency in outcomes for customers in that all customers will be afforded the same protections against discrimination, the same rules for calculation of termination fees, and the same rules requiring pricing transparency;
* the water charge rules will be able to regulate any future infrastructure charges or water planning and management charges imposed by inter-jurisdictional infrastructure operators such as the MDBA;
* the water charge rules will provide a regulatory ‘fall back’ should the States withdraw from regulation of operators who otherwise meet the new Part 6 application provisions.

The proposed changes to the application of Part 6 mean that Part 9 of the WCIR (accreditation) could be repealed (see section 5.9). Because Basin State regulators would no longer be accredited under the WCIR, they would not be bound by the ACCC Pricing Principles as a condition of accreditation.

The ACCC considers that the gain in terms of decreased regulatory burden of these proposals would outweigh potential small increases in inconsistency of regulators’ approaches to approvals and determinations. Although accredited regulators are required to apply the ACCC’s Pricing Principles when approving or determining charges (as a condition of accreditation), in practice the regulator (whether the ACCC or an accredited State regulator) has considerable discretion and substantially different pricing outcomes can occur.

The ACCC pricing principles would be retained to provide a clear guide for circumstances where the ACCC did have an approval role (e.g. for regulation of charges of the MDBA or BRC, if imposed in the future). The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector.

Further, in approving or determining charges, they (and the operator) would need to ensure that the operator’s charges were consistent with the other requirements of the water charge rules.

This is similar to current arrangements in relation to water trading rules. Basin States are primarily responsible for trading arrangements within their jurisdiction, however they must ensure their arrangements are consistent with the Basin Plan water trading rules. This allows for the ongoing role for Basin States, capitalising on their significant local expertise, while ensuring a Basin-wide level of protection for water users which facilitates the development of efficient water markets

Recognising there may be a number of reasons why a Basin State may choose not to require an operator’s infrastructure charges to be approved or determined, and that the benefits of this form of regulation will vary across operators, there may be circumstances where the application of Part 6 is not the best regulatory outcome. The rules should provide for the ACCC to provide an exemption where the application of the requirements of Part 6 (requiring an operator to have its infrastructure charges approved or determined) would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles.

Any such assessment by the ACCC should take into the circumstances, including:

* the total volume of water access right relevant to the operator’s infrastructure services
* the classes of the infrastructure services provided by the operator;
* the preferences of the operator’s customers, and
* the views of Basin State regulators

In conclusion, the ACCC considers there are strong arguments for refining the role of approvals and determinations under the water charge rules.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended such that the application of Part 6 applies based on the following criteria.  Where:   1. holders of a class of water access right**s** must obtain infrastructure services from an  infrastructure operator in order to have water relating to that water access right stored or delivered; or 2. a person must obtain infrastructure services from an infrastructure operator in relation to the storage or delivery of water to give effect to an arrangement for the sharing of water between more than one Basin State;   and:   1. the infrastructure operator is not required to have all its infrastructure charges approved or determined by a single State agency under State water management law;   that infrastructure operator is a *Part 6 operator* to whom Part 6 applies.  The rules should be amended to allow for the ACCC to provide an exemption to the requirement on a Part 6 operator to have its infrastructure charges approved or determined under Part 6 of the rules.  The ACCC should only give such an exemption if it is satisfied that the application of those requirements would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles, taking into account:   1. the total volume of water access rights in relation to which the class of water access rights holders must obtain infrastructure services from the operator, if applicable; 2. the total volume of water subject to water sharing arrangements in relation to which a person must obtain infrastructure services from the operator, if applicable; 3. the types or classes of infrastructure services provided by the operator; 4. any preferences expressed by the operator’s customers to the ACCC; 5. any views expressed by a State Agency to the ACCC; and 6. any other matters that the ACCC considers relevant.   The exemption should be granted for a specific period or for an unspecified period if the decision to exempt is subject to review at a specific time.  In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.  *Note:* *Rule advice 5-M should only be adopted if the rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions, are also accepted.*  *Note: If rule advice 5-M is adopted, rule advice 5-W (winding back accreditation requirements) should also be adopted.*  *See also* Rule advice 5-W.  This rule advice is implemented in Rules 23 to 23C of the proposed water charge rules. |

### Procedural requirements

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 operator’s charges. However, there is no statutory deadline for an operator to lodge their application.[[255]](#footnote-255) Further 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.[[256]](#footnote-256) The ACCC has also produced guidelines in relation to applications under Part 6.[[257]](#footnote-257)

In its Issues Paper, the ACCC sought stakeholder’s views in relation to procedural requirements of Part 6 of the WCIR. In particular, the ACCC sought feedback on:

whether there are ways to reduce regulatory burden arising from information requirements, without compromising the regulator’s ability to properly approve or determine a Part 6 operator’s regulated charges (Question 25);

whether the WCIR should impose different time limits on the regulator in relation to Part 6 (Question 26); and

whether the WCIR should impose a statutory deadline by when a Part 6 operator must lodge its application (Question 27).

#### Stakeholder feedback

In responding to these questions about Part 6 procedural requirements, stakeholders broadly raised concerns of two types:

the timeliness of regulatory decisions, in the context where a Part 6 operator levies charges on other infrastructure operators (such as IIOs) who use the Part 6 operators’ charges resulting from the determination as an input into their own decisions about infrastructure charges they levy on their customers; and

consultation requirements in the Part 6 processes.

##### Timeliness of regulatory decisions

In submissions to recent pricing reviews, the Act Review and the ACCC’s Issues Paper, operators, the NSW Irrigators’ Council and the National Irrigators’ Council (NIC) expressed concern about regulatory timelines for the approval or determination of charges for Part 6 operators. The NIC submitted that a key issue is the timing of the release of the final decision for price approvals or determinations:

*As most IIOs work to a traditional financial year (1 July – 30 June), they update fees and charges to apply from 1 July. Member owned IIOs are responsible to a Board and must follow a process to receive Board approval of changes to the fees and prices schedule. Further, all must comply with the WCIR to provide customers with the regulated notice prior to implementing changes to the fees and prices.*

*Currently the practice has been for the ACCC to announce final determinations in June prior to the bulk water provider implementing prices in July. This does not provide IIOs enough time to include final bulk water charges when undergoing their annual price review.*

*NIC recommends changes to the WCIR to provide that determination of regulated charges be finalised by the end of April each year to allow time for IIOs to calculate the impact on charges, follow their approval process and give customers the regulated notice of changes prior to the opening of the financial year.[[258]](#footnote-258)*

The NSW Irrigators’ Council identified that many infrastructure operators operate on a financial year, with new charges applying on 1 July.[[259]](#footnote-259) The NSW Irrigators’ Council submitted that due to the late release of the final decision on the determination of State Water (now, WaterNSW) charges, and the requirement to publish a Schedule of Charges at least 10 business days before the Schedule takes effect, infrastructure operators were required to estimate State Water’s charges “in the absence of a clear signal of the level [of these charges]”. The NSW Irrigators’ Council submitted that this created “significant risk and uncertainty” and imposed a “financial liability on IIOs and their customers and shareholders who will have to bear the difference in the costs of the ACCC’s determined bulk water charges and the IIOs initially published charges; not to mention the administrative costs incurred through multiple mail-outs and notifications to customers”.

For the purpose of charge pass-throughs, Murray Irrigation Limited (MIL) supported adjusting the timeframe under which a Part 6 operator must lodge their application with the regulator for approval or determination of its charges, or removing the 10-day publication requirement.[[260]](#footnote-260) MIL was concerned about delays in the determination process that result in final determinations being released after the deadline for it to set prices and notify customers. MIL recommended that the rules should be amended to require pricing applications to be submitted by a date that would allow the determination to be finalised two months prior to commencement of the new financial year.

Western Murray Irrigation supported finalisation of price determinations well before June, for example during mid- to late-April. It stated the following:

*Recently WMI was hours away from releasing its 2015/16 Schedule of Charges when the ACCC issued its final decision on WaterNSW’s 2015-16 charges for infrastructure services. This resulted in WMI expending a considerable sum to destroy the original envelopes, prepare new envelopes, insert the revised schedule and then post off. If it was possible to avoid physical posting out of the Schedule of Charges and replace this solely with uploading on the WMI website, it would result in significant cost savings for customers (owners).*

*….It would be beneficial to WMI (and thus its customers) if the final determinations of regulated charges could be finalised well before June (say mid-late April) in order to allow sufficient time for WMI to incorporate the determination into its Schedule of Charges for the coming year.[[261]](#footnote-261)*

##### Consultation requirements under Part 6

The Victorian Farmers’ Federation (VFF) supported more clarity being provided to Part 6 operators about what constitutes effective customer consultation. [[262]](#footnote-262) The VFF added that “[i]improving consultation with customers would support a greater level of transparency and accountability in the water sector”. The VFF raised concerns about the commitment of rural water corporations to effectively engage with their customers and customer representatives. The VFF submitted that customers of GMW are frustrated about the process for developing proposed changes to GMW’s pricing approach, which were used to inform GMW’s application to the ESCV in March 2015. The VFF submitted its concern that there has been insufficient information provided about the impacts of the price change, that the process has been finalised without “full and open consideration” of customer views and “implemented ahead of customer knowledge and understanding”.

Peter Beex, an irrigator in GMW’s Murray Valley network, submitted that the ACCC presently “relies on the operator for information regarding consultation” and should “obtain a better understanding of the stakeholder's viewpoint”. [[263]](#footnote-263) Mr Beex suggested that the ACCC should ask irrigators directly about their views on annual prices and fees levied for individual services, which could be achieved with online responses taken in a similar format as the Issue Paper.

Daniel Mongan, an irrigator in GMW’s Central Goulburn network, stated that operators “have a potential conflict of interest to ensure that the proposal that they make is accepted by customers” during consultations.[[264]](#footnote-264) Mr Mongan was of the view that this could lead to an operator only presenting data in support of its own preferred outcomes, in order to skew customers’ perceptions of available alternatives. Mr Mongan stated that “[a]s a priority the [water charge rules] need to be amended to ensure information supplied to customers [is] independent and impartial. This should be accompanied by sufficient consequences to prevent Water Corporations providing misleading information to their customers”.

Mr Mongan also submitted that infrastructure operators are provided with insufficient guidance/ structure as to how they should consult with their customers in relation to tariff reform.[[265]](#footnote-265) Mr Mongan noted that operators typically consult with their customers as part of the development of the [Victorian] Water Plan; however, when many elements (that affect price) are changing at the same time, it does not support customers to make informed decisions. Mr Mongan suggested that tariff reforms should be regulated by the water charge rules or that there should be a requirement for reviews to completed outside the Water Plan review.

Mr Mongan also called for the regulator to act as a ‘customer advocate’ to assess the “validity of the claims” made by the infrastructure operator, noting that customers do not have resources to scrutinise the information. [[266]](#footnote-266) Mr Mongan called for amendments to be made to the water charge rules to ensure that there is customer support including customer consultative groups and for tariff reforms to be subject to the same scrutiny as regulated expenditure.

Similarly, stakeholders at the Shepparton public forum also raised considerable concerns in the context of the regulation of GMW’s charges about lack of access to planning documents that, in their view, would better equip them to assess an operator’s pricing proposals and meaningfully contribute the regulatory processes for determining the operator’s charges.

#### Discussion

##### Timeliness of regulatory decisions

Under WCIR Rule 7, an infrastructure operator must give a copy of its Schedule of Charges to a customer at least 10 business days before the service is provided. This requirement applies to all infrastructure operators. Some infrastructure operators provide on-river infrastructure services to customers that are also infrastructure operators. For example, WaterNSW imposes charges for storage and delivery services on MIL, who in turn recovers these charges from its customers. In some cases, an operator may simply pass on such charges in full, while in others it may adjust their own charges once they has been notified of the relevant operator’s charges for on-river infrastructure services.

As noted above, IIOs have raised concerns, both during the WaterNSW 2014-15 price determination and during the consultation process for the Water Charge Rules review, that the regulator’s decisions on regulated charges of Part 6 operators who supply on-river infrastructure services to other operators have been too late to allow those other operators enough time to prepare and send their own Schedules of Charges before the start of the new water year.

Enabling more timely decisions for Part 6 operators would assist operators to provide their Schedules of Charges in a more timely manner, but requires consideration of all the stages in a charge determination process, from the application through to the notifications to customers.

The rules do not prescribe that the regulator’s decision must be notified by any particular time before the start of the year to which the charges relate. Although rule 30 requires that the regulator’s decision must be made within 13 months after receiving the operator’s application under Part 6, Division 1, the WCIR do not prescribe any time within which the application must be submitted. Similarly, for the annual review of charges under Division 3 of Part 6, there is no deadline for the application to be submitted, but the regulator’s decision must be made within 3 months of receiving the application (rule 37). Therefore, if the application is submitted late, it may be difficult for the regulator to complete its decision in good time before the start of the new water year.

In the case of the ACCC’s determination of State Water’s charges for 2014-17, State Water submitted its formal application on 30 July 2013, although it had submitted a draft application on 30 May 2013. The ACCC released its final decision on 28 June 2014. This was within the 13 months allowed (from both the draft and formal lodgement dates), but too late to allow IIOs to give their customers 10 days’ notice prior to 1 July.

##### Consultation requirements under Part 6

Although the existing WCIR do not prescribe consultation, the ACCC’s Pricing Principles set out the expectation that operators will consult with customers on issues of significance to them. Such consultation is likely to cover the trade-offs between pricing and service outcomes, major investment decisions, significant maintenance works and proposed tariffs.

The Pricing Principles also state that:

*‘…the regulator must have regard to the consultation that has been undertaken by the operator. For instance, where a regulator deems consultation to be insufficient or unsatisfactory it may influence the regulator’s views on whether proposed expenditure is prudent or efficient.’*[[267]](#footnote-267)

Also, WCIR Rule 28 and 29 require the regulator to invite submissions on the Part 6 operator’s application from interested parties and have regard to any submissions it receives before publishing its draft approval or determination of a Part 6 operator’s regulated charges, and rule 36 provides a similar requirement for the annual review process.

Consultation between A Part 6 operator and its customers is likely to facilitate a better application from the operator. Further, if customers’ views and knowledge are taken account of at an early stage, this is likely to lead to a better regulatory decision. Customers are particularly well-placed to provide information, for example, on whether proposed upgrades in services would be worth the additional cost.

The need for consultation is greater for a major price approval or determination under Division 2 of Part 6 (which occurs at the beginning of a regulatory period) than for an annual review under Division 3 (annual reviews occur in subsequent years of the regulatory period). Changes in charges through the annual review are likely to be smaller and the process is more mechanistic. Further, the time frame for a decision is shorter in the annual review. Therefore, the regulatory burden of earlier consultation is less likely to be justified for an annual review.

While noting the concerns of stakeholders in relation to a Part 6 operator not undertaking sufficient consultation, the ACCC does not consider it appropriate to mandate the specific form of consultation that should be undertaken by a Part 6 operator. There may be many different ways that successful consultation may be undertaken, and the ACCC notes that there is little evidence that the detailed consultation requirements currently forming part of Part 5 of the water charge rules has been valued by customers.[[268]](#footnote-268)

The current provisions requiring both the operator and the regulator to *undertake* consultation during Part 6 processes should be retained. Also, the ACCC has proposed rule amendments that all infrastructure operators, including Part 6 operators, must include on their Schedules of Charges a statement setting out (among other things) how a person may seek to participate in the operator’s process(es) for determining its charges (see section 5.4.1). This statement would include setting out a Part 6 operator’s consultation processes.

The ACCC encourages stakeholders, particularly interested customers of a Part 6 operator or other infrastructure operator whose charges are determined under Basin State regulatory regimes, to actively seek to participate in the operator’s consultation processes. Also, such stakeholders are encouraged to provide submissions to any approval or determination process under Part 6. However, the ACCC does not consider that the objective of tailored, successful consultation by each Part 6 operator with its own customers is one that is best achieved by mandating the form of consultation via the rules.

#### Draft rule advice

Rule advice ‑

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| The rules should be amended such that timeframes that apply to Part 6 processes are as per Table 5.3.  Table 5.3: Proposed Regulatory Timelines for Part 6 Operators   |  |  |  | | --- | --- | --- | |  | **Original Approval/Determination** | **Annual Review Approval/Determination** | | **Approval/Determination lodged** | 15 months before the start of the regulatory period to which the approval determination relates. | 4 months before the start of the year of the regulatory period to which the approval / determination relates. | | **Regulator provides notice of its final decision** | 30 business days before the start of regulatory period to which the approval /determination relates. | 30 business days before the start of the year of the regulatory period to which the approval/determination relates. | | **Part 6 operator to notify customers of its Schedule of Charges†** | 25 business days before the regulated charges in its Schedule of Charges is due to commence | 25 business days before the regulated charges in its Schedule of Charges is due to commence | | **Other infrastructure operators‡** | 10 business days before the regulated charges are due to commence. | 10 business days before the regulated charges are due to commence. |   † This should apply to all infrastructure operators who provide on-river infrastructure services, not just Part 6 operators. This requirement should apply via Schedule of Charge requirements. ‡ i.e. other than Part 6 operators / operators who provide on-river infrastructure services) to notify its customers. This requirement should also apply via Schedule of Charge requirements.  This rule advice is implemented in Rule 11 and in Part 6, Divisions 2 and 3 of the proposed water charge rules. |

### Length of the regulatory period

Section 92(4) of the Act allows the WCIR to specify the duration of a determination, which the WCIR implements via Rule 3 – definition of ***regulatory period.*** Rule 24 provides the regulator limited discretion to vary the regulatory period from the period as defined by rule 3. Rule 3 currently specifies a standard regulatory period of four years (after an initial period of 3 years).

A change from the standard four-year period was made by the ESCV in its 2013 determination for LMW under Part 6 of the rules, which set a five-year period. This used the provision under rule 24 to align the rural with the urban side of LMW’s operations. Regarding infrastructure operators outside Part 6, the QCA set five year price paths for SunWater and SEQWater irrigation schemes.

The National Electricity Rules (NER) provide that a regulatory control period must be not less than five years (s6.3.2). This is longer than the four year period currently in the rules, but the NER allow for greater potential to vary charges within a period due to pass-throughs and contingent projects.

The ACCC’s submission to the Act Review recommended that section 92(4) of the Act be redrafted to provide that the water charge rules may also provide for the duration of the regulatory period to be determined by the ACCC or relevant accredited regulator. The Independent Expert Panel (the Panel) considered that there should be further consultation on amending section 92(4), but recommended that regulators’ discretion be limited to *extending* the period.[[269]](#footnote-269)

**In its Issues Paper, the ACCC sought feedback on whether the provisions relating to regulatory periods set out in the WCIR appropriate.**

#### **Stakeholder feedback**

All submissions that commented on the regulatory period supported the regulator having flexibility.

IPART recommended changing the rules to provide greater discretion for the regulator, to increase or decrease the length of the period as appropriate (between three and five years).[[270]](#footnote-270) IPART considered this flexibility would allow the regulator to balance the incentives power of a longer regulatory period with the uncertainty of a utility's short-term operating environment and would provide a more efficient overall regulatory framework.

The ESCV did not make a formal submission but in a consultative meeting on 24 March 2015 ESCV staff expressed a preference for greater flexibility for regulatory periods. A default period of five years was suggested, with discretion for the regulator to set a shorter period.

The VFF supported discretion to vary regulatory periods, stating the view that it would enable “local circumstances to be taken into account”.[[271]](#footnote-271) The VFF added that “[t]his should not be a substitute for effective long term planning on the part of water authorities. Nor is it envisaged that the regulatory period would be varied without due cause. But it is another tool in the regulatory box which can be used when required”.

GMW supported allowing the regulator to set longer regulatory periods, with a minimum period equal to the current 4 years.[[272]](#footnote-272) In GMW’s view, this would increase the efficiency of regulation, reduce regulatory costs (for the infrastructure operator and regulator) and be consistent with the situation for similar water infrastructure operators, such as LMW, which now have a five year regulatory period to match the period for its urban water services. GMW noted potential forecasting uncertainties and risks when there is a longer regulatory period but considered that this is “not a substantial issue” for an infrastructure operator such as GMW, which has mainly fixed costs and a revenue cap.

The NSW Irrigators’ Council submitted to the Act Review that in NSW the regulatory timeframes for approval or determination of charges differs between State Water (now WaterNSW), Sydney Catchment Authority (now WaterNSW) and the NSW Office of Water (now the water area within the NSW Department of Primary Industries).[[273]](#footnote-273) The NSW Irrigators’ Council submitted that in addition to having two separate regulators that approve or determine charges, “NSW has to undergo three determination processes”. The NSW Irrigators’ Council submitted its view that “this process is not transparent for NSW or consistent across the [MDB]”.

#### **Discussion**

There are trade-offs to consider in setting the length of the regulatory period. On the one hand, a longer period reduces the regulatory burden and cost of frequent reviews, and provides greater certainty about the price path. It provides more incentive for providers to reduce costs through efficiency, as they will have longer to benefit from reduced costs before charges are reduced to take account of the new observed cost level. However, too long a period could result in the level of charges diverging from the underlying level of costs as conditions change. Longer regulator periods may also mean a slower adoption of improved regulatory approaches.

Shorter periods allow for more timely responses to changes in conditions. For example, reductions in operating cost could be more quickly passed on to customers. On the other hand, too short a period makes reviews too frequent, with higher consequential costs. It leaves less incentive for providers to reduce costs through efficiency, as their charges will more quickly be reduced to take account of the new observed cost level.

The ACCC notes that both accredited Basin State regulators with Part 6 responsibilities, IPART[[274]](#footnote-274) and ESCV, recommended discretion for the regulator. They commented that their past experience has indicated that a shorter period can be appropriate when a major change in conditions or investment is expected but uncertain. In such a situation, a new determination can be made after there is greater clarity on the new conditions.

IPART considered that in some circumstances a shorter or longer period could be justified by uncertainty regarding such circumstances as:

* a potential change in the scope or scale of a regulated agency;
* the timing or scale of a large project; or
* a potential governance or regulatory change.[[275]](#footnote-275)

Similarly, the VFF suggested that reducing the regulatory period is one option for the regulator to maintain clear oversight when it is not satisfied with an operator’s pricing proposal.[[276]](#footnote-276) GMW provided a number of suggestions to adjust regulatory periods including providing the regulator with full discretion (having regard to the infrastructure operator’s proposal and other factors), setting a longer regulatory period (five years was provided as an example) or a minimum regulatory period (four years was provided as an example) with discretion to set a longer period. [[277]](#footnote-277)

As another alternative, IPART recommended that, if the wider discretion is not provided for, the rules could be amended to allow for the regulator to vary the regulatory period to align with the period for other services delivered by or associated with the operator (for example, to align with regulatory determination periods for non-MDB rural areas).

Allowing the regulator to align regulatory periods would avoid the regulatory burden resulting from an operator having to engage in separate determination processes for its different services. By comparison, differences in the length of regulatory periods between different operators or jurisdictions are unlikely to have significant adverse economic consequences.

Part 6 operators such as WaterNSW and LMW have significant operations outside the scope of the water charge rules (so that these operations are not subject to price determination under Part 6), and allowing more flexibility in the rules for different regulatory periods will reduce the regulatory burden associated with non-alignment of these different determination processes.

As such, the ACCC considers that the rules should be amended to change the default regulatory period from four to three years, coupled with the flexibility for this period to be lengthened when doing so would align the regulatory period under Part 6 with other regulatory processes.

More generally, the ACCC considers that it would be preferable for the rules to allow for the regulator to have discretion over the length of the regulatory period, for shorter as well as longer periods than the default. As the ESCV and IPART have found, there is value in having discretion. A limited discretion could be given to allow the aligning of regulatory periods for operators. However, a wider discretion would be preferable:

* Longer periods may be suitable when costs are stable, so that regulatory costs are reduced, there is more certainty about the future price path, and more incentive for the operator to reduce costs.
* Shorter periods may be suitable when a major change such as in governance or costs and it would be preferably to review the situation when there is greater clarity.

Allowing such discretion may require an amendment to s.92 of the Act. The ACCC notes that the Panel recommended that the Act amended to allow the regulator to have discretion to determine the regulatory period. Therefore, proposed amendments that would provide for fuller regulatory discretion is contingent on that recommendation being accepted.

Given the ACCC’s rule advice in relation to the application of Part 6 and the consequential limited role for accreditation, there will be less need to adjust regulatory periods to align with other regulatory periods faced by operators. This is because under the proposed amendments, approvals and determinations under Part 6 will be limited to multi-jurisdictional operators, or where a Basin State has decided not exclude an infrastructure operator from its regulatory processes.

In summary, the ACCC’s rule advice that the regulator should have discretion to vary the regulatory period encompasses the possibility of the need to align regulatory periods, but more broadly is concerned with the regulator having the ability to respond to individual circumstances as the need arises, such as are outlined above.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to alter the definition of “regulatory period” (Rule 3 in Part 1) to provide for a default regulatory period of three years (instead of four years) for Part 6 operators.  Rule 24 should be amended to allow the regulator to be able to lengthen the regulatory period in order to align the regulatory period with:   * + regulatory periods that apply to a Part 6 operator in relation to urban water services (as is currently provided for); and   + regulatory periods that apply to the Part 6 operator in relation to non-MDB (rural) water services.   If the Act is amended to allow for the regulator to have discretion in determining the length of the regulatory period, the rules should be amended to provide the regulator to generally be able to vary the regulatory period for longer than 3 years and up to a maximum of 5 years (including for reasons other than aligning regulatory periods).  *Note*: *The ACCC’s view is that allowing the regulator general discretion to vary the regulatory period cannot be achieved without an amendment to the Act. The ACCC notes that the Act Review Panel recommended that the Act be amended to allow the regulator to have discretion to determine the regulatory period. Therefore, this section of this draft advice is contingent on that recommendation being accepted.*  This rule advice is implemented in Rules 3 and 24 of the proposed water charge rules. |

### Basis for approving or determining regulated charges

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:

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:

* 1. 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
  2. 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).[[278]](#footnote-278) 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. The interaction between the BWCOP and the water charge rules generally is discussed in section 4.2.

An accredited regulator (as a condition of their accreditation) must also take account of the ACCC’s pricing principles[[279]](#footnote-279) when approving or determining charges (see section 5.9 for further discussion of accreditation arrangements).[[280]](#footnote-280)

#### **Stakeholder feedback**

In its Issues Paper, the ACCC sought stakeholders’ views on whether the tests set out in rule 29 are sufficiently clear to regulators and operators (Question 29). The ACCC also asked 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 (Question 30).

Stakeholder comments on defining terms in the BWCOP and the possibility of ordering the BWCOP into a hierarchy are discussed in section 4.2.

Stakeholders did not provide specific comments on the tests set out in Rule 29; however, the ACCC, based on its experience in implementing this rule, and proposed amendments to the water charge rules set out in this draft advice, considers that there is scope to improve the clarity of rule 29.

#### **Discussion**

Rule 29 of the WCIR sets out the decision rule for charge approvals and determinations.

Sub-rule 29(1) provides that the regulator must approve or determine the charges. Sub- rule 29(3) specifies that if the regulator is not satisfied that the tests in sub-rule 29(2) are met it must determine the charges.

##### Requirement to approve

Subrule 29(2) does not specify any particular course if the regulator is satisfied with the Part 6 operator’s application. The intent is that the regulator approves the charges set out in the application in this event.

##### Equivalence of sub-rules 29(b)(i) and (ii)

The current drafting of rule 29(2)(b) is potentially ambiguous in relation to how a regulator is to account for revenue from sources other than the infrastructure charges to be approved or determined.

On one interpretation, the requirements under rule 29(2)(b)(i) and (ii) are logically identical. On an alternative interpretation, the requirement under rule 29(2)(b)(i) would have the effect that revenue from sources unrelated to the provision of infrastructure services would be fully offset by reductions in the amount that could be recovered through the infrastructure charges being approved or determined.

To avoid such ambiguity, the ACCC proposes re-drafting this sub-section to reflect the regulatory approach that has been followed in practice and provide regulators and infrastructure operators with greater clarity.

##### Interpretation of ‘other revenue’

‘Other revenue’, in the case where there is a government contribution to the cost of specified activities, clearly encompasses those contributions. It could also include other revenue which derives from the same infrastructure services as customers are charged for and helps to defray the cost. For example, fees charged to hydro-electricity operators could conceivably form part of ‘other revenue’, although neither IPART nor the ACCC has assessed them in revenue in price determinations to date.

‘Other revenue’ could also include all revenue derived by the operator from activities not directly related to its infrastructure services—for example, WaterNSW’s revenue from providing construction services to the MDBA. The ACCC considers that this was not the intent of rule 29 and it was not interpreted in that way by the ACCC during the ACCC’s 2014 of WaterNSW’s (then State Water) charges. Construction services provided by WaterNSW is unlikely to meet the definition of ‘infrastructure services’ under the rules, and have a different cost base to that for infrastructure services. Therefore it would not be appropriate to include revenue from such services when the related costs are excluded.

The ACCC is of the view that the interpretation of rule 29(b) would be clarified by removing the reference to ‘other revenue’. Instead, the rule should simply require the regulator to consider whether the forecast revenue from infrastructure charges is reasonably likely to meet:

the prudent and efficient costs of providing infrastructure services, less

any government contributions related to the provision of those infrastructure services.

##### Consistency with water charge rules as a whole

The ACCC notes that Part 6 does not currently explicitly require the regulator to ensure that infrastructure charges it approves or determines are consistent with the water charge rules as a whole. This is partially because under the current rule Part 3 (non-discrimination against customers based on whether they hold an irrigation right) only applies to member-owned operators, which under the current rules cannot be Part 6 operators. Also, other requirements in the rules are placed on infrastructure operators rather than on the regulator directly.

The ACCC considers that it is incumbent on the regulator not to approve or determine charges that are inconsistent with the rules as a whole, despite the fact that the prohibitions in the rules are generally directed at the operator rather than the regulator. This is particularly the case given the proposed changes to apply Part 3 of the rules to all infrastructure operators (including Part 6 operators). While Part 6 operators should not include infrastructure charges that are inconsistent with the rules in their applications to the regulator, the regulator should also be satisfied that the charges it approves or determines are consistent with the rules as a whole.

The ACCC recognises that, during the transitional period immediately after the proposed amendments to the rules are made, the situation may arise where it is not possible for charges determined by the regulator to be fully consistent with amended rule requirements outside of Part 6. In these cases, the regulator should seek to ensure that charges it approves or determines—including through the annual review process—are consistent as far as possible with the amended water charge rules as a whole.

As such, the ACCC considers the decision criteria in rule 29 (for an initial determination or review) and rule 37 (for annual reviews of infrastructure charges) should be amended to expressly require the regulator to consider the consistency of the infrastructure charges being approved or determined with the other requirements of the water charge rules. The ACCC notes that—in relation to rule 37 (for annual reviews of infrastructure charges)—any variations to the charges of the original decision will also need to be made taking into account price stability. As such, full consistency between the infrastructure charges and the other water charge rules may not occur until after the end of the regulatory period underway at the time the water charge rules are amended. Nevertheless, there would be an expectation that any variation of charges under rule 37 should, at a minimum, not result in the operator’s infrastructure charges being any less consistent with the other requirements of the water charge rules.

#### Draft rule advice

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| Rule advice ‑   * Rule 29(2) should be amended to more clearly take into account government subsidies and community service obligations, as well as revenue from sources other than regulated water charges. In particular, Rule 29(2) should require the regulator to be satisfied that the forecast revenue from infrastructure charges is reasonably likely to meet:   + the prudent and efficient costs of providing infrastructure services; less   + any amount to be contributed by governments in relation to providing the infrastructure services. * Rule 29 should be amended to also require the ACCC not to approve the infrastructure charges set out in an application unless it is satisfied that the infrastructure charges contained in the application are otherwise consistent with the rules. * Rule 37 should be amended to allow a regulator to amend the infrastructure charges in the initial determination to the extent that it is reasonably necessary to make variations having regard to the consistency of the infrastructure charges with the other requirements of the water charge rules.   This rule advice is implemented in Rule 29 and Rule 37 of the proposed water charge rules.  *See also section 5.6.4.* |

### Annual review of regulated charges

Under Part 6 of the WCIR, the ACCC, or an accredited regulator, sets the regulated charges for Part 6 operators for the first year of the regulatory period and the methodology for setting regulated charges for the remaining years of the regulatory period.

The Part 6 operator must apply to the regulator for approval or determination of its infrastructure charges in each year subsequent to the initial year of the regulatory period (an ‘annual review’). In its application, the operator must include certain information relating to the demand / consumption of infrastructure services for the current and forthcoming regulatory year and the proposed infrastructure charges in respect of the year to which the application relates.

At that review, the regulator must set regulated charges according to the methodology in the original approval / determination. However it may vary these charges if it is reasonably necessary to do so having regard to changes in the demand and consumption forecasts used in the original approval/determination, and/or price stability.

The regulator must complete this review within three months of receiving the application, although if necessary, it may extend this period by one month at a time. This three month period does not include any time that an information request from the regulator to the Part 6 operator is outstanding.

Where the demand and consumption forecasts set out in the original approval / determination are reasonably accurate, there may be little utility in having an annual review as the annual review would then likely confirm the regulated charges set out in the original approval/determination or modify them slightly. The benefit of such a review would be low. The costs are potentially high relative to the benefits, as the annual review is a resource-intensive process.

In its Issues Paper, the ACCC sought stakeholders’ views on whether the provisions in the WCIR regarding the annual review of regulated charges for Part 6 operators are appropriate and in particular, whether there are better alternatives for updating regulated charges when demand or consumption forecasts change.

#### **Stakeholder feedback**

The NSW Irrigators Council submitted to the Water Act Review that the annual review process “creates greater risk and uncertainty about future bulk water charges as any ‘over’ or ‘under’ recovery by [State Water, now WaterNSW] could trigger significant adjustments and volatility in bulk water charges from one year to the next”.[[281]](#footnote-281) The NSW Irrigators’ Council also noted that there was no annual review process under price determinations carried out by IPART under state water management law.

The ACCC received several conflicting views about the annual review process, with some stakeholders advocating for a more flexible process, and others calling for a more prescriptive process.

The main deregulatory proposal with regard to the annual review process came from WaterNSW (formerly State Water).[[282]](#footnote-282) WaterNSW proposed that the Part 6 operator should have the discretion as to whether the annual review is held. Under this proposal, the regulated charges in the years subsequent to the first year of the regulatory period would be the indicative prices outlined in the original approval/determination, or the indicative prices for future regulatory years calculated during a review process if and when a review occurs. WaterNSW further proposed that, in deciding whether to vary the regulated charges at an annual review, the regulator should be required to achieve the BWCOP.

In contrast, several stakeholders expressed concerns that the rules do not sufficiently incentivise the operator to find other remedies than increases in charges to address negative impacts arising from demand or consumption fluctuations.

The Victorian Farmers’ Federation submitted its concern that the information that a Part 6 operator is required to provide in an annual review “does not hold [the operator] accountable for impacts which may be attributable to poor planning and management”.[[283]](#footnote-283) The VFF proposed that a Part 6 operator should be required to explain how and why charges proposed at an annual review differ from the indicative charges included in the original approval/determination. The VFF also supported the operator providing an ”‘analysis of what factors have changed, how this influenced the revised forecast and why these differences were not identified in the earlier forecast”; “explain[ing] whether any alternatives to price increases were considered and why a price increase is the preferred solution”, and ”set[ting] out what alternatives to regulated charge increases were considered and why an increase in regulated charges is the preferred option”. The VFF further suggested that the Part 6 operator should be encouraged to find the shortfall in revenue from ‘efficiency measures’.

Daniel Mongan, an irrigator in GMW’s Central Goulburn network, was of the view that “[t]he current annual review process is too limited in scope and does not allow the regulator to address the concerns of customers”.[[284]](#footnote-284) Mr Mongan proposed that, “the information requirements under the water charge rules for price reviews [should] include reference to short-medium run marginal costs of supply, to ensure prices charged to customers are cost reflective (and therefore efficient)”. In making this proposal, Mr Mongan noted that Water Plans consider the short-medium run cost of supply; therefore the pricing approach adopted by the Water Corporations should follow this timeframe as long as it is unlikely to have an impact on price stability.

#### **Discussion**

##### Part 6 operator discretion over annual reviews

The ACCC notes that if the rules were amended to make the undertaking of the annual review optional, then this could lower the regulatory burden on Part 6 operators. Where demand forecasts are similar to those set out in the original approval/determination, then the benefit from conducting the annual review is unlikely to be high. The annual review is likely to confirm or only slightly modify the indicative prices set at the original approval/determination.

However, allowing the operator discretion over when the annual review is to occur introduces asymmetric and possibly perverse incentives. Where demand has been lower than forecast, the Part 6 operator is likely to under-recover its revenue requirement. In this situation, it has the incentive to request the regulator to conduct an annual review. However, if demand has been higher than forecast, then the operator will be over-recovering its revenue requirement. In this situation, the operator has no incentive to request an annual review, even though it is over-recovering from customers.

Although the Part 6 operator would have an incentive to request an annual review if it were under-recovering revenue, it may not do so; however, this could still prove detrimental to its customers. It is likely that the operator would wish to recover this under-recovered revenue in later years. This could mean that customers of the operator may face large price increases in later years. That an operator would not seek a review to immediately recover its under-recovered revenue requirement is not merely a theoretical possibility, as this is what WaterNSW proposed in its application to the WaterNSW Annual Review of Regulated Charges 2015-16. In its application to that review, WaterNSW proposed that its charges for 2015-16 reflect the indicative charges set out in the 2014 Determination (adjusted for inflation) and that the shortfall in its revenue requirement for that year be recovered in later regulatory periods.

Further, that there will be consistently little under- or over-recovery of revenue is likely under only one scenario; where the tariffs are set to reflect the actual fixed-to-variable cost ratio of the Part 6 operator. The costs involved in providing water infrastructure services are largely fixed. Where the operator’s tariffs reflect this, changes in demand since the release of the original approval / determination are unlikely to significantly affect the ability of the operator to achieve its annual revenue requirement.

The introduction of optional reviews of the infrastructure charges set at the original approval/determination could potentially remove a substantial regulatory burden on the regulated entity. However, this could potentially involve a substantial cost to customers. On balance, the ACCC does not support the proposal of optional reviews, as it is considers that the possible detriment to customers is likely to outweigh the reduction in regulatory burden on Part 6 operators.

##### Additional requirements on operators in annual review process

The ACCC notes the varied proposals from stakeholders to increase the requirements on information a Part 6 operator is required to provide at the annual review. Each of the additional requirements proposed by stakeholders would place an additional regulatory cost on the Part 6 operator. For example, in relation to the pieces of analysis proposed by the VFF, each analysis represents a significant piece of work for the operator, and would substantially increase the cost of preparing the application to the regulator.

If the Part 6 operator were to seek to vary its regulated charges for the forthcoming year on the grounds of price stability, the onus is already on the operator to prove to the regulator that the change is necessary. There appears little purpose in prescribing in detail the evidence that the operator must give the regulator to prove that a change in infrastructure charges is necessary.

Requiring the Part 6 operator to explain the alternatives to proposed price increases, set out alternatives and state why a price increase was the preferred option would likewise increase the regulatory burden with few benefits for customers. The Part 6 operator is only likely to propose increases in infrastructure charges so that it can achieve the revenue requirement for a particular year set by the regulator at the original approval / determination. Given that the revenue requirement has already been approved by the regulator as being consistent with recovering the prudent and efficient costs of the operator, it is unlikely that there will be many alternatives open to the operator, other than increasing prices, which do not result in a reduction in the level or quality of services being provided. Reconsidering whether the operator should still be able to achieve its previously-determined revenue requirement is beyond the scope of the annual review, and would amount to a variation of the initial determination (which may be allowable under certain contexts in any case—see section 5.6.5).

##### Requirements regarding the Basin Water Charging Objectives and Principles

The ACCC does not support WaterNSW’s proposal that in ‘approving or determining regulated charges the regulator must *achieve* the BWCOP’[[285]](#footnote-285) (*emphasis added)*. A regulator, when approving or determining regulated charges in the initial determination, is already required under subrule 29(4) to have regard to whether the regulated charges would *contribute to* achieving the Basin water charging objectives and principles.[[286]](#footnote-286) The ACCC does not consider it to be appropriate to require any particular decision to fully *achieve* the BWCOP; accordingly, it does not support any change that would require this.

To require the regulator to, in approving/determining regulated charges at an annual review, have regard to the achievement of the BWCOP is likely to prove costly to stakeholders and provide little benefit as the regulator should already have considered these matters at the original approval / determination.

##### Timeline for the annual review

**The ACCC notes that concerns from stakeholders regarding timely access to information about Part 6 operators’ charges, particularly where charges of a Part 6 operator are imposed on infrastructure operators who are themselves subject to the current 10-day rule for the provision of a schedule of charges. This issue is discussed in detail in section 5.6.1. The ACCC acknowledges that stakeholders’ concerns in this matter are equally applicable to the annual review as to the initial determination / approval. Accordingly, the ACCC recommends that specific timelines be adopted in the annual review process. These timelines are set out in Rule advice 5-N.**

##### Criteria for the variation of charges in an annual review

**The rules currently provide two grounds for a regulator varying the charges from those set out in the original approval or determination.**

**The first is where variations to infrastructure charges are reasonably necessary having regard to changes in the demand or consumption forecasts set out in the operator’s application (compared to the demand or consumption forecasts included in the original approval or determination. The second is where variations to infrastructure charges are reasonably necessary having regard to price stability. The term ‘price stability’ is not defined in the rules, however the ACCC’s annual review of WaterNSW’s 2014-15 infrastructure charges noted that an assessment of ‘price stability’ would need to consider the overall impact on customer bills (not just on individual charges) and also longer-term considerations.**[[287]](#footnote-287)

**Section 5.6.3 notes the greater need for regulatory scrutiny of the infrastructure charges of Part 6 operators to ensure those charges are not inconsistent with the proposed water charge rules (especially in relation to non-discrimination requirements). To this end, rule advice 5-P includes a suggested amendment to add the consistency of infrastructure charges with the water charge rules to the criteria a regulatory must consider when undertaking an annual review (see 5.6.3 for more detail).**

### Variations of determinations

Currently under the rules, 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 the regulator details of the event and the attempts made by the operator to rectify the material and 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 during the remainder of the regulatory period to rectify the material and adverse effects of the unforeseen event exceeds $15 million (absolute materiality threshold) or 5 per cent of the value of the operator’s RAB as at the beginning of the regulatory period (RAB materiality threshold), whichever is the lesser; and
* 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.

#### Stakeholder feedback

There were few submissions to the Act Review in relation to the variation of an approval / determination. In its submission, the NSW Irrigators Council stated that the variation provisions “creates significant uncertainty for bulk water users. As bulk water users need to make forward planning decisions, the risk associated with facing significantly altered bulk water charges is significant”.[[288]](#footnote-288)

In its Issues Paper, the ACCC sought feedback on whether the requirements that must be met before an approval or determination of regulated charges can be varied are set appropriately. In response, stakeholders submitted a number of proposals which are considered in the following sections.

##### Pass-throughs and contingent projects

The ACCC notes that the rationale for ‘pass-throughs’[[289]](#footnote-289) and contingent projects arises because there are some situations where, due to a range of uncertainties, it may not be clear at the time of the original approval / determination that certain costs will in fact be incurred during the regulatory period. ‘Pass through’ type provisions allow for an amendment of the approval / determination during the regulatory period, conditional on the occurrence of a certain nominated event or certain types of events specified in the regulations applicable to the approval / determination.[[290]](#footnote-290) The water charge rules already provide for uncertain situations via two mechanisms—the annual review process[[291]](#footnote-291) and the variation process.

GMW noted that pass-through events are sometimes defined in a price determination, “for example, the AER determines pass through events where there is some likelihood of an event occurring but the timing and cost impact is unknown at the time of the determination.[[292]](#footnote-292) State Water (now Water NSW) noted in its submission to the Act Review that the “reopening provisions do not include a specific pass through mechanism for a regulatory change event”.[[293]](#footnote-293)

##### Reducing the current absolute and RAB materiality thresholds

In its submission, GMW stated that current materiality threshold requirements in the WCIR “results in a greater level of risk being borne by GMW”. GMW submitted that “the materiality threshold for variation of determinations should be lowered to 1% of annual revenues, consistent with other regulatory frameworks”. In support of this submission, GMW noted that the National Electricity Rules specify a materiality threshold of 1 per cent of *Maximum Allowed Revenue* for electricity transmission and distribution businesses for a regulatory year. It also noted that IPART and the Independent Competition and Regulatory Commission (ACT) had used similar materiality thresholds in their previous revenue variation decisions. GMW noted that for the regulated water industry in Victoria, there were no materiality thresholds under the state regulatory framework, but that the ESC needs to ensure that any variations comply with the ‘Regulatory Principles’ in the Water Industry Regulatory Order.

GMW did not believe that lowering the materiality threshold would result in a substantially higher number of variation applications, stating that the “administrative costs associated with submitting an application for variation to the regulator…provides a disincentive for submitting applications for immaterial costs”.[[294]](#footnote-294)

##### Allowing the regulator to initiate a variation of the original determination

In its submission, IPART suggested that the regulator (in addition to the operator) should be able to initiate a variation in order “that both appropriate cost increases and decreases can be passed through into prices”. [[295]](#footnote-295) IPART considered that current arrangements “effectively provide for only an increase in costs, are asymmetrical and therefore inappropriate. It protects the utility from increases in costs, but does not provide for customers to benefit from cost decreases that could arise from unforeseen circumstances.”

##### Allowing variation of the approval / determination where the operator proposes to implement a new or altered product or service

WaterNSW suggested that the variation provisions should be broadened “to allow regulated businesses to engage directly with their customers to introduce innovative products”.[[296]](#footnote-296) WaterNSW stated that the current variation process “falls well short of the flexible and responsive best practice regulation exhibited in the United Kingdom”. As an example, WaterNSW noted that during 2014, it had proposed to introduce a scheme for water trading between the Peel and Namoi Rivers which, in WaterNSW’s view, “would have enabled a reduction in Peel Valley prices”. However, WaterNSW contended that the proposed trading scheme became “inoperable and was suspended” because of the re-opening provisions in which WaterNSW was unable to levy a new charge that had not been previously approved or determined by the ACCC.

##### Narrowing the circumstances under which a Part 6 operator may seek the variation of a determination

In its submission, IPART proposed *narrowing* the circumstances under which the Part 6 operator may seek a variation of an approval / determination, to unforeseen regulatory and taxation change events.[[297]](#footnote-297) IPART suggested that because these changes are outside the operator’s control (i.e. requiring government to change relevant legislation) and it ”is fair for prices to be set in order to meet the legislative requirements of the provision of the regulated services”. IPART considered that this was appropriate as the key uncertainty for a Part 6 operator was the availability of water, which it felt would be sufficiently dealt with at the annual review. Further, if the regulator were concerned about the uncertainty of the Part 6 operator’s regulatory environment, it could shorten the regulatory period.

#### Discussion

##### Pass-throughs and contingent projects

Currently, a regulator must approve or determine infrastructure charges based on the forecast prudent and efficient cost of providing infrastructure services. This requires the regulator to form a view about whether the expenditure proposed by the infrastructure operator is prudent and efficient. For some ‘business as usual’ costs, there will be a high degree of certainty that the costs will be incurred by the infrastructure operator. However, for other projects (such as certain capex items), there will be a degree of uncertainty about:

* whether the infrastructure operator will go ahead with the project;
* whether the project will proceed as proposed or not;
* the timing of the expenditure of the project; or
* whether the cost of the project has been forecast accurately.

Where the regulator factors the forecast expenditure into the infrastructure operator’s revenue requirement (and therefore into approved or determined charges), but the expenditure does not occur, customers will face higher than necessary charges. However, where the regulator does not factor this forecast expenditure into the revenue requirement and the expenditure proves necessary; this means that the infrastructure operator will be undercompensated for its provision of water infrastructure services. This may lead to reduced quality of services for customers and underinvestment in the infrastructure operator’s infrastructure.

There are broadly two methods in which the WCIR could be amended to allow the regulator to approve expenditure in an original approval / determination, conditional on some event occurring during the regulatory period. The first method is allowing for ‘pass-throughs’. The second method, which is the approach preferred by the ACCC, is through allowing the regulator to approve ‘contingent projects’.

Allowing for pass-throughs at the original approval / determination

As noted above, Part 6 operators may currently seek a variation of an approval / determination where an unforeseen event occurs during a regulatory period that materially and adversely affects the operator’s business. The regulator may only approve an application if it meets certain materiality thresholds.[[298]](#footnote-298)

However, if the Part 6 operator can foresee an event which will occur during the regulatory period, but is unable to quantify its monetary effect at the time of the approval / determination, this event cannot currently be included in the original determination.

Such provisions are included in other regulatory frameworks. For example, in the National Electricity Rules (NER), Rule 6.5.10 permits a distributor to include in its original proposal a ‘nominated pass through event’. These events are of certain types: regulatory changes, service standards, taxation changes, and retailer insolvency events and other specified events.[[299]](#footnote-299) It is at the discretion of the regulator to approve such events for inclusion in the original approval / determination. In the NER, if the event occurs that triggers the pass-through, the regulator may examine the amount of the proposed pass-through. However, the regulator must approve an amount that reflects increase in the regulated business’s costs that the event caused.[[300]](#footnote-300)

The ACCC agrees that there is merit in allowing the regulator to include in an original approval / determination provisions to account for future increases in costs whose timing and impact is uncertain. However, the ACCC considers that an up-front’ pass-through’ mechanism, although used in some sectors, is not an appropriate mechanism for inclusion in the water charge rules because:

* although it allows the regulator to examine the amount of the pass-through at the time of the event occurs, it requires the regulator to pass-through an amount which reflects the increased costs of the regulated business in relation to the event, rather than examining the effect that the event will have on the business. For example, such an approach does not let the regulator consider whether the regulated business would have some method for mitigating the impact of the event. If the regulated business both accepts the gain of regulated revenue resulting from the event and mitigates the loss through other means, this potentially allows the regulated business to make a windfall gain.
* pass-through mechanisms do not grant the regulator sufficient discretion to reject the proposed pass-through on other suitable grounds. Particularly for capital expenditure projects, a pass-through mechanism would require the regulator, should the pass-through event occur, to include in the regulated business’s revenue requirement for the remainder of the regulatory period, enough revenue to build the project. This would be the case even if it emerged that there was an alternative project that could equally meet the same objective as the project included in the pass-through, or the project turned out to be unnecessary. That, pass-through mechanisms may allow for expenditure that is neither prudent nor efficient.

Instead, the ACCC considers it more appropriate to limit the inclusion in an approval / determination of conditional additional expenditure related to capital expenditure projects only, via a ‘contingent projects’ mechanism as set out below.

Contingent Projects

The ACCC recommends that the rules allow the regulator to specify a project as a ‘contingent project’ during the approval / determination process, along with the criteria that must be met before the infrastructure operator can apply for the cost of the project to be factored into the calculation of the infrastructure operator’s charges for the remainder of the regulatory period. These projects should be limited to capital expenditure projects only.

The ability for the regulator to approve the inclusion of a contingent project in an approval / determination is used in other regulated industries, in particular the energy industry.[[301]](#footnote-301)

The ACCC considers that amendments allowing the regulator to specify a project as a contingent project in an approval / determination should have the following elements:

* the regulator should have the discretion to specify a project as a ‘contingent project’ (either in response to a Part 6 operator’s request, or on the regulator’s initiative), taking into account:
  + the cost of the project;
  + the likelihood the project will occur;
  + the timing of the project;
  + the necessity of the project; and
  + the feasibility of the project.
* the regulator may specify the criteria (or ‘trigger event’) that must be met before the infrastructure operator can apply for the contingent project to be included in the revenue requirement for the remainder of the regulatory period; the criteria set would depend upon the circumstances.
* where the regulator is satisfied that the contingent project meets the criteria, the regulator can review whether the contingent project is included in the revenue requirement for the remainder of the regulatory period, taking into account information that was not available at the time of the original determination.
* as a result of including the contingent project in the revenue requirement for the remainder of the regulatory period, the regulator can decide which infrastructure charges should be varied, by how much and when, subject to the decision rules discussed in section 5.6.3.

##### The Variation Process

The ACCC considers it generally desirable that the circumstances in which a determination can be varied are limited. Variation processes are resource intensive for all parties, lower customer certainty around infrastructure charges, and may be used by a Part 6 operator to re-open issues decided at the original determination. Nonetheless, the circumstances under which a variation may be sought, and the criteria on which a variation application is assessed must be suitable in order to ensure that a Part 6 operator does not suffer excessive detriment or achieve windfall gains for events out of its control.

Who may seek a variation?

Currently, only a Part 6 operator may seek a variation of an approval / determination. This means that where an unforeseen event occurs that materially and adversely affects a Part 6 operator, the operator can seek to vary the original approval / determination to remedy the effects of the unforeseen event. However, where the unforeseen event confers on the Part 6 operator a material benefit, there is no opportunity for the regulator to vary the approval / determination in order to share these material benefits with the operator’s customers via reduced infrastructure charges.

The ACCC believes it is appropriate to consider the nature of the event when considering grounds for seeking a variation. In particular, the ACCC considers that regulatory and taxation events should be treated differently to other events, since these events are the result of government policy and/or regulatory decisions, as well as being beyond the Part 6 operator’s control.

Taxation / regulatory events

The ACCC considers that *both* the regulator and the Part 6 operator should be able to seek a variation of the original approval / determination on the grounds of changes in taxation[[302]](#footnote-302) and regulatory events.[[303]](#footnote-303) This would include the situation where a Part 6 operator imposes regulated charges on other Part 6 operators (for example, if either the BRC or MDBA directly imposed charges for infrastructure services on other Part 6 operators). Notwithstanding the costs of the variation process, and the fact that, to some extent, the regulator can deal with this change in tax or regulatory events at the next approval / determination process, the ACCC considers that there are compelling reasons for allowing the regulator to initiate a variation in this context:

* in many cases the intention of the government in making taxation and regulatory changes is that the benefits of these changes should be passed onto customers. Where such a policy intent is clearly evident, the regulator should not frustrate this clear intention.
* extra revenue or lower costs from a taxation or regulatory change is a windfall gain. It is not apparent why Part 6 operators should solely benefit from this windfall gain rather than passing it (at least in part) on to customers.
* the costs for undertaking the variation review are unlikely to be high as in the case of a variation in relation to non-tax / non-regulatory events (other events), as the main question to be decided is the monetary cost of the taxation and regulatory events and these should be measurable.
* it is consistent with other regulatory frameworks, such as the NER. Under the NER, the regulator is allowed to seek the variation of the original approval / determination in certain circumstances.

The ACCC acknowledges that to allow for the regulator to initiate a variation of the original approval / determination due to changes in taxation or regulatory arrangements would not be in the interests of Part 6 operators. Previously, if the Part 6 operator was affected by an unforeseen and material taxation or regulatory event that caused it to gain additional revenue or face significantly reduced costs, it could keep this gain (although it may need to later give it back through other mechanisms). However, if the regulator were allowed to seek the variation of an approval / determination due to taxation or regulatory changes, then a Part 6 operator may need to immediately give back all or part of the ‘upside’ from this unforeseen event in the form of reduced infrastructure charges in future years of the regulatory period. Moreover, the operator will be subject to the costs of involvement in a variation process, although these costs are unlikely to be high due to the restricted subject matter of such a review.

The ACCC also notes that the current variation process would not allow for the amendment of the original approval / determination in many circumstances to account for taxation and regulatory events. Where the event is foreseeable (but the monetary impact of the event is uncertain), the current variation process does not permit the regulator to vary the original approval or determination to account for this regulatory or taxation event. Given the difficulty for a Part 6 operator in avoiding or mitigating these costs when they occur, the ACCC considers it appropriate to remove this foreseeability requirement from the rules with regard to taxation and regulatory events.

Non-regulatory / non-taxation events (Other Events)

The ACCC considers that while Part 6 operators should be able to initiate a variation review for other events, regulators should *not* be able to do so. There are several reasons which suggest that regulators should be able to initiate such reviews, including symmetry with variations for taxation and regulatory events; fairness in allowing customers to share in unforeseen gains made by Part 6 operators; and consistency with other regulatory frameworks such as the NER. However, on balance the ACCC considers that there are compelling reasons for *not* allowing regulators to initiate such variation review processes including:

* **providing an incentive for Part 6 operators to seek efficiencies**. The regulator is only likely to initiate a variation process where the Part 6 operator has achieved a large reduction in costs. In these circumstances, the regulator is likely to seek to return the gains from this reduction in costs to the customer. This will mean that the Part 6 operator will have little incentive to seek cost efficiencies. Encouraging Part 6 operators to seek efficiencies will benefit customers because at the next approval / determination, the regulator can take this into account when setting the operator’s revenue requirement[[304]](#footnote-304)
* **other avenues for passing on the cost reductions** for non-taxation and non-regulatory events to customers over the longer term. For example, at the 2014 Determination of Regulated Charges for WaterNSW, the ACCC determined that WaterNSW underspent its capex in the 2010-14 regulatory period. The ACCC ‘clawed back’ this underspend by reducing the opening RAB for the next regulatory period by the amount of the unspent capex from the previous regulatory period and the depreciation relating to that unspent capex. Another avenue for recovering reductions in costs is for the regulator to consider these reductions when calculating the operator’s revenue requirement for the forthcoming period.
* the variation process will be **costly** for the regulated business
* a **reduction in regulatory certainty** for businesses

Materiality thresholds

GMW contended that the current materiality thresholds in the rules should be lowered.[[305]](#footnote-305) The following examples consider this argument for the absolute and RAB materiality thresholds in turn, noting that for Part 6 operators with a RAB of $300 million or less, 5 per cent of the RAB (at most $15 million) will be the relevant trigger; while for Part 6 operators with a RAB of greater than $300 million, the $15 million absolute materiality threshold will apply.

*Example One: absolute materiality threshold*

For WaterNSW, its opening RAB for 2014-15 was $657.3 million while its regulated revenue for that financial year was $84.3 million. This means that the absolute materiality threshold of $15 million minimum equates to almost 18 per cent of WaterNSW’s regulated revenue, while the RAB materiality threshold - five per cent of WaterNSW’s opening RAB for 2014/15 - is $32.87 million. Here, the binding materiality threshold is the absolute materiality threshold because it is the lesser amount. This absolute materiality threshold is quite high relative to WaterNSW’s regulated revenue, and it is difficult to conceive of a scenario where an unforeseen event could be as large as 18 per cent of a Part 6 operator’s annual revenue requirement.

*Example Two: RAB materiality threshold*

Assume a hypothetical Part 6 operator which has a RAB at the start of the regulatory period of $100 million and a revenue requirement for that year of $13 million. In this example, the absolute materiality threshold is $15 million, while the RAB materiality threshold is $5 million (5% \* $100 million RAB). This means that in this example the binding threshold is the RAB materiality threshold as it is the lesser amount. Therefore the amount required during the remainder of the regulatory period to rectify the material and adverse effects of the unforeseen event needs to exceed $5 million before the regulator may vary a Part 6 operator’s original approval / determination (after having received a request from the operator). In this case, the RAB materiality threshold equates to 38 per cent of the annual revenue requirement. This is very high

As these examples demonstrate, the monetary impact of the unforeseen event that will allow the Part 6 operator to apply for a variation is very high when compared with its annual revenue requirement. Therefore, the ACCC considers it appropriate that the materiality thresholds that must be met before the Part 6 operator (and the regulator for taxation and regulatory events) can seek a variation be lowered.

The ACCC also considers that lower thresholds are more consistent with the purpose of an approval / determination process. Such a process is meant to give the Part 6 operator the ability to recover revenue sufficient to cover the prudent and efficient costs of their operations for the regulatory period.[[306]](#footnote-306) It therefore appears logical that where there is a material unforeseen event (or for taxation and regulatory events, a foreseen event which has an uncertain monetary impact) that prevents them from doing so, that it should be allowed to recover this revenue to make up for the shortfall.

However, even though the materiality threshold currently may be too high, any amended threshold needs to balance the desirability of possibly more frequent variations occurring due to these lower thresholds against the factors which favour the limitation of such reviews (mentioned at the start of this section).

As noted above, in its submission to the ACCC’s Issues Paper, GMW suggested that the materiality threshold be set at 1 per cent of the Part 6 operator’s revenue requirement for the regulatory year in which they are seeking a variation.[[307]](#footnote-307) This materiality threshold is similar to that used in the NER, where ‘materially’ is defined with reference to an increase or decrease in costs (as opposed to the revenue impact) of the operator exceeding 1 per cent of its Maximum Allowed Revenue (annual revenue requirement) for a regulatory year.[[308]](#footnote-308)

The ACCC considers it appropriate that the materiality thresholds for the variation process differ between taxation and regulatory events and other events. Taxation changes and regulatory events are legal obligations from the perspective of the Part 6 operator; the Part 6 operator has no choice in whether to pay the amounts incurred under these obligations. Further, these expenses are unlikely to be able to be insured against or mitigated against. Therefore this lower threshold for such events appears appropriate.

However, the ACCC is concerned that a move to a 1 per cent materiality threshold (as proposed by GMW) would set the materiality threshold for taxation events and regulatory events as too low. The ACCC does not consider a tax or regulatory event that has a monetary impact of only 1 per cent of revenue for the regulatory year in which they seek a variation as particularly high, especially as this impact can be spread over the remainder of the regulatory period. Given the costs of variation inquiries for regulated operators and the regulator, the ACCC considers that taxation and regulatory changes of such magnitude can be dealt with during the next approval / determination process. In these circumstances, the ACCC considers that a materiality threshold of 1 per cent of the combined amount of the revenue requirement for the current and remaining years of the regulatory period (1 per cent remainder materiality threshold) would be more appropriate.

However, even though the taxation or regulatory event arises from a legal obligation that is unavoidable for the Part 6 operators, the ACCC does not consider that where the event occurs and meets the required threshold that the entire additional amount should automatically be included in the Part 6 operator’s materiality threshold for the remainder of the regulatory period. That is, the Part 6 operator would still need to satisfy the regulator that it cannot reduce its expenditure to avoid the consequences of the event. Further, consistent with the current variation process, the monetary impact of the event would need to remain above the 1 per cent materiality threshold after these matters have been considered. Although the ACCC acknowledges that the Part 6 operator cannot avoid the taxation or regulatory events, it may be able to mitigate the cost of these events to the customer. Further, the purpose of the taxation or regulatory changes imposed may be intended to make the Part 6 operator change its behaviour, so if the regulator allows the operator to include in its revenue requirement enough revenue to continue its ‘business as usual’ practices, this may frustrate the intended purpose of the change.

With regard to other events, the ACCC does not consider that a 1 per cent remainder materiality threshold to be appropriate. Unless the unforeseen event is likely to cause the Part 6 operator financial distress, the ACCC regards it as appropriate to leave this change in costs to the next approval / determination process. On balance, a materiality threshold for other events of 5 per cent of the *revenue requirement[[309]](#footnote-309)* for the year to which the variation process relates and the remainder of the regulatory period (5 per cent remainder materiality threshold) would appear to be an appropriate threshold. This would still be subject to the requirement that the regulator be satisfied that the Part 6 operator is not able to reduce its expenditure without materially and adversely affecting the reliability or safety of its business or its ability to comply with its legislative or regulatory obligations.

The ACCC acknowledges that this 5 per cent remainder materiality threshold for other events is to some extent arbitrary. However, it appears to be reasonable in that the threshold is achievable, substantial, but unlikely to often occur. For instance, in Example Two above, if there are three years remaining in the regulatory period, the 5 per cent remainder materiality threshold is $1.95 million as against the current RAB materiality threshold of $5 million. Further, the ACCC considers it more appropriate that the threshold should reflect the impact of the event over the regulatory period rather than at a particular point in time, as the regulator sets the revenue requirement to allow the Part 6 Operator to recover its regulated revenue over that timeframe. Other events may be less significant when measured across that timeframe when compared with the operator’s revenue across a particular year.

However, even if this 5 per cent remainder materiality threshold is satisfied, it is not recommended that this amount is automatically added to the Part 6 operator’s revenue requirement for the remainder of the regulatory period. Currently, even where the threshold for seeking variation is met, Part 6 operators must satisfy the regulator that:

* it is reasonably likely that the total expenditure during the remaining part of the regulatory period is likely to exceed the total forecast expenditure for that remaining part[[310]](#footnote-310)
* that the applicant has demonstrated that it is not able reduce its expenditure to avoid the exceeding the total forecast expenditure for the remainder of the regulatory period without materially adversely affecting the reliability or safety of the applicant’s water service infrastructure or the applicant’s ability to comply with any relevant regulatory or legislative obligations.[[311]](#footnote-311)

The ACCC considers it appropriate that, with regard to other events, these conditions on granting a Part 6 operator a variation of the original approval / termination remain. Although the events that meet this threshold may be unforeseen, there appears to be no reason to require customers to pay higher charges when the Part 6 operator can mitigate the loss from the unforeseen event or will otherwise gain its revenue requirement. The materiality threshold will therefore be just that; a threshold for the Part 6 operator to pass to gain the regulator’s consideration as to whether the operator is allowed to recover costs related to an unforeseen non-taxation and non-regulatory event. The amount actually added to the revenue requirement and passed through to customers (if the variation is approved) may be less than the amount in the application (although it must be at least as high as the actual threshold amount).[[312]](#footnote-312)

However, where the regulator allows a variation, and the revenue the Part 6 operator gains from this relates to one-off additional expenditure in a particular year of the regulatory period, the ACCC expects the Part 6 operator will smooth out this recovery of additional expenditure over the remaining years of the regulatory period (and possibly over subsequent regulatory periods) to avoid customers facing large increases in prices in any particular year.

In contrast to the process for taxation and regulatory events, for other events the ACCC proposes maintaining the requirement for the event to be unforeseen before the Part 6 operator can apply for a variation to the original approval / determination. Given that foreseen other expenditure is likely to be capital expenditure:

* if the monetary impact of the event is known before the start of the regulatory period, it can be assessed by the regulator at the time of the original approval / determination
* if the monetary impact of the event is unknown at the start of the regulatory period, the regulator can use other processes (e.g. under the proposed new contingent project provisions set out above) for assessing whether expenditure relating to the event should be included in the revenue requirement.

Allowing a variation relating to a new or altered product or service

Currently, the variation provisions of the rules provide a safeguard for Part 6 operators by allowing them to apply for a variation of the original approval / determination to account for an unforeseen event which has an adverse and material effect on the operator’s business.[[313]](#footnote-313) The proposals in this draft advice expand these protections by allowing the operator to apply for a variation in the circumstance of foreseen taxation and regulatory events and for foreseen capital expenditure projects (where the monetary impact is uncertain) by asking the regulator to include contingent projects in the original approval / determination.

While this draft advice recommends that the regulator be given some extra powers to prevent the Part 6 operator receiving windfall gains in certain circumstances, the ACCC considers that the variation process is substantially intended to assist Part 6 operators to provide water infrastructure services by protecting them against unexpected events or expected events where the quantitative impact is uncertain.

The ACCC considers this rationale is quite different to the rationale on which WaterNSW seeks to change to the variation provisions of the WCIR; to promote “customer empowerment and innovation” and “flexible and responsive best practice regulation”.[[314]](#footnote-314) The current variation process, amended in accordance with the ACCC’s Draft Advice, could not easily accommodate WaterNSW’s proposals and WaterNSW has not shown in its proposals how this may be accomplished.

Further, the ACCC notes that new services and products are usually developed over several years. As such there does not appear to be an urgent need to accommodate these new products and services as part of the variation process.

Given this, the ACCC considers that regulated charges for new services and products are most appropriately dealt with at the time of the original approval / determination and does not recommend that the rules be amended to allow for them to be considered as part of the variation process.

Other proposed amendments relating to the variation process

The ACCC notes that under the current rules, before allowing the variation the regulator must be satisfied that the Part 6 operator cannot reduce its expenditure without it ‘materially adversely affecting the reliability *and* safety of the applicant’s water service infrastructure’. The ACCC considers it is sufficient that the regulator is satisfied that the materially adverse effect be on the reliability *or* safety of the applicant’s water service infrastructure. A materially adverse effect on either could be highly detrimental to a regulated business and its customers and therefore allowing a variation in either circumstance is warranted.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to provide the regulator with the discretion to specify a capital expenditure project as a ‘contingent project’ during the approval / determination process. This could occur:   * if the infrastructure operator submits such a project to the regulator in its application to the original approval / determination process, or * on the initiative of the regulator after examining that application.   In considering whether a project is suitable for inclusion as a contingent project, the regulator should be required to consider:   * the cost of the project; * the likelihood the project will occur; * the timing of the project; * the necessity of the project; and * the feasibility of the project.   The regulator may specify the criteria (or ‘trigger event’) that must be met before the infrastructure operator can apply for the cost of a contingent project to be included in the revenue requirement for the remainder of the regulatory period.  The inclusion of the prudent and efficient cost of a contingent project in the revenue requirement for the remainder of the regulatory period should be subject to regulatory scrutiny.  In providing for the cost of a contingent project via a variation, the regulator should not vary the determination of infrastructure charges unless it is satisfied of the matters set out in WCIR subparagraph 29(2)(b) and (c).  This rule advice is implemented in Part 6, Divisions 2 and 4 of the proposed water charge rules.  Rule advice ‑  The rules should be amended to provide for the following in relation to variations of determinations:   * The regulator should be allowed to seek a variation for taxation events and regulatory events where the event provides a benefit to an infrastructure operator of more than 1% of the operator’s aggregate revenue requirement for the year to which the variation relates and the remaining years of the regulatory period. * For a taxation or regulatory event, the materiality threshold should be reduced to 1% of the aggregate revenue requirement for the year to which the review relates and the remaining years of the regulatory period, and the current requirement for the event to have been ‘unforeseen’ should be removed. * For other events, materiality threshold should be reduced to 5% of the aggregate revenue requirement for the year to which the review relates and the remaining years of the regulatory period. * Amend the requirement for an operator to demonstrate that it is not able to reduce its expenditure without materially *and* adversely affecting the reliability *or* safety of its water service infrastructure.   This rule advice is implemented in Part 6, Division 4 of the proposed water charge rules. |

## Distributions (Part 7)

Currently Part 7 of the WCIR is triggered by a member-owned operator (servicing more than 10 gigalitres (GL)[[315]](#footnote-315)) making a distribution to all its ‘related customers’. [[316]](#footnote-316) When Part 7 is triggered, the operator is a “Part 7 operator”[[317]](#footnote-317), and the regulator is required to undertake a limited (in comparison to Part 6 requirements) price determination / approval role.

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

In its Issues Paper, the ACCC sought stakeholders’ views on whether the requirement in the definition of Part 7 operator that the operator is member-owned should be removed. Further, the ACCC sought feedback on whether the trigger in Part 7 should extend to where an infrastructure operator that makes a distribution to some (but not all) of its related customers. Finally, the ACCC asked whether there are examples of non-financial distributions that might provide material benefit to related customers.

#### Stakeholder feedback

The only feedback the ACCC received from stakeholders on Part 7 was from Murrumbidgee Irrigation Limited (MI), Western Murray Irrigation (WMI) and Coleambally Irrigation Cooperative Limited (CICL). Both MI and WMI submitted that Part 7 should not extend to an operator that makes a distribution to some (but not all) of its members.[[318]](#footnote-318) MI argued that such application of Part 7 would catch a range of “common forms of distributions” and “[e]ffectively, [require operators] to cease making such distributions, which would reduce the flexibility and value of their service”. MI further stated that it makes distributions (of efficiency gains) on the basis of water delivery right held by members. [[319]](#footnote-319)

Similarly, WMI submitted that:

*If [the scope of Part 7] were extended [to cover distributions to some but not all members], more operators could then be exposed to the burdensome regulation described in Part 7 and this would increase costs to operators and government, not reduce them. If the scope of the rule were extended, in order to avoid regulation as a Part 7 operator, an operator which makes a distribution to any one or more related customers would have to contend that “the distribution was made without distinction between related customers and other customers” for the purposes of rule 45(2)(b). There is room for debate about the meaning of those words and they open up the potential for time-consuming and burdensome investigations by, and debates with, the ACCC in relation to the issue. If the scope of the rule were extended, prudent operators would probably need to go to the additional expense of obtaining legal advice before making any distributions. The existing rule is clear and straightforward because it applies only if a distribution is made to all related customers. This is easy to interpret and apply and it minimises cost and regulation.* [[320]](#footnote-320)

CICL submitted that the ACCC should consider whether “an IIO is acting in a way that discourages competition or limits customers’ rights to transformation”. [[321]](#footnote-321) CICL added that there is a difference between dividends and member benefits; if a customer “does not seek to be a member of an IIO, they should not be eligible for member benefits”. CICL also noted that it “has no difficulty in the ACCC taking a continuing and close interest in the charges that IIOs levy non-member customers”.

#### Discussion

Part 7 was developed to ensure that member-owned operators would *not* be able to circumvent the non-discrimination rule 10 by increasing charges to all customers and return profits to related customers through distributions. Part 7 does not *prevent* an operator from making such distributions, but rather provides a strong incentive not to because the consequence of triggering Part 7 is that the operator’s regulated charges will be approved/determined by an independent regulator for a five year period.

Although Part 7 provides some deterrence for member-owned operators to discriminate between related customers and other customers, the current drafting is also only likely to be effective in very limited circumstances. An operator need only leave out a single related customer when making a distribution to related customers (but not other customers) to avoid triggering Part 7. This means that it is very unlikely that Part 7 would ever be triggered in practice.

Further, the current drafting implies that only financial distributions are covered. However, unused conveyance water or “surplus water” (sometimes called “enhancements”) may also be returned to related customers. Such water is easily convertible into money through the temporary water market. ACCC staff have investigated a number of complaints relating to surplus water distributions.

Finally, Part 7 does not restrict or provide a disincentive for operators to make distributions on discriminatory bases other than between related customers and other customers—for example, based on the purpose for which water has, or will be, used, or the volume of tradeable water right held or used by a customer.

##### Types of distributions that should ‘trigger’ Part 7

Regulatory certainty will be maximised by the rules setting out a discrete list of types of permissible distributions, with distributions falling outside of these parameters subject to further scrutiny and *potentially* leading to charge approval / determination (see next sub-section).

In particular, the appropriate basis on which general distributions should be made is on the basis of customers’ right of access to the operator’s water service infrastructure. For most infrastructure operators, this is represented by the volume of *water delivery right held*, since water delivery right holdings form the basis upon which responsibility for costs of the water service infrastructure are determined.

The ACCC acknowledges that there may be some special cases where it is appropriate to make more targeted forms of distributions that should be expressly allowed by the rules (i.e. not trigger the application of Part 7):

where customers in a certain area of the network had contributed to a fund for capital works in that area which did not eventuate (and as such the distribution could be viewed as a refund to these customers)

for reasonable honorariums

to only those customers in a certain part or parts of a network (for distributions of water savings or the proceeds of selling water savings).

Where an operator wanted to make a distribution to its owner(s), and ‘ownership’ did not correspond with a person’s right of access, the regulatory concern would be that the infrastructure operator was earning monopoly rents. As such, charge approval / determination would be appropriate. Where an infrastructure operator’s regulated infrastructure charges are approved or determined by an independent economic regulator (either under Part 6 or Basin State legislation), then this concern is substantially addressed. As such, distributions by such operators should also be permissible.[[322]](#footnote-322)The rules should also not prevent an operator from passing through a rebate made by another infrastructure operator in accordance with the pass-through rules as proposed under section 5.13 of this paper. That is, passing through of a rebate in a manner that is consistent with the pass-through rules should not be considered a ‘distribution’ for the purposes of Part 7.

##### The ‘consequences’ of a distribution

While in some cases an approval / determination role for the regulator is appropriate, the current automatic triggering of a price determination may not be an appropriate or proportionate regulatory response. As an alternative, the ACCC could provide an exemption from the requirement for an operator’s infrastructure charges to be approved or determined. In deciding whether to exempt an infrastructure operator from the application of Part 7, the ACCC could consider whether the exemption is unlikely to have a negative impact on the achievement of Basin Water Charging Objectives and Principles. The ACCC should also have regard to the following matters:

the nature of the infrastructure operator’s services;

the nature of the distribution made to its customers (including but not limited to whether it was made on the same grounds as the proposed types of proscribed price discrimination in Part 3);

the preferences expressed by the operators customers (in particular those customers that did not receive the distribution),

any action taken by the operator in response to concerns expressed by the ACCC

any undertakings given by the operator as to future distributions

These criteria would allow the ACCC to take into account both the magnitude of the impact of the distribution as well as the likelihood of other infrastructure operators adopting the distribution practice (or alternatively, the necessity for the application of Part 7 in response to that distribution). As part of its decision-making process, the ACCC should also have the ability to undertake public consultation and request information from the operator.

The ACCC also considers that the appropriate length of time that an operator (that has not been exempted) should be required to have its charges approved or determined should be three, rather than five, years. This would align with the proposed default regulatory period for determinations / approvals under Part 6. Such a change reduces the regulatory burden of an operator making a non-standard distribution, while maintaining an effective deterrent for such distributions and therefore maintaining an appropriate level of protection for customers.

By providing for exemptions from the regulatory consequences of a non-standard distribution, there is little justification for maintaining the current limited application of these provisions to member-owned operators providing infrastructure services in relation to more than 10GL. Broadening the scope of the rules to non-standard distributions of all infrastructure operators would mean all customers of infrastructure operators would be protected from potential exploitation by monopoly service providers reliant on discriminatory distributions to compensate preferred customers.

#### Draft rule advice

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| Rule advice ‑  Part 7 should be amended to adapt the “triggering” provisions (Part 7, Division 1) to apply to all distributions by an infrastructure operator, other than ***standard distributions***. Standard distributions are those made:   * on the basis of all the operator’s customers’ rights of access (typically represented by their water delivery right); * to customers that had previously contributed to a fund for the replacement of infrastructure when this money is no longer required because the replacement of the infrastructure is no longer required, in proportion to the contributions made by each customer; * in the form of reasonable honorariums; * to all customers in a specific part of the area serviced by the infrastructure operator in relation to water savings achieved by the operator in that part, in proportion to each customer’s right of access to that part; or * made by an infrastructure operator to its owners but only if the infrastructure operators’ infrastructure charges are approved or determined under Part 6 or by a State Agency under the water management law of a Basin State.   Under the draft rule advice for amending the application of Part 6 and the consequent removal of the need for accreditation, the regulator for Part 7 will be the ACCC.  *See also* Rule advice 5‑U.  This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.  Rule advice ‑  The rules should be amended to allow for the ACCC to provide an exemption to the requirement on a Part 7 operator to have its infrastructure charges approved or determined.  The ACCC should only give such an exemption if it is satisfied that providing the exemption is unlikely to have a negative impact on the achievement of the Basin Water Charging Objectives and Principles, taking into account:   * the nature of the operator’s infrastructure services; * the nature of the distribution made by the operator to its customers (including but not limited to whether it was made on the same grounds as the proposed types of proscribed price discrimination in Part 3); * the preferences of the operator’s customers (in particular those customers that did not receive the distribution); and * any action taken by the operator in response to the ACCC’s concerns; and * any undertakings given by the operator as to future distributions.   In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.  This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.  Rule advice ‑  The water charge rules should be amended to provide that an infrastructure operator is also taken to have made a distribution where it trades, transfers or allocates water in the form of a ‘water allocation’ or an allocation of water to an irrigation right other than:   * the allocation of water from an irrigation infrastructure operator to the holder of an irrigation right for the purpose of reflecting the allocation of water by a State Agency to the water access entitlement held by the irrigation infrastructure operator on their behalf; or * those necessary to give effect to a trade of water access right or irrigation right by a customer,   Such a trade, transfer or allocation would not trigger Part 7 if it met the criteria of a ***standard distribution*** as listed in Rule advice 5‑S.  This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.  Rule advice ‑  The water charge rules should be amended such that an infrastructure operator ceases to be a Part 7 operator after three years, rather than 5 years, as is currently the case.  This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules. |

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

The terms of reference for the Water Charge Rules Review specifically require the ACCC to consider the lessons learned from other sectors in relation to appeal mechanisms.

Under the WCIR, decisions made by the ACCC, including on price approvals or determinations of regulated charges in Part 6 and 7, are 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.[[323]](#footnote-323) 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 like the rural water sector in the MDB, have judicial review. Others have merits review as an additional appeal mechanism.[[324]](#footnote-324) There are also various forms of merits review, such as limited merits review in the electricity and gas sectors.[[325]](#footnote-325)

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.

Currently, the regulatory framework of the WCIR only provides for judicial review. 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.[[326]](#footnote-326)

In its Issues Paper, the ACCC sought feedback on how appeal mechanisms could differ from those currently provided. In particular, the ACCC asked stakeholders what type of review model would be most appropriate for the water sector taking into account the experience from other sectors. Further, the ACCC sought stakeholders’ views on who should have the ability to appeal a decision under the WCIR.

#### Stakeholder feedback

The ACCC received a range of views from stakeholders regarding the benefits of incorporating additional appeal mechanisms beyond judicial review into the WCIR.

Frontier Economics submitted to the Act Review that the “robustness of the regulatory arrangements” could be enhanced through a formal appeal mechanism; however, Frontier Economics did not provide any detail on the structure or form that the appeal mechanism should take.[[327]](#footnote-327) Several stakeholders supported creating a merits review mechanism. For example, WaterNSW recommended adding a new part to WCIR to give effect to such a mechanism.[[328]](#footnote-328) WaterNSW considered that a merits review would provide the following advantages:

* facilitate robust and consistent economic outcomes.
* ensure that the regulator exercises its powers lawfully and within its mandate.
* prevent outside influences creeping into the regulatory process.
* provide the regulator with incentives to reduce the potential for regulatory errors, thereby improving the quality of pricing decisions.
* facilitate greater investment as operators would have greater confidence that regulatory decisions would allow an adequate return.

In its Act Review submission, State Water (now, WaterNSW) also noted its support for the introduction of a full merits review mechanism for price approvals or determinations by the ACCC or an accredited regulator, with appeals to be heard by the Competition Tribunal.[[329]](#footnote-329) State Water noted that the merits review mechanism would allow customers, in addition to infrastructure operators, to appeal decisions, thereby increasing the protection for customers and that the “regulator would implement measures to address the potential for legal error and scrutiny under a judicial review process”.[[330]](#footnote-330) State Water also submitted its view that the right to judicial review would have a “negligible” cost burden because “institutional arrangements for judicial review already exist through the court system” and it would provide “cost savings in correcting legal errors” that can be passed onto customers.

WaterNSW considered that access to judicial review was not certain and in any case would not address the deficiencies it perceived with recent decisions. In WaterNSW’s view, the ACCC’s discussion in its Issues Paper of the “potential” applicability of the *Administrative Decisions Judicial Review Act 1977* “provides some doubt of the ability to use this mechanism as part of the water economic regulatory framework”.[[331]](#footnote-331) WaterNSW recommended that “the right to judicial appeal should be explicitly set out in the Water Act for the avoidance of doubt”.[[332]](#footnote-332) The ACCC notes in response that this recommendation would require an amendment to the Act, and as such is beyond the scope of the present review of the water charge rules.

Similarly, Goulburn-Murray Water (GMW) “strongly” supported the introduction of a merits review process for decisions under the WCIR. In GMW’s view, merits review would “bring [the WCIR] into line with standard regulatory practice and provide the opportunity for manifestly incorrect decisions to be challenged”.[[333]](#footnote-333) GMW also submitted that, where a State regulator has been accredited, it would be appropriate for that State’s regulatory review processes to apply, in order to keep the costs of the review to a minimum. [[334]](#footnote-334) GMW provided detail about appeal mechanisms under the Victorian Water Industry Regulatory Order (WIRO) 2012, which provide for both judicial and merits review. [[335]](#footnote-335) GMW acknowledged that “the process and context for merits review must be proportional to the materiality of the decisions”.[[336]](#footnote-336) The Essential Services Commission of Victoria (ESCV) did not make a submission to the ACCC’s Issues Paper but in consultative meetings expressed a preference for a limited merits review.

In contrast, IPART opposed the introduction of a merits review mechanism, arguing that the judicial review provisions included in the rules are appropriate, and noting that “they enable the application of regulatory processes that are robust, transparent and comprehensive and that the ground for any appeal under the ADJR Act are appropriately limited to errors of law”.[[337]](#footnote-337) IPART did not support merits reviews but if a merits review process is to be introduced, recommended several conditions:

* the review body should be an 'administrative' type body experienced in economic regulation (such as a specialist review panel) rather than a 'court-like' body;
* appeals should only be allowed only on specific issues, to be undertaken in a whole-of-determination context;
* the reviewing body should be required to “stand in the shoes” of the WCIR regulator to ensure “that any review of aspects of a determination under the WCIR is conducted in a thorough, balanced and holistic manner”
* the review should only rely on information that was available to the original regulator.

The National Irrigators’ Council (NIC) and Central Irrigation Trust (CIT) also opposed introduction of a merits review, citing concerns with how merits review processes operate in other sectors.[[338]](#footnote-338)

Several stakeholders, such as NIC[[339]](#footnote-339), CIT[[340]](#footnote-340), Waterfind[[341]](#footnote-341), Western Murray Irrigation (WMI)[[342]](#footnote-342) and individual irrigators attending public forums expressed a preference for having a water ombudsman for the rural water sector. The NIC and CIT supported having an Ombudsman on the condition that it covered all aspects of the Water Act, the MDB Plan and associated State and Federal legislation.

#### Discussion

##### Appeals under the Administrative Decisions Judicial Review Act 1977

The ADJR Act applies to decisions made under the WCIR when one of the specified grounds for review in the ADJR Act are met. Of most relevance are the grounds for review provided for in section 5 of the ADJR Act.

A person who is aggrieved by a decision made under the water charge rules may apply to the Federal Court for an order of review in respect of the decision on any one or more of the grounds of judicial review specified in the ADJR Act. Judicial review (as opposed to merits review which looks at the substance of the decision) may be generally described as a review of the legal processes and lawfulness for the making of the decision. Judicial review focusses on errors in the application of the law. It relates to matters such as whether the decision maker had the power to make the decision and whether the decision maker applied ‘procedural fairness’ in making the decision. The rules of procedural fairness require a decision maker to give a person a proper hearing before making any decision that affects a person’s interests. For example, if the ACCC failed to consult with interested parties in making a decision to approve or determine regulated charges under Part 6 of the WCIR this would be a ground for judicial review under the ADJR Act.

Another example of a ground of review under the ADJR Act would be if the ACCC failed to take into account a relevant consideration when making its decision under the WCIR. A relevant consideration would include a consideration which the ACCC must take into account as required by the WCIR. For example, if the ACCC in making an accreditation decision under Part 9 of the WCIR failed to take into account a relevant consideration such as the requirements set out in Schedule 5 of the WCIR, this would be a ground for judicial review under the ADJR Act.

##### Including a merits review mechanism in the water charge rules

Some stakeholders have expressed dissatisfaction with the current judicial review appeal mechanism. For example, WaterNSW expressed a concern that “review under the Administrative Decisions Judicial Review Act 1977 within the current regulatory framework could not be called upon to hold all stakeholders to account to implement the economic and social policy objectives in schedule 2 of the Water Act 2007 in a consistent and transparent manner”.[[343]](#footnote-343)

Merits review provides ‘checks and balances’ on decisions made by the regulator. In particular, it provides an opportunity to ‘correct’ or improve the original decisions. Several options for merits review could be considered, such as:

* limited review along the lines applied for the energy regime
* review by an administrative body with specialist expertise.

Merits review can be either on a full or limited basis. WaterNSW recommended merits review without specifying which of these variants it preferred. IPART submitted that, if there is to be merits review, it should be of the limited kind. NIC (representing irrigator groups) and CIT opposed any kind of merits review.

There were no submissions offering explicit support for full merits review. In the energy sector, full merits review was rejected as an option by the expert panel reviewing the appeals regime. The panel accepted that the regime should avoid the costs and delay of “full” reviews, and avoid the risk that the availability of such review would, over time, turn it into the primary decision making process.

Based on evidence from the energy sector, which has a limited merits review mechanism, the actual review of a decision can be very costly. However, the actual costs of making an appeal mechanism available depend on the level of use of the mechanism. If the possibility of merits review has the effect of producing regulatory decisions that are not appealed (for example, via providing increased assurance that regulators apply sufficient rigour to their decisions and explanation of their decisions), there may in fact be little actual cost incurred in relation to the mechanism. Nevertheless, even if the appeal mechanism is little used in practice, there may be costs in terms of additional uncertainty faced by regulated parties and their customers, and there are the set-up costs of creating a new entity in the case where the appeals body is not an already existing body.

It is not clear how substantial the benefits of a merits review mechanism would be in terms of improved regulatory decision making. In making regulatory decisions, the ACCC and other accredited regulators weigh up various complex objectives. These decisions require considerable expertise and industry knowledge from the regulator. Moreover, the regulator is required to publically consult during its decision making processes, and have regard to concerns of stakeholders. It would be difficult for a review body to come to a clear alternative view that is objectively preferable to the original decision.

Including a new merits review mechanism into the rules would involve substantial additional costs, and could introduce into the regulatory process considerable delays and uncertainties, particularly if a new body is created for the purpose and is appealed to frequently. The gains in quality of decision making would need to be substantial to warrant these extra costs. Moreover, merits reviews would increase the regulatory burden of a system which already involves extensive consultation and analysis. Several stakeholders saw the energy sector appeal system as a poor model creating excessive costs and uncertainty. The rural water sector is considerably smaller so the benefits of a similar regime would be less. On balance, the ACCC is of the view that is not clear that the benefits would outweigh the costs, and as such does not support the creation of a specific merits review mechanism for the water charge rules. Given the above considerations, maintaining the current judicial review mechanism provides the most appropriate appeal mechanism for the water charge rules.

##### Jurisdictional mechanisms

Another option, suggested by GMW, is that where a State regulator has been accredited, that State’s regulatory review processes could apply. Victoria has provisions for review of decisions under its WIRO. The water businesses may appeal requests for information, disclosure of information, or a determination made by the ESCV. An appeal must be heard by an appeal panel consisting of three members as appointed by the Registrar (which is appointed by the regulations).[[344]](#footnote-344) GMW stated that no merits review has actually “been sought in the Victorian water sector since the start of independent economic regulation in the mid-2000s”.[[345]](#footnote-345)

Using such State-based mechanisms could achieve most of the benefits of merits review while keeping costs to a minimum, in that it would avoid the regulatory burden of a new layer of oversight. However, if State-based mechanisms were allowed, it is unclear what mechanism, if any, would be available in the context where there was a multi-jurisdictional operator who was subject to Part 6.[[346]](#footnote-346) Inconsistencies between jurisdictions would also be exacerbated by allowing some types of appeals in certain jurisdictions but not others. Moreover, costs in terms of regulatory uncertainty and delays to the decision-making process would still occur.

##### Ombudsman

CIT[[347]](#footnote-347), Waterfind[[348]](#footnote-348), WMI[[349]](#footnote-349) and NIC[[350]](#footnote-350) suggested a water ombudsman in response to the ACCC’s questions relating to appeal mechanisms for Part 6. However, the ACCC does not consider an ombudsman to be an appropriate avenue for reviewing a regulatory determination. The role of an ombudsman is to assist individual stakeholders with complaints. An ombudsman would not be expected to review the merits of major pricing decisions. The proposal of having a water ombudsman to adjudicate individual rural water disputes more generally is discussed in section 8.3.

## Accreditation of Basin State regulators (Part 9)

Part 9 of the WCIR allows for the accreditation of a Basin State regulator to undertake approvals or determinations of regulated charges for Part 6 and Part 7 operators within a Basin State. 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. To date, there are two accredited regulators under the WCIR, and three infrastructure operators whose infrastructure charges must be approved or determined by accredited regulators, as follows:

The Essential Services Commission of Victoria (ESCV) achieved accreditation under the WCIR in February 2012.[[351]](#footnote-351) ESCV approves / determines charges for Lower Murray Water (LMW) and Goulburn-Murray Water (GMW).

* + The current regulatory period for LMW is 2013–2018.
  + The current regulatory period for GMW ends in mid-2016. The next regulatory period will run from 2016–2020.

The Independent Pricing and Regulatory Tribunal (IPART) (NSW) achieved accreditation under the WCIR in September 2015.[[352]](#footnote-352) IPART will approve/ determine of charges for WaterNSW (formerly State Water Corporation) beginning from the next regulatory period.

* + Accreditation is proposed to take effect from 1 June 2016 and will apply to WaterNSW for the 2017-2021 regulatory period.

#### Stakeholder feedback

Stakeholders provided feedback on the accreditation provisions in Part 9 of the WCIR in both the Act Review and as part of the Water Charge Rules Review process.

Submitters to the Act Review raised two key concerns relating to accreditation under Part 9 of the WCIR. Firstly, submitters to the Act Review stated that the existence of multiple regulators across Basin States has not achieved consistency in regulatory decisions (under Part 6 of the WCIR) and led to inefficiencies in the regulation of water charges.

Southern Riverina Irrigators expressed the view that it would be preferable to minimise the number of agencies regulating water charges in the Basin.[[353]](#footnote-353) Both Southern Riverina Irrigators[[354]](#footnote-354) and NSW Irrigators’ Council (NSWIC) submitted that two regulators (IPART and the ACCC) determining charges in NSW has increased costs and the complexity of water charging in NSW. NSWIC added that “the involvement of the ACCC…has demonstrably not achieved greater consistency”.[[355]](#footnote-355)

WaterNSW (formerly State Water) stated that dealing with two regulators increases regulatory burden on WaterNSW with “no apparent benefit” to WaterNSW or its customers.[[356]](#footnote-356) The dichotomy between Basin water resources and non-basin water results in “inefficient regulation of pricing with higher costs to customers because WaterNSW is required to: participate in two separate pricing processes (ACCC for MDB valleys and IPART for coastal valleys and some Fish River customers) using different sets of rules; and provide variations of the same data to two separate administrative bodies”. [[357]](#footnote-357) WaterNSW was of the view that this “anomaly” can be resolved by IPART seeking accreditation.

Secondly, the Act Review raised a concern that accreditation is difficult to obtain. The Independent Panel’s report for the Review noted that “some [submissions] suggested that the WCIR accreditation arrangements are overly prescriptive and may deter regulators from seeking accreditation”.[[358]](#footnote-358) WaterNSW recommended that the Panel should consult with IPART on changes to the Act or the WCIR, “which would encourage [IPART] to seek accreditation”.[[359]](#footnote-359) However, WaterNSW did not elaborate on what specific aspects of the WCIR may create difficulties in obtaining accreditation. The ACCC notes that IPART has since applied and successfully had its application for accreditation arrangements approved. Its accreditation commences on 1 June 2016.

In its Issues Paper, the ACCC sought stakeholders’ views on the advantages and disadvantages of accrediting Basin State regulators, and whether the current procedure for accrediting Basin State regulators under the WCIR could be improved. Responses received via submissions focussed on different aspects of accreditation.

Murray Irrigation Limited (MIL) submitted that IPART did not apply for accreditation “due to the inflexibility provided for a State to address state specific issues and operate under broader objectives and principles provided for under their State legislation”.[[360]](#footnote-360) MIL was of the view that where the water charge rules apply, irrigators in NSW “effectively have less protection than they had under the IPART determination process”. MIL recommended that the accredited state regulator be able to “customise pricing principles” relevant to state specific issues as long as they are consistent with the intent of the Basin Water Charging Objectives and Principles.[[361]](#footnote-361)

The Victorian Farmers’ Federation (VFF) noted its support for the accreditation of Basin state regulators. [[362]](#footnote-362) The VFF recommended (in the context that the ESCV is considering alternative pricing approaches) that “there needs to be consistency in the principles which underpin both regulatory regimes” (that apply in Victoria). The VFF recommended adding “two principles to the criteria for assessing different pricing approaches – encouraging effective engagement with customers and stakeholders and considering the future operating environment”.

The National Irrigators’ Council (NIC) noted that “[w]here a bulk water supplier operates within and outside the Basin, accreditation of a state regulator can reduce duplication and administrative burden for the bulk water supplier”.[[363]](#footnote-363)

Daniel Mongan, a private irrigator in GMW’s Central Goulburn irrigation district, identified that Basin State regulators are “incredibly experienced and have learnt many valuable lessons since the introduction of economic regulation to the water industry”. Mr Mongan also noted however, that ACCC oversight is required because Basin State regulators potentially face a conflict of interest given that they are “operated by the state government, who are (commonly) the owners of the largest Water Corporations”.[[364]](#footnote-364)

#### Discussion

Part 9 of the WCIR allows for a State agency (instead of the ACCC) through accreditation to approve or determine regulated charges for Part 6 and Part 7 operators within a Basin state.

The ACCC notes that accreditation arrangements were included in the rules primarily in relation to the application of Part 6, rather than Part 7. For example, the arguments put forward by stakeholders in support of accreditation refer to the potential lower regulatory burden of having Part 6 approvals and determinations undertaken by Basin State regulators responsible for regulating other elements of these businesses. However these arguments do not generally apply in the case of infrastructure operators that could—under the current rules—be a Part 7 operator, as such member-owned operators are not subject to charge approval / determination by Basin State regulators.

The ACCC’s draft rule advice on amendments to the application of Part 6 (as set out in section 5.6) will, if adopted, mean that accreditation will no longer be necessary for the purposes of Part 6 and the regulator for the purpose of any new Part 7 operators should be the ACCC.

As such, the ACCC considers that Part 9 should no longer provide for Basin State regulators to apply for accreditation.

However, to provide certainty to currently accredited Basin State regulators, infrastructure operators and customers, the ACCC considers that existing accreditation arrangements should continue to apply in relation to Part 6 on an operator-by-operator basis until the end of the regulatory periods underway at the time amendments to Division 1 of Part 6 commence.

Further, the ACCC considers that accreditation arrangements should cease to apply in relation to any operators subject to approvals or determinations under Part 7 when these operators cease to be Part 7 operators under the rules. To date, there have been no Part 7 operators.

##### Gaining Accreditation

**One submission to the Act Review suggested that accreditation under Part 9 of the WCIR is difficult to obtain.**

**In response, the ACCC notes that the accreditation process under Part 9 of the WCIR is a straightforward process. It is largely administrative in nature and does not require a complex application to be submitted to the ACCC. The ACCC’s assessment of an application is limited to the consideration of whether the requirements of Schedule 5 of the WCIR are met.[[365]](#footnote-365) The applicant must also satisfy the information requirements such as provision of the applicant’s name and address.[[366]](#footnote-366)**

**Schedule 5 requires that certain provisions of the WCIR (called the ‘applied provisions’ which allow for regulation of Part 6 and Part 7 operators) must apply and be in force in the relevant state before the formal accreditation application is lodged. This requirement requires the commitment of the relevant State Government and State Parliament to pass the necessary legislation to allow the relevant state agency’s application to proceed.**

**The ESCV, and more recently IPART, have both successfully had their applications for accreditation approved under Part 9 of the WCIR. ESCV has been accredited since February 2012 and IPART’s accreditation commences on 1 June 2016.**

##### Inconsistency in regulatory approach

In relation to feedback that multiple regulators across the Basin results in inconsistency in regulatory decisions; the ACCC notes that while this is true, it is not always an undesirable outcome. In the absence of a single regulator model, different regulators will exercise their discretion differently. The ACCC does not seek consistency for consistency’s sake. Consistency in relation to some aspects of a regulator’s decision will be desirable or necessary in some circumstances whereas in other situations, different pricing decisions will be expected, for example, to reflect that costs vary in different parts of the Basin (see also section 5.10).

If the ACCC’s rule advice is adopted and the accreditation arrangements cease to have effect (after a transition period), the ACCC Pricing Principles will no longer be binding on accredited state regulators,[[367]](#footnote-367) however the principles may provide guidance to state regulators on key regulatory issues.

#### Draft rule advice

|  |
| --- |
| Rule advice ‑  Part 9 should be amended so that it does not apply beyond the period necessary to transition from the current application of Part 6.  Part 9 should be amended to provide that accreditation arrangements cease to apply in relation to approvals and determinations for:   * Infrastructure operators not currently subject to Part 6 or Part 7: when the amendments to Part 9 commence; * Infrastructure operators subject to Part 6: at the end of the regulatory period underway at the time amendments to Division 1 of Part 6 commence. * Infrastructure operators subject to Part 7: when those operators cease to be Part 7 operators   unless the accreditation is revoked, withdrawn by a Basin State or expires earlier.  This rule advice is implemented in the repeal of Part 9 of the current WCIR, and through Part 11 of the proposed water charge rules. |

## Differences in charging arrangements and their impacts

Under section 92(1)(c) of the Act, the water charge rules should contribute to achieving the Basin Water Charging Objectives and Principles (BWCOP). This includes the facilitation of consistency in pricing policies across sectors and jurisdictions where entitlements are able to be traded.[[368]](#footnote-368) The BWCOP are based on clauses 58-63 and 64-77 of the Intergovernmental Agreement on the National Water Initiative (NWI).[[369]](#footnote-369) The implementation of consistent pricing policies was one action to facilitate efficient water use and trade in entitlements.[[370]](#footnote-370) States and Territories further agreed to implement compatible institutional and regulatory arrangements and remove barriers to trade that would facilitate the operation of efficient water markets and opportunities for intrastate and interstate trade.[[371]](#footnote-371)

The terms of reference for the Act Review required the Independent Expert Panel (the Panel) to consider the level of Basin-wide consistency in water charging regimes and the contribution made by those charging regimes to the water charging objectives.[[372]](#footnote-372) The Panel considered that 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*.[[373]](#footnote-373) Consistency in charging practices is seen as necessary in order to address pricing distortions and facilitate the efficient functioning of water markets.

The ACCC is required by its terms of reference, based on the Expert Panel’s recommendation, to consider a range of issues related to the consistency of water charging regimes. This includes the continuing appropriateness of tiered regulation (see Section 5.2), the consistent application of the BWCOP (see Section 4.2), the form and content of charge determinations and the number of regulatory authorities (see Section 5.6).

This section focuses on the extent to which the water charge rules contribute to one of the outcomes of consistent pricing policies,[[374]](#footnote-374) to facilitate the efficient functioning of water markets. The water charge rules seek to preclude water charging arrangements that could impose a barrier to trade or distort trade-related decision making.

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. Charging arrangements therefore reflect 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 (See section 4.2).

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 between charges for on-river infrastructure services (imposed on a valley-by-valley basis by infrastructure operators who provide on-river infrastructure services) and charges for off-river infrastructure services (such as those imposed by IIOs).

Significant differences persist in the water charging regimes applying throughout the MDB. Tariff structures, and the way in which government water planning and management charges and on-river infrastructure charges are passed on to irrigators, vary considerably within and between Basin States.

* In Victoria, charges for on-river infrastructure services (often called ‘bulk water charges’) are 100 per cent fixed (that is, they do not vary with the volume of water delivered), while such charges in NSW and Queensland are both fixed and variable. Charges for on-river infrastructure services are not levied in SA.
* Nearly all IIOs who provide off-river infrastructure services 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 usage charges and / or a tiered tariff structure. The relative weighting between these charges varies across operators 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. However, there can be reasonable grounds for differences in infrastructure operators’ charging arrangements, several of which are noted above.

In its Issues Paper, the ACCC sought stakeholder views on:

* circumstances under which differences in charging arrangements between infrastructure operators could distort an irrigator’s decisions regarding water use or trade (Question 41);
* examples of infrastructure operator charging practices that could impose a barrier to trade (Question 42);
* measures that could be taken to address any distortion arising from different infrastructure operator charging practices (Question 43); and
* whether there should be a general requirement for all infrastructure operators’ charging arrangements to be consistent with the BWCOP (Question 44).

#### Stakeholder feedback

Stakeholders raised the question of consistency in relation to a wide range of matters. These have been grouped together where possible, and are discussed separately in the following sections.

### Consistency as an objective

##### Consistency at the level of the infrastructure operator

A number of IIOs and the National Irrigators’ Council (NIC) raised concerns about pursuing consistency as an objective because they wished to maintain IIO discretion in determining their own charges.[[375]](#footnote-375) Queensland Farmers’ Federation (QFF) similarly submitted that discretion in designing tariff structures and charging arrangements is important and it is necessary to allow for differences between schemes and operators.[[376]](#footnote-376) Submissions stated that each infrastructure operator is different for a variety of reasons, including areas of operation, customers and service levels.[[377]](#footnote-377) Consistency was described in the submissions as being “aspirational” and “impossible” to achieve.[[378]](#footnote-378) Murrumbidgee Irrigation Limited (MI) submitted that “differences in charging arrangements are to be expected in a competitive and innovative industry”.[[379]](#footnote-379) Coleambally Irrigation Cooperative Limited (CICL) considers attempts to “compare charges across IIOs have been ‘fraught’ because no two IIO’s customers, area of operations or service levels at the same,” although this does not mean the ACCC’s comparisons between IIOs should be avoided, but rather the limitations should be clearly stated and the “extent of the effort that the ACCC might devote to this exercise should be limited”.[[380]](#footnote-380) CICL added that pricing and service levels within an IIO over time “is of much more relevance than what is happening elsewhere”.[[381]](#footnote-381)

Within this context, some submissions commented on the level of discretion that should be afforded to infrastructure operators to set their prices and design their tariff structures. NIC stated that infrastructure operators should not have “free reign” but should be able to “construct their prices according to their particular circumstances in full knowledge that their customers have recourse to the ACCC if they consider the prices unreasonable”.[[382]](#footnote-382) Western Murray Irrigation (WMI) submitted that it supported regulation that would allow for full cost recovery and local-level decision making noting that NSW was the only Basin State that is “aiming for full cost recovery from its water users”.[[383]](#footnote-383)

WaterNSW (formerly State Water) submitted to the Act Review that a source of inconsistency in water charging arrangements is the tiered approach to regulation.[[384]](#footnote-384) WaterNSW called for *increased* regulation of Part 5 and Part 7 infrastructure operators (by way of “incentive based outcomes observed under Part 6 pricing regulation”) to “ensure consistent and efficient pricing outcomes are obtained for customers” and to promote Basin wide consistency and the achievement of the BWCOP.[[385]](#footnote-385) In summarising this submission, the Panel reviewing the Act, provided its view that there a trade-off between the tiered approach to regulation and consistency.[[386]](#footnote-386)

In contrast to operators and WaterNSW, Daniel Mongan, an irrigator in Goulburn Murray Water (GMW)’s submitted that “there should be consistency amongst all of the infrastructure operators in the Murray-Darling Basin (MDB). This would remove the differences between approaches along the Murray river operators and allow water to flow to its highest value.”[[387]](#footnote-387) The Victorian Farmers’ Federation (VFF) also “believes that the pricing of Victorian rural water corporations need to be benchmarked against each other” despite there being some local differences that need to be taken into account.[[388]](#footnote-388)

##### Consistency at the ‘macro’ level

While infrastructure operators and peak bodies such as the NIC supported maintaining infrastructure operators’ discretion in setting their own charges, these stakeholders, as well as others, appear to desire greater consistency at the ‘macro’ level – that is, between regulators, and within and between Basin States. For example, the NIC saw that the main benefit of accreditation under the WCIR was that it would allow one agency to be “responsible for determining all water charges across the State”.[[389]](#footnote-389) NIC contrasted the situation in NSW where WaterNSW was subject to direct regulation by both the ACCC and Independent Pricing and Regulatory Tribunal (IPART) unfavourably with the situation in Victoria where ESCV has received accreditation under the WCIR and therefore is the sole regulator to conduct price determinations for LMW, GMW, and other infrastructure operators.[[390]](#footnote-390)

The QFF and VFF likewise commented on the importance of consistency between the Commonwealth water charge rules and the state-based regime. The VFF submitted its support for consistency in the principles underpinning the regimes at the Commonwealth and State level, which currently both apply in Victoria. The VFF stated that two principles should be included in the criteria used to assess different pricing approaches “encouraging effective engagement with customers and stakeholders”, and “considering the future operating environment”. [[391]](#footnote-391) The VFF added that it wants to “ensure that the principles underpinning both regulatory regimes will create value for customers and enhance transparency” whilst also allowing “flexibility to adapt regulatory response to the impacts” of changes in the rural water market.[[392]](#footnote-392)

QFF submitted that despite the limited scope of the water charge rules, it was recognised in Queensland that there was a need for a consistent approach and that the water charge rules “have been and continue to be very effective in providing guidance for the implementation of water infrastructure charges and terminations fees across Queensland”.[[393]](#footnote-393) QFF added that the Queensland Competition Authority was guided by the water charge rules in its recommendation on price paths for SunWater and SEQWater. IPART also submitted that they consider the “WCIR provide[s] a good framework for regulation of bulk water in the Basin.”[[394]](#footnote-394)

Murray Irrigation Limited (MIL) submitted that although “rules relating to the determination of bulk water prices are sound […] in practice the rules have not achieved the intended goal of consistency across the Basin.”[[395]](#footnote-395) In its submission to the Act Review, MIL suggested that Basin State regulators should be able to approve infrastructure charges and apply their own pricing principles, as long as the intent of those principles is consistent with the WCIR or the BWCOP.[[396]](#footnote-396) See Section 5.6 for the ACCC’s rule advice in relation to the regulatory approval or determination of infrastructure charges.

WaterNSW submitted that after almost five years of the WCIR, “a common approach to pricing has still not been achieved and there still remains no consistent application of economic principles within the basin.”[[397]](#footnote-397) WaterNSW further noted that this was evident with the recent different regulatory decisions of GMW and WaterNSW.[[398]](#footnote-398) WMI submitted that there has “little improvement in consistency of water charging regimes in terms of bulk water charges.”[[399]](#footnote-399)

The Murray-Darling Basin Authority (MDBA) submitted to the Act Review that “transparency of pricing decisions is low” and there are inconsistencies between jurisdictions in the approach to cost recovery and consumption based pricing.[[400]](#footnote-400) MDBA further submitted that there are “consequential distortions” in the water market, which “undermine the objective of achieving efficient use of water”.[[401]](#footnote-401) The MDBA added that “[t]here is also a risk that over time inconsistent approaches to price recovery could result in problems with infrastructure operation and maintenance”. WMI, MIL and NSW Irrigators Council also compared NSW to other states by identifying NSW’s focus on ‘beneficiary pays principles’ and its focus on identifiable government/user cost shares compared to Victoria and SA, where it is difficult to determine the extent infrastructure charges are subsidised.[[402]](#footnote-402)

WMI also noted that SA “still does not on charge its irrigators and general use customers for bulk water charges”.[[403]](#footnote-403) The MDBA also submitted to the ACCC that differences between state governments in the level of cost recovery for River Murray Operations (RMO) contributions, which are ultimately paid by irrigators, “appear at odds with the National Water Initiative in achieving a level playing field for water users”.[[404]](#footnote-404)

Murray Valley Private Diverters submitted that water charging arrangements must “adequately factor in how to improve Government inefficiencies” and “must take into account the differences that occur throughout the [MDB]”.[[405]](#footnote-405) Murray Valley Private Diverters stated that differences might exist because of “how water is managed, how water charges are determined, the specific organisational and infrastructure arrangements for water delivery, historical regional differences and the ability of individuals [*sic*] users to pay”. Murray Valley Private Diverters stated that they “reject the concept that uniform rules and charges can apply to the entire [MDB]” and called for a review of the appropriateness of the Basin Water Charging Objectives and Principles in relation to MDB-wide consistent water charging arrangements. Murray Valley Private Diverters also noted that the Act’s “attempts” at uniform water charging arrangements “has resulted in more complex arrangements and further costs to water managers and water users”.

The SA Government submitted its view to the Act Review that the water charge rules and water market rules “are assisting to promote the efficient use of, and investment in, water infrastructure, improve consistency and transparency of charging and facilitate the efficient operation of water markets”.[[406]](#footnote-406)

Many submissions to both the Act Review and to the ACCC’s Issues Paper suggested that a key inconsistency is the current absence of the application of the water charge rules, particularly Part 6, to the MDBA. These issues are discussed in Section 5.12.

In its Issues Paper, the ACCC indicated that one approach to improving consistency would be to impose a general requirement for all infrastructure operators’ charging arrangements to be consistent with the BWCOP (Question 44). Stakeholders were divided on this proposition, with operators generally viewing the proposal as a hampering of operator discretion, while one submission from a water market intermediary provided support.

CICL and MI submitted that they would not support such a requirement.[[407]](#footnote-407) CICL’s view was that it could not support such a general requirement when those objectives and principles are “yet to be articulated”.[[408]](#footnote-408) MI stated that the requirement would:

* increase regulatory burden;
* be ambiguous and difficult to apply in practice and would could create uncertainty;
* represent a compliance burden for operators in that they would have to review their current charging arrangements and consider the BWCOP when they want to adjust charges “for the benefit of customers and members”.[[409]](#footnote-409)

In contrast, Waterfind supported the proposal and contended that “compliance (and monitoring) of the BWCOP are of great benefit for all water market participants”.[[410]](#footnote-410)

The National Farmers’ Federation (NFF) submitted that consistency in the application of the BWCOP by economic regulators that approve or determine charges is an important consideration.[[411]](#footnote-411) The NFF added that “there has been limited opportunity to fully test the application of these principles” because the ACCC has only made a price determination in NSW.

##### ACCC view on consistency as an objective

There is currently a tiered approach to regulation under the WCIR, with the intent of balancing compliance costs with the benefits of regulation.[[412]](#footnote-412) The tiered approach is necessary under the current approach in the WCIR because the focus is to achieve consistency in the pricing principles to approve or determine charges – a ‘top-down approach’ to consistent water charging arrangements. Under Rule 29(4) regulators must have regard to the BWCOP when approving or determining charges. Additionally, the ACCC imposes on accredited Basin State regulators as a condition of accreditation that they must have regard to the ACCC’s Pricing Principles. Consequently, as the ACCC noted in its final advice on the development of the WCIR, the approval or determination of charges is a costly option and should only apply where the governance arrangements do not limit the potential misuse of market power, and where the operator is large enough to warrant that level of regulation.[[413]](#footnote-413)

In its Issues Paper, the ACCC asked stakeholders for their views on improving consistency in water charging arrangements, by extending that ‘top-down approach’ to require all infrastructure operators to determine their charges consistently with the BWCOP. The ACCC has considered the submissions to the Issues Paper; the ACCC agrees that the requirement would not produce sufficient benefits to outweigh the increased compliance costs (see section 4.2).

One of the main themes of the ACCC’s Draft Advice is to move from an approach to regulation that applies differently to different groups of regulated entities (and therefore greater protection for some irrigators compared to others), to a more streamlined approach providing a consistent framework for regulated water charges that applies as widely as possible, but which allows a degree of discretion to both regulated entities and the regulator. The ACCC considers that this approach will continue to recognise the different characteristics of infrastructure operators and the limited scope of the application of the rules. This approach will better contribute to consistency in water charging arrangements while still ensuring that there is a measured approach to regulation in terms of the level of regulatory costs infrastructure operators face.

Under section 91(2) of the Act, the water charge rules are limited to apply to regulated water charges in the MDB, excluding charges for urban water supply activities. Additionally, the characteristics of infrastructure operators in the Basin differ due to among other factors, size, ownership, infrastructure assets, infrastructure services and costs and the approach to determining charges. Moreover, Basin States have shown a clear preference for continuing to be involved in regulation of infrastructure charges.

The ACCC’s proposed approach throughout this Draft Advice takes into account all of these factors and aims to create a consistent set of regulatory requirements that will apply to all infrastructure operators, rather than seeking to regulate to produce an outcome where all charging arrangements are as similar as possible. Under the proposed amendments, infrastructure operators can generally determine charges and consult with their customers in a way that best meets the individual needs of their business and customers, subject to some basic customer protections and transparency requirements. Importantly, the regulator still maintains the ability to take into account to individual circumstances when undertaking its roles, whether this is under the various exemption mechanisms provided under the rules, or in undertaking approvals and determinations. The proposed water charge rules requirements will ensure that infrastructure charges across the MDB do not unfairly discriminate between customers and that pricing transparency is improved, to assist irrigators and other water users in making timely and efficient commercial decisions.

### Valley-based and postage stamp pricing

Some submissions discussed consistency in water charging arrangements in considering the merits of valley-based pricing arrangements versus ‘postage stamp pricing’.[[414]](#footnote-414)

The Peel Valley Water Users Association (PVWUA) submitted concerns about the differences in the level of charges between NSW valleys in submissions both to the Issues Paper and Act Review.

The PVWUA was of the view that if it is the water charge rules that produce inequitable charges, then the rules should be amended “to produce a more equitable pricing outcome”.[[415]](#footnote-415) In the PVWUA’s view, the cause of the ‘inequitable water charges’ is that there is no definition of what constitutes a ‘perverse outcome’ under the BWCOP.[[416]](#footnote-416) The PVWUA further stated that there is a need for a definition of ‘perverse or unintended pricing outcomes’,[[417]](#footnote-417) and in its view, the pricing outcomes are ‘perverse’ and ‘intended’.[[418]](#footnote-418)

Additionally, the PVWUA submitted its support for postage stamp pricing.[[419]](#footnote-419) The PVWUA reasoned that the MDB is a single entity and therefore, as an alternative to valley-based pricing, there should be a standard charge applying across the entire Basin. The PVWUA recommended that a weighted average usage charge would be the “fairest system to all users” and not result in reduced revenue for State Water (now WaterNSW).[[420]](#footnote-420)

By contrast, some stakeholders submitted concerns about postage stamp pricing for valleys in GMW’s area. Peter Beex stated that GMW’s approach to impose a single water charge is contradictory with the Act, noting that the Expert Panel’s interpretation of the water charging objectives in the Act—to ensure charges are set on a consistent basis (rather than produce consistent charges per se) and to reflect the costs of providing the service (with no cross subsidisation between valleys).[[421]](#footnote-421) Peter Beex added that the single charge could distort irrigators’ decisions to invest in the Murray Valley if, in order to achieve the single price, water usage charges and infrastructure access fees increase in the Murray Valley and decrease in the Shepparton Valley.[[422]](#footnote-422) Daniel Mongan and the VFF also commented on GMW’s water charging arrangements and corresponding consultation process in relation to potential changes outlined in the GMW Blueprint document.[[423]](#footnote-423)

##### ACCC view on postage stamp pricing in the rural water sector

The ACCC supports the BWCOP including the commitments made under the NWI to promote the efficient functioning of water markets and to reduce barriers to trade through consistent water charging arrangements.[[424]](#footnote-424)

The ACCC also supports the Expert Panel’s interpretation that the intention of Part 4 of the Act, under which the water charge rules are made, is to “ensure that water charges are set on a consistent basis; it is not intended to produce consistent charges per se”.[[425]](#footnote-425) In line with this interpretation, the ACCC does not support postage stamp pricing in the rural water sector, as advocated by the Peel Valley Water Users Association. The ACCC agrees with the Expert Panel’s position that postage stamp pricing would not give effect to the objectives of the Act related to user-pays and price transparency, and that it would result in cross subsidisation and inefficient use of infrastructure services and water.[[426]](#footnote-426) Concerns about other aspects of prices in the Peel Valley are discussed in section 4.2.

### Consistency in price approvals / determinations

WaterNSW (formerly State Water) noted in its submission to the Act Review that recent MDB water charging arrangements “neither achieve Basin-wide consistency nor contribute to the [BWCOP] to the degree intended by the Act.[[427]](#footnote-427) WaterNSW reiterated its view that “charges under the new pricing arrangements closely resemble the charges determined under the previous charging arrangements [and that] [t]he new charging arrangements have also promoted more diverse outcomes for other parts of the MDB”.[[428]](#footnote-428) WaterNSW noted that in recent decisions, the ACCC and the ESCV had different interpretations and applications of the BWCOP and imposed different tariff structures and price control mechanisms. To achieve greater consistency in water charging arrangements, WaterNSW called for a guided discretion model and greater prescription in charging arrangements, incorporating the following elements:[[429]](#footnote-429)

* “[P]rovide clear objectives in relation to regulatory decisions”, which could be facilitated by:
  + weighting the BWCOP or ordering the BWCOP into a hierarchy
  + excluding consideration of irrelevant matters, which might influence the outcome of the pricing decision
  + removing unclear or ambiguous objectives, or providing greater guidance on how to interpret (particularly in relation to the phrase, ‘perverse and unintended pricing outcomes’).
* “[A]dopt high level mechanisms prescribed in the energy sector, which provide a greater degree of guidance for the decisions to be made by the regulator”.
* “[A]dopt the high level mechanisms prescribed in the energy sector, which provide improved procedural and information requirements for the pricing process”.

In response to its concern about “uncertain, inconsistent or unintended regulatory outcomes”, WaterNSW called for the introduction of a merits review mechanism.[[430]](#footnote-430) WaterNSW submitted that in the absence of such a mechanism, there is less incentive for administrative bodies to be accountable for the decisions that they make. [[431]](#footnote-431) Appeal mechanisms are considered separately in section 5.8.

WaterNSW submitted a similar view to the Issues Paper. In that submission, WaterNSW contended that the WCIR has not achieved a common approach to pricing or application of economic principles within the Basin. [[432]](#footnote-432) WaterNSW stated that the key reason for inconsistent charging arrangements under the WCIR is that regulators must consider “conflicting efficiency and social objectives, with no guidance on how to trade them off”.[[433]](#footnote-433) WaterNSW identified that in the national electricity market, there is substantial guidance “to achieve conflicting policy objectives” and that this has provided consistent charging arrangements across interconnected systems, and a robust market.[[434]](#footnote-434) WaterNSW submitted that Rule 29(4) of the WCIR should be amended such that a regulator’s primary objective is to promote economic efficiency and support infrastructure development, without resulting in pricing outcomes that distort market activity”.[[435]](#footnote-435)

WaterNSW additionally recommended that the BWCOP should be ordered into a hierarchy, and the WCIR used to define the terms used in the BWCOP to “foster consistent charging arrangements, promote investment and trade”.[[436]](#footnote-436) The ACCC sought stakeholder views on the issue of ranking the BWCOP. Submissions are summarised in section 4.2.

NSW Irrigators’ Council submitted that the “involvement of the ACCC in bulk water charging determinations” [i.e. through price determinations under Part 6] has not achieved consistency because on-river infrastructure charges are still regulated by the ESCV and the ACCC in NSW.[[437]](#footnote-437) MIL provided a similar view in its submission to the Issues Paper: “States that were already regulated now have an additional layer of bureaucracy, while States that have not been regulated in the past are still not captured”.[[438]](#footnote-438)

##### ACCC approach to consistency in Part 6 (price determinations)

Questions relating to the appropriate application of Part 6 of the WCIR, including questions of consistency in regulatory approach and about the ACCC’s involvement in direct price regulation, are addressed in Section 5.6.

### Water charging arrangements that create barriers to trade

Many stakeholders pointed out the link between inconsistent charging arrangements and water markets. Submissions to the Act Review noted that water users in SA do not pay on-river infrastructure charges.[[439]](#footnote-439) MIL commented that this “highlights that there is no consistency or equity in water charges across the Basin which also assist[s] [to] distort permanent and allocation markets”.[[440]](#footnote-440) This point was further reiterated in MIL’s submission to the ACCC’s Issues Paper.

NSW Irrigators’ Council submitted that on-river infrastructure charges are heavily subsidised by State Governments in Victoria and SA. [[441]](#footnote-441) MIL added that in Victoria it is difficult to determine the extent to which prices are subsidised.[[442]](#footnote-442)

Peter Beex contended in his submission to the ACCC’s Issues Paper that one reason that there is a significant volume of trade out of zone 6 (in Victoria) to SA, is because water users in SA can avoid the Victorian on-river infrastructure charge (“bulk water charge”) of $11.80/ML by transferring it into SA.[[443]](#footnote-443) In Mr Beex’s view, this difference in charging arrangements facilitates, and even provides incentives for, arbitrage in water markets. Peter Beex alleged that the differences in charging arrangements affect the price at which water allocation is traded, and called for a “level playing field for bulk water charges” to create competition between water trading zones and assist in creating a “real price” for high reliability water shares.[[444]](#footnote-444)

Peter Beex also submitted that casual usage could create a barrier to trade because casual users are not contributing to the costs of operating the infrastructure on a regular basis, resulting in the infrastructure access fee (payable by water delivery right holders) being relatively higher and therefore, by implication distorting water delivery right holders’ trade decisions.[[445]](#footnote-445) Peter Beex called for the removal of casual usage fees and suggested that casual users should be given water delivery rights so that when setting the infrastructure access fee, the operator (GMW) can take into account earnings from these customers.

John Girdwood submitted his concern about inconsistencies in the level of charges applying to water access entitlements (WAE) between Victoria and NSW. [[446]](#footnote-446) John Girdwood noted that a NSW irrigator pays about two thirds of the price paid by a Northern Victoria irrigator. [[447]](#footnote-447) John Girdwood questioned what has been achieved with a National Water Market, stating that it is the “[s]ame dams, same river, same water, same products”. [[448]](#footnote-448) Mr Girdwood added that it was “extremely annoying to enter the temporary market for water in competition with NSW irrigators”.[[449]](#footnote-449)

Frontier Economics submitted that differences in tariff structures could distort customers’ water trading decisions.[[450]](#footnote-450) Frontier Economics provided the example that an irrigator facing a higher variable charge, has a greater incentive to sell their water allocation as compared to an irrigator facing a lower variable charge and as such “some users facing higher variable charges [sell] their water allocations even where this is an inefficient outcome”. [[451]](#footnote-451) Frontier Economics argued that greater consistency in water charges across the MDB would “facilitate more efficient functioning of inter-jurisdictional water markets”.

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) survey of irrigators commissioned by the ACCC identified that, for most irrigators in the Goulburn-Broken and Murray systems, the level of fixed and variable charges is very important or somewhat important to their trading decisions. In contrast, irrigators in the Murrumbidgee system and the Northern Basin felt that the level of charges were less important, with 47 percent and 45 percent, respectively, of respondents in the Murrumbidgee and Northern Basin responding that fixed charges were “not important” to a decision to undertake a permanent water trade, and 61 percent and 48 percent, respectively, of respondents in these areas indicating that variable charges are “not important” to decisions to trade water allocation.[[452]](#footnote-452)

The Marsden Jacob Associates (MJA) Report (see also Box 5.2 below) commissioned by the ACCC identified that there are substantial variations in the structure and level of IIO charges across the MDB, but those differences do not have a material influence on trade decisions. MJA further also found that while there are differences in the nominal value of fixed and variable charges (due to differences in capital cost recovery models), these differences are unlikely currently to be materially influencing trade decisions.

MJA recommended that in light of these findings, the ACCC should continue to monitor whether differences in IIO charges are affecting water markets. MJA suggested that the ACCC could monitor “long-term seasonally corrected water usage across IIOs” in relation to differences in capital recovery frameworks, compliance requirements and fixed to variable charge splits. MJA stated that this would be to ensure that such charge characteristics do not result in perverse incentives, encouraging irrigators to trade out of higher cost IIOs towards lower cost IIOs.

In contrast, Central Irrigation Trust (CIT) and NIC commented that water trade data (in particular the significant volume of interstate trade of water allocations and entitlements) indicates that trade across the MDB, and the efficient use and migration of water, is uninhibited by existing water charging arrangements.[[453]](#footnote-453) NIC further commented that the member-owned structure of many infrastructure operators provides incentives for these operators *not* to impose unreasonable or price-distorting charges.[[454]](#footnote-454) NIC noted that member-owned IIOs are accountable to their members and that industry innovation and competition for investment act as a deterrent to these practices.

CICL submitted that it does not apply conditions on the trade of water within or beyond its area of operations, other than to meet its groundwater and salinity levels under its operating licence, and it is not aware of “any differences” in other IIOs that would constitute a barrier to trade.[[455]](#footnote-455)

Some stakeholders identified in their submissions to the Act Review that there was inconsistency in the price approval / determination decisions made under Part 6 of the WCIR for State Water, as compared to GMW and LMW. These stakeholders submitted that the pricing outcomes affect the efficient functioning of water markets. For example, WaterNSW (formerly State Water) submitted that because of the relatively higher proportion of variable to fixed charges set for State Water’s charges by the ACCC’s 2014 price determination, it faces financial risk in being unable to recover its usage charge when water allocations are traded interstate.[[456]](#footnote-456) State Water submitted that it cannot levy its usage charge on customers in interstate jurisdictions because “there is no specific agreement or mechanism for recovery of revenue” and customers in other jurisdictions are accustomed to paying fixed charges.[[457]](#footnote-457)

QFF submitted that there are a range of factors in Queensland irrigation schemes that could affect irrigator’s trade decisions, for example “gaps” in state water planning are one factor that could affect trade decisions. [[458]](#footnote-458) The QFF further submitted that trade could be facilitated through introducing arrangements for capacity share or peak water access in summer. [[459]](#footnote-459) The MDBA considered “charging arrangements have the potential to distort the market and discriminate between water users” and can also influence a water user’s decision to trade and the type of trade they undertake.[[460]](#footnote-460)

##### Transaction fees & charges applied when a person trades

Waterfind called for greater regulation of transaction fees (trade application fees and trade out fees) to “reduce trade barriers” and “ensure consistency across the Murray-Darling Basin”. Waterfind stated that by bringing water planning and management charges (in particular, transaction fees) under WCIR regulation, it would “improve transparency and efficiency of water markets” and enhance the “comparability of water market transactions”.[[461]](#footnote-461)

Waterfind raised its concern that trade transaction fees are currently regulated under the WCPMIR, which focuses on publishing information related to these charges rather than the determination or approval of the charges. Waterfind submitted its view that “significant water market trade barriers stem from the fact that at present, member owned infrastructure operators can freely set their transaction fee arrangements”, rather than those charges being subject to regulatory approval or determination (i.e. under Part 6 of the rules).[[462]](#footnote-462) Waterfind called for the regulatory approval of transaction fees and other water planning and management charges.[[463]](#footnote-463)

Additionally, Waterfind identified that ‘transaction fees’, in particular in the form of infrastructure charges imposed on water allocations traded out of member-owned private irrigation districts create barriers to trade.[[464]](#footnote-464) Waterfind called for these charges to be prohibited or capped. [[465]](#footnote-465)

The MDBA submitted its view that additional or higher charges should not apply to water that is traded into a state or district than would be payable for water associated with “local entitlements”, except where the difference relates to the marginal cost of administering the trade.[[466]](#footnote-466) The MDBA further noted that the marginal cost of administering a trade may be different for each trade authority approval because there is wide variation in the number of trades in each state.[[467]](#footnote-467)

National Water Brokers submitted to the Act Review its concerns about the differences in transaction costs between state jurisdictions and that such differences have the effect of creating a barrier to efficient trade, to or from states or IIOs where the fees are higher, particularly for small volume transactions. National Water Brokers called for a more consistent charging regime “to enable more efficient water trading”.[[468]](#footnote-468)

MJA also provided a range of evidence about the impact of infrastructure charging arrangements on water markets (see Box 5.2).

Box 5.2: MJA study: The Impact of Infrastructure Charge Structure on Water Trade in the MDB—case study of WaterNSW’s variable use charge

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| The ACCC commissioned MJA to investigate circumstances under which water charging arrangements, and differences in those arrangements, could act as a barrier to trade or impact on an irrigator’s decision to trade, versus use, carryover or forfeiture of water.  MJA investigated the impacts of WaterNSW’s current water charging practice of imposing its variable usage charge on the seller of a water allocation when that water allocation is traded to a non-NSW buyer. In its submission to the Act Review, WaterNSW stated that it imposes the variable usage charge on water allocations traded out of NSW due to its relatively higher proportion of variable to fixed charges, and therefore to avoid the financial risk associated with being unable to recover revenue when water allocations are traded interstate.[[469]](#footnote-469)  MJA concluded that this water charging practice has led to dual pricing for NSW water allocation in the southern MDB. Buyers in Victoria and SA were typically offering $5 to $7 less for a NSW water allocation, meaning that a NSW seller would be better off selling their water allocation within NSW where a relatively higher price is likely to be on offer.  MJA noted that from its consultations with stakeholders, it was suggested that the impact was not material under current market conditions; however, MJA was of the view that it “leaves the pathway open for a clearly material impact to emerge”.[[470]](#footnote-470) |

##### ACCC view on the impacts of water charging arrangements on trade

The ACCC is concerned about the unnecessary impediment to trade that might arise as a result of infrastructure charges that are imposed on, or as a condition of, trade, which are unrelated to trade or do not reflect the reasonable and efficient costs of processing a trade. The water charge rules currently do not prevent charges being imposed on a customer as a condition or a result of trade, nor do the rules currently directly address the imposition of infrastructure charges to prevent people from trading water out of a particular irrigation area or jurisdiction (effectively acting as an export tax on water trade). These charges have the potential to unduly inhibit water trade, and preclude, at the margin, the use of water resources and infrastructure assets by their highest value use.

The ACCC acknowledges that current charging arrangements have not precluded trade decisions entirely. However, charges that are imposed on, or as a condition of trade, where there is no fundamental reason for the charge to be linked to trade, could prevent or distort trade decisions at the margin, without preventing trade entirely.

The ACCC considers that stakeholders’ concerns about the impact of tariff structures on trade, and the effect of charges being levied on or because of trade which do not appropriately reflect administration costs, provide further support for its rule advice on the proposed non-discrimination rules. In particular, Rule advice 5‑D advises that an infrastructure operator should not be able impose an infrastructure charge when a person applies to trade, as a condition of trade, or because a person has traded, other than a charge which reflects the administration costs necessarily incurred to process a trade. This proposed amendment will directly address concerns about the potential for infrastructure charges to be levied in distortionary ways. Rule advice 5‑B(b) (proposed non-discrimination rules) will also limit an infrastructure operator’s ability to levy discriminatory charges for the same class of infrastructure service based on whether a person has participated in water markets.

The ACCC recognises that, as a default approach, variable and fixed infrastructure charges should reflect underlying variable and fixed costs. Such an approach would be consistent with the principles of achieving full cost recovery and user pays. However, the ACCC does not recommend amending the rules to mandate the fixed / variable split of charges to reflect the underlying fixed / variable composition of costs. There are a range of considerations that an operator must take into account when setting its charges, such as the time periods over which costs are to be recovered, complexities such as economies of scale and the costs of supplying different services or different customer groups, risk sharing between the operator and its customers (or other equity concerns), and the difficulties inherent in setting charges to reflect forecast costs in an environment of considerable uncertainty.

The ACCC is of the view that operators should, consistently with the BWCOP, continue to move towards cost-reflective and upper bound pricing where practicable, but that operators should generally retain the discretion to set fixed and variable charges in a manner which best reflects their individual circumstances (see, however, the ACCC’s draft rule advice relating to pass through of directly attributable charges at section 5.13). The ACCC also recognises that enforcing a rule which required revenues recovered via fixed and variable charges to exactly match underlying fixed and variable costs would require exact and detailed data on an operator’s fixed versus variable costs, which would be prohibitively costly for an operator to provide.

The ACCC notes that the primary rationale behind stakeholder support of cost-reflective charging is the possible impacts on water markets of tariff regimes that differ in their ‘fixed vs variable split’. The ACCC considers that it is more important to address aspects of charging arrangements that directly distort trading decisions, such as infrastructure charges levied directly on trade,[[471]](#footnote-471) rather than attempting to partially address the indirect effects of differing tariff structures by mandating cost-reflective charging via the rules.

The ACCC recognises that underlying differences in charging arrangements will continue to persist, and are likely to continue to affect prices in water markets. Whether these effects amount to distortions on trade will depend on the reasons for the differences in charging arrangements. The ACCC acknowledges the limited ability of the rules to fully prevent all distortionary effects of tariff structures. This is due to the prohibitive costs in obtaining the information required to fully understand underlying cost structures and implement fully cost-reflective charges for all infrastructure operators. In addition, the rules are limited in their ability to fully prevent distortionary effects because there remain entities who provide water infrastructure services who do not recover some or all of their costs through infrastructure charges, thereby distorting relative prices.

The ACCC agrees with MJA that there is a need for ongoing monitoring of the impact of operator charges on market outcomes. The ACCC believes this will be possible given the proposed non-discrimination provisions, the information collected via infrastructure operators’ and other entities’ schedules of charges, and the annual Requests For Information the ACCC makes to inform its Water Monitoring Reports.

## Commercially negotiated charges and third party access regimes

The WCIR regulates charges for access to, and services provided in relation to, water service infrastructure. Commonly, an infrastructure service is provided to customers by levying the standard infrastructure charge included on the infrastructure operator’s Schedule of Charges. However, an infrastructure operator may also enter into a contract for the provision of infrastructure services to new or existing customers at a different charge. These contracts may arise in relation to access to infrastructure services under any of the available mechanisms pursuant to Part IIIA of the Competition and Consumer Act 2010 (CCA).[[472]](#footnote-472) Such contracts may also arise independently (i.e. outside of Part IIIA). For the purposes of this discussion, it is useful to distinguish between charges specified in a contract developed under Part IIIA (which will be referred to as a “Part IIIA charge”),[[473]](#footnote-473) and those that arise out of independent contracts (which will be referred to as a “commercially negotiated charge”).

Generally, Part IIIA charges and commercially negotiated charges would be considered ‘infrastructure charges’ as per the ACCC’s proposed approach,[[474]](#footnote-474) and are therefore subject to the water charge rules. If the infrastructure operator levies a commercially negotiated charge or a Part IIIA charge, then the operator must ensure that those charges comply with the current non-discrimination provisions under Rule 10, which prohibits certain infrastructure operators from engaging in price discrimination between irrigation right holders and other customers. The ACCC has proposed additional non-discrimination prohibitions for Rule 10, [[475]](#footnote-475) which would also apply to commercially negotiated charges and Part IIIA charges (in the absence of further amendments proposed below).

Further, an infrastructure operator is also required to publish details of their charges, including commercially negotiated charges and Part IIIA charges, in their Schedule of Charges. The WCIR currently provide some limited protections in relation to publication of commercial-in-confidence information where there is a contract between the infrastructure operator and a customer for an agreed charge. Currently under Rule 9, an infrastructure operator and customer, or a customer, may apply to the ACCC for an exemption from the requirement that the operator must include the charge on its Schedule of Charges.[[476]](#footnote-476) The test for granting the exemption is that disclosure of the details of the charge would have a material and adverse effect for the infrastructure operator and the customer (or just the customer, when only the customer has applied for an exemption). The ACCC must publish a notice on its website when an exemption has been granted. Currently under Rule 55, where an exemption under Rule 9 has effect the ACCC may publish the names of the parties and the date on which the exemption has been granted, but may not publish any other information to which the exemption relates.

Box 5.3: Access to Services under Part IIIA of the Competition and Consumer Act 2010

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| The objects of Part IIIA of the CCA 2010 are to:   * promote the economically efficient operation of, use of, and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and * provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.[[477]](#footnote-477)   There are a number of mechanisms through which access to infrastructure services can be provided under Part IIIA. This includes declaration and negotiation/arbitration, an access undertaking, an ‘effective’ State or Territory access regime and a competitive tender process for government owned facilities.  **Declaration and negotiation/ arbitration**  Any person may apply to the National Competition Council seeking a recommendation that a service[[478]](#footnote-478) be declared. Once the designated Minister declares a service, an access seeker can enter into negotiations with the service provider. In the event that there is a dispute, an application can be made to the ACCC to have the dispute resolved via arbitration.  **Access undertaking or access code**  The owner or operator of a facility can lodge an access undertaking with the ACCC. If accepted, the access undertaking sets out the terms and conditions upon which the owner or operator of a facility that provides a service would be willing to provide third party access. A service cannot be declared if there is an access undertaking in place. Similarly, an industry body can lodge an access code with the ACCC. If accepted, the access code sets out the rules for access to a service.  **Effective State or Territory access regime**  A State or Territory can establish its own third party access regime and apply to the National Competition Council seeking a recommendation that the regime should be certified as ‘effective’. A service may not be declared once the Commonwealth Minister certifies a State or Territory access regime as ‘effective’.  **Competitive tender processes for government-owned facilities**  This relates to applications made to the ACCC to approve a tender process for the construction or operation of a facility owned by the Commonwealth, or a State or Territory. |

Some state jurisdictions have developed,[[479]](#footnote-479) or are developing, legislation to establish or regulate a third party access regime in relation to water infrastructure services provided within the state. The WCIR are not intended to exclude or limit the operation of any law of a State, including any Basin State third party access regime.[[480]](#footnote-480) In its Issues Paper, the ACCC sought stakeholders’ views on how the WCIR should deal with the interaction between the rules and third party access regimes, and with commercially negotiated charges more generally. In particular, there is a need to consider:

* Whether, and how, an exemption from the proposed non-discrimination provisions should apply to commercially negotiated charges, including commercially negotiated charges under a third party access regime;
* What information must be provided on an infrastructure operator’s Schedule of Charges in relation to commercially negotiated charges; and
* How commercially negotiated charges should be taken into account by a regulator during the course of approvals and determinations under Parts 6 and 7 of the WCIR.

#### Stakeholder feedback

Submissions to the Issues Paper generally did not make substantive comments on how the WCIR should accommodate commercially negotiated charges and Part IIIA charges. However, Central Irrigation Trust (CIT) submitted that “[t]hird party access agreements should be encouraged and negotiated outcomes should be outside the WCIR. This will encourage business to be innovative in attracting further and varied customers.”[[481]](#footnote-481) Also, the Queensland Farmers Federation submitted that commercially negotiated charges and third party access regimes are “a matter for SunWater and SEQWater to address but it is recognised that there is a need for transparency in regard to processes that would be put in place to allow for commercially negotiated charges and third party access”.[[482]](#footnote-482) Murrumbidgee Irrigation also provided its view on the treatment of commercially negotiated charges in the context exemptions from the publication of a Schedule of Charges (summarised in section 5.4.3).[[483]](#footnote-483) Thus, it appears that stakeholders are not overly concerned about how the rules specifically address such charges, but that there is support for operators to be able to enter into commercially negotiated arrangements, particularly under third party access regimes.

Also, relevantly, during the consultation period for the Issues Paper, the South Australian (SA) parliament passed the *Water Industry (Third Party Access) Amendment Bill 2015*[[484]](#footnote-484) (‘the Bill’) to establish a third party access regime for water infrastructure in SA. The SA Government intends to apply to the National Competition Council to have the regime certified as an ‘effective access regime’ for the purposes of Part IIIA of the CCA.[[485]](#footnote-485)

In the course of its consultation process on the development of the Bill, the SA Department of Treasury and Finance raised its concerns regarding uncertainty in the scope of the application of the water charges rules.[[486]](#footnote-486) To the extent of any overlap between the infrastructure services covered by SA’s third party access regime and the water charge rules, the SA Department of Treasury and Finance also noted concerns about potential legal inconsistency, which could have the effect of invalidating the state legislation.[[487]](#footnote-487) A further concern related to the complexity of the regime whereby “some infrastructure services of SA Water (and potentially other water industry entities) would be subject to Commonwealth water charge rules, some would be subject to the state-based access regime, and some would be subject to both”. [[488]](#footnote-488)

To address these concerns, the Bill included a displacement provision for the purposes of Section 250D of the Act. Under this displacement provision, the state legislation will prevail to the extent that there are any legal inconsistencies between the state legislation (i.e. the third party access regime) and the water charge rules. To the extent that there are no legal inconsistencies, then both the state legislation and the water charge rules can operate concurrently.[[489]](#footnote-489)

#### Discussion

The WCIR do not specify separate requirements for Part IIIA charges that arise through the provision of infrastructure access and related services under the available mechanisms set out in Part IIIA of the CCA, including the third party access regime created by the SA Bill.

To deal with concerns about possible inconsistencies, one option is a broad carve-out from all WCIR requirements for Part IIIA charges. The ACCC considers that charges arising under these arrangements will not necessarily be inconsistent with the water charge rules generally, but acknowledges that there may be cases where those charges could be inconsistent with the proposed non-discrimination rules. Therefore, the ACCC does not consider a blanket exemption is necessary or appropriate. Rather, the merits of a possible exemption for Part IIIA charges should be considered on a case by case basis for each general area of the water charge rules.

##### Non-discrimination provisions

As identified by stakeholders, commercial negotiations and Part IIIA arrangements could provide incentives for operators to develop innovative services which better provide for customers’ needs, and provide for more efficient balancing of risk, taking into account the specific circumstances of a particular access seeker or customer. Commercial negotiations could also provide incentives, and the ability, to develop innovative pricing structures that strengthen price signals for efficient use of, and investment in, infrastructure. While recognising this, the ACCC seeks to ensure that the interests of other customers are protected by preventing commercially negotiated charges which discriminate against certain customers on particular grounds, via the proposed new non-discrimination provisions.

The ACCC seeks to ensure that the intent of the water charge rules will be upheld regardless of the avenues through which access to infrastructure may be sought in the foreseeable future. However, it is important to balance this concern with the objective of promoting the economically efficient operation of, use of and investment in the infrastructure. The ACCC considers that an appropriate balance can be struck by distinguishing between commercially negotiated charges generally and Part IIIA charges when considering the application of the non-discrimination rules.

Part IIIA charges

The ACCC considers that it is appropriate to provide an exemption from the non-discrimination rules for Part IIIA charges. The requirements of Part IIIA, coupled with the continued application of the disclosure requirements in Parts 2 and 4 (Schedule of Charges) of the water charge rules, should ensure there is adequate scrutiny of Part IIIA charges. In particular, the ACCC recognises that there are particular features of the Part IIIA framework, which provide protections for customers’ interests and oversight of the infrastructure operator’s charging arrangements. For example, under a Part IIIA regime an operator is generally *required* to enter into negotiations with new and existing customers when requested. Also, where an agreement cannot be reached, there are dispute resolution mechanisms in place.

Further, there is a significant process required for access to infrastructure to occur in accordance with Part IIIA. For example, before charges of the kind covered by the proposed exemption would be possible, the infrastructure service must be ‘declared’, the State or Territory regime certified as ‘effective’ or the access undertaking or access code is accepted by the ACCC. Additionally, access is only likely to be granted to one or a few customers under this process. As such, the ACCC considers that the proposed exemption would only apply in limited circumstances.

Based on these reasons, the ACCC supports an exemption from the application of Part 3 (non-discrimination rules) in relation to these charges.

Commercially negotiated charges

The ACCC does not consider that the proposed exemption should extend to commercially negotiated charges that arise outside of the mechanisms set out in Part IIIA of the CCA. The ACCC considers that being ‘commercially negotiated’ is insufficient grounds for a charge to be exempt from the non-discrimination provisions under Part 3 of the water charge rules.

The ACCC is concerned that outside Part IIIA of the CCA, in general there may not be a framework or guidelines to approaching negotiations, which in turn could mean that there are fewer protections from preferential treatment of selected customers. This is contrasted to Part IIIA, which provides a framework and guiding principles to encourage a consistent approach to access regulation.[[490]](#footnote-490) Moreover, an operator is not required in general commercial negotiations to open negotiations with other access seekers, nor can an access seeker ‘fall back’ on a pre-determined dispute resolution process (for example, arbitration) should negotiations fail. Therefore, the proposed exemption should be targeted to Part IIIA charges only, as outlined above. This approach should not be viewed are precluding an infrastructure operator from entering into a contract with a new or existing customer for a commercially negotiated charge. An infrastructure operator would need to ensure however that the charge is not levied, or made available, to a customer on any of the proscribed discriminatory bases referred to in the proposed Part 3 non-discrimination rules.

##### Information publication requirements

The ACCC notes Part 2 of the WCIR already allows for operators and customers to apply for an exemption from the requirement to disclose details of charges on a schedule of charges..[[491]](#footnote-491) This exemption mechanism could be used in relation to commercially negotiated charges or Part IIIA charges. The ACCC considers that no explicit provision should be made for charges arising under Part IIIA (or for commercially negotiated charges generally) in relation to this existing exemption mechanism; the test regulating when an exemption may be granted in relation to such charges should be the same as for infrastructure charges generally.

##### Accounting for commercially negotiated and Part IIIA charges in price determinations

As detailed above, another issue in relation to the interaction between commercially negotiated and Part IIIA charges and the water charge rules is how the regulator should treat such charges during an approval or determination of regulated charges[[492]](#footnote-492) under Parts 6 and 7 of the water charge rules. The ACCC considers that even under the current rules, a regulator would be required to take account of revenue received from such charges when undertaking such approvals or determinations, however the ACCC’s pricing principles do not currently deal with this issue directly.

The ACCC will be conducting a review of these pricing principles in 2016. This review can consider the development of principles that relate to the way in which a regulator should take account of commercially negotiated and Part IIIA charges during an approval or determination of infrastructure charges.

#### Draft rule advice

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| --- |
| Rule advice ‑  The rules should be amended to provide an exemption such that charges negotiated, arbitrated or otherwise arising under the following arrangements under Part IIIA of the Competition and Consumer Act 2010 are permitted despite the non-discrimination requirements of Part 3 of the WCIR:   1. an access undertaking or access code; 2. a declared service; 3. an effective access regime; 4. a competitive tender process.   There should not be any general exemption for other ‘commercially negotiated’ infrastructure charges.  This rule advice is implemented in Rule 10(7) of the proposed water charge rules. |

## Regulation of MDBA or Border Rivers Commission charges

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).

During the Act Review, several stakeholders expressed concerns 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.[[493]](#footnote-493)

While there is scope in the Act for the MDBA to impose infrastructure and/or planning and management charges to recover its costs, the MDBA does not currently impose such charges.[[494]](#footnote-494) Rather, the MDBA’s infrastructure (and WPM) costs are funded through contributions from the Commonwealth and Basin State governments (see Box 5.4). These contributions are recovered from water users by Basin States in different ways and to different extents. As such, the MDBA is not currently subject to the water charge rules.

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. As such, the BRC is also not currently subject to the water charge rules.

Should the MDBA or BRC elect to impose infrastructure charges and/or planning and management charges directly, those charges would likely 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 (see section 5.2).

Box 5.4: Legislative framework for MDBA and BRC funding

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| --- |
| *Murray-Darling Basin Authority*  The funding of the MDBA’s joint activities and its subsidiary, River Murray Operations (RMO), is set out in the MDB Agreement.[[495]](#footnote-495) The MDBA is also an independent statutory authority and receives an appropriation from the Commonwealth for agency costs and the Commonwealth’s contribution to joint activities.  Sub-section 212(1) of the *Water Act 2007* allows the MDBA to impose fees and charges in performing its functions. Under sub-section 212(2) the MDBA cannot impose a fee unless:   * The ACCC has advised that the fee is reasonable, and * The MDBA has published the (ACCC) advice on its website.   In giving advice the ACCC must take into account (1) the Basin water charging objectives and principles, and (2) any additional matters specified in regulations.  In the event that the MDBA decided to levy an infrastructure charge or a planning and management charge, that charge would be subject to the water charge rules.  The Agreement sets out issues including the management and decision making structure of the Ministerial Council and Authority, the ownership of assets used by the MDBA and the financing of the MDBA’s activities.  *Dumareseq-Barwon Border Rivers Commission (BRC)*  The NSW-Queensland Border Rivers Agreement sets up the arrangements for the construction and management of the shared water infrastructure between the two states as well as the agreed water sharing agreements.  This agreement also set up the BRC as a separate statutory agency. The NSW and Queensland governments each have legislation that sets out the BRC functions, ownership of assets, management structure and allocation of costs of the BRC as well as some additional arrangements to deal with BRC functions relating to the implementation of the National Water Initiative (NWI). The costs of these functions are split equally between NSW and QLD, although there may be different contributions from the respective water departments (NSW Office of Water and Qld Department of Natural Resources and Mines) and providers of on-river infrastructure services (“bulk providers”) (WaterNSW and SunWater).  In the case of NSW, the service costs of the BRC are passed on to users through charges set by the Independent Pricing and Regulatory Tribunal (IPART). No information is available as to whether the service costs of DNRM and SunWater are recovered from water users in Queensland. |

#### Stakeholder feedback

A number of submissions to the Act Review raised concerns over the transparency of ‘government charges’ and expressed particular concern about cost recovery in relation to MDBA ‘river operations.[[496]](#footnote-496) Both the NSW Department of Primary Industries (DPI) - Water (formerly Office of Water) and WaterNSW (formerly State Water) recover MDBA costs through charges to irrigators. Submitters to the Act Review were concerned that MDBA costs are not subject to the same level of scrutiny as other bodies that charge for water infrastructure services.

Southern Riverina Irrigators recommended that “the MDBA undergo an open and transparent price determination process to ensure that Governments and subsequently irrigators are only paying the prudent and efficient costs” of MDBA’s infrastructure service provision.[[497]](#footnote-497) State Water (now, Water NSW) submitted to the Act Review that it supported consideration being given to “some form of price regulation”.[[498]](#footnote-498)

The National Farmers’ Federation (NFF) also submitted that the MDBA should be subject to:

* “independent regulatory oversight for monopoly service provision;
* transparency in the process of establishing the cost base to be recovered and then how these costs are to be recovered;
* a sound process of benchmarking of the costs to be recovered to determine whether these are efficient, prudent and relevant;
* periodic review of cost recovery;
* processes to establish agreed service standards with end users and to independently review the effectiveness of the business in achieving these service standards.” [[499]](#footnote-499)

Submissions to the ACCC’s Issues Paper raised similar concerns.

The National Irrigators’ Council (NIC) submitted that:

*“NIC members remain concerned that the same level of public scrutiny is not applied to MDBA river operations charges which, while paid by State Governments are recovered from water users at least in NSW through WaterNSW charges regulated under the WCIR or from natural resource management levy payers in South Australia.”[[500]](#footnote-500)*

The NSW Government supported more scrutiny of the MDBA and BRC, and contended that, given the “significant bulk water supply functions” provided by these entities, they “should be subject to the same rules as other infrastructure operators”.[[501]](#footnote-501) The NSW Government added that “[t]he application of these rules to relevant MDBA and BRC activities would be consistent with the National Water Initiative pricing principles and promote transparency, consistency and equity in terms of the recovery of costs from water users”.

Similarly, Murray Irrigation Limited (MIL) recommended that “regulation of MDBA charges/contributions relating to River Operations [should be implemented]...to allow for scrutiny and ensure Basin Governments are only asked to fund effective and efficient activities with appropriate cost shares”.[[502]](#footnote-502) Central Irrigation Trust also agreed that “MDBA and BRC should be subject to the WCIR”.[[503]](#footnote-503)

In contrast, the Victorian Farmers’ Federation (VFF) submitted that:

*“The VFF does not support the MDBA imposing charges directly. The MDBA is funded by contributions from the Commonwealth and Basin State governments on an agreed cost sharing arrangement. This can be renegotiated if circumstances require.”[[504]](#footnote-504)*

However, the VFF did believe there is a need for “greater transparency about how funding provided to the MDBA is spent on river operations as well as on planning, management, monitoring and reporting activities”.

The MDBA’s own submission to the ACCC’s Issues Paper discussed costs-sharing arrangements between the Commonwealth and the Basin States, which provide a significant proportion of MDBA funding. The MDBA detailed the funding arrangements of its joint activities of RMO and how these are approved by Basin States. In relation to RMO, the MDBA commented:

*“While not mandated, a review of RMO efficiency occurs every 5 years or so. The most recent review in 2014 found that the lower bound revenue for RMO, based on assessment of efficient costs is $72.245 million. The upper bound requirement was shown to be $229.486 million. The Ministerial Council set the 2014-15 RMO budget at $54.71 million.”[[505]](#footnote-505)*

The MDBA noted the arrangements by which some Basin states recover some of their RMO contributions through indirect water charges, commenting that:

*“These different arrangements appear to be at odds with the intent of the National Water Initiative in achieving a level playing field for water users. In this content, it may be useful for the ACCC to provide explicit guidance to the joint governments on a more consistent and transparent approach to meeting their RMO costs.”[[506]](#footnote-506)*

The MDBA noted the concern of stakeholders regarding the efficiency of RMO. It noted that it conducts periodic reviews (historically every 5 years or so), but that these reviews are not mandated under the Agreement and no consistent approach has been taken to them.

*“RMO is a bulk water service provider whose ‘customers’ are the State Constructing Authorities (SCAs). However, because the MDBA does not deliver water directly to users or impose charges, it is not a regulated entity as defined by the WCIR. Therefore, there is no scope under the current implementation of the WCIR for the ACCC to assess RMO costs against the tests for efficiency and prudency that are applied to other operators under the WCIR.”[[507]](#footnote-507)*

The MDBA proposed that the current ad-hoc arrangements could be replaced by an ACCC assessment of RMO:

*“[A]n ACCC assessment of RMO costs using the same tests for efficiency and prudency as are currently applied to other bulk water operators. This information could be applied by the relevant pricing regulator/s in making state-based pricing determinations.”[[508]](#footnote-508)*

#### Discussion

The ACCC recognises the concerns raised by the MDBA in relation to Basin State contributions, regarding the significant variations in how contributions are paid for across Basin States. These arrangements do not clearly contribute [[509]](#footnote-509) to the Basin Water Charging Objectives and Principles (BWCOP) of the Act, which require that water charging should:

* promote economically efficient and sustainable use government resources devoted to the management of water resources
* ensure sufficient revenue streams to allow efficient delivery of services, and
* give effect to principal of user pays and achieve pricing transparency in respect of water storage and cost recovery for water planning and management.

The Murray Darling Basin Agreement, which sets out funding arrangements between Basin States and the Commonwealth for MBDA activities. The ACCC considers that these arrangements could be reconsidered in light of the BWCOP. However, such matters are beyond the scope of the water charge rules, and remain the responsibility of Basin States and the Commonwealth.

The ACCC has formed the view that certain MDBA functions, such as those performed by RMO, are infrastructure services for the purposes of the water charge rules. Accordingly, if the MDBA were to impose charges for these services, these charges would be infrastructure charges under the rules, and the MDBA would likely be an “infrastructure operator”. The ACCC has not formed a view as to whether the BRC provides infrastructure services.

Similarly, the ACCC is of the view that the MDBA and the BRC do carry out water planning and management activities. If the MDBA or BRC were to impose a charge to recover costs for these activities, these charges would likely meet the definition of a “planning and management charge”, and so also be subject to certain requirements under the rules.

It is clear that unless the MDBA or BRC imposed infrastructure charges or planning and management charges, their activities will remain beyond the scope of the water charge rules. However, it is important that the MDBA and BRC should be captured by the WCIR, if either were to impose charges that meet the definition of ‘infrastructure charge’ or ‘planning and management charge’ in the future. The majority of stakeholders support this outcome, and the ACCC also considers that this would be important for the achievement of the BWCOP.

The ability to apply Part 6 (approval / determination of an infrastructure operator’s charges) to the MDBA / BRC in the event they impose charges is a key rationale for the ACCC’s recommendation to amend the application of Part 6 to cover such inter-jurisdictional infrastructure operators. This rationale applies even in the context of the ACCC no longer conducting price determinations and approvals for infrastructure operators whose infrastructure charges are all approved or determined by a single State agency under State water management law (see Rule advice 5-M). It is not appropriate for a state based regulator to approve / determine MDBA charges given their operations run across state boundaries; hence, only a national regulator could appropriately regulate charges levied by the MDBA.

However, it is not clear that the MDBA intends to seek to impose regulated water charges (including infrastructure charges or planning and management charges). During the ACCC’s consultations, the MDBA stated that the MDBA is unlikely to impose charges.

One option raised by the MDBA to address stakeholder concerns was for the ACCC to conduct efficiency reviews of the MDBA.[[510]](#footnote-510) This could provide somewhat more scrutiny of the cost and efficiency of the MDBA’s activities and could potentially address concerns that the MDBA is not sufficiently scrutinised and operates inefficiently. However, this is not a preferred approach as the rules cannot provide for the scrutiny of costs in the absence of charges. There are currently other reports that discuss the efficiency of the MDBA; it is not clear whether an ACCC efficiency review would add significant value above what is available through current reports.

In relation to concerns about the efficiency of MDBA activities, the ACCC notes the conclusion of the Independent Expert Panel (the Panel) for the Review of the Act that “[t]he Murray–Darling Basin Authority should consider how it can more clearly differentiate between its Basin Plan, River Murray Operations and other joint activity functions and associated costs in its financial reporting”.[[511]](#footnote-511) The Panel also concluded specifically in relation to RMO that “[i]nformation on the River Murray Operations budget and costs (compatible with information provided on assets and operations through water charge determinations made under Part 4 of the Act) should be made publicly available by the Murray–Darling Basin Ministerial Council.”[[512]](#footnote-512)

The ACCC notes that Basin States, in conjunction with the Commonwealth, being the parties who directly fund MDBA and BRC activities, are best-placed to progress reforms to improve transparency of MDBA and BRC costs and funding arrangements.

See rule advice 5-M regarding the application of Part 6.

## Transparency of cost pass-throughs

Water is harvested, stored and delivered on-river[[513]](#footnote-513) by infrastructure operators (e.g. SunWater in Queensland, Goulburn-Murray Water (GMW) in Victoria, WaterNSW). These operators deliver water to ‘private diverters’ (customers who take water from a natural watercourse for their own use) and other infrastructure operators that extract water from the river for delivery through their own networks (that is, infrastructure operators who provide off-river infrastructure services, e.g. for irrigation or to urban customers).

Where one operator provides on-river infrastructure services to another infrastructure operator, that second operator is likely to incur infrastructure charges payable to the on-river infrastructure operator. Also, infrastructure operators may incur planning and management charges payable either to another operator or to a State Agency such as a government water department. The vast majority of these charges (by value) are levied against water access rights.

Where an infrastructure operator incurs an infrastructure charge or a planning and management charge in the course of their operations, they face a choice as to how to recover these costs from customers. Some operators choose to “pass through” these charges to their customers, meaning that they levy a separate charge (or charges) to recover revenues to pay the charges they incur, in addition to their general infrastructure charges which recover other costs. Alternatively, an operator may roll the costs of infrastructure and planning and management charges they incur into their general cost base, and so recover the costs of these charges via the general infrastructure charges they themselves levy on their customers.

The WCIR currently require IIOs to separately show the components of their charges attributable to on-river infrastructure charges or to the holding of, or management of, water access entitlements (WAE) by the operator.[[514]](#footnote-514) This provides partial transparency for customers of IIOs in that these customers are given information on the extent to which revenues from the IIO’s own charges are used to pay on-river infrastructure charges or for the costs of holding or managing WAE. However, there is no clear requirement that infrastructure operators generally must pass through on-river infrastructure charges and planning and management charges that it incurs on behalf of its customers in a transparent and accountable manner. As such, IIO and other infrastructure operators vary considerably in how the cost of these charges is passed through to their own customers.

In some instances, an operator specifies a single, separate fixed or variable ‘government fee’. In other instances, fixed on-river infrastructure charges and planning and management charges are presented separately whilst variable on-river infrastructure charges and planning and management charges are included in an infrastructure operator’s ‘usage’ charge.

Further complicating the way these charges are passed through to customers is the rebate some IIOs in NSW receive from WaterNSW. This rebate is generally used in one of two ways:

* To pay for all or a portion of on-river infrastructure charges and/or planning and management charges imposed on conveyance water; or
* To pay for a portion of the total fixed on-river infrastructure charges incurred by the IIO.

Other infrastructure operators incorporate on-river infrastructure charges and planning and management charges into their tiered tariff structures for infrastructure charges.

In all of these cases, the total on-river infrastructure and planning and management charges passed through by an infrastructure operator to the customer (and payable to the operator) are not easily comparable to the on-river infrastructure and planning and management charges that are actually imposed on the infrastructure operator itself. These charging practices reduce price transparency and make it difficult for customers to compare the charges imposed on infrastructure operators with any infrastructure charges imposed by infrastructure operators to recover these costs. This is particularly relevant when a customer is considering the merits of transformation or termination.

Further, SA does not have on-river infrastructure charges (also referred to as “bulk water charges); rather they benefit from on-river infrastructure services provided by the MDBA which is funded through direct government contributions, the cost of which (in SA) is recovered from water users through planning and management charges.

#### Stakeholder feedback

A number of submissions to the Act raised concerns over pricing, cost recovery and transparency for ‘government charges’, both generally and specifically in relation to open and transparent determination of Murray-Darling Basin Authority (MDBA) river operation charges. These submissions were from:

* Murray Valley Private Diverters[[515]](#footnote-515)
* Southern Riverina Irrigators[[516]](#footnote-516)
* NSW Irrigators’ Council[[517]](#footnote-517)
* Murray Irrigation Limited[[518]](#footnote-518)
* National Farmers’ Federation[[519]](#footnote-519)
* NSW Government[[520]](#footnote-520)
* State Water (now, Water NSW) [[521]](#footnote-521)

These submissions raised concerns over the transparency of Government charges, in particular MDBA costs. Both the NSW Department of Primary Industries (DPI) - Water (formerly NSW Office of Water) and State Water (now WaterNSW) recover MDBA costs through charges on water users. Other Basin States recover the cost of contributions to the MDBA through other, less direct methods. Further, submissions argued that MDBA costs are not subject to the same level of scrutiny as the other costs of Part 6 operators.

These submissions recommended that the MDBA undergo an open and transparent price determination process to ensure Governments, and through them irrigators, are only paying prudent and efficient costs. The scrutiny of MDBA costs is considered further in section 5.12.

In its Issues Paper, the ACCC sought stakeholders’ views on whether the WCIR should regulate how WPM (planning and management charges) and bulk water charges (on-river infrastructure charges) incurred by infrastructure operators are passed on to customers (Question 49).

Infrastructure operators commenting on this issue expressed a clear preference for maintaining their discretion as to how they choose to pass through charges. Murrumbidgee Irrigation Limited (MI) submitted that:

*“the rules should not regulate how water planning and management charges and bulk water charges are passed on to customers. Operators should retain discretion as to how to account for revenues and costs of whatever kind, including bulk water charges. Absorbing these costs into overall pricing structures should be one option available. The requirements for operators to publish their schedules of charges is sufficient for customers to compare different pricing structures”.[[522]](#footnote-522)*

MI further noted that electricity charges levied on member-owned operators and passed through to customers are not typically publically available in sufficient time for inclusion in the IIO’s Schedule of Charges. MI stated that “[t]his may lead to a perverse outcome where operators adopt higher maximum charges to avoid the costly process of re-issuing revised schedule of charges at the time when electricity charges are eventually made public”.[[523]](#footnote-523)

Central Irrigation Trust (CIT) similarly did not support the regulation of charge pass-throughs.[[524]](#footnote-524) Within this context, WMI stated that it “does not support any new or modified regulation that increases costs as these are borne by customers”.[[525]](#footnote-525) The National Irrigators’ Council similarly stated that it “does not support additional regulation on IIOs and does not believe regulating how bulk water charges and water planning and management charges are passed on to customers is necessary”.[[526]](#footnote-526)

Coleambally Irrigation Cooperative Limited (CICL) stated that “[i]n the absence of any discussion of whether there is a problem or issue associated with the status quo, CICL must question the need for further regulation”.[[527]](#footnote-527)

In contrast, other stakeholders raised concerns about the lack of transparency of “government charges” and planning and management charges. Moreover, several stakeholders showed confusion on what certain charges related to or considered pricing arrangements to be far more complicated than necessary, which is indicative of a lack of clear and transparent information about charging arrangements. For example, stakeholders attending the Deniliquin public forum questioned Murrumbidgee Irrigation Limited (MI) about its charging structure and MI discussed how it incorporates government charges into its declining block tariff tiered pricing structure.[[528]](#footnote-528) Under this charging arrangement, customers are not able to clearly see how the ‘government charges’ are reflected in charges they pay. Irrigators at the Shepparton public forum raised concerns about the complexity and transparency of the pricing system as a whole, and supported having a greater degree of pricing transparency in relation to GMW’s charging structure.[[529]](#footnote-529) Various stakeholders also echoed concerns raised in the Act review about pricing transparency in relation to the MDBA (see section 5.12). Col Murray, representing Tamworth Regional Council, and Chairperson of the Namoi Councils Joint Organisation commented at the Tamworth public forum in relation to charges set by WaterNSW that the pricing regime is “too complex”.[[530]](#footnote-530)

The Queensland Farmers Federation (QFF) commented that “[t]he price paths implemented for both the SEQWater and SunWater schemes have addressed the costs of implementing water planning and management that is the responsibility of scheme operators. Bulk water charges [in the Queensland MDB] are also passed through in specifically defined tariffs (i.e. a distribution scheme has a bulk fixed and variable charge compared with a distribution fixed and variable charge) in the current price paths.”[[531]](#footnote-531)

#### Discussion

The ACCC acknowledges that operators wish to maintain flexibility over their charging arrangements as much as possible. However, the ACCC is of the view that allowing an operator total discretion over how it passes through such charges works directly against achieving pricing transparency and can result in an operator’s charges distorting decisions on trade, transformation and termination.

The ACCC considers that where planning and management charges, or infrastructure charges imposed by another infrastructure operator or government department, are passed through to customers via their infrastructure operator, transparency of how that operator passes through these charges is a fundamental part of achieving pricing transparency for these charges overall. In these cases arrangements must provide sufficient traceability to ensure that the customer ultimately paying the charges can clearly understand the origin, and actual cost, of the charge.

Moreover, the ACCC is concerned about infrastructure operators specifying their own charges in a way that could potentially mislead customers about what charges relate to. For example, the ACCC is aware of instances of operators combining several charges it is required to pay to different entities (for example, an infrastructure charge payable to an infrastructure operator for on-river infrastructure services, and a planning and management charge payable to a State Agency) into a single ‘government charge’ payable by customers. In these instances, the operator is under no obligation to show customers how the amount payable under the ‘government charge’ relates to the actual charges incurred by the operator. Furthermore, the operator may impose its ‘government charge’ on a different basis, for example by applying a tiered tariff structure, which would result in these costs being recovered disproportionally from some customers. Such practices may distort customers’ understanding of the relative costs of services they (or their operator on their behalf) are receiving, which may distort their decision-making.

The ACCC advises that the water charge rules should:

* regulate through new ‘pass through rules’ how certain infrastructure charges and planning and management charges should be passed through to customers, in a way that balances operators’ discretion with customers’ needs; and
* require infrastructure operators who pass through those charges or collect charges on behalf of another entity, to publish certain information relating to pass through charges on their Schedule of Charges.

These changes will provide pricing transparency and ensure customers have information and oversight over the charges they are paying and the purpose of each charge, for example whether the charge relates to use of and access to an infrastructure operator’s infrastructure or to charges that are incurred by the infrastructure operator and passed on to the customer. Such transparency will improve customers’ ability to deal flexibly with tradeable water rights they hold. Further, the proposed pass through requirements will ensure that operators pass through charges in a way that does not unfairly disadvantage certain customers (for example, customers who have transformed) and in a way that does not risk misleading customers about the services for which pass through charges are levied.

##### Pass-through rule

The ACCC considers that the proposed pass-through rules should be limited to charges incurred by infrastructure operators and levied with reference to water access rights (which can include WAE or water allocation). Charges are generally levied as fixed volumetric charges based on the volume of WAE held, or as variable volumetric charges based on the volume of water allocation used / delivered. However the rules should be drafted in a way that covers *any* charge levied with reference to a water access right, including but not limited to a charge per volume (usually per megalitre (ML)) of water:

* held (such as the nominal volume on a WAE or a volume of water allocation in an account)
* allocated (either to a WAE or by an operator for its irrigation right holders)
* extracted / taken / used
* delivered
* stored
* carried over
* traded
* surrendered / forfeited

The water access right could be held by a customer of the operator or by the infrastructure operator (where customers hold a different type of water access right than the operator, or hold an irrigation right against the operator). In any case, where an infrastructure operator incurs an infrastructure charge or planning and management charge levied with reference to water access right, it will need to recover the cost these water access right charges from its customers.

The approach taken by the proposed pass through rules will necessarily depend upon how clear the link is between the actions and rights of the customer and the water access right charges incurred by the infrastructure operator. Accordingly, the ACCC advises that the pass-through rule should address how infrastructure operators recover the costs of three types of water access right charges that they can incur:

* charges that are directly attributable to a particular customer (‘directly attributable charges’);
* charges that are shared across customers—they cannot be directly attributable to a particular customer (‘shared charges’), and
* shared charges that relate to water under water access rights that is lost during distribution of water to customers (‘distribution loss shared charges’)

Pass through of ‘directly attributable charges’

If a customer’s actions in relation to their water access right or irrigation right requires an infrastructure operator to incur an infrastructure charge or planning and management charge, the charge is directly attributable to the customer and should be considered a ‘directly attributable charge’. The rules should require the infrastructure operator to pass through the ‘directly attributable charge’ to that customer (and only to that customer) on the basis of that customer’s water access right or irrigation right (as relevant), and, if the charge incurred by the operator is a volumetric charge, preserving the relevant volume as detailed below. The rules should also require that this be done separately from the infrastructure operator’s other charges.

The ‘relevant volume’ for a volumetric charge would be the volume that most closely relates to the basis on which the infrastructure operator incurred the charge. For example, if the infrastructure operator incurs a charge per ML of water delivered (to the infrastructure operator by a different infrastructure operator), then the charge should be passed through per ML of water delivered to the customer. Similarly, if an infrastructure operator incurs a charge per ML of WAE held, then the charge should be passed through per ML of water access right or irrigation right held by the customer.

There can be a difference between the volume of water the infrastructure operator has delivered to it and the volume of water the infrastructure operator then delivers to its customer due to losses during distribution of water to the customer. Similarly, an infrastructure operator may hold a greater volume of WAE than the sum total of irrigation rights held by its customers. However, it may still be possible to directly attribute the cost incurred by the infrastructure operator to a particular customer, even where that customer holds an irrigation right.

Note that if the charge is not a volumetric charge (for example, a flat rate charge levied on each of the operator’s customers who holds a water access right), the infrastructure charge levied by the operator should likewise be a non-volumetric charge.

Pass through of ‘shared charges’

The situation becomes more complex where the infrastructure operator holds a water access right for the purposes of supplying water to its customers, but where its customers hold a different type of water access right. An example is in Victoria, some water authorities hold a Victorian bulk entitlement[[532]](#footnote-532) which they use to service the WAEs (Victorian water shares) of their customers. Similarly, an infrastructure operator may hold a portfolio of water access rights, with different charges incurred for holding / using etc. each type of water access right.

In these cases, the charges incurred by the infrastructure operator may not be directly attributable to any one customer (they are ‘shared charges’) so a requirement for a direct pass through is not feasible. As such, the rules should require that the infrastructure operator recover the costs of such shared charges through infrastructure charges levied on the basis of the volume of their customers’ water access rights and/or irrigation rights (as relevant). The cost of these shared charges should not be recovered through charges levied on the basis of water delivery right or on some other basis such as a flat charge per customer.

The rules should allow an operator to recover the cost of multiple shared charges through the one infrastructure charge (so long as it is separate from the operator’s other charges).

Pass through of ‘shared charges’ associated with distribution losses

An exception to the above requirement (to pass through ‘shared charges’ only on the basis of the relevant volume of customers’ water access rights / irrigation rights) is in relation to shared charges imposed on an infrastructure operator’s water access right(s) relating to the loss of water during distribution of water to customers.

These ‘distribution loss shared charges’ would include charges incurred by an infrastructure operator in relation to water access right(s) held or used in the process of delivering water to its customers (but does not extend to water actually delivered to customers). This recognises that a proportion of water diverted by an infrastructure operator will be lost to seepage, evaporation or for some other reason, and not reach its customers’ off-take points. Many infrastructure operators hold separate water access rights for such purposes.

The only rule requirement should be that any charge(s) to recover these distribution loss shared charges should be separate from the infrastructure operator’s other charges.

##### Termination fee calculation

Consistently with the ACCC’s Rule advice 6-B, the calculation of termination fees should be based on infrastructure charges that are levied on the basis of a person’s right of access (such as a water delivery right or a water drainage right) and are fixed (that is, they do not vary with the amount of water actually delivered / drained).

Given the proposed approach to pass-through charges, this means that the amount subjected to the termination fee multiple:

* could include fixed infrastructure charges imposed to recover distribution loss shared charges (to the extent that an operator elected to pass through these costs through separate fixed charges levied on a customer’s right of access)
* could not include any charges to recover the costs of other shared charges or of directly attributable charges (as these should only be recovered by reference to a customer’s water access right or irrigation right).

The ACCC considers that this is appropriate, as these distribution loss shared charges are ongoing costs that the operator will continue to incur after a customer terminates.

The costs of directly attributable charges and shared charges (other than distribution loss shared charges) can continue to be recovered by reference to a terminating customer’s irrigation right or water access right. One of the key rationales for requiring an infrastructure operator to do this separately from its other charges is so a customer can be sure that these costs are not recovered through charges which form the basis for termination fees.

In view of this, the ACCC also considers that the appropriate action for an operator who does *not* comply with the requirement to separate out such charges is to limit the termination fee multiple that operator can apply. This means that even if an operator fails to comply with the proposed pass-through rule requirements, a terminating customer should not be disadvantaged. Accordingly, the ACCC advises that if an infrastructure operator:

* incurs directly attributable charges, shared charges or distribution loss shared charges[[533]](#footnote-533)) based on water access right, and
* does not have separate charges for the passing through the cost of these charges;

then the termination fee multiple should be limited to 1x (not 10x).

##### Schedule of Charges requirements

To ensure greater price transparency, infrastructure charges levied by an operator to recover the costs of directly attributable charges, shared charges and distribution loss shared charges should be included on its Schedule of Charges. This should include:

1. the name and amount of any directly attributable charge, shared charge or distribution loss shared charge being recovered;
2. the name of the entities levying those charges on the infrastructure operator;
3. how the infrastructure charge levied by the operator (to recover these costs) was determined

In some cases, an infrastructure operator may collect a charge on behalf of another entity. For example, NSW DPI-Water may authorise WaterNSW to collect a particular planning and management charge on its behalf. In this case, NSW DPI-Water does not levy a charge on WaterNSW; rather the charge is levied directly on customers, but is collected by WaterNSW. Where this occurs, the entity levying the charge must state on its Schedule of Charges that it has authorised another entity to collect the charge on its behalf. Similarly, the infrastructure operator collecting the charge should be required to state on its schedule of charges the name of the person for whom it is collecting the charge.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended regulate the manner in which an infrastructure operator can recover amounts incurred by the operator through planning and management charges or infrastructure charges levied by reference to water access rights.   * The amount of a ***directly attributable charge*** should be recovered through a separate infrastructure charge on a water access right or irrigation right (as applicable) of the customer, and only the customer, whose actions resulted in the operator incurring the charge. The infrastructure charge levied by the operator should preserve as closely as possible the characteristics of the directly attributable charge it incurred. * The amount of any ***distribution loss shared charges*** should be recovered separately from the operator’s other charges. * The amount of any other ***shared charges*** should be recovered separately from the operator’s other charges, and against a volume of water access right or irrigation right. * The amounts recovered should take into account any discounts received by the infrastructure operator.   Where:   * ***directly attributable charge*** means an infrastructure charge or planning and management charge levied by reference to a water access right and incurred by an infrastructure operator as a direct consequence of actions taken by a customer in relation to their water access right or irrigation right, including the customer holding those rights. * ***shared charge*** means an infrastructure charge or planning and management charge levied by reference to a water access right that is incurred by an infrastructure operator but which is not a directly attributable charge * ***distribution loss shared*** ***charge*** means a shared charge relating to water under a water access right that is lost during distribution of water to customers.   This rule advice is implemented in Rule 9A of the proposed water charge rules.  Rule advice ‑  The rules should be amended to provide that if an infrastructure operator:   * incurs directly attributable charges or shared charges or distribution loss shared charges, and * does not have separate infrastructure charges to pass through the costs of these directly attributable charges and / or shared charges and / or distribution loss shared charges as specified in Rule advice 5-Y;   then their termination fee multiple applied in the calculation of the maximum termination fee should be limited to 1x (not 10x).  This rule advice is implemented in Rule 72 of the proposed water charge rules. |

# Water Charge (Termination Fees) Rules 2009

## Background

Termination fees refer to fees payable to an infrastructure operator by an irrigator when they terminate or surrender the whole or part of a right of access to the operator’s water service infrastructure. 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. The WCTFR do not *require* the imposition of a termination fee, and currently only apply to termination fees imposed by IIOs.

At the time the WCTFR were made, 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 which are fixed and are incurred by the operator whether or not an irrigator chooses to terminate access. Allowing operators to impose termination fees permits them to recover these fixed costs.

*Stakeholder feedback on the WCTFR*

The Independent Expert Panel (the Panel) reviewing the Act received no submissions specifically on the WCTFR, which it considered indicated that the rules may be operating effectively.[[534]](#footnote-534) In fact, only one submission to the Act Review referred to the WCTFR. This submission, from the SA Government, submitted that irrigation groups are concerned about the impact of a large number of terminations on the ability of an IIO to run its business.[[535]](#footnote-535) The SA Government called for the ACCC to continue to monitor terminations.

Submissions to the ACCC’s Issues Paper were generally supportive of the provisions currently forming the WCTFR; in particular, there were no submissions challenging the general application of the ‘10 times multiple’ which caps the maximum amount of the termination fee an operator is permitted to charge.

Many submissions that discussed the WCTFR supported the current approach to termination fees. Murray Irrigation Limited (MIL) stated that it “supports the current methodology to calculate the total network access charge and the circumstances under which the termination fees may be charged”.[[536]](#footnote-536) Coleambally Irrigation Cooperative Limited (CICL)[[537]](#footnote-537) and Murrumbidgee Irrigation (MI) [[538]](#footnote-538) recommended that no change be made to the current approach to termination fees. Both the National Irrigators’ Council (NIC)[[539]](#footnote-539) and Western Murray Irrigation (WMI)[[540]](#footnote-540) noted that there does not appear to be evidence that the current WCTFR are impeding the operation of markets. Central Irrigation Trust (CIT) submitted that the lack of comment on the WCTFR during the Review of the Act is “evidence that the WCTFR are operating as designed and not impeding water trade”.[[541]](#footnote-541) The NIC[[542]](#footnote-542) and CIT[[543]](#footnote-543) also noted that “stranded assets continue to be a real risk” for IIOs, particularly with water reforms occurring across the Basin and as the ownership of water changes from private to public entities. WMI likewise submitted that “[t]he issue of stranded assets is a risk that the WMI Board and Management have front of mind at all times. WMI supports the [WCTFR] as they protect the remaining customers from the undue burden of exiting customers”.[[544]](#footnote-544)

Several submissions noted the benefits of the WCTFR to the IIO and other irrigators who remain connected to the irrigation network. MIL submitted that the termination fee mitigates the loss of income to the IIO when a customer terminates.[[545]](#footnote-545) The NIC[[546]](#footnote-546) and CIT[[547]](#footnote-547) noted that the ability to charge termination fees ensures that remaining irrigators do not have to bear the burden of exiting irrigators. Similarly, Mr Daniel Mongan, an irrigator in Goulburn-Murray Water (GMW)’s Central Goulburn network, submitted that the termination fee is “vital” to maintaining price stability and to ensure irrigation remains viable. Mr Mongan further submitted that because the assets are long-life assets, maintained to optimise their useful life, it is inefficient to allow customers to use and discontinue use of the network, and it imposes a cost burden on those irrigators that “consistently” use the irrigation network.[[548]](#footnote-548) Lower Murray Water (LMW) noted its support for the current approach to termination fees at the Mildura public forum.

CICL[[549]](#footnote-549) and MIL[[550]](#footnote-550) also noted that termination is not the only option available to an irrigator who seeks to discontinue access to their irrigation networks. In particular, an irrigator may be able to trade rights of access such as water delivery rights to existing or new customers of the IIO.

However, some submissions cited certain instances where, in their view, the WCTFR fail to provide appropriate protections for the customers of IIOs. In some cases, feedback given was concerned with the interests of irrigators who wish to terminate. For example, some stakeholders, both through written submissions and during the regional public forums held by the ACCC as part of its consultation on the water charge rules review (especially during the Renmark and Mildura forums), contended that:

* where an irrigator has made a lump-sum capital contribution to the network, they should not be required to pay a termination fee;[[551]](#footnote-551)
* where IIOs maintain a ‘sinking fund’ - a fund for the purpose of building future infrastructure gained from levies on irrigators – that termination fees should not be permitted;[[552]](#footnote-552)
* where the water access right is not tradeable, for example, for certain ‘stock and domestic’ water access rights which are not tradeable under state water management law, IIOs should not be permitted to charge termination fees in relation to rights of access to the IIO’s irrigation network (such as water delivery rights);[[553]](#footnote-553)
* a terminating irrigators’ land should hold additional value once the termination fee has been paid because the incoming irrigators’ fixed charges have ‘already been paid’ in the termination fee;[[554]](#footnote-554)
* if the termination fee is used to rationalise the irrigation network (i.e. to remove the irrigators’ channel), then any remaining amount of the termination fee should be refunded to the terminating irrigator;[[555]](#footnote-555)
* IIOs face a perverse incentive to increase the fixed components of their water charges when these charges are used to calculate the termination fee, in order to increase the amount of the termination fee and thereby “protect them from water users exiting their area of operation”;[[556]](#footnote-556)

On the other hand, some submissions were concerned more with the interests of remaining irrigators after another customer has terminated, or with the interests of other customers generally in circumstances where an operator has entered into a contract with a specific prospective customer that involves a discounted or waived termination fee clause. For example, submissions to the ACCC’s Issues Paper have indicated that some irrigators consider that:

* the IIO’s ability to selectively offer zero/discounted termination fees upfront (that is, before an irrigator joins the IIO’s network) is unfair, because, in their view, the existing irrigators are subsidising other irrigators who benefit from the zero/discounted termination fees;[[557]](#footnote-557)
* the IIO’s ability to selectively offer zero/discounted termination fees at other times (i.e. to an existing customer) is unfair and has discouraged network rationalisation ;[[558]](#footnote-558)
* where an IIO increases its fixed component of charges in order to increase termination fees, this results in reduced incentives for ongoing irrigators to save water or increase efficiency because charges are not based on the amount of water delivered. Further, this situation results in reduced incentives for IIOs to increase the efficiency of their services or products (because they receive a guaranteed income); Wah Wah Stock and Domestic Water Users Association (WWSDWUA) submitted their concern that charges may then continually increase to fund those inefficient services.[[559]](#footnote-559)

The ACCC also heard during several of its public forums about cases where irrigators were facing difficulties with paying termination fees after having participated in government buyback programs or otherwise sold their water access entitlement (WAE). These issues are discussed in section 8.2.2.

*Discussion*

The ACCC acknowledges that there are several, sometimes competing, interests to account for when considering issues relating to termination fees, such as those of the operator, terminating irrigators, prospective new customers to the operator’s network, and remaining or other customers. Specific aspects of the WCTFR are considered separately in the following sections, as follows: the method of calculating termination fees (section 6.2), circumstances when a termination fee may be imposed (section 0), and approval of additional termination fees (section 6.4).

In considering the views raised by stakeholders, the ACCC has had regard to the specific context of considerable change that has occurred across the Murray-Darling Basin (MDB) in recent years. In particular, the ACCC notes that there has been a period of significant structural adjustment across the MDB, often involving network rationalisation. This same period has also seen the emergence of the Commonwealth Environmental Water Holder, who now holds a large volume of water access rights in comparison to the average holdings per irrigator. These changes have affected many operators, irrigators and other water users, many of whom have faced significant costs and challenges to adapt.

One important aspect of these developments is that an operator which currently meets the definition of ‘IIO’[[560]](#footnote-560) as defined in the Act may cease to meet that definition at some time in the future. This could occur, for example, for an operator who provides a significant level of services to customers other than irrigators, such as urban and environmental water users. Further, there may be operators who have never met the definition of ‘IIO’ but who nevertheless may be entitled to charge a termination fee.[[561]](#footnote-561) The ACCC considers that the WCTFR should regulate termination fees by all infrastructure operators who are entitled to charge them, rather than the subset of infrastructure operators who meet the definition of ‘IIO’. This will ensure that customers (both the terminating customer and the remaining customers) of all operators are afforded the same protections when terminations occur.

Further, this recommendation to extend the application of the WCTFR to all infrastructure operators also reflects the ACCC’s Draft Advice to amalgamate the water charge rules into a single instrument. The WCIR currently apply to all infrastructure operators; therefore, applying the WCTFR to all infrastructure operators will help ensure a ‘level playing field’ between different types of operators, in that an operator’s status as an IIO will not affect which water charge rules apply to them.

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to regulate termination fees levied by all infrastructure operators, not only irrigation infrastructure operators.  This rule advice is implemented in Part 10 of the proposed water charge rules. |

## Method of calculating termination fees

The WCTFR calculate the maximum applicable termination fee by reference to the total network access charge (TNAC). TNAC currently includes all fixed charges payable by the terminating irrigator to an operator in the financial year in which notice is given or in which termination takes effect, and excludes charges levied by reference to the amount of water actually delivered (‘variable charges’), 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 currently cap the termination fee at 10 times the relevant 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.

### Total Network Access Charge and calculation of the termination fee

#### Stakeholder feedback

The ACCC asked in its Issues Paper whether the definition of TNAC in the WCTFR is clear and appropriate (Question 50). The National Irrigators’ Council (NIC),[[562]](#footnote-562) Central Irrigation Trust (CIT)[[563]](#footnote-563) and Coleambally Irrigation Cooperative Limited (CICL) [[564]](#footnote-564) submitted that the current definition *is* clear and appropriate. CICL noted that the intent of the rules is not to facilitate water trading but rather to provide a “buffer to IIOs…and remaining customers within a group-owned scheme when others decided to remove themselves” and “the need for that buffer is not diminished”.[[565]](#footnote-565) The NIC[[566]](#footnote-566) and CIT[[567]](#footnote-567) both stated that “[t]he conditions being experienced in the [MDB] and reasons for these rules have not changed”.

However, as detailed in section 6.1 above, the ACCC received feedback from irrigators across several areas of the Basin that operators have incentives to determine their charges in a way that maximises termination fees payable,[[568]](#footnote-568) and that, in the view of customers, operators are not sufficiently taking into account contributions made by customers via other methods than paying infrastructure charges – for example, via lump-sum contributions.[[569]](#footnote-569) Also, several irrigators expressed concern about selective discounting of infrastructure charges and termination fees by certain operators.[[570]](#footnote-570) Further concerns raised by stakeholders in relation to specific aspects of termination fee calculation are included in the following discussion sections.

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) survey of irrigators commissioned by the ACCC also shed light on irrigators’ views on barriers to termination. An extract from this report is provided in Box 2.1.

Box 6.1 Barriers to termination – evidence from ABARES irrigator survey[[571]](#footnote-571)

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| Irrigators that were customers of an IIO were asked to consider what they would do with their water delivery right if they were to permanently sell their water. The most common response was to keep the water delivery right so that irrigators had the option of having water delivered in the future (37 per cent). A further 20 per cent of irrigators indicated they would sell the water delivery right with their water.  Only 9 per cent of irrigators had previously considered terminating some or all of their water delivery right but decided not to. The main reason given by these irrigators was that termination fees were too expensive.  There were also only a small number of irrigators (12 per cent) that had previously sold (not terminated) some or all of their water delivery right separately from a trade of an irrigation right or WAE. The main reason given for not doing so was that there was no need to sell the water delivery right (56 per cent). |

#### Discussion

##### Capping maximum termination fees: the 10 times multiple

The 10 times multiple for the termination fee base (currently referred to as “TNAC”) was chosen as a balance between the interests of terminating and remaining irrigators, and the operator. The ACCC notes that the 10 times multiple is not intended to equate to ten years’ worth of actual fixed costs incurred by the operator, but rather that this multiple provides an appropriate level of protection for the operator and remaining customers in the medium-term after the termination occurs. It is not appropriate that termination fees afford such protections in perpetuity, as this would preclude the operator from receiving signals about efficient network rationalisations and work against the objective of promoting the efficient and sustainable use of water resources and water infrastructure assets.[[572]](#footnote-572) The ACCC considers that there is no strong reason to change the multiple at this time. However, the ACCC will continue to monitor termination fees through its monitoring role, and notes that there may be cause to re-visit the multiple in the future. The ACCC also reiterates that the 10 times multiple is not a required or default setting for the calculation of termination fees – it rather sets a regulatory cap which the termination fees cannot ordinarily exceed.[[573]](#footnote-573)

##### Composition of the Total Network Access Charge (TNAC)

Currently calculation of the maximum allowable termination fee under Rule 7 of the WCTFR references the concept of the “total network access charge” (TNAC). TNAC is defined under Rule 3 as follows:

***Total network access charge***, for the purposes of the calculation of a fee under rule 7 in respect of the termination or surrender of a right of access to an IIO’s irrigation network, means the total amount that would have been payable to the operator in respect of a full financial year by a terminating irrigator, if termination or surrender had not occurred, including amounts payable in respect of the recovery of expenditure on capital works, but does not include:

1. Any amount calculated by reference to the number of units or volume of water actually delivered to the terminating irrigator; or
2. If a service for the storage of water is provided in addition to the service for the delivery of water, any amount in respect of the service for the storage of water; or
3. Any amount imposed as a fee in respect of the costs of connecting, or disconnecting, the terminating irrigator to the operator’s irrigation network; or
4. Any amount that exceeds an amount based on the recovery of the costs (whether recurrent or capital) incurred by the operator in relation to the provision of the right of access or services provided in relation to that right; or
5. If a fee payable under a contract is approved under rule 8, any amount payable under the contract in respect of the recovery of expenditure on capital works relating to the operator’s irrigation network carried out, or to be carried out, within 5 years after the contract was entered into; or
6. Any amount of GST.

This definition takes the approach of initially considering all charges payable to the operator, and then excluding certain types of charges or amounts. Particular elements of this definition are discussed in detail below.

Broadly, however, the ACCC considers that the rules for determining the maximum termination fee can be made more clear by taking an approach that has as its basis only the *fixed infrastructure charges that are levied with respect to the volume or unit share of the terminating customer’s right of access to the infrastructure* (typically their water delivery right, but also a right to drainage where applicable) that are payable to the operator (*See* Rule advice 6‑B ).

This approach will improve clarity and ensure that the amount paid by the terminating customer more closely reflects the unavoidable fixed costs faced by the operator. The main differences between the recommended approach and the current approach are the treatment of non-volumetric charges (discussed below), and of variable charges other than those referencing the units or volume of water *actually delivered*. The ACCC has in its monitoring activities noted the increased occurrence of and reliance on non-volumetric charging.[[574]](#footnote-574) Also, the ACCC anticipates that variable infrastructure charges may not always reference the actual amount of water *delivered* to a customer. For example, if a variable infrastructure charge were to be set with reference to the volume of water *allocated* to a customer’s account (i.e. allocated against a customer’s water access right or irrigation right for use, trade, carryover, etc.), rather than the volume *actually used* by the customer, this charge may not fall within subclause (a) of the current definition, and as such may not be excluded for the purposes of calculating the termination fee.

Also, the ACCC has made rule advice to address new concepts which were not explicitly addressed at the time the ACCC made its initial rule advice for the formation of the WCIR and WCTFR, such as accounting for a customer’s contributions in the case of charges for exclusive infrastructure, and the treatment of pass-through charges. The impetus for accounting for these issues is the feedback received from stakeholders during the ACCC’s consultation on the Issues Paper. These issues are discussed below.

##### Shadow access fees

Because the termination fee base 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. The rationale for the current approach is that, where an operator elects to recover a higher amount through variable charges than is needed to recover variable costs, they should not then be permitted to levy termination fees as if they had cost-reflective charging arrangements (which would generally result in a higher proportion of recovery via fixed charges, since costs of operating water service infrastructure are largely fixed[[575]](#footnote-575)). To do so would unfairly disadvantage terminating irrigators compared to remaining irrigators. The ACCC considers that this rationale for not allowing termination fees to reference shadow access fees remains valid.

Some stakeholders noted that the proportion of fixed charges versus variable charges levied by certain operators has been increasing in recent years, and argued that the current definition of TNAC, which allows only fixed charges to form the basis for termination fees, provide incentives for operators to increase the proportion of their revenues recovered via fixed charges.[[576]](#footnote-576) The ACCC notes, however, that one of the water charging principles of the Act is that “water charges are to be based on full cost recovery for water services to ensure business viability and avoid monopoly rents…”[[577]](#footnote-577), and also that it has historically been the practice of many operators to set fixed charges *below* the amount needed to recover fixed costs. To the extent that the operators alter their charges towards being more cost-reflective, whether due to the WCTFR or for other reasons, this outcome is consistent with this principle. The ACCC also notes that for gravity-fed systems, the vast majority of the costs incurred by the operator are fixed with respect to the amount of water delivered. In these cases, a high ratio of fixed charges to variable charges may be entirely consistent with the above principle.

However, some irrigators raised concerns about where an operator sets fixed charges to recover *more* than fixed costs (i.e. opposite to the case considered above).[[578]](#footnote-578) In these cases, stakeholders argued, the 10 times multiple which caps termination fees will yield an amount that covers fixed costs for a longer period than if fixed charges were cost reflective. Many irrigators who gave feedback to the ACCC also expressed a strong preference for variable charges over fixed charges, and perceived having to pay fixed charges for access to infrastructure services in times of low water availability as fundamentally unfair.[[579]](#footnote-579)

The ACCC acknowledges that increasing the proportion of costs that are recovered via fixed charges (as opposed to variable charges) will, other things equal, raise the amount of charges faced by customers in times when water availability is low, and also raise the level of the maximum termination fee, relative to the case where there is a higher ratio of variable charges. However, this also means that the total amount paid in times of greater water availability, and hence greater water use, are lower than they would be when compared to a charging approach with a greater reliance on variable charges.

Ultimately, the relative reliance that an operator places on fixed versus variable charges is a matter for the infrastructure operator and (if relevant) the regulator, taking into account the preferences of customers and the need to ensure revenue is sufficient to recover the actual costs incurred for the operation and ongoing maintenance of the infrastructure. [[580]](#footnote-580)

##### ‘Non-volumetric’ charges

The many different types of infrastructure charges that an infrastructure operator can impose were discussed in Chapter 2. Where an infrastructure operator’s customers hold water delivery rights against it, the operator will typically recover most of the costs it incurs in providing infrastructure services through a combination of a fixed charge levied on the volume of water delivery right a customer holds, and a variable charge levied per megalitre (ML) of water delivered. Some operators also have separate fixed and/or variable charges for drainage services. As discussed previously, an infrastructure charge is considered ‘fixed’ if it does not vary with the volume of physical water delivered, allocated, used, drained etc.[[581]](#footnote-581)

Many infrastructure operators also impose non-volumetric charges, for example a charge per water meter, per outlet, per property, per account or with reference to the size of landholdings. Such non-volumetric charges have the effect of increasing the average cost of access (per ML of water delivery right held) for smaller irrigators compared to larger irrigators in a way that will not be addressed by the proposed non-discrimination provisions set out in Rule advice 5‑B.

The ACCC has observed via its monitoring of regulated charges that some operators have begun rebalancing charge structures away from fixed charges levied per ML of water delivery right held towards ‘non-volumetric’ charges.[[582]](#footnote-582) This has the effect of increasing the average cost of access for smaller irrigators compared to larger irrigators.

It also means the maximum termination fee payable per ML[[583]](#footnote-583) terminated will vary depending on whether a customer is terminating some or all of their right of access, and that fully terminating a right of access can involve a very high termination fee (in per ML terms). This occurs because certain non-volumetric charges can currently be included in the termination fee base. For example, assume there is a large account fee payable by each irrigator who holds an account with the operator. An irrigator who terminates only a portion of their right of access will not have this fee included in their termination fee base if they do not close their account. However, the account fee *would* be included in the termination fee base when the irrigator terminates *all* of their remaining right of access, even if the volume of the right terminated is very small.

The ACCC considers that the practice of recovering ongoing (non-avoidable) fixed costs via non-volumetric charges should be discouraged, so as to avoid the situation where the last ML terminated attracts a disproportionately high termination fee, and to disallow discrimination against smaller customers in this manner. Moreover, to the extent that such charges are used to recover avoidable costs that will cease to be incurred once the customer fully terminates, they should not be included in termination fees at all. Accordingly, the ACCC advises that non-volumetric charges should not be included in the calculation of the termination fee base; however in some cases, the maximum termination fee can take such charges into account (see below).

##### Separate charges for dedicated infrastructure

Infrastructure operators may imposes either a separate fixed volumetric or non-volumetric infrastructure charge specifically in relation to infrastructure dedicated to the exclusive use of the terminating customer, such as a charge per meter or per outlet. Where this is the case, and a customer is terminating their right of access to infrastructure services in relation to that dedicated infrastructure, this should be taken into account when setting the maximum termination fee allowable.

Rather than including this separate charge in the termination fee base, calculation of the termination fee payable in respect of this exclusive infrastructure should take into account the infrastructure operator’s original capital contribution to the infrastructure, less the accumulated amount paid by the terminating customer up until that point through the separate charge(s). The maximum termination fee that the infrastructure operator can impose as calculated with reference to fixed charges on the terminating customer’s right of access should be allowed to be increased by the lesser of:

1. Any capital cost the infrastructure operator can demonstrate it has incurred (i.e. excluding any capital contribution by the customer, government or other party) in relation to the dedicated infrastructure, minus the cumulative amount paid under the relevant infrastructure charge (or other infrastructure charge previously imposed specifically in relation to the dedicated infrastructure); and
2. 10x the amount of the relevant infrastructure charge (i.e. the separate charge that relates to the specific infrastructure).

These rules should also take account of where an infrastructure operator levies a separate infrastructure charge in relation to infrastructure used exclusively by the terminating customer, but has not imposed that charge in each year since the cost was initially incurred. For the purposes of the calculation of the termination fee in relation to that charge (described above), the calculation should be made as if the charge had been imposed in each year since the capital cost was initially incurred. If the amount of this charge is varied from year to year, the calculation should take account of amounts actually paid, and use the average of annual charges paid for the period since the commencement of the amended WCR, for any year since the cost was initially incurred for which the infrastructure charge was not levied.

Box 6.2 Case study—how to calculate a termination fee relating to a separate charge for exclusive infrastructure

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| Maddie Blake is a customer of ClearWaters Irrigation (CWI). She has 40 ML of water delivery right and two outlets decides to terminate part of her right of access, by terminating 30 ML of her water delivery right and one of her two outlets. CWI has a separate charge levied per outlet (from CWI’s channel to the Maddie’s property) set at $100 per outlet (per annum) which has been imposed for 8 years. The full cost of the outlet was $2000, of which CWI incurred $1500 of capital cost due to an upfront capital contribution of $500 paid by Maddie.  CWI also has a fixed charge set at $20 per megalitre (ML) of water delivery right held.  The termination fee base in relation to the fixed charges levied per ML of Maddie’s right of access (currently called “TNAC”) would be equal to 30ML x $20 = $600 and the maximum termination fee in relation to the water delivery right terminated would be $6000 (=10 x$600). This termination fee base could then be increased to account for the separate charge payable in relation to the outlet which is being terminated. The amount of the increase is calculated as the lesser of:   1. Any capital cost the infrastructure operator can demonstrate it has incurred ($1500) minus the cumulative amount paid under the relevant infrastructure charge (8 years x $100 per year = $800) = $700; and 2. 10x the amount of the relevant infrastructure charge ($100) = $1000.   The total maximum termination fee would therefore equal $6700 ($6000 in relation to the water delivery right plus $700 in relation to the outlet, since $700 is the lesser amount). |

This approach reflects stakeholders’ calls for past contributions to be directly taken into account, for the case where there is infrastructure that is exclusively used by the terminating customer (discussed in more detail below). In this case, termination of the customer’s access to that exclusively used infrastructure should have a greatly lower (or zero) cost for remaining irrigators and the operator. For example, in the case of a water meter, the operator will not be required to maintain the meter at the terminating irrigator’s property, and may even be able to relocate or resell the metre for use elsewhere.

However, the ACCC considers that mandating how operators should take into account direct contributions and past payment of infrastructure charges in relation to *shared* infrastructure is not advisable for several reasons, including:

* That a terminating customer’s past level of use of shared infrastructure (and corresponding payments of infrastructure charges) should not necessarily be directly linked to their responsibility for the future costs they impose on others when they terminate, as represented by the termination fee;
* Significant additional regulatory burden may be created for the operator in terms of the record keeping required to give effect to such accounting requirements; and
* The water charge rules regulate the *maximum* termination fee which can be imposed, and the ACCC notes that the operator may take into account past capital contributions.

##### Treatment of pass-through charges in calculation of termination fees

In section 5.13, the ACCC made rule advice for how an infrastructure operator should treat ‘pass through charges’ when determining their own infrastructure charges. In that discussion, the ACCC advised that only shared charges incurred by an operator in relation to water access right relating to the loss of water during distribution of water through its infrastructure should be able to be passed through on the basis of water delivery right (or other right of access to the operator’s infrastructure such as a right to drainage) held by a customer. This will have the effect that, as with all other charges, the only pass-through charges which may be included in the calculation of the termination fee are charges that are:

1. fixed volumetric infrastructure charges; and
2. levied on the basis of water delivery right (or other right to drainage) held.

##### Accounting for direct contributions from irrigators

As detailed in section 6.1 above, several stakeholders were of the view that operators did not sufficiently take into account contributions made by irrigators via avenues other than payment of infrastructure charges. There are several elements to this concern: firstly, if the operator does not take into account revenues from other sources when setting its infrastructure charges, and that customers could be paying more than is required to meet that portion of the operator’s costs that is not covered by other revenues. Secondly, there is a distributional aspect regarding the relative contributions of different customers to the ongoing costs of operating the water service infrastructure incurred by the operator.

The ACCC considers that capital contributions are generally already accounted for in operators’ pricing decisions inasmuch as they allow ongoing infrastructure charges (and therefore the maximum termination fees) to be lower than they otherwise would be. The ACCC has not found evidence that the general price level of operators are being set to achieve monopolistic profits at the expense of irrigators.

The ACCC also notes that costs and benefits associated with water service infrastructure are to a large extent shared across customers. Where a customer makes a lump-sum contribution to an operator’s costs, it may not be clear whether, and what, benefits that customer should receive in return. The rules set the *maximum*, not the default, amount of the termination fee. The ACCC notes that nothing in the water charge rules *precludes* an operator from taking direct customer contributions into account when calculating the amount of the termination fee. However, the ACCC does not consider it appropriate to regulate how the operator should take into account direct customer contributions, as the circumstances in which direct contributions occur may vary widely.

##### Discounting of termination fees and use of termination fees revenue

Infrastructure operators are free to waive or discount the termination fees payable by customers at any time, including to facilitate or to encourage appropriate network modernisation and rationalisation. Operators can and do use termination fee discounts/waivers as a strategy to encourage new customers to join the network or, conversely, to encourage disconnection and network rationalisation. There is no requirement for operators to give the same offer to waive/discount termination fees to all customers.

Stakeholders raised concerns about discounting of termination fees in a range of circumstances. Peter Beex, an irrigator in Goulburn-Murray Water (GMW)’s network, stated that “[t]he ability of the IIO’s to waiver [*sic*]termination fees has caused irrigators to “hang out” for the golden handshake deals that the neighbour received years before”.[[584]](#footnote-584) In this case, the argument is that the ability to give a discount impedes network rationalisation because it provides incentives for irrigators to adopt a ‘wait-and-see’ approach. On the other hand, the ACCC notes that waiving of termination fees may be a powerful incentive to induce a customer to terminate, where they otherwise may be reluctant because of their liability to pay the termination fee. Further, the ACCC considers that, in the circumstances outlined by Mr Beex, that customers may be able to use the fact that discounts have been offered to others as leverage in negotiations with their operator, thus lessening bargaining asymmetries which may exist between the operator and individual customers. The ACCC acknowledges that such negotiations may, as outlined by Mr Beex, result in terminations taking longer than they otherwise would, but on balance considers that the ability to offer a discount in this situation has the potential to result in a ‘win-win’ outcome for the operator and the terminating customer.

Stakeholders attending the Griffith public forum gave evidence of situations where an operator used revenue from previous terminations as a fund to offer contracts offering a discount or waiving of future termination fees (should termination occur) as an incentive for new customers to take up water delivery right with the operator.[[585]](#footnote-585) Attitudes towards this practice were mixed, with some stakeholders appreciating that new entrants corresponded with an improvement of the viability of irrigation in the area, and others seeing this use of termination fee revenues as unfairly advantaging new customers over existing irrigators.

Some stakeholders considered that payment of termination fees should be perpetually linked with a particular water delivery right, such that if one customer terminates and pays a termination fee, the new holder of that right when it is “re-issued” should be exempt from paying fixed charges for the amount of time covered by the termination fee (i.e. that payment of the termination fee means that the fixed charges associated with a particular water delivery right are “already paid”[[586]](#footnote-586)); others considered that if a water delivery right is re-issued, the person who paid the termination fee should be refunded.[[587]](#footnote-587)

Where termination is swiftly followed by “re-issue” and/or issuing of “new” water delivery rights, the ACCC considers it preferable that the water delivery right be traded from the customer who wishes to terminate to the person who wishes to obtain additional water delivery right. The ACCC has made Rule advice 6‑E and Rule advice 6‑F to encourage the development of water delivery right trade. However, in cases where there are multiple terminations or where there is a significant passage of time between terminations and re-issue, or in cases where there are multiple terminations and new/re-issues, the ACCC considers that there is not necessarily a “best use” of termination fee revenue.

For example, an operator using termination fee revenue to offer potential new customers zero/discounted termination fees may encourage these new customers. If they do so, this should defray the fixed costs of operating the network over a larger number of customers than before (until such time as these new customers terminate). This should flow through to lower fixed charges and therefore lower termination fees for existing customers.

As such, there does not appear to be a clear rationale from altogether preventing IIOs from offering discounted/waived termination fees to new customers.

On balance, the ACCC considers that it is not appropriate to mandate how an operator uses its termination fees revenues, including whether termination fees can or should be used to fund discounts to new customers. However, the ACCC does consider it appropriate and beneficial for the operator to be transparent about how it uses termination fees revenues, and has made rule advice and recommendations to encourage such transparency. In particular, the ACCC has made Rule advice 5‑Y, which requires that an infrastructure operator advise its customers as to how they can make an enquiry or resolve a dispute with the infrastructure operator in relation to regulated water charges, which would in the ACCC’s view include an inquiry about how termination fees revenues are used. The ACCC does not consider that separate rule advice to specifically require operators to produce a statement about how termination fees revenues are used is necessary. See also Recommendation 6‑A.

##### Which charges apply when calculating termination fees?

Given the proposed change to the publication requirements for schedules of charges (see section 0), it is possible that some irrigators will not receive their Schedule of Charges until after the new charges come into effect. Under the current arrangements for calculating termination fees, such irrigators would be unable to terminate (or provide notice of termination) prior to becoming aware of any significant increases in fixed infrastructure charges (and therefore termination fees). To avoid this outcome, the rules for calculating termination fees should clarify that the operator should calculate termination fees based on the infrastructure charges in effect at the time the irrigator gives their notice, or 30 days before the notice is given, whichever produces the lower maximum termination fee.

#### Draft recommendations

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| Recommendation ‑  Infrastructure operators should provide information to their customers on how they have, and intend, to use revenue from termination fees.  *See also* Rule advice 5-E.  Rule advice ‑  The rules should be amended such that the calculation of termination fees should only include fixed volumetric infrastructure charges imposed:   1. per unit of water delivery right; or 2. per unit water drainage right (where this is separate from the water delivery right);   to the extent that these aspects of a customer’s right of access are being terminated.  The maximum termination may include an amount, however, to account for chargesdealt with under Rule advice 6‑C *.*  This rule advice is implemented in Rule 72 of the proposed water charge rules.  Rule advice ‑  *Separate charges for infrastructure that is dedicated for the exclusive use of the terminating customer*  The rules should be amended to provide that, if a separate charge is imposed in respect of infrastructure that is dedicated to the exclusive use of the terminating customer, the maximum termination fee that the infrastructure operator can impose can include an additional amount being the lesser of:   1. Any capital cost the infrastructure operator can demonstrate it has incurred (i.e. excluding any capital contribution by the customer, government or other party) in relation to the dedicated infrastructure, minus the cumulative amount paid under the relevant infrastructure charge (or other infrastructure charge previously imposed specifically in relation to the dedicated infrastructure); and 2. 10x the amount of the relevant infrastructure charge (i.e. the separate charge that relates to the specific infrastructure).   If the operator charges a separate infrastructure charge in relation to infrastructure used exclusively by the terminating customer, *but has not imposed that charge in each year since the cost was initially incurred*, for the purposes of the calculation of the termination fee in relation to that charge (described above), the calculation should be made as if the charge had been imposed in each year since the capital cost was initially incurred. If the amount of this charge is varied from year to year, the calculation should take account of amounts actually paid, and use the average of annual charges paid for the period since the commencement of the amended WCR, for any year since the cost was initially incurred for which the infrastructure charge was not levied.  This rule advice is implemented in Rule 72 of the proposed water charge rules.  Rule advice ‑  The rules should be amended to provide that, when calculating the maximum termination fee, the infrastructure operator must use the infrastructure charges in effect: at the time the irrigator provides notice of their intention to terminate or request for information on what a termination fee would be (see section 6.3), or30 days before the notice is provided; whichever produces the lower maximum termination fee.  *See also* Rule advice 6-F.  This rule advice is implemented in Rule 72 of the proposed water charge rules. |

### Effect of the WCTFR on operation of markets for tradeable water rights

#### Stakeholder feedback

In its Issues Paper, the ACCC sought feedback on whether the operation of the WCTFR could be modified to improve the operation of markets (Question 51). Some submissions stated that there was no evidence that the current approach to termination fees is impeding water markets, and therefore there is no need to change that approach. CIT submitted that the WCTFR are “not impeding water trade”. CIT further stated that since 2009, 30 per cent of irrigation rights have been traded out of its trusts, which in CIT’s view is evidence that the WCTFR are not causing an impediment in the market. [[588]](#footnote-588) WMI and the NIC similarly submitted that the WCTFR are not impeding the “operation of markets” [[589]](#footnote-589)

Waterfind submitted that the termination fees are facilitating the efficient functioning of water markets and addressing potential barriers to entry.[[590]](#footnote-590) However, Waterfind suggested that the comparability of termination fees between IIOs in different states could be improved by requiring uniformity in the units used to define water delivery rights. Waterfind noted in particular that the use of ML/day by Victorian infrastructure operators was difficult to interpret and make comparisons and it complicates calculations of a proportional adjustment (in the amount of water delivery rights held).

CICL submitted that the intent of the termination fees is not to facilitate water trade, but rather to reduce the burden on the IIO and remaining customers within a “group-owned scheme” when there is a termination.[[591]](#footnote-591) CICL stated that the need for the termination fee has not diminished. The effect of the WCTFR on markets for different types of tradeable water rights is discussed further below.

CICL[[592]](#footnote-592) and MIL[[593]](#footnote-593) also noted that termination is not the only option available to an irrigator who seeks to discontinue its access to their irrigation networks. MIL also noted in its submission to the Act Review that “it is not in the interest of IIOs to limit trade [of water delivery rights] where possible as ongoing income through both delivery rights and water use is preferable to termination”.[[594]](#footnote-594)

#### Discussion

The majority of submissions received in response to the ACCC’s question about how the approach to termination fees affects the operation of markets focussed on the links between termination fees and trade of water access rights (see stakeholder discussion section above). However, termination fees affect supply and demand for tradeable water rights in different ways depending on the right in question. These are discussed in turn below.

*Trade of water access rights*

Water access rights, including water access entitlements (WAEs) and water allocations, generally may be traded separately from rights to access water service infrastructure, such as water delivery rights. However, where an irrigator holds both a water access right and a water delivery right, termination fees payable by irrigators in relation to the water delivery right held may be factored into prices for water access rights, particularly for WAEs, since this is the main valuable water-related asset held by irrigators. Accordingly, other things being equal, a seller who is liable to pay a termination fee may seek a higher price for a WAE compared to a seller who does not hold any water delivery right.

The question of whether this effect of termination fees on water access right prices amount to a *distortion* is complex. To the extent that termination fees represent an appropriate adjustment to account for negative effects of the terminating customer on remaining customers and the operator, termination fees should not be considered distortionary because they represent part of the cost of using water in an area reliant on particular water service infrastructure, that an individual *should* factor into their decision-making. Indeed, the ACCC has previously noted that distortions could be caused both by the complete absence of termination fees on the one hand, or termination fees being too high on the other.[[595]](#footnote-595) This viewpoint acknowledges that it is appropriate to require the terminating customer to take into account, at least in part, the costs borne by others as a result of their decision to terminate. However, it also means that an assessment of the level of those costs is required, as well as a decision as to what amount of those costs should be borne by the terminating customer. Given the competing interests of the terminating customer versus the remaining customers and the operator, these answers are not straight-forward and may require value judgements to be made. This is why the ACCC set the 10 times fee multiple as a simple method to cap termination fees, but remains open to the possibility of this fee multiple being altered in the future (see section 6.2.1 above).

Further, it is important to appreciate that where water rights have been unbundled, termination fees are levied on the basis of a person’s right of access to water service infrastructure (such as a water delivery right), and *not* on a person’s right to water (such as a WAE or irrigation right). This means that there is not a necessary or direct relationship between a person’s decision to trade their water access right (or irrigation right) and their decisions about their water delivery right.

Based on the above considerations, the ACCC acknowledges that termination fees may affect prices of and/or willingness to trade water access rights, but considers that termination fees currently do not amount to a distortion on trade.

*Trade of water delivery rights*

Water delivery rights may be tradeable within an irrigation network. The Water Trading Rules, which form part of the Basin Plan require that an IIO must not unreasonably restrict the trade of a water delivery right.[[596]](#footnote-596) The ability for an irrigator to trade water delivery right to another irrigator within the IIO’s network (or to a new entrant) provides a much less costly alternative to termination for irrigators wishing to reduce their water delivery right holdings.

Currently, markets for water delivery rights are in general not well-developed, although several operators such as Murray Irrigation Limited (MIL) and CICL are leading the development of such markets in the Southern Murray-Darling Basin. Robust water delivery right markets (within an IIO’s irrigation network) facilitate flexible management of the network, enhance the ability of irrigators to deal flexibly with their tradeable water rights, and are strongly endorsed by the ACCC.

The obligation to pay a termination fee for terminating a water delivery right means that a person seeking to acquire water delivery right faces both costs and benefits. On the one hand, acquisition of a water delivery right provides the ‘buyer’ with access to the IIO’s irrigation network and places an obligation on the IIO to deliver water through the irrigation network in relation to water rights (whether irrigation rights or water access rights) held by that person. On the other hand, the acquisition of the water delivery right means in most instances that the ‘buyer’ is taking on the obligation to pay ongoing fixed charges, as well as the obligation to pay a termination fee at some future time if they wish to terminate their right of access. When the value of the right of access is greater than the costs associated with holding water delivery right, a person seeking to acquire water delivery right should be prepared to pay a positive price for the right. This is expected to occur in circumstances where the irrigation network (or the relevant part of the network) is being operated at or near full capacity.

In contrast, where the costs of holding water delivery right exceed the benefits, a ‘negative price’ may emerge in water delivery right markets. This means that in effect the “seller” (current holder of the right) pays the “buyer” to take on the right, in order to avoid paying the termination fee. In this circumstance, “suppliers” in water delivery right markets should be willing to pay up to the value of the termination fee for another person to take on their water delivery right. In this case, a person wishing to acquire water delivery right should be willing to acquire water delivery right via trade from another irrigator where the benefits (in terms of acquiring the right of access and the payment made by the “seller”) exceeds the costs (the obligation to pay ongoing fixed charges and possibly a termination fee in the future). The final price associated with the trade will be decided by negotiation between the “buyer” and “seller”.

However, the existence of willing buyers and sellers is not necessarily sufficient to ensure that robust water delivery right markets emerge. In particular, an operator has incentive to prevent such trades in order to benefit from payment of termination fees by the terminating customer, and then issue “new” water delivery right to those wishing to acquire these rights. The ACCC considers that actions by operators to unreasonably[[597]](#footnote-597) restrict, or disallow altogether, trade of water delivery rights cause detriment to the operator’s customers and should be prohibited. The ACCC considers that it is important to encourage operators to facilitate water delivery right trade, both as an alternative to termination and to facilitate more efficient use of water service infrastructure generally. Accordingly, the ACCC advises that operators who do not provide for the trade of water delivery right within their networks should have their maximum termination fee capped at 1 times (instead of 10 times). Further, operators should be required to inform a customer, upon receiving notification of an intention to terminate, of their policies and opportunities for trade of water delivery right.

The ACCC notes that trade of a water delivery right requires that the water delivery right is able to be separated from the water access right or irrigation right. Thus, rule advice 6-B would not apply to a right of access to water service infrastructure which is implied into a water access right (for example, WAEs generally have an implied right to delivery on-river which cannot be separated from the right to water).

#### Draft rule advice

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| Rule advice ‑  The rules should be amended to provide that, if an infrastructure operator does not provide for the trade of water delivery right in relation to their water service infrastructure separately from the trade of a water access right or irrigation right, the multiple applied to the fixed volumetric charge levied per unit of water delivery right or unit of water drainage right should be 1x rather than 10x.**[[598]](#footnote-598)**  *See also* Rule advice 6-F.  This rule advice is implemented in Rule 72 of the proposed water charge rules. |

## Circumstances in which a termination fee can be imposed

The WCTFR prohibit an operator from charging a termination fee except in circumstances authorised by the WCTFR. Where an operator is able to charge a termination fee, the WCTFR regulated the maximum amount that can be imposed.

Currently, an irrigator may elect to terminate or surrender their right of access to the IIO’s irrigation network by giving written notice to the operator. An operator may impose a termination fee without written notice from the irrigator only where the operator 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 customer is not liable to pay ongoing access fees and is not liable to pay a termination fee under any contract with the operator;[[599]](#footnote-599) or
* the operator does not separate out fees for a service for the storage of water that it provides, from the charges in respect of the customer’s right of access.[[600]](#footnote-600)

#### Stakeholder feedback

The ACCC sought feedback from stakeholders on whether they had concerns about the limits on when a termination fee can be imposed under the WCTFR (Question 52). In addition, the ACCC asked whether stakeholders believed the WCTFR inhibit operators from making efficient network augmentation or rationalisation decisions, and, if so, how (Question 53). Generally, feedback from operators was that the circumstances specified in the rules under which a termination fee may be imposed are set appropriately, and that termination fees are not inhibiting operators from making efficient network rationalisations.[[601]](#footnote-601)

On the other hand, the ACCC heard feedback from irrigators that they consider the circumstances in which termination fees may be imposed to be too permissive in some cases.[[602]](#footnote-602)

#### Discussion

The specific instances where the WCTFR currently do permit, but, in the view of certain stakeholders, should *not* permit a termination fee to be imposed, have been discussed in previous sections, as follows:

* operator’s ability to charge a termination fee where water access rights and/or water delivery rights are not tradeable: section 6.2.2.
* operator’s ability to charge a termination fee without accounting for direct capital contributions made by terminating customer: section 6.2.1, *Accounting for direct contributions from irrigators*

The only example cited by a stakeholder of where termination fees *do* inhibit efficient network rationalisation was in relation to selective discounting of termination fees, and is addressed in section 6.2.1, *Discounting of termination fees and use of termination fees revenue*.

##### Operator’s responsibilities upon receiving notice of intention to terminate

Although not raised directly by stakeholders, the ACCC considers that the processes for terminations, and in particular the operator’s responsibilities during that process, form an important aspect of an operator’s ability to charge a termination fee.

The *Water Market Rules* *(2009)* (WMR) entitle an irrigator to give notice to an operator of their intention to transform. The operator is then obliged to advise the irrigator on matters such as the amount of the irrigation right that will be withheld to cover fixed conveyance losses and whether the irrigator would need to provide a form of security (if the irrigator is retaining their water delivery right).

Under the current rules, there is no such intermediate step. An irrigator will not necessarily know the amount of the termination fee that would be payable until they provide notice that they are in fact terminating their right of access. The rules also do not require the infrastructure operator to set out how they have calculated, or intend to calculate, the termination fee.

The ACCC considers that there would be benefit in providing a mechanism similar to that in the WMR in relation to termination fees. This will provide greater certainty to customers about the termination fee payable in their circumstances. The rule will also seek to ensure that where possible, a customer has all relevant information about the options and associated costs to reduce their right of access to the operator’s water service infrastructure and sufficient time to consider this information before making a decision. These rules will also support the Basin Plan water trading rule 12.28, which requires that an IIO must not unreasonably restrict the trade of water delivery right.[[603]](#footnote-603)

#### Draft rule advice

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| Rule advice ‑   * The rules should be amended to allow for a customer to provide notice to their infrastructure operator of their intention to terminate some or all of their right of access. * Upon receiving such a notice, the infrastructure operator must:  1. set out the value of the termination fee that would be payable upon termination (binding on the operator for 30 business days), and how that fee was calculated; 2. notify the customer if they are able to trade their water delivery right and any rules governing such trade.   Under this rule, an infrastructure operator should also be required to provide the information in (a) and (b) above upon receiving a request in writing from a customer for information on the termination fee that would be payable if the customer were to terminate some or all of their right of access.  This provision should be a civil penalty provision.  *See also* Rule advice 6‑E *and* Rule advice 5-Z.  This rule advice is implemented in Rule 74 of the proposed water charge rules. |

## Approval of additional termination fees

Rule 8 of the WCTFR provides for the allowance of termination fees that are in excess of the amount otherwise permitted under the rules in certain circumstances. Specifically, Rule 8 allows such a termination fee where the fee is specified in an existing or new contract between an operator and a customer and relates to the recovery of capital expenditure that could not be recovered under the termination fee calculated under Rule 7 of the WCTFR. The ability of operators and customers to negotiate such a clause accounts for the possibility that some efficient investments may only be viable with cost recovery periods longer than those implied by the maximum termination fees allowed by the rules.

Rule 8 requires the parties to the contract to obtain approval from the ACCC for this termination fee. Before the ACCC decides whether to approve the additional termination fee, a party to the contract must submit to the ACCC:

* a copy of the contract;
* the contact details of the parties;
* details of contracts/arrangements made for the carrying out of capital works which relate to the termination fee; and
* any further information the ACCC requests.

The ACCC must approve the additional termination fee if:

* it is satisfied that the fee is clearly stated within the contract;
* the fee relates to capital works entered into within the first five years of the contract; and
* the fee is reasonably related to the recovery of the estimated or actual cost and it was agreed by the parties to the contract in a fair and reasonable negotiation. Further, before approving the fee, the ACCC must have regard to the Basin Water Charging Objectives and Principles.[[604]](#footnote-604)

In the more than six years since the introduction of the WCTFR, the ACCC has received only one application from an IIO for assessment, and this was assessed to be invalid.[[605]](#footnote-605) Further, the ACCC has only received two customer inquiries relating to additional termination fees and both of those were in 2009.

#### Stakeholder feedback

The ACCC has received no evidence of support a change to Rule 8. Stakeholders have not made any submissions on the issue of additional termination fees in response to the Issues Paper or otherwise.

#### Discussion

The ACCC considers that the reasons for the implementation of regulatory supervision of the additional termination fee process are still valid. Any amended approach that by-passes ACCC scrutiny requires the customer:

* to be able to assess whether the trade-off between a higher termination fee and the building of new infrastructure is in their self-interest;
* to have enough knowledge of the WCR and sufficient negotiation skills to participate in a fair and reasonable negotiation;
* to know of his/her ability to and the circumstances in which it can refer a matter to the regulator (the ACCC).

Whereas some irrigators would be able to assess such matters, many irrigators may not have the necessary commercial expertise in such contract negotiations, often have limited or no knowledge of the various Water Charge Rules, or have limited resources and may not be able to make this assessment. Customers may also be in a relatively weak bargaining position in relation to an operator for a variety of reasons.

Accordingly, the ACCC considers that it is appropriate to maintain this rule in its current form.

# Water Charge (Planning and Management Information) Rules 2010

## Background

The *Water Charge (Planning and Management Information) Rules 2010* (the WCPMIR) seek to advance the objective of pricing transparency by requiring persons determining charges for water planning and water management (WPM) activities[[606]](#footnote-606) to publish information about the charges.[[607]](#footnote-607)

Pricing transparency was one of a number of objectives and principles for water planning and management charges (hereafter, referred to simply as planning and management charges) that States and Territories committed to implementing under the National Water Initiative (NWI). These NWI commitments 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). 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.

Planning and management charges generally represent a small proportion of an irrigators’ total regulated water bill—less than five per cent for most irrigators.[[608]](#footnote-608)

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

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

Different approaches by Basin State governments to cost recover 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-related decisions. The WCPMIR were intended to assist Basin States to adopt more consistent approaches to cost recovery for WPM activities.

At the time the WCPMIR were made, 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. Where planning and management charges were applied these 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.

During the policy development stage, some stakeholders proposed that the Minister make rules to allow the Commonwealth to set the planning and management charges imposed by Basin States. In its advice to the Minister, the ACCC noted there were policy and legal issues for the Commonwealth Government to direct 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 Murray-Darling Basin (MDB), or relate to urban water supply activities.

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

#### Stakeholder feedback

In its Issues Paper, the ACCC sought feedback on the following:

* should Basin States be required to publish information about their planning and management charges
* do water users utilise information published by Basin States regarding the planning and management charges they impose
* what are the compliance costs associated with these rules,
* what might enhance the effectiveness of these rules.

A number of submissions supported the proposition for Basin States to disclose information about their planning and management charges. The Independent Pricing and Regulatory Tribunal (IPART) supported the intent of the WCPMIR to “improve the consistency, scope and availability of information about water planning and management charges across Basin States”.[[609]](#footnote-609) Similarly, the Victorian Farmers’ Federation (VFF) recommended that Basin States be required to publish information about “how their Water Planning and Management charges are derived and how these funds are spent”.[[610]](#footnote-610) The VFF added that “[t]he criteria for guiding decision-making should be made public so that customers and stakeholders are able to clearly understand how the funds are being used to deliver on the legislated objectives”. Information disclosure under the WCPMIR was also supported by Waterfind[[611]](#footnote-611) and Murray Irrigation Limited (MIL).[[612]](#footnote-612) However, MIL also raised concerns about the level of Basin States’ compliance with these requirements, noting that “[i]f the ACCC has been unable to ensure compliance after five years, the conclusion must be that the rules are ineffective – even if the intent and the information that is provided…is useful and sound”.

In contrast, the Queensland Government did not support the publication requirements on water planning and management costs, noting that “particularly when Queensland has no full-cost recovery water charges in place [it] has questionable benefit for the water market”.[[613]](#footnote-613) The Queensland Government also stated that the expense of collecting the information “would far outweigh any water market benefit of producing the information”, that “requirements need to be proportionate with the outcomes the Act is seeking to influence and… commensurate with the significance and contentiousness of the subject matter” and that “water users’ behaviour is [unlikely to] change as a result [of the requirements]”. It also questioned whether the information the WCPMIR requires to be published to assist in achieving the Basin Water Charging Objectives and Principles, achieved much more than the information Queensland currently publishes.

The Queensland Farmers’ Federation (QFF) agreed with the views expressed by the Queensland Government, stating “little is to be gained from continued monitoring of the application of water management charges”.[[614]](#footnote-614) The QFF considered that “the matter of the recovery of water planning and water management costs should be left to state jurisdictions given the differences in approach each state have adopted”.[[615]](#footnote-615)

Waterfind noted the importance of WPM information to its business. Waterfind stated that it “accesses and uses the [planning and management] charge information on a regular basis”, and that “it is of essential importance that this information is easily available, as it enables Waterfind to provide clear and transparent total cost information when an irrigator seeks to enter the [w]ater [m]arket”.[[616]](#footnote-616) In contrast, Daniel Mongan, an irrigator in Goulburn-Murray Water’s Central Goulburn network, stated that he has no use for the planning and management information and “[t]he charges should not have to be published, nor should the amount of information required be prepared”.[[617]](#footnote-617) Mr Mongan stated that the compliance costs are an “unnecessary administrative burden” and “GMW is required to supply extraneous amounts of detail…which relates to charges that are immaterial to both customers and GMW”. However, Mr Mongan added that the ACCC should ensure that the charges governments and water corporations impose are cost reflective but the process should not be “onerous, or greater than the requirements for other miscellaneous charges”.[[618]](#footnote-618)

In relation to compliance costs, Basin States indicated that compliance with the current WCPMIR, and associated monitoring requests, imposes a regulatory burden. No submissions presented details of compliance costs faced in publishing planning and management information. IPART indicated “that NSW had complied with the WCPMIR, at relatively little cost”.[[619]](#footnote-619) GMW also noted that while there were compliance costs, these were insignificant.[[620]](#footnote-620) Coliban Water said the obligation to publish information for them was “onerous” as they only had one charge, which only recovers $10,000 in revenue per annum.[[621]](#footnote-621) The NSW Government suggested that compliance costs could be reduced by aligning the submission of the annual planning and management charges information to the ACCC at the same time as for IPART (i.e. in October each year). [[622]](#footnote-622)

While reflecting that the WCPMIR has increased the detail of consistent information about planning and management charges, many stakeholders questioned whether the WCPMIR have led to any greater degree of consistency in approach or move to fuller cost recovery as set out in the BWCOP. The National Irrigators’ Council (NIC) said, “publication of these charges is consistent with the operation of transparent water pricing across the Murray-Darling Basin; however the effectiveness of these rules is limited to transparency of charges rather than determination of charges and therefore the ability for stakeholders to participate in an open and transparent determination process is dependent on the State involved”.[[623]](#footnote-623) GMW said that although compliance costs for GMW are insignificant, it shares stakeholders’ concerns regarding the effectiveness of the WCPMIR in advancing consistent approaches on planning and management activity cost-recovery approaches. GMW added that the WCPMIR have not achieved “the desired effect of increasing transparency”.[[624]](#footnote-624)

Waterfind noted disclosure of planning and management charges (transaction fees, in particular) might be more effective if it was captured in the WCIR.[[625]](#footnote-625) Waterfind submitted that this “would provide more rigour, transparency and comparability around water market transaction fees”. The QFF submitted that “there are significant difficulties in developing a consistent approach to the implementation of water charges given the significant differences in the way jurisdictions are implementing water planning and related activities”.[[626]](#footnote-626)

The NSW Government considered that there is a lack of transparency about precisely what the WPM activities in each Basin state were and how charges for each WPM activity are set[[627]](#footnote-627) The NSW government also identified that it is a “key concern” that there is less than full consistency between Basin States in the approach to setting planning and management charges. The NSW Government stated that this does not assist the effectiveness of cross-border water trading, stating that “there needs to be a level of consistency in the way that all Basin jurisdictions apply [planning and management] charges and the extent of subsidisation”. The NSW Government added that “it would be useful if the ACCC did a proper analysis of how the Basin States are identifying WPM activities and setting these charges and if they are consistent with the broader pricing principles”. The NSW Government suggested that, “[i]t would also be useful if the ACCC analysed the possible distortions in the water trading market due to the differing WPM charging approaches” As noted above, the NIC submitted that while the publication of planning and management charges is consistent with transparent water pricing, it urged “the ACCC to consider whether the publication of these charges is already facilitated under State regulations to minimise duplication”.[[628]](#footnote-628)

#### Discussion

##### Basin State compliance with the WCPMIR

Basin States have generally complied with the requirements to disclose information about planning and management charges. By contrast compliance with the requirement to disclose WPM activities and the cost of those activities has been more variable. Where there is non-compliance with the WCPMIR by Basin States, the ACCC has previously adopted an approach of working with Basin States to improve compliance over time. ACCC staff have spent considerable resources assisting Basin States to comply with the rules, although in some cases, this has had limited effect.

Queensland, in particular, has advised that it does not intend to comply due to the significant resource burden involved in producing the information required by the WCPMIR.[[629]](#footnote-629) The ACT has also refused to disclose the activities and costs associated with its key planning and management charge.

##### NWI and the BWCOP commitments to disclose WPM costs

All State and Territory Governments, and the Commonwealth Government, committed to ‘bring into effect consistent approaches to pricing and attributing costs of water planning and management’ through the NWI. They also committed to annual public reporting on cost recovery for WPM activities.[[630]](#footnote-630) These Governments also followed up the commitments of the NWI by developing a set of pricing principles for the cost recovery of WPM activities in 2010.

The water charge rules must contribute to the achievement of the BWCOP. The BWCOP are based on the commitments made in the NWI for WPM pricing transparency, disclosure and reporting of the cost recovery for WPM activities. However, the drafting of the Act limits the ability of the WCPMIR to achieve all the requirements of the BWCOP:

* the rules can only require the provision of information about the charges and WPM activities to which it relates, and
* cannot compel information about the cost of WPM activities for which no charge is levied.

##### The value of planning and management charge and cost disclosure

Disclosure of planning and management *charge* information is useful to water users, as it informs users of their quantum relative to other water charges. Also, since planning and management charges are usually *unavoidable* (i.e. in order to gain a license or trade a water allocation you must pay a charge), it is appropriate that there is disclosure. Finally, noting that one of the objectives of the water charge rules is to improve pricing transparency, it is appropriate that all regulated water charges imposed on water users, including planning and management charges, be disclosed using a consistent framework across the MDB.

The value regarding disclosure of WPM *activities* and associated costs appears mixed. Disclosure of WPM activities and their associated costs allows users to understand what activities a charge pays for, what those activities cost and the degree to which planning and management charges imposed recover the WPM costs incurred. As discussed above, the WCPMIR does not oblige Basin States to disclose information about WPM activities for which no charge is levied.

Basin States have struggled to practically achieve the requirements of the WCPMIR. Planning and management charge disclosure is generally *objective* – a specific charge amount is imposed, the charge is imposed on a type of customer in a certain area etc. In collecting and presenting WPM cost information, persons determining a charge have to make *assessments* on

* the degree to which WPM costs identified relate to WPM activities *carried out in the MDB*, and
* the degree to which WPM costs *can be separated from other* (non-WPM) *costs*.

The majority of compliance issues related to the WCPMIR involve the presentation of cost information.

The ACCC has previously noted the significant inconsistency in the approach to planning and management charges is unlikely to be sufficiently material to significantly distort water markets.[[631]](#footnote-631) This view is based on limited research, disclosed in the 2010-11 and 2013-14 water monitoring reports that show planning and management charges are small relative to infrastructure operator charges.[[632]](#footnote-632)

##### Conclusion

The ACCC assesses that there is value in continuing to require persons who determine planning and management charges to publish information on these charges. While seeing value in the disclosure of WPM activities and costs, the ACCC notes that the limitations of the Act make it difficult for Basin States to meet the requirements for disclosure of WPM cost recovery through the WCPMIR alone. Noting the existing NWI framework for identifying and presenting information on cost recovery of WPM activities, the ACCC proposes that this might be a more effective means to achieve the BWCOP on this issue.

#### Draft recommendations

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| Recommendation ‑  The ACCC supports the ongoing commitment made by governments to greater cost recovery for water planning and management activities, as part of the National Water Initiative, but recommends that the water charge rules are not an effective policy tool to ensure these commitments are met. |

## Requirements about information to be published

The WCPMIR require a person who determines a planning and management charge (usually a Minister or another government executive or a delegate of that person) to publish information on that charge including (among other details):[[633]](#footnote-633)

* 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.

Planning and management charges may be imposed directly on users or incorporated into other (infrastructure) charges imposed by infrastructure operators as a pass-through charge (see section 5.13).

In its Issues Paper, the ACCC sought stakeholder feedback on whether the level of detail of information required to be published under the WCPMIR about planning and management charges was appropriate, and whether there are specific requirements to publish information in the WCPMIR that are unnecessary, onerous, unreasonable or unduly costly.

#### Stakeholder feedback

Submissions provided a number of relevant responses to the level of detail required for information published through the WCPMIR, whether the requirements are unnecessary, onerous, unreasonable and unduly costly.

As discussed in section 7.2, Waterfind submitted that it valued planning and management charge information provided under the WCPMIR.[[634]](#footnote-634)

The NSW Government stressed the importance of consistency of information provided. The NSW Government prepares planning and management information to meet both Commonwealth and its own reporting requirements. [[635]](#footnote-635) The NSW Government submitted that it “prefers the [WCPMIR] requirements to be consistent with IPART reporting requirements in terms of content as most of the information required under these rules is provided to and published by IPART. Currently the Office of Water has to convert the cost information required by IPART into the ACCC required structure”. In recommending that Basin States be required to publish information on their planning and management charges and what it is spent on, the Victorian Farmers’ Federation (VFF) submission noted a recommendation from a recent Victorian Auditor General Office report on the Environmental Contribution Levy.[[636]](#footnote-636) Victorian Auditor General Office recommended as “a priority [that] the Department of Environment and Primary Industries enhances public reporting of the Environmental Contribution Levy in annual reports and other mechanisms. This should clearly describe the purpose, benefits and achievements of the Environmental Contribution Levy and its funded projects and/or initiatives”.[[637]](#footnote-637)

Stakeholders expressed differing views as to whether disclosure of costs under the WCPMIR represented a significant compliance burden. These views were set out in section 7.2.

Waterfind also raised particular concerns regarding the regulation of transaction fees.[[638]](#footnote-638) Waterfind noted the importance of departments and operators publishing the information required under the rules and proposed that this might be better achieved through consolidating the WCPMIR into the WCIR.

#### Discussion

Since the WCPMIR has come into effect, Basin States have *identified more charges* specifically as planning and management charges, both inside and outside the MDB. In meeting the commitments of the WCPMIR, Basin States have also provided *more detail* regarding the basis on which a charge is imposed and who it is imposed on. This increase disclosure has also resulted in a clearer understanding that many planning and management charges are imposed by infrastructure operators along with their infrastructure charges.

Consistent with the recommendation in section 7.2, the ACCC considers that the rules should be amended to remove the requirement to publish information on activities that relate to a planning and management charge and the costs associated with those activities.[[639]](#footnote-639)

Rules advice in section 4.3.1 has proposed the consolidation of the three current WCR into a single set instrument. The combined instrument would apply to regulated water charges and a charge captured under the term ‘regulated charge’ in the WCPMIR would be considered a planning and management charge under the combined water charge rules.

The WCIR and WCPMIR currently require the publication of different types of information about charges, at different times, depending on whether the charges are infrastructure charges or planning and management charges; and on whether they are imposed by an infrastructure operator, IIO or some other entity. All these charges are ultimately payable by irrigators and other water users. The proposed WCR should, as much as possible, streamline these information requirements to ensure pricing transparency and better informed decisions.

Rule advice in section 5.4.1 proposes greater consistency of disclosure requirements for infrastructure charges and planning and management charges, based on the approach currently taken in Rule 5(2) of the WCPMIR.

#### Draft rule advice

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| Rule advice ‑  The requirement to disclose the nature and cost of WPM activities related to planning and management charges (rules 5(2)(d) and 5(2)(j) of the WCPMIR) should be repealed.  This rule advice is implemented in the proposed repeal of the WCPMIR.  Rule advice ‑  The rules should be amended such that remaining requirements in the WCPMIR to disclose information about planning and management charges are retained and harmonised with the general pricing transparency requirements for infrastructure charges.  See rule advices 5-E and 5-F.  This rule advice is implemented in Rule 11 of the proposed water charge rules. |

## Requirements as to timing and place of publication

The introduction of a new planning and management charge or amendment of a material characteristic of an existing planning and management charge currently 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 planning and management charge reside or carry on business. The information must be available before the planning and management charge or the amendment comes into effect and must be provided to any person on request.

In the Issues Paper the ACCC sought feedback on whether there were specific requirements as to the timing and place of publication of information that were unnecessary or onerous.

#### Stakeholder feedback

In relation to the issue of timing and location for publishing information for new charges or amendments to existing charges, only one submission talked directly to this issue. The NSW Government said the requirement to publish on the Internet and in the media is unnecessary. [[640]](#footnote-640) The NSW Government noted that charges imposed by the Department of Primary Industries (DPI) are subject to IPART’s public consultation process when IPART sets price paths for their charges and the charges are available on the Office of Water’s website.

Noting the importance of consistency between the information they provide to the ACCC and to IPART, the NSW Government asked if they could provide the information to the ACCC at the same time that it is provided to IPART (in October).

#### Discussion

Under the WCPMIR and WCIR, infrastructure operators and individuals who determine planning and management charges apply different requirements relating to:

* when information must be published about a charge (or change in a charge)
* when information about a charge must be provided to a customer
* requirement to provide notice in newspapers when a charge is imposed, and
* the information that must be made available where a charge is paid.

Rule advice in section 5.4.2 has proposed a simplification of publication requirements for regulated water charges. Of relevance to the publication of planning and management charges are:

* the removal of the requirement to publish a notice in a local newspaper or in the *Australian Government Gazette* when a charge is imposed or changed*.*
* amendment of the timeframe when charge information must be published before the charge takes effect, and by which time a Schedule of Charges must be sent to customers to a 25 business day requirement for certain infrastructure operators and all other persons who determine planning and management charges

In most cases the proposed changes suggested in section 5.4.2 are consistent with the requirements of WCPMIR or do not significantly reduce the level of information disclosure. The WCPMIR requires persons determining a planning and management charge to publish information about a charge on a website. No Basin State departments or water authorities have identified to the ACCC that they published information about a new or changed charge through the Australian Government Gazette.

Removal of the requirement to publish notices in local newspapers of the introduction of a new planning and management charge may reduce the means by which water users can be advised of these charges. Noting that department and infrastructure operators keep details of current charges on their websites it is not clear that these notification requirements represents a significant information source for water users. Publishing notices does impose a (small) regulatory burden on Basin State departments and infrastructure operators. The proposed requirement for operators to provide a Schedule of Charges upon request is consistent with the requirements of WCPMIR. State legislation may oblige departments and operators to publish notices of charge changes. In practise a removal of the requirement to publish notices of a new planning and management charge are unlikely to significantly inconvenience water users.

For the proposed requirements as to the timing and place of publication of information on planning and management charges, please see Rule advice 5-G and Rule advice 5-I in section 0.

# Other issues of concern

## Water market concerns

Many stakeholders raised various concerns relating to the operation of water markets in the Murray Darling Basin. These are discussed in the following sections.

### Transparency in water markets

The lack of reliable information about water holdings and trades, particularly price information, was raised by a number of stakeholders.

Some stakeholders raised concerns about the lack of transparency of water access right holdings, particularly by non-irrigators. The ACCC notes that Basin State water registers are generally searchable, however a fee is typically charged for title searches for specific water access entitlements (WAE). Also, there does not appear to be any readily available summary of the extent of WAE holdings by non-irrigators, aside from information published by environmental water holders directly.[[641]](#footnote-641) Concerns about the participation in the market by non-irrigators are discussed in more detail in section 8.1.3.

##### Effect of water market intermediaries on market transparency

Stakeholders also raised the potential for water market intermediary misconduct and the impacts intermediaries’ actions could potentially have on prices for water access rights. For example, one stakeholder in the Shepparton public forum stated that where water markets are fragmented, intermediaries may (deliberately or otherwise) cause price inflation when providing information to potential market participants. The example given was that of a broker providing advice to a buyer seeking to purchase a large volume of water allocation. In the stakeholder’s view, the broker provided information about prevailing market prices with reference to the price as listed on an exchange where only a very small volume of water allocation was traded. The view was that it was likely that prices in this small market would be higher than for a market where there was a larger number of traders and a greater volume of water allocation being traded. Therefore, in this stakeholder’s view, use of price information obtained from a ‘small’ market as a basis for the formation of willingness-to-pay estimates in other contexts has the effect of putting upward pressure on water allocation prices outside of that reference market.

Further, some stakeholders were of the view that brokers deliberately avoided conducting trades through public exchanges in order to conceal information about the identity of particular buyers and/or sellers, or the volume of water allocation traded. The view was that such behaviour amounts to misconduct because the brokers are deliberately obstructing pricing transparency in water markets and encouraging collusion and ‘insider trading’.

The Commonwealth government had previously released for consultation in 2013 a COAG draft Regulation Impact Statement for the potential regulation of water market intermediaries, but that to date no further action has been taken.[[642]](#footnote-642) Following on from this, the Independent Expert Panel (the Panel) for the review of the Act recommended that:

*…industry develop, in consultation with the Australian Government, an industry-led scheme of regulation for water market intermediaries. The scheme could include voluntary accreditation, a code of conduct and a defalcation fund. If a scheme is not developed, the Australian Government should regulate water market intermediaries. State referrals would be necessary to give effect to Basin-wide or national regulation.[[643]](#footnote-643)*

The ACCC notes that although water market intermediaries (including water brokers) are not currently subject to any industry specific legislation, they must still comply with the provisions of the *Competition and Consumer Act 2010* (CCA)including the Australian Consumer Law (ACL). The ACL prohibits, among other matters, misleading and deceptive conduct, and false or misleading representations of various kinds. The ACCC enforces the CCA and, together with state and territory fair trading agencies, enforces the ACL.

The ACCC has previously encouraged, and continues to encourage, any stakeholder with *specific* concerns about the conduct of water market intermediaries (including water brokers) to report these concerns to the ACCC.

##### Availability of market data

More generally, the ACCC has also previously called for improvements in how water trade prices are reported.[[644]](#footnote-644) In particular it appears that prices reported for trades are often skewed by other transactions occurring at the same time (for example, the trade of water with land or water with water delivery right). Furthermore, trade data does not generally distinguish between market-based arms-length transactions and related-party transactions (for example, where an irrigator trades water from one property to another) or transactions where only the location (and not the ownership) of a water access right is changed. Very large trades by environmental water holders can also mean that reported trade figures give a misleading impression. For example, an environmental water holder may trade water allocation from one location to another in order to facilitate the delivery of water to a wetland, or trade (gift) a volume of water allocation to a delivery partner such as a catchment management authority, however both these trades will be recorded alongside market-based transactions.

The ACCC observes that issues of water market data reliability and availability have the potential to lead to a lack of confidence in the market in some areas. Irrigators seek readily accessible information as to the volume and price of water trades, and some also seek the identity of sellers and purchasers. These concerns were particularly evident in the Shepparton public forum, and in submissions from irrigators in that area. The ACCC recognises that a well-functioning market requires confidence from its participants and transparency.

At present information about water trading is held on individual Basin State water registers, and the accessibility and level of detail of each register varies. In examining the timeliness and accuracy of water market information, the Report of the Independent Expert Panel concluded that:

*Basin State governments should take opportunities to enhance the interoperability of registers, building on the work that has been undertaken through the National Water Markets System program to create more efficient services for users.[[645]](#footnote-645)*

The ACCC agrees with the Panel’s conclusion, and recommends that to address these issues the Australian Government should work with the Basin States to improve the accuracy and consistency of water trade reporting across the Basin.

#### Draft Recommendations

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| Recommendation 8‑A  The ACCC recommends that the Australian Government should work with Basin States to improve the accuracy and consistency of water trade reporting. In particular, water trading price data should be collected on a consistent basis in a way that can allow for the separation of market-based trades from other types of trades. |

### Unbundling of water rights

‘Unbundling’ of water rights can be taken to mean one or both of the following:

* separating a right to water from a right to land
* further unbundling a water right to create separate rights to:
  + a share of available water resources
  + inflows
  + storage capacity (including access to carryover)
  + delivery of water (on-river and /or off-river)
  + use water on land
  + operate water-related infrastructure (such as a pump)

Unbundling occurred in most Basin States between 2003 and 2007 as required under the National Water Initiative (NWI), to which all Basin States have subscribed. This unbundling typically involved the creation of water access entitlements (WAEs), separate from land, as well as water use rights and sometimes rights to operate certain works. Infrastructure operators providing off-river infrastructure services have also generally created separate water delivery rights.

In its Final Advice on the Water Trading Rules (WTR), the ACCC noted that unbundling can increase trading opportunities and thus provide water users with greater flexibility to manage their water access, use, delivery and land-holding needs.

Unbundling has several impacts on the value of water rights, particularly in conjunction with the ability to trade these rights:

* the total net value of a person’s water right holdings, which previously related to a single right, is separated across several rights
* water access rights (including WAEs and water allocation) have positive value because they give the holder certain rights to take and hold water, which has intrinsic value
* generally, where a separate water delivery right is created, this takes on a ‘negative’ value because it forms the basis on which ongoing fixed infrastructure charges (and possibly termination fees) are imposed for off-river infrastructure services (primarily the delivery of water through pipes and channels) which were previously levied on the combined water right
* the positive value of a water access right increases when it is made tradeable, because more alternative uses are now possible (e.g. use for irrigation in a different valley, environmental use, etc.), and therefore demand for the right increases
* the negative value of a water delivery right decreases when it is made tradeable, because water delivery rights can more effectively be used to ration network capacity, and because an irrigator may be able to avoid paying termination fees via water delivery right trade

Therefore, the net effect of unbundling and trade facilitation is to increase the value of a person’s holdings of tradeable water rights (their WAEs, water allocations, water delivery rights and irrigation rights), and to allow them to deal more flexibly with the rights they hold.

However, many stakeholders at the ACCC’s public forums indicated strong concerns about unbundling and, in particular, the creation of separate water delivery rights, which they regard as a liability. In some cases, irrigators had sold their WAE (often to the Government) separate from their water delivery right, and were now facing increased fixed infrastructure charges (levied on the water delivery right which they had retained) and could not afford the termination fees payable to terminate their water delivery right. In other cases, there were reports that irrigators had been advised to sell their WAE in order to retire debt, but to retain their water delivery right, and rely on water allocation trade (‘temporary trade’) in order to meet their water needs, and were now facing high water prices which stakeholders stated made their farms unsustainable. Concerns about high water allocation prices are considered in section 8.1.3.

The ACCC acknowledges that there were significant and complex changes for irrigators during the transition to unbundling between 2003 and 2007, and that many irrigators during that time faced significant financial pressure given the severe drought conditions. Some irrigators may have made decisions to trade their WAEs, or their water delivery rights, without a complete understanding of the long-term impact of these decisions. It became apparent in the course of this review that some irrigators continue to have concerns about the complexity of water trading markets, and may not fully understand the nature of the unbundled water rights and, in particular, what water charge obligations relate to the unbundled rights.

Similarly, charges for on-river infrastructure services are usually levied on the basis of water access right held or used (in the absence of any separate right to storage of on-river delivery). This can in turn can lead to a belief that these infrastructure charges are for the water access right itself (rather than the infrastructure services relating to the water access right), and there are corresponding concerns at having to pay these charges in periods of low water availability. The ACCC notes that the obligation to pay ongoing infrastructure charges and, where relevant, termination fees, was not created by unbundling.

While the ACCC remains of the view that unbundling water rights will be ultimately beneficial for most irrigators as it increases the value of their holdings and increases flexibility, it recognises that some individual irrigators have been significantly impacted to their detriment by the transition. Some stakeholders have suggested that an Ombudsman or other mediation service would be of assistance to individual irrigators when negotiating with monopoly infrastructure operators as to charges, fees and water access in their particular circumstances. The ACCC considers this suggestion further in section 8.3 below. The ACCC also recognises that it is incumbent upon regulators and Government agencies in this area to more clearly explain and improve water users’ understanding of the nature of the water rights that they hold, the options to trade those rights and the regulated water charges applicable to them. This may go some way towards addressing these issues and assist irrigators and other water users to make better informed trading decisions.

#### Draft recommendations

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| Recommendation 8‑B  Basin States, infrastructure operators, the MDBA and the ACCC should make it a priority to better inform rights holders of the benefits and obligations on right holders conferred by each type of tradeable water right, particularly in relation to charges payable and trading options. |

### Trade by non-water users and concerns about ‘speculators’

Unbundling and the removal of certain trading restrictions has enabled non-water users to obtain water access rights. For the purpose of this discussion, a non-water user is a person that does not use water for irrigation, environmental purposes or any other consumptive use, but instead primarily holds water access rights for investment purposes.

The ACCC has heard concerns from several stakeholders, chiefly via its public forums, about ownership and trade of water access rights by non-water users. In these stakeholders’ views, non-water users who hold water access rights are engaging in ‘speculative’ activity in water markets, and deliberately attempting to drive up water allocation prices in order to maximise their investment returns. These stakeholders recommended that non-water users should be banned or limited in some way from holding water access rights.

Given the limitations on available information as to the entities involved in water trading (see the discussions at 8.1.1 above), most of the submissions received by the ACCC on this issue have been necessarily anecdotal. The ACCC also has not been able to find any firm evidence of water market speculation driving up water prices. Furthermore, the available data appears to indicate an ongoing strong inverse correlation between water allocation prices and general water availability. That is, water allocation prices in water markets generally increase during periods of dry seasonal conditions (and low storage inflows) because less water is available to be allocated for use and/or trade and water demands of crops increase. Conversely, water allocation prices generally decrease during wetter periods when more water is available and demand is lower. Although individuals’ marginal water use and trading actions affect the supply of and demand for water allocation in the market at a particular point in time, fundamentally prices reflect the total amount of water available to be allocated.

Having said that, the ACCC acknowledges that the current high water allocation trading prices are a concern for many irrigators. The ACCC also accepts that non-water users will seek to maximise their return on water assets. However, water trading is also of benefit to irrigators. Irrigators will also ordinarily seek to maximise their return on their water access rights by using the water made available under such rights to produce agricultural output. However, for some irrigators in some circumstances it may be more beneficial to carryover water, or sell water allocation on the market. The availability of flexible water markets provides irrigators this additional financial option.

The ACCC remains of the view that there should not be any limitations on which entities can buy and sell water in the Basin. It also recognises, however, that due to information asymmetries there may be conduct by participants in the market that may be distorting or manipulating the market to unfairly benefit some participants.

While not raised by stakeholders, the ACCC notes that tariff structures (in particular for on-river infrastructure services) featuring lower fixed charges (and higher variable charges) arguably reduce the WAE holding costs for those water market participants seeking to trade (rather than use) the consequential water allocation. Similarly, the lack of any separate charge for those who store water for most or all of a season, or who carryover water into the next season is also beneficial to such traders.

It would be cause for concern if any market participant was seeking to manipulate markets through misleading and deceptive conduct or anticompetitive practices. If specific concerns are identified raising such issues, the ACCC can and will investigate them. These issues may also benefit from a broader market study or formal inquiry by the ACCC or another body.

## Concerns about the Murray Darling Basin Plan & water recovery

### Sustainable Diversion Limits

The Basin Plan sets long-term average sustainable diversion limits (SDLs) that are considered to ‘reflect an environmentally sustainable level of water use (or 'take'). An environmentally sustainable level of take is the amount of water that can be taken for town water supplies, industry, agriculture and other human or 'consumptive' uses, while ensuring there is enough water to achieve healthy river and groundwater systems.

A number of stakeholders have either implicitly or explicitly questioned the SDL limits as water set aside for non-consumptive or environmental purposes is water that cannot be used for irrigation. Irrigator Ruth Angel stated that ‘environmental flows are prioritised. They get water when we don’t.’[[646]](#footnote-646) A number of stakeholders at the regional public forums commented that there was too great a priority placed on environmental (non-consumptive) water versus water for irrigation.

Some stakeholders questioned the process for adjusting the SDL as being uncertain in regard to the likely outcome of the process.

### Water recovery methods and their impacts

There are a number of methods that Basin States and the Commonwealth Government can use to recover water for environmental purposes. The two primary methods are:

* buybacks of water from irrigators
* infrastructure projects to increase water efficiency, with a portion of the water savings used for environmental outcomes.

The overwhelming majority of stakeholders who expressed a view on water recovery methods during the ACCC’s public forums had strong reservations about buy-backs. The ACCC notes the Government has recently moved to cap the volume of water that can be recovered through buyback at 1500 GL and instead to prioritise water recovery through infrastructure investment.[[647]](#footnote-647)

However concerns were also raised in relation to infrastructure projects. In particular, there were concerns from some irrigators about the potential for further efficiency improvements (and government funding) where irrigators had previously self-funded other efficiency measures. Also, although water efficiency projects are often built at no capital cost to infrastructure operators and individual irrigators, this infrastructure can have higher ongoing (“opex”) costs than the infrastructure it replaced; a cost that must ultimately be borne by irrigators. Other stakeholders felt that the volume of water they were required to transfer to the Government in return for infrastructure funding was too high.[[648]](#footnote-648)

### Summary

The ACCC notes these issues and the concerns of irrigators with the changes required because of the Basin Plan. However these matters are outside the scope of the ACCC’s review and of the water charge rules and have been discussed in a number of other forums. The ACCC accordingly does not propose to comment further on these issues.

## Concerns about dispute resolution mechanisms in the rural water sector

In its Issues Paper the ACCC raised the possibility of a new Ombudsman service to resolve disputes between infrastructure operators and individual irrigators.

The Ombudsman service may involve the creation of a new body which would involve additional costs which would ultimately be passed onto irrigators. Alternatively, it may be possible (and preferable) to use or modify existing agencies with similar purposes. For example, there is an existing energy and water ombudsman in most states, such as the Energy and Water Ombudsman of NSW (EWON) and Victoria (EWOV). These ombudsmen have varying powers to deal with rural irrigation matters with only EWOV having jurisdiction over rural water matters at a general level (although whether there is jurisdiction in relation to a particular matter will depend on the circumstances).

Several stakeholders commented on the possibility of an Ombudsman. Waterfind noted that smaller irrigation trusts often set “unjust restrictions to water trading” on their members. [[649]](#footnote-649) Waterfind also stated that the trustees “in some cases even benefit monetarily or in other ways due to imposed restrictions and their position”. Waterfind stated that it “believes that the opening for an ombudsman or tribunal type oversight would provide an option for individual trust members to claim their rights to manage their own water assets in problematic situations, as well as provide some pressure to trusts or schemes practicing unjust policies”.

The National Irrigators’ Council (NIC) [[650]](#footnote-650)  and Central Irrigation Trust (CIT) [[651]](#footnote-651)  provided qualified support, stating that they would “support an Ombudsman review process only if [it] covered all aspects of the Water Act, the MDBA Plan [*sic*] and associated Federal and State government rules, regulations and operations”. Both stakeholders stated that they “would not support such a review process if it was only limited to the 3 [water charge rules] being reviewed”.

Broadly, the ACCC considers that disputes arising between an infrastructure operator and its customer related to a requirement of the water charge rules, or the CCA more generally, can and should be raised directly with the ACCC. While the ACCC does not provide a dispute resolution service in relation to the rules, it will investigate allegations of a contravention and work with infrastructure operators to resolve any such concerns. Where an alleged contravention has had a detrimental impact on a customer, this will be taken into account by the ACCC in deciding how it seeks to resolve the matter.

However, the ACCC is aware that disputes between infrastructure operators and their customers often involve a range of inter-related issues, potentially including water charge rules issues, matters governed by State water management law such as water quality issues, and other matters that may form part of an infrastructure operator’s licence conditions. The ACCC considers that an ombudsman scheme with jurisdiction over such disputes could be a particularly valuable service for infrastructure operator customers.

There are various forms a new body could take. One option would be for the current jurisdiction of state-based ombudsmen to be expanded to include disputes on matters governed by State water management law and possibly other types of disputes between infrastructure operators and customers.

For example, there is an existing energy and water ombudsman in all Basin States (except the A.C.T.), however their coverage of infrastructure operators and irrigators is limited:

* The Energy and Water Ombudsman of Queensland (EWOQ) covers only residential and some small business customers in the south-eastern corner of Queensland. The small business customers covered are those consuming less than 100 kilolitres (0.1 ML) per year. Therefore, irrigators are not covered by the EWOQ scheme.[[652]](#footnote-652)
* The Energy and Water Ombudsman of NSW (EWON) covers only small retail customers. Small retail customers are defined as customers consuming a maximum of 15 megalitres (ML) per year.[[653]](#footnote-653) This level of consumption means that small businesses, including irrigators are not covered by the scheme.
* The Energy and Water Ombudsman of SA (EWOOSA) covers retail customers only and not small businesses such as irrigators.[[654]](#footnote-654)

Only the EWOV covers disputes between irrigators and irrigation operators. There are two conditions on EWOV’s jurisdiction of such disputes:

* the infrastructure operator must be a member of EWOV[[655]](#footnote-655)
* binding determinations are limited to $20,000 or $50,000 if both parties agree.[[656]](#footnote-656)

Alternatively, the scope of the jurisdiction of small business commissioners in each Basin State could be extended to allow them to mediate such disputes. Queensland and the A.C.T. do not have a Small Business Commissioner, however, there may be other bodies that can handle this mediation function such as Dispute Resolution Centres in Queensland or the Conflict Resolution Service in the A.C.T.

A further option is a dedicated new National or Basin-wide scheme, which may be more able to deal with cross-jurisdictional issues and matters that concern both Commonwealth and State issues. There are a number of dispute resolution mechanisms set up at Commonwealth and State levels for small businesses, commercial tenancies and franchises that may provide a template or guide for the most effective way resolve such disputes.

All three options will involve additional costs which may be recovered in part or in full from the industry (and therefore from water users). The relative costs and benefits of expanding existing schemes or creating a new scheme should be considered by governments at the Basin State and Commonwealth level.

#### Draft recommendations

|  |
| --- |
| Recommendation 8‑C  The ACCC recommends that governments consider the merits of expanding the jurisdiction of existing ombudsman schemes or small business commissioners to resolving disputes between infrastructure operators and their customers, or the creation of a new scheme to perform these roles. |

## Water quality concerns

In submissions to the Issues Paper, and during public forums, some stakeholders raised concerns about the quality of water supply delivered by infrastructure operators.

For example, Wah Wah Stock and Domestic Water Users Association (WWSDWUA) noted that “[w]ater currently delivered in the open channel system often has high levels of blue green algae and is not suitable for Stock [and] Domestic use”.[[657]](#footnote-657) Sally Jones, an irrigator in Murrumbidgee, also expressed concerns about “serious ongoing water problems” in the Murrumbidgee Irrigation Area, in particular, the management of siltation and salinity. [[658]](#footnote-658) Ms Jones stated that the, “gross lack of transparency and auditing means that the water quality deficiencies are not being highlighted and appropriately managed”.

While water quality may be a characteristic of a class of infrastructure service (for example, where water is treated to a particular quality), the water charge rules cannot directly regulate water quality. This is typically done, if at all, under State water management law and through licence conditions placed on infrastructure operators. As such, the ACCC’s recommendation in relation dispute resolution mechanisms in section 8.3 is relevant.

# Assessment of change in regulatory cost

The ACCC has considered a range of possible amendments to the water charge rules. Further details on the specific proposed amendments are set out in chapters 5 to 7. This chapter sets out the estimated change in regulatory costs associated with the proposed amendments.

The terms of reference for the review of the water charge rules requires the ACCC to consider consistency with the Commonwealth Government’s deregulation agenda to reduce the regulatory burden for individuals, businesses and community organisations (see section 1.1). The ACCC believes that the proposed changes to the water charge rules have balanced the competing interests of reducing the regulatory burden while also maintaining effective standards.

The ACCC encourages feedback on the estimated change in regulatory costs provided in this chapter (see section 1.3 on how to make a submission).

Table 9.1 below sets out the annualised change in regulatory costs for each category of proposed changes to the water charge rules (see table 9.2). The estimated change in regulatory burden due to the proposed changes to the water charge rules is a reduction of $172 155 per annum.

Table 9.1—Annualised change in regulatory cost

|  |  |
| --- | --- |
| **Category of proposed amendment** | **Change in regulatory cost ($)** |
| Non-discrimination provisions | 13 515 |
| Schedule Of Charges | -43 270 |
| Network Service Plans | -77 558 |
| Approvals and determinations | -78 000 |
| Distributions | 4215 |
| Termination fees (calculation method) | 8352 |
| Termination fee (other provisions including information requirements) | 3587 |
| Planning and management charges (information disclosure) | -2618 |
| Planning and management charges (publication requirements) | -4371 |
| One-off and start-up costs | 3993 |
| Estimated annualise change in regulatory burden | -$172 155 |

The majority of the decreases to regulatory costs are associated with the proposed changes to price determinations, network service plans and schedule of charges. However, the regulatory savings are not evenly distributed across all groups of infrastructure operators. There is a negligible impact on group 1 and group 2 (small and medium size member-owned operators) and a large change in regulatory burden for group 3 and group 4 (large member-owned and non member-owned operators). The change in regulatory burden is primarily due to the proposed changes to price determinations and network service plans.

The ACCC consulted the Office of Best Practice Regulation (OBPR) and OBPR guidance material on the methodology to estimate the change in the regulatory burden.[[659]](#footnote-659)

Regulatory costs are the cost impacts on businesses, communities and individuals that occur as a result of the introduction of new regulations, including a change to existing regulations. The estimated change in regulatory costs for the proposed amendments to the water charge rules set out below were assessed as the costs imposed on the businesses that are subject to the water charge rules. Under OBPR guidelines all regulatory burdens imposed on state and commonwealth government departments are not included in regulatory costs. The ACCC has included government owned corporations, but Basin State Government departments have not been included.

Also, consistent with OBPR guidance the change in the regulatory burden only relate to costs incurred directly by regulated businesses. The benefits to the customers of regulated businesses (for example, customers having access to more information regarding charges) are outside the scope of the regulatory burden measurement methodology.

Accordingly, the ACCC has assessed the change in the regulatory burden in relation to 31 infrastructure operators[[660]](#footnote-660) that are currently subject to the water charge rules. The water charge rules impose different requirements on these infrastructure operators depending on their size and ownership structure. As such, the regulatory costs incurred are not uniform across all operators, and even within each group. To account for this variation in calculating the change in the regulatory burden, the ACCC has grouped the 31 operators based on the following characteristics:

* Nature of activities: whether the infrastructure operator is also an IIO[[661]](#footnote-661)
* Ownership: whether an infrastructure operator is ‘member owned’ or not[[662]](#footnote-662)
* Size: measured by the volume of water held under water access entitlement (WAE) that the operator services.

Table 9.2 below sets out four groups of infrastructure operators, and identifies the characteristics and number of operators within each group. The change in the regulatory cost for each group is based on an estimate of the average affect for all operators within the group that are affected by the proposed amendment.

Table 9.2—Operator groups

|  |  |  |
| --- | --- | --- |
| **Group** | **No. of operators** | **Characteristics** |
| 1 | 8 | IIO, member-owned holding less than 10 gigalitres (GL) of WAE |
| 2 | 12 | IIO, member-owned, holding between 10-125 GL of WAE |
| 3 | 5 | IIO, member owned operator holding more than 125 GL of WAE and non-member operator holding 125 GL-250 GL |
| 4 | 6 | Infrastructure Operator (that may or may not also be an IIO), non-member owned, holding 10 GL – 125 GL of WAE or more than 250 GL of WAE |

Consistent with the OBPR methodology, where a change in the burden only occurs in the first year, the estimated change in the burden has been annualised over a 10 year period.

For most proposed changes to the water charge rules, the change in regulatory cost is calculated as the total number of operators affected by the proposed change multiplied by the estimated change in staff hours required to comply, multiplied by the OBPR default standard hourly wage rate of $37.40, multiplied by a labour on-cost multiplier of 1.75.[[663]](#footnote-663)

The estimated change in regulatory burden has been calculated for nine categories of proposed amendments, as well as for the initial increase in burden associated with operators understanding the proposed changes.[[664]](#footnote-664)

Table 9.3 below presents the categories of proposed rule amendments including the operator group(s) affected and the proposed rule amendment.

Table 9.3—Categories of proposed amendments and affected operator groups

|  |  |  |  |
| --- | --- | --- | --- |
| **Category of proposed amendment** | **Relevant operator groups (see table 9.1)** | **Relevant water charge rules[[665]](#footnote-665)** | **What the proposed amendments relate to** |
| Non-discrimination provisions | 1, 2, 3, 4 | WCIR  (Part 3) | Enhanced non-discrimination provisions in relation to infrastructure charges |
| Schedule of charges | 1, 2, 3, 4 | WCIR  (Part 4) | The information an infrastructure operator is require to provide on its schedule of charges and publication requirements |
| Network Service Plans | 3 | WCIR  (Part 5) | The repeal of Network Service Plans |
| Approvals and determinations | 4 | WCIR  (Part 6) | The application of Part 6 including procedural arrangements, length of regulatory period, basis for approving or determining charges, annual reviews and variations of determinations |
| Distributions | 1, 2, 3 | WCIR  (Part 7) | The application of Part 7 when certain distributions are made to customers by IOs |
| Termination fees (calculation method) | 1, 2, 3, 4 | WCTFR | The method used to calculate termination fees |
| Termination fees (other provisions including information requirements) | 1, 2, 3, 4 | WCTFR | The circumstances a termination fee can be imposed and the limitations on imposing termination fees |
| Planning and management charges (information disclosure) | 4 | WCPMIR | The removing requirements for the disclosure of information in relation to water planning and management activities |
| Planning and management charges (publication requirements) | 4 | WCPMIR | The publication requirements for Basin State departments and water authorities that levy a WPM charge |
| One-off and start-up costs | 1,2,3,4 | WCIR, WCTFR, WCPMIR | The consolidation of the water charge rules into a single instrument and the one-off costs to understand proposed amendments |

The following sections present the calculation of estimated change in regulatory burden for each category of proposed rule amendments.

## Proposed amendments regarding infrastructure charges

### Non-discrimination provisions

Under the current Part 3 provisions of the WCIR, a member-owned operator (of any size) is prevented from charging a different charge for an infrastructure service of the same class to a customer based on whether or not that customer holds an irrigation right against the operator. However, this rule does not prevent different charges where the difference reflects actual cost differences.

As outlined in section 5.3, these provisions should be extended to prohibit all infrastructure operators (regardless of ownership) from discriminating in relation to:

* the purpose for which water has been or will be used; or
* whether a tradeable water right has been traded or transformed; or
* the volume, holdings or use of a tradeable water right or separate location related right
* whether there is an association between a separate location-related right and a water access right;
* the area of land owned, occupied or irrigated.

However, the amendments will preserve the operator’s ability to differentiate charges based on underlying costs or levels of service.

The proposed changes to the non-discrimination provisions would also prohibit the imposition of most infrastructure charges as a condition of approval, at the time of, or as a result of a trade of tradeable water right.

The ACCC analysed operators’ schedules of charges and websites in light of the proposed expanded non-discrimination provisions. This analysis suggested 21 operators will either need to adjust their charging approach or provide the ACCC with further information demonstrating that certain differences in charges for infrastructure services of the same class reflect actual differences in underlying costs.

The change in regulatory burden for these 21 operators will include additional staff hours required to either provide supporting evidence to the ACCC to justify charges that are specified differently on the basis of one or more of the above points, or to change their current charging approach to satisfy the proposed non-discrimination provisions. The additional staff hours required will vary across the 21 operators, and even within each group.  Accordingly, all estimates are an average for the group.  For example, the average estimated additional staff hours for each operator in Group 4 is 65 hours, whereas for Group 3 operators it is 120 hours on average given their current charging arrangements as assessed by the ACCC.

This change in regulatory burden is likely to occur only in the first year after the proposed rule change.

As shown in table 9.4 below, the annualised estimated change in regulatory cost for the proposed non-discrimination provisions across all affected operators is an increase of $13 515.

Table 9.4—Change in regulatory cost due to proposed changes to the non-discrimination provisions.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Group 1** | **Group 2** | **Group 3** | **Group 4** | **Total** |
| **No. of affected operators** | 5 | 8 | 5 | 3 | 21 |
| **Review current policies and provide additional information and / or change charging approach** | | | | | |
| Average hours per operator | 94 | 100 | 120 | 65 |  |
| Change in regulatory cost for each group | 30 761 | 52 360 | 39 270 | 12 763 | 135 154 |
| **Annualised change in regulatory cost** | | | | | **$13 515** |

### Schedule of charges

Under the current Part 1 and Part 4 provisions of the WCIR, infrastructure operators are required to produce a Schedule of Charges (“Schedule”). They are further prohibited from imposing infrastructure charges relating to an infrastructure service unless that charge is listed in their Schedule and a copy of the Schedule has been provided to customers.

As outlined in sections 5.4 and 5.13, the ACCC has proposed a number of amendments to the Schedule of Charges requirements. These proposed changes can be considered as either information requirements or publication requirements.

*Information requirements*

The ACCC has proposed a number of amendments to the current Schedule of Charges information provisions (see section 5.4.1) that broadly relate to:

* increasing the level of detail describing what information must be included on the Schedule of Charges
* extending information disclosure requirements to all infrastructure operators
* information relating to ‘pass-through charges’
* information relating to exemptions for an operator to publish details of a regulated charge on their Schedule of Charges and
* information disclosure in relation to planning and management charges (regulatory cost of this proposed amendment is included in section 9.3 below).

The ACCC analysed operators’ Schedules and websites in light of the proposed changes to Schedule of Charges information requirements. All infrastructure operators will be required to make changes to their current Schedule to comply with the proposed Schedule of Charges information requirements. The change in regulatory cost is related to the additional hours required for operators to review their current policies and Schedule to ensure the information requirements under the proposed amendments are included on their Schedule.

The required changes and resulting additional staff hours for each operator to satisfy the proposed changes to Schedule of Charges information requirements will vary across the 31 operators, and even within each group. This is based on the information that operators currently provide on their Schedule and the proposed changes.

For example, under the proposed amendments, operators will be required to provide a general statement setting out:

* the process by which the infrastructure operator decided on the infrastructure charges
* the process customers can seek to participate in the infrastructure operators process for deciding infrastructure charges or make an enquiry or complaint in relation to any matter contained in the operator’s Schedule

This kind of statement has not previously been required to be included on operators’ Schedules. As such, this proposed amendment will result in additional staff hours for all 31 operators. In contrast, the proposed amendment for operators to state the date at which the Schedule comes into effect will only result in additional hours for some operators as other operators already provide this information on their current Schedule.

Due to this variation across operators, all estimates are an average for the group. For example, the estimated additional staff hours for each operator in Group 2 is 30 hours average, whereas for Group 4 operators it is 16 hours on average given these operators include more of the information that will be required under the proposed amendments on their current Schedules.

The change in regulatory burden is likely to occur only in the first year after the proposed rule change. Once operators have reviewed their current policies and Schedules and made changes to satisfy the proposed information requirements, there will be no change in regulatory costs going forward in addition to what is currently required.

*Publication requirements*

Once an operator has produced its Schedule, the WCIR currently require the operator to make that Schedule available in certain ways (see section 5.4.2). The proposed amendments to the Schedule of Charges publication requirements will significantly reduce the regulatory burden on operators.

Under the proposed changes, operators will:

* be required to publish their Schedule on a public section of their website and send the Schedule to customers to satisfy the publication requirement
* be expressly permitted to send an electronic copy of their Schedule (rather than a hard copy) to customers
* no longer be required to publish a copy of their Schedule in a local newspaper or in the Australian Government *Gazette*.

The timeframe for when an infrastructure operator must provide its Schedule to customers will also be changed reducing the regulatory burden on operators.

The ACCC analysed operators’ Schedule, websites and information provided to the ACCC as part of the ACCC’s monitoring role in light of the proposed changes to publication requirements. The regulatory burden for publication requirements will be reduced for 31 operators.

The change in regulatory burden for these 31 operators is related to the reduction of staff hours required to send physical Schedules to customers and printing and postage costs. There will be a change in regulatory burden for seven operators who currently publish their Schedules in the Australian Government Gazette or a newspaper.

The estimated change in regulatory burden has accounted for staff hours and printing and postage costs that will be incurred to provide hard copies of the operators’ Schedules when requested. The ACCC estimates that staff hours will be reduced by 50 per cent on average under the proposed changes to publication requirements. The ACCC estimates that, on average, 31 operators will save $728 on printing and postage costs per annum. However, it is likely that some operators will save more than this while others will save considerably less. Further, seven operators will save $2100 on average as they will no longer be required to publishing their Schedules in the Australian Government Gazette or a local newspaper.

As with the proposed Schedule of Charges information requirements, the change in regulatory burden for proposed publication requirements will vary across the 31 operators, and even within each group. This is primarily due to the variation in the number of customers each operator has. Accordingly, all estimates are an average for the group.

The change in regulatory cost for these 31 operators for Schedule of Charges publication requirements will be realised each year.

*Exemptions to list a regulated charge on Schedule of Charges*

As discussed in section 5.4.3, the ACCC proposed amendments if an operator is granted an exemption from publishing a regulated charge on its Schedule. Under the proposed amendments, the operator will be required to include notice of the exemption on their Schedule. To date, the ACCC has received no applications for an exemption to include a regulated charge on its Schedules. As such, there is likely to be no change in regulatory costs for applications made to the ACCC for an exemption to list a regulated charge on the operator’s Schedule.

As shown in table 9.5 below, the annualised estimated change in regulatory cost for the proposed changes to Schedule of Charges information and publication requirements is a decrease of $43 270.

Table 9.5—Change in regulatory cost due to proposed changes to the Schedule of Charges provisions

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  |  | Group 1 | Group 2 | Group 3 | Group 4 | Total |
| No. of affected operators | | 8 | 12 | 5 | 6 | 31 |
| **Initial review of current policies and information provided on current Schedule of Charges and pass-through charges[[666]](#footnote-666)** | | | | | | |
| Average hours per operator | | 23 | 33 | 29 | 18 |  |
| Change in regulatory cost for each group | | 12 043 | 25 918 | 9490 | 7069 | 54 520 |
| Annualised change in regulatory cost for reviewing current policies and information provided on current Schedule of Charges and pass-through charges | | | | | | **5452** |
| Annual publication requirements**[[667]](#footnote-667)** | | | | | | |
| Average hours per operator | | -4 | -7 | -7 | -4 |  |
| Change in regulatory cost for each group | | -2094 | -5498 | -2291 | -1571 | **-11 454** |
| Annual printing and postage costs per operator | | -728 | | | | **-22 568** |
| Annual publication in Australian Government Gazette or in a newspaper for 7 operators | | -2100 | | | | **-14 700** |
| **Annualised change in regulatory cost** | | | | | | **-$43 270** |

### Network Service Plans

As discussed in section 5.5, the ACCC’s draft advice is for Part 5 of the WCIR to be repealed. If adopted, five infrastructure operators (the five operators in Group 3) will no longer be required to:

* develop a NSP that provides details of the operator’s plans relating to its water service infrastructure over the forthcoming five-year period
* prepare a Network Consultation Paper (NCP) to facilitate consultation with their customers
* give a copy of the NSP to each customer, along with a summary of the consultation undertaken in preparing the NSP
* submit a copy of their NSP to the ACCC who will provide it to a qualified engineer for comment and advice on the prudency and efficiency of the plan which must then be given to each customer and
* prepare and provide an information statement each year to customers when providing its schedule of charges.

Repealing Part 5 of the WCIR will significantly reduce the regulatory burden for five infrastructure operators. The ACCC has estimated the change in regulatory burden based on the regulatory cost of the current Part 5 provisions.

The ACCC has received information from Central Irrigation Trust (CIT) and Murray Irrigation Limited (MIL) regarding the regulatory cost of NSPs and has taken these estimates into account when estimating the change in regulatory cost associated with the proposed repeal of Part 5. CIT estimated that the development of the NSP and associated consultation costs are in excess of $50,000.[[668]](#footnote-668) During the ACCC’s public forum in Deniliquin, a representative from MIL stated that the 2012 NSP cost MIL around $100,000 to complete.[[669]](#footnote-669)

The estimated change in regulatory cost includes the staff hours required to complete the NSP process and other costs such as printing and postage expenses incurred to provide NSPs and NCPs to customers. Staff hours were estimated as a total number that is required to complete the NSP regardless of whether the work was completed in house by the infrastructure operator or outsourced to a consultancy.

The change in regulatory burden varies across the operators in Group 3 due to differences between each operator including its size and management. Accordingly, the estimates are an average for all operators in the group.

It is estimated that the number of staff hours for each operator to complete the NSP process is 900 hours, once every five years. The publication costs of NSPs and NCPs including printing and postage costs is estimated at an average of $16 363 per operator. These operators are required to prepare and provide an information statement each year to customers when providing its schedule of charges. It is estimated that this will require on average seven hours each year.

As shown in table 9.6 below, the annualised estimated change in regulatory cost for the proposed repeal of Part 5 provisions is a decrease of $77 558.

Table 9.6—Change in regulatory cost due to proposed changes to the NSP

|  |  |  |
| --- | --- | --- |
|  | **Group 3** | **Total** |
| **No. of affected operators** | 5 | 5 |
| **NSP process including consultation and NCP** | | |
| Average hours per operator | -900 |  |
| Change in regulatory cost for Group 3 | -294 525 | -294 525 |
| Annualised change in regulatory cost for NSP process including consultation and NCP | | **-58 905** |
| **NSP publication including printing and postage costs** | | |
| Change in regulatory cost for Group 3 | -81 815 | -81 815 |
| Annualised change in regulatory cost for printing and postage costs | | **-16 363** |
| **Annual staff hours to prepare information statement** | | |
| Hours per operator | -7 |  |
| Change in regulatory cost for Group 3 | -2290 | **-2290** |
| **Annualised change in regulatory cost** | | **-$77 558** |

### Approvals and determinations

Under the current Part 6 provisions of the WCIR, an infrastructure operator that is not member-owned and services more than 250GL of water held under WAEs is required to apply for determination or approval of regulated charges by the ACCC or an accredited regulator under Part 9 of the WCIR.[[670]](#footnote-670)

Furthermore, when determining or approving regulated charges, the regulator must apply or consider the following:

* procedural requirements for application for a determination or approval
* the length of the regulatory period
* the basis for approving or determining regulated charges
* annual reviews of regulated charges and
* variation of determinations.

As outlined in section 5.6, the ACCC has proposed a number of amendments that affect the application of Part 6 and procedural requirements under Part 6.

There will be a change in estimated regulatory cost for the three operators that are currently regulated under Part 6.

*Amendments to application of Part 6*

Currently the three operators subject to Part 6 of the WCIR are also subject to regulation of other charges under Basin State legislation. This is because these operators provide infrastructure services outside the Murray-Darling Basin (MDB) and / or in reference to urban water which is not covered by the water charge rules.

As outlined in section 5.6, these three operators will most likely no longer be Part 6 operators under the proposed amendments to the water charge rules. This is because Basin State water management law is very likely to continue to apply, which would provide for their infrastructure charges to be determined by a Basin State regulator outside of the water charge rules. The ACCC has already granted accreditation to relevant Basin State regulators, the Essential Services Commission Victoria (ESCV)[[671]](#footnote-671) and the Independent Pricing and Regulatory Tribunal (IPART),[[672]](#footnote-672) to determine or approve regulated charges of these three operators.

The headline change in regulatory cost due to the proposed changes to the application of Part 6, where Part 6 of the water charge rules will no longer apply to the three operators, is equivalent to the entire cost to the infrastructure operator of participating in the approval or determination process. However, the ACCC considers that this method to estimate the change in regulatory cost is not appropriate as the three operators will still most likely be subject to a requirement to have their infrastructure charges approved or determined, but under Basin State water management law rather than under the water charge rules. Further, if Basin State water management law ceased to apply, which the ACCC considers to be unlikely, to one of these operators, they would revert to being subject to proposed Part 6 provisions.

Given this, the ACCC has estimated the change in regulatory cost as equivalent to the difference between the current provisions where each operator is subject to two approval or determination processes (Basin State water management law and the water charge rules) and the proposed amendments where each operator will only be subject to one process (Basin State water management law).

Submissions from Basin State regulators and infrastructure operators noted the significant regulatory burden imposed on them when more than one application for determination to more than one regulator is required.[[673]](#footnote-673) However, these submissions did not provide cost estimates.

State Water (now WaterNSW)’s 2013 application to the ACCC for regulated charges to apply from 1 July 2014 provided that operational expenditure for regulatory and ACCC requirements were $200 000.[[674]](#footnote-674) WaterNSW provided that this was due to ‘higher costs associated with the move to the ACCC and contributions to NSW Government reviews of bulk water costs/charges outside the regulatory determination.’[[675]](#footnote-675) The ACCC estimates that with the accreditation of IPART now in place, this operational expenditure is more likely to be in the order of $100 000.

Goulburn-Murray Water (GMW) and Lower Murray Water (LMW) did not provide similar information in their application to the ESCV. However, the ACCC considers that the cost for GMW and LMW is likely to be similar to WaterNSW. As such, the cost applying for approval or determination of regulated charges under two different processes is likely to be $100 000 per application.

Under the current Part 6 provisions, the initial regulatory period is three years and subsequent regulatory periods are four years. Over 10 years, there will be on average 2.6 applications which is equivalent to $260 000 per operator. The annualised regulatory cost is therefore estimated at $26 000 per operator.

The proposed amendment to the application of Part 6 also provides for the regulation of infrastructure charges imposed by infrastructure operators whose infrastructure services must be obtained in relation to water sharing arrangements between Basin States. [[676]](#footnote-676) The change in regulatory burden for this proposed amendment is zero as no such operator currently impose infrastructure charges and this is unlikely to change in the foreseeable future.

*Amendments to procedural requirements under Part 6*

As outlined in section 5.6 the ACCC has proposed amendments to Part 6 processes. These include:

* revised time limits for determinations and annual reviews
* allowing variation of regulatory periods to better align determinations applying to Basin and non-Basin charges
* clarifying requirements for the regulator to take into account government subsidies or CSOs and other sources of non-regulated charge revenue
* Altering materiality thresholds which must be met in order for an operator to be able to apply for a variation of a determination
* Allowing for the regulator to include a ‘contingent project’ in the initial approval / determination.

Given the proposed amendments to the application of Part 6 outlined in section 5.6 and the discussion above where Part 6 is unlikely to apply to any infrastructure operators, the change in regulatory burden for proposed amendments to procedural requirements under Part 6 is estimated at zero.

As shown in table 9.7 below, the annualised estimated change in regulatory burden for the proposed changes to the price determination provisions is a reduction of $78 000.

Table 9.7—Change in regulatory cost due to proposed changes to determinations and approvals

|  |  |  |
| --- | --- | --- |
|  | Group 4 | |
| **No. of affected operators** | 3 | |
| **Proposed changes to application of Part 6 provisions** | | |
| Change in regulatory cost per operator | -260 000 | |
| Change in regulatory cost for Group 4 | -780 000 | |
| **Annualised change in regulatory cost** | | **-$78 000** |

### Distributions

Under Part 7 of the WCIR, a member-owned operator is required to have its infrastructure charges approved or determined by the ACCC or an accredited regulator for five years if they make financial distributions to all ‘related customers’ but not to other customers.

As outlined in section 5.7, the ACCC has proposed a number of amendments to Part 7 provisions for distributions to address the narrowly defined ‘trigger’ and the ‘consequence’[[677]](#footnote-677) when an operator provides distributions. The main amendments proposed for Part 7 will:

* adapt the ‘trigger’ provisions to cover all distributions except certain defined distributions that are specifically exempted
* expand the definition of distribution to cover the distribution of water
* apply to distributions made by all infrastructure operators, rather than only member-owned infrastructure operators
* specify the ACCC as the regulator for Part 7 and
* amend the ‘consequence’ of triggering Part 7 provisions providing the ACCC with the ability to exempt an operator who has ‘triggered’ Part 7

A number of submissions to the ACCC’s Issues Paper argued that expanding the scope of distributions would increase the regulatory burden imposed on operators and limit their ability to manage their business.[[678]](#footnote-678) However, the ACCC considers that the proposed amendments will not substantially impact most infrastructure operators. Most infrastructure operators that make distributions that the ACCC is aware of make distributions on the basis of one or other of the proposed specifically permitted distributions.

The change in regulatory cost in relation to the approval or determination of infrastructure charges under Part 7 is estimated at zero under the proposed changes. This is because the process of applying for approval or determination of infrastructure charges is unchanged under the proposed changes. Further, to date no operators have provided financial distributions to their members of the kind that would trigger the application of Part 7.

However, there is a change in regulatory cost for 25 operators associated with the additional staff hours that will be required to understand the types of distributions that will ‘trigger’ the amended Part 7 provisions and assessing whether an operator’s distribution would be in the form specifically permitted under the proposed provisions.

As with other proposed changes to the water charge rules, the additional staff hours required will vary across the 25 operators, and even within each group. Accordingly, all estimates are an average for the group.

This change in regulatory cost is likely to occur only in the first year after the proposed rule change.

As shown below in table 9.8 below, the annualised estimated change in regulatory cost for the proposed changes to Part 7 provisions is an increase of $4215.

Table 9.8—Change in regulatory cost due to proposed changes to the Part 7 provisions

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Group 1** | **Group 2** | **Group 3** | **Total** |
| **No. of affected operators** | 8 | 12 | 5 | 25 |
| **Initial review of current policies and understanding ‘trigger’ and ‘safe harbour’ distributions** | | | | |
| Average hours per operator | 21 | 28 | 28 |  |
| Change in regulatory cost for each group | 10 996 | 21 991 | 9163 | 42 150 |
| **Annualised change in regulatory cost** | | | | **$4215** |

## Proposed amendments regarding termination fees

As discussed in section 6.2, the ACCC proposes to expand the current application of termination fee provisions from IIOs to infrastructure operators more generally. This will result in an additional four infrastructure operators being subject to rules governing termination fees. However, currently, operators that are an infrastructure operator but not an IIO generally do not impose a termination fee as the right to delivery is still bundled with the right to water in the most of the MDB (see section 6.1). As such, because further unbundling is unlikely in the foreseeable future, the change in regulatory burden for these four operators now subject to the termination fee provisions is estimated to be zero.

### Method of calculating termination fees

Under the current WCTFR, IIOs calculate the maximum applicable termination fee in reference to the total network access charge (TNAC). Broadly, TNAC currently:

* refers to all fixed charges that are payable by an irrigator to an IIO in the financial year in which notice is given or the termination takes effect and
* excludes fixed charges in relation to a service for the storage of water.

As discussed in section 6.2, the ACCC has proposed a number of amendments relating to the calculation of termination fees. These proposed amendments include

* applying the termination fee multiple (currently x10) only to fixed volumetric infrastructure charges levied per unit of water delivery right held, but
* also allowing the maximum termination fee to be increased by 10x any separate charge for infrastructure that is dedicated to the exclusive use of the terminating irrigator (where access to that infrastructure is being terminated).

The ACCC analysed operators’ schedules of charges and websites in light of the proposed changes to the method for calculating termination fees. 27 operators will need to change their approach to calculating termination fees.

The change in regulatory burden for these 27 operators will result from additional staff hours to review their current policies and method of calculating termination fees. If an operator’s current method of calculating termination fees does not meet the proposed amendments, operator will need to change their approach. The additional staff hours required to satisfy the proposed changes to calculating termination fees will vary across the 27 operators, and within each group. Accordingly, the estimated additional staff hours for each operator in Group 4 is estimated to be seven hours on average, whereas for Group 3 operators it is 20 hours on average given their current termination fee calculation method and current complexity of their charges.

This change in regulatory cost is likely to occur only in the first year after the proposed rule change.

However, there will also be an additional change in the regulatory cost each year as operators are expected to want to include in the calculation of maximum termination fees any separate non-volumetric charges for infrastructure that is dedicated to the exclusive use of a terminating irrigator. These operators will be required to record contributions made by irrigators to infrastructure that is provided for their exclusive use prior to termination.

Again the additional staff hours required by each operator will vary. Accordingly, the estimated additional staff hours for each operator in Group 1 is estimated to be two hours on average, whereas for operators in Groups 2 and 3, that generally have more complex tariff structures, it is estimated at 4 hours on average. The average yearly additional staff hours also accounts for the difference in the number of terminations in each operator. The ACCC has used data provided through its annual monitoring role to assess the number of terminations in each operator.[[679]](#footnote-679)

As shown in table 9.9 below, the annualised estimated change in regulatory cost for the proposed changes to the calculation of termination fee is an increase of $8352

Table 9.9—Change in regulatory cost due to proposed changes to the method of calculating termination fees

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  |  | **Group 1** | **Group 2** | **Group 3** | **Group 4** | **Total** |
| **No. of affected operators** | | 8 | 12 | 5 | 2 | 28 |
| **Review  current policies and method of calculating  termination fees, and if required changing approach** | | | | | | |
| Average hours per operator | | 10 | 15 | 20 | 8 |  |
| Change in regulatory cost for each group | | 5236 | 11 781 | 6545 | 1047 | 24 609 |
| Annualised change in regulatory cost for initial review of current policies and method of calculating termination fees, and if required changing approach | | | | | | **2461** |
| **Annually record contributions made by irrigators for additional termination fee** | | | | | | |
| Average hours per operator | | 2 | 4 | 4 | 3 |  |
| Change in regulatory cost for each group | | 1047 | 3142 | 1309 | 393 | **5891** |
| **Annualised change in regulatory cost** | | | | | | **$8352** |

### Other termination fee provisions including additional information provisions

Under the current WCTFR provisions, operators are not obliged to advise an irrigator of the amount of the termination fee payable or to set out how the termination fee is calculated when the irrigator gives notice of termination.

As discussed in section 6.3, the ACCC proposes amendments to the WCTFR that will require operators, upon receiving a notice of an intention to terminate, or a request for an estimate of the termination fee, to

* set out the total termination fee including how it was calculated
* notify the irrigator if they are able to trade their water delivery right and any rules governing such trade.

Furthermore, the ACCC proposes that the water charge rules reduce the termination fee multiple in relation to water delivery right charges from 10x to 1x if an operator does not provide for the trade of water delivery rights.

To account for the proposed changes to the distribution of schedules of charges (see section 5.4), the ACCC also proposes that the calculation of the maximum termination fee be done using the infrastructure charges that were in effect either at the time the irrigator gives their notice or 30 days before the notice is given, whichever produces the lower maximum termination fee.

The ACCC analysed operators’ schedule of charges and websites in light of these proposed changes to the circumstances in which a termination fee can be imposed.

There will be a change in regulatory cost for 27 operators. This change will include additional staff hours required to review their current policies and processes as well as setting up new processes to enable provision of additional information to terminating or potentially terminating customers. The additional staff hours required will vary across the 27 operators. Accordingly, all estimates are an average for the group.

This change in regulatory burden is likely to occur only in the first year after the proposed rule change.

However, there will also be an additional change in the regulatory cost each year as operators will be required to provide terminating or potentially terminating customers with additional information.

Again the additional staff hours required by each operator will vary. Accordingly, the estimated additional staff hours for each operator in Group 1 is estimated to be one hour on average, whereas for Group 2 operators it is 2 hours on average given the difference in the number of terminations in each operator. The ACCC has used data provided through its annual monitoring role to assess the number of terminations in each operator and to estimate an average.[[680]](#footnote-680)

As shown in table 9.10 below, the annualised estimated change in regulatory cost for the proposed changes to termination fee provisions is an increase of $3587.

Table 9.10—Change in regulatory cost due to changes in termination fee provisions

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  |  | **Group 1** | **Group 2** | **Group 3** | **Group 4** | **Total** |
| **No. of affected operators** | | 8 | 12 | 5 | 2 | 27 |
| **Initial review of current policies relating to termination fees** | | | | | | |
| Average hours per operator | | 4 | 4 | 4 | 4 |  |
| Change in regulatory cost for each group | | 2094 | 3142 | 1309 | 524 | 7069 |
| Annualised change in regulatory cost for initial review of current policies relating to termination fees | | | | | | **707** |
| **Annual provision of information to terminating customers** | | | | | | |
| Average hours per operator | | 1 | 2 | 2 | 1 |  |
| Change in regulatory cost for each group | | 524 | 1571 | 654 | 131 | **2880** |
| **Annualised change in regulatory cost** | | | | | | **$3587** |

## Proposed amendments regarding planning and management charges

Planning and management charges are currently regulated under the WCPMIR which applies to Basin Sate government departments and water authorities. Under OBPR guidelines all regulatory burdens imposed on state and commonwealth government departments are not included in regulatory costs. As such, the estimated change in regulatory burden only includes four water authorities in Victoria[[681]](#footnote-681) and not the five Basin State departments that also have requirements under the WCPMIR.

GMW submitted that the cost of compliance has been insignificant to them whilst IPART noted that “NSW has complied with the WCPMIR, at relatively little cost.”[[682]](#footnote-682)

### Disclosure of planning and management charge information

Under the current WCPMIR provisions, persons who determine charges to recover the costs of WPM activities are required to disclose details of the:

* charge and charge amount
* processes for determining the charge amount
* planning and management activities the charge relates to
* associated costs of planning and management activities.

As outlined in section 7.2, the ACCC proposes that the WCPMIR be repealed, but that requirements for disclosure of particular information relating to planning and management charges be incorporated into the existing schedule of charge requirements under the WCIR.

As such, persons who determine planning and management charges will continue to be required to disclose information related to planning and management charges but they will no longer be required to provide and disclose cost information on planning and management activities.

Under this proposed change, four operators will no longer be required to disclose cost information relating to planning and management activities. The change in regulatory burden is due to the reduction in staff hours required to disclose planning and management cost information. There is no change in the regulatory burden under the proposed changes to include planning and management charge information requirements in the proposed schedule of charge requirements of the water charge rules. This is due to there being no substantive changes to the information that will be required in relation to planning and management charges.

The reduction in staff hours will vary across the four operators. Accordingly, all estimates are an average for the group. The variation in staff hours across the four operators is primarily due to the number of water planning and management activities undertaken by the operator.

The change in regulatory burden is estimated to occur annually, as Basin State departments and water authorities are required to publish information relating to planning and management charges before they take effect, and such charges are typically adjusted each year.

As shown in table 9.11 below, the annualised estimated change in regulatory cost for the proposed repeal of WCPMIR and incorporation of the cost disclosure requirements into the revised water charge rules on schedules of charges is a decrease of $2618.

Table 9.11—Change in regulatory cost due to proposed repeal of the WCPMIR and incorporation into the water charge rules

|  |  |  |
| --- | --- | --- |
|  | **Group 4** | |
| **No. of affected operators** | 4 | |
| **Removal of requirement to disclose planning and management cost information annually** | | |
| Average hours per operator | -10 | |
| Change in regulatory cost for Group 4 | **-2618** | |
| **Annualised change in regulatory cost** | | **-$2618** |

### Planning and management charge publication requirements

Under the current WCPMIR, persons who determine planning and management charges, when changing or imposing a new charge, are required to:

* publish information on their website or in the Australian Government Gazette before the charge takes effect
* publish notices in a newspaper(s) circulated in the region(s) where the charge is imposed indicting where information on the charge is available and when the charge takes effect
* make information published on the website available to others at the operator’s primary place of business and
* make information available to a customer upon request.

As outlined in section 7.3, persons who determining planning and management charges will no longer be required to:

* publish information in the Australian Government Gazette or
* publish notices in local newspapers.

The proposed changes will reduce the regulatory cost for four operators.

The change in regulatory cost for these four operators will include a reduction in the number of staff hours required to publish the required information and the cost of publishing in the Australian Government Gazette and local newspapers. The reduction in staff hours will vary across the four operators. Accordingly, the estimates are an average for the four operators.

The change in regulatory burden is estimated to occur annually, as Basin State departments and water authorities are required to publish information relating to planning and management charges before they take effect, and such charges are typically adjusted each year.

As shown below in table 9.12, the annualised estimated change in regulatory cost for the proposed change to planning and management charge publication requirements is a decrease of $4371.

Table 9.12—Change in regulatory cost due to changes to planning and management charge publication requirements

|  |  |  |
| --- | --- | --- |
|  | **Group 4** | |
| **No. of affected operators** | 4 | |
| **Annual publication requirements[[683]](#footnote-683)** | | |
| Average hours per operator | -6 | |
| Change in regulatory cost for Group 4 | **-1571** | |
| Annual publication of planning and management information in Australian Government Gazette and notice in a newspaper | **-2800** | |
| **Annualised change in regulatory cost** | | **-$4371** |

## One-off and start-up costs

Under the proposed changes to the water charge rules, there will be a change in regulatory cost for 31 operators associated with one-off and start-up costs. This change in regulatory burden is in addition to the change in regulatory burden outlined in sections 9.1-9.3 and is associated with the initial changes to the regulations. The change in regulatory burden is associated with 31 operators assessing and understanding the overall changes to the water charge rules as well as how their obligations will change under the proposed amendments. This includes the proposed amendment to combine the WCIR, WCFTR and WCPMIR into a single instrument.

The ACCC estimated that the change in regulatory cost for these 31 operators will be between 10 and 25 additional staff hours. The additional staff hours required for operators to assess the proposed changes and any changes to their obligations will vary across operators, and even within each group. Accordingly, all estimates are an average for the group. For example, the estimated additional staff hours for each operator in Group 1 and Group 4 is 15 hours average, whereas for Group 2 operators it is 25 hours on average as the changes to their obligations are more varied and they will likely take longer to comprehend and understand the changes to their obligations compared to operators in other groups.

This change in regulatory cost is likely to only occur in the first year after the proposed changes outline in chapters 4-7 take effect.

As shown in table 9.13 below, the annualised estimated change in regulatory cost for operators to assess and understand the overall changes to the water charge rules is an increase of $3993.

Table 9.13—Change in regulatory cost due to one-off and start-up costs associated with the proposed changes to the water charge rules

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Group 1 | Group 2 | Group 3 | Group 4 | Total |
| No. of affected operators | 8 | 12 | 5 | 6 | 31 |
| Initial review of proposed changes to the water charge rules and understanding obligations under the proposed changes | | | | | |
| Average hours per operator | 15 | 25 | 20 | 15 |  |
| Change in regulatory cost for each group | 7854 | 19 635 | 6545 | 5891 | 39 925 |
| **Annualised change in regulatory cost** | | | | | **$3993** |

# 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:

* 1. 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
  2. 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
  3. opportunities for advancing the consistent application of the water charging objectives and principles, including options to rank objectives and define terms
  4. lessons learned from other sectors in relation to appeal mechanisms
  5. opportunities to combine the water charge rules and Water Market Rules in one instrument
  6. consistency with the Australian Government’s deregulation objectives
  7. 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 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

**Part 1—Preliminary**

**1 Objectives and principles**

This Schedule sets out:

1. the Basin water charging objectives; and
2. 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:

1. 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

1. to ensure sufficient revenue streams to allow efficient delivery of the required services; and
2. to facilitate the efficient functioning of water markets (including inter‑jurisdictional water markets, and in both rural and urban settings); and
3. 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
4. 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:

* 1. the operational, maintenance and administrative costs, externalities, taxes or tax equivalent regimes; and
  2. provision for the cost of asset consumption; and
  3. provision for the cost of capital (calculated using a weighted average cost of capital).

1. If full cost recovery is unlikely to be achieved and a Community Service Obligation is deemed necessary:
   1. the size of the subsidy is to be reported publicly; and
   2. where practicable, subsidies or Community Service Obligations are to be reduced or eliminated
2. 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:
   1. the total cost of water planning and management; and
   2. 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

# Appendix C—ACCC draft rule advice and recommendations

## Draft rule advice

[Rule advice 4‑A](#_Toc436133840)

[The three sets of water charge rules (WCIR, WCTFR and WCPMIR) should be combined into a single instrument by incorporating the relevant provisions of the WCTFR and WCPMIR into the WCIR and renaming this as the Water Charge Rules. The water market rules should not be combined with the water charge rules.](#_Toc436133841)

[This rule advice affects all three sets of water charge rules (WCIR, WCTFR and WCPMIR).](#_Toc436133842)

[Rule advice 4‑B](#_Toc436133843)

[The proposed single set of water charge rules should apply to ‘regulated water charges’ as set out in the Act and Regulations, with separate definitions for:](#_Toc436133844)

[ ***infrastructure charge*** – corresponding with the definition of ‘regulated charge’ in the WCIR](#_Toc436133845)

[ ***planning and management charge*** – corresponding with the definition of ‘regulated charge’ in the WCPMIR](#_Toc436133846)

[ ***termination fee*** – corresponding with a charge allowed for under the current WCTFR rule 6 or rule 8](#_Toc436133847)

[This rule advice is reflected throughout the proposed water charge rules, and terms are defined in Part 1, Rule 3.](#_Toc436133848)

[Rule advice 4‑C](#_Toc436133849)

[The private right of action (to recover loss or damage resulting from a breach of the rules) which currently applies to the water charge (infrastructure) rules should be extended to apply to the water charge rules more generally.](#_Toc436133850)

[This rule advice is implemented in Rule 57 of the proposed water charge rules.](#_Toc436133851)

[Rule advice 5‑A](#_Toc436133852)

[The rules should be amended such that Part 3 applies to all infrastructure operators instead of only to member-owned operators.](#_Toc436133853)

[This rule advice is implemented in Rule 10 of the proposed water charge rules.](#_Toc436133854)

[Rule advice 5‑B](#_Toc436133855)

[The rules should be amended to expand the current protections in rule 10 to also prohibit price discrimination (including through discounting) based on:](#_Toc436133856)

[(a) The purpose for which water has been, is, or will be, used;](#_Toc436133857)

[(b) Whether a tradeable water right has been traded or transformed (includes water delivery right, water allocation, water access entitlement, irrigation right);](#_Toc436133858)

[(c) The holding, volume or use of a tradeable water right or separate location related right;](#_Toc436133859)

[(d) Whether there is an association between a separate location-related right and a water access right; or](#_Toc436133860)

[(e) The area of land owned, occupied or irrigated.](#_Toc436133861)

[***Note:*** the water charge rules should continue to allow, but not require, the operator to differentiate charges based on underlying costs or levels of access / service.](#_Toc436133862)

[***Note:*** these provisions should not remove the requirement for a person to hold water delivery right if they are to have water delivered to them by an infrastructure operator without incurring higher charges (e.g. casual usage charges).](#_Toc436133863)

[***Note***: Location-related right means any of the following:](#_Toc436133864)

[(a) Water delivery right; or](#_Toc436133865)

[(b) Works approval; or](#_Toc436133866)

[(c) Water use approval](#_Toc436133867)

[This rule should be a civil penalty provision.](#_Toc436133868)

[This rule advice is implemented in Rule 10(1) of the proposed water charge rules.](#_Toc436133869)

[Rule advice 5‑C](#_Toc436133870)

[The rules should be amended to expand the current protections in Part 3 to also prohibit an operator from levying an infrastructure charge for a class of infrastructure service where the operator limits the availability of the class of infrastructure service based on:](#_Toc436133871)

[(a) The purpose for which water has been, is, or will be, used;](#_Toc436133872)

[(b) Whether a tradeable water right (includes water delivery right, water allocation, water access entitlement, irrigation right) has been traded or transformed;](#_Toc436133873)

[(c) The holding, volume or use of a tradeable water right or separate location related right;](#_Toc436133874)

[(d) Whether there is an association between a separate location-related right and a water access right; or](#_Toc436133875)

[(e) The area of land owned, occupied or irrigated.](#_Toc436133876)

[However, (a) should not apply to an infrastructure service that is limited to customers using water for a stock or domestic purposes.](#_Toc436133877)

[Also, (c) should not apply to the extent that the availability of an on-river infrastructure service is limited by reference to the priority or reliability of a class of water access entitlement, or by reference to the water resource of a water access entitlement](#_Toc436133878)

[***Note:*** These provisions should not remove the requirement for a person to hold water delivery right if they are to have water delivered to them by an infrastructure operator (without incurring casual usage charges).](#_Toc436133879)

[***Note:***The water charge rules should continue to allow, but not require, the operator to differentiate pricing based on underlying costs.](#_Toc436133880)

[***Note***: Location-related right means any of the following:](#_Toc436133881)

[(a) Water delivery right; or](#_Toc436133882)

[(b) Works approval; or](#_Toc436133883)

[(c) Water use approval](#_Toc436133884)

[This rule should be a civil penalty provision.](#_Toc436133885)

[This rule advice is implemented in Rule 10(2) of the proposed water charge rules.](#_Toc436133886)

[Rule advice 5‑D](#_Toc436133887)

[The rules should be amended to prohibit an infrastructure operator from imposing, or demanding payment of, an infrastructure charge:](#_Toc436133888)

[ upon an application to trade, transfer or terminate a tradeable water right (including where the application is not made to the infrastructure operator);](#_Toc436133889)

[ as a condition of the infrastructure operator granting its consent or approval to a trade, transfer or termination of a tradeable water right](#_Toc436133890)

[ when or because a tradeable water right has been traded or transformed;](#_Toc436133891)

[ because a customer has undertaken, or intends to undertake, a trade, transfer or termination of a tradeable water right;](#_Toc436133892)

[other than where that infrastructure charge reflects the administrative costs necessarily incurred in processing the trade, transfer or termination.](#_Toc436133893)

[This rule should be a civil penalty provision.](#_Toc436133894)

[This rule advice is implemented in Rule 10A of the proposed water charge rules.](#_Toc436133895)

[Rule advice 5‑E](#_Toc436133896)

[Schedule of charge requirements for infrastructure operators:](#_Toc436133897)

[The rules should require an infrastructure operator to produce a schedule of charges containing the following information for each infrastructure charge or planning and management charge that it proposes to levy:](#_Toc436133898)

[(a) the name of the charge;](#_Toc436133899)

[(b) the circumstances in which the charge is incurred including:](#_Toc436133900)

[i. the class of persons by whom the charge is payable;](#_Toc436133901)

[ii. if applicable, the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;](#_Toc436133902)

[iii. if applicable, the class of water access right, water delivery right or irrigation right to which the charge relates;](#_Toc436133903)

[(c) the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine the amount;](#_Toc436133904)

[(d) when the charge is payable and, if payable by instalments, the number of instalments and intervals at which they are payable;](#_Toc436133905)

[(e) for an infrastructure charge - a description of the class of infrastructure service to which the charge relates](#_Toc436133906)

[(f) for a planning and management charges determined by the infrastructure operator, the legislative, contractual or other authority for the regulated charge and the agency or person to whom the charge is payable;](#_Toc436133907)

[(g) for directly attributable charges, shared charges and distribution loss shared charges:](#_Toc436133908)

[i. the name and amount of any infrastructure charges or water planning and management charges that contributed to an amount of the charge being recovered;](#_Toc436133909)

[ii. the name of the entities levying charge on the operator; and](#_Toc436133910)

[iii. how the infrastructure charge(s) levied by the operator to recover the amount of a directly attributable charge, shared charge or distribution loss shared charge was determined.](#_Toc436133911)

[(h) if a charge is collected on behalf of another person, the name of that person;](#_Toc436133912)

[(i) any other information the person determining the charge considers necessary or desirable to explain the regulated charge.](#_Toc436133913)

[(j) If the operator levies a fee for physically connecting, or physically disconnecting a customer to or from the operator’s water service infrastructure that varies based on the actual costs incurred in performing the connection or disconnection, the operator is not required to state the amount of the connection or disconnection fee on its Schedule of Charges, but must describe the general basis for calculating such a fee.](#_Toc436133914)

[The Schedule of Charges should also include:](#_Toc436133915)

[(a) the effective date of the Schedule of Charges;](#_Toc436133916)

[(b) a statement setting out the process(es) by which:](#_Toc436133917)

[i. the infrastructure operator determined the regulated water charges contained in the Schedule of Charges (this should be at the general level, rather than for each individual charge);](#_Toc436133918)

[ii. a customer may participate in the infrastructure operator’s processes for determining the regulated water charges in the Schedule of Charges;](#_Toc436133919)

[iii. a customer can make an enquiry or resolve a dispute with the infrastructure operator in relation to regulated water charges.](#_Toc436133920)

[This rule advice is implemented in Rule 11 of the proposed water charge rules.](#_Toc436133921)

[Rule advice 5‑F](#_Toc436133922)

[Schedule of charge requirements for entities other than infrastructure operators:](#_Toc436133923)

[The rules should require that a person (other than an infrastructure operator) determining a planning and management charge must include on its Schedule of Charges the following information for each planning and management charge:](#_Toc436133924)

[(a) the name of the charge;](#_Toc436133925)

[(b) the circumstances in which the charge is incurred including:](#_Toc436133926)

[i. the class of persons by whom the charge is payable;](#_Toc436133927)

[ii. if applicable, the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;](#_Toc436133928)

[iii. if applicable, the class of water access right, water delivery right or irrigation right to which the charge relates;](#_Toc436133929)

[(c) the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine the amount;](#_Toc436133930)

[(d) when the charge is payable and, if payable by instalments, the number of instalments and intervals at which they are payable;](#_Toc436133931)

[(e) the legislative, contractual or other authority for the charge;](#_Toc436133932)

[(f) the agency or person to whom the charge is payable; and](#_Toc436133933)

[(g) any other information the person determining the charge considers necessary or desirable to explain the regulated charge.](#_Toc436133934)

[The Schedule of Charges should also include:](#_Toc436133935)

[(a) the effective date of the Schedule of Charges;](#_Toc436133936)

[(b) a statement setting out the process(es) by which:](#_Toc436133937)

[i. the person determined the charges contained in the Schedule of Charges (this should be at the general level, rather than for each individual charge);](#_Toc436133938)

[ii. a customer may participate in the processes for determining the regulated water charges in the Schedule of Charges;](#_Toc436133939)

[iii. a customer can make an enquiry or resolve a dispute in relation to regulated water charges.](#_Toc436133940)

[This rule advice is implemented in Rule 11 of the proposed water charge rules.](#_Toc436133941)

[Rule advice 5‑G](#_Toc436133942)

[The rules should be amended to require all infrastructure operators who have a website to publish their schedule of charges on a page on their website that is easily and publicly accessible (not only operators servicing over >10Gl of water access entitlement).](#_Toc436133943)

[This rule advice is implemented in Rule 11 of the proposed water charge rules.](#_Toc436133944)

[Rule advice 5‑H](#_Toc436133945)

[The rules should be amended to remove requirements to publish a schedule of charges in a local newspaper or in the Gazette.](#_Toc436133946)

[This rule advice is implemented in the repeal of current WCIR Rule 15(1)(b) and (c).](#_Toc436133947)

[Rule advice 5‑I](#_Toc436133948)

[The rules should be amended to change the timeframe for when a Schedule of Charges must be provided:](#_Toc436133949)

[ For an infrastructure operator which provides infrastructure services that must be used for the storage or delivery of water relating to:](#_Toc436133950)

[o a class of water access right or](#_Toc436133951)

[o water sharing arrangements between Basin States;](#_Toc436133952)

[the Schedule of Charges must be sent to its customers and published on its website (if it has a website) 25 business days before the Schedule of Charges comes into effect.](#_Toc436133953)

[ For all other infrastructure operators, the Schedule of Charges must be sent to its customers and published on its website (if it has a website) 10 business days before the Schedule of Charges comes into effect.](#_Toc436133954)

[ For a person other an infrastructure operator, who determines ‘planning and management charges’ the Schedule of Charges must be published on its website 25 business days before the Schedule of Charges comes into effect.](#_Toc436133955)

[An infrastructure operator should not be required to ensure that a customer has ***received*** the Schedule of Charges within the timeframe specified in the rules. Instead, the operator must have sent its schedule (by post, fax, email, SMS or other means), within the required timeframe. An infrastructure operator does not need to notify all customers via the same means.](#_Toc436133956)

[This rule advice is implemented in Rule 11 of the proposed water charge rules.](#_Toc436133957)

[Rule advice 5‑J](#_Toc436133958)

[The rules should be amended to allow for an application for an exemption from the publication requirements in a situation where publication would have a ‘material and adverse effect’ on only the operator.](#_Toc436133959)

[This rule advice is implemented in Rule 9 of the proposed water charge rules.](#_Toc436133960)

[Rule advice 5‑K](#_Toc436133961)

[The rules should be amended to require infrastructure operators who have received an exemption under Rule 9 to include notice of the exemption on their Schedule of Charges. The infrastructure operator must include on its Schedule of Charges:](#_Toc436133962)

[ the name of the entity (or entities) that is the subject of the exemption;](#_Toc436133963)

[ the time period of the arrangement;](#_Toc436133964)

[ the nature of the infrastructure service and / or access to which the charge exempt from disclosure relates.](#_Toc436133965)

[Rule 55 should be amended to allow the ACCC to publish the name of the parties who are the subject of the exemption, and the type of infrastructure service to which the exemption relates.](#_Toc436133966)

[This rule advice is implemented in Rule 9(13A) and rule 55 of the proposed water charge rules.](#_Toc436133967)

[Rule advice 5‑L](#_Toc436133968)

[The rules should be amended to repeal the Part 5 (Network Service Plan) requirements if the rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions, are also accepted.](#_Toc436133969)

[This rule advice is implemented in the repeal of Part 5 of the current WCIR and related provisions referencing Part 5 operators.](#_Toc436133970)

[Rule advice 5‑M](#_Toc436133971)

[The rules should be amended such that the application of Part 6 applies based on the following criteria.](#_Toc436133972)

[Where:](#_Toc436133973)

[(a) holders of a class of water access right**s** must obtain infrastructure services from an  infrastructure operator in order to have water relating to that water access right stored or delivered; or](#_Toc436133974)

[(b) a person must obtain infrastructure services from an infrastructure operator in relation to the storage or delivery of water to give effect to an arrangement for the sharing of water between more than one Basin State;](#_Toc436133975)

[and:](#_Toc436133976)

[(c) the infrastructure operator is not required to have all its infrastructure charges approved or determined by a single State agency under State water management law;](#_Toc436133977)

[that infrastructure operator is a *Part 6 operator* to whom Part 6 applies.](#_Toc436133978)

[The rules should be amended to allow for the ACCC to provide an exemption to the requirement on a Part 6 operator to have its infrastructure charges approved or determined under Part 6 of the rules.](#_Toc436133979)

[The ACCC should only give such an exemption if it is satisfied that the application of those requirements would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles, taking into account:](#_Toc436133980)

[(a) the total volume of water access rights in relation to which the class of water access rights holders must obtain infrastructure services from the operator, if applicable;](#_Toc436133981)

[(b) the total volume of water subject to water sharing arrangements in relation to which a person must obtain infrastructure services from the operator, if applicable;](#_Toc436133982)

[(c) the types or classes of infrastructure services provided by the operator;](#_Toc436133983)

[(d) any preferences expressed by the operator’s customers to the ACCC;](#_Toc436133984)

[(e) any views expressed by a State Agency to the ACCC; and](#_Toc436133985)

[(f) any other matters that the ACCC considers relevant.](#_Toc436133986)

[The exemption should be granted for a specific period or for an unspecified period if the decision to exempt is subject to review at a specific time.](#_Toc436133987)

[In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.](#_Toc436133988)

[This rule advice is implemented in Rules 23 to 23C of the proposed water charge rules.](#_Toc436133989)

[Rule advice 5‑N](#_Toc436133990)

[The rules should be amended such that timeframes that apply to Part 6 processes are as per Table 5.3.](#_Toc436133991)

Table 5.3: Proposed Regulatory Timelines for Part 6 Operators

|  |  |  |
| --- | --- | --- |
|  | **Original Approval/Determination** | **Annual Review Approval/Determination** |
| **Approval/Determination lodged** | 15 months before the start of the regulatory period to which the approval determination relates. | 4 months before the start of the year of the regulatory period to which the approval / determination relates. |
| **Regulator provides notice of its final decision** | 30 business days before the start of regulatory period to which the approval /determination relates. | 30 business days before the start of the year of the regulatory period to which the approval/determination relates. |
| **Part 6 operator to notify customers of its Schedule of Charges†** | 25 business days before the regulated charges in its Schedule of Charges is due to commence | 25 business days before the regulated charges in its Schedule of Charges is due to commence |
| **Other infrastructure operators‡** | 10 business days before the regulated charges are due to commence. | 10 business days before the regulated charges are due to commence. |

† This should apply to all infrastructure operators who provide on-river infrastructure services, not just Part 6 operators. This requirement should apply via Schedule of Charge requirements. ‡ i.e. other than Part 6 operators / operators who provide on-river infrastructure services) to notify its customers. This requirement should also apply via Schedule of Charge requirements.

[This rule advice is implemented in Rule 11 and in Part 6, Divisions 2 and 3 of the proposed water charge rules.](#_Toc436133992)

[Rule advice 5‑O](#_Toc436133993)

[The rules should be amended to alter the definition of “regulatory period” (Rule 3 in Part 1) to provide for a default regulatory period of three years (instead of four years) for Part 6 operators.](#_Toc436133994)

[Rule 24 should be amended to allow the regulator to be able to lengthen the regulatory period in order to align the regulatory period with:](#_Toc436133995)

[o regulatory periods that apply to a Part 6 operator in relation to urban water services (as is currently provided for); and](#_Toc436133996)

[o regulatory periods that apply to the Part 6 operator in relation to non-MDB (rural) water services.](#_Toc436133997)

[If the Act is amended to allow for the regulator to have discretion in determining the length of the regulatory period, the rules should be amended to provide the regulator to generally be able to vary the regulatory period for longer than 3 years and up to a maximum of 5 years (including for reasons other than aligning regulatory periods).](#_Toc436133998)

[This rule advice is implemented in Rules 3 and 24 of the proposed water charge rules.](#_Toc436133999)

[Rule advice 5‑P](#_Toc436134000)

[ Rule 29(2) should be amended to more clearly take into account government subsidies and community service obligations, as well as revenue from sources other than regulated water charges. In particular, Rule 29(2) should require the regulator to be satisfied that the forecast revenue from infrastructure charges is reasonably likely to meet:](#_Toc436134001)

[o the prudent and efficient costs of providing infrastructure services; less](#_Toc436134002)

[o any amount to be contributed by governments in relation to providing the infrastructure services.](#_Toc436134003)

[ Rule 29 should be amended to also require the ACCC not to approve the infrastructure charges set out in an application unless it is satisfied that the infrastructure charges contained in the application are otherwise consistent with the rules.](#_Toc436134004)

[ Rule 37 should be amended to allow a regulator to amend the infrastructure charges in the initial determination to the extent that it is reasonably necessary to make variations having regard to the consistency of the infrastructure charges with the other requirements of the water charge rules.](#_Toc436134005)

[This rule advice is implemented in Rule 29 and Rule 37 of the proposed water charge rules.](#_Toc436134006)

[Rule advice 5‑Q](#_Toc436134007)

[The rules should be amended to provide the regulator with the discretion to specify a capital expenditure project as a ‘contingent project’ during the approval / determination process. This could occur:](#_Toc436134008)

[ if the infrastructure operator submits such a project to the regulator in its application to the original approval / determination process, or](#_Toc436134009)

[ on the initiative of the regulator after examining that application.](#_Toc436134010)

[In considering whether a project is suitable for inclusion as a contingent project, the regulator should be required to consider:](#_Toc436134011)

[ the cost of the project;](#_Toc436134012)

[ the likelihood the project will occur;](#_Toc436134013)

[ the timing of the project;](#_Toc436134014)

[ the necessity of the project; and](#_Toc436134015)

[ the feasibility of the project.](#_Toc436134016)

[The regulator may specify the criteria (or ‘trigger event’) that must be met before the infrastructure operator can apply for the cost of a contingent project to be included in the revenue requirement for the remainder of the regulatory period.](#_Toc436134017)

[The inclusion of the prudent and efficient cost of a contingent project in the revenue requirement for the remainder of the regulatory period should be subject to regulatory scrutiny.](#_Toc436134018)

[In providing for the cost of a contingent project via a variation, the regulator should not vary the determination of infrastructure charges unless it is satisfied of the matters set out in WCIR subparagraph 29(2)(b) and (c).](#_Toc436134019)

[This rule advice is implemented in Part 6, Divisions 2 and 4 of the proposed water charge rules.](#_Toc436134020)

[Rule advice 5‑R](#_Toc436134021)

[The rules should be amended to provide for the following in relation to variations of determinations:](#_Toc436134022)

[ The regulator should be allowed to seek a variation for taxation events and regulatory events where the event provides a benefit to an infrastructure operator of more than 1% of the operator’s aggregate revenue requirement for the year to which the variation relates and the remaining years of the regulatory period.](#_Toc436134023)

[ For a taxation or regulatory event, the materiality threshold should be reduced to 1% of the aggregate revenue requirement for the year to which the review relates and the remaining years of the regulatory period, and the current requirement for the event to have been ‘unforeseen’ should be removed.](#_Toc436134024)

[ For other events, materiality threshold should be reduced to 5% of the aggregate revenue requirement for the year to which the review relates and the remaining years of the regulatory period.](#_Toc436134025)

[ Amend the requirement for an operator to demonstrate that it is not able to reduce its expenditure without materially *and* adversely affecting the reliability *or* safety of its water service infrastructure.](#_Toc436134026)

[This rule advice is implemented in Part 6, Division 4 of the proposed water charge rules.](#_Toc436134027)

[Rule advice 5‑S](#_Toc436134028)

[Part 7 should be amended to adapt the “triggering” provisions (Part 7, Division 1) to apply to all distributions by an infrastructure operator, other than ***standard distributions***. Standard distributions are those made:](#_Toc436134029)

[ on the basis of all the operator’s customers’ rights of access (typically represented by their water delivery right);](#_Toc436134030)

[ to customers that had previously contributed to a fund for the replacement of infrastructure when this money is no longer required because the replacement of the infrastructure is no longer required, in proportion to the contributions made by each customer;](#_Toc436134031)

[ in the form of reasonable honorariums;](#_Toc436134032)

[ to all customers in a specific part of the area serviced by the infrastructure operator in relation to water savings achieved by the operator in that part, in proportion to each customer’s right of access to that part; or](#_Toc436134033)

[ made by an infrastructure operator to its owners but only if the infrastructure operators’ infrastructure charges are approved or determined under Part 6 or by a State Agency under the water management law of a Basin State.](#_Toc436134034)

[Under the draft rule advice for amending the application of Part 6 and the consequent removal of the need for accreditation, the regulator for Part 7 will be the ACCC.](#_Toc436134035)

[This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.](#_Toc436134036)

[Rule advice 5‑T](#_Toc436134037)

[The rules should be amended to allow for the ACCC to provide an exemption to the requirement on a Part 7 operator to have its infrastructure charges approved or determined.](#_Toc436134038)

[The ACCC should only give such an exemption if it is satisfied that providing the exemption is unlikely to have a negative impact on the achievement of the Basin Water Charging Objectives and Principles, taking into account:](#_Toc436134039)

[ the nature of the operator’s infrastructure services;](#_Toc436134040)

[ the nature of the distribution made by the operator to its customers (including but not limited to whether it was made on the same grounds as the proposed types of proscribed price discrimination in Part 3);](#_Toc436134041)

[ the preferences of the operator’s customers (in particular those customers that did not receive the distribution); and](#_Toc436134042)

[ any action taken by the operator in response to the ACCC’s concerns; and](#_Toc436134043)

[ any undertakings given by the operator as to future distributions.](#_Toc436134044)

[In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.](#_Toc436134045)

[This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.](#_Toc436134046)

[Rule advice 5‑U](#_Toc436134047)

[The water charge rules should be amended to provide that an infrastructure operator is also taken to have made a distribution where it trades, transfers or allocates water in the form of a ‘water allocation’ or an allocation of water to an irrigation right other than:](#_Toc436134048)

[ the allocation of water from an irrigation infrastructure operator to the holder of an irrigation right for the purpose of reflecting the allocation of water by a State Agency to the water access entitlement held by the irrigation infrastructure operator on their behalf; or](#_Toc436134049)

[ those necessary to give effect to a trade of water access right or irrigation right by a customer,](#_Toc436134050)

[Such a trade, transfer or allocation would not trigger Part 7 if it met the criteria of a ***standard distribution*** as listed in Rule advice 5‑S.](#_Toc436134051)

[This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.](#_Toc436134052)

[Rule advice 5‑V](#_Toc436134053)

[The water charge rules should be amended such that an infrastructure operator ceases to be a Part 7 operator after three years, rather than 5 years, as is currently the case.](#_Toc436134054)

[This rule advice is implemented in Part 7, Division 1 of the proposed water charge rules.](#_Toc436134055)

[Rule advice 5‑W](#_Toc436134056)

[Part 9 should be amended so that it does not apply beyond the period necessary to transition from the current application of Part 6.](#_Toc436134057)

[Part 9 should be amended to provide that accreditation arrangements cease to apply in relation to approvals and determinations for:](#_Toc436134058)

[ Infrastructure operators not currently subject to Part 6 or Part 7: when the amendments to Part 9 commence;](#_Toc436134059)

[ Infrastructure operators subject to Part 6: at the end of the regulatory period underway at the time amendments to Division 1 of Part 6 commence.](#_Toc436134060)

[ Infrastructure operators subject to Part 7: when those operators cease to be Part 7 operators](#_Toc436134061)

[unless the accreditation is revoked, withdrawn by a Basin State or expires earlier.](#_Toc436134062)

[This rule advice is implemented in the repeal of Part 9 of the current WCIR, and through Part 11 of the proposed water charge rules.](#_Toc436134063)

[Rule advice 5‑X](#_Toc436134064)

[The rules should be amended to provide an exemption such that charges negotiated, arbitrated or otherwise arising under the following arrangements under Part IIIA of the Competition and Consumer Act 2010 are permitted despite the non-discrimination requirements of Part 3 of the WCIR:](#_Toc436134065)

[(a) an access undertaking or access code;](#_Toc436134066)

[(b) a declared service;](#_Toc436134067)

[(c) an effective access regime;](#_Toc436134068)

[(d) a competitive tender process.](#_Toc436134069)

[There should not be any general exemption for other ‘commercially negotiated’ infrastructure charges.](#_Toc436134070)

[This rule advice is implemented in Rule 10(7) of the proposed water charge rules.](#_Toc436134071)

[Rule advice 5‑Y](#_Toc436134072)

[The rules should be amended regulate the manner in which an infrastructure operator can recover amounts incurred by the operator through planning and management charges or infrastructure charges levied by reference to water access rights.](#_Toc436134073)

[ The amount of a ***directly attributable charge*** should be recovered through a separate infrastructure charge on a water access right or irrigation right (as applicable) of the customer, and only the customer, whose actions resulted in the operator incurring the charge. The infrastructure charge levied by the operator should preserve as closely as possible the characteristics of the directly attributable charge it incurred.](#_Toc436134074)

[ The amount of any ***distribution loss shared charges*** should be recovered separately from the operator’s other charges.](#_Toc436134075)

[ The amount of any other ***shared charges*** should be recovered separately from the operator’s other charges, and against a volume of water access right or irrigation right.](#_Toc436134076)

[ The amounts recovered should take into account any discounts received by the infrastructure operator.](#_Toc436134077)

[Where:](#_Toc436134078)

[ ***directly attributable charge*** means an infrastructure charge or planning and management charge levied by reference to a water access right and incurred by an infrastructure operator as a direct consequence of actions taken by a customer in relation to their water access right or irrigation right, including the customer holding those rights.](#_Toc436134079)

[ ***shared charge*** means an infrastructure charge or planning and management charge levied by reference to a water access right that is incurred by an infrastructure operator but which is not a directly attributable charge](#_Toc436134080)

[ ***distribution loss shared*** ***charge*** means a shared charge relating to water under a water access right that is lost during distribution of water to customers.](#_Toc436134081)

[This rule advice is implemented in Rule 9A of the proposed water charge rules.](#_Toc436134082)

[Rule advice 5‑Z](#_Toc436134083)

[The rules should be amended to provide that if an infrastructure operator:](#_Toc436134084)

[ incurs directly attributable charges or shared charges or distribution loss shared charges, and](#_Toc436134085)

[ does not have separate infrastructure charges to pass through the costs of these directly attributable charges and / or shared charges and / or distribution loss shared charges as specified in Rule advice 5-Y;](#_Toc436134086)

[then their termination fee multiple applied in the calculation of the maximum termination fee should be limited to 1x (not 10x).](#_Toc436134087)

[This rule advice is implemented in Rule 72 of the proposed water charge rules.](#_Toc436134088)

[Rule advice 6‑A](#_Toc436134089)

[The rules should be amended to regulate termination fees levied by all infrastructure operators, not only irrigation infrastructure operators.](#_Toc436134090)

[Rule advice 6‑B](#_Toc436134091)

[The rules should be amended such that the calculation of termination fees should only include fixed volumetric infrastructure charges imposed:](#_Toc436134092)

[(a) per unit of water delivery right; or](#_Toc436134093)

[(b) per unit water drainage right (where this is separate from the water delivery right);](#_Toc436134094)

[to the extent that these aspects of a customer’s right of access are being terminated.](#_Toc436134095)

[The maximum termination may include an amount, however, to account for chargesdealt with under Rule advice 6‑C*.*](#_Toc436134096)

[This rule advice is implemented in Rule 72 of the proposed water charge rules.](#_Toc436134097)

[Rule advice 6‑C](#_Toc436134098)

[*Separate charges for infrastructure that is dedicated for the exclusive use of the terminating customer*](#_Toc436134099)

[The rules should be amended to provide that, if a separate charge is imposed in respect of infrastructure that is dedicated to the exclusive use of the terminating customer, the maximum termination fee that the infrastructure operator can impose can include an additional amount being the lesser of:](#_Toc436134100)

[(a) Any capital cost the infrastructure operator can demonstrate it has incurred (i.e. excluding any capital contribution by the customer, government or other party) in relation to the dedicated infrastructure, minus the cumulative amount paid under the relevant infrastructure charge (or other infrastructure charge previously imposed specifically in relation to the dedicated infrastructure); and](#_Toc436134101)

[(b) 10x the amount of the relevant infrastructure charge (i.e. the separate charge that relates to the specific infrastructure).](#_Toc436134102)

[If the operator charges a separate infrastructure charge in relation to infrastructure used exclusively by the terminating customer, *but has not imposed that charge in each year since the cost was initially incurred*, for the purposes of the calculation of the termination fee in relation to that charge (described above), the calculation should be made as if the charge had been imposed in each year since the capital cost was initially incurred. If the amount of this charge is varied from year to year, the calculation should take account of amounts actually paid, and use the average of annual charges paid for the period since the commencement of the amended WCR, for any year since the cost was initially incurred for which the infrastructure charge was not levied.](#_Toc436134103)

[This rule advice is implemented in Rule 72 of the proposed water charge rules.](#_Toc436134104)

[Rule advice 6‑D](#_Toc436134105)

[The rules should be amended to provide that, when calculating the maximum termination fee, the infrastructure operator must use the infrastructure charges in effect:](#_Toc436134106)

[ at the time the irrigator provides notice of their intention to terminate or request for information on what a termination fee would be (see section 6.3), or](#_Toc436134107)

[ 30 days before the notice is provided;](#_Toc436134108)

[whichever produces the lower maximum termination fee.](#_Toc436134109)

[This rule advice is implemented in Rule 72 of the proposed water charge rules.](#_Toc436134110)

[Rule advice 6‑E](#_Toc436134111)

[The rules should be amended to provide that, if an infrastructure operator does not provide for the trade of water delivery right in relation to their water service infrastructure separately from the trade of a water access right or irrigation right, the multiple applied to the fixed volumetric charge levied per unit of water delivery right or unit of water drainage right should be 1x rather than 10x.](#_Toc436134112)

[This rule advice is implemented in Rule 72 of the proposed water charge rules.](#_Toc436134113)

[Rule advice 6‑F](#_Toc436134114)

[ The rules should be amended to allow for a customer to provide notice to their infrastructure operator of their intention to terminate some or all of their right of access.](#_Toc436134115)

[ Upon receiving such a notice, the infrastructure operator must:](#_Toc436134116)

[(a) set out the value of the termination fee that would be payable upon termination (binding on the operator for 30 business days), and how that fee was calculated;](#_Toc436134117)

[(b) notify the customer if they are able to trade their water delivery right and any rules governing such trade.](#_Toc436134118)

[Under this rule, an infrastructure operator should also be required to provide the information in (a) and (b) above upon receiving a request in writing from a customer for information on the termination fee that would be payable if the customer were to terminate some or all of their right of access.](#_Toc436134119)

[This provision should be a civil penalty provision.](#_Toc436134120)

[This rule advice is implemented in Rule 74 of the proposed water charge rules.](#_Toc436134121)

[Rule advice 7‑A](#_Toc436134122)

[The requirement to disclose the nature and cost of WPM activities related to planning and management charges (rules 5(2)(d) and 5(2)(j) of the WCPMIR) should be repealed.](#_Toc436134123)

[This rule advice is implemented in the proposed repeal of the WCPMIR.](#_Toc436134124)

[Rule advice 7‑B](#_Toc436134125)

[The rules should be amended such that remaining requirements in the WCPMIR to disclose information about planning and management charges are retained and harmonised with the general pricing transparency requirements for infrastructure charges.](#_Toc436134126)

[See rule advices 5-E and 5-F.](#_Toc436134127)

[This rule advice is implemented in Rule 11 of the proposed water charge rules.](#_Toc436134128)

## Draft recommendations

[Recommendation 4‑A](#_Toc436132842)

[The ACCC will review its guidance materials and work with Basin State regulators and other industry stakeholders to develop more practical and detailed guidance on the interpretation of, and the interaction between, the Basin Water Charging Objectives and Principles.](#_Toc436132843)

[This will include:](#_Toc436132844)

[ interpretation of key terms such as “perverse or unintended pricing outcomes”;](#_Toc436132845)

[ improved identification of and links between the infrastructure services provided and how infrastructure charges are determined to recover the costs of service provision; and](#_Toc436132846)

[ cost allocation and the basis for determining charging areas (for example, where charging areas are based on geographic areas) should be assessed.](#_Toc436132847)

[Recommendation 4‑B](#_Toc436132848)

[Future reviews of the ACCC’s Pricing Principles will be undertaken in close consultation with industry stakeholders, and the ACCC will work with Basin State economic regulators to ensure the Pricing Principles reflect regulatory best practice. The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector.](#_Toc436132849)

[Recommendation 4‑C](#_Toc436132850)

[The ACCC will continue to monitor the necessity and benefit of asking for particular compliance information through these processes and, in specific investigations, will continue to consider requests for extensions of time to respond to the ACCC where resourcing is a concern.](#_Toc436132851)

[Recommendation 4‑D](#_Toc436132852)

[The ACCC will continue to work closely with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from the ACCC’s review.](#_Toc436132853)

[Recommendation 6‑A](#_Toc436132854)

[Infrastructure operators should provide information to their customers on how they have, and intend, to use revenue from termination fees.](#_Toc436132855)

[Recommendation 7‑A](#_Toc436132856)

[The ACCC supports the ongoing commitment made by governments to greater cost recovery for water planning and management activities, as part of the National Water Initiative, but recommends that the water charge rules are not an effective policy tool to ensure these commitments are met.](#_Toc436132857)

[Recommendation 8‑A](#_Toc436132858)

[The ACCC recommends that the Australian Government should work with Basin States to improve the accuracy and consistency of water trade reporting. In particular, water trading price data should be collected on a consistent basis in a way that can allow for the separation of market-based trades from other types of trades.](#_Toc436132859)

[Recommendation 8‑B](#_Toc436132860)

[Basin States, infrastructure operators, the MDBA and the ACCC should make it a priority to better inform rights holders of the benefits and obligations on right holders conferred by each type of tradeable water right, particularly in relation to charges payable and trading options.](#_Toc436132861)

[Recommendation 8‑C](#_Toc436132862)

[The ACCC recommends that governments consider the merits of expanding the jurisdiction of existing ombudsman schemes or small business commissioners to resolving disputes between infrastructure operators and their customers, or the creation of a new scheme to perform these roles.](#_Toc436132863)

1. The ‘proposed water charges rules’ show what the rules would look like if all of the ACCC’s draft rule advice is accepted. [↑](#footnote-ref-1)
2. Available at: <http://www.comlaw.gov.au/Details/F2011L00058> [↑](#footnote-ref-2)
3. Available at: <http://www.comlaw.gov.au/Details/F2013C00160> [↑](#footnote-ref-3)
4. Available at: <http://www.comlaw.gov.au/Details/F2010L02133> [↑](#footnote-ref-4)
5. [Report of the Independent Review of the Water Act 2007](http://www.environment.gov.au/water/publications/report-of-the-independent-review-water-act-2007), Recommendation 11. [↑](#footnote-ref-5)
6. Available at: <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development/issues-paper> [↑](#footnote-ref-6)
7. ibid. [↑](#footnote-ref-7)
8. Division 4.1, Water Regulations 2008. [↑](#footnote-ref-8)
9. Available at: <https://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information>. [↑](#footnote-ref-9)
10. Some infrastructure operators that provide an off-river infrastructure service for the delivery of water will also provide a service for the (off-river) storage of water or drainage of water. [↑](#footnote-ref-10)
11. Australian Bureau of Statistics, *water use on Australian Farms*, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/A5A4DA2DF9F997A0CA2571AD007DDFD4?opendocument>, accessed October 2015. [↑](#footnote-ref-11)
12. Charges in respect of urban water supply activities beyond the point at which water has been removed from a Basin water resource are not covered by the water charge rules. However, regulated water charges incurred by an urban water supplier (and imposed by another infrastructure operator) may nevertheless be subject to the water charge rules. [↑](#footnote-ref-12)
13. The definition of ‘water access right’ in the Act also includes stock and domestic rights, riparian rights and any other right to the take or use of water prescribed by the regulations. [↑](#footnote-ref-13)
14. Basin Plan water trading rules, rule 12.48. [↑](#footnote-ref-14)
15. A water delivery right may be measured in a number of different ways, including in ML or number of delivery entitlements (where a delivery entitlement may entitle the irrigator to the delivery of a particular volume of water in ML/day, or as a share of capacity of the network). Water delivery rights can also be held against infrastructure operators. [↑](#footnote-ref-15)
16. The Basin Plan water trading rules are limited to those water deliver rights held against infrastructure operators that meet the definition of ‘irrigation infrastructure operator’. [↑](#footnote-ref-16)
17. This would include water access right, irrigation right, water delivery right and other water-related rights, such as a right to drainage or a water use approval or a works approval. It would not include, for example, a holding of land. [↑](#footnote-ref-17)
18. Variable volumetric charges could also be levied on the basis of the volume of water allocation (pursuant to a water access entitlement or an irrigation right) that is credited as a result of an allocation announcement, stored, carried over, forfeited, surrendered or traded (although see section 5.13). [↑](#footnote-ref-18)
19. This includes flood mitigation and asset management of dams, lakes, weirs and other water storage structures. [↑](#footnote-ref-19)
20. This includes taking customers’ orders, determining and implementing storage releases, monitoring water usage and administering customers' water accounts. [↑](#footnote-ref-20)
21. Usually with higher charges for volumes delivered in excess of the volume of water delivery right held (sometimes referred to as casual usage charges). [↑](#footnote-ref-21)
22. *Water Act 2007 (Cth)*, s. 91(3). [↑](#footnote-ref-22)
23. Available at <http://www.accc.gov.au/regulated-infrastructure/water/water-projects> [↑](#footnote-ref-23)
24. Murray-Darling Basin Plan 2012, part 12, <http://www.comlaw.gov.au/Details/F2012L02240> [↑](#footnote-ref-24)
25. *Water Act 2007 (Cth)*, s. 137. The MDBA enforce the Basin Plan water trading rules. [↑](#footnote-ref-25)
26. Available at <http://www.accc.gov.au/regulated-infrastructure/water/water-guides> [↑](#footnote-ref-26)
27. Report of the Independent Review of the Water Act 2007, Recommendation 13. [↑](#footnote-ref-27)
28. Report of the Independent Review of the Water Act 2007, Recommendation 21. [↑](#footnote-ref-28)
29. Report of the Independent Review of the Water Act 2007, Recommendation 12. [↑](#footnote-ref-29)
30. Frontier Economics, Submission to the Independent Review of the Water Act 2007, June 2014, p.1. [↑](#footnote-ref-30)
31. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p 9. [↑](#footnote-ref-31)
32. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p 9. A similar view was put forward by State Water (now, WaterNSW) in its submission to the Act Review, in relation to weighting the BWCOP or ordering the BWCOP into a hierarchy. See: State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.12-24. [↑](#footnote-ref-32)
33. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p 9. [↑](#footnote-ref-33)
34. Victorian Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-34)
35. Victorian Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-35)
36. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-36)
37. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-37)
38. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-38)
39. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-39)
40. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-40)
41. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-41)
42. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, pp.5-6. [↑](#footnote-ref-42)
43. Principle (4) under the ‘Water storage and delivery’ heading in Part 3 of Schedule 2 of the Act states that: “Water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.” [↑](#footnote-ref-43)
44. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-44)
45. Principle (7) under the ‘Water storage and delivery’ heading in Part 3 of Schedule 2 of the Act states that: “Pricing policies should ensure consistency across sectors and jurisdictions where entitlements are able to be traded.” [↑](#footnote-ref-45)
46. Peel Valley Users Association Inc, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-46)
47. ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015. [↑](#footnote-ref-47)
48. In this case, ‘non-regulated tributary inflow refers to flows from tributaries entering the Peel River below Chaffey Dam. [↑](#footnote-ref-48)
49. ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015. [↑](#footnote-ref-49)
50. Email from David Gee (Split Rock Water Users Association) to Mr Barnaby Joyce (Minister for Agriculture), ‘Peel/Namoi Water Pricing: Split Rock Water Users Assoc comment’, 27 August 2015. [↑](#footnote-ref-50)
51. ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015. [↑](#footnote-ref-51)
52. ACCC, *Final decision on State Water Pricing Application: 2014-15 – 2015-17*, June 2014, p.12. [↑](#footnote-ref-52)
53. IPART, *Bulk Water Prices for State Water Corporation and Water Administration Ministerial Corporation Water from 1 October 2006 to 30 June 2006 – Final report*, September 2006, p.9. [↑](#footnote-ref-53)
54. IPART, *Department of Land and Water Conservation Bulk Water Prices from 1 October 2001*, 2001, p.69. [↑](#footnote-ref-54)
55. ACCC, *Final decision on State Water Pricing Application: 2014-15 – 2015-17*, June 2014, p.49. As detailed in its 2014 final decision on State Water’s infrastructure charges, operating expenditure (“opex”) represents the vast majority of costs in this valley. [↑](#footnote-ref-55)
56. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-56)
57. Coliban Water, Submission to the ACCC water charge rules review issues paper, July 2015 p.1; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.3; Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5, Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4, Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-57)
58. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.1, 3. [↑](#footnote-ref-58)
59. NSW Government, Submission to the ACCC water charge rules review issues paper, August 2015, p.2. [↑](#footnote-ref-59)
60. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-60)
61. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-61)
62. Water Act 2007 (Cth), s. 92. [↑](#footnote-ref-62)
63. Note, however, the proposed further clarification of the meaning of ‘planning and management charge’ proposed in section 7.2. [↑](#footnote-ref-63)
64. Available at: <http://accc.gov.au/regulated-infrastructure/water/water-guides>, accessed October 2015. [↑](#footnote-ref-64)
65. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015; Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015; Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-65)
66. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-66)
67. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-67)
68. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-68)
69. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-69)
70. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-70)
71. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-71)
72. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-72)
73. The Regulatory Performance Framework, released by the Commonwealth Government in October 2014, aims to reduce the cost of regulation imposed on individuals, business and community organisations. It sets out a framework for Commonwealth regulators to consider as part of policy making and regulatory processes. [↑](#footnote-ref-73)
74. Targeted communication is one of the key performance indicators listed in the Regulatory Performance Framework. The ACCC will be required to consider and report to the Commonwealth Government on how it is meeting this indicator in creating new guidance material. [↑](#footnote-ref-74)
75. Report of the Independent Review of the Water Act 2007, Conclusion 8.1. [↑](#footnote-ref-75)
76. Report of the Independent Review of the Water Act 2007, Recommendation 19 proposed that regulations prescribe (specific) types of enforceable undertakings, in consultation with stakeholders. The Commonwealth Government is considering its response to the Act Review. [↑](#footnote-ref-76)
77. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.4; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.1, Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-77)
78. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-78)
79. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, pp.5-6. WMI stated that it “has found dealing with the ACCC extremely frustrating and costly always having to revert to expensive legal advice as the ACCC will not provide a clear answer and act in a threatening manner. The internal paperwork and processes to comply with the ACCC rules has been costly and is a classic case of rep tape for no value.” [↑](#footnote-ref-79)
80. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-80)
81. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-81)
82. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-82)
83. For example, Western Murray Irrigation, ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015. [↑](#footnote-ref-83)
84. CIT, NIC and WMI also noted the concern that fines would eventually be paid by customers, Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.4, Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2, National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-84)
85. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-85)
86. See section 6.1 of the ACCC, *Enforcement Guideline - Water Market and Water Charge Rules,* April 2011, available at: <https://www.accc.gov.au/system/files/ACCC%20enforcement%20guide%20to%20water%20rules.pdf>, accessed October 2015. [↑](#footnote-ref-86)
87. 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 at: <http://www.accc.gov.au/regulated-infrastructure/water/water-guides>, accessed October 2015. [↑](#footnote-ref-87)
88. Report of the Independent Review of the Water Act 2007, conclusion 7.2. [↑](#footnote-ref-88)
89. Report of the Independent Review of the Water Act 2007, recommendation 18. See also Interagency Working Group on Review of Water Information Reporting Burdens’, available at <https://www.environment.gov.au/system/files/pages/117d6268-6372-42dc-9ed5-e3f5be5dfa15/files/review-water-information-reporting-18-tor.pdf>, accessed November 2015. [↑](#footnote-ref-89)
90. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.33-36. [↑](#footnote-ref-90)
91. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-91)
92. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-92)
93. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-93)
94. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.4-5, Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.4, National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-94)
95. *Water Act 2007 (Cth)*, s. 93. [↑](#footnote-ref-95)
96. Water infrastructure charges should be distinguished from commodity input prices paid by agricultural businesses, such as prices for fertiliser, seed, feed and other inputs for agricultural business. [↑](#footnote-ref-96)
97. The Queensland Government is currently implementing local management arrangements under which SunWater will transfer ownership and operation of 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 the St George irrigation scheme, will be subject to regulation under the water charge rules. [↑](#footnote-ref-97)
98. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2-3. [↑](#footnote-ref-98)
99. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-99)
100. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-100)
101. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-101)
102. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-102)
103. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3, 5. [↑](#footnote-ref-103)
104. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2, 6. [↑](#footnote-ref-104)
105. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, pp.7-8. [↑](#footnote-ref-105)
106. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-106)
107. Victorian Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-107)
108. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-108)
109. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-109)
110. Coliban Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.1: “Coliban Water supports…the intent of a tiered approach to minimise regulatory burden for smaller infrastructure operators.” [↑](#footnote-ref-110)
111. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3-4. [↑](#footnote-ref-111)
112. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-112)
113. ACCC Final Advice on the water charge infrastructure rules, June 2009, p.24-26. [↑](#footnote-ref-113)
114. ACCC Final Advice on the water charge infrastructure rules, June 2009, p 26. [↑](#footnote-ref-114)
115. The ACCC was concerned that the member-owned operator might require higher charges from non-member customers or make distributions to member customers in order to reduce the net charges levied on member customers. In turn, this could discourage member customers to transform their irrigation rights and therefore deter or distort water trade. [↑](#footnote-ref-115)
116. ACCC Final Advice on water charge infrastructure rules, June 2009, p 23. [↑](#footnote-ref-116)
117. Water Charge Infrastructure Rules 2010, Rule 6 [↑](#footnote-ref-117)
118. ACCC Final Advice on water charge infrastructure rules, June 2009, p.54. [↑](#footnote-ref-118)
119. Transformation of irrigation rights is dealt with in the Water Market Rules 2009. [↑](#footnote-ref-119)
120. ACCC Final Advice on water charge infrastructure rules, June 2009, p.55. [↑](#footnote-ref-120)
121. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-121)
122. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.14. [↑](#footnote-ref-122)
123. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. NIC also submitted that the ACCC should take a reactive rather than proactive approach to compliance. [↑](#footnote-ref-123)
124. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-124)
125. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-125)
126. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-126)
127. Sally Jones, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-127)
128. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-128)
129. Ruth Angel, Submission to the ACCC water charge rules review issues paper, July 2015, pp.1-2. [↑](#footnote-ref-129)
130. Ruth Angel, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-130)
131. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015 pp.3-4. [↑](#footnote-ref-131)
132. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, pp.6-7. [↑](#footnote-ref-132)
133. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, pp.7-8. [↑](#footnote-ref-133)
134. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5: “We recommend that Rule 10 (the ‘no discrimination rule’) be redrafted to accurately reflect the policy intent to cover systemic discrimination by operators against non-irrigation right holders based on their status as persons who do not hold irrigation rights”. [↑](#footnote-ref-134)
135. ACCC Final Advice on water charge infrastructure rules, June 2009, p.54. [↑](#footnote-ref-135)
136. ACCC Final Advice on water charge infrastructure rules, June 2009, p.28. [↑](#footnote-ref-136)
137. However, this concern does not, extend to an operator that has ‘casual usage charges’ for where a customer wishes to receive delivery of water but does not have water delivery right sufficient to provide for the delivery of that volume. [↑](#footnote-ref-137)
138. ***Location related right***is defined in s12.06(2) of the Basin Plan water trading rules to mean any of the following:

     Water delivery right;

     Work approval;

     Water use approval. [↑](#footnote-ref-138)
139. Deloitte Aurecon, Report to the ACCC and Murray Irrigation Limited under part 5 of the Water Charge (Infrastructure) Rules 2010, July 2012, p.46. [↑](#footnote-ref-139)
140. Deloitte Aurecon, Report to the ACCC and Murrumbidgee Irrigation Limited under part 5 of the Water Charge (Infrastructure) Rules 2010, July 2012, p.46. [↑](#footnote-ref-140)
141. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015; Sally Jones, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-141)
142. The wording of this provision draws on Water Trading Rule 12.08, which provides that a person may trade a water access right free from restrictions which relates to the purpose for which the water relating to that right has been, or will be, used. [↑](#footnote-ref-142)
143. Available at: <http://www.mirrigation.com.au/Customers/Schedule-of-Charges> [↑](#footnote-ref-143)
144. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2: “Murray Irrigation supports amending the rules to reduce the regulatory burden on IIOs and to simplify the regulatory regime.”; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.1: “WMI believes that a material reduction in the amount and complexity of regulation is warranted.” [↑](#footnote-ref-144)
145. ACCC, A guide to the water charge infrastructure rules: publishing and non-discriminatory charging requirements, 2011, p.30. [↑](#footnote-ref-145)
146. Further information on MI’s Rice Monitoring Fee is available at: <http://www.mirrigation.com.au/Customers/Rice-Monitoring/Rice-Water-Use-Targets>. [↑](#footnote-ref-146)
147. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-147)
148. Available at: <http://www.accc.gov.au/system/files/Marsden%20Jacobs%20Associates%20-%20impact%20of%20infrastructure%20charges%20on%20water%20trade%20in%20the%20MDB.pdf> [↑](#footnote-ref-148)
149. ‘Allocation assignments’ is the NSW terminology for trade of a water allocation that involves a change of ownership. [↑](#footnote-ref-149)
150. Available at: <https://www.statewater.com.au/Customer%20service/water-ordering-trading-pricing/Water%20Trading>. [↑](#footnote-ref-150)
151. See: State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.45-46, in which State Water (now, WaterNSW) sets out its concerns about its tariff structure and collecting revenue from interstate customers. In its submission, State Water calls for “an agreement or Memorandum of Understanding between [o]perators and/or Governments within the MDB” in relation to the billing and collection of revenue from interstate customers. [↑](#footnote-ref-151)
152. The ACCC asked MJA to assess this approach. Marsden Jacob Associates’ concluded from its analysis that such an approach would make sellers of NSW water allocation indifferent between selling water to buyers in NSW or interstate. [↑](#footnote-ref-152)
153. This proposed rule would not prevent an operator from imposing higher infrastructure charges on the grounds that a customer did not have, or had insufficient, water delivery right (even if this was the result of trading water delivery right). In particular, this rule does not prevent an operator from having casual usage charges apply where a customer wishes to receive delivery of water but does not have water delivery right sufficient to provide for the delivery of that volume. [↑](#footnote-ref-153)
154. Defined (as in the Basin Plan) to include transfer, and to relate to changes in location and or ownership of a right. [↑](#footnote-ref-154)
155. 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.

     As set out in section 4.3.1, the ACCC has proposed to rename such charges as ‘infrastructure charges’. [↑](#footnote-ref-155)
156. fees or charges payable to an IIO for access to the IIO’s irrigation network; changing access to the irrigation network; terminating access; surrendering a right to the delivery of water through the network [↑](#footnote-ref-156)
157. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8.

     The National Farmers’ Federation submitted its view that the recovery of MDBA costs is the “greatest area of inconsistency in water charging”. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9, 16.

     NSW Government, Submission to the Independent Review of the Water Act 2007, 2014, p.2.

     NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, 2014, pp.3, 9.

     Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, pp.2-3.

     State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41. [↑](#footnote-ref-157)
158. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-158)
159. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-159)
160. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6 [↑](#footnote-ref-160)
161. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-161)
162. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, pp.8-9. [↑](#footnote-ref-162)
163. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-163)
164. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2,4,5. [↑](#footnote-ref-164)
165. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-165)
166. See: <http://www.accc.gov.au/system/files/ABARES%20irrigator%20survey%20-%20final%20report.pdf>. [↑](#footnote-ref-166)
167. However, this response varied significantly between the Northern Basin as compared to all other regions, with only 16 per cent of irrigators in the Northern Basin indicating that they had received a schedule of charges in the last 12 months. [↑](#footnote-ref-167)
168. Only irrigators who were customers of IIOs were asked to respond to this question. [↑](#footnote-ref-168)
169. Consistent with the responses to other questions, there were some differences between regions. The per cent of customers dissatisfied with the level of engagement from their operator ranged from 37 per cent (in the Goulburn-Broken region) to 5 per cent (in the Murray region). Similarly, the per cent of satisfied customers ranged from 65 per cent (in the Murray region) to 37 per cent (in the Goulburn-Broken region). The responses from irrigators in the Northern Basin and Murrumbidgee were rather consistent. [↑](#footnote-ref-169)
170. WCIR Rule 4, definition of ***schedule of charges*,** subparagraph (b). [↑](#footnote-ref-170)
171. Intergovernmental Agreement on the National Water Initiative, June 2004, available at: <http://www.nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>, accessed October 2015. [↑](#footnote-ref-171)
172. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-172)
173. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, pp.8-9. [↑](#footnote-ref-173)
174. Note: if an operator has gained an exemption under Rule 9 from the requirement to include a particular charge on its Schedule of Charges, Rule 7 does not apply in relation to that charge. [↑](#footnote-ref-174)
175. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.12. MIL added that printing and postage costs amount to approximately $5000 to mail-out their Schedule and information statement. [↑](#footnote-ref-175)
176. National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, pp.14-15. [↑](#footnote-ref-176)
177. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, pp.13-14. [↑](#footnote-ref-177)
178. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-178)
179. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-179)
180. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.5, 7. [↑](#footnote-ref-180)
181. These rules have the effect of requiring an operator to give a copy of its Schedule of Charges at least 10 business days before the service is provided. [↑](#footnote-ref-181)
182. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-182)
183. Eagle Creek Pumping Syndicate, Submission to the Interagency Working Group on Water Information, March 2015, p 3. [↑](#footnote-ref-183)
184. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, pp.8-9. [↑](#footnote-ref-184)
185. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-185)
186. Coliban Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-186)
187. SunWater, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-187)
188. This rule applies whenever rule 11(1) or rule 12 applies; that is, when an infrastructure operator is required to provide its Schedule of Charges to customer, certain operators (those with more than 10GL) are further required to make the Schedule of Charges publically available as per rule 15. Currently infrastructure operators with less than 10GL are not required to publish their Schedule. [↑](#footnote-ref-188)
189. The term ‘managed water resources’ is defined in Rule 3 of the WCIR. [↑](#footnote-ref-189)
190. Report of the Independent Review of the Water Act 2007, Conclusion 4.6 [↑](#footnote-ref-190)
191. The phrase ‘class of water access right’ is used in both the Basin Plan water trading rules and the WCPMIR. The ACCC will provide guidance on the interpretation of this term. [↑](#footnote-ref-191)
192. ACCC Final Advice on the water charge infrastructure rules, June 2009. [↑](#footnote-ref-192)
193. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-193)
194. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-194)
195. WCIR, rule 18 sets out the specific consultation requirements. [↑](#footnote-ref-195)
196. The WCIR are not prescriptive on how infrastructure operators must give the NSP to customers. However, Part 5 operators must ensure that all customers receive the NSP in accordance with the WCIR. An operator may provide customers with different options for receiving the NSP.

     See: ACCC, [A guide to the water charge infrastructure rules: tier 2 requirements](http://www.accc.gov.au/publications/water-charge-infrastructure-rules/a-guide-to-the-water-charge-infrastructure-rules-tier-2-requirements), June 2011, p.19. [↑](#footnote-ref-196)
197. WCIR, rule 18. [↑](#footnote-ref-197)
198. 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.

     [↑](#footnote-ref-198)
199. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015 p.2; Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p, 2; Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6; National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.14; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.6; Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.9. [↑](#footnote-ref-199)
200. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.10 [↑](#footnote-ref-200)
201. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. CICL submitted that the NSP and benchmarking (required in the information statement) are “in excess of what IIO’s customers want and what is required for the ACCC to maintain oversight of IIO’s pricing”, see: [↑](#footnote-ref-201)
202. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.6; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. CICL added that tier 2 operators provide significant financial data in annual reports. [↑](#footnote-ref-202)
203. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-203)
204. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2-4. MI added its view about the level of uncertainty in forecasts provided in the NSP stating that the information “cannot be relied on for any useful purpose”. [↑](#footnote-ref-204)
205. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3. [↑](#footnote-ref-205)
206. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.9; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. CICL described the Part 5 consultation requirements as “excessive” and “reflect[ing] a lack of understanding about the nature of the relationship between the IIO and their customers” and added that the relationship between the IIO and its customer is defined in Company Rules, Policies and/or Service Contracts; therefore the ACCC does not need to define the “means and content” of this communication. [↑](#footnote-ref-206)
207. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2-3. CICL added that the relationship between the IIO and its customer is defined in Company Rules, Policies and/or Service Contracts; therefore the ACCC does not need to define the “means and content” of this communication. [↑](#footnote-ref-207)
208. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.14 [↑](#footnote-ref-208)
209. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-209)
210. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-210)
211. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3. [↑](#footnote-ref-211)
212. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-212)
213. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-213)
214. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-214)
215. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3; National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.15; MIL added that the member-owned nature of the business, in addition to growing competition, is a deterrent to monopoly pricing; Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-215)
216. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-216)
217. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. CICL added that even without these aspects, customers have the same recourse to the ACCC as other customers. [↑](#footnote-ref-217)
218. SunWater, Submission to the ACCC water charge rules review issues paper, July 2015, p.1.

     In the 2012 water price review of SunWater’s irrigation charges, the Queensland Competition Authority (QCA) recommended that SunWater should produce a five-yearly network service plan and annual updates. The rationale for the recommendation was to address concerns about insufficient customer consultation regarding business planning including the reasons for additional or unplanned expenditure and exploration of options and their cost effectiveness with customers. [↑](#footnote-ref-218)
219. The QCA’s price review is provided to the relevant QLD Minister as a series of recommendations for approval. On 1 July 2012, the Minister for Energy and Water Supply, The Hon Mark Ardle, responded to QCA’s consultation recommendations by asking SunWater to consult with QCA and peak industry bodies to develop an implementation plan for enhanced customer consultation (see: <http://statements.qld.gov.au/Statement/Id/79723>). The first implementation plan was released in September 2012, with regular progress reports provided thereafter (available at: <http://www.sunwater.com.au/schemes/nsp/annual-nsp-and-performance-reports>). As part of this process, SunWater has also produced a network service plan for 2014, 2015 and 2016, and has published on its website responses to questions and comments raised in consultation with customers on these plans (available at: <http://www.sunwater.com.au/schemes/nsp/annual-nsp-and-performance-reports>). [↑](#footnote-ref-219)
220. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-220)
221. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-221)
222. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3. [↑](#footnote-ref-222)
223. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, pp.5-6. [↑](#footnote-ref-223)
224. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-224)
225. ACCC public forum on the review of the water charge rules, Deniliquin, 3 August 2015. [↑](#footnote-ref-225)
226. National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.14. [↑](#footnote-ref-226)
227. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3-4; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-227)
228. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-228)
229. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5; National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.14. [↑](#footnote-ref-229)
230. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.10; [↑](#footnote-ref-230)
231. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-231)
232. National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.14. [↑](#footnote-ref-232)
233. National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.14. [↑](#footnote-ref-233)
234. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, pp.5,7. [↑](#footnote-ref-234)
235. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, pp.5,7. [↑](#footnote-ref-235)
236. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-236)
237. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.15; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.8; Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.9. [↑](#footnote-ref-237)
238. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3, 5. [↑](#footnote-ref-238)
239. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-239)
240. National Irrigators’ Council, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-240)
241. Water charge rules review terms of reference, Terms of Reference, item 3. [↑](#footnote-ref-241)
242. ACCC, Water infrastructure charge rules advice to the Minister for Climate Change and Water, June 2009, pp.26,29. [↑](#footnote-ref-242)
243. WCIR, rule 23. [↑](#footnote-ref-243)
244. For example, irrigation network services. However, it is important to note that “irrigation network” is a defined term that relates to a network that is used in the delivery of water for the primary purpose of being used for irrigation. There may be infrastructure operators who are providing services via a network that does *not* meet the definition of irrigation network. [↑](#footnote-ref-244)
245. The MDBA does not currently impose charges. [↑](#footnote-ref-245)
246. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015; ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015, Renmark, 28 July 2015, Shepparton, 3 August 2015, Deniliquin, 3 August 2015, Griffith, 4 August 2015, Tamworth, 24 August 2015, Dubbo, 25 August 2015.

     Murray Irrigation Limited also noted the limited flexibility in the rules to “allow a state authority to customise pricing principles to better suit the business and structure of their state’s water resources and bulk water providers”. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2, 5, 7, 8. [↑](#footnote-ref-246)
247. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-247)
248. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-248)
249. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, pp.10-11. [↑](#footnote-ref-249)
250. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-250)
251. Coliban Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-251)
252. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.8; Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.2. [↑](#footnote-ref-252)
253. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-253)
254. The Act already provides for Basin States to ‘opt-in’ the non-MDB parts of their states to the coverage of the water charge rules (and the water market rules). No state has expressed an interest in this option to date. [↑](#footnote-ref-254)
255. WCIR, rule 30. [↑](#footnote-ref-255)
256. WCIR, Schedule 1, 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; and current and proposed regulated charges. [↑](#footnote-ref-256)
257. ACCC, [A guide to the water charge infrastructure rules: pricing application for part 6 operators](http://www.accc.gov.au/publications/water-charge-infrastructure-rules/a-guide-to-the-water-charge-infrastructure-rules-pricing-application-for-part-6-operators), October 2011. [↑](#footnote-ref-257)
258. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015 p.12. [↑](#footnote-ref-258)
259. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.7-8. [↑](#footnote-ref-259)
260. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p7.

     MIL also expressed similar concerns in its submission to the Water Act Review, noting that it has to estimate those charges when sending its Schedule, if the determination is not finalised. MIL identified the implications are that “if [MIL] change[s] [its] charges to better reflect the final State Water price determination, [MIL] cannot backdate the charges to the start of the quarter…[a]lternatively, [MIL], or [its] customers, must absorb the difference until the start of the next quarter or [MIL] must pay the added costs of altering [its] account system to apply different rates for a specified time period. At the same time, [MIL] must also incur the cost of mailing out new fees and prices schedule and information statement”. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.12,13. [↑](#footnote-ref-260)
261. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-261)
262. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-262)
263. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-263)
264. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.2.; ACCC public forum on the review of the water charge rules, Shepparton, 3 August 2015. [↑](#footnote-ref-264)
265. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; ACCC public forum on the review of the water charge rules, Shepparton, 3 August 2015, p.1. [↑](#footnote-ref-265)
266. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.2; ACCC public forum on the review of the water charge rules, Shepparton, 3 August 2015, p.2. [↑](#footnote-ref-266)
267. ACCC, *Pricing Principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010,* July 2010, p.55. [↑](#footnote-ref-267)
268. For this and other reasons the ACCC has recommended the repeal of Part 5 in its entirety (see section 5.5.). [↑](#footnote-ref-268)
269. The panel stated:

     “The ACCC suggested amendments to the Act to enable regulators to set the duration of a pricing determination or approval of charges, in order to be more responsive to wider economic conditions, or other factors that may influence the efficiency and operation of existing or future determinations. The ACCC proposes that section 92(4) be redrafted to provide that the water charge rules may also provide for the duration to be determined by the ACCC or relevant accredited regulator.

     …The Panel considers that consultation should be undertaken on amending section 92(4) to allow the ACCC or an ACCC accredited regulator to determine the regulatory period applying to a price determination or charge approval. The Panel recommends that regulators’ discretion to amend the regulatory period be limited to extending the period relative to the periods specified in the rules, to provide flexibility for regulators without reducing certainty or increasing costs for regulated entities and their customers.” *Report of the Independent Review of the Water Act 2007*, p.65,66. [↑](#footnote-ref-269)
270. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, pp.5-7. [↑](#footnote-ref-270)
271. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-271)
272. Goulburn Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-272)
273. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.8. [↑](#footnote-ref-273)
274. On 23rd September 2015, the ACCC approved IPART’s application for accreditation. [↑](#footnote-ref-274)
275. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-275)
276. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-276)
277. Goulburn Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.1, 2. [↑](#footnote-ref-277)
278. WCIR, rule 29(4). [↑](#footnote-ref-278)
279. ACCC, *Pricing principles for price approvals and determinations under the Water Charge(Infrastructure) Rules 2010*, July 2010. [↑](#footnote-ref-279)
280. See the ACCC’s website for the [final decision](http://www.accc.gov.au/regulated-infrastructure/water/water-charge-infrastructure-rules-accreditation-arrangements/accreditation-escv) on the accreditation of the Essential Services Commission of Victoria. [↑](#footnote-ref-280)
281. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.9. The NSW Irrigators’ Council also noted that there was no annual review process when IPART determined WaterNSW’s charges under state water management law and that IPART determined the prices for the entire regulatory period with CPI adjustments. [↑](#footnote-ref-281)
282. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.8,9. [↑](#footnote-ref-282)
283. Victorian Farmers Federation, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, pp.6-7. [↑](#footnote-ref-283)
284. Daniel Mongan, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, pp.2-3. [↑](#footnote-ref-284)
285. WaterNSW, *WaterNSW Application to the ACCC for Annual Review of Regulated Charges*, 9 March 2015, p.8. [↑](#footnote-ref-285)
286. WCIR, Rule 29(4) [↑](#footnote-ref-286)
287. See section 7.3 of the Final Decision, available at: <http://accc.gov.au/regulated-infrastructure/water/water-projects/water-nsw-formerly-state-water-annual-price-review-2015-16/final-decision> [↑](#footnote-ref-287)
288. NSW Irrigators Council, Submission to Independent Expert Panel 2014 Statutory Review of the *Water Act 2007 (Cth)*, p.9 [↑](#footnote-ref-288)
289. In this discussion ‘pass through’ refers to a regulator providing for its initial determination to include costs where the actual amount of the cost is unknown at the time the regulator makes its decision. This should not be confused with the discussion of “pass through charges” in section 5.13, which deals with how an infrastructure operator determines charges to recover amounts payable for certain infrastructure charges and/or planning and management charges the operator itself incurs. [↑](#footnote-ref-289)
290. Note that with an up-front pass-through as currently provided for in other sectors, the regulator has limited discretion. Once the event occurs, the regulator must include (remove) revenue from the revenue requirement, for the remainder of the regulatory period equivalent to the increased (decreased) costs caused by the event. [↑](#footnote-ref-290)
291. This is considered in section 5.6.4. [↑](#footnote-ref-291)
292. Goulburn Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-292)
293. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.35. [↑](#footnote-ref-293)
294. Goulburn Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-294)
295. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-295)
296. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3, 7, 8, 9. [↑](#footnote-ref-296)
297. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-297)
298. WCIR, rule 43(5)(b)(i). [↑](#footnote-ref-298)
299. National Electricity Rules, Rule 6.5.10(a) and Rule 6.6.1(a1). [↑](#footnote-ref-299)
300. National Electricity Rules, Rule 6.6.1(c) and (d) [↑](#footnote-ref-300)
301. Rule 6.6A: <http://www.aemc.gov.au/getattachment/851c7baa-77a0-4c12-af05-25e9efdf5124/National-Electricity-Rule-Version-74.aspx>; 6A.8.1, National Electricity Rules: <http://www.aemc.gov.au/getattachment/afb01658-ea8f-4329-9ee5-7e47d69c4e59/National-Electricity-Rule-Version-74.aspx>; Rule 80, National Gas Rules: <http://www.aemc.gov.au/getattachment/8d0f72eb-7950-4b96-9a08-134e9de26b86/National-Gas-Rules-Version-27.aspx> [↑](#footnote-ref-301)
302. The definition of ***taxation event***, should be based on the definition of ‘tax change event’, below.

     A **tax change event** occurs if:

     (a) any of the following occurs during the course of a regulatory period for a Part 6 operator:

     (i) a change in a relevant tax, in the application or official interpretation of a relevant tax, in the rate of a relevant tax, or in the way a relevant tax is calculated;

     (ii) the removal of a relevant tax;

     (iii) the imposition of a relevant tax; and

     (b) in consequence, the costs to the Part 6 operator of providing regulated infrastructure services meet the materiality threshold for taxation and regulatory events.

     A **relevant tax** is any tax payable by a Part 6 operator other than:

     (a) income tax and capital gains tax;

     (b) stamp duty, financial institutions duty and bank accounts debits tax;

     (c) penalties, charges, fees and interest on late payments, or deficiencies in payments, relating to any tax; or

     (d) any tax that replaces or is the equivalent of or similar to any of the taxes referred to in paragraphs (a) to (b) (including any State equivalent tax). [↑](#footnote-ref-302)
303. In this context, the ACCC considers a regulatory event:

     includes a change to regulatory requirements on the Part 6 operator that relates to the provision of infrastructure services

     includes the approval or determination of regulated water charges incurred by the infrastructure operator by the ACCC or State Agency under State water management law. This includes where an infrastructure operator imposes regulated charges on other part 6 operators. For example (MDBA / BRC charges.

     does not include an obligation to pay a fine, a penalty or compensation in response to any breach of law. [↑](#footnote-ref-303)
304. In contrast, providing an incentive for the Part 6 operator to seek efficiencies is only a limited consideration for taxation and regulatory changes, because the gains from such unforeseen events are likely to be windfall in nature and are beyond the operator’s control. Therefore there is no reason to restrict a regulator’s ability to initiate a variation review on these grounds of taxation and regulatory charges. [↑](#footnote-ref-304)
305. Goulburn Murray Water, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, p.2-4. [↑](#footnote-ref-305)
306. See for example, WCIR, rule 29(2)(b). [↑](#footnote-ref-306)
307. Goulburn Murray Water, Submission to the ACCC water infrastructure charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-307)
308. See National Electricity Rules, Chapter 10 (definition of ‘materially’: <http://www.aemc.gov.au/getattachment/c8cc78d2-bca2-4b5a-989c-740db109f4f6/National-Electricity-Rules-Version-62.aspx>.) [↑](#footnote-ref-308)
309. As opposed to the current threshold which is set, in part, at 5 per cent of the opening RAB for the operator. [↑](#footnote-ref-309)
310. WCIR, rule 43(5)(b)(ii). [↑](#footnote-ref-310)
311. WCIR, rule 43(5)(c). [↑](#footnote-ref-311)
312. WCIR, rule 43(5)(b)(i). [↑](#footnote-ref-312)
313. Explanatory Memorandum - *Water Act 2007 and Water Charge (Infrastructure) Rules 2010*, p.20. [↑](#footnote-ref-313)
314. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-314)
315. Part 7 of the WCIR applies to a member-owned infrastructure operator servicing more than 10 GL of water held under water access entitlements. [↑](#footnote-ref-315)
316. WCIR rule 6 states that:

     In these Rules, a customer of an infrastructure operator is a related customer if:

     The customer is a beneficiary of a trust of which the infrastructure operator is a trustee; or

     Where the infrastructure operator is a company within the meaning of the *Corporations Act 2001*, the customer is–

     a related body corporate within the meaning of that Act in relation to the infrastructure operator; or

     a member of the company; or

     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

     the customer has any other legal or equitable interest in the infrastructure operator. [↑](#footnote-ref-316)
317. 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. [↑](#footnote-ref-317)
318. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-318)
319. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-319)
320. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-320)
321. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, pp.7-8. [↑](#footnote-ref-321)
322. There is still the possibility that distributions by such operators could be made on the same grounds as the enhanced non-discrimination provisions proposed for Part 3. Despite this, the risk of discriminatory distributions by operators subject to charge approval / determination is considered to be very limited. [↑](#footnote-ref-322)
323. Section 5 of the ADJR Act lists the grounds of judicial review. [↑](#footnote-ref-323)
324. 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. [↑](#footnote-ref-324)
325. 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 Tribunal (the Tribunal) the nominated body to conduct the reviews. [↑](#footnote-ref-325)
326. See: ACCC, Final Advice to the Minister on Accreditation under the water infrastructure charge rules, February 2010, p.12. [↑](#footnote-ref-326)
327. Frontier Economics, Submission to the Independent Review of the Water Act 2007, June 2014, p.4. [↑](#footnote-ref-327)
328. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, pp.6,7,10. WaterNSW also noted that the Act would be “the most appropriate legislative instrument to explicitly provide for a merits review”, with supporting material in the WCIR. [↑](#footnote-ref-328)
329. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.24-29. [↑](#footnote-ref-329)
330. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.29-30. [↑](#footnote-ref-330)
331. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-331)
332. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. State Water (now, WaterNSW) also expressed this position in its submission to the Act Review. State Water also noted that the right to judicial review is explicitly set out in the energy sector.

     State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.30-32. [↑](#footnote-ref-332)
333. Goulburn-Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-333)
334. GMW noted for example that it would reduce the need for interstate travel and excessive legal costs. [↑](#footnote-ref-334)
335. GMW noted that this allows for decisions to be appealed on the basis that either “there has been a bias or the determination is based wholly or partly on an error of fact in a material respect”. [↑](#footnote-ref-335)
336. Goulburn-Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-336)
337. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.7,8. [↑](#footnote-ref-337)
338. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.12; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-338)
339. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.12 [↑](#footnote-ref-339)
340. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-340)
341. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-341)
342. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.6. [↑](#footnote-ref-342)
343. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-343)
344. Essential Services Commission Act (s 55, 56). [↑](#footnote-ref-344)
345. Goulburn Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-345)
346. For example, the MDBA could, if it imposed infrastructure charges, be such an entity—see section 5.12. [↑](#footnote-ref-346)
347. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-347)
348. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-348)
349. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.6. [↑](#footnote-ref-349)
350. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.12 [↑](#footnote-ref-350)
351. The ACCC’s final advice on the approval of ESCV’s application for accreditation is available from the ACCC’s website: <http://www.accc.gov.au/regulated-infrastructure/water/water-charge-infrastructure-rules-accreditation-arrangements/accreditation-escv>. [↑](#footnote-ref-351)
352. The ACCC’s final advice on the approval of IPART’s application for accreditation is available from the ACCC’s website: <http://www.accc.gov.au/regulated-infrastructure/water/water-projects/ipart-application-for-accreditation-under-the-water-charge-infrastructure-rules>. [↑](#footnote-ref-352)
353. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, pp.2-3. [↑](#footnote-ref-353)
354. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, pp.2-3. [↑](#footnote-ref-354)
355. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.8. [↑](#footnote-ref-355)
356. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.5,32,33. [↑](#footnote-ref-356)
357. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.5. [↑](#footnote-ref-357)
358. Report of the Independent Review of the Water Act 2007, p.82. [↑](#footnote-ref-358)
359. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.5 [↑](#footnote-ref-359)
360. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.2, 7, 8.

     MIL also noted that “the IPART legislation allowed for a wider range of factors to be considered including contemplating a government/user co-payment and applying an efficiency dividend to MDBA charges”. [↑](#footnote-ref-360)
361. In its submission to the Act Review, MIL also supported the states being able to apply their own pricing principles as long as those principles are consistent with the WCIR. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8. [↑](#footnote-ref-361)
362. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-362)
363. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p 10. [↑](#footnote-ref-363)
364. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-364)
365. Rule 63(2) of the WCIR [↑](#footnote-ref-365)
366. Information requirements as set out in Schedule 4 of the WCIR. [↑](#footnote-ref-366)
367. IPART and the ESCV must apply the ACCC Pricing Principles as a condition of their accreditation. [↑](#footnote-ref-367)
368. Schedule 3, Part 3, Clause 3(7). [↑](#footnote-ref-368)
369. Report of the Independent Review of the Water Act 2007, p.43. [↑](#footnote-ref-369)
370. Intergovernmental Agreement on the National Water Initiative, p.13. [↑](#footnote-ref-370)
371. Intergovernmental Agreement on the National Water Initiative, pp.10-11. [↑](#footnote-ref-371)
372. Report of the Independent Review of the Water Act 2007, p.58. [↑](#footnote-ref-372)
373. Report of the Independent Review of the Water Act 2007, p.6. [↑](#footnote-ref-373)
374. As outlined in the Intergovernmental Agreement on the National Water Initiative. [↑](#footnote-ref-374)
375. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. WMI submitted that each infrastructure operator is unique and there should be no expectation that its charging regime will be consistent with another;

     National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3,12; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-375)
376. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-376)
377. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.3; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-377)
378. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. CIT labelled “consistent pricing” an “aspirational target” that is impossible to achieve; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. NIC submitted that the BWCOP, to ensure consistency in pricing policies, is “aspirational rather than achievable”; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.4;– WMI submitted their view that as an objective, consistency is impossible to achieve [↑](#footnote-ref-378)
379. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-379)
380. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.7 [↑](#footnote-ref-380)
381. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-381)
382. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-382)
383. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4. [↑](#footnote-ref-383)
384. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.36. [↑](#footnote-ref-384)
385. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.38-39. State Water also stated that a “Part 5 or part 7 operator still has an opportunity to extort monopoly rents from customers or levy charges beyond prudent and efficient costs”. [↑](#footnote-ref-385)
386. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39, 61. State Water also stated that any increases in regulatory burden would be offset by customer savings. [↑](#footnote-ref-386)
387. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.5 [↑](#footnote-ref-387)
388. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-388)
389. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p13. [↑](#footnote-ref-389)
390. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p13. [↑](#footnote-ref-390)
391. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-391)
392. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.6,7. VFF also stated its support for using price benchmarking between Victorian rural water corporations. [↑](#footnote-ref-392)
393. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-393)
394. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-394)
395. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. MIL also noted this in its Submission to the Independent Review of the Water Act 2007. [↑](#footnote-ref-395)
396. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8; Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, pp.7,8. [↑](#footnote-ref-396)
397. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-397)
398. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-398)
399. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4. [↑](#footnote-ref-399)
400. The MDBA also noted that the absence of a “level playing field” has resulted in “different charges for similar products, and implications for competitive neutrality”. [↑](#footnote-ref-400)
401. Murray-Darling Basin Authority, Submission to the Independent Review of the Water Act 2007, June 2014, p.8. [↑](#footnote-ref-401)
402. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4; Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.7; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.6. [↑](#footnote-ref-402)
403. Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4. [↑](#footnote-ref-403)
404. Murray-Darling Basin Authority, Submission to the Independent Review of the Water Act 2007, June 2014 [↑](#footnote-ref-404)
405. Murray Valley Private Diverters, Submission to the Independent Review of the Water Act 2007, June 2014, pp.4-5. [↑](#footnote-ref-405)
406. South Australian Government, Submission to the Independent Review of the Water Act 2007, June 2014, p.16. [↑](#footnote-ref-406)
407. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8. [↑](#footnote-ref-407)
408. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-408)
409. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-409)
410. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-410)
411. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, p.3. [↑](#footnote-ref-411)
412. ACCC, Final advice on the development of the WCIR p.48. [↑](#footnote-ref-412)
413. ACCC, Final advice on the development of the WCIR, p.xix. [↑](#footnote-ref-413)
414. ‘Postage stamp pricing’ refers to where all users are charged the same charge, especially in the situation where there are likely to be underlying differences in cost of supply to different user groups – for example, because of differences across geographical areas. [↑](#footnote-ref-414)
415. Peel Valley Users Association Inc, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-415)
416. Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.2. [↑](#footnote-ref-416)
417. Peel Valley Users Association Inc, Submission to the ACCC water charge rules review issues paper, July 2015, p.4; Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.2. [↑](#footnote-ref-417)
418. Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.2; Peel Valley Users Association Inc, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-418)
419. Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, pp.1, 3. [↑](#footnote-ref-419)
420. Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.3. The PVWUA also noted that it releases 95 per cent of its water to other downstream valleys. See Section 4.2 for further discussion on this issue. [↑](#footnote-ref-420)
421. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, pp.1, 6. [↑](#footnote-ref-421)
422. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. Mr Beex also noted that over the last financial year, the infrastructure usage fee has increased by 11 per cent in the Murray Valley, and decreased by 16 per cent in Shepparton. [↑](#footnote-ref-422)
423. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015; Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, July 2015,. [↑](#footnote-ref-423)
424. Intergovernmental Agreement on the National Water Initiative, clauses 58 – 60. [↑](#footnote-ref-424)
425. Report of the Independent Review of the Water Act 2007, p.60. [↑](#footnote-ref-425)
426. Report of the Independent Review of the Water Act 2007, p.60. [↑](#footnote-ref-426)
427. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.1. [↑](#footnote-ref-427)
428. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.36. [↑](#footnote-ref-428)
429. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.12-24. [↑](#footnote-ref-429)
430. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.26. WaterNSW reiterated this in Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-430)
431. State Water further submitted that the merits review process could improve the quality of regulatory decisions and the achievement of the BWCOP, and that over time, a body of precedent would develop and that would also improve consistency in water charging arrangements. (pp.26-27) [↑](#footnote-ref-431)
432. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-432)
433. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3-4. [↑](#footnote-ref-433)
434. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-434)
435. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-435)
436. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015, p.9; The NSW Irrigators’ Council also submitted its view that the “plans and rules made under Part 1 section 10(1) [of the Act] have not improved the Basin-wide consistency of water charges but, to the contrary, have added additional complexity and costs …”, NSW Irrigators’ Council, submission to the Water Act Review, June 2014, p.7. [↑](#footnote-ref-436)
437. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, p.8. [↑](#footnote-ref-437)
438. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-438)
439. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, p.6; Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4; Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.7. [↑](#footnote-ref-439)
440. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.7. [↑](#footnote-ref-440)
441. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, p.6 ; NSW Irrigators’ Council also noted that there is a “sophisticated bulk water charging regime” in NSW and that other states do not pay comparable water charges. [↑](#footnote-ref-441)
442. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014 p.7. [↑](#footnote-ref-442)
443. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, pp.6-7. [↑](#footnote-ref-443)
444. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-444)
445. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.3. [↑](#footnote-ref-445)
446. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-446)
447. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1 [↑](#footnote-ref-447)
448. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1 [↑](#footnote-ref-448)
449. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1 [↑](#footnote-ref-449)
450. Frontier Economics, Submission to the Independent Review of the Water Act 2007, June 2014, p.3. [↑](#footnote-ref-450)
451. Frontier Economics, Submission to the Independent Review of the Water Act 2007, June 2014, p.3. [↑](#footnote-ref-451)
452. Ashton, D June 2015, *Water trading and water charge rules: a survey of irrigators in the Murray–Darling Basin*,

     ABARES report to client prepared for the Australian Competition and Consumer Commission, Canberra, Table 1. [↑](#footnote-ref-452)
453. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3, 6; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-453)
454. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13. [↑](#footnote-ref-454)
455. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, pp.8-9. [↑](#footnote-ref-455)
456. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.46. [↑](#footnote-ref-456)
457. State Water added that it is difficult to assess “usage of water on the opposite border” and debit it from the NSW water accounts to “access meters and/or readings to accurately measure the amount of water taken at the respective location” in relation to tagged water access entitlements. [↑](#footnote-ref-457)
458. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-458)
459. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-459)
460. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-460)
461. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-461)
462. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3-4. [↑](#footnote-ref-462)
463. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.3-4. [↑](#footnote-ref-463)
464. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.4-5. [↑](#footnote-ref-464)
465. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.4-5. [↑](#footnote-ref-465)
466. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-466)
467. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-467)
468. The National Water Brokers further submitted that one way to reduce costs would be to have a National Standard of Water Registers. The National Water Brokers, submission to the Water Act Review, June 2014, p.5. [↑](#footnote-ref-468)
469. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, July 2015, p.46. [↑](#footnote-ref-469)
470. Marsden Jacob Associates, *The impact of infrastructure charge structures on water trade in the Murray-Darling Basin*, Report prepared for the ACCC, June 2015, p.22. [↑](#footnote-ref-470)
471. See section 5.3 and Rule advice 5-C. [↑](#footnote-ref-471)
472. This includes where access to the infrastructure is subject to an arbitration or other dispute resolution process. [↑](#footnote-ref-472)
473. This includes where the charge is arbitrated, determined, negotiated or otherwise arising as the outcome of a dispute resolution process. [↑](#footnote-ref-473)
474. See Rule advice 4‑B. [↑](#footnote-ref-474)
475. See section 5.3. [↑](#footnote-ref-475)
476. The ACCC has also made rule advice to allow an operator to seek an exemption in the case where publication requirements relating to the infrastructure charge would cause a materially adverse impact on the operator, but not the customer. Where an operator receives an exemption from publication requirements under rule 9, the ACCC’s proposed amendments to Schedule of Charge requirements will require the operator to include notice of the exemption on its schedule of charges. See Rule advice 5-J and Rule advice 5-K. [↑](#footnote-ref-476)
477. Section 44AA of the Competition and Consumer Act 2010. [↑](#footnote-ref-477)
478. As defined under section 44B, Part IIIA, CCA. [↑](#footnote-ref-478)
479. For example, NSW established an access regime under Part 3 of the Water Industry Competition Act 2006 (NSW) in relation to Sydney Water Corporation and Hunter Water Corporation. This access regime has been certified as ‘effective’ under Part IIIA. [↑](#footnote-ref-479)
480. *Water Act 2007 (Cth)*, s. 250B. [↑](#footnote-ref-480)
481. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-481)
482. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-482)
483. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-483)
484. The Bill passed both houses of the SA Parliament on 14 October 2015. See <http://www.legislation.sa.gov.au/LZ/B/CURRENT/WATER%20INDUSTRY%20(THIRD%20PARTY%20ACCESS)%20AMENDMENT%20BILL%202015/UNOFFICIAL%20ROYAL%20ARMS/WATER%20ACCESS%20AMENDMENT%20BILL%202015.UN.PDF> [↑](#footnote-ref-484)
485. Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, Explanatory Memorandum, September 2013, p.4. [↑](#footnote-ref-485)
486. Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, February 2013, pp.10-11.

     The Bill does not apply to infrastructure operated by IIOs in SA. Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, Explanatory Memorandum, September 2013, pp.21-22. [↑](#footnote-ref-486)
487. Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, February 2013, pp.10-11.

     The areas where the Department of Treasury and Finance raised particular concerns about potential inconsistencies was in relation to an activity prohibited under state legislation that is not prohibited under the water charge rules - the Department cited non-discrimination as an example. Additionally, regulatory requirements may be more ‘onerous’ under the state legislation than the water charge rules – the Department cited the approval or determination of charges by an independent regulator as an example.

     Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, Explanatory Memorandum, September 2013, pp.21-22. [↑](#footnote-ref-487)
488. Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, February 2013, pp.10-11. [↑](#footnote-ref-488)
489. Department of Treasury and Finance, Access to Water and Sewerage Infrastructure, Explanatory Memorandum, September 2013, pp.21‑22. [↑](#footnote-ref-489)
490. [↑](#footnote-ref-490)
491. However, as detailed in Rule advice 5‑K, an amendment to that provision is proposed, which would require the operator to publish on its Schedule of Charges whether any exemptions have been provided to particular services (excluding the dollar amount). This intent of this amendment is to increase transparency about the existence of any such negotiated / arbitrated charges. [↑](#footnote-ref-491)
492. In this section, a reference to ‘an approval or determination of regulated charges’ includes a reference to a variation of an approval or determination under Part 6 Division 4, or an annual review of an approval or determination under Part 6 Division 3. [↑](#footnote-ref-492)
493. 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> [↑](#footnote-ref-493)
494. Water Act 2007 (Cth), s. 212. [↑](#footnote-ref-494)
495. Australian Government, Murray-Darling Basin Agreement, Schedule 1 to the Water Act 2007 (Cth) [↑](#footnote-ref-495)
496. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8.

     The National Farmers’ Federation submitted its view that the recovery of MDBA costs is the “greatest area of inconsistency in water charging”. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, pp.3, 9, 16.

     NSW Government, Submission to the Independent Review of the Water Act 2007, 2014, p.2.

     NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9.

     Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, pp.2-3.

     State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41. [↑](#footnote-ref-496)
497. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, p.3.

     This view was supported by: State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41, NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, 2014, p.9, Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8, National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, p.16. [↑](#footnote-ref-497)
498. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.40. [↑](#footnote-ref-498)
499. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, p.16. [↑](#footnote-ref-499)
500. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13. [↑](#footnote-ref-500)
501. NSW Government, Submission to the ACCC water charge rules review issues paper, August 2015, p.1. [↑](#footnote-ref-501)
502. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, August 2015, p.8. [↑](#footnote-ref-502)
503. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, August 2015, p.7 [↑](#footnote-ref-503)
504. Victorian Farmers Federation, Submission to the ACCC water charge rules review issues paper, August 2015, pp.7-8. [↑](#footnote-ref-504)
505. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, August 2015, p.3. [↑](#footnote-ref-505)
506. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, August 2015, p.5. [↑](#footnote-ref-506)
507. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, August 2015, p.4. [↑](#footnote-ref-507)
508. Murray-Darling Basin Authority, Submission to the ACCC water charge rules review issues paper, August 2015, p.4. [↑](#footnote-ref-508)
509. These funding arrangements are outside the water charge rules and as such are not *required* to contribute to the BWCOP; however, the BWCOP are largely based on NWI commitments to which all Basin States have subscribed. Accordingly, if the NWI was fully implemented these funding arrangements should be largely consistent with the BWCOP. [↑](#footnote-ref-509)
510. The ACCC/AEC conducts several types of reviews in other sectors. These include:

     • prudency reviews of capital expenditure programs in electricity and gas network resets

     • monitoring reviews of airports and container ports in terms of price, costs and quality of service

     • a review of Australia Post’s reserved services and the degree to which these services might cross subsidise other functions, and

     • annual reviews of some access regimes.

     In each case, these reviews are either part of a regulated determination set down in legislation, the product of a Ministerial direction under the CCA to monitor, or are part of an access determination under the CCA. [↑](#footnote-ref-510)
511. Report of the Independent Review of the Water Act 2007, Conclusion 9.1. [↑](#footnote-ref-511)
512. Report of the Independent Review of the Water Act 2007, Conclusion 9.3. [↑](#footnote-ref-512)
513. See also discussion of ‘on-river infrastructure services’ in section 2.1. [↑](#footnote-ref-513)
514. WCIR, Rule 4(d). This rule requirement only applies to IIOs. [↑](#footnote-ref-514)
515. Murray Valley Private Diverters submitted that it was concerned that “[w]ater users are not receiving transparent information on government charges, particularly in relation to the MDBA and other Federal actions arising from the [Act]”. Murray Valley Private Diverters, Submission to the Independent Review of the Water Act 2007, June 2014, p.4. [↑](#footnote-ref-515)
516. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, pp.2-3. [↑](#footnote-ref-516)
517. NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9. [↑](#footnote-ref-517)
518. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8. [↑](#footnote-ref-518)
519. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9,16. [↑](#footnote-ref-519)
520. NSW Government, Submission to the Independent Review of the Water Act 2007, June 2014, p.2. [↑](#footnote-ref-520)
521. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41. [↑](#footnote-ref-521)
522. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-522)
523. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7.

     MI stated that a similar problem exists with charges imposed by the NSW Office of Water (determined by IPART) and WaterNSW’s potion of government bulk water charges, including the NSW Government’s contribution to the MDBA’s costs. [↑](#footnote-ref-523)
524. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-524)
525. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-525)
526. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13. [↑](#footnote-ref-526)
527. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.10. [↑](#footnote-ref-527)
528. ACCC public forum on the review of the water charge rules, Deniliquin, 3 August 2015. [↑](#footnote-ref-528)
529. ACCC public forum on the review of the water charge rules, Shepparton, 3 August 2015. [↑](#footnote-ref-529)
530. ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015. [↑](#footnote-ref-530)
531. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-531)
532. See <http://www.depi.vic.gov.au/water/governing-water-resources/water-entitlements-and-trade/bulk-entitlements> [↑](#footnote-ref-532)
533. Note: distribution shared loss charges may be levied on the volume of water delivery right held, and if so would be eligible to form part of the basis for calculating termination fees. If the operator elects to recover distribution loss shared charges on the basis of volume of water *delivered* to the terminating customer, or on the basis of a customer’s water access right or irrigation right, these charges would not be included for the purposes of calculating termination fees. In any case, the operator must recover distribution loss shared charges separately from its other charges. [↑](#footnote-ref-533)
534. *Report of the Independent Review of the Water Act 2007*, p.48. [↑](#footnote-ref-534)
535. <http://www.environment.gov.au/submissions/water-act/43-south-australia.pdf> [↑](#footnote-ref-535)
536. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-536)
537. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.10, [↑](#footnote-ref-537)
538. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7 [↑](#footnote-ref-538)
539. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13 [↑](#footnote-ref-539)
540. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-540)
541. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-541)
542. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-542)
543. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-543)
544. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-544)
545. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-545)
546. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.4. [↑](#footnote-ref-546)
547. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-547)
548. Daniel Mongan, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-548)
549. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-549)
550. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-550)
551. ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015 [↑](#footnote-ref-551)
552. ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015. [↑](#footnote-ref-552)
553. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-553)
554. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-554)
555. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. Stakeholders at the Griffith public forum also expressed the same concern. [↑](#footnote-ref-555)
556. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015, pp.1, 3. Stakeholders at the Mildura public forum also expressed similar concerns. [↑](#footnote-ref-556)
557. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.8.; Anita Brown, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-557)
558. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-558)
559. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015, pp.1-2. [↑](#footnote-ref-559)
560. Part 1, Section 7(4) of the Act states that: “If the infrastructure operator operates the water service infrastructure for the purposes of delivering water for the primary purpose of being used for irrigation:

     The operator is an ***irrigation infrastructure operator***; and

     The infrastructure is the operator’s ***irrigation network***.”

     This ‘primary purpose’ test means, in effect, that an operator’s status as an IIO depends on the purpose(s) for which water delivered by the operator is used. [↑](#footnote-ref-560)
561. The ACCC recognises that “termination fee” is not currently a defined term, and has made Draft Rule Advice that this term be defined – see Rule advice 4‑B. In this Advice, ‘termination fee’ is used to refer to fees payable for the termination of a right of access to an infrastructure operator’s water service infrastructure. At present, the WCTFR only regulate such fees for rights held against an IIO, rather than against infrastructure operators generally. [↑](#footnote-ref-561)
562. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13. [↑](#footnote-ref-562)
563. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-563)
564. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.10. [↑](#footnote-ref-564)
565. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-565)
566. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13. [↑](#footnote-ref-566)
567. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-567)
568. ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015. [↑](#footnote-ref-568)
569. ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015. [↑](#footnote-ref-569)
570. ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015. [↑](#footnote-ref-570)
571. Ashton, D June 2015, *Water trading and water charge rules: a survey of irrigators in the Murray–Darling Basin,* ABARES report to client prepared for the ACCC, Canberra. [↑](#footnote-ref-571)
572. Schedule 2, Part 2, subsection 2(a) of the Act. [↑](#footnote-ref-572)
573. The termination fee rules currently allow the termination fee to exceed 10x TNAC in the limited circumstances where the ACCC has approved an additional termination fee relating to contracts negotiated between the operator and a customer for certain capital works. See WCTFR Rule 8. [↑](#footnote-ref-573)
574. *ACCC Water Monitoring Report 2013-14*, April 2015, p.69. [↑](#footnote-ref-574)
575. The ACCC acknowledges that the proportion of fixed versus variable costs differs across operators, and that operators operating piped and pumped infrastructure are likely to incur a relatively greater proportion of their costs as variable costs than other operators, due to the variable electricity costs of operating such infrastructure. [↑](#footnote-ref-575)
576. Wah-Wah Stock & Domestic Water Users Association (WWSDWUA) stated that “[t]he rules the ACCC have for termination fees which allows operators to charge 10 times the fixed costs have encouraged operators to increase the fixed component of water charges.” WWSDWUA further stated that Murrumbidgee Irrigation increased its fixed charges by 40 per cent in the 2014-15 year, and questioned the reason for the increase. WWSDWUA submitted that MI’s charges are now 95 per cent fixed. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015, pp.1-4. [↑](#footnote-ref-576)
577. Schedule 2, Part 3, Section 3(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”. [↑](#footnote-ref-577)
578. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015; ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015 [↑](#footnote-ref-578)
579. ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015; ACCC public forum on the review of the water charge rules, Renmark, 28 July 2015. [↑](#footnote-ref-579)
580. Subject to the other requirements of the water charge rules. For example, see section 5.13 for the ACCC’s advice on how operators should pass through charges of other infrastructure operators. [↑](#footnote-ref-580)
581. A fixed charge may reference the volume of a right that is *held* by a customer, but it is fixed with respect to the level of *use*. An example of a fixed charge is a charge that is $10 per ML of water delivery right held by the customer. An example of a variable charge is a charge that is $7 per ML of water allocation delivered to the customer. An example of a non-volumetric charge is a charge is $100 per hectare of land held by the customer (i.e. it does not reference the volume of a water right held by a customer. [↑](#footnote-ref-581)
582. *ACCC Water Monitoring Report, 2013-14*, April 2015 p.98. [↑](#footnote-ref-582)
583. Or other unit, if the right of access being terminated is denominated in some other unit such as a flow rate share. [↑](#footnote-ref-583)
584. Peter Beex, Submission to the ACCC water charge rules review issues paper, July 2015, p.8. [↑](#footnote-ref-584)
585. ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015. [↑](#footnote-ref-585)
586. John Girdwood, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. This argument was also raised by stakeholders in the ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015. [↑](#footnote-ref-586)
587. ACCC public forum on the review of the water charge rules, Renmark, 28 July 2015. [↑](#footnote-ref-587)
588. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-588)
589. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-589)
590. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, pp.4-5. [↑](#footnote-ref-590)
591. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.10. [↑](#footnote-ref-591)
592. Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-592)
593. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-593)
594. Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.6. [↑](#footnote-ref-594)
595. ACCC, Position Paper water charge rules for termination fees, August 2008, p.xi. [↑](#footnote-ref-595)
596. Section 12.28, Basin Plan water trading rules. [↑](#footnote-ref-596)
597. The ACCC considers that reasonable restriction of water delivery right trade should be determined with reference to the factors explicitly listed under rule 12.29 of the Basin Plan water trading rules. [↑](#footnote-ref-597)
598. This should not otherwise limit the calculation of a maximum termination fee in relation to a right to drainage, or charging of termination fees in relation to infrastructure dedicated to the exclusive use of the terminating irrigator (where an infrastructure operator has a separate, specific charge in relation to that infrastructure). [↑](#footnote-ref-598)
599. WCTFR, Rule 6(2)(a). [↑](#footnote-ref-599)
600. WCTFR, Rule 6(2)(b). [↑](#footnote-ref-600)
601. Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.14; Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.7; Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015, p.10.

     CICL noted that “[r]ationalisation of group schemes is easily said but much harder to achieve because it inevitably comes down to some customers being pressed to accept relocation, reduced service levels and/or higher charges. That said, where an IIO is intent on rationalisation, access to a pool of termination fees that might be used [to] fund rationalisation is far more likely to assist [than] inhibit the process”.

     Queensland Farmers’ Federation made a comment on the termination fee set by the Queensland Competition Authority, which falls outside the jurisdiction of the WCTFR. The Queensland Farmers’ Federation noted that the “[Queensland Competition Authority] imposed termination fees in some high cost schemes that would restrict opportunities for irrigators to take options to trade out of a scheme if they were wanting to address financial problems on farm and within the scheme. These changes may restrict an operator from rationalising sections of a scheme by allowing customers to trade out of the problem section of the scheme”. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-601)
602. Specific stakeholder feedback on these issues is discussed in sections 6.2.1 and 6.2.2, as relevant. [↑](#footnote-ref-602)
603. The ACCC notes, however, that the Basin Plan water trading rule does not apply to infrastructure operators that are not IIOs. [↑](#footnote-ref-603)
604. The ACCC must decide whether or not to approve the additional termination fee within 30 days, excepting any days on which an ACCC information request to stakeholders is outstanding. The ACCC may extend its decision-making period by 30 days. [↑](#footnote-ref-604)
605. The ACCC found the application invalid, in part because the relevant capital works had commenced some years before the contract was entered into. The infrastructure operator declined to re-submit the application. [↑](#footnote-ref-605)
606. 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 planning and management charges or WPM activities. The Act and the WCPMIR therefore currently rely upon the ordinary meaning of these terms; further guidance on defining and identifying WPM activities and planning and management 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: Principles for cost recovery of water planning and management activities’. These pricing principles, developed jointly by the Australian, State and territory governments, were endorsed by the Natural Resource Management Ministerial Council in April 2010. [↑](#footnote-ref-606)
607. Explanatory Statement, Water Charge (Planning and Management Information) Rules 2010. [↑](#footnote-ref-607)
608. ACCC, Water Monitoring Report 2013-14, 2015, pp65-67 – The ACCC calculate hypothetical irrigator bills to show changes in absolute amounts paid by irrigators and to track the relative proportions of the bill that relate to WPM, bulk and IIO charges. Planning and management charges paid by irrigators differ across the Basin and the hypothetical bills assume only planning and management charges regularly applied rather than irregular transaction charges. In most Basin States this means planning and management charges represent around 5 per cent of total hypothetical irrigator bills [↑](#footnote-ref-608)
609. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-609)
610. Victorian Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-610)
611. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-611)
612. Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. MIL added that the level of compliance with the WCPMIR also highlights differences in the approaches taken by Basin States towards bulk water charges and the recovery of Murray-Darling Basin Authority costs. [↑](#footnote-ref-612)
613. Queensland Department of Natural Resources and Mines, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-613)
614. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-614)
615. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-615)
616. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-616)
617. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-617)
618. Mr Mongan suggested that the ACCC could achieve this analysis through a “time in motion study” or similar exercise. [↑](#footnote-ref-618)
619. IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-619)
620. Goulburn-Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-620)
621. Coliban Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.1 [↑](#footnote-ref-621)
622. NSW Government, Submission to the ACCC water charge rules review issues paper, August 2015, pp.1-2. [↑](#footnote-ref-622)
623. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.14. [↑](#footnote-ref-623)
624. Goulburn-Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-624)
625. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.7. [↑](#footnote-ref-625)
626. Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.6,7. The QFF added that “[t]here is also the added difficulty of addressing the need for and efficiency of different planning systems and accounting for cost recovery from varied polluters or the beneficiaries from aspect[s] of regulatory reform”. [↑](#footnote-ref-626)
627. NSW Government, Submission to the ACCC water charge rules review issues paper, August 2015, p.1. [↑](#footnote-ref-627)
628. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.14. [↑](#footnote-ref-628)
629. Queensland Department of Natural Resources and Mines, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-629)
630. National Water Initiative, clause 67. [↑](#footnote-ref-630)
631. ACCC, Submission to the Review of the Water Act, 2014, p.6. [↑](#footnote-ref-631)
632. *ACCC Water Monitoring Report 2010-11*, pp.64-66; *ACCC Water Monitoring Report 2013-14*, p.50. [↑](#footnote-ref-632)
633. 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> [↑](#footnote-ref-633)
634. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-634)
635. NSW Government, Submission to the ACCC water charge rules review issues paper, August 2015, pp.1-2. [↑](#footnote-ref-635)
636. Victorian Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-636)
637. Victorian Auditor-General as cited in Victorian Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-637)
638. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-638)
639. The current requirements in the WCPMIR relating to these matters are at rule 5(2)(d)(i) and (5)(2)(j). [↑](#footnote-ref-639)
640. NSW Government, Submission to the ACCC water charge rules review issues paper, August 2015, p.2. [↑](#footnote-ref-640)
641. For example, see the material published on the water held by the Commonwealth Environmental Water Holder (CEWH) at: <http://www.environment.gov.au/water/cewo/about/water-holdings> [↑](#footnote-ref-641)
642. Draft Council of Australian Governments regulation impact statement for consultation, Regulation of Water market intermediaries, April 2013: http://ris.dpmc.gov.au/2013/04/19/regulation-of-water-market-intermediaries-coag-consultationregulation-impact-statement-standing-council-on-environment-and-water [↑](#footnote-ref-642)
643. Report of the Independent Review of the Water Act 2007, Recommendation 9. [↑](#footnote-ref-643)
644. See: ACCC, Submission to the Independent Review of the Water Act 2007, July 2014, p.4; ACCC Water Monitoring Report 2012-13, April 2015, Chapter 2. [↑](#footnote-ref-644)
645. Report of the Independent Review of the Water Act 2007, Conclusion 4.3. [↑](#footnote-ref-645)
646. Ruth Angel, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-646)
647. The Water (Amendment) Act 2015 received Royal Assent on 13 October 2015. [↑](#footnote-ref-647)
648. Michael Renehan, Murray Irrigation Limited, ACCC public forum on the review of the water charge rules, Deniliquin, 3 August 2015. [↑](#footnote-ref-648)
649. Waterfind, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-649)
650. National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015, p.13. [↑](#footnote-ref-650)
651. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.6. [↑](#footnote-ref-651)
652. That is, EWOQ covers residential customers and small business customers with a consumption of less than 100 Kl in the Gold Coast Council, Logan City Council, Redland City Council, Queensland Urban Utilities and Unity water area (i.e. Moreton Bay, Sunshine Coast and Noosa local authority area). See: Electricity and Water Ombudsman of Queensland website, <http://www.ewoq.com.au/Complaints/Typesofcomplaints.aspx>, accessed: November 2015. [↑](#footnote-ref-652)
653. *Water Industry Competition Act 2006*, section 49; and *Water Competition (General) Regulation 2008*, Regulation 5. [↑](#footnote-ref-653)
654. Discussion with Pia Bentick (Company Secretary of EWOOSA), 14 September 2015. [↑](#footnote-ref-654)
655. Current members of EWOV may be found at: Electricity and Water Ombudsman of Victoria website: <https://www.ewov.com.au/providers/water-companies>, accessed: September 2015. [↑](#footnote-ref-655)
656. Energy and Water Ombudsman Charter, Rule 6.1. [↑](#footnote-ref-656)
657. Wah Wah Stock and Domestic Water Users Association, Submission to the ACCC water charge rules review issues paper, July 2015, p.2. [↑](#footnote-ref-657)
658. Sally Jones, Submission to the ACCC water charge rules review issues paper, July 2015, p.1. [↑](#footnote-ref-658)
659. Available at: <https://www.dpmc.gov.au/office-best-practice-regulation> [↑](#footnote-ref-659)
660. These are the 31 infrastructure operators that the ACCC monitors pursuant to sections 94 and 99 of the Act. [↑](#footnote-ref-660)
661. IIO is defined in section 7 of the Act. [↑](#footnote-ref-661)
662. ‘member owned operator’ is defined in WCIR, rule 5. [↑](#footnote-ref-662)
663. Available at: <https://www.dpmc.gov.au/sites/default/files/publications/005_Regulatory_Burden_Measurement_Framework_1.pdf> [↑](#footnote-ref-663)
664. A number of proposed relatively minor amendments will not result in any measurable change in regulatory burden. For example, those that increase clarity or align rule drafting with the practical enforcement of the rule rather than any substantial change to the intent or requirements under the current rules [↑](#footnote-ref-664)
665. As discussed in chapter 4, the ACCC’s draft advice is that the Water Charge (Infrastructure) Rules 2010 (WCIR), the Water Charge (Termination Fees) Rules 2009 and the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) be combined into a single instrument. [↑](#footnote-ref-665)
666. Regulatory costs for Schedule of Charges information requirements for planning and management charges is included in section 9.3.1 [↑](#footnote-ref-666)
667. Regulatory costs for publication requirements of planning and management charges is included in section 9.3.2 [↑](#footnote-ref-667)
668. Central Irrigation Trust, Submission to the ACCC water charge rules review issues paper, July 2015, p.5. [↑](#footnote-ref-668)
669. ACCC public forum on the review of the water charge rules, Deniliquin, 3 August 2015 [↑](#footnote-ref-669)
670. WCIR, rule 23. [↑](#footnote-ref-670)
671. The ESCV was accredited t to determine or approve GMW and LMW’s regulated charges from February 2012 [↑](#footnote-ref-671)
672. IPART is accredited to determine or approve WaterNSW’s regulated charges from June 2016 [↑](#footnote-ref-672)
673. WaterNSW, Submission to the ACCC water charge rules review issues paper, July 2015; Queensland Farmers’ Federation, Submission to the ACCC water charge rules review issues paper, July 2015; National Irrigators’ Council, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-673)
674. State Water Corporation, pricing application to the ACCC for regulated charges to apply from 1 July 2014, June 2013, available at: <http://www.accc.gov.au/system/files/Pricing%20application%20to%20the%20Australian%20Competition%20and%20Consumer%20Commission%20for%20regulated%20charges%20from%20July%202014_0.PDF> [↑](#footnote-ref-674)
675. State Water Corporation, pricing application to the ACCC for regulated charges to apply from 1 July 2014, June 2013, p.67. [↑](#footnote-ref-675)
676. The Murray-Darling Basin Authority would be such an operator, but does not currently impose infrastructure charges. [↑](#footnote-ref-676)
677. The ‘consequence’ is currently considered to be the approval or determination of regulated charges by the ACCC or an accredited regulator. [↑](#footnote-ref-677)
678. Murrumbidgee Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015; Western Murray Irrigation, Submission to the ACCC water charge rules review issues paper, July 2015; Coleambally Irrigation Cooperative Limited, Submission to the ACCC water charge rules review issues paper, July 2015. [↑](#footnote-ref-678)
679. Available at: <http://www.accc.gov.au/regulated-infrastructure/water/water-monitoring-reporting> [↑](#footnote-ref-679)
680. Available at: <http://www.accc.gov.au/regulated-infrastructure/water/water-monitoring-reporting> [↑](#footnote-ref-680)
681. These four water authorities (GMW, LMW, Coliban and GWMW) are more widely considered to be infrastructure operators that determine planning and management charges. [↑](#footnote-ref-681)
682. Goulburn Murray Water, Submission to the ACCC water charge rules review issues paper, July 2015, p.5; IPART, Submission to the ACCC water charge rules review issues paper, July 2015, p.9. [↑](#footnote-ref-682)
683. This only accounts for change in regulatory burden for planning and management charges despite the proposed incorporation of planning and management information provisions into Part 4 of the water charge rules. Publication costs for other infrastructure charges are included in 9.1.2. [↑](#footnote-ref-683)