



ACCC Draft Decision IPART Accreditation application

29 July 2015

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1. Summary

Part 9 of the Water Charge (Infrastructure) Rules 2010 (WCIR) allows a state agency¹ to apply to the ACCC for accreditation of arrangements under which it would become the accredited agency responsible for approving or determining the regulated charges of Part 6 and Part 7 operators in the Murray-Darling Basin (MDB) under the WCIR instead of the ACCC.²

On 25 June 2015, the Independent Pricing and Regulatory Tribunal of NSW (IPART) submitted an application for accreditation to the ACCC (IPART application). IPART currently regulates the prices charged for monopoly services provided by certain metropolitan water utilities in NSW, as well as prices charged by providers of monopoly bulk water services for non-Murray-Darling basin areas of NSW (including the Hunter valley, and North and South Coast districts).

The ACCC has made a draft decision to approve the IPART application subject to conditions. The ACCC must make its final decision by 25 September 2015. It now invites members of the public to make submissions on the draft decision, including proposed conditions and the date on which accreditation is proposed to take effect by **26 August 2015**.

In making its draft decision to approve the IPART application, the ACCC is satisfied that the application includes the information required by rule 60 and Schedule 4 of the WCIR and satisfies the criteria in Schedule 5 of the WCIR. The ACCC's assessment of the IPART application against those requirements is set out in this draft decision.

In addition to the two mandatory conditions that apply to accreditation arrangements, the ACCC also sets out two further conditions that the ACCC proposes to apply to the accreditation. The ACCC applied the same two conditions to the accreditation of the Essential Services Commission of Victoria (ESCV) in February 2012. In applying the same conditions to this accreditation, the ACCC seeks to ensure consistency of approach across the MDB by accredited agencies under the WCIR.

The first condition requires IPART to apply the ACCC pricing principles for price approvals and determinations under the WCIR as published by the ACCC from time to time.³ This is to ensure that multiple regulators across the MDB will apply one set of pricing principles to all determinations under the WCIR, helping to achieve consistency where decisions are being made by different regulators in different Basin states.

The second condition requires that information obtained or produced by IPART in carrying out its functions under arrangements accredited under Part 9 of the WCIR be provided to the ACCC, upon request by an ACCC officer. This ensures that the ACCC can access information to enable it to undertake its monitoring, enforcement and advisory functions

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Rule 3 of the WCIR defines a 'State agency' by reference to paragraph (c) of the definition of agency of a State in the Water Act 2007 (Cth) (Water Act); meaning a 'body (whether incorporated or not) established or appointed for a public purpose by or under a law of the State (including a local government body).

Under Division 2 of the WCIR, the regulator must approve or determine an operator's regulated charges. For brevity, this decision will refer to determining charges. The accredited agency also carries out functions relating to the annual review of regulated charges, applications for variation or approval of its decision, and publication of submissions.

The current version is *Pricing Principles for pricing approvals and determinations under the Water Charge (Infrastructure) Rules 2010*, published by the ACCC in July 2011, referred to in this document as the ACCC Pricing Principles and contained in attachment B.

under the Water Act 2007 (the Water Act), functions that contribute to achieving the Basin water charging objectives and principles.

Accredited arrangements will come into effect on **1 June 2016**, to enable the ACCC to complete the annual review of charges for 2016-17, and will cease to have effect after ten years (expiring on **1 June 2026**) unless revoked or renewed prior to that date.

2. Introduction

2.1. IPART application

A state agency may make an accreditation application under Part 9, rule 60 of the WCIR.

On 25 June 2015, IPART submitted its application for accreditation under rule 60.⁴ If given final approval, accreditation will allow IPART to determine the regulated charges of Part 6 and 7 operators in NSW.⁵ Currently, Water NSW is the only operator in NSW currently subject to price determinations or approvals under the WCIR.

A copy of the IPART application is available at www.accc.gov.au/water.

2.2. Application requirements and assessment criteria

In assessing an application for accreditation, the ACCC is required to consider only whether it meets the requirements of r 60, contains the schedule 4 information requirements and satisfies the criteria in Schedule 5.

Rule 60 requires that an accreditation application must:

- be in writing
- include the information set out in Schedule 4
- be made within the relevant timeframe
- be accompanied by evidence in writing that the application is supported by the Minister, or the Head of a Department, of the State Agency responsible for that agency.

Schedule 4 requires the application to contain - among other necessary information - a statement as to whether the criteria in schedule 5 are satisfied. The Schedule 5 criteria refer

In order for IPART to be accredited as the regulator for the next regulatory period (1 July 2017 – 30 June 2021), IPART needed to submit its application to the ACCC by 30 June 2015 because Rule 60(2)(b)(ii) of the WCIR requires the accreditation application to be made 24 months before the commencement of the regulatory period.

⁵ 'Regulated charges' has the meaning given in rule 3 of the WCIR.

A Part 6 operator is an infrastructure operator that is not member owned and provides services in relation to more than 250 GL of managed water resources. Part 7 operators are member owned infrastructure operators servicing more than 10GL of water held under water access entitlements that make a distribution/s to all of its 'related customers'.

WCIR rule 6 states that: 'In these Rules, a customer of an infrastructure operator is a related customer if:

⁽a) The customer is a beneficiary of a trust of which the infrastructure operator is a trustee; or

⁽b) Where the infrastructure operator is a company within the meaning of the *Corporations Act 2001*, the customer is—
i. a related body corporate within the meaning of that Act in relation to the infrastructure operator; or
ii. a member of the company; or

⁽c) where the infrastructure operator is a body corporate incorporated under a law of a State or of the Commonwealth (other than the *Corporations Act 2001*), the customer is a member of the body corporate; or the customer has any other legal or equitable interest in the infrastructure operator.

Schedule 4 also requires the name and address of the applicant; the title of the State Act under which the applicant is established or appointed; the title of the State Act under which the applied provisions are applied as a law of the State; the

to 'applied provisions' which are those provisions in the WCIR that are required in order for a regulator (either a state agency if accredited, or the ACCC) to determine the regulated charges of Part 6 and 7 operators.

Schedule 5 sets out the following criteria:

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

Under rule 63(2), the ACCC:

- (a) must not approve an application under this Part for the accreditation of arrangements unless the ACCC is satisfied that the arrangements are in accordance with the criteria set out in Schedule 5; and
- (b) must not refuse to approve an application under this Part for the accreditation of arrangements unless the ACCC is satisfied that the arrangements are not in accordance with the criteria set out in Schedule 5.

2.3. Timeframes and consultation process

2.3.1. Decision timeframes

Under rule 63, within 3 months of receiving an accreditation application (or such period as extended, where the ACCC requests further information⁸), the ACCC must publish and consult on a draft decision and approve or refuse to approve the application.⁹

The ACCC intends to publish its final decision in relation to the application by 25 September 2015.

- (a) Divisions 2,3 and 4 of Part 6
- (b) Division 2 of Part 7
- (c) Division 1 of Part 8
- (d) Schedules 1,2 and 3
- (e) Part 1, so far is relevant to the interpretation of the provisions referred to in paragraphs (a), (b), (c) and (d).

public purpose for which the applicant is established or appointed; and the arrangements for which the applicant seeks accreditation.

⁷ Under rule 59(2), applied provisions means the following provisions of the WCIR:

Rule 61 permits the ACCC (before making its decision) to request in writing that the applicant provide further (relevant) information within a period specified by the ACCC. The ACCC's decision making time is extended by the period for which the information request is unfulfilled: rule 63(3).

If the ACCC is unable to make a decision in this period, it can be extended by one month subject to giving notice to the applicant of its reasons: rule 63(4) of the WCIR

2.3.2. Consultation process and submissions

Rule 62 requires the ACCC to publish the application and its draft decision (including proposed conditions) and invite interested parties to make submissions to the ACCC.

The ACCC invites written submissions on this draft decision (including the proposed conditions and the date on which accreditation is proposed to take effect) by **26 August 2015**.

How to make a submission

In accordance with rule 62(2), and to foster an informed consultative process, all submissions received will be considered public submissions and published on the ACCC website. However if a submitter claims that their submission contains confidential information, where possible the ACCC will publish a version of the submission that excludes the confidential information, subject to the considerations set out in the ACCC-AER information policy: the collection, use and disclosure of information.¹⁰

Persons 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 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 commercial-in-confidence version should highlight the confidential material in yellow. 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 prefers to receive submissions in an electronic form that enables the submission text to be searched, either in PDF or Microsoft Word format.

Submissions and any questions you have concerning this consultation can be emailed to IPARTaccreditation@accc.gov.au.

Alternatively, submissions can be mailed to

ACCC

Attention: Water Compliance team

GPO Box 520

MELBOURNE VIC 3001

2.3.3 Term and commencement date of accreditation

Rule 68 provides that accreditation has effect for a period of 10 years from the date specified in the notice of final decision unless the arrangements are revoked under rule 67 or renewed under rule 69 of the WCIR.

The ACCC proposes that accreditation of arrangements will take effect from **1 June 2016**. Commencement of accreditation on this date provides for the ACCC to complete the annual

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.

review of regulated charges for the final year of the ACCC's determination of charges for the current regulatory period.¹¹

3. ACCC assessment of IPART application

The ACCC is satisfied that the IPART application:

- meets the requirements of rule 60
- contains the information required by Schedule 4 and
- satisfies the criteria set out in Schedule 5 of the WCIR.

Table 1 outlines in detail the reasons why the ACCC considers that the IPART application meets the criteria set out in Schedule 5 of the WCIR.

Table 1 - Assessment of IPART application

Schedule 5 - Criteria

Schedule 5 (1) - There must be a law of the State under which the applied provisions are a law of the State; and that includes provision to the effect that the applied provisions operate only during such period or periods as an accreditation of arrangements under Part 9 has effect

Assessment

The Independent Pricing and Regulatory Tribunal Amendment (Accredited State Water Regulator) Act 2015, amended the Independent Pricing and Regulatory Tribunal Act 1992 so as to give effect to the applied provisions under NSW law.¹²

The ACCC is satisfied the applied provisions are a law of NSW under Part 3B, section 24AG of *Independent Pricing* and Regulatory Tribunal Act 1992.

Section 24AG Application of Commonwealth provisions

In respect of Basin water resources, the Commonwealth provisions, as in force from time to time, apply as a law of this State.

The ACCC also notes IPART's intention to clarify that section 15 of the IPART Act does not apply to Part 3B of the Act.

The ACCC is satisfied that Part 3B will not apply unless IPART obtains accreditation for arrangements under Part 9 of the WCIR. Section 24AI provides that the applied provisions have effect while the arrangements are 'accredited arrangements' under section 24AJ (a).

Section 24AI operation of the applied provisions

Without limiting section 24AG, the applied provisions have effect only while the arrangements referred to in section 24AJ (a) are accredited arrangements.

See the ACCC, Final decision on State Water Pricing Application 2014-15 to 2016-17, (2 July 2014) and Attachments to Final decision on State Water Pricing Application 2014-15 to 2016-17, (28 June 2014), available on the ACCC website at www.accc.gov.au

The Independent Pricing and Regulatory Tribunal Amendment (Accredited State Water Regulator) Act 2015 (NSW) commenced on 12 June 2015

	Section 24AJ Application for accreditation The Tribunal may: (a) apply to the ACCC for section 24AH (to the extent to which it provides for the approval or determination by the Tribunal of regulated charges of Part 6 operators and Part 7 operators relating to Basin water resources in accordance with the applied provisions) to be accredited as accredited arrangements and (b) do anything else necessary to enable those arrangements to be so accredited.
Schedule 5(2) - The functions of the State Agency must include the functions conferred on a Regulator under the applied provisions	The ACCC is satisfied that this requirement is met by s24AH of Part 3B of the <i>Independent Pricing and Regulatory Tribunal Amendment (Accredited State Water Regulator) Bill 2015.</i> Section 24AH Functions of Tribunal The Tribunal has all the functions conferred on a Regulator under the applied provisions.
Schedule 5(3) - The State Agency must not be subject to the direction of a Minister of the State in carrying out its functions under the applied provisions	The ACCC is satisfied that this requirement is met by section 24AK of Part 3B of the <i>Independent Pricing and Regulatory Tribunal Amendment (Accredited State Water Regulator) Bill 2015.</i> Section 24AK Tribunal not subject to Ministerial control in the exercise of functions Despite any provision of this Act or any other law to the contrary, the Tribunal is not subject to the control or direction of any Minister in the exercise of its functions under the applied provisions.
Schedule 5(4) - The State Agency must not be, or have a relevant interest in, a Part 6 operator or a Part 7 operator.	There is currently one Part 6 operator in NSW (that is, Water NSW). The ACCC is satisfied that IPART does not have a relevant interest in this operator. There are no Part 7 operators in NSW. ¹³

Part 7 of the WCIR applies to member owned operators who provide services with respect to a sum of managed water resources greater than 10GL and make a distribution to all of the operator's related customers.

4. Proposed conditions of accreditation

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

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

Under rule 59(1)(c), the ACCC may, if it determines that it is necessary to do so, impose further terms, conditions or obligations on the accreditation, if the terms, conditions or obligations are not inconsistent with the WCIR/the applied provisions and contribute to achieving the Basin water charging objectives and principles set out in Schedule 2 of the Water Act.

The ACCC proposes to include two further conditions in IPART's accreditation arrangements. These conditions also apply to the ESCV accreditation.

a. IPART must apply the pricing principles, as published by the ACCC from time to time

In approving or determining regulated charges of a Part 6 or Part 7 operator under arrangements accredited under Part 9 of the WCIR, IPART must apply the pricing principles, as published by the ACCC from time to time.

This ensures that all accredited regulators will apply one set of pricing principles to all determinations under the WCIR, helping to achieve consistency where decisions are being made by different regulators in different Basin states.

b. IPART must provide to the ACCC information relevant to IPART carrying out its functions under the accredited arrangements upon request.

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

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

This ensures that the ACCC can access information to enable it to undertake its monitoring, enforcement and advisory functions under the Water Act. These roles directly support the achievement of the Basin water charging objectives and principles.

The reasons the ACCC has applied these conditions are set out in detail below.

4.1. Application of pricing principles

The ACCC has published the ACCC pricing principles that are to be applied by the regulator when undertaking price approvals or determinations of Part 6 and Part 7 operators under the WCIR. ¹⁴ The ACCC pricing principles outline the methodology the ACCC or an accredited agency will apply in making determinations. **Attachment B** contains the current version of the ACCC pricing principles.

The principles cover the determination of costs for regulated charges, how revenue should be determined and, ultimately, how charges are levied to recover this revenue. For example,

See ACCC pricing principles as described in note 3 above, forming attachment B to this document.

the principles relate to the determination of the rate of return to be applied to assets and the approach used to assess operating and capital expenditure proposed by an operator.

The ACCC wants to ensure that there is consistency in applying principles in determinations where there are different regulators for Part 6 and Part 7 operators across the Basin states. This will contribute to achieving the Basin water charging principle that 'pricing policies should ensure consistency across sectors and jurisdictions where entitlements are able to be traded'. ¹⁵

The ACCC will review the current version of the ACCC pricing principles after finalising the Water Charge Rules Review.¹⁶

4.2. Provision of information to the ACCC

The ACCC requires the ability to access information produced or obtained by IPART in carrying out its role under the accredited arrangements. The ACCC has monitoring and enforcement functions and responsibilities that directly support the achievement of the Basin water charging objectives and principles and that rely on access to information.

Among other matters, the ACCC is responsible for monitoring compliance with the water charge rules¹⁷ and regulated water charges and reporting the results of such monitoring in accordance with an agreement between the Minister and the ACCC.¹⁸ As the enforcement agency, the ACCC is responsible for identifying and responding to contraventions of the water charge rules.¹⁹ The ACCC is also responsible for enforcing determinations made by the ACCC or by an accredited agency. In order to fulfil these functions and responsibilities, the ACCC requires the ability to access information obtained by an accredited agency.

Further, the ACCC's ability to obtain information from IPART will assist it to carry out another of its statutory roles, to provide advice to the Minister: the Minister is required to ask the ACCC for advice about water charge rules the Minister proposes to make, or about proposed amendments or revocations of rules, and the ACCC must advise the Minister on these matters. Access to information about how an accredited agency has determined the charges of Part 6 or Part 7 operators under the WCIR may assist the ACCC in providing advice to the Minister on the operation of the rules in respect of Part 6 or Part 7 operators.

While some information produced or obtained by IPART in carrying out its role under the accredited arrangements will be publicly available, other information may not be.

The ACCC proposes that, upon request by an officer of the ACCC, IPART is required to disclose to the ACCC information that IPART receives or produces in carrying out its role under the accredited arrangements. The ACCC officer may nominate the information that is requested, the form in which - and when - the information is to be provided.

The context in which the information is required will determine how exactly the information contributes to the Basin water charging objectives and principles. For example, if the ACCC

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Water Act, Schedule 2, Part 3, principle (d).

The ACCC's current Water Charge Rules Review is reviewing the WCIR (including the accreditation arrangements under Part 9) and the water charge (termination fees) rules 2009 and the water charge (planning and management information) rules 2010 (referred to collectively as the water charge rules). The ACCC is due to provide its advice to Government in December 2015. The review is seeking, among other matters, to improve the operation of the rules. If the WCIR instrument is remade or a new instrument is made, the sunset date will be reset.

See reference to water charge rules in note 16 above.

Section 94 of the Water Act

¹⁹ Section 137 (b) of the Water Act

²⁰ Water Act, s. 93.

See note 13 above.

does not have information on which to investigate a breach of a rule, it may not be able to take compliance action, which could lead to perverse pricing outcomes. This would be in conflict with objective (e) of the Basin water charging objectives and principles. A breach of the rules where the ACCC cannot take action due to lack of information may create a barrier to trade between Basin areas and could lead to the inefficient use of water resources and water infrastructure assets. This would be in conflict with objective (a) (i) and (ii) of the BWCOPs.

The ACCC may revoke the accreditation of arrangements if IPART fails to comply with any conditions specified;²² fails to comply with the accredited arrangements in a material respect²³ or the accreditation arrangements no longer satisfy schedule 5.

5. ACCC Draft Decision

The ACCC's draft decision is to approve the IPART application for accreditation arrangements under Part 9 of the WCIR. In accordance with ss.92(g) and (h) of the Water Act 2007 and rule 59(c) of the WCIR, the ACCC proposes that in carrying out its functions under the accredited arrangements:

a. IPART must apply the pricing principles, as published by the ACCC from time to time

In approving or determining regulated charges of a Part 6 or Part 7 operator under arrangements accredited under Part 9 of the WCIR, IPART must apply the pricing principles as published by the ACCC from time to time.

b. IPART must provide to the ACCC information relevant to IPART carrying out its functions under the accredited arrangements upon request.

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

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

The accreditation will take effect on 1 June 2016.

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²² Rule 67(1) (b) of the WCIR

²³ Rule 67(1) (a) of the WCIR

Attachment A – Basin water charging objectives and principles (Schedule 2 of the *Water Act 2007*)

Part 1—Preliminary

1 Objectives and principles

This Schedule sets out:

- (a) the Basin water charging objectives; and
- (b) the Basin water charging principles.
- Note 1: These objectives and principles are relevant to the formulation of water charge rules under section 92 of this Act.
- Note 2: These objectives and principles are based on those set out in clauses 64 to 77 of the National Water Initiative when Part 2 of this Act commences.

Part 2—Water charging objectives

2 Water charging objectives

The water charging objectives are:

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

Part 3—Water charging principles

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

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

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

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

4 Cost recovery for planning and management

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

5 Environmental externalities

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

6 Benchmarking and efficiency reviews

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

Attachment B - Pricing principles for price approvals and determinations under the WCIR

This version of the pricing principles is current at July 2015. The pricing principles may be revised from time to time to reflect changes in market conditions or new regulatory approaches.