

Attachment 1 – Notification to ACCC

██████████
Director, Water Section
Special Enforcement and Advocacy Division
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000
██████████

9 August 2021
Email

Dear ██████████

WaterNSW: Section 81(11) of the Water Charge Rules 2010

1 Introduction

We refer to:

- the *Water Charge Rules 2010* (Cth) (**Water Charge Rules**) as amended by the *Water Charge Amendment Rules 2019* (Cth) (**Water Charge Amendment Rules**);
- the letters sent to you by Liz Livingstone of the Independent Pricing and Regulatory Tribunal (**IPART**) on 29 January 2020 (Attachment 2) and 10 June 2020 (Attachment 3); and
- the standing reference given to IPART under section 12(1) of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (**IPART Act**) by the Minister for Customer Service for the pricing of the infrastructure services provided by WaterNSW in the Border, Gwydir, Namoi, Peel, Lachlan, Macquarie, Murray, Murrumbidgee and Lowbidgee valleys in the Murray Darling Basin, and certain rural customers in the Fish River Water Supply Scheme (collectively, **MDB Services**) dated 29 May 2020 (**Standing Reference**) (Attachment 3a).

Rule 81(11) of the Water Charge Rules requires WaterNSW to notify the Australian Competition and Consumer Commission (**ACCC**) of whether or not it is a 'Part 6 operator' under rule 23 of the Water Charge Rules as soon as practicable after 1 July 2020. Rule 81(11) also requires WaterNSW to notify the ACCC of any matter that WaterNSW is aware that may result in it ceasing to be a Part 6 operator, or becoming one, on a specified date as soon as practicable after 1 July 2020.

This letter notifies the ACCC that WaterNSW has ceased to be a 'Part 6 operator' for the MDB Services under the Water Charge Rules as required by rule 81(11) of the Water Charge Rules. Accordingly, WaterNSW considers that the ACCC should form the view that WaterNSW has ceased to be a 'Part 6 operator' in respect of the MDB Services and that the economic regulation of them should transfer to IPART under the IPART Act.

On 29 May 2020, the Minister for Customer Service made the Standing Reference under section 12(1) of the IPART Act that requires IPART to investigate and report the determination of pricing for the MDB Services. The Standing Reference further requires IPART to consider '*the approach to approving infrastructure charges provided for under rule 29(2)(b) of the [Water Charge Rules]*'.

WaterNSW considers that the Standing Reference is a matter that we have become aware of that should lead to the ACCC concluding that we have ceased to be a Part 6 operator.

WaterNSW notes that it provides infrastructure services other than the MDB Services. These infrastructure services are regulated by IPART under the IPART Act. WaterNSW is not a 'Part 6 operator' in respect of these services and the Water Charge Rules do not apply. This letter does not relate to these other infrastructure services provided by WaterNSW.

2 Background

Regulation under the Water Charge Rules

WaterNSW was previously a 'Part 6 operator' in respect of the MDB Services and its provision of these services was regulated by IPART under the Water Charge Rules.

Transition under the amended Water Charge Rules

WaterNSW submitted a pricing proposal for the MDB Services to IPART on 30 June 2020 pursuant to rule 25 of the *Water Charge (Infrastructure) Rules 2010* (Cth) (as they then applied). This pricing proposal is a 'transitional application' as defined in rule 81(2) of the now amended Water Charge Rules. The 'transition period' as defined in rule 81(3) of the Water Charge Rules for WaterNSW will end at the end of the regulatory period of IPART's determination or approval for the transitional application, which is expected to be 30 June 2025.

Under rules 81(6) and 81(7), IPART continues to be the regulator of the MDB Services for the transition period under the Water Charge Rules. IPART is required to make a determination or approval in respect of the transitional application under the Water Charge Rules as they applied prior to their amendment on 1 July 2020.

On 26 May 2021, IPART advised WaterNSW that the Tribunal has decided to defer making its determination of maximum prices WaterNSW can charge for its rural bulk water services and that the Tribunal will now make its determination in mid-September 2021.

Rule 81(4) provides that WaterNSW will continue to be a 'Part 6 operator' under the Water Charge Rules for the transition period even though it has ceased to satisfy rule 23 of the Water Charge Rules.

Requirement to notify the ACCC

Rule 81(11) of the Water Charge Rules requires WaterNSW to notify the ACCC as soon as practicable after 1 July 2020 of:

- whether or not it is a 'Part 6 operator' under rule 23 of the Water Charge Rules as amended; and
- any matter that it is aware of that may result in the infrastructure operator ceasing to be a 'Part 6 operator', or becoming one, on a specified date.

The ACCC must form a view of whether WaterNSW is a 'Part 6 operator' or is likely to cease to be one before the end of the transition period and notify WaterNSW of this view under rule 81(12). If the ACCC is of the view that WaterNSW is, or is likely to be, a 'Part 6 operator', then the ACCC must determine whether to grant an exemption from the operation of Divisions 2, 3 and 4 of Part 6 of the Water Charge Rules after the end of the transition period.

The following sections of this letter notify the ACCC that WaterNSW considers that it has ceased to be a 'Part 6 operator' for the MDB Services and provide the reasons for this notification. It is our view that the ACCC should conclude that WaterNSW is no longer a 'Part 6 operator' and that IPART should regulate WaterNSW's provision of the MDB

Services under the Standing Reference and the IPART Act after the expiry of the transitional period, which is expected to end on 30 June 2025.

3 Notification that WaterNSW has ceased to be a 'Part 6 operator'

Purpose of the amendments to the Water Charge Rules

The amendments to the Water Charge Rules made by the Water Charge Amendment Rules provide for State-based regulators, such as IPART, to regulate infrastructure providers that would otherwise be 'Part 6 operators' under State-based laws rather than to be accredited to regulate those infrastructure providers under the Water Charge Rules. WaterNSW considers that the Water Charge Rules are now intended to operate as a regulatory 'fall-back' only where relevant State laws do not provide for the regulation of the infrastructure provider.

This policy position is reflected at page 146 of the ACCC's *Review of the Water Charge Rules – Final Advice* published in September 2016 (**Final Advice**), which led to the amendments to the Water Charge Rules):

The ACCC agrees ... that there should be appropriate regulatory oversight of the current Part 6 operators and considers this can be achieved where Basin State regulatory approaches ensure that relevant infrastructure operators' costs are prudent and efficient and infrastructure charges are set at levels that would not allow the operator to earn monopoly returns...

'Part 6 operator' criteria

The Water Charge Rules implement this policy approach through the criteria by which an infrastructure provider is determined to be a 'Part 6 operator'. In particular, in order to be a 'Part 6 operator' WaterNSW must satisfy the following requirements set out in rule 23 of the Water Charge Rules:

An infrastructure operator is a Part 6 operator if:

(a) the operator is not required to have all its infrastructure charges determined or approved by a single State Agency under a law of the State in a way that is consistent with paragraph 29(2)(b); and

(b) the operator levies an infrastructure charge in relation to either:

(i) a bulk water service in respect of water access rights; or

(ii) infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State.

In WaterNSW's view, it continues to satisfy rule 23(b), but no longer satisfies the requirement set out in rule 23(a) of the Water Charge Rules (which was inserted by the Water Charge Amendment Rules). This is because WaterNSW considers that all of its infrastructure charges will now be determined by IPART under the IPART Act and because IPART Act regulates infrastructure charges in a way that is consistent with rule 29(2)(b) of the Water Charge Rules.

In particular, the Minister for Customer Service made the Standing Reference under section 12(1) of the IPART Act on 29 May 2020. The Standing Reference (Attachment 3) requires IPART to investigate and report the determination of pricing for the MDB Services (which are defined by reference to those services for which WaterNSW is currently a 'Part 6 operator' under the Water Charge Rules) under the IPART Act. The IPART Act requires IPART to set either maximum prices or a methodology for fixing prices for the MDB Services under the Standing Reference having regard to the matters specified in section 15 of the IPART Act and any matters specified by the Minister in the Standing Reference under section 13(1)(c) of the IPART Act.

Regulation in a way that is consistent with rule 29(2)(b)

In our view, the regulatory regime established by the IPART Act and the Standing Reference requires IPART to determine WaterNSW's infrastructure charges for the MDB Services in a way that is consistent with rule 29(2)(b) of the Water Charge Rules. Rule 29(2)(b) of the Water Charge Rules provides that:

(2) The ACCC must not approve the infrastructure charges set out in an application under this Division unless the ACCC is satisfied:

...

(b) that the forecast revenue from the charges is reasonably likely to meet, but not materially exceed, the prudent and efficient costs of providing the infrastructure services, less:

(i) any government contributions related to the provision of those infrastructure services; and

(ii) any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and

(iii) any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services;

...

WaterNSW considers that the IPART Act ensures that the principle that infrastructure charges are determined or approved in a way consistent with rule 29(2)(b) of the Water Charge Rules is given due consideration by IPART. In particular, the matters that IPART is required to have regard to under section 15 of the IPART Act include (amongst other things):

- *'the cost of providing the services concerned'* under section 15(1)(a) of the IPART Act;
- *'the appropriate rate of return on public sector assets, including appropriate payment of dividends to the Government for the benefit of the people of New South Wales'* under section 15(1)(c) of the IPART Act; and
- *'the need for greater efficiency in the supply of services so as to reduce costs for the benefit of consumers and taxpayers'* under section 15(1)(e) of the IPART Act.

WaterNSW considers that section 15(2) of the IPART Act further reinforces this requirement by requiring IPART to indicate what regard it has had to the matters specified in section 15 of the IPART Act. The other considerations included in section 15(1) of the IPART Act do not detract from the requirement for IPART to give due consideration to the regulation of WaterNSW in a way that is consistent with rule 29(2)(b) of the Water Charge Rules in WaterNSW's view.¹

¹ The other factors that IPART is required to consider include *'the protection of consumers from abuses of monopoly power in terms of prices, pricing policies and standard of services', 'the effect on general price inflation over the medium term', 'the need to maintain ecologically sustainable development (within the meaning of section 6 of the Protection of the Environment Administration Act 1991) by appropriate pricing policies that take account of all the feasible options available to protect the environment', 'the impact on pricing policies of borrowing, capital and dividend requirements of the government agency concerned and, in particular, the impact of any need to renew or increase relevant assets', 'the impact on pricing policies of any arrangements that the government agency concerned has entered into for the exercise of its functions by some other person or body', 'the need to promote competition in the supply of the services concerned', 'considerations of demand management (including levels of demand) and least cost planning', 'the social impact of the determinations and recommendations', and 'standards of quality, reliability and safety of the services concerned (whether those standards are specified by legislation, agreement or otherwise)'.*

WaterNSW considers that the Standing Reference further ensures that the policy objectives underlying rule 29(2)(b) of the Water Charge Rules are given due consideration by specifically requiring IPART to consider *'the approach to approving infrastructure charges provided for under rule 29(2)(b) of the [Water Charge Rules]'*. Further, IPART stated in its letter to the ACCC dated 29 January 2020 (Attachment 2) that it would demonstrate in its public report how it had considered the matter specified in the Standing Reference.

WaterNSW considers that the regulatory regime established by the IPART Act and the Standing Reference, which will apply to its provision of the MDB Services, will ensure consistency with rule 29(2)(b) of the Water Charge Rules because of the matters that IPART must have regard to when determining the infrastructure charges for the MDB Services under the IPART Act. IPART is also of this view and commented in its letter dated 10 June 2020 (Attachment 3) that:

... our general approach, demonstrated over many years of pricing determinations, is consistent with the approach set out in rule 29(2)(b) of the amended [Water Charge Rules]. That is, IPART generally sets prices that recover efficient costs.

This view is also consistent with the ACCC's consideration in the Final Advice. In particular, the ACCC comments in relation to the requirement for a State-based regulatory regime to be consistent with rule 29(2)(b) of the Water Charge Rules at page of 146 as follows (emphasis added; footnotes omitted):

The ACCC considers this will provide an essential level of protection for customers in aggregate — ensuring that revenue from infrastructure charges meets, but does not materially exceed, the prudent and efficient costs of providing the infrastructure services, taking into account government contributions through Community Service Obligations (CSOs) or forgone returns and any other revenue derived from the operator's water service infrastructure (see section 5.6.3).

The ACCC considers that while the criteria used by the alternative State-based regulators (IPART, ESCV, QCA and Essential Services Commission of SA (ESCOSA)) are not identical to the [Basin Water Charging Objectives and Principles] and current Part 6, they are likely to be consistent with the proposed requirements above.

The ACCC's commentary in the Final Advice demonstrates that the ACCC intended the requirement in rule 23(a) of the Water Charge Rules to be interpreted purposively. That is, the requirement is intended to be for the objectives in the State-based regime to be consistent with the principle in rule 29(2)(b) of the Water Charge Rules rather than identical. WaterNSW considers that the criteria that IPART must use when determining the infrastructure charges for the MDB Services under the IPART Act and Standing Reference satisfies this test. WaterNSW considers that it is no longer a 'Part 6 operator' under the Water Charge Rules as a result.

4 Conclusion

WaterNSW does not consider that it satisfies the criteria to be a 'Part 6 operator' under the Water Charge Rules for the reasons described above. If the ACCC forms a different view, then WaterNSW requests that it identify what amendments to the regulatory regime under the IPART Act would be required in order for it to satisfy rule 29(2)(b) of the Water Charge Rules and that it be provided with an opportunity to make a submission on whether it should be exempted from Divisions 2, 3 and 4 of Part 6 of the Water Charge Rules, which the ACCC would then be required to consider under rule 81(12)(c) of the Water Charge Rules.

WaterNSW would welcome the opportunity to discuss these steps further with the ACCC, and to work with the ACCC to ensure that WaterNSW is appropriately regulated under the IPART Act.