



Australian
Competition &
Consumer
Commission

Accreditation under the water infrastructure charge rules

Final advice

February 2010

Australian Competition and Consumer Commission
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Contents

Abbreviations	iv
Glossary.....	v
Summary.....	vii
ACCC position	vii
Proposed accreditation framework	vii
1. Introduction.....	1
1.1. Development of advice on the WICR.....	2
1.2. Further advice on accreditation under the WICR	4
1.3. Consultation process	4
2. Proposed accreditation framework	6
2.1. Process for applying for and granting an accreditation	9
2.2. Timing of the accreditation process.....	12
2.3. Term of an accreditation	13
2.4. Accreditation criteria	15
2.5. Terms, conditions and obligations of accreditation	17
2.6. Revocation or variation of an accreditation	23
2.7. Changes to the draft infrastructure charge rules	25
Appendix 1 List of submissions.....	27
Appendix 2 Basin water charging objectives and principles	28
Water charging objectives	28
Water charging principles	28
Appendix 3 The Murray–Darling Basin	30
Contacts.....	31

Abbreviations

ACCC	Australian Competition and Consumer Commission
Basin	Murray–Darling Basin
Cwlth	Commonwealth
ESC	Essential Services Commission (Victoria)
GMW	Goulburn-Murray Water
GL	gigalitre (1000 megalitres)
GVIA	Gwydir Valley Irrigators Association Inc.
IPART	Independent Pricing and Regulatory Tribunal (New South Wales)
LMW	Lower Murray Water
MDB	Murray–Darling Basin
NFF	National Farmers’ Federation
NWI	National Water Initiative
RAB	regulatory asset base
the Water Act	<i>Water Act 2007</i> (Cwlth)
VFF	Victorian Farmers Federation
WACC	weighted average cost of capital
WICR	water infrastructure charge rules
WMI	Western Murray Irrigation

Glossary

This glossary endeavours to provide practical meanings of terms in the context of this draft advice. However, readers may need to consider the legal meaning of some terms under the *Water Act 2007* and obtain legal advice on these definitions, if required.

Basin state	means the following: <ul style="list-style-type: none">(a) New South Wales(b) Victoria(c) Queensland(d) South Australia(e) Australian Capital Territory.
bulk water charge	means a charge payable for the storage of water for, and the delivery of water to, any of the following: <ul style="list-style-type: none">(a) infrastructure operators(b) other operators of reticulated water systems(c) other persons prescribed by regulations for the purposes of this paragraph.
infrastructure operator	a person who owns or operates infrastructure for one or more of the following purposes: <ul style="list-style-type: none">(a) the storage of water(b) the delivery of water(c) the drainage of water for the purpose of providing a service to another person. This includes bulk water operators and irrigation infrastructure operators.
irrigation infrastructure operator	is any person or entity that operates infrastructure for the purpose of delivering water to another person for the primary purpose of irrigation (e.g. an irrigator).
Murray–Darling Basin	is the area falling within the boundary described in the dataset that: <ul style="list-style-type: none">(a) is titled ‘Murray–Darling Basin Boundary—<i>Water Act 2007</i>’(b) has a dataset scale of 1:250 000(c) specifies the boundary of the Murray–Darling Basin drainage division derived from the dataset titled ‘Australia’s River Basins 1997’ and is dated 30 June 1997(d) is held by the Commonwealth.
National Water Initiative	means the intergovernmental agreement on a national water initiative between the Commonwealth and the governments of New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory (as amended from time to time).

regulated water charge	is a charge to which the water charge rules (Division 1, Part 4 of the Water Act) apply. This includes bulk water charges and fees and charges payable to an irrigation infrastructure operator for access to the operator's network.
water access right	is any right conferred by or under a law of a state to hold water from a water resource or to take water from a water resource. This includes stock and domestic rights, riparian rights, a water access entitlement, a water allocation and any other right relating to the taking or use of water prescribed by regulations.
water charge rules	are rules made by the Minister for Climate Change and Water under s. 92 of the Water Act that relate to regulated water charges.
water resource	means <ul style="list-style-type: none"> (a) surface water or groundwater, or (b) a watercourse, lake, wetland or aquifer (whether it currently has water in it) and includes all aspects of the water resource (including water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource).

Summary

Under the *Water Act 2007*¹ (Water Act) the Australian Competition and Consumer Commission is responsible for advising the Minister for Climate Change and Water (the minister) on the content of water charge rules and subsequently for monitoring compliance with, and enforcement of, those rules.

The ACCC provided its final advice on the water infrastructure charge rules (WICR) on 26 June 2009. The minister has since requested the ACCC to provide further advice on the issue of accreditation of state agencies by the ACCC under the WICR.

The ACCC released its draft advice on accreditation, including amended draft WICR, on 6 November 2009. Interested parties were invited to make submissions in response to the draft advice and ten submissions were received in response (see appendix 1).

This paper sets out the ACCC's final advice to the minister on accreditation as part of the WICR and is accompanied by draft WICR which incorporate rules for accreditation.

ACCC position

In its final advice on the WICR, the ACCC recommended a single regulator approach rather than allowing for the accreditation of state agencies to undertake price approvals or determinations.² Following an extensive consultation process, the ACCC assessed that the Water Act objectives and principles could be best achieved through a single regulator approach.³ Importantly, this would ensure a consistent approach when setting charges across the Murray–Darling Basin (MDB), which in turn would facilitate efficient water markets and the efficient use of water resources and water-related infrastructure.

On balance, the ACCC still considers that a single regulator approach would offer the highest net benefit compared with an approach with multiple regulators responsible for undertaking approvals or determinations.

Proposed accreditation framework

Section 92(3) of the Water Act provides that the water charge rules may deal with:

- ACCC accreditation of arrangements under which regulated water charges are determined or approved by agencies of the states

¹ Unless otherwise noted, all legislation referred to in this document is Commonwealth.

² See Section 3.2.7 of the ACCC's *Water infrastructure charge rules: Advice to the Minister for Climate Change and Water—June 2009*, viewed on the Department of the Environment, Water, Heritage and the Arts website, www.environment.gov.au.

³ Schedule 2 of the Water Act.

- the process to be followed in applying for or granting an accreditation
- the terms and conditions on which arrangements are accredited (including the determination of some or all of those terms and conditions by the ACCC)
- the obligations to be imposed in relation to the accreditation of arrangements (including the determination of some or all of those obligations by the ACCC).

Further, under s. 92(6) of the Water Act, the water charge rules may provide for the circumstances in which an accreditation may be revoked or the circumstances in which the terms and conditions on which an accreditation is given may be varied.

In recommending rules under these provisions, the ACCC's main objective was to ensure that the proposed rules contribute to achieving the Basin water charging objectives and principles as outlined in Schedule 2 of the Water Act (see appendix 2). In particular, a framework with approvals or determinations being undertaken by numerous accredited state agencies, rather than by a single regulator, will require certain safeguards to ensure a consistent approach to charging across the MDB.

Further, the rules for accreditation have been developed to maximise transparency and regulatory certainty while minimising compliance and administrative costs for stakeholders.

The accreditation of state agencies will be in respect of approvals or determinations under Parts 6 and 7 of the draft WICR. That is, the approval or determination of charges levied by:

- non-member owned operators that provide services relating to more than 250 GL of entitlement (Part 6 operators)
- member-owned operators that make a distribution to their members and provide services relating to more than 10 GL of entitlement (Part 7 operators).

Process for accreditation

The ACCC proposes a three month process for granting accreditations, including:

- the relevant state agency applying to the ACCC for accreditation
- the ACCC releasing for public comment a draft decision on whether to grant the accreditation, including (where relevant) any terms, conditions or obligations that the ACCC proposes to make as part of the accreditation
- the ACCC releasing a final decision on whether to accredit an agency's proposed arrangements, including any terms, conditions or obligations of the accreditation, where relevant.

The ACCC will then accredit an agency if it is satisfied that the agency's proposed arrangements meet the criteria for accreditation (discussed below).

The ACCC recommends that accreditation applications be submitted to the ACCC two years before the end of the relevant operator's current regulatory period.⁴ Further, a state agency will not be able to apply to have its arrangements accredited unless it has the relevant functions and powers to undertake Part 6 and Part 7 approvals or determinations under state legislation. That is, having the necessary state legislation is a pre-condition of applying for accreditation.

To ensure certainty for both regulators and operators, the draft advice provides that the term of an accreditation will be 10 years, with the accredited agencies required to reapply two years before their accreditation expires. This application process would be the same as the initial accreditation application process.

The ACCC's accreditation advice and rules also set out the proposed circumstances in which an accreditation may be revoked or varied and the processes for doing so. These rules provide for the ACCC or an accredited state agency to initiate a revocation or variation of an accreditation with consultation requirements in the case of any variation and those revocations initiated by the ACCC.

Criteria for accreditation

The criteria for accreditation are critical to ensuring that the arrangements under which a state agency is accredited contribute to achieving the Basin water charging objectives and principles. In particular, the criteria should set out the framework for achieving consistency in the absence of a single regulator. In turn, this should facilitate efficient water markets and the efficient use of water resources and investment in water-related infrastructure.

The proposed criteria include:

- The arrangements (being set out in state legislation) must provide for the agency to undertake approvals or determinations under that state legislation as if the agency was the ACCC undertaking approvals or determinations under Part 6 or Part 7 of the WICR—this will increase consistency across the MDB by providing for all accredited agencies (and the ACCC, where relevant) to apply the same rules.
- The agency must not be subject to the direction or control of a minister of the relevant state in implementing Part 6 and Part 7 approvals or determinations⁵—this will ensure that the approval or determination process is robust, transparent and separate from other policy processes and decisions.

⁴ This time frame applies to Part 6 approvals or determinations. An accredited agency will generally become responsible for Part 7 approvals or determinations from the date that it is accredited.

⁵ However, this is not intended to capture agencies which are under the direction or control of a minister in other respects of their operations.

- The agency must be independent of Part 6 and Part 7 operators—this will ensure that the agency has no conflict of interest in approving or determining charges of Part 6 and Part 7 operators.

Terms, conditions and obligations of accreditation

The ACCC proposes that the following terms, conditions and obligations be included explicitly in the accreditation rules to encourage regulatory certainty and transparency in the accreditation framework:

- The relevant provisions of the WICR apply as a law of the state—this will ensure that the relevant state legislation remains unchanged and in force.
- The accredited agency must approve or determine regulated charges of all Part 6 and Part 7 operators within the relevant state in accordance with the accredited arrangements—this will ensure all regulators apply the same rules and also ensure consistency of approach within a state for Part 6 and Part 7 approvals or determinations.
- The ACCC may determine such terms, conditions or obligations as are required to contribute to achieving the Basin water charging objectives and principles—this will provide flexibility to accommodate matters specific to a particular jurisdiction or application for accreditation.

In relation to this last rule, such terms, conditions or obligations could be made at the time of granting an accreditation or at a later date when an accreditation is already in force. In both circumstances the ACCC will have to consult on any proposed terms, conditions or obligations before these can be introduced. In addition, such terms, conditions or obligations could only be made where they contribute to achieving the Basin water charging objectives and principles.

The draft WICR

The accreditation rules form a new part of the draft WICR (Part 9). Other parts of the draft WICR have also required amendment so that they can apply whether the ACCC or an accredited state agency is responsible for Part 6 or Part 7 approvals or determinations.

The WICR cannot confer powers or functions onto state agencies in respect of the approval or determination of charges, they can only accredit arrangements under which agencies have the power to approve or determine charges. Hence, the states will still be required to draft or amend their legislation to provide for the accreditation of state agencies under the WICR.

1. Introduction

The Murray–Darling Basin (MDB) extends across four states and one territory, and is Australia’s most important agricultural region (see appendix 3).

The *Water Act 2007*⁶ (Water Act) creates new institutional and governance arrangements to address the sustainability and management of water resources in the MDB. The Water Act builds on earlier reform initiatives, including the National Water Initiative (NWI) and the Murray–Darling Basin Agreement.

Under the Water Act the Australian Competition and Consumer Commission (ACCC) has been given new functions relating to water trading rules, water market rules and water charge rules. For water charge rules, the ACCC’s role is to advise the Minister for Climate Change and Water (the minister) on the rules and to monitor and enforce compliance with the rules.⁷ The minister is responsible for making the water charge rules under the Water Act.

In developing its advice on the water charge rules, the ACCC had regard to the Basin water charging objectives and principles set out in Schedule 2 of the Water Act. The main objectives of the Water Act (and the NWI) are to promote the efficient use of, and investment in, water infrastructure and to facilitate the efficient operation of water markets.⁸ Water charge rules that encourage full cost recovery⁹ for water services will contribute to achieving an economically efficient and sustainable use of water resources and water infrastructure assets.¹⁰ Water charge rules applied consistently and transparently across the Basin¹¹ will assist the efficient functioning of water markets¹² by removing distortions to trade and by sending signals about efficient investment in water infrastructure assets.

The water infrastructure charge rules (WICR) are one subset of the water charge rules and apply to fees and charges levied by infrastructure operators—including irrigation infrastructure operators and bulk water operators—for the provision of water access services, including the storage and delivery of water. The ACCC provided its advice on the WICR to the minister on 26 June 2009. The minister has since requested the ACCC to provide further advice on the issue of accreditation of state agencies by the ACCC under the WICR.

The ACCC released its draft advice on accreditation as part of the WICR, including draft WICR, on 6 November 2009. Ten submissions were received in response to the ACCC’s draft advice.

⁶ Unless otherwise noted, all legislation referred to in this document is Commonwealth.

⁷ Sections 93(2), 94, 100A and 100D of the Water Act.

⁸ Clauses 58 and 64 of the NWI, and Schedules 2 and 3 of the Water Act.

⁹ Schedule 2, clause 3(3) of the Water Act.

¹⁰ Schedule 2, clause 2 of the Water Act.

¹¹ Schedule 2, clause 3(7) of the Water Act.

¹² Schedule 2, clause 2(c) of the Water Act.

This paper sets out the ACCC's final advice to the minister on accreditation as part of the WICR and is accompanied by draft WICR which incorporate changes to provide for the accreditation framework.

1.1. Development of advice on the WICR

The minister wrote to the ACCC requesting that the ACCC provide advice and draft water charge rules by the end of June 2009.¹³

In developing its final advice on the WICR, the ACCC undertook an extensive consultation process, releasing the following papers for consultation:

- an issues paper on water charge rules for charges payable to irrigation infrastructure operators
- an issues paper on bulk water charge rules
- a position paper on water charge rules for charges payable to irrigation infrastructure operators and bulk water operators
- draft advice on the WICR and draft WICR.

At each stage of the consultation process, the ACCC invited comment from Basin state water ministers and agencies, operators, interested stakeholders and the public.

The ACCC also published notices in national and regional newspapers and on the internet inviting submissions in response to the issues papers, position paper and draft advice. The ACCC received a total of 72 submissions in response to these papers; all written submissions are publicly available on the ACCC website (www.accc.gov.au).

In addition, the ACCC held numerous meetings with key stakeholders throughout the public consultation process, including a public forum in Sydney following the release of the draft advice. This provided stakeholders with the opportunity to discuss issues directly with ACCC commissioners and staff. The ACCC's final advice on the WICR took into account submissions received throughout the consultation process and comments made in meetings and in the public forum.

1.1.1. ACCC's final advice on the WICR

On 26 June 2009 the ACCC provided its final advice on the WICR to the minister. In its final advice, the ACCC recommended a three-tiered approach to regulating the various types of operators. The three tiers were to apply to operators depending on the type of market failure and the materiality of any resulting inefficiencies.

Tier 1 rules were recommended to address issues of discriminatory pricing and pricing transparency. Publishing requirements to promote pricing transparency would apply to all operators, with broader requirements applying for operators servicing more than 10 GL of entitlement. Non-discriminatory pricing rules would apply to all member-owned operators, with approval or determination requirements applying to

¹³ As provided for under section 93(1) of the Water Act.

member owned operators that make a distribution to their members and that provide services in relation to more than 10 GL of entitlement.¹⁴

Tier 2 rules were recommended to address concerns about asymmetric information and to promote transparency in the processes used by operators to determine their charges. These rules would require each tier 2 operator to develop a network service plan outlining its processes for determining charges, including its approaches towards asset management, every five years. Tier 2 operators would include larger member-owned operators¹⁵ and any medium-sized non-member owned operators not captured under tier 3.¹⁶

Tier 3 rules were recommended to address the potential misuse of market power and any resulting inefficiencies. These rules would require larger non-member owned operators¹⁷ to have their charges approved or determined by the ACCC. Currently, Goulburn-Murray Water (GMW), Lower Murray Water (LMW) and State Water would be captured by the tier 3 rules. Under current state arrangements, the Essential Services Commission of Victoria (ESC) is responsible for determining charges levied by GMW and LMW, and the New South Wales Independent Pricing and Regulatory Tribunal (IPART) is responsible for determining State Water's charges.

1.1.2. ACCC's advice on whether to provide rules for accreditation

Under s. 92 of the Water Act, the minister may make water charge rules that provide for the ACCC to:

- approve or determine regulated water charges, and/or
- accredit arrangements under which regulated water charges are determined or approved by agencies of the states (instead of by the ACCC).

In its final advice on the WICR, the ACCC recommended that any approvals or determinations under the WICR (under tiers 1 and 3) should be undertaken by the ACCC rather than by accredited state agencies.

This was on the basis that the Basin water charging objectives and principles¹⁸ would be best achieved by a single regulator being responsible for approvals or determinations across the MDB. In particular, this approach would be best able to ensure a consistent¹⁹

¹⁴ No operators are currently captured by the requirement to have their charges approved or determined under the tier 1 rules because no member-owned operators currently pay a distribution to their members.

¹⁵ Larger member-owned operators are defined as member-owned operators that provide services in relation to more than 125 GL of entitlement—currently Murrumbidgee Irrigation Limited, Murray Irrigation Limited, Coleambally Irrigation Cooperative Limited and Central Irrigation Trust.

¹⁶ Medium-sized non-member owned operators are defined as non-member owned operators that provide services in relation to more than 125 GL but less than 250 GL of entitlement—currently SunWater.

¹⁷ Non-member owned operators servicing more than 250 GL of entitlement.

¹⁸ Schedule 2 of the Water Act.

¹⁹ Schedule 2, clause 3(7) of the Water Act.

approach to setting charges across the MDB. In turn, this would facilitate freer water markets²⁰ and more efficient use of water resources and investment in water infrastructure.²¹ It would also benefit the monitoring and enforcing of the rules. Further, a national regulator would be better able to act in the interests of the MDB as a whole rather than in the interests of a particular jurisdiction.

On balance, the ACCC considered that a single regulator approach would offer the highest net benefit compared with an approach where multiple regulators were responsible for undertaking approvals or determinations. Section 3.2.7 of the ACCC's final advice provides a full discussion of this issue.

1.2. Further advice on accreditation under the WICR

The Department of Environment, Water, Heritage and the Arts publicly released the ACCC's final advice on the WICR on 27 July 2009.²² The minister subsequently requested the ACCC to consult with interested parties and to provide further advice on rules for accreditation as part of the WICR. The ACCC has been asked to provide this further advice by 28 February 2010.

1.3. Consultation process

In developing its advice on accreditation, the ACCC released its draft advice on accreditation, including amended draft WICR, on 6 November 2009. The ACCC invited comment from Basin state water ministers and agencies, operators, interested stakeholders and the public.

The ACCC requested that stakeholders limit their comments to issues relating to accreditation. Given the nature and timeframe of this request for advice, the ACCC has been required to focus on providing advice in relation to accreditation under the WICR, rather than revisiting the WICR in totality. The ACCC notes that the content of the remainder of the WICR was subject to an extensive consultation process that was completed in July 2009 and stakeholders were provided opportunities to make submissions to this process. To revisit the WICR more generally could disadvantage stakeholders that participated in that process but that have less interest in the issue of accreditation more specifically.

The ACCC received ten written submissions in response to its draft accreditation advice and rules. These submissions, as well as the abovementioned draft documents, can be found on the ACCC website (www.accc.gov.au).

Stakeholder comments relating to accreditation are addressed in this advice as they arise. A number of stakeholders also commented on other parts of the WICR. As noted

²⁰ Schedule 2, clauses 2(c) and 3(7) of the Water Act.

²¹ Schedule 2, clause 2(a) of the Water Act.

²² The ACCC's final advice on the water infrastructure charge rules and the accompanying draft water charge (infrastructure) rules can be viewed on the Department of Environment, Water, Heritage and the Arts website, www.environment.gov.au.

in the draft advice, the ACCC's advice to the minister on accreditation will not consider these issues for the reasons discussed above.

This document constitutes the ACCC's final advice to the minister on the accreditation of state agencies by the ACCC under the WICR.

2. Proposed accreditation framework

This chapter outlines the ACCC's proposed framework for the accreditation of arrangements by the ACCC under which state agencies will undertake approvals or determinations for the purposes of the water infrastructure charge rules (WICR).

The minister may make water charge rules that provide for the approval or determination of charges by the ACCC and/or for the accreditation of arrangements under which state agencies undertake such approvals or determinations instead of the ACCC.²³ The ACCC notes that most of the stakeholders that made submissions to the ACCC's draft advice on accreditation supported the inclusion of accreditation under the WICR.

The National Farmers' Federation (NFF) noted:

NFF welcomes the ACCC incorporating the accreditation of state agencies for making determinations under the Water Charge Rules.²⁴

The Gwydir Valley Irrigators Association Inc (GVIA) noted:

GVIA is supportive of the accreditation of IPART, quite simply because IPART holds a great deal of corporate knowledge of the NSW irrigation industry and bulk water charging, which is unlikely to be ever matched by ACCC.

GVIA appreciates the need for, and the desirability of, consistent water charge determination principles across the Basin, but believes this outcome can be achieved through the accreditation of bodies like IPART.²⁵

Western Murray Irrigation (WMI) similarly noted it 'fully supports the use of multiple regulators'²⁶.

The Victorian Farmers Federation (VFF) noted:

... VFF is supportive of the ACCC's accreditation process for state agencies under the water infrastructure rules. Accreditation of already experienced regulators to continue to administer complementary regulatory functions would optimize the regulatory framework, both in terms of the process and costs, leading to more investment certainty and better rural water services.²⁷

²³ Section 92 of the Water Act.

²⁴ NFF, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 4, December 2009.

²⁵ GVIA, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

²⁶ WMI, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 1, December 2009.

²⁷ VFF, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

The Victorian Government noted:

The Victorian Government supports the water infrastructure charge rules providing for accreditation arrangements to enable jurisdictional regulators to continue to make water charge determinations within the Murray Darling Basin (MDB).²⁸

However, the New South Wales Government noted that ‘the NSW position is that a single rather than multiple regulator approach is preferable’²⁹ The New South Wales Government further noted that it ‘do[es] not expect that NSW will seek accreditation upon implementation of the charge rules’³⁰.

In relation to what can be included in a framework for accreditation, s. 92(3) of the Water Act provides that the rules may deal with:

- the process to be followed in applying for, and making or giving, an accreditation
- the terms and conditions on which arrangements are accredited (including the determination of some or all of those terms and conditions by the ACCC)
- the obligations to be imposed in relation to the accreditation of arrangements (including the determination of some or all of those obligations by the ACCC).

Under s. 92(6) of the Water Act, the water charge rules may provide for circumstances in which an accreditation may be revoked or the circumstances in which the terms and conditions of an accreditation may be varied.

In developing its advice on accreditation, the ACCC’s main objective was to develop rules that would contribute to achieving the Basin water charging objectives and principles outlined in Schedule 2 of the Water Act (see appendix 2). These objectives and principles include:

- promoting the economically efficient and sustainable use of water resources and water infrastructure assets
- ensuring that operators receive sufficient revenue to provide the required services
- facilitating efficient water markets
- giving effect to the principles of user-pays
- achieving pricing transparency

²⁸ Victorian Government, *Submission to the ACCC’s draft advice on accreditation under the water infrastructure charge rules*, p. 1, December 2009.

²⁹ New South Wales Government, *Submission to the ACCC’s draft advice on accreditation under the water infrastructure charge rules*, p. 1, February 2010.

³⁰ New South Wales Government, *Submission to the ACCC’s draft advice on accreditation under the water infrastructure charge rules*, p. 1, February 2010.

- avoiding perverse or unintended outcomes
- encouraging full cost recovery
- ensuring consistency in charging where entitlements are able to be traded.

As noted in the draft advice, a framework with approvals or determinations being undertaken by numerous accredited state agencies rather than by a single regulator will require certain rules to ensure that there is a consistent approach to charging across the MDB.

Consistency in charging across jurisdictions where water can be traded³¹ is an important prerequisite for an efficient water market.³² An interconnected water market will provide an opportunity for irrigators to trade water across state boundaries. In deciding whether to trade water entitlements or to continue in irrigation, an irrigator will, in simple terms, assess the profits earned in irrigation against the profits earned through the sale of water entitlements.

The profits earned by an irrigator depend on many factors, including commodity prices, product yields and input costs such as water access fees. Where those fees vary across state boundaries because of different regulatory frameworks or an inconsistent interpretation and application of the same framework, decisions about whether to continue in irrigation or to trade water may be distorted. If there are distortions to the water market, this will result in less efficient water use and investment in water-related infrastructure. Clearly such outcomes would be at odds with the Basin water charging objectives and principles, including the efficient and sustainable use of water resources and water infrastructure assets³³ and the efficient functioning of water markets.³⁴

The *Water Charge (Termination Fees) Rules 2009*, *Water Market Rules 2009*, WICR, water planning and management charge rules and water trading rules are integral in removing distortions to water markets and water trade.³⁵ The collective set of rules, interpreted and applied consistently across the Basin, is critical to ensuring that irrigators can make efficient and informed decisions; which, in turn, will help to achieve the Basin water charging and water market objectives and principles.

The ACCC's proposed accreditation framework has also been formulated to maximise transparency and regulatory certainty while minimising compliance and administrative costs for stakeholders.

The New South Wales Government supported the ACCC's proposed accreditation framework and noted:

³¹ Schedule 2, clause 3(7) of the Water Act.

³² Schedule 2, clauses 2(c) and 3(1) of the Water Act.

³³ Schedule 2, clause 2(a) of the Water Act.

³⁴ Schedule 2, clauses 2(b) and 3(7) of the Water Act.

³⁵ An irrigator's net profit from trade of a water access entitlement, in simple terms for an exiting irrigator, is a function of the water price and the termination fee. The water market and trading rules facilitate the efficient functioning of water markets so that the water price can reflect its relative scarcity incorporating all market participants from within that interconnected market.

... the rules should contribute to achieving the Murray-Darling Basin water charging objectives and principles. In particular, the framework should achieve consistency in approving, or determining, prices in the absence of a single regulator and it should be recognised that these outcomes require the framework to be quite prescriptive with respect to the accreditation process.³⁶

The ACCC's proposed process for accreditation is outlined in this chapter, including:

- the proposed process and timing for accreditation including the proposed accreditation criteria (sections 2.1–2.4)
- the proposed terms, conditions and obligations associated with an accreditation (section 2.5)
- the proposed rules for the revocation or variation of an accreditation (section 2.6)
- the changes that have been required to the draft WICR in order to implement the accreditation framework (section 2.7).

2.1. Process for applying for and granting an accreditation

The majority of submissions did not address the process for applying for and granting accreditations. However, the Victorian Government made a general comment about the process for accreditation, noting:

[The] accreditation rules should provide for an objective, transparent and consultative process whereby the ACCC can assess the competency and capacity of jurisdictional regulators to make determinations consistent with the water infrastructure charge rules.³⁷

The ACCC agrees with the Victorian Government's comment and believes that the proposed accreditation framework meets these objectives.

The Essential Services Commission of Victoria (ESC) also commented on the process for applying for accreditation, arguing that the application for accreditation should be made by the relevant state government rather than by the state agency for which accreditation is sought:

The Commission [ESC] considers that an accreditation application should be made by the Government, rather than the regulator ...

[This] would require a policy decision on the appropriate regulatory arrangements to apply to the water authorities operating in that State and ... would, therefore, most appropriately be made by the Government of that State ...

³⁶ New South Wales Government, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 1, February 2010.

³⁷ Victorian Government, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

The relevant State legislation would have to be amended to give the State regulator the necessary functions and powers to implement the water infrastructure charge rules. Legislative amendments would need to be undertaken by the Government.³⁸

The ACCC understands that in order for a state agency to apply to have its arrangements accredited it will need the support of its state government. In particular, the state government will need to enact state legislation to give the state agency the requisite powers and functions in order to undertake approvals or determinations consistent with the WICR (see section 2.3.1). In this way, the state government will first have to make a policy decision on whether the relevant operator's (or operators') charges should be determined by a state agency or the ACCC. If the state government decides that a state agency should be the responsible body, it will then have to enact the required state legislation before a state agency could apply for accreditation.

However, as it is the state agency that will ultimately be responsible for undertaking approvals or determinations, should its arrangements be accredited, the ACCC considers that it is important that the state agency is responsible for applying for accreditation. In particular, this will ensure that the state agency is directly accountable for complying with any terms, conditions or obligations that the ACCC may impose as part of the accreditation (see section 2.5.3). Hence, the ACCC has maintained the proposed approach in its draft advice whereby the state agency seeking accreditation of its arrangements will be responsible for applying to the ACCC.

The proposed process for applying for and granting an accreditation includes:

- the relevant state agency applying to the ACCC for accreditation³⁹
- the ACCC releasing a draft decision on whether to grant the accreditation (and reasons for that decision) for public comment
- the ACCC releasing a final decision on whether to accredit the arrangements (and reasons for that decision).

Under this process stakeholders will be able to comment on the ACCC's draft decision. In particular, the applicant agency will be able to respond to the ACCC's draft decision and its reasons for making that decision.

Before a state agency can apply for accreditation, the relevant state must have enacted legislation that allows the agency to undertake approvals or determinations under the WICR; this is essentially a precondition of applying for an accreditation.

In its accreditation application, the state agency will be required to provide:

- the name and address of the applicant agency

³⁸ ESC, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

³⁹ Being an agency referred to in part (c) of the definition of 'agency of a State' in s. 4 of the Water Act. The agency will also have to have the relevant powers under state legislation before being able to apply for accreditation.

- details of the state agency, including:
 - the title of the state act under which the agency is established or appointed
 - the title of the state act under which the agency's proposed arrangements are applied as a law of the state
 - the public purpose for which the applicant is established or appointed
- a statement on whether the state agency satisfies the accreditation criteria (see section 2.4)
- the arrangements under which the applicant agency is seeking accreditation.

The ACCC will be required to accredit or refuse to accredit an agency's arrangements within three months of receiving an accreditation application, not including any time during which a request for further information remains unfulfilled. If the ACCC cannot make a decision within this time, it may extend the decision timeframe by one month at a time, providing it writes to the applicant outlining its reasons for the extension and publishes this information on its website.

Before making its final decision, the ACCC will be required to make a draft decision on whether to accredit the state agency's arrangements. The draft decision will include the ACCC's reasons for its decision, along with any proposed terms, conditions or obligations attached to the draft decision, where relevant. The ACCC's draft decision will be published on the ACCC website with the following:

- the agency's application (subject to confidentiality)
- any further information received from the applicant in support of its application or in response to a request for further information from the ACCC (subject to confidentiality)
- an invitation to interested parties to make submissions in response to the ACCC's draft decision.

In making its final decision on whether to accredit a state agency, the ACCC will write to the agency giving its final decision, the reasons for that decision and, where an accreditation is given, any terms, conditions and obligations the ACCC has determined relating to that accreditation. This information will also be published on the ACCC website. The ACCC will be required to grant an accreditation where it is satisfied that the agency's arrangements meet the accreditation criteria (section 2.4).

At any time during this process, the ACCC may write to the applicant agency requesting further information in support of its application. Such a request must specify the timeframe in which the agency is to provide the relevant information. As mentioned above, any time in which an information request remains outstanding will not count towards the three-month timeframe during which the ACCC is required to make its decision (subject to extensions).

The process for applying for and the granting of accreditations is provided in rules 60–63 of Part 9 of the draft rules.

2.1.1. Review of the decision to accredit arrangements

In its submission to the draft advice, the Victorian Government noted:

... decisions made by the ACCC on whether or not to accredit a jurisdictional regulator could have a significant impact on regulated businesses and their customers. As such, these decisions should be reviewable on their merits as well as on matters of law ... The Victorian Government would like to see the ACCC consider the application of merits review for these decisions in its final advice.⁴⁰

The ACCC did not discuss the issue of merits review in its draft advice as the Water Act does not provide for merits review of decisions of the ACCC. However, any administrative decisions made under the WICR could be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cwth). This would include the decision on whether or not to accredit arrangements under which a state agency will approve or determine charges.

The ACCC also notes that the criteria for accreditation (discussed below) are largely objective and hence, the ACCC will have limited discretion in making its decision on accreditation. Either the state agency's arrangements will meet the accreditation criteria and be accredited, or they will not and the ACCC will not grant an accreditation. In this context, it would appear that judicial review would serve a similar purpose as merits review.

2.2. Timing of the accreditation process

As noted in the draft advice, the long lead time associated with Part 6 approvals or determinations makes it necessary for arrangements to be accredited well in advance of the expiry of a Part 6 operator's regulatory period.

In particular, Part 6 of the draft WICR requires that the regulator must approve or determine charges for Part 6 operators within 13 months of receiving a pricing application in respect of the first year of a regulatory period. Further, the ACCC's final advice on the WICR recommended that Part 6 operators submit their pricing applications at least 15 months before the end of a regulatory period. This was to ensure that price approvals or determinations would be completed in time to allow operators to meet their publishing requirements under the rules and to ensure that new prices could come into effect immediately following the expiration of a regulatory period.

By adding a three month accreditation process to this timeframe a state agency would be required to submit an accreditation application to the ACCC 18 months before the expiration of the regulatory period. Because the ACCC, the state agency and the relevant operator will require some certainty about which regulator will be undertaking

⁴⁰ Victorian Government, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

the next approval or determination process, the ACCC proposes that state agencies should apply to the ACCC no later than two years before the expiry of a Part 6 operator's regulatory period in order to be accredited to undertake approvals or determinations for the operator for its next regulatory period. Two years will also allow flexibility if the decision timeframes under either process require extension.

Putting this into context, current regulatory periods for Victorian operators (GMW and LMW) are set to expire on 30 June 2013. Any Victorian agency wishing to seek accreditation would be required to submit its application for accreditation to the ACCC no later than 30 June 2011 for the accreditation to take effect for the next regulatory period for both GMW and LMW. In New South Wales, a State Water price determination process is underway for the period from 1 July 2010 to 30 June 2014; accordingly, any accreditation of a New South Wales agency will need to be received by 30 June 2012.

The New South Wales recognised this in its submission to the draft advice and noted:

Should NSW seek, and obtain, accreditation at a later stage, then the Independent Pricing and Regulatory Tribunal of NSW would be nominated as the accredited agency to carry out price determinations for the NSW bulk water operators. I note that a NSW application for accreditation would need to be made by 30 June 2012, two years before expiry of the upcoming bulk water price determination period for the State Water Corporation.⁴¹

For approvals or determinations under tier 1 (Part 7 approvals or determinations), the timing is less relevant because this is a new form of regulation. Currently no operators would be subject to Part 7 and there is no defined regulatory period (i.e. Part 7 approvals or determinations could commence at any time).

For this reason, the ACCC is proposing that the accredited state agency assume responsibility for Part 7 approvals or determinations from the date at which it is granted accreditation, except where such an approval is already being undertaken. In that case, the accredited agency would assume responsibility for approving or determining that operator's charges as soon as that process was completed.

None of the submissions received in response to the draft advice commented on the proposed timing of the accreditation process.

Rules 63(7) and 64 of Part 9 of the draft rules provide for when the accreditation will begin.

2.3. Term of an accreditation

In deciding on the appropriate term for which an accreditation should be given, there are a number of considerations:

⁴¹ New South Wales Government, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 1, February 2010.

- the term should be sufficient to ensure regulatory certainty (i.e. it should last for an entire regulatory period at a minimum)
- shorter terms would be likely to increase administrative costs for the applicant agency and the ACCC in submitting and assessing applications
- the rural water sector is in a period of change (i.e. the appropriateness of a certain regulatory approach may change as the sector changes).

The Water Act also provides for the water charge rules to provide for the variation and revocation of an accreditation. Used effectively, this should ensure that an accredited agency will only retain accreditation where it is acting in accordance with the rules and the terms, conditions and obligations of the accreditation. To some extent, this will mitigate the need for shorter accreditation terms. (See section 2.7 for a discussion of the recommended revocation and variation provisions.)

Given these considerations the ACCC, in its draft advice, recommended that a term of 10 years would strike an appropriate balance between providing regulatory certainty and retaining some flexibility to adapt to changing circumstances.

In its submission to the draft advice, IPART argued that an accreditation should not be limited to a set term.⁴²

In determining the term of an accreditation the ACCC sought to provide regulatory certainty, minimise administrative costs and ensure that the framework was able to adapt to changes in the rural water sector which may impact on the appropriateness of any regulatory framework.

In most cases a term of 10 years would span two regulatory periods for Part 6 operators. To remain accredited over a continuous period the agency will be required to apply for the accreditation of its arrangements two years before the term of its current accreditation is set to expire. This process will be the same as that for applying for or the granting of an accreditation in the first instance and will also be a three month process (where it is not extended).

In this way, an agency would only need to apply to the ACCC every eight years in order to retain a continuous period of accreditation. The ACCC does not consider this particularly onerous and considers this to strike a good balance between regulatory certainty and ensuring that the rules are flexible enough to adapt to any changing circumstances.

In balancing these considerations, the ACCC maintains its recommendation that arrangements should be only accredited for a term of 10 years.

The term of an accreditation is provided for in rule 68 of Part 9 of the draft rules, while rule 69 provides the time frame for reapplying for an accreditation.

⁴² IPART, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

2.4. Accreditation criteria

As discussed in section 2.1, the ACCC will only be able to accredit the arrangements under which state agencies can undertake approvals or determinations under the WICR where it is satisfied that the agency meets the criteria for accreditation.

The criteria for accreditation are critical to ensuring that the arrangements under which a state agency is accredited will contribute to achieving the Basin water charging objectives and principles. In particular, they should set out the framework for achieving consistency in the absence of a single regulator. In turn, this should remove distortions to water trade and encourage the efficient use of water resources and water-related infrastructure.

As discussed in the ACCC's draft advice, the proposed criteria include:

- the arrangements (being set out in state legislation) must provide for the agency to undertake approvals or determinations under that state legislation as if the agency was the ACCC undertaking approvals or determinations under Part 6 or 7 of the WICR
- the agency must not be subject to the direction or control of a minister of the relevant state in implementing Part 6 and Part 7 approvals or determinations
- the agency must be independent of Part 6 and Part 7 operators.

These are discussed below.

2.4.1. Arrangements must require the agency to undertake approvals or determinations in accordance with the relevant parts of the WICR

A consistent approach to setting charges across the MDB is an important prerequisite to achieving the Basin water charging objectives of efficient water markets and the efficient use of water resources and investment in water-related infrastructure.

To achieve this consistency, all regulators will need to make determinations and approvals as if they were the ACCC making determinations or approvals under the WICR. In doing so, the agency will be limited to considering only those relevant factors included under Part 6 and Part 7 of the rules.

Providing for state agencies to apply these parts of the rules will require state legislation to be amended to provide the relevant agency with the functions and powers to make determinations or approvals of regulated charges on the same basis as the ACCC makes determinations or approvals under the WICR. That is, the state legislation will need to give the relevant agency the necessary functions and powers to implement the relevant parts of the WICR.

In its submission to the draft advice, IPART questioned the need for states to enact legislation:

Schedule 5 of the Draft Rules includes, as a condition of accreditation, a requirement that the relevant parts of the Draft Rules be given effect as a law of the State. Given the application of the Water Act as a result of the referral of powers by NSW to the Commonwealth, such a requirement may be unnecessary.⁴³

While participating states have referred powers to the Commonwealth in respect of the Water Act, this does not automatically refer powers onto state agencies⁴⁴. While the water charge rules may deal with the accreditation of arrangements under which state agencies may undertake approvals or determinations, the relevant provisions of the Water Act do not actually provide for the water charge rules to give powers to those state agencies to fulfil those functions. The Water Act only gives powers to the minister and the ACCC in respect of water charge rules. Therefore, state agencies will have to have the necessary functions and powers under their own state legislation; these cannot simply be referred through the Water Act or the WICR.

The draft WICR have been redrafted so that the relevant parts of the rules—those relating to Part 6 and Part 7 approvals or determinations—can apply whether it is the ACCC or an accredited state agency undertaking the approval or determination function. However, the states will be required to have enacted legislation that provides for the agency to undertake approvals or determinations in accordance with the WICR.

The ACCC will need to be satisfied that the state legislation does in fact achieve the desired outcome before it can grant an accreditation. Failure to establish this before granting an accreditation could be problematic if it were found that the legislation did not achieve the desired outcome, which could lead to the accreditation being varied or revoked. This would be undesirable because it would increase regulatory uncertainty for regulators and regulated businesses.

Therefore, the ACCC recommends that one of the accreditation criteria should be that the agency must have the powers and the functions under state legislation to make determinations on, or grant approvals of, regulated charges consistent with the relevant parts of the WICR.⁴⁵

2.4.2. Agency must not be subject to the direction or control of a minister in implementing Part 6 and Part 7 approvals or determinations

As noted in the draft advice, a robust accreditation framework should ensure that decisions made in a price approval or determination process are made separately from other policy decisions. For example, if a state agency is required to approve or determine charges in line with a ministerial directive, this ultimately undermines the rigour and independence of the regulatory process. This could be especially problematic where the minister is a shareholder in the regulated operator.

⁴³ IPART, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

⁴⁴ The WICR may only deal with those matters set out in s 92(3) of the Water Act which do not include the conferring of powers on state agencies.

⁴⁵ This criterion is given effect under clauses 1 and 2 of Schedule 5 of the draft rules.

The ACCC understands that governments may choose to contribute funds to an operator's business or to provide rebates or subsidies to an operator's customers. Further, governments have a role in determining the regulatory and legislative obligations that operators are required to comply with. However, these policy objectives and outcomes should be achieved transparently and independently from the approval and determination process.

Therefore, the ACCC recommends that one criterion of accreditation be that the state agency must not be subject to the direction or control of the minister of the relevant state in relation to Part 6 and Part 7 approvals or determinations. However, the ACCC notes that this criterion is not intended to exclude state agencies that are subject to the control of a minister in respect of the agency's other activities or functions that do not relate to the approval or determination of Part 6 or Part 7 operators' charges.

None of the submissions to the draft advice commented on this criterion.

2.4.3. Agency must be independent of Part 6 and Part 7 operators

To help achieve the Basin water charging objectives and principles, there should be some restrictions applied to the type of state agencies that may be granted accreditation. In particular, any accredited agency should be completely independent of all Part 6 and Part 7 operators, which will ensure the agency has no conflict of interest in approving or determining charges and can do so in accordance with the rules.

The ACCC notes that all relevant existing state regulators currently appear to meet this criterion. In particular, for each state and territory where the Water Act applies (or could apply under opt-in provisions), the following agencies appear to meet this criterion:

- Queensland Competition Authority
- ESC, Victoria
- IPART, New South Wales
- Essential Services Commission of South Australia
- the Utilities Commission, Northern Territory
- Independent Competition and Regulatory Commission, Australian Capital Territory.

None of the submissions to the draft advice commented on this criterion.

The accreditation criteria are provided in Schedule 5 of the draft rules.

2.5. Terms, conditions and obligations of accreditation

The following terms, conditions and obligations were recommended in the ACCC's draft advice to be included explicitly in the accreditation rules:

- the relevant provisions of the draft WICR must apply as a law of the state
- the accredited state agency must approve or determine regulated charges of all Part 6 and Part 7 operators within the relevant state in accordance with the accredited arrangements
- the ACCC may determine such terms, conditions or obligations as required to contribute to achieving the Basin water charging objectives and principles.

No specific comments were received in relation to the first two of these proposed rules. However, some comments were made in response to the third proposed rule. These rules, including stakeholders' comments in response to the draft advice on these rules, are discussed below.

2.5.1. The relevant provisions of the WICR apply as a law of the state

The criterion in section 2.4.3 provides that the ACCC will not grant an accreditation unless it is satisfied that the state legislation provides for the state agency to make determinations and approvals consistently with the relevant parts of the rules.

To support this criterion, the ACCC also recommends that the rules should provide that accreditations are conditional on the relevant provisions of the WICR applying as a law of the relevant state. This will ensure that the required state legislation is in place before an accreditation is made (through the accreditation criteria) and that this legislation is unchanged and remains in force (through this condition of accreditation).

2.5.2. The accredited agency must approve or determine regulated charges of all Part 6 and Part 7 operators within its state in accordance with the accredited arrangements

To ensure a consistent approach across a state, the ACCC believes that an accredited agency should be responsible for undertaking approvals or determinations for all Part 6 and Part 7 operators within its state. This will ensure a consistent approach to Part 6 and Part 7 approval or determination processes in each state. It will also ensure that the state agency approves or determines charges consistently with the accredited arrangements.

2.5.3. The ACCC may determine such terms, conditions and obligations as are necessary to achieve the Basin water charging objectives and principles

Under the Water Act the rules may provide for the determination of terms, conditions and obligations of accreditation by the ACCC.

The primary purpose for the ACCC recommending such a rule is so that it has a means by which to require accredited state agencies to follow the ACCC's pricing principles in approving or determining charges under the WICR and to make changes to such principles without changes being required to be made to the WICR. Unless the ACCC

is able to determine the terms, conditions or obligations of an accreditation, this could not be achieved.⁴⁶ This requirement is fundamental to achieving a basic level of consistency in charging across the MDB (see discussion below).

Further, the ACCC and state agencies will require flexibility to deal with issues specific to a particular jurisdiction or application. Thus, the ACCC recommends that the accreditation rules should contain a general provision allowing the ACCC to set additional terms, conditions and obligations on an accreditation.

Additional terms, conditions or obligations could be added when the ACCC is granting an accreditation or at a later time, where considered necessary. However, the ACCC would only be able to determine additional terms, conditions or obligations of an accreditation where these would contribute to achieving the Basin water charging objectives and principles. In this way, the ACCC's discretion would be limited.

Further, additional terms, conditions or obligations of an accreditation could only be imposed where the ACCC has consulted on those terms, conditions or obligations. Where terms, conditions or obligations are being proposed as part of the granting of an accreditation, such terms, conditions or obligations would need to be included in the ACCC's draft decision and released for consultation. Where additional terms, conditions or obligations are being proposed at a later date (after an accreditation has already been granted), the ACCC would be required to hold a three month process, including public consultation, before such terms, conditions or obligations could come into effect.

The draft WICR also provide accredited agencies with the opportunity to suggest changes to the terms, conditions or obligations of their accreditation. Such a request would trigger a public process by which the ACCC would have to consult on whether to make the suggested changes. In this way, both the ACCC and accredited state agencies could trigger a variation to the terms, conditions or obligations of an accreditation.

In its submission to the draft advice, the ESC stated:

The Commission [ESC] is concerned that such a provision would allow the ACCC substantial discretion, including the capacity to change the terms or conditions of accreditation after a State regulator has obtained accreditation. The Commission considers that State regulators, and the regulated infrastructure operators in each State, need certainty about the terms and conditions under which the regulator performs its regulatory functions.⁴⁷

As noted above, the ACCC may only determine that an accreditation should be subject to certain terms, condition or obligations where:

- those terms, conditions or obligations are necessary to contribute to achieving the Basin water charging objectives and principles

⁴⁶ Under the *Legislative Instruments Act 2003*, there are limits to the extent to which legislative instruments—such as the WICR—can incorporate other documents by reference.

⁴⁷ ESC, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 5, December 2009.

- the ACCC has consulted on those terms, conditions or obligations.

In general, the ACCC is unlikely to seek new terms, conditions or obligations on an accreditation unless it considers these to be fundamental to ensuring that an accredited agency can continue to undertake its functions under the WICR in a way that will contribute to achieving the Basin water charging objectives and principles. While this provision does provide the ACCC with some discretion the ACCC is unlikely to use this discretion unless this is considered necessary. To unnecessarily impose new terms, conditions or obligations on an accreditation would create regulatory uncertainty which would be contrary to the objectives of the WICR.

The ACCC also notes that the ability to impose new terms, conditions or obligations on an accreditation in response to an unforeseen circumstance is favourable to other more extreme measures such as revoking an accreditation. The ACCC considers that new terms, conditions or obligations could potentially address any problems that arise through the term of an accreditation without creating the regulatory uncertainty associated with a revocation (which is the likely alternative in the case of unforeseen circumstances).

Pricing principles

As noted in the draft advice, the ACCC is likely to require accredited agencies to apply the ACCC's Part 6 and Part 7 pricing principles in undertaking these types of approvals or determinations. This is fundamental to:

- providing regulatory certainty for Part 6 and Part 7 operators
- minimising compliance costs for stakeholders
- achieving consistency in the implementation of the rules; it will ensure that all regulators undertaking approvals or determinations under Parts 6 or 7—whether an accredited state agency or the ACCC—are implementing the rules in the same way.

Indeed, the ACCC had already committed to developing price methodology guidelines under the WICR before accreditation was included in the WICR.⁴⁸ This was on the basis that price methodology guidelines can promote regulatory certainty for regulated operators by communicating the way in which the regulator will apply the rules. This in turn will assist operators in complying with the rules and hence, will minimise compliance costs for stakeholders.

The only additional function that the pricing principles will serve under a framework with multiple regulators responsible for approving or determining charges is to promote consistency of approach. This is an important prerequisite to achieving the Basin water charging objectives and principles.

⁴⁸ ACCC, 2009, *Water infrastructure charge rules—Advice to the Minister for Climate Change and Water*, June, p. 87.

The form of price control and the setting and roll-forward of the regulatory asset base are already provided in the draft WICR. The pricing principles are likely to address the following additional issues:

- depreciation
- return on capital (the weighted average cost of capital).
- capital and operating expenditure
- cost allocation methodology
- demand or consumption forecasts
- tariff structure
- the treatment of government contributions
- efficiency incentive mechanisms.

The ESC and IPART commented on the ACCC's proposed pricing principles in their submissions to the draft advice.

The ESC noted:

The Commission [ESC] considers that the ACCC should release its draft pricing principles for comment as soon as practicable and that State regulators should be consulted in developing those principles. The Commission further submits that finalisation of the water infrastructure charge rules, including the accreditation rules, should be deferred until stakeholders can consider and comment on the pricing principles.⁴⁹

IPART noted:

IPART is concerned firstly that depending on the scope and context of these [pricing] principles, an accredited regulator could potentially have no capacity to exercise judgement and instead is limited to applying formulaic approaches that result in inefficient outcomes in practice ...

Secondly, IPART is concerned that the initial pricing principles have not yet been released and that the Draft Rules do not include a restriction on the ACCC amending its pricing principles or issuing additional pricing principles at any time.

Given the importance of the context of the pricing principles, IPART suggests that the development of those principles be expedited to allow regulators sufficient time to review them before deciding whether to seek accreditation.

Further IPART suggests that the Draft Rules be amended to require the ACCC to consult with an accredited regulator before issuing or varying pricing principles; and to

⁴⁹ ESC, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

require the ACCC to obtain Ministerial consent before issuing or amending a pricing principle.⁵⁰

The ACCC is in the process of developing the pricing principles and will consult with interested parties on the content of these. Importantly, the pricing principles are expected to be made public before the WICR commence and state regulators should have ample time to consider the pricing principles before deciding whether to apply to have their arrangements accredited.

In relation to IPART's concerns regarding regulatory discretion, the ACCC considers that the WICR together with the pricing principles provide the minimum level of prescription required to achieve a consistent approach to charging across the Basin in the absence of a single regulator. As discussed in the introductory chapter, consistency in pricing is fundamental to achieving many of the Basin water charging objectives and principles—namely, an efficient water market, efficient water use and efficient investment in water infrastructure assets. Hence, consistency of approach is critical to the success of the WICR. The measures included in the WICR and pricing principles are considered necessary to achieve this.

As mentioned above, the ACCC also considers that the pricing principles are important for communicating with Part 6 and Part 7 operators on the approach of the regulator and thereby promoting regulatory certainty and transparency.

That said the ACCC understands the importance of providing regulators with sufficient discretion to adapt to the specific circumstances faced by the regulated operator. The ACCC has aimed to develop rules and pricing principles which provide an appropriate level of flexibility and discretion to the regulator. The same level of discretion and flexibility will apply whether it is the ACCC or an accredited regulator undertaking price approvals or determinations. .

In relation to the ACCC's ability to vary the pricing principles, this will be subject to the same constraints as for any other terms, conditions or obligations associated with an accreditation. Namely, as following the pricing principles will be a condition of accreditation, the pricing principles will only be able to be varied where:

- the variation contributes to achieving the Basin water charging objectives and principles
- the ACCC has publicly consulted on the variation.

These factors will limit the ACCC's ability to vary the pricing principles. In particular, the ACCC will not be able to vary the pricing principles without the accredited agency first being consulted on the proposed variation.

In relation to IPART's suggestion that ministerial consent should be required for any amendment to the pricing principles, it is not clear what this process would achieve given the technical nature of this document. As noted above, any variation to the pricing principles will require public consultation. In this context, a further requirement

⁵⁰ IPART, *Submission to the ACCC's draft advice on accreditation under the water infrastructure charge rules*, p. 2, December 2009.

to obtain ministerial consent would delay the process which could have significant costs where a variation was considered important to achieving the Basin water charging objectives and principles.

The terms, conditions and obligations of accreditation are provided for in rule 59 of the Part 9 of the draft rules. The processes associated with the setting of terms, conditions and obligations are provided for in rules 65 and 66 of the draft rules.

2.6. Revocation or variation of an accreditation

Section 92(6) of the Water Act provides that the accreditation rules may provide for the circumstances in which:

- an accreditation may be revoked
- the terms and conditions on which an accreditation is given may be varied.

These are discussed below. None of the submissions received commented on the ACCC's proposed processes for the revocation or variation of an accreditation. For this reason this section of the advice (and corresponding rules) remains largely unchanged from that in the ACCC's draft advice.

2.6.1. Revocation

Revocation provisions should be used only in circumstances where the foundation on which an accreditation has been granted has been compromised or undermined. In particular, the ACCC recommends that an accreditation should be revoked in the following circumstances:

- where the state agency is not making approvals or determinations under the requirements of the WICR
- where the ACCC is satisfied that the agency has failed to meet any terms, conditions or obligations under which the accreditation was granted
- where the arrangements no longer meet the criteria for accreditation.

The ACCC will not revoke an accreditation without first notifying the accredited agency and providing its reasons for the proposed revocation. The ACCC will also make this notice available on its website, www.accc.gov.au. The agency will be given an opportunity to make representations on why its accreditation should not be revoked. The ACCC will have two months from notifying the agency to make its final decision on the revocation. The ACCC will generally revoke an accreditation unless it is satisfied that the agency has shown that it will take such actions (or cease such actions) to rectify the circumstances that triggered the ACCC's initial decision to revoke the accreditation.

There may also be circumstances where an accredited agency may wish to cease its approval or determination functions for the purposes of the WICR. In such

circumstances, it may apply to the ACCC for revocation of its accreditation. The ACCC will then publish a notice of the revocation and provide it to the relevant operators.

In both cases, a revocation will take effect from the date specified in the notice of revocation. Any charges approved or determined by an accredited agency under parts 6 or 7 before revocation occurred would remain in force as they would otherwise have remained under the WICR. The ACCC will then assume responsibility for all subsequent approvals or determinations under Part 6 or Part 7 until the time an agency was otherwise accredited.

Where a revocation takes effect after an accredited agency has received an application under Part 6 or Part 7 but before the agency has made a final decision about that application, the ACCC will assume responsibility for that decision. The relevant operator will be required to submit an application to the ACCC, and the ACCC will become responsible for approving or determining charges for that operator under the relevant parts of the WICR.

The revocation provisions are given in rule 67 of Part 9 of the draft rules.

2.6.2. Variation

To establish regulatory certainty and stability, the ACCC recommends that variation of the terms and conditions of an accreditation should occur only under limited circumstances. The ACCC will make a variation only where it is satisfied that the variation will contribute to achieving the Basin water charging objectives and principles. The variation will take effect from the date prescribed in the ACCC's notice of variation. A variation could be initiated by the ACCC or could be requested by the accredited agency.

ACCC variation

If the ACCC wished to vary the terms or conditions under which an accreditation was given, it would be required to:

- give notice of its draft decision to vary the terms and conditions of an accreditation (and reasons for this)
- publish this information on its website and invite submissions on its draft decision.

The ACCC's final decision on whether to vary the terms and conditions of an accreditation must be published within three months of the draft decision's publication on the ACCC website. The final decision and reasons for that decision must also be available on the ACCC website (www.accc.gov.au).

Variation by accredited agency

An accredited agency wishing to vary the terms and conditions of its accreditation must request this in writing to the ACCC, along with the reasons for the requested variation. The ACCC is required to publish a draft variation decision on its website within one

month of receiving the variation request. The ACCC is then required to make its final decision on varying the terms and conditions of an accreditation within three months of making its draft decision. Its final decision and reasons for that decision would also be published on the ACCC website.

The variation provisions are given in rules 65 and 66 of Part 9 of the draft rules.

2.7. Changes to the draft infrastructure charge rules

The accreditation rules will form a new part of the draft WICR (Part 9). This will include new draft rules to provide for:

- the process to be followed in applying for and in granting accreditations, including the criteria for accreditation
- the terms, conditions and obligations relating to an accreditation
- the circumstances in which an accreditation may be revoked or the terms and conditions on which an accreditation is given may be varied.

In addition, there will be two new schedules:

- Schedule 4 includes details of the information that needs to be included in applications for accreditation.
- Schedule 5 sets out the criteria for accreditation.

The draft WICR also required amendment elsewhere so that they could apply whether the Part 6 or 7 approvals or determinations are being made by the ACCC or by an accredited state agency.

The states will still have to draft or amend their legislation to provide for the accreditation of state agencies under the WICR. This could be achieved by the relevant state legislation referencing the relevant provisions of the WICR.

In particular, the draft WICR will require:

- new definitions as required for the new rules providing for accreditation—including for accredited agency, accredited arrangements, applied provisions and the regulator.
- amendment of certain definitions so they can apply to accredited arrangements in the same way as they apply to the ACCC—including for application period and business day
- amendment to provide that Part 6 and Part 7 operators will not be in breach of the rules if their charges have been approved or determined by an accredited state agency rather than the ACCC
- amendment of certain requirements outside of Part 6 and Part 7, but relating to approvals or determinations under these parts so these

requirements can apply to both accredited agencies and the ACCC alike (e.g. for rule 9(11)(b) and throughout Division 1, Part 8

- amendment of Part 6 and Part 7 so that references to the ACCC will be taken to be references to the ACCC or an accredited agency—divisions 2–4 of Part 6 and Division 2, Part 7
- amendment of confidentiality requirements so they apply for applications and submissions received in respect of the new accreditation rules (Part 9)—requiring amendment of Division 1, Part 8.

Appendix 1 List of submissions

The ACCC received the submissions from the following organisations in response to its draft advice on the accreditation of state agencies by the ACCC under the water infrastructure charge rules:

- National Farmers' Federation (NFF)
- Queensland Government
- Essential Services Commission (Victoria) (ESC)
- Government of South Australia
- Gwydir Valley Irrigators Association Inc. (GVIA)
- Independent Pricing and Regulatory Tribunal (New South Wales) (IPART)
- Victorian Farmers Federation (VFF)
- Victorian Government
- Western Murray Irrigation Limited (WMI)
- New South Wales Government

Appendix 2 Basin water charging objectives and principles

Water charging objectives

The **water charging objectives** are:

- (a) to promote the economically efficient and sustainable use of:
 - (i) water resources
 - (ii) water infrastructure assets
 - (iii) government resources devoted to the management of water resources
- (b) to ensure sufficient revenue streams to allow efficient delivery of the required services
- (c) to facilitate the efficient functioning of water markets (including inter-jurisdictional water markets, and in both rural and urban settings)
- (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
- (e) to avoid perverse or unintended pricing outcomes.

Water charging principles

Water storage and delivery principles

- (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
 - (b) provision for the cost of asset consumption
 - (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
 - (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.

Cost recovery for planning and management

See the ACCC's *Water charge rules for water planning and management charges* final advice (July 2009)⁵¹.

Environmental externalities

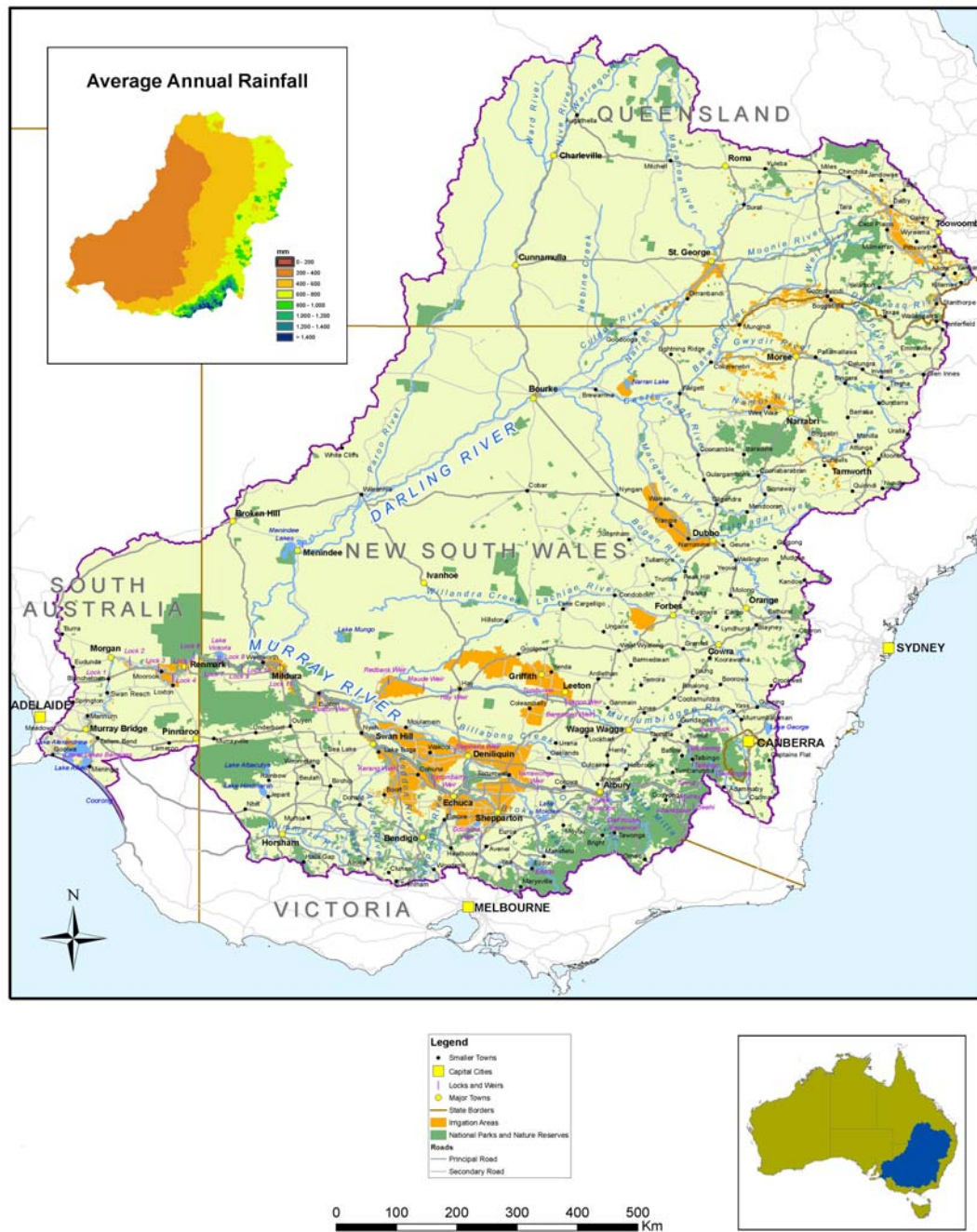
- (1) Market-based mechanisms (such as pricing to account for positive and negative environmental externalities associated with water use) are to be pursued where feasible.
- (2) The cost of environmental externalities is to be included in water charges where found to be feasible.

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 benchmark and efficiency review systems are to be met through recovery of regulated water charges.

⁵¹ This has been released by the Department of Environment, Water, Heritage and the Arts (DEWHA) and can be accessed at <http://www.environment.gov.au/water/australia/water-act/planning-management-charge-rules.html>.

Appendix 3 The Murray–Darling Basin



Sources: Murray–Darling Basin Authority; Topographic data: Topo 250K © Geoscience Australia, 2006; Rainfall data: Bureau of Meteorology, 2001; Irrigation data: various state agencies and irrigation companies © MDBA 2008; National Parks and Reserves data: Department of Environment, Water, Heritage and the Arts, 2004 (CAPAD); map produced February 2009.

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