



Australian
Competition &
Consumer
Commission

Compliance with the Water Rules:
Information for Irrigation Infrastructure Operators

Guidelines on amendments to the Water Charge (Termination Fees) Rules and the Water Market Rules

The Water Charge (Termination Fees) Rules 2009 and the Water Market Rules 2009 (collectively, the Water Rules) were amended by the Minister in October 2012.¹

These guidelines are provided by the Australian Competition and Consumer Commission (ACCC) to assist irrigation infrastructure operators (IIOs) to comply with the amended Water Rules. These guidelines are for guidance purposes only and do not constitute legal advice. If an IIO is uncertain about how the guidance applies to its circumstances, it can seek further information from the ACCC or consider obtaining independent legal advice.

The ACCC is responsible for monitoring and enforcing compliance with the Water Rules under the *Water Act 2007* (Cwlth).

For more information about the amendments to the Water Rules, please see the Guides to the Water Market Rules 2009 and the Water Charge (Termination Fees) Rules 2009, available online at the ACCC website: www.accc.gov.au/water.

Amendments to the Water Charge (Termination Fees) Rules

The Total Network Access Charge

The amendment

The definition of the term ‘total network access charge’ in rule 3 has been amended to clarify the calculation of the maximum termination fee.

An irrigator may give written notice of termination to an IIO part way through a financial year. The IIO may decide to charge the irrigator access fees only for that part of the financial year in which the irrigator had the access to the IIO’s network. The amendment clarifies that, notwithstanding the decision by the IIO to charge pro-rata access fees, the calculation of the maximum termination fee under the rules is based on the total amount that would have been payable by the irrigator in respect of the full financial year had termination or surrender not occurred.

How does this affect IIOs?

The amendment provides comfort to IIOs that their decision to charge a terminating irrigator pro-rata access fees as a result of their termination does not impact on the maximum termination fee they can charge the irrigator under the rules.

However, in calculating the maximum termination fee, the IIOs must still take into account any discount or rebate on access fees given by an IIO to the terminating

¹ See the Water Market Amendment Rules 2012 and the Water Charge (Termination Fees) Amendment Rules 2012. The rules were registered on 16 October 2012 and commenced on 17 October 2012.

irrigator that is not related to the act of termination (e.g. discount for on-time payment of access fees).

Imposition of access fees after termination

The amendment

Rule 5 has been amended to clarify the impact of termination on a terminating irrigator's obligation to pay access fees to the IIO.

Once an irrigator has paid a termination fee and the termination of their right of access (or a part thereof) has taken place, an IIO must no longer charge the irrigator access fees for the terminated part of their right of access (commencing from the new financial year).²

How does this affect IIOs?

IIOs can continue to charge the irrigator access fees for any part of the right of access that has not been terminated and can collect from the irrigator any unpaid access fees accrued in relation to the terminated right (or part) prior to the termination.

Imposition of a termination fee upon the trade of water access right

The amendment

Rule 6 has been amended to limit the circumstances in which an IIO may impose a termination fee when termination arises out of a contractual breach by the irrigator.

Under a contract between the parties, an IIO may be entitled to terminate an irrigator's right of access to its irrigation network in response to a breach by the irrigator of their contractual obligations.

The amendment makes clear that an IIO may impose a termination fee if it gives written notice of termination to the irrigator for breach of contract, except where the contractual breach is associated with the irrigator's act of trading their water access right.³

How does this affect IIOs?

The amendment concerns only the circumstances in which a termination fee may be imposed and does not affect an IIO's ability to terminate an irrigator's access to its irrigation network for a breach of the irrigator's contractual obligations.

However, IIOs should be aware that they cannot impose a termination fee if they compel termination on the basis that an irrigator has breached their contractual obligations as a result of trading their water access right.

² Subrule 5(3) of the Water Charge (Termination Fees) Rules 2009.

³ Paragraph 6(1)(b) of the Water Charge (Termination Fees) Rules 2009.

Relevant point in time for calculating the maximum termination fee

The amendment

Rule 7 has been amended to clarify the applicable date for determining the total network access charge for the purpose of calculating the maximum termination fee.

A termination fee levied by an IIO must generally not exceed an amount of 10 times the applicable total network access charge.

The amendment clarifies that the applicable total network access charge must be calculated by reference to the amounts payable by the irrigator in respect of the financial year in which notice of termination is given or the financial year specified in that notice as that in which termination or surrender is to take effect, whichever is the later.⁴

How does this affect IIOs?

Upon receiving a written notice of termination from an irrigator, IIOs should check whether it specifies a date or a financial year in which the irrigator requests termination to take effect. If the notice specifies a future date, the total network access charge should be calculated based on that date. If no date has been specified, the total network access charge should be based on the date of the notice of termination itself.

Amendments to the Water Market Rules

Irrigation rights

The amendments

Rule 7 has been amended to improve the transparency of the process of determining an irrigator's irrigation right for the purpose of transformation.

A person seeking to transform their irrigation right may make a written request to an IIO for the details of their contractual arrangements with the IIO, including the number of units or volume of water to which the person is entitled under their irrigation right. The IIO is obliged to provide this information to the person. Further, following the amendment, the IIO must now also provide such details as are reasonably necessary to confirm the accuracy of the calculation of the number of units or volume of water.⁵

IIOs that do not hold a separate conveyance licence are also required to provide to a transforming irrigator the number of units or volume of water that will be withheld by the IIO, in accordance with the formula in the rule,⁶ to account for the fixed network losses. The amendments clarify that IIOs must base this calculation on the number of

⁴ Paragraph 7(a) of the Water Charge (Termination Fees) Rules 2009.

⁵ See amendments to paragraphs 7(1)(b) and 7(1)(c) of the Water Market Rules 2009.

⁶ See paragraph 7(2)(a) of the Water Market Rules 2009.

units or volume of water under the person's irrigation right and not water under their seasonal allocation.

How does this affect IIOs?

Some IIOs have already determined the irrigation right entitlements of all their members and issued certificates to each person specifying the number of units or volume of water to which that person is entitled to under their irrigation right. These IIOs are likely to have satisfied the requirement of substantiating the irrigation right calculations as part of this process and are unlikely to be required to provide further details to transforming irrigators.

Those IIOs that have not done this should ensure that they keep a clear record of their members' irrigation rights and the methodology used to calculate those rights. When responding to a written request for details of the irrigator's contractual or other arrangements, the IIO should provide this methodology and any other details reasonably necessary to enable the person to understand how their irrigation right was calculated.

All IIOs that do not hold a separate conveyance licence should already be calculating water withheld for fixed network losses on the basis of an irrigator's irrigation rights and not their seasonal allocation.

Security

The amendment

Rule 10 has been amended to provide a mechanism for IIOs that provide delivery on a flow rate or other basis to determine whether they can request security from partially transforming irrigators.

IIOs typically define the water delivery rights of their members on a volumetric basis – as a volume of water that a person is entitled to have delivered over a course of an irrigation season. Under rule 10, these IIOs may request security from a transforming irrigator who wishes to maintain delivery following transformation if the irrigator:

- a) transforms their entire irrigation right; or
- b) transforms a part of their irrigation right and will hold more than a 5:1 ratio of the volume of water under their delivery right to the volume of water under their irrigation right following the transformation.⁷

An IIO that initially defines the water delivery rights of its members on a volumetric basis may in time choose to convert these rights to be defined on a flow rate or other basis (the Conversion). The amendment expands the operation of rule 10 to allow IIOs that choose this approach to continue to apply the 5:1 ratio after the Conversion to determine whether they can request security from partially transforming irrigators. In order to apply the ratio, the IIO must first nominally convert the transforming

⁷ Subrule 10(1) of the Water Market Rules 2009.

irrigator's water delivery rights back to volumetric delivery rights using the same conversion formula or mechanism as was used at the time of the Conversion, adjusted for any restructure of delivery rights that may have taken place after the Conversion.⁸

There may also be IIOs that have never defined irrigators' water delivery rights on a volumetric basis and instead first issued the rights to all members as a specified number of units being equal to the number of units to which the person is entitled under their irrigation right (or to a number of units reasonably representing the person's irrigation right immediately prior to the issue as agreed in writing). The amendment expands the operation of rule 10 to allow such IIOs to apply the 5:1 ratio to the units of water delivery rights and irrigation rights to determine whether they can request security from partially transforming irrigators (providing water delivery rights have not been restructured after they were first issued other than as a result of the irrigator's dealings).⁹

How does this affect IIOs?

IIOs that define the water delivery rights of their members on a volumetric basis are not required to take any additional steps to comply with the amended rules and should continue to apply the same threshold criteria to determine if they can request security from transforming irrigators.

If an IIO converts the volumetric-based water delivery rights of all its members to water delivery rights defined on a flow rate or other basis, the IIO should keep a record of that conversion, including the formula or mechanism used by the IIO. The IIO should also keep a record of any structural adjustments to each person's water delivery rights made by the IIO after the conversion. This will enable the IIO to apply the amended rule to determine if it can request security from transforming irrigators.

⁸ Subrule 10(1A) of the Water Market Rules 2009.

⁹ Subrules 10(1B) and 10(1C) of the Water Market Rules 2009.