



Australian
Competition &
Consumer
Commission

ACCC enforcement guide water market and water charge rules

April 2011

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

First published by the ACCC 2009, updated April 2011.

10 9 8 7 6 5 4 3 2 1

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ISBN information as required

ACCC 03/2011 42161

www.accc.gov.au

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1. Introduction

The Enforcement guide—water market and water charge rules publication has been produced to assist water market participants to understand the ACCC’s approach to enforcing the Water Act 2007 (Water Act) and the following rules made under the Water Act:

- Water Charge (Termination Fees) Rules 2009 (WCTFR)
- Water Market Rules 2009 (WMR)
- Water Charge (Infrastructure) Rules 2010 (WCIR)
- Water Charge (Planning and Management Information) Act 2010 (WCPMIR, collectively, the Rules).

The guide explains the ACCC’s role, how it will respond to possible contraventions of the Rules and the Competition and Consumer Act 2010 (CCA) and the enforcement options available.

The guide does not constitute legal advice. Rather, the ACCC has made the guide available to inform water market participants of the options available to the ACCC in the event of a possible contravention. If a water market participant seeks to understand how the Rules and the Water Act affect it directly,

the ACCC recommends it obtains independent legal advice.

This guide should be read in conjunction with the Water Act, the Rules and the ACCC’s [Compliance and enforcement policy](#), which outlines the ACCC’s approach to compliance and enforcement of the CCA. The ACCC will publish information and provide guidance to assist water market participants subject to the Rules to achieve compliance. Where the ACCC takes enforcement action its approach and choice of response will depend on a range of factors, including the magnitude and deliberateness of actions leading to non-compliance and the seriousness of the consequences of those actions. These factors are discussed below.

2. Role of the ACCC

The ACCC is an independent Commonwealth statutory authority promoting competition and fair trade in the market place to benefit consumers, businesses and the community. It has authority to administer the CCA and has regulatory oversight for a number of industries. Under the Water Act, the ACCC is responsible for monitoring and enforcing the Rules.

The ACCC does not act on behalf of particular interests, and does not provide professional, legal or commercial advice, or mediation or conciliation services. Its role is to ensure compliance with the laws it administers. The ACCC cannot give advice on compliance; rather, it offers guidance. The ACCC does not enforce the terms and

conditions of contracts between private parties (e.g. supply contracts between irrigation infrastructure operators and irrigators).

2.1. Competition and Consumer Act 2010

In addition to its regulatory and enforcement functions under the Water Act, the ACCC administers and enforces compliance with the CCA.

The CCA prohibits a range of conduct. Section 18 of the Australian Consumer Law (in Schedule 2 of the CCA) prohibits corporations from engaging in misleading or deceptive conduct, or conduct that is likely to mislead or deceive and may be relevant to stakeholders in the water context. Misleading or deceptive conduct includes the making of misleading or deceptive statements or representations. Other provisions of the Australian Consumer Law within the CCA may also be relevant; including prohibitions on unconscionable conduct and the making of false or misleading representations about goods and services.

Conduct prohibited under the Rules may also contravene the CCA. Because the CCA prohibitions are broader than the Rules, it is also possible that conduct that does not contravene the Rules may nonetheless contravene the CCA. The CCA provides the ACCC with a range of remedies for contravention of its provisions.

Information on the ACCC's approach to compliance and enforcement of the Australian Consumer Law and the CCA more generally is available in the ACCC's [Compliance and enforcement policy](#).

3. ACCC functions under the Water Act

Under the Water Act, the ACCC is required to monitor and enforce compliance with the Rules.

The Rules are statutory instruments made by the relevant Minister (currently the Minister for Sustainability, Environment, Water, Population and Communities). The Rules generally apply to infrastructure operators (except for the WCPMIR). The WMR and WCTFR apply to irrigation infrastructure operators and govern the operation of aspects of the water market in the Murray–Darling Basin and the relationship between irrigation infrastructure operators and irrigators. The WCIR apply to infrastructure operators.¹

Guides explaining the Rules can be viewed on the [ACCC website](#).

¹ Where there is a reference in this document to an infrastructure operator, it includes reference to an irrigation infrastructure operator where the context requires.

4. Water charging, market and trading objectives and principles

The ACCC monitors and enforces the Rules having regard to the water charging and water market and trading objectives and principles of the Water Act. These two sets of objectives and principles include, among other things:

- ❖ facilitating the efficient functioning of water markets
- ❖ ensuring sufficient revenue streams to allow efficient delivery of required services
- ❖ giving effect to the principles of user-pays and achieving pricing transparency in respect of water storage and delivery in irrigation systems and cost recovery for water planning and management activities
- ❖ providing appropriate protection of third-party interests
- ❖ enabling the appropriate mix of water products to develop
- ❖ promoting the economically efficient and sustainable use of water resources, water infrastructure assets and government resources devoted to managing water resources

The Rules create obligations for infrastructure operators and other specified persons. The obligations are designed to help achieve the water charging and water market and trading objectives and principles for example by removing unreasonable restrictions on trade in an important natural resource asset. The Rules limit the extent to which irrigation infrastructure operators can take advantage of a natural monopoly to manipulate the market for tradeable water rights.

5. Compliance monitoring and information gathering

Under the Water Act, the ACCC is required to monitor regulated water charges and compliance with the Rules and to provide monitoring reports to the Minister. The purpose of monitoring is to assess compliance with the Rules.

The ACCC intends that its performance of its monitoring function is thorough and comprehensive, but not unduly intrusive. Its approach relies on observations of behaviour and activities in the market, information received from complainants and information reported to it under the Rules. The ACCC also collects information from infrastructure operators to help monitor compliance with the Rules.

The ACCC's approach to obtaining, using and disclosing of information from stakeholders is outlined in the guide – [ACCC-AER information policy: the collection, use and disclosure of information](#).

To perform its functions under the Water Act, the ACCC will, from time to time, need to obtain information or documents from irrigators, infrastructure operators, third

parties and other interested groups. The ACCC will generally request information voluntarily in the first instance.

If a request for information or documents is refused or is not fully complied with, the ACCC has the option of issuing a statutory notice to compel a party to provide information, documents or evidence as required.

Compliance with a statutory notice is compulsory and failure to comply or knowingly giving false or misleading information in response to a notice are criminal offences.

The ACCC's guide – [Section 155 of the Competition and Consumer Act](#) – provides detailed information about the ACCC's statutory power to obtain information, documents and evidence.

6. Compliance and enforcement

6.1. Education, advice and persuasion

As noted, the ACCC will work with infrastructure operators to achieve compliance with the Rules. Preventing contraventions of the Rules is preferable to taking enforcement action after a contravention has occurred; therefore, the ACCC's initial approach to achieving compliance with the Rules is to work cooperatively with stakeholders.

This cooperative approach to compliance includes making available targeted and general information publications and liaison with infrastructure operators, irrigators, government agencies and other stakeholders about the Rules.

The ACCC will continue to provide assistance to infrastructure operators and irrigators to better understand the Rules; however at this time, the ACCC expects that implementation of the WMR and WCTFR by infrastructure operators is complete, having regard to the period of time these rules have now been in force.

6.2. ACCC approach to enforcement

Where the ACCC is investigating and considers that there has been a contravention of the rules and the cooperative compliance approach is unsuccessful, the Water Act provides the ACCC with a range of remedies.

In deciding which compliance or enforcement tool (or the combination of such tools) to use, the ACCC's first priority is always to achieve the best possible outcome for the community. Decisions are made on a case-by-case basis, taking a range of factors and circumstances into consideration.

When determining the appropriate enforcement response, the ACCC will consider factors including, but not limited to:

- ❖ relevant objectives and principles of the Water Act and the Rules
- ❖ whether the conduct has caused, or is likely to cause, detriment to another party
- ❖ the infrastructure operator's compliance culture and/or policy
- ❖ the deliberateness of the contravention and the period over which it extended
- ❖ the nature and extent of the contravening conduct
- ❖ whether the ACCC's response is likely to have a worthwhile educational or deterrent effect
- ❖ whether the infrastructure operator has a history of contraventions and non compliance with the Rules
- ❖ whether the conduct demonstrates blatant disregard for the law
- ❖ whether the conduct is likely to become widespread if the ACCC does not intervene
- ❖ whether the conduct is of significant public interest or concern
- ❖ the infrastructure operator's willingness to cooperate with the ACCC
- ❖ the amount of loss or damage caused
- ❖ whether the infrastructure operator has sought to remedy the contravention prior to ACCC involvement

The ACCC expects that infrastructure operators will understand their obligations under the Rules and that they will, where necessary, seek independent legal advice. Ignorance of the Rules is not a mitigating factor in the ACCC's evaluation of its enforcement response.

7. Enforcement options

The enforcement responses available to the ACCC fall into two categories: administrative resolution and statutory enforcement action.

7.1. Administrative resolution

An administrative resolution provides a relatively informal way to resolve a possible contravention of the Rules. Depending on the circumstances, administrative resolutions can range from a commitment made by an infrastructure operator in correspondence to a signed agreement with the ACCC setting out the detailed terms and conditions of a resolution.

An administrative resolution could involve the ACCC:

- ❖ warning infrastructure operators that particular conduct may be non-compliant
- ❖ warning infrastructure operators that the ACCC is concerned with the actions they are taking

- ❖ notifying infrastructure operators that they have committed a possible contravention that needs to be remedied
- ❖ reaching agreement with the infrastructure operator that it will remedy a contravention and notify the ACCC once it has been remedied
- ❖ educating non-compliant infrastructure operators on their compliance obligations
- ❖ reminding infrastructure operators of their obligations under the Rules

Administrative resolutions provide the ACCC with the flexibility to select a response that is proportionate and tailored to the circumstances of the potential contravention.

7.2. Statutory enforcement

The Water Act contains a number of statutory remedies in response to possible contraventions of the Rules. These include stronger administrative action and court proceedings. The available statutory responses are:

- Enforceable undertakings
- Infringement notices
- Litigation including—
 - Injunctions
 - Declarations
 - Civil penalty orders.

Enforceable undertakings

The ACCC may resolve potential contraventions of the Rules by accepting court-enforceable undertakings under s. 163 of the Water Act. These undertakings will generally consist of an agreement in writing between a person (e.g. the infrastructure operator) and the ACCC that they will:

- take specified action to comply with the Rules
- refrain from specified action to comply with the Rules
- take specified action to ensure that it does not, or is unlikely to, commit a contravention in the future.

The ACCC will not accept a court-enforceable undertaking that denies liability for the contravention of the Rules.

An enforceable undertaking must be given voluntarily. The ACCC cannot compel person to give an enforceable undertaking.

The ACCC maintains public registers of various notices and undertakings issued or accepted by the ACCC. Enforceable undertakings accepted by the ACCC under s.163 of the Water Act are included on a specific undertakings register, which is available on the [ACCC website](#).

In the event that a person who has given an enforceable undertaking fails to comply with its terms, the ACCC may apply to court for any of the following orders:

- that the person comply with the enforceable undertakings
- that the person pay an amount to the ACCC up to the amount of any financial benefit they have obtained that is attributable to the contravention of the enforceable undertaking
- any order that the court considers appropriate directing the person to compensate any person that has suffered loss as a result of the contravention
- any other orders the court considers appropriate.

Infringement notices

The ACCC may resolve contraventions of the civil penalty provisions of the Rules by issuing an infringement notice under s. 156 of the Water Act. Such a notice requires a penalty to be paid within 28 days of the notice being given.

Payment of a penalty under an infringement notice:

- prevents the ACCC from subsequently issuing proceedings in relation to the particular alleged contravention
- does not involve an admission by of liability for the alleged contravention by the person to whom the notice is given.

However, the payment of an infringement notice for an alleged contravention does not prevent the ACCC from instituting legal proceedings if the conduct recurs after payment of the penalty.

Failure to comply with an infringement notice is likely to result in litigation.

As noted above, the ACCC maintains public registers recording notices and undertakings issued or accepted by the ACCC. A specific infringement notice register for those notices issued under s.156 of the Water Act is also [available online](#).

Litigation

The ACCC will take legal action for a contravention of the Rules when, having regard to all the circumstances, the ACCC considers litigation is the best way to deliver an effective outcome.

The ACCC is more likely to proceed to litigation when the conduct is particularly harmful, if there is reason to be concerned about the future behaviour of the infrastructure operator or when the infrastructure operator is unwilling to provide an alternative satisfactory resolution. In determining whether to institute legal proceedings, the ACCC will consider the factors listed above at section 6.2 ACCC's approach to enforcement.

Under the Water Act, the Federal Court may:

- ❖ impose penalties for contraventions of the civil penalty provisions of the Rules
- ❖ make findings of fact that show contraventions of the Rules so that damages may be recovered by irrigators affected by the conduct, where applicable
- ❖ make declarations that an infrastructure operator or an individual has contravened the Water Act or the Rules
- ❖ injunct or restrain a person from current or future conduct or require respondents to take certain action
- ❖ make various non-punitive orders, including orders for implementing a specified program for compliance with the Water Act, the regulations and the Rules
- ❖ make injunctions requiring respondents to publish notices about their conduct and to disclose relevant information to others (e.g. to their customers)

In addition to bringing proceedings against an infrastructure operator, the ACCC may also commence court proceedings against individuals who may have been directly or indirectly involved in the contraventions and against the executive officers of a body corporate involved in a contravention of the Rules.

8. Private legal proceedings

Under some of the Rules, individuals who suffer loss or damage because of conduct by another person that contravenes the Rules may commence court proceedings to recover the amount of that loss or damage. Private legal proceedings do not involve the ACCC and are not subsidised by the ACCC.

The ACCC may seek to intervene in private legal proceedings brought under the Rules or other laws where it considers it is in the public interest to do so.

9. Relevant publications

The following relevant publications are available on the ACCC website:

9.1. Rules

[Water Market Rules 2009](#)

[Water Charge \(Termination Fees\) Rules 2009](#)

[Water Charge \(Infrastructure\) Rules 2010](#)

[Water Charge \(Planning and Management Information\) Rules 2010](#)

9.2. Guidance for the Rules

Operator guides:

- [A guide to the water market rules and water delivery contracts](#)
- [A guide to the water charge \(termination fees\) rules](#)
- [A guide to water charge \(infrastructure\) rules: publishing and non-discriminatory charging requirements](#)
- [A guide to water charge \(infrastructure\) rules: distributions triggered approvals or determinations \(the Part 7 rules\)](#)
- [A guide to water charge \(infrastructure\) rules: Tier 2 requirements](#)
- [A guide to water charge \(infrastructure\) rules: price determinations and approvals \(Tier 3\)](#)
- [A guide to the water charge \(planning and management information\) rules](#)

Irrigator guides:

- [Permanently selling your water and terminating your delivery right—a guide for irrigators about the water market rules and rules on termination fees](#)
- [Transforming your irrigation right and maintaining water delivery—a guide for irrigators about the water market rules](#)

9.3. General guidance

[ACCC Compliance and enforcement policy](#)

[ACCC-AER information policy: the collection, use and disclosure of information](#)

[ACCC guide: Section 155 of the Competition and Consumer Act](#)

Contacts

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Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service, www.relayservice.com.au

For other business information, go to www.business.gov.au

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