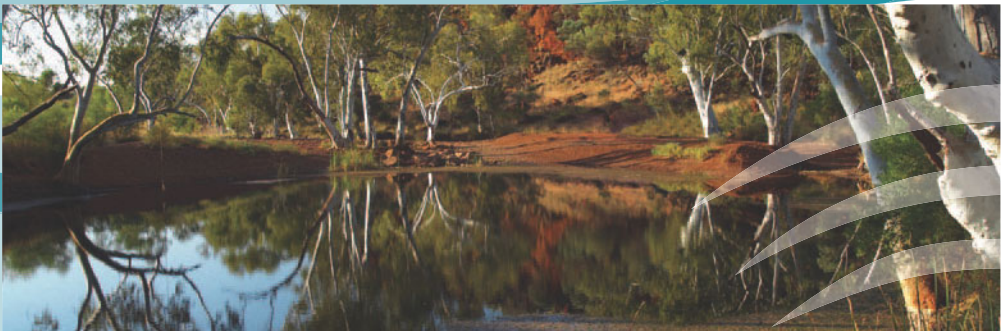




Australian
Competition &
Consumer
Commission

ACCC water monitoring

2009–10 update to the Minister for
Sustainability, Environment, Water, Population
and Communities



SEPTEMBER 2010

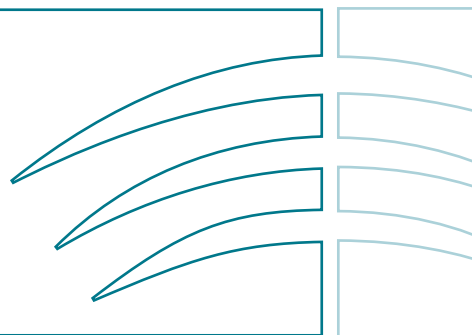


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Australian Competition and Consumer Commission
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Summary

This document is the first water monitoring update by the Australian Competition and Consumer Commission (ACCC) to the Minister for Sustainability, Environment, Water, Population and Communities (the minister). The update outlines the development of the water market rules and water charge rules under the *Water Act 2007* (the Water Act) and presents an early snapshot of how the requirements of the water market rules and water charge rules made to date have been implemented by industry.

The commencement of the *Water Charge (Termination Fees) Rules 2009* (WCTFR) and the *Water Market Rules 2009* (WMR) in June 2009 has generated many changes to the practices and processes of irrigation infrastructure operators (IIOs). These changes are designed to facilitate the efficient functioning of water markets and promote the economically efficient use of water resources and water infrastructure assets.

The ACCC has been actively involved in facilitating the implementation of the WMR and WCTFR, and continues to engage with stakeholders to disseminate an understanding of these rules.

Based on the ACCC's contacts with stakeholders and the ongoing monitoring of compliance with the WMR and WCTFR, this update highlights that IIOs, in general, have adjusted their practices and policies to reflect these rules. The majority of IIOs monitored by the ACCC have reduced the multiple used in their calculation of termination fees in response to the requirements of the WCTFR. Most have also established internal procedures and processes for transformation to minimise barriers to trade.

However, the ACCC has conducted investigations in relation to certain aspects of the WMR and WCTFR. The ACCC has responded to concerns identified through its compliance and monitoring activities that the conduct of a number of IIOs may have been in breach of the WMR and WCTFR. The ACCC has also recently achieved two enforcement outcomes in relation to the WCTFR, accepting court enforceable undertakings from Murray Irrigation Limited, and issuing three infringement notices to, and accepting a court enforceable undertaking from, Murrumbidgee Irrigation.

The majority of complaints and inquiries received by the ACCC since the commencement of the WMR and WCTFR have been about uncertainty around the application of these rules to private irrigation districts, private water trusts and the coverage of the Water Act to joint water supply schemes in New South Wales (NSW). The application and coverage issues, in combination with the 4 per cent limit on the permanent trade of water out of irrigation areas in Victoria, have limited the efficacy of the WMR and WCTFR in facilitating an efficient water market.

The ACCC is in the process of further developing its monitoring framework. More data will be collected on regulated water charges, transformation and compliance with the water market rules and water charge rules. This information will inform the 2009–10 annual monitoring report and future water monitoring updates.

Introduction

The ACCC is required under the Water Act to monitor:

- regulated water charges¹
- transformation arrangements²
- compliance with the water market rules³ and water charge rules.⁴

The ACCC is also required to provide results of its monitoring to the minister in accordance with the agreement between the minister and the ACCC.

The agreement between the minister⁵ and the ACCC states that the ACCC will undertake to:

- provide monitoring **reports** to the minister for public release at least once a year, with the first report to be provided no later than March 2011
- publish the monitoring reports no sooner than three weeks after they are provided to the minister
- provide monitoring **updates** to the minister during 2009–10 and 2010–11 as required.

This document is the first ACCC monitoring **update** to the minister. It focuses on:

- the ACCC's development of the water market and water charge rules (chapter 1)
- the ACCC's educational activities, outlining steps taken by the ACCC to create awareness of and facilitate implementation of, and compliance with, the WMR and WCTFR (chapter 2)
- the establishment of the ACCC's monitoring framework (chapter 3)
- observations from the ACCC's compliance and monitoring activities (chapter 4).

Subsequent monitoring **reports**, the first of which will be provided by March 2011, will provide more data and observations as the ACCC's monitoring regime is comprehensively implemented and other sets of water charge rules are made.⁶

1 Section 94(1)(a) of the Water Act.

2 Section 99(1)(a) of the Water Act.

3 Section 99(1)(b) of the Water Act.

4 Section 94(1)(b) of the Water Act.

5 At the time of the agreement, the Minister for Climate Change and Water.

6 The water charge (planning and management information) rules have been recently made by the Minister and commenced on 24 July 2010. The water charge (infrastructure) rules are yet to be made by the minister. See chapter 1 of this report for further detail.

1. Development of the water market and water charge rules

The Water Act created new institutional and governance arrangements to address the sustainability and management of water resources in the Murray–Darling Basin (MDB).

The Water Act gives the minister the role of making water charge rules and water market rules. These rules are intended to facilitate the efficient functioning of water markets and to increase the efficiency and sustainable use of water resources and the infrastructure used to provide water resources. The ACCC's role under the Water Act is to advise the minister on the making of the water charge rules and water market rules, and to monitor and enforce compliance with the rules.

The ACCC has provided the minister with advice on:

- water market rules—final advice provided in December 2008
- water charge rules for termination fees—final advice provided in December 2008
- water charge rules for infrastructure operators—final advices provided in June 2009 and February 2010
- water charge rules for water planning and management charges—final advice provided in July 2009.

To date the minister has made:

- the *Water Market Rules 2009*, which took full effect on 1 January 2010
- the *Water Charge (Termination Fees) Rules 2009*, which took full effect on 1 September 2009
- the *Water Charge (Planning and Management Information) Rules 2010*, which commenced on 23 July 2010 and have a transitional period that ends on 30 June 2011

and is considering the water charge (infrastructure) rules.⁷

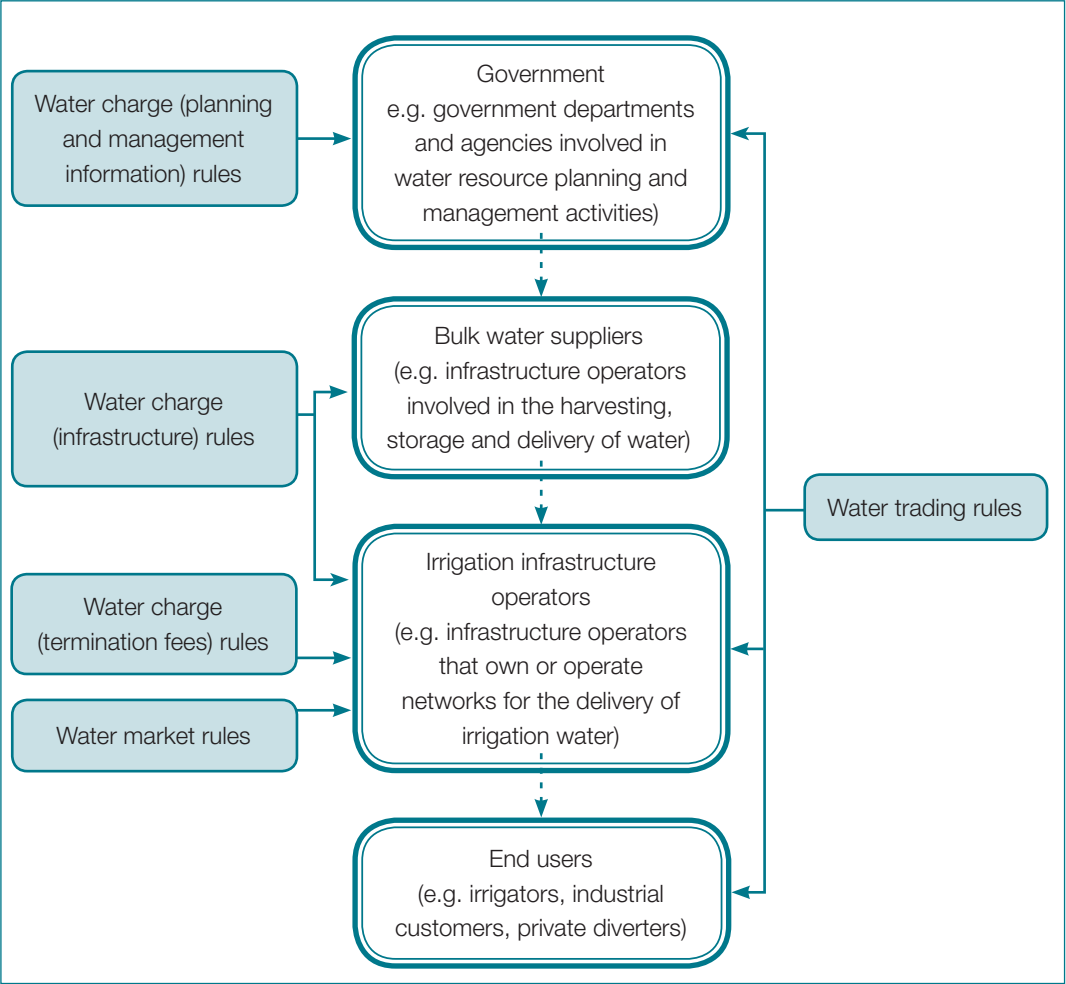
Under the Water Act, the ACCC is also required to provide advice to the Murray–Darling Basin Authority (MDBA) on water trading rules. The water trading rules will form a component of the Basin Plan and will be enforced by the MDBA. The ACCC provided its advice to the MDBA in March 2010. The MDBA will consider the ACCC's advice on trading rules in formulating the Basin Plan.⁸

The various sets of water charge rules regulate the pricing conduct of government departments and infrastructure operators within the rural water supply sector in the MDB. The water market rules regulate the administrative processes of IIOs to reduce barriers to trade. The following chart identifies the parties in the rural water industry supply chain that are required to comply with the various water charge rules and water market rules.

⁷ The minister released a public notice on 14 July 2010 announcing her intention to make water infrastructure charge rules and sought public submissions. This is because the rules the minister proposes to make are not substantially the same as the draft rules provided in relation to the ACCC's advice.

⁸ For more information on the Basin Plan, go to the MDBA website at www.mdba.gov.au and is considering the water charge (infrastructure) rules.

Chart 1: The water market rules and water charge rules and the rural water industry supply chain



Below is a brief overview of the various rules.

Water market rules

The *Water Market Rules 2009* (WMR) address the policies and administrative arrangements of IIOs which create barriers to water trade.

The WMR enable irrigators to ‘transform’ the part of the water access entitlement held on their behalf by an IIO into a separately held water access entitlement, which is an independent statutory right. Once irrigators directly hold a water access entitlement, IIOs cannot restrict trade.

Water charge (termination fees) rules

The *Water Charge (Termination Fees) Rules 2009* (WCTFR) deal with the charges imposed by IIOs on irrigators wanting to terminate their access to the irrigation network. These charges, referred to as termination fees, provide a contribution from exiting irrigators for the unavoidable ongoing costs of maintaining irrigation infrastructure.

The WCTFR aim to promote the economically efficient use of water infrastructure and facilitate the efficient functioning of the water market by setting a cap on termination fees.

Water charge (infrastructure) rules

The proposed water charge (infrastructure) rules relate to charges imposed by infrastructure operators for the provision of storage, delivery and drainage services.

The objective of these rules is to encourage the economically efficient and sustainable use of water infrastructure assets and ensure sufficient revenue streams for infrastructure operators while avoiding monopoly rents.

The rules involve a three-tiered approach to regulation, ranging from transparency requirements to direct regulatory control of charges:

- Tier 1 rules require all infrastructure operators in the MDB to publish water charges and include a non-discriminatory pricing requirement for member owned infrastructure operators.
- Tier 2 rules require infrastructure operators to develop network service plans outlining the processes for determining charges, including approaches to asset management, every five years. Tier 2 infrastructure operators include larger member owned infrastructure operators and medium-sized non-member owned infrastructure operators not captured under tier 3:
 - Murray Irrigation Limited
 - Murrumbidgee Irrigation Limited
 - Coleambally Irrigation Cooperative Limited
 - SunWater
 - Central Irrigation Trust.
- Tier 3 rules address the potential misuse of market power by larger non-member owned infrastructure operators: Goulburn-Murray Water, Lower Murray Water and State Water. These operators are required to have their regulated water charges approved or determined by an independent economic regulator.

Water charge (planning and management information) rules

The *Water Charge (Planning and Management Information) Rules 2010* deal with charges for water planning and water management activities. These activities refer to a broad range of functions undertaken by government departments and agencies aimed at supporting sustainable water use. In practice, these activities include the administration of water entitlements, the development of water resource plans and other activities to address the impacts of water use.

The water charge (planning and management information) rules focus on improving pricing transparency by requiring government agencies to publish information on water planning and management charges in a consistent format.

Water trading rules

The proposed water trading rules aim to facilitate the operation of efficient water markets and increase opportunities for trading.

The water trading rules may deal with issues including the following:

- the terms on, and processes by, which water can be traded
- the imposition or removal of restrictions on and barriers to water trade
- the availability of information, and the reporting of information, to enable water trading.

Consultation during the development of water market, water charge and water trading rules

The ACCC consulted extensively in developing its advice on water market, water charge and water trading rules. Prior to providing its advice on each set of rules, the ACCC released for consultation:⁹

- an issues paper
- a position paper
- draft advice and draft rules.¹⁰

In total, the ACCC received 357 submissions from stakeholders as part of its various consultation processes.

The ACCC's staff also conducted in excess of 122 meetings with interested parties to discuss their perspective and/or submission. In addition, the ACCC organised seven public forums to present issues and hear the views of stakeholders.

Further, the ACCC published 18 media releases relating to the development of water market, water charge and water trading rules.

⁹ All these documents are available on the ACCC's website at www.accc.gov.au/water.

¹⁰ The ACCC did not release draft water trading rules for consultation.

2. The ACCC's educational activities

The ACCC has been undertaking a range of educational activities to help irrigators to understand their rights and to assist IIOs in understanding their obligations under the WMR and WCTFR. It has also issued guidance to MDB governments and government agencies. The ACCC's educational activities include the following.

Advertising

The ACCC issued press releases and placed advertisements in local and national newspapers across the MDB when the WMR and WCTFR were made. It also sent letters to IIOs about the commencement of these rules.

Publications

The ACCC prepared several publications targeting both irrigators and IIOs.¹¹ These were released following the commencement of the WMR and WCTFR, and include the following.

Irrigator guides—published 23 June 2009

- *Transforming your irrigation right and maintaining water delivery*—this guide discusses issues related to transforming an irrigation right while maintaining delivery.
- *Permanently selling your water and terminating your delivery right*—this guide looks at general issues relating to permanently selling water and terminating delivery rights.

Operator guides—published 23 June 2009

- *A guide to the Water Market Rules 2009 and water delivery contracts*—this guide provides compliance information to operators on the WMR and information that may be useful for drafting water delivery contracts.
- *Water charge (termination fees) rules 2009: technical guide for irrigation infrastructure operators*—this guide provides technical information on the WCTFR.

Enforcement guidelines—published 28 August 2009

- *Enforcement guidelines: water market and water charge rules*—these guidelines were produced to assist operators in understanding the ACCC's approach to enforcing compliance with the rules and the options available to the ACCC in the event of a possible contravention.

The ACCC has also issued a guide to the water charge (planning and management information) rules, published on 26 July 2010.

¹¹ All these documents are available on the ACCC's website at www.accc.gov.au/water.

Stakeholder engagement

The ACCC engaged with stakeholders such as IIOs, irrigators, peak industry groups, community groups, and state and local government in various forums. It has:

- made presentations on the WMR and WCTFR at the request of stakeholders; for example, at the request of Western Murray Irrigation, ACCC staff made presentations at an information session for local professionals such as lawyers, bankers and accountants in Wentworth, NSW
- held meetings with groups of irrigators; for example, ACCC staff travelled to Koraleigh in NSW to discuss the WMR and WCTFR with irrigators of the Bungunyah-Koraleigh Irrigation Trust
- participated in forums such as the Department of the Environment, Water, Heritage and the Arts community consultations and the MDBA Basin Plan forums.

3. Monitoring framework

The Water Act requires the ACCC to monitor the following:

- regulated water charges
- transformation arrangements
- compliance with the water market and water charge rules.

The ACCC is currently establishing its monitoring framework to fulfil its obligation under the Water Act. The monitoring framework involves two main processes for information gathering, as outlined below.

Informal information gathering

The ACCC's informal information gathering is proactive and includes activities such as:

- examination of information provided by IIOs on their websites, including pricing schedules, transformation policies and other relevant announcements
- data collection and compilation from direct liaison with irrigators and IIOs (the ACCC received 267 direct contacts from stakeholders, primarily as inquiries and complaints, between 23 June 2009 and 30 June 2010)
- information obtained in the course of the ACCC assessing and investigating potential breaches of the WMR and WCTFR.

Data collected through the above informal avenues is analysed and forms the basis of the ACCC's observations discussed in chapter 4 of this update.

Formal information gathering

The ACCC is further developing its formal information gathering process. The ACCC's formal information gathering involves annual reporting of data in relation to regulated water charges, transformation arrangements and compliance with the water market and water charges rules by regulated entities (infrastructure operators and government entities). A series of information requests is expected to yield data that can be used to:

- analyse and compare regulated charges across different operators in the MDB through the use of indicators such as average charges and hypothetical irrigator bills
- analyse and report on movements in regulated charges over time
- monitor and report on the various procedures and arrangements for transformation adopted by different IIOs in the MDB
- monitor and report on transformation events across different IIOs in the MDB
- monitor and report on termination transactions across different IIOs in the MDB
- monitor and report on compliance with the water market rules and water charge rules.

Information collected through this process will form the basis of a comprehensive annual monitoring report to the minister, which will cover the 2009–10 financial year.

The various transparency and reporting requirements under the water charge (planning and management information) rules and the proposed water charge (infrastructure) rules should also provide information on:

- the capital and operating expenditure of the larger infrastructure operators in the MDB
- the proposed price paths for the larger infrastructure operators in the MDB
- the types and amounts of water planning and management charges imposed across the MDB
- the capital and operating costs of water planning activities across the MDB to which regulated charges apply.

To date, the ACCC has released the following reporting requirements for consultation:

- *Information request part 1*, which contains proposed reporting requirements for IIOs in relation to regulated water charges and compliance with the WMR and WCTFR¹²
- *Information request part 2*, which contains proposed reporting requirements for infrastructure operators that impose bulk water charges and charges of the kind referred to in s. 91(1)(d) of the Water Act and government entities that determine water planning and management charges.¹³

The final information requests parts 1 and 2 were provided to stakeholders in July 2010, with information to be provided to the ACCC by 30 September 2010.

The ACCC will develop two more requests for information:

- *Information request part 3*, which will contain reporting requirements for infrastructure operators on compliance with the water charge (infrastructure) rules once these rules are made
- *Information request part 4*, which will contain reporting requirements for government entities on compliance with the water charge (planning and management information) rules.

¹² ACCC, 2009, *ACCC Water monitoring: draft information request: part 1 (Regulated water charges; Water Charge (Termination Fees) Rules 2009; Water Market Rules 2009)*, www.accc.gov.au/water.

¹³ ACCC, 2010, *ACCC Water monitoring: draft information request: part 2 (Regulated water charges)*, www.accc.gov.au/water.

4. Observations from the ACCC’s monitoring activities

The ACCC’s monitoring activities have revealed some key themes on how the WMR and WCTFR are affecting market conduct.

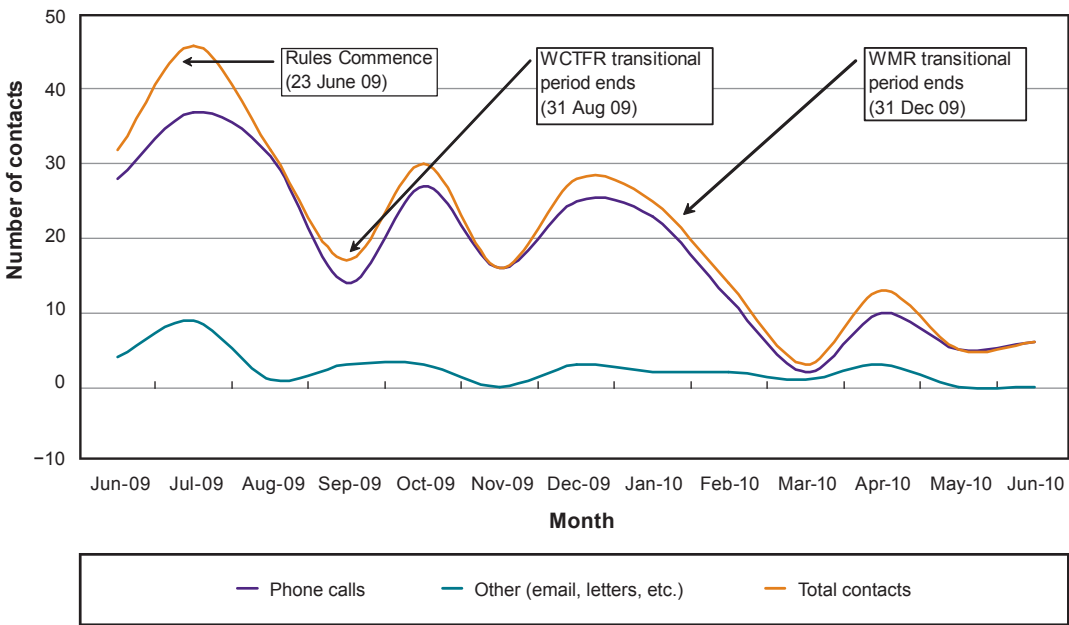
Declining number of complaints and inquiries

The ACCC receives regular contact from stakeholders, particularly irrigators and IIOs.¹⁴ This interaction peaked around the commencement of the two sets of rules and again at the end of the relevant transitional periods (see chart 2). Complaints and inquiries on the WMR and WCTFR have decreased over time.

As noted earlier, the ACCC also proactively monitors compliance with the WMR and WCTFR—for example, through examination of information provided by IIOs on their websites. A number of issues being investigated were identified through monitoring rather than complaints.

The ACCC has run educational activities for irrigators. However, given the falling number of contacts and issues identified through proactive monitoring, it is not clear how well irrigators understand their rights. The ACCC is reviewing its educational activities.

Chart 2: Contacts received by the ACCC since commencement of the WMR and WCTFR



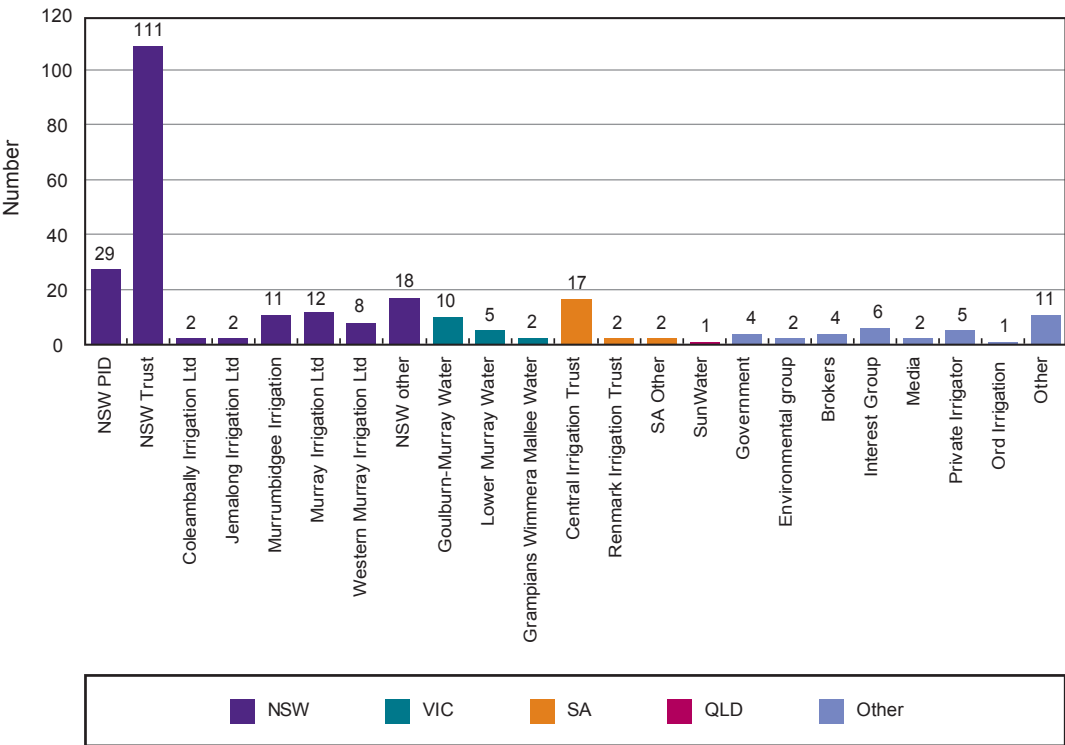
Source: ACCC’s data—ACCC informal information gathering

¹⁴ Contact information in this section is limited to the period from 23 June 2009 (date the WMR and WCTFR commenced) to 30 June 2010.

Concentration of complaints and inquiries

Out of the 267 contacts received by the ACCC (from 117 parties), approximately 74 per cent were from NSW stakeholders and were predominantly about compliance with the WMR by NSW private irrigation districts and private water trusts (see chart 3).

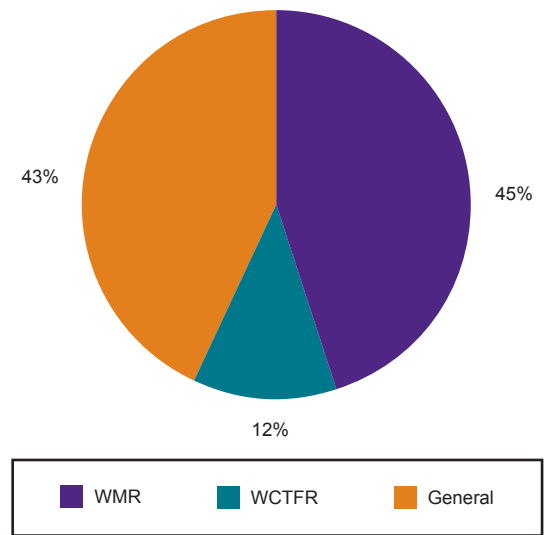
Chart 3: Inquiries received categorised by state



Source: ACCC data—ACCC informal information gathering

Complaints and inquiries about the WMR made up around 45 per cent of total complaints and inquiries received by the ACCC (see chart 4). The majority of these complaints and inquiries have been about the uncertainty around the application of the WMR to NSW private irrigation districts and private water trusts and coverage of the Water Act to NSW entities with co-held licences such as joint water supply schemes.

Chart 4: Inquiries received categorised by rule type



Source: ACCC data—ACCC informal information gathering

Unlike the WMR, complaints and inquiries about the WCTFR only comprised 12 per cent of contacts (see chart 4). However, the ACCC has concerns that the conduct of a number of IIOs may be in breach of the WCTFR. These concerns were identified through the ACCC’s compliance and monitoring activities.

Compliance with the WMR and WCTFR

As noted above, the ACCC released guidelines on its approach to the enforcement of the WMR and WCTFR in August 2009.¹⁵ Those guidelines set out that, where appropriate, the ACCC will initially use a cooperative and educational approach to achieve compliance. The guidelines also noted, however, that the ACCC’s approach to enforcement of the rules will depend on a range of factors, including the magnitude and deliberateness of the possible contravention and the seriousness of the consequences of the possible contravention. The ACCC has a range of enforcement options, ranging from less formal administrative resolutions to enforceable undertakings, infringement notices and litigation.

Investigations

The ACCC is currently investigating the conduct of two IIOs for possible breaches of rule 5(1) of the WCTFR. The conduct subject to investigation generally relates to processes for termination and circumstances in which a termination fee may be imposed. Despite a large proportion of contacts to the ACCC being about the WMR, the ACCC has only identified one compliance issue concerning the conduct of IIOs under the WMR.

In addition to current investigations, the ACCC also conducted five investigations that were closed since the commencement of the WMR and WCTFR. Two of these investigations were resolved following the receipt of further information from operators in response to ACCC concerns and a further two of these investigations resulted in the ACCC taking enforcement action. The details of these enforcement actions are discussed further below. The fifth investigation related to the coverage of private irrigation trusts under the rules, which is also discussed further below.

¹⁵ ACCC, 2009, *Enforcement guidelines: water market and water charge rules*.

Enforcement actions

The ACCC has recently achieved enforcement outcomes in two investigations concerning termination fees.

Murray Irrigation Limited—termination fees

The ACCC's first enforcement action was accepting court enforceable undertakings from Murray Irrigation Limited (MIL) for multiple breaches of the WCTFR.¹⁶

MIL, an IIO that owns and operates water service infrastructure servicing over 2400 farms in southern NSW, admitted to breaching the WCTFR on multiple occasions by charging more than the permissible fees under the WCTFR.

Around September 2009, MIL offered a 10 per cent discount to customers who paid their quarterly tax invoice on time and offered the discount again when issuing a second quarterly invoice in or about December 2009. Between 1 September 2009 and 1 January 2010, MIL imposed a termination fee on 64 terminating customers who qualified for the discount.

Additionally, MIL has for some time imposed a \$220 fee for the surrender of delivery entitlements. Since 1 September 2009, MIL imposed the fee for the surrender of delivery entitlements on 112 occasions.

MIL breached the WCTFR when it failed to have regard to a discount it offered to customers in calculating the appropriate termination fee and when it imposed an additional \$220 fee for the surrender of delivery entitlements.

The undertaking given by MIL provides, among other things, that MIL will refrain, for a period of three years, from imposing termination fees that have not been appropriately calculated, having regard to any discounts or concessions for which terminating customers have qualified. MIL has also ceased imposing the fee for the surrender of delivery entitlements.

MIL has issued refunds of over \$115 000 to affected customers and proposes to issue further refunds for the \$220 fee for the surrender of delivery entitlements.

Murrumbidgee Irrigation—termination fees

The ACCC's second enforcement action was taken against Murrumbidgee Irrigation Limited (MI) for multiple breaches of the WCTFR.

The ACCC's investigation was finalised by the payment of three infringement notices totalling \$66 000 by MI and acceptance by the ACCC of a court enforceable undertaking given by MI. As a result of the investigation, MI voluntarily refunded approximately \$640 000, including interest, to the affected irrigators.

MI, an IIO that owns and operates water service infrastructure servicing approximately 3200 farms in the Riverina area of NSW, admitted to breaching the WCTFR by charging more than the maximum permissible termination fees on 27 occasions and by charging termination fees in the absence of written notice of termination or surrender on 12 occasions. The breaches occurred between 1 September 2009 and 31 March 2010.

MI's irrigators are classified into nine different pricing groups. Its fixed access charges for 2009–10 varied within each pricing group according to the number and type of delivery entitlements held, as well as the number of farm and outlet connections serviced. However, MI imposed the same termination fee

¹⁶ A copy of the undertaking is available on the public register page of the ACCC's website at www.accc.gov.au/content/index.phtml/itemId/3673.

on irrigators within the same pricing group for each delivery entitlement held, without having regard to the pricing tier or type of delivery being terminated for the individual irrigator.

The undertaking given by MI provides, among other things, that MI will refrain, for a period of three years, from imposing termination fees above the maximum permissible amount or if written notice of termination has not been given. The undertaking also provides that MI will develop and implement, for a period of three years, a detailed compliance program.

Coverage and application of the WMR and WCTFR

There remain a number of issues that limit the efficacy of the WMR and WCTFR in facilitating an efficient water market.

The ACCC understands that joint water supply schemes, private irrigation districts and private water trusts together comprise around a quarter of NSW's irrigation water in regulated MDB rivers. However, there is uncertainty about the ability of these infrastructure operators to implement the WMR.

The NSW *Water Management Act 2000* (WMA) may not provide private irrigation districts and private water trusts with the necessary powers to be able to implement all aspects of the WMR. The ACCC understands that the NSW Office of Water is working to resolve this matter through amendments to the WMA. The ACCC has also written to private irrigation districts, private water trusts and irrigators who contacted the ACCC on this issue, informing them of recent discussions with the Office of Water and advising them that the ACCC is not intending to enforce the WMR and WCTFR with regard to the conduct of private irrigation districts and private water trusts until this issue has been resolved.

Furthermore, it is unclear whether a joint water supply scheme is an IIO for the purposes of the Water Act because a joint water supply scheme may or may not operate water infrastructure for the purpose of delivering water to non-members of that joint water supply scheme. This may limit the application of the WMR and WCTFR. In addition, joint water supply schemes are unlikely to be able to give effect to transformation because members of the joint water supply scheme are unlikely to hold irrigation rights under the co-held licence of the joint water supply scheme. This may limit the application of the WMR.

The achievement of an efficient water market has also been limited by the application of the 4 per cent limit on the permanent trade of water out of irrigation areas. The limit is currently in place in Victoria (where the WMR are not relevant).

Table 1 shows irrigation areas in Victoria where the 4 per cent trade-out limit had been reached as at 30 June 2010. Under the Victorian legislation, no further trade-out would occur in five of the 17 irrigation areas identified (subject to certain exemptions).

Table 1: Irrigation areas in Victoria—4 per cent trade-out limit

Irrigation area	Reliability class	4% trade-out limit reached
Campaspe Irrigation District	High	Yes
Campaspe Irrigation District	Low	No
Central Goulburn Irrigation Area	High	Yes
Central Goulburn Irrigation Area	Low	No
Murray Valley Irrigation Area	High	No
Murray Valley Irrigation Area	Low	Yes
Nyah, Tresco and Woorinen	High	No
Nyah, Tresco and Woorinen	Low	No
Pyramid-Boort	High	Yes
Pyramid-Boort	Low	No
Robinvale, Red Cliffs, Merbein, FMID	High	No
Rochester Irrigation Area	High	No
Rochester Irrigation Area	Low	No
Shepparton Irrigation Area	High	Yes
Shepparton Irrigation Area	Low	No
Torrumbarry Irrigation Area	High	No
Torrumbarry Irrigation Area	Low	No

Source: Victorian Water Registrar as at 30 June 2010¹⁷

The ACCC also understands that the NSW government is considering a new implementation of the 4 per cent limit.

The ACCC is of the view that the 4 per cent limit has a number of negative effects which are clearly counterproductive to the objectives underlying the WMR and WCTFR. These effects include:

- preventing water moving to its highest value use
- artificially segmenting the water market
- giving rise to efficiency losses, especially long-term dynamic efficiency losses, and preventing the efficient operation of water markets
- preventing irrigators experiencing financial distress from realising the full value of their water access rights and restricting purchases of water for the environment.

¹⁷ Data on the 4 per cent trade-out limit at the end of 2009–10 is available at <http://www.waterregister.vic.gov.au/Public/Documents/TradeoutLimit2007-2010.pdf> (accessed on 18 August 2010).

The level of termination fees

The practices of most monitored IIOs in imposing and calculating termination fees after the introduction of the WCTFR are substantially different from those that were in place before the WCTFR came into full effect.

Before the WCTFR came into effect, IIOs who imposed termination fees used one of the three following methods:

- a simple multiple of access fees
- a complex multiple of access fees (most commonly diverting from a simple multiple either by using a shadow access fee or tax adjustments)
- the net present value of a number of years of access fees.

The most common method among the monitored IIOs was a multiple of access fees, the commonly used multiple being 15.¹⁸

After the introduction of the WCTFR, data collected through the ACCC's informal information gathering show that most monitored IIOs have aligned their processes with the requirements of the WCTFR, reducing the multiple used in their calculation of termination fees to a 10 times multiple.¹⁹

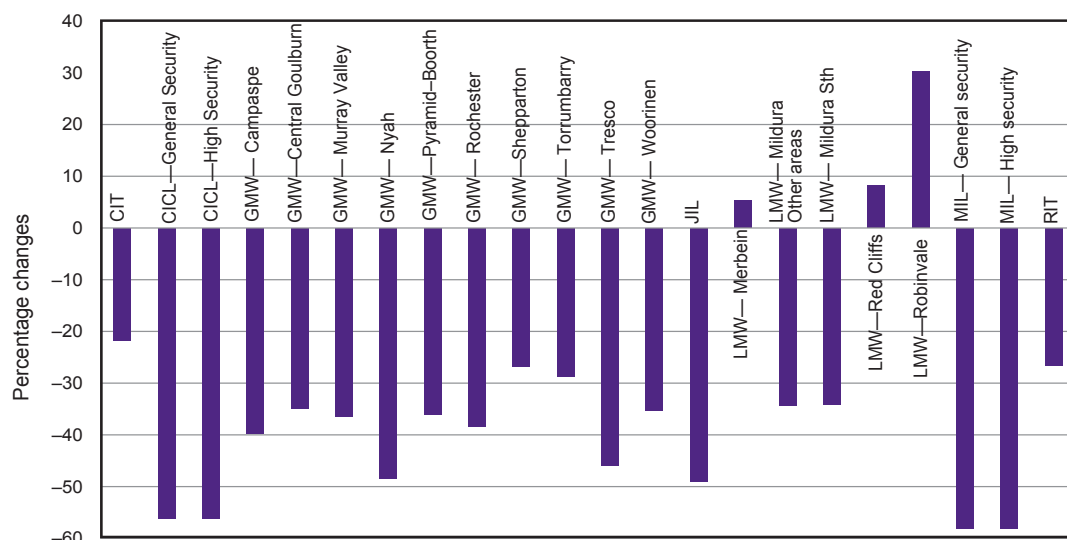
Chart 5 shows percentage changes in termination fees before and after the WCTFR for a sample of operators. Data used in the chart is sourced from IIOs' pricing schedules. The reference period before the WCTFR is the financial year 2008–09 and the reference period after the WCTFR is the financial year 2009–10 from 1 September 2009.²⁰

18 Prior to the WCTFR being made, the Schedule E Protocol on Access, Exit and Termination Fees under the Murray–Darling Basin Agreement stated that a termination fee should be not more than 15 times greater than the access fee (or shadow access fee) paid by the irrigator.

19 The WCTFR require that the maximum termination fee is 10 times the total network access charge (as defined). The prohibition of the use of shadow access charges in the calculation of termination fees under the WCTFR also created an incentive for some IIOs to rebalance the structure of their charges in an attempt to align fixed access charges with fixed costs of providing infrastructure services.

20 IIOs' pricing schedules show details of charges applicable in a financial year. The WCTFR commenced on 23 June 2009 when termination fees for the financial year 2008–09 were applicable; these are referred to as 'termination fees before the WCTFR'. Given the transitional period provision, the WCTFR came into full effect on 1 September 2009. The termination fees for the financial year 2009–10 reflect the requirements of WCTFR and are therefore referred to as 'termination fees after the WCTFR'.

Chart 5: Termination fees before and after commencement of the WCTFR—percentage changes²¹



Source: ACCC's construction from IIOs' charging schedules and IIOs' response to ACCC's request for information

The fall in termination fees after the WCTFR ranges from 22 per cent (CIT) to 58 per cent (MIL—high and general security). Information collected by the ACCC shows that this fall is largely driven by the change in the multiple used for calculating termination fees rather than the change in the access fee against which that multiple is applied. For most of the IIOs in the sample, this multiple has changed from 15 to 10.²²

Technical issues with the implementation of the WMR and WCTFR

The implementation phase has highlighted some technical issues with the functioning of the WMR and WCTFR. These include:

- a concern expressed by Murray Irrigation Limited that it may not benefit from the protection against legal action that s. 97(10) of the Water Act provides to IIOs following Murray Irrigation Limited's recent re-issue of irrigators' water entitlements
- technical issues about the application of the WMR and WCTFR
- the interaction between the WCTFR and the imposition of the goods and services tax (GST) on termination fees.

On the first two matters, the ACCC provided its final advice to the minister on proposed amendments to the rules to address these issues on 31 March 2010. The ACCC provided its advice to the minister on an amendment to the WCTFR in recognition of the imposition of GST on termination fees in June 2010.

²¹ CIT refers to Central Irrigation Trust; CICL, Coleambally Irrigation Cooperative Limited; GMW, Goulburn-Murray Water; JIL, Jemalong Irrigation Limited; LMW, Lower Murray Water; MIL, Murray Irrigation Limited; and RIT, Renmark Irrigation Trust.

²² Chart 5 also shows an increase in termination fees after the WCTFR for the three irrigation districts of LMW. This increase reflects the rise in fixed access charges applicable to each irrigation district. LMW's method for determining termination fees before the WCTFR for these districts was already 10 times the access fee, as required under the WCTFR.

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