



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Guidance for infrastructure operators about additional termination fees

**Water Charge Rules 2010**

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Australian Competition and Consumer Commission  
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# Key terms

**capital contribution:** payment by a customer to an infrastructure operator to develop or augment the operator's water service infrastructure, for example, the operator's irrigation network.

**infrastructure charges:** charges that infrastructure operators impose for access, or a change of access, to their water service infrastructure, and for services provided in relation to that access.

**infrastructure operator:** any person or entity that owns or operates infrastructure for one or more of the following purposes. The:

- (i) storage of water
- (ii) delivery of water
- (iii) drainage of water

for providing a service to someone who does not own or operate the infrastructure.

**irrigation infrastructure operator:** an infrastructure operator that owns or operates water service infrastructure for delivering water for the primary purpose of irrigation.

**irrigation network:** the water service infrastructure of an irrigation infrastructure operator, as defined in section 7(4) of the *Water Act 2007*. In practice, an irrigation network typically constitutes a network of carriers (open channels, pipes and/or natural waterways) that convey water from a water source through customer service points to customer properties. It may be either a gravity fed network (typically using channels and/or natural waterways) or a pressurised network (using pipes).

**infrastructure service:** access, or a service provided relation to access, to water service infrastructure and includes the storage, delivery, drainage and taking of water.

**Water Charge Rules 2010:** rules for fees and charges payable to an infrastructure operator for bulk water charges; access to the irrigation infrastructure operator's network, or services provided in relation to that access; and matters specified in regulations made under section 91(1)(d) of the *Water Act 2007*. Also included are rules for water planning and management activities and terminating access to an operator's irrigation network.

**water charging objectives and principles:** the objectives and principles set out in schedule 2 of the *Water Act 2007*.

# About this guidance

The Water Charge Rules 2010 (WCR) came into effect on 1 July 2020. The WCR are based on ACCC advice to the Minister on 21 September 2016 and incorporate and modify the previous Water Charge (Infrastructure) Rules 2010 and Water Charge (Termination Fee) Rules 2009.

This guidance is to help infrastructure operators and their customers to understand when the ACCC can approve an additional termination fee.

## Termination fees

A termination fee can be imposed by an infrastructure operator on a customer who terminates or surrenders the whole or part of their right of access to the operator's water service infrastructure, and the operator has met certain requirements in the WCR to provide a termination information statement to the customer. This includes a water delivery right and a right to the drainage of water through the operator's infrastructure. A termination fee can include a **general termination fee** and an **additional termination fee**.<sup>1</sup>

Setting a maximum termination fee helps strike a balance between:

- allowing a customer to terminate
- covering the ongoing costs of the infrastructure operator.

## The maximum general termination fee

### If an infrastructure operator allows the trade of the water delivery right the customer wishes to terminate

The maximum general termination fee is 10 times the total fixed volumetric charges for the rights of access the customer wishes to terminate (as levied per unit for a full financial year).

### If an infrastructure operator does not allow the trade of the water delivery right the customer wishes to terminate.

The maximum general termination fee is equal to the total fixed volumetric charges for the rights the customer wishes to terminate (as levied per unit for a full financial year).

## What about infrastructure that is for the exclusive use of the terminating customer?

The general termination fee can also include a fee related to dedicated infrastructure that is exclusively used by the customer. Where there is a separate charge for dedicated infrastructure used exclusively by the terminating customer, which will no longer be used by the customer after the termination, the maximum general termination fee relating to that dedicated infrastructure is the lesser of:

- 10 times the amount of the separate charge for that infrastructure for a full financial year, or
- a reasonable estimate of the total cost of the dedicated infrastructure, net of a reasonable estimate of any contribution towards that cost made by the terminating customer, whether via direct contribution (for example, a lump sum payment) or via the payment of the separate infrastructure charge.

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<sup>1</sup> More information about how to calculate the maximum termination fee is in the ACCC's guidance '[What do the new Water Charge Rules mean for infrastructure operators: Frequently Asked Questions](#)'

The ACCC has issued guidance to assist infrastructure operators in the Murray–Darling Basin to understand the kinds of charges that must be included in a schedule of charges, including one-off charges, lump sums, or ‘capital contributions’.<sup>2</sup> It provides information about when capital contributions would be considered infrastructure charges for the purposes of the WCR.

## Additional termination fees

Sometimes if an infrastructure operator and a customer have a contract relating to capital works for the operator’s water service infrastructure, the ACCC may approve an **additional termination fee** to allow for the recovery of expenditure relating to those works.

## ACCC approval of additional termination fees

An infrastructure operator can levy an additional termination fee if it has been approved by the ACCC under rule 73 of the WCR. An application can be made if there is a contract between an infrastructure operator and one or more holders of rights of access. The contract must involve:

- the carrying out of capital works relating to the operator’s water service infrastructure within 5 years after the contract was entered into
- the payment of a fee by a terminating customer, relating to the recovery of capital infrastructure.

A party to the contract may, within 3 months after the contract was entered into, apply to the ACCC for approval of the **additional termination fee**. The ACCC in making its decision, will consider the water charging objectives and principles.<sup>3</sup> The ACCC can approve the additional termination fee as determined in accordance with the contract if it is satisfied that:

- the contract relates to, or is made in anticipation of, the carrying out of water service infrastructure capital works by the infrastructure operator. The capital works must be started within 5 years of the contract being entered into
- the contract provides for fees payable for access to the operator’s water service infrastructure by the holders of rights of access. The fees must reasonably relate to the recovery of expenditure on those capital works. They must not be an amount **exceeding the actual, or reasonable estimate of, expenditure** by the operator
- the contract provides for a fee payable to the operator by a terminating customer on termination. The fee must be agreed by each party to the contract through **a fair and reasonable negotiation**. The fee is clearly stated in the contract, and is not subject to variation without the agreement of the holders of the rights of access
- the operator advised the holders of the rights of access, who are the parties to the contract, of the general effect of the WCR.

## Application for approval of additional termination fees

An application for approval of an additional termination fee must include:

- a copy of the contract
- the contact details of the parties to the contract
- details sufficient to confirm that the works have been, are being, or are to be carried out within 5 years of the contract being entered into
- any further information requested by the ACCC.

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2 ACCC (2022) Guidance for infrastructure operators about capital contributions on a schedule of charges – available at: <https://www.accc.gov.au/publications/guidance-for-infrastructure-operators-about-capital-contributions-on-a-schedule-of-charges>.

3 The Basin water charging objectives and principles are contained in schedule 2 to the *Water Act 2007* (Cth).

The ACCC must decide whether to approve the fee and give written notice of its decision to the parties. If the ACCC does not approve the fee, it must provide reasons for its decision.<sup>4</sup>

The ACCC may extend the timeframe by 30 business days if it provides written notice to the applicant explaining why the ACCC is unable to make its decision within the timeframe for decision.

If, after 30 business days from receiving the application, the ACCC has not made a decision and has not provided written notice to the applicant that it has been unable to make a decision, the ACCC is taken to have approved the fee.

#### ► Case study: an additional termination fee

Lake Infrastructure Limited is an infrastructure operator who is planning on raising funds to increase the capacity of its Lakeview canal by 4,000 ML. Fifty customers receive their water through the Lakeview canal.

Forty of the customers on the Lakeview canal sign a contract whereby they will receive 100ML of additional water delivery rights each. The contract states that they agree they will pay an additional termination fee if they decide to terminate their access to the Lakeview canal (subject to the ACCC's approval). This fee relates to the water delivery rights which Lake Infrastructure Limited has been able to grant by increasing the capacity of Lakeview canal through the infrastructure upgrade.

The total cost of the infrastructure upgrade is \$2 million, which equates to \$500 per ML of water delivery right. Lake Infrastructure Limited decides that it will pay for the upgrade out of its infrastructure upgrade sinking fund. The contract stipulates that works for the infrastructure upgrade will begin within the next year.

Two months after the customers sign the agreement, Lake Infrastructure Limited applies for approval for an 'additional termination fee'. The application includes all the information required under rule 73 of the WCR and includes documentary evidence that:

- Lake Infrastructure Limited has found a construction company that is able to do the building and excavation works for the infrastructure upgrade within the next year. The construction company has quoted a total cost of \$2 million for the upgrade works based on plans by a reputable hydrological engineering firm.
- The ongoing price of a water delivery right (which includes drainage) for the Lakeview canal is \$5 per ML per year under Lake Infrastructure Limited's current schedule of charges. Lake Infrastructure Limited allows the trade of water delivery right for the water service infrastructure it operates (including the Lakeview canal). This means the maximum general termination fee that Lake Infrastructure Limited can levy is 10 times the fixed volumetric charges for the right of access the customer wishes to terminate or drainage right (levied per unit of water delivery right or drainage right for a full financial year) (\$5 times 10 = \$50).<sup>5</sup>
- Lake Infrastructure Limited sends each of its Lakeview customers information about the WCR. It includes the latest ACCC guidance and material about how the WCR apply to Lake Infrastructure Limited (this information has also been provided to the ACCC).

4 If the ACCC does not make a decision about whether to approve the fee within a period of 30 business days after the day it receives and application, the ACCC is taken to have made a decision, at the end of the period, to approve the fee. In calculating a period of 30 business days, disregard, if the ACCC has requested further information in relation to the application, a day during any part of which the request, or any part of the request, remains unfulfilled. If the ACCC a) is unable to make a decision within the period of 30 business days and b) within that period gives written notice to the applicant explaining why the ACCC has been unable to make a decision on the fee within that period of 30 business days, the period of 30 business days is extended by a further period of 30 business days.

5 For more information see ACCC (2020) [What do the new Water Charge Rules mean for infrastructure operators and irrigators?](#)

- At Lake Infrastructure Limited's suggestion, customers on the Lakeview canal engage a lawyer to negotiate with Lake Infrastructure Limited on the terms of the agreement for the water delivery right. The lawyer is provided with all the relevant information from the construction company related to the cost and scope of the upgrade works. The ACCC's guidance material related to the WCR, and the water charging objectives and principles are also provided. The customers' lawyer negotiates with Lake Infrastructure Limited for several months to finalise the terms of the contract, including the additional termination fee. Some of the customers also seek their own independent legal and financial advice.
- Under the contract, it is agreed that if the customer decides to terminate within the next 10 years, the customer will pay an additional termination fee of \$450 per ML (subject to the ACCC's approval). That will be in addition to the maximum general termination fee as calculated according to the WCR (\$50 per ML of water delivery right based on Lake Infrastructure Limited's current schedule of charges).
- ACCC staff contact each of the Lakeview canal customers who have signed the contract. All agree that the negotiations (and the agreement) with Lake Infrastructure Limited have been fair and reasonable and that they had been given reasonable time to collate and consider all the relevant information. Based on all the information provided in Lake Infrastructure Limited's application, the ACCC approves the additional termination fee because it meets all the requirements in rule 73 of the WCR.



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