



Australian  
Competition &  
Consumer  
Commission

## **A guide to the water charge (termination fees) rules**

October 2012

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## About this guide

This document *A guide to the water charge (termination fees) rules*, October 2012, provides guidance on the application of the Water Charge (Termination Fees) Rules 2009 (including amendments) and replaces the ACCC's previous publication *A guide to the water charge (termination fees) rules*, December 2011.

This document updates the previous publication by incorporating the Water Charge (Termination Fees) Amendment Rules 2012 registered by the Minister for Sustainability, Environment, Water, Population and Communities on 16 October 2012.

The ACCC has released other guides for rules made under the *Water Act 2007(Cth)*:

- *A guide to the water market rules and water delivery contracts*, October 2012
- *A guide to the Water Charge (Planning and Management Information) Rules 2010*, July 2010, and
- Various guides for Tiers 1, 2 and 3 operators on the Water Charge (Infrastructure) Rules 2010.

The ACCC has also released two introductory guides for irrigators:

- *Transforming your irrigation right and maintaining water delivery*, and
- *Permanently selling your water and terminating your delivery right*.

The ACCC has published an enforcement guide which outlines its approach to enforcing the water charge (termination fees) rules and water market rules.

All the guides released by the ACCC can be found on its website [www.accc.gov.au/water](http://www.accc.gov.au/water).

The ACCC welcomes feedback on this guide. Comments can be made in writing to [water@acc.gov.au](mailto:water@acc.gov.au).

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## Abbreviations

|   |   |
|---|---|
| ACCC  | Australian Competition and Consumer Commission  |
| Basin                                       | Murray–Darling Basin  |
| GST   | goods and services tax  |
| minister                                    | Minister for Sustainability, Environment, Water, Population and Communities (formerly Climate Change and Water) |
| ML  | megalitre (1 million litres)  |
| operator                                    | irrigation infrastructure operator  |
| TNAC  | total network access charge   |
| water charge<br>(termination<br>fees) rules | rules under the Water Charge (Termination Fees) Rules 2009<br>(including amendments)                            |
| Water Act                                   | <i>Water Act 2007</i> (Cth)   |
| water market<br>rules                       | rules under the Water Market Rules 2009 (including amendments)  |

# Glossary

This glossary endeavours to provide practical meanings of relevant terms used in this guide; however, readers may need to consider the legal meaning of some terms under the *Water Act 2007* (Cth) and obtain legal advice on these definitions.

|                                    |  |
|------------------------------------|--|
| access fee                         | A fee imposed by an operator for the provision of access to its irrigation network.  |
| additional infrastructure charge   | An access fee in respect of expenditure on capital works for which an additional termination fee is approved by the ACCC.  |
| additional termination fee         | A termination fee payable in respect of expenditure on capital works in addition to the ‘maximum termination fee’ an operator is permitted to impose under rule 6. The additional termination fee must be approved by the ACCC under rule 8. |
| bulk water charge                  | A charge payable for the storage of water for, and delivery of water to:<br>(a) infrastructure operators,<br>(b) other operators of reticulated water systems, and<br>(c) other persons prescribed by the regulations.                       |
| capital expenditure                | Expenditure on capital works that the operator recovers from customers over multiple pricing periods (rather than wholly recovering the cost in the same period in which it is incurred).  |
| disconnection fee                  | A fee to recover the costs incurred in physically disconnecting an irrigator from an operator’s irrigation network.  |
| discount rate                      | The comparative value of a dollar at some future time and its present value.   |
| fixed costs                        | Costs that do not vary with the volume of water delivered.   |
| irrigator                          | A person who receives water delivery services from an operator—may include a person who receives water for any reason, such as for stock and domestic purposes.  |
| irrigation infrastructure operator | Any person or entity that owns or operates an irrigation network for the purpose of delivering irrigation water to another person (see chapter 2).   |
| irrigation network                 | The water service infrastructure of an irrigation infrastructure operator.   |
| irrigation right                   | A right that a person has against an operator to receive water that is not a water access right or water delivery right.   |

|                             |  |
|-----------------------------|--|
| maximum termination fee     | The maximum amount of termination fees (calculated in accordance with rule 7) an operator is permitted to charge an irrigator under rule 6.  |
| present value               | The value of a whole stream of future payments discounted by an appropriate discount rate.   |
| regulated water charge      | A charge to which the water charge rules (Division 1 of Part 4 of the Water Act) may apply. This includes fees and charges payable to an operator for access to, or terminating access to, the operator's network.   |
| right of access             | In relation to an operator's irrigation network, includes a right to the delivery of water (the water delivery right) and a right to the drainage of water through that network (see section 3.1).   |
| rule                        | A reference to a rule in the Water Charge (Termination Fees) Rules 2009 (including amendments), unless otherwise specified.  |
| shadow access fee           | A hypothetical access fee where the operator recovers all of its fixed costs through its access fee and not through variable charges (cf. pricing structures where operators recover some fixed costs through their variable charges).   |
| terminating irrigator       | A person who terminates the whole or a part of their right of access to an operator's irrigation network.  |
| termination fee             | A fee payable to an operator by a holder of a right of access for terminating access or surrendering a water delivery right.   |
| termination notice          | A written notice of termination or surrender given by an irrigator or the operator to the other party for the purpose of rule 6 of the water charge (termination fees) rules.  |
| total network access charge | The total amount that would have been payable to an operator in respect of a full financial year by an irrigator for a right of access to its irrigation network if termination or surrender had not occurred, subject to various inclusions and exclusions, as defined in Rule 3.                           |
| water access right          | Any right conferred by or under a law of a state to hold or to take water from a water resource. This includes stock and domestic rights, riparian rights, water access entitlements, water allocations and any other rights relating to the taking or use of water, but does not include irrigation rights. |

|                              |  |
|------------------------------|--|
| water access entitlement     | A perpetual or ongoing entitlement, by or under a law of a state, to exclusive access to a share of the water resources of a water resource plan area. |
| water delivery right         | A right to have water delivered by an operator.  |
| water service infrastructure | Infrastructure for the storage, delivery or drainage of water.   |

# 1 Purpose

The purpose of this document is to provide guidance on the application of the Water Charge (Termination Fees) Rules 2009, and the amendments to those rules made by the minister under the Water Act.

The Water Charge (Termination Fees) Rules 2009 came into effect on 1 September 2009 and relate primarily to fees<sup>1</sup> payable by irrigators upon termination<sup>2</sup> of their right of access to an irrigation infrastructure operator's irrigation network. Other regulated water charges are covered by separate rules made by the minister under the Water Act.<sup>3</sup>

Broadly, the Water Charge (Termination Fees) Rules 2009 limit the circumstance in which termination fees can be charged by irrigation infrastructure operators and cap the total amount of the fees that can be charged.

The Water Charge (Termination Fees) Rules 2009 were amended by the Water Charge (Termination Fees) Amendment Rules 2011, made on 16 February 2011, to allow operators to add GST to termination fees (section 5.3).

The Water Charge (Termination Fees) Rules 2009 were further amended by the Water Charge (Termination Fees) Amendment Rules 2012 to:

- prohibit operators from charging irrigators access fees following termination of their right of access (section 3.3.1)
- prohibit operators from charging termination fees as a result of irrigators trading a water access right (section 4.2.2)
- clarify the meaning of the term total network access charge (section 5.1), and
- clarify the relevant date for calculation of the maximum termination fee (section 5.1.1).

The Water Charge (Termination Fees) Amendment Rules 2012 came into effect on 17 October 2012.

This guide should be read in conjunction with the Water Charge (Termination Fees) Rules 2009, the amendments to the rules, the accompanying explanatory statements, the ACCC's final advices to the minister about the Water Charge (Termination Fees) Rules 2009 and subsequent amendments.<sup>4</sup>

The information in this guide does not represent legal advice and may change from time to time.

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<sup>1</sup> For the purpose of this guide, references to a fee also include references to a charge and vice versa.

<sup>2</sup> For the purpose of this guide, references to termination of an irrigator's access also include, where relevant, surrender of delivery rights.

<sup>3</sup> Refer to the Water Charge (Infrastructure) Rules 2010, the Water Charge (Planning and Management Information) Rules 2010 and the Water Market Rules 2009.

<sup>4</sup> These publications are available on the ACCC's website ([www.accc.gov.au](http://www.accc.gov.au)).

## 1.1 Who is this guide for?

This guide is intended to assist irrigation infrastructure operators to develop and to implement policies necessary to comply with the water charge (termination fees) rules. In general, this guide will help the following parties to understand how the water charge (termination fees) rules will apply to them:

- irrigation infrastructure operators
- irrigators (as the recipients of services provided by operators), and
- advisors to operators and irrigators (consultants, lawyers, brokers etc.).

The water charge (termination fees) rules have been made under the Water Act and, as such, the coverage of the water charge (termination fees) rules is limited by the Water Act.<sup>5</sup> The water charge (termination fees) rules apply to operators who meet the definition of ‘irrigation infrastructure operator’ under the Water Act (chapter 2).

## 1.2 What does this guide do?

This guide:

- explains the ACCC’s view of the rules
- provides examples of how the water charge (termination fees) rules could be applied in particular cases, and
- provides guidance on what operators should and should not do if they wish to minimise the risk of breaching the water charge (termination fees) rules.

## 1.3 What does this guide not do?

This guide does not have legal force. Rather, this guide is intended to assist stakeholders in understanding their rights and obligations under the water charge (termination fees) rules. Parties in doubt about the application of the water charge (termination fees) rules should seek independent legal advice.

Examples provided in this guide are for illustrative purposes only. Examples need to be viewed on a case-by-case basis having regard to the specific circumstances of the operator.

The ACCC encourages all affected parties to follow this guide, both in terms of the text and the spirit of the document, and to seek independent legal advice on their rights and obligations under the water charge (termination fees) rules. Adherence to this guide does not guarantee against enforcement action by the ACCC. The ACCC will consider enforcement matters on a case-by-case basis, taking into account all relevant circumstances.

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<sup>5</sup> The effect of this is that generally the water charge (termination fees) rules will regulate termination fees in the Murray-Darling Basin.

## 2 Who do the water charge (termination fees) rules apply to?

Application of the water charge (termination fees) rules will depend on whether an entity is an irrigation infrastructure operator as defined in the Water Act.

Entities will need to determine for themselves whether they are an irrigation infrastructure operator. The information provided below, as with all other information contained in this document, is for guidance purposes only. The ACCC strongly encourages operators and irrigators to seek their own independent legal advice on the application of the water charge (termination fees) rules.

Broadly, section 7 of the Water Act defines an irrigation infrastructure operator as a person who owns or operates water service infrastructure<sup>6</sup> for the purpose of:

- providing a service to another person, and
- delivering water for the primary purpose of irrigation.

The relevant questions for determining whether an entity is an irrigation infrastructure operator are:

- is the entity a person?
- does the person own or operate water service infrastructure for the purpose of delivering water?
- is the delivery of water to another person?
- is the delivery of water for the primary purpose of being used for irrigation?

Each of these questions is considered below.

### 2.1 Is the entity a person?

A 'person' is not specifically defined in the Water Act. However, corporations that are incorporated under the *Corporations Act 2001* are deemed separate legal personalities. Similarly, associations incorporated under the *Associations Incorporation Act 1984* (NSW) and entities registered as a co-operative under the co-operatives legislation of a state, such as the *Co-operatives Act 1992* (NSW), are also considered separate legal persons.

In some circumstances, an entity that is not incorporated or registered as a co-operative may be a separate legal person.

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<sup>6</sup> Infrastructure owned or operated for the purpose of storage, delivery or drainage of water.

## **2.2 Does the person own or operate water service infrastructure for the purpose of delivering water?**

An irrigation infrastructure operator is a person that owns or operates infrastructure for the storage, delivery or drainage of water for the purpose of delivering water.

Evidence that a person owns water service infrastructure may include evidence of the assets being held in the name of the person (for instance, in the name of the corporation, incorporated association or co-operative). An indication that the person operates water service infrastructure for the purpose of delivering water could be that the person holds the necessary state works approval.

A person may still be considered to be operating infrastructure even if they are doing so on behalf of another person.

## **2.3 Is the delivery of water to another person?**

Where the person operating the water service infrastructure is a separate legal person to the person (or people) to whom water is being delivered, any delivery of water in the network will necessarily be to ‘another person’. This means that, in providing water delivery services, corporations, incorporated associations and co-operatives will all provide that service to another person.

Despite being a legal ‘person’, it is clear that private diverters do not meet this third requirement because they only deliver water to themselves and not to another person.<sup>7</sup>

The case is less certain for entities established as member groups but not separately incorporated, such as in the case of joint water supply schemes in which individual members are co-holders of the water access entitlement. Where the member group only delivers water to members in that group, it is possible that the requirement that delivery of water be to another person will not be satisfied. Conversely, if the member group provides water delivery services to non-members, it is possible that the member group delivers water to ‘another person’ and so may satisfy this requirement.

## **2.4 Is the delivery of water for the primary purpose of being used for irrigation?**

An irrigation infrastructure operator who is operating water service infrastructure must be delivering water for the primary purpose of being used for irrigation.

This requirement is met if the majority of the water delivered is being used by recipients for irrigation purposes. However, in some circumstances, water may be delivered for a variety of purposes, including stock and domestic. Determining which is the ‘primary purpose’ will need to be done on a case-by-case basis. For example, if a person delivers water predominantly for stock and domestic purposes, it may be unclear whether water is being delivered for the primary purpose of being used for irrigation. Matters to consider when determining whether this requirement is met include:

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<sup>7</sup> A private diverter is a person that extracts water directly from a natural watercourse for their own use.

- the number of people receiving water for irrigation purposes relative to the total number of people receiving water delivery for other purposes, or
- the volume of water delivered for irrigation purposes relative to the total volume of water delivered.

This issue concerns the interpretation of the term ‘primary purpose’. A determination on whether delivery of water is for the ‘primary purpose’ of irrigation can only be made by a court and the ACCC cannot provide legal advice to operators on this issue. The ACCC encourages entities to seek independent legal advice if they are in doubt about whether they meet this requirement.

**Example 1: Is an entity an irrigation infrastructure operator for the purposes of the Water Act?**

Remote Pumping is a joint water supply scheme registered under the *Co-operatives Act 1992* (NSW) as Remote Pumping Ltd. Due to its registration as a co-operative, the Co-operatives Act deems Remote Pumping to be a separate legal person.

Under the *Water Management Act 2000* (NSW), Remote Pumping Ltd holds a works approval and a water use approval. A single water supply works approval issued to Remote Pumping Ltd covers all the landholders and different parcels of land in the district, and provides for water management work located on, passing through or otherwise benefiting or affecting those parcels. The water use approval authorises the use of water on specified land.

Because Remote Pumping Ltd is a separate legal person, any supply of water to the co-holders will necessarily be to ‘another person’.

Remote Pumping Ltd uses its infrastructure, such as its channels and pumps to deliver water for a number of purposes. It supplies irrigation water to 72 members, stock and domestic water to 100 members and local town water supplies to Sandy Creek which represents 68 residences. Of the total 8,000ML of water that Remote Pumping Ltd delivers to all of these customers, 7,500ML is delivered to irrigator members and is sourced from a general security irrigation water access entitlement held by the operator and the 72 members who hold irrigation rights against that water access entitlement.

It is likely that Remote Pumping Ltd is an irrigation infrastructure operator for the purposes of the water charge (termination fees) rules.

### 3 What do the water charge (termination fees) rules cover?

The water charge (termination fees) rules cover:

- all fees levied by an operator on an irrigator in respect of the termination of the irrigator's right of access to the operator's irrigation network (section 3.2), and
- some other regulated charges in specific circumstances (section 3.3).

The water charge (termination fees) rules relate only to the fees payable by irrigators on termination and do not affect the right of an operator to terminate any part of an irrigator's right of access in accordance with an applicable contract or arrangement.<sup>8</sup>

Operators should implement and maintain procedures to ensure that fees imposed by them in respect of termination are in accordance with the water charge (termination fees) rules. The ACCC encourages operators to provide appropriate compliance training for its personnel and ensure that there are officers within the organisation with responsibilities for ensuring compliance with the water charge (termination fees) rules and keeping records of all termination transactions.

Operators that levy fees in breach of the water charge (termination fees) rules may be liable to pay a civil penalty.<sup>9</sup>

#### 3.1 What is a 'right of access'?

Under the water charge (termination fees) rules, an operator is only permitted to impose a termination fee on an irrigator for termination of their 'right of access'.

The term 'right of access' refers to the right of an irrigator under a contract, arrangement or legislation in respect of access to an operator's irrigation network. The 'right of access' includes the right to the delivery of water (the water delivery right) and the drainage of water through that network as well as any associated access services<sup>10</sup> provided by the operator.<sup>11</sup>

The right of access is distinct from the irrigator's irrigation right, which is an entitlement to receive water from an operator. It is also distinct from a water access entitlement.

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<sup>8</sup> Rule 11 of the water charge (termination fees) rules.

<sup>9</sup> The maximum penalty for each contravention is 200 penalty units (currently \$22,000) for individuals and 1000 penalty units (currently \$110,000) for corporations.

<sup>10</sup> For the purpose of this guide, references to 'access' or 'right of access' also include, where relevant, services provided in relation to that right or access.

<sup>11</sup> Rule 3 of the water charge (termination fees) rules.

## 3.2 How do the water charge (termination fees) rules regulate termination fees?

The water charge (termination fees) rules prohibit operators from imposing<sup>12</sup> fees for the termination of any part of an irrigator's right of access, unless all the applicable criteria set out in rules 6, 7 and/or 8 are satisfied.<sup>13</sup> Specifically:

- Rule 6 specifies the circumstances in which operators are permitted to impose termination fees on irrigators (chapter 4).
- Rule 7 sets a cap on the amount of the termination fees that can be imposed under rule 6 and provides a methodology for calculating the maximum permissible amount for each irrigator (chapter 5).
- Rule 8 specifies the circumstances in which the ACCC can approve the imposition of additional termination fees by operators (chapter 6).

## 3.3 How do the water charge (termination fees) rules affect other regulated charges?

The water charge (termination fees) rules:

- prohibit operators from charging access fees following termination (section 3.3.1)<sup>14</sup>, and
- regulate the charging of disconnection fees (section 3.3.2).

### 3.3.1 Access fees

Under the water charge (termination fees) rules, irrigators have a choice to either pay ongoing access fees or to terminate the whole or a part of their right of access (and pay a corresponding termination fee). If an irrigator chooses the latter, termination of their right of access should result in cessation of all the associated rights and obligations, including an obligation to pay ongoing access fees, with respect to the terminated right or part of that right.<sup>15</sup>

The water charge (termination fees) rules reinforce this by prohibiting operators from charging irrigators any access fees in respect of the terminated portion of an irrigator's right of access.<sup>16</sup>

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<sup>12</sup> Also demanding and receiving or causing to be imposed, demanded or received.

<sup>13</sup> Subrule 5(1) of the water charge (termination fees) rules.

<sup>14</sup> However, the water charge (termination fees) rules do not regulate the amount or the structure of annual access fees payable by irrigators in general.

<sup>15</sup> However, an irrigator may still be required to pay ongoing fees that are associated with their landholding rather than access to the operator's infrastructure (e.g. land rates, flood protection levy).

<sup>16</sup> Subrule 5(3) of the Water Charge (Termination Fees) Amendment Rules 2012.

This prohibition:

- takes effect in the financial year following termination of the right of access, provided that the irrigator has paid to the operator any termination fees imposed by the operator in accordance with rules 6, 7 and 8
- does not affect an irrigator's obligation to pay the operator fees incurred in, or prior to, the financial year of in which the termination takes place, and
- does not affect an irrigator's obligation to pay the operator fees for any continuing part of their right of access.

### 3.3.2 Disconnection Fees

The water charge (termination fees) rules do not prohibit operators from levying a fee to recover the costs incurred by the operator in physically disconnecting an irrigator from its irrigation network.

However, the water charge (termination fees) rules require that:

- operators identify such a fee as a 'disconnection fee' separately to any termination fee charged by the operator under the water charge (termination fees) rules<sup>17</sup>
- the fee is charged for removing or disabling a physical connection (e.g. a farm outlet) between an operator's irrigation network and the irrigator's farm or other infrastructure, and
- the fee is set to recover only the reasonable costs incurred by the operator for removing or disabling a physical connection between its irrigation network and the irrigator's own infrastructure.<sup>18</sup>

What constitutes the 'reasonable costs' for removing or disabling a physical connection will depend on the particular circumstances of the operator and may typically include the administrative and direct costs of disconnecting an irrigator's point of connection to the operator's irrigation network. The 'reasonable costs' do not include the costs associated with:

- the rationalisation or reconfiguration (e.g. decommissioning) of the operator's irrigation network as a consequence of the disconnection, and
- creation of easements and building fences along the operator's irrigation network once an irrigator has disconnected.

If the above requirements are met, then operators are entitled to charge a disconnection fee:

- irrespective of whether the requirements in rules 6, 7 and 8 have been met, and

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<sup>17</sup> Subrule 10(2) of the water charge (termination fees) rules.

<sup>18</sup> Subrule 10(1) of the water charge (termination fees) rules.

- in addition to any termination fees charged by the operator under rules 6, 7 and 8 for termination of the irrigator's right of access.

### **3.3.3 Fees under the Water Market Rules 2009**

The water charge (termination fees) rules do not prohibit operators from charging fees authorised under the water market rules.<sup>19</sup>

Under the water market rules, an operator may require an application for the transformation of an irrigator's irrigation right (which may occur at the same time as the termination of an irrigator's right of access) to be accompanied by a fee for processing the application and, if applicable, a fee relating to a water delivery right (i.e. fees to recover costs incurred by an operator in entering into a new water delivery contract with the transformed irrigator).<sup>20</sup>

Operators can charge fees permitted under the water market rules in addition to any fees permitted under the water charge (termination fees) rules if an irrigator transforms and terminates at the same time.

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<sup>19</sup> Subrule 5(2)(a) of the water charge (termination fees) rules.

<sup>20</sup> Subrule 13(1) of the water market rules.

## 4 When can termination fees be imposed?

This chapter sets out the circumstances in which an operator may impose a termination fee under rule 6 of the water charge (termination fees) rules.<sup>21</sup>

An operator is permitted to impose a termination fee on a terminating irrigator if:

- the terminating irrigator is liable to pay access fees to the operator
- a written termination notice has been given by the irrigator or the operator to the other party (section 4.1),<sup>22</sup> and
- the amount of the termination fee does not exceed the maximum permissible termination fee calculated in accordance with rule 7 of the water charge (termination fees) rules (chapter 5).

However, even if the above requirements are met, an operator is not permitted to impose a termination fee if:

- access fees levied on a terminating irrigator by the operator include charges for the service of the storage of water (provided by the operator in addition to the service for the delivery of water) (section 4.2.1)<sup>23</sup>
- the operator terminates an irrigator's right of access upon trade of a water access right (section 4.2.2), or
- the irrigator's right of access is transferred or assigned to another party rather than terminated (section 4.2.3).

### **Example 2: Imposing termination fees under rule 6**

An irrigator's delivery contract provides for a right to the delivery of 100ML of water. The irrigator pays the operator annual access fees in relation to that right. The operator does not provide any services for the storage of water in addition to delivery services.

The irrigator elects to terminate their right to the delivery of 30ML of water and provides notice in writing to the operator that this portion of their right is to be terminated.

The operator is permitted to impose a termination fee on the irrigator in relation to the irrigator's right to the delivery of 30ML of water that is being terminated. The operator can continue to impose access fees on the irrigator's right to the delivery of the remaining 70ML of water.

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<sup>21</sup> The circumstances in which an operator can impose an additional termination fee under rule 8 of the water charge (termination fees) rules are set out in chapter 6.

<sup>22</sup> Subrule 6(1) of the water charge (termination fees) rules.

<sup>23</sup> Subrule 6(2)(b) of the water charge (termination fees) rules.

## 4.1 Termination notice

### 4.1.1 What is a termination notice?

A termination notice is a written statement by an irrigator or an operator on the other party, of their intention to terminate any part of the irrigator's right of access.

A termination notice is a key element of the water charge (termination fees) rules because:

- operators are not permitted to charge termination fees prior to, or in the absence of, a written termination notice being given, and
- the date of a termination notice or the date specified in the termination notice (whichever is the later) is the date that must be used by an operator to calculate the maximum termination fee that it is permitted to charge that irrigator under rule 7 of the water charge (termination fees) rules.

### 4.1.2 In what circumstances will an operator be allowed to impose a termination fee once a termination notice has been given?

The circumstances in which an operator will be permitted to impose a termination fee on an irrigator vary depending on whether a termination notice is given by the irrigator or the operator.

If a termination notice is given by an irrigator to an operator, the water charge (termination fees) rules permit the operator to impose a termination fee on the irrigator at any time following receipt of the notice.<sup>24</sup> However, an irrigator's termination notice must be given voluntarily; an operator must not compel an irrigator to give a termination notice if the irrigator does not intend to terminate any part of their right of access. The water market rules prohibit operators from requiring an irrigator to terminate their right of access as a condition of approving the irrigator's application for transformation.<sup>25</sup>

If a termination notice is given by an operator to an irrigator, the water charge (termination fees) rules permit an operator to impose a termination fee only if:

- the termination notice is given in accordance with a contract between the parties
- the termination by the operator of the irrigator's right of access is in response to a breach by the irrigator of their contractual obligations, and
- the termination is not on the grounds that the irrigator is trading all or part of their water access right.<sup>26</sup>

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<sup>24</sup> Subrule 6(1)(a) of the water charge (termination fees) rules.

<sup>25</sup> Rule 19 of the water market rules.

<sup>26</sup> Subrule 6(1)(b) of the Water Charge (Termination Fees) Amendment Rules 2012.

Operators should only be imposing termination fees on an irrigator under the water charge (termination fees) rules if the contractual obligation breached by the irrigator is so significant that it would justify the operator terminating the contract.

Operators and irrigators have the flexibility to enter into commercial contracts specifying actions that may lead to termination. However, it is important to note that contracts may be subject to fair trading laws of the Commonwealth or the relevant State or Territory. Termination provisions in contracts may conflict with applicable laws if they are unfair. Parties should seek their own legal advice regarding the terms of contracts. Generally speaking, ‘events’ that may justify termination by an operator include:

- an irrigator’s failure after a pre-determined period (e.g. 90 days) to meet ongoing access fee payments
- an irrigator becoming insolvent or bankrupt
- an irrigator continuously breaching the environmental discharge obligations attached to drainage.

**Example 3: Imposing termination fees as a result of giving termination notice for breach of delivery contract**

An irrigator’s delivery contract provides for a right to the delivery of 100ML of water. The irrigator pays the operator annual access fees in relation to that right, which do not include a fee for the storage of water.

The irrigator owes the operator access fee payments that are overdue by more than 90 days (the pre-determined period for the payment of outstanding debts provided for in the delivery contract) and has not responded to the operator’s debt recovery measures (e.g. flexible progress payments, external debt collection, preliminary legal proceedings etc.). The operator has since been advised that the irrigator has declared bankruptcy and that the operator is listed as a creditor. The irrigator is in breach of a clause within the delivery contract that permits the operator to trigger termination.

If the operator gives the irrigator a termination notice in respect of the entire delivery contract, the operator is permitted to impose a termination fee on the irrigator for their entire delivery right (i.e. right to the delivery of 100 ML of water).

**4.1.3 In what form can a termination notice be given and what must it contain?**

The water charge (termination fees) rules require the termination notice to be in writing, but do not specify the form in which the termination notice must be given. However, a termination notice must demonstrate a clear intention to terminate. To this end, termination notices should include:

- the name(s) of the holder(s) of the right of access
- each component of the right of access being terminated (e.g. number of delivery entitlements and/or farm outlets being terminated etc)

- the relevant date being the date the termination notice is given and, where applicable, the date on which termination is to take effect; and
- a statement clearly depicting an intention to terminate the specified right of access.

A termination notice can be given by way of a letter, an email or any other form of written communication that clearly establishes the purpose of the document and sets out all the details relevant to the termination. Operators should have procedures in place to ensure they can clearly establish when a termination notice is received from irrigators.

Operators may choose to request (but may not require) that customers give a termination notice in a particular form. For instance, a termination notice may form a part of a pro forma application for transformation and/or trade of an irrigator's water access entitlement. Irrigators may be asked to set out in such a form whether they intend to terminate or maintain their delivery rights after transformation and, where termination is chosen, to set out each component of the right of access to be terminated. To constitute a valid termination notice for the purpose of the water charge (termination fees) rules, the information provided by the irrigator in the pro forma application form must be complete and unambiguous.

Notwithstanding an operator's preference for termination notice to be provided in a particular form, an operator must accept a termination notice from an irrigator irrespective of the form in which the notice is given (provided that the irrigator's notice contains the required information).

Operators should make information available to their customers setting out their preferred procedure for receiving a termination notice under the water charge (termination fees) rules. In the circumstances where a pro forma application form is intended to serve as a termination notice, operators should provide sufficient information in the form to notify the irrigators that:

- by filling out the relevant section, the irrigator may be giving a termination notice, and
- termination fees under the water charge (termination fees) rules may apply if the irrigator chooses to terminate their delivery entitlements.

#### **Example 4: Giving termination notice**

An irrigator's delivery contract provides for a right to the delivery of 100ML of water. The irrigator pays the operator annual access fees, which do not include a fee for the storage of water. The irrigator also pays the operator an annual fee for the maintenance of 2 farm outlets, which connect the irrigator's farm to the operator's irrigation network. The irrigator also holds an irrigation right to 100 ML of water.

The irrigator is seeking to transform an irrigation right to 60 ML of water for the purpose of trading the corresponding water access entitlement. For this purpose, the operator requests the irrigator to fill out a pro forma transformation application. Under a section of the pro forma application entitled 'delivery rights', the irrigator is asked to

specify whether the irrigator intends to terminate any portion of their right to delivery of water after transformation by ticking a corresponding box marked ‘Yes’ or ‘No’.

The pro forma application states that by choosing the box marked ‘Yes’, the irrigator may be giving a termination notice in respect of their water delivery right and a termination fee may apply. The pro forma application also requests that, if the box ‘Yes’ is chosen, the irrigator fills out (in the space provided in the application) the volume (or number of units) of water under their water delivery right, as well as the number of outlet connections, that the irrigator is seeking to terminate.

In filling out the pro forma transformation application, the irrigator ticks the box marked ‘Yes’, but does not fill out the details of the termination as requested by the form. However, the irrigator verbally tells the operator that their intention is to terminate 1 outlet and the right to the delivery of a volume of water corresponding to the volume of transformed water entitlements. Following receipt of the application, the operator sends an email to the irrigator’s solicitor to confirm the details in relation to the termination. The irrigator’s solicitor replies in writing that their client is seeking to terminate a right to the delivery of 60 ML of water and 1 outlet connection.

Had the irrigator included all the details of the right of access they were seeking to terminate in the pro forma, the pro forma would have constituted a valid written notice of termination under the water charge (termination fees) rules. However, provision of those details by the irrigator verbally did not satisfy the requirement under the water charge (termination fees) rules for termination notice to be in writing.

Therefore, for the purpose of the water charge (termination fees) rules, the email from the solicitor constitutes a valid termination notice and allows the operator to impose a termination fee for termination of 1 outlet and right to the delivery of 60 ML of water.

#### **4.1.4 Can a termination notice be withdrawn by an irrigator?**

If an irrigator has given an operator a termination notice, the irrigator may, in writing, withdraw that notice prior to the imposition of the termination fee by the operator. The operator cannot impose a termination fee after the termination notice has been withdrawn by the irrigator.

However, if an irrigator has given a termination notice and the operator has terminated the irrigator’s right of access specified in that notice and has imposed a termination fee in accordance with the water charge (termination fees) rules, the irrigator is obliged to pay the fees imposed by the operator (unless agreed otherwise by the parties).<sup>27</sup>

#### **4.1.5 What administrative actions must an operator take to ensure compliance with the water charge (termination fees) rules?**

To ensure compliance with the water charge (termination fees) rules, operators:

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<sup>27</sup> Rule 9 of the water charge (termination fees) rules.

- must ensure that termination fee invoices are not issued to irrigators and termination fees are not demanded from irrigators prior to, or in the absence of, a termination notice being given
- should clearly set out the conditions of termination in the delivery contract with irrigators, including the circumstances in which an operator may terminate the irrigator’s right of access
- should establish procedures for receiving termination notices from irrigators and inform irrigators of those procedures, and
- should keep a record of all termination notices received from terminating irrigators.

## **4.2 In which circumstances are operators NOT permitted to impose termination fees?**

### **4.2.1 Operators not to impose termination fees if charges for a service of storage of water are combined with access fees**

A small number of operators provide services for the storage of water to irrigators (e.g. bulk water services through bulk storage infrastructure) in addition to providing water delivery and drainage services through their irrigation network. To ensure that they can impose termination fees under the water charge (termination fees) rules, these operators should charge fees for the water storage services separately to the fees for the provision of access to their irrigation infrastructure (e.g. delivery and drainage). The water charge (termination fees) rules do not permit an operator to impose a termination fee if the irrigator is provided with a service for the storage of water in addition to the service for the delivery of water and the charges for the storage of water are included in the charges in respect of the right of access.

Some operators charge irrigators access fees that include other amounts that must be excluded for the purpose of calculating the maximum termination fee under rule 7 of the water charge (termination fees) rules. Such operators are typically permitted to net out those specific excluded amounts when calculating the maximum termination fee (section 5.1.5). However, operators that combine fees for the water storage services with fees for the provision of access are not permitted to simply net out the amount of the storage fees for the purpose of calculating the maximum termination fee – these operators are prohibited from imposing termination fees altogether.<sup>28</sup>

#### **Example 5: Separation of bulk water charges from access fees by bulk water providers**

An operator provides a number of services to its irrigation customers, including:

- bulk water services (including storage) through its bulk water infrastructure, and

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<sup>28</sup> Subrule 6(2)(b) of the water charge (termination fees) rules.

- delivery services through its distribution and drainage network.

The operator also utilises a wetland for temporary storage of water in the course of delivering water to its irrigation customers.

The operator charges its irrigation customers a number of fixed fees, including:

- an access fee for the provision of access to its irrigation network
- a bulk water charge to recover the fixed costs of its bulk water services
- a storage fee to recover the costs of operating and maintaining the wetland.

A customer of the operator has given a written notice of termination of their right of access to the operator's irrigation network.

The operator is only permitted to impose a termination fee on the terminating irrigator if the operator charges a bulk water charge separately to the access fee. If this requirement is met, the operator is permitted to impose a termination fee; however, the bulk water charge cannot be included in the calculation of the maximum termination fee (see section 5.1.5). If this requirement is not met, the operator cannot impose a termination fee.

The operator only uses the wetland for temporary storage of water in the course of carrying out its irrigation delivery function. Therefore, the fees for the wetland are likely to relate to a service for storage of water provided in the course of delivery of water, rather than a service 'in addition to' the service for the delivery of water. This means that the operator can impose a termination fee on the terminating irrigator even if the fee charged by the operator in relation to the wetland is included as part of the operator's fixed access fee. Further, this fee can also be included in the calculation of the maximum termination fee under the water charge (termination fees) rules.

#### **4.2.2 Operators not to impose termination fees upon trade of a water access right**

Irrigators who sell their water access right may choose not to terminate their right of access (e.g. right to the delivery of a corresponding volume of water) and continue to pay ongoing access fees.

The water charge (termination fees) rules prohibit an operator from imposing a termination fee for the sole reason that an irrigator trades their water access right without terminating the corresponding proportion of their right of access (even if termination or surrender of that right is a condition of the contract between the parties).<sup>29</sup>

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<sup>29</sup> Subrule 5(1) of the Water Charge (Termination Fees) 2009 and subrule 6(1)(b) of the Water Charge (Termination Fees) Amendment Rules 2012.

### **Example 6: Trading water access rights and maintaining delivery**

An irrigator holds an irrigation right against an operator for 100ML of water. Under the delivery contract between them, the irrigator has a right to the delivery of 100ML of water.

The irrigator submits an application to the operator to transform the right to receive 40ML of water under their irrigation right into a water access entitlement (with a right to 60ML remaining under their irrigation right). The irrigator also gives written notice to the operator for termination of their right to the delivery of 25ML of water (with a right to the delivery of 75ML remaining under their delivery right). Following transformation, the irrigator trades their water access entitlement.

The delivery contract between the irrigator and the operator stipulates that the irrigator must hold a right to the delivery of a volume of water corresponding to the volume of water the irrigator is entitled to receive under their irrigation right and under any water access rights they hold.

Once the trade has been completed, the operator notifies the irrigator that holding a right to the delivery of 75ML of water exceeds the irrigator's right to receive 60ML of water under their irrigation right and, by reason of the trade, under the delivery contract the irrigator must terminate a right to the delivery of 15ML of water and pay an applicable termination fee.

The operator would be in breach of the water charge (termination fees) rules because the operator imposed a termination fee on the irrigator as a result of the irrigator's trade of a water access entitlement.

### **4.2.3 Operators not to impose termination fees for transfer or assignment of a right of access**

The water charge (termination fees) rules distinguish the termination of an irrigator's right of access from the transfer or assignment of that right to another person (e.g. transfer of delivery entitlements to another person within the operator's network as part of an internal sale of rights to water).<sup>30</sup>

Termination of an irrigator's right of access results in the cessation of the irrigator's obligation to pay access fees to the operator in relation to that right, whereas transfer or assignment of that right results in the obligation to pay access fees being transferred to another person.

Accordingly, under the water charge (termination fees) rules, operators are not permitted to impose termination fees by reason only of a transfer or assignment of a right of access where the operator can continue to charge access fees for the right of access that has been transferred or assigned.

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<sup>30</sup> Rule 4 of the water charge (termination fees) rules.

## 5 Calculation of the maximum termination fee

This chapter sets out the methodology for calculating the maximum termination fee an operator is typically permitted under the water charge (termination fees) rules to impose on an irrigator for termination of the irrigator's access to the operator's irrigation network.

If the requirements set out in rule 6 are met (chapter 4), an operator can:

- charge a terminating irrigator a fee (GST exclusive) not exceeding:
  - the amount determined by multiplying by 10 the total network access charge (TNAC) (section 5.1),<sup>31</sup> or
  - a lesser amount agreed between the irrigator and the operator and as provided for in a contract/arrangement between the parties (section 5.2)<sup>32</sup> (the maximum termination fee)
- gross up the termination fee by an applicable amount of GST (section 5.3).

The maximum termination fee that an operator can charge is subject to the specific circumstances of the irrigator and may not be uniform for all irrigators. Therefore, prior to issuing a termination fee invoice, an operator should ensure that the amount imposed does not exceed the maximum termination fee that the operator is permitted to charge that particular terminating irrigator.

The water charge (termination fees) rules do not permit operators to charge fees for termination that exceed the maximum termination fee.<sup>33</sup> If an operator charges an irrigator separate fees that relate to termination of their right of access (for example, a fee for processing the termination application separately to the fee for the surrender of delivery rights), the operator must ensure that the total amount of all the fees for termination does not exceed the amount of the maximum termination fee the operator is permitted to charge the irrigator.

Moreover, operators must ensure that all publications of indicative termination fees or rates (e.g. via website, newsletter or schedule of charges) accurately reflect the termination fees or rates that would be payable by all terminating irrigators in all circumstances or are accompanied by appropriate qualifications. Publication of a single termination fee or rate payable by all terminating irrigators in circumstances where the termination fees or rates payable by individual irrigators are likely to vary<sup>34</sup> may be misleading and may result in a contravention of the *Competition and Consumer Act 2010*.

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<sup>31</sup> Subrule 7(1)(a) of the water charge (termination fees) rules.

<sup>32</sup> Subrule 7(1)(b) of the water charge (termination fees) rules.

<sup>33</sup> Operators can charge disconnection fees in addition to the maximum termination fee (section 3.3.1). In some circumstances, an operator can also impose an additional termination fee, if approved by the ACCC, as set out in chapter 6.

<sup>34</sup> For example, irrigators hold different types of delivery entitlements and pay different access fees for each type of delivery entitlement.

## 5.1 Calculation of the TNAC

The term ‘total network access charge’ is defined in rule 3 of the water charge (termination fees) rules as the total amount that would have been payable to the operator in respect of a full financial year by a terminating irrigator, if termination had not occurred, subject to various inclusions and exclusions.

In calculating the TNAC, operators must determine for each termination transaction:

- the financial year relevant to the calculation of the TNAC (section 5.1.1)
- all the fees payable by the terminating irrigator in the relevant financial year which can be included, in whole or in part, in the calculation of the TNAC (sections 5.1.2 and 5.1.3)
- whether the amount of each fee permitted to be included in the TNAC must be adjusted to:
  - reflect the amount of the fee that was actually paid by the irrigator in the relevant financial year (e.g. as a result of a discount)
  - net out fees that must be excluded from the calculation of the TNAC (if those fees are bundled into the permitted fee) (section 5.1.4)
- any fees that must be excluded from the calculation of the TNAC (section 5.1.5)
- for termination of a part of a right of access:
  - the fees that relate to that part of access and that can be included in the calculation of the TNAC
  - the fees that irrigators will continue to pay following the termination and that must therefore be excluded from the calculation of the TNAC (section 5.1.6).

The TNAC is an amount that is calculated only for the purpose of determining the maximum termination fee that an operator can impose on an irrigator under the water charge (termination fees) rules. While the TNAC is calculated by reference to actual charges, operators are not obliged to impose the TNAC (or charges that would constitute a TNAC) on irrigators. Nor are operators obliged to consider the rules relating to the calculation of the TNAC when setting their ongoing fees and charges. The water charge (termination fees) rules do not require the adoption by operators of specific pricing structures or categories and it is not the ACCC’s intention to unwind existing policies such as uniform or postage stamp pricing. However, an operator’s pricing structure and specific fees and charges will determine the TNAC that can be used to calculate the maximum termination fee.

It is the ACCC’s expectation that operators will be able to substantiate the inclusion of fees in the TNAC to assist the ACCC to assess whether the maximum termination fee has been properly calculated. For this reason, the ACCC encourages operators to

specify their fees for access and non-access related activities separately. Specifically, as noted above at 4.2.1, operators should separately identify and charge for the service of the storage of water. This will simplify the calculation of the TNAC and reduce the risk to operators of not complying with the water charge (termination fees) rules. This approach also promotes greater transparency of compliance with the water charge (termination fees) rules for irrigators and the ACCC.

### **5.1.1 Financial year relevant to the calculation of the TNAC**

The TNAC must be calculated in respect of the financial year in which the termination notice is given under subrule 6(1) of the water charge (termination fees) rules, unless a future date for termination is specified in the notice.<sup>35</sup> In the latter case, the charges used in the calculation of the TNAC will be those applying in the financial year in which the termination is to take effect under the notice.

It is important for operators to note that a decision made by an operator that affects access charges payable by irrigators in respect of a particular financial year (e.g. a decision to suspend or discount certain charges) will affect the maximum termination fee that an operator can impose on irrigators terminating their access to the operator's irrigation network in that financial year (for further detail see section 5.1.4).

### **5.1.2 Amounts 'payable' by a terminating irrigator**

Operators can only include in the TNAC those fixed access fees that are actually payable in respect of the relevant financial year by a terminating irrigator (i.e. already paid or owed to be paid or would be payable if termination had not occurred). Operators are not permitted to calculate the TNAC on the basis of a shadow access fee. In the past, operators recovered some of their fixed costs through variable charges, but then calculated termination fees as a multiple of fixed shadow access fees estimated by the operator (but not actually charged). This practice is not permitted under the water charge (termination fees) rules.

If an irrigator terminates their right of access part way through a financial year, an operator may choose to pro-rata the irrigator's annual access fees and charge only for the portion of the year during which the irrigator maintained access. This will not affect the calculation of the maximum termination fee, as the operators can include in the calculation of the TNAC the amounts of the access fees that an irrigator would have paid for the full financial year had the irrigator not terminated their right of access.<sup>36</sup>

### **5.1.3 Fees that can be included in the calculation of the TNAC**

Operators undertake a variety of business functions, which may include those set out in Table 1 below.

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<sup>35</sup> Subrule 7(1)(a) of the Water Charge (Termination Fees) Amendment Rules 2012.

<sup>36</sup> However, the operator may still be required to make the adjustments discussed in section 5.1.4.

**Table 1: Business functions typically undertaken by operators**

|  |   |
|--|---|
| Headworks management                       | Water resources assessment and allocation         |
| Groundwater management                     | Control of own bulk water supply system           |
| Irrigation water distribution              | Irrigation water application                      |
| Stock and domestic water supply system     | Surface drainage services                         |
| Sub-surface drainage services              | Bulk urban water supply                           |
| Urban water distribution (at retail level) | Extraction of groundwater for irrigation purposes |
| Conduct a water trading brokerage service  | Provide recreational facilities <sup>37</sup>     |

In general, the TNAC represents the sum of all fixed fees<sup>38</sup> payable by an irrigator to an operator in the relevant financial year for the provision of a right of access to the operator's irrigation network. An irrigator's right of access includes a right to the delivery and to the drainage of water through the operator's irrigation network (section 3.1). Therefore, fees payable by the irrigator in relation to the irrigation water distribution and surface/sub-surface drainage services (such as those set out in Table 1) are likely to be relevant to the calculation of the TNAC.

The water charge (termination fees) rules provide that the TNAC may include fees payable by irrigators for the recovery of both the operating and capital costs<sup>39</sup> incurred by operators in relation to the provision of access to their irrigation network, including:

- maintenance, renewal and replacement of irrigation channels, pipelines, surface and sub-surface drains
- maintenance, renewal and replacement of roads, bridges and culverts
- maintenance, renewal and replacement of regulating and measurement (flow and water level – excluding irrigator service points) structures
- maintenance, renewal and replacement of pumping stations (including civil works, mechanical and electrical equipment), and
- costs associated with the administration of a right of access (delivery rights).<sup>40</sup>

An operator may also be permitted to include in the calculation of the TNAC, fees that may not be directly related to the provision of access to the operator's irrigation network, in circumstances where:

- the fees are levied on an irrigator by the operator in respect of costs necessarily incurred by the operator in complying with obligations under the operator's

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<sup>37</sup> Australian National Committee on Irrigation and Drainage, *Australian irrigation water provider benchmarking report, 2005/2006*, Key irrigation industry statistics and performance indicators, April 2007, table 26, p. 45.

<sup>38</sup> Fixed fees and charges do not vary with the quantity of water being delivered or drained.

<sup>39</sup> Under rule 8 of the water charge (termination fees) rules, operators can also seek ACCC's approval to impose an additional termination fee to recover capital expenditure in certain circumstances.

<sup>40</sup> These will include an allocation of corporate or head office costs.

operating licence, statement of obligations and/or other legislative/regulatory instrument, and

- the provision of access by an operator is conditional upon compliance with the obligations specified in such instrument (e.g. an obligation to implement a leakage reduction program).

Operators must determine whether or not to include such fees in the calculation of the TNAC on a case-by-case basis. If requested by the ACCC, operators should be able to demonstrate how the obligation relates to the provision of the right of access to the operator's irrigation network and that the fees included in the TNAC recover only the costs that are necessarily incurred by the operator in complying with that obligation.

#### **5.1.4 Adjustments to the amount of fees that can be included in the calculation of the TNAC**

Having identified which access fees payable by a terminating irrigator may be included in the calculation of the TNAC, an operator must consider whether it should make any adjustment to those charges for the purpose of calculating the maximum termination fee.

If an operator sets its access fees to include a fee that is either not related to the provision of access or which must be excluded from the calculation of the TNAC under the water charge (termination fees) rules, the operator must net out this fee prior to calculating the TNAC.

If an operator decides to reduce an access fee payable by a terminating irrigator in respect of the relevant financial year, the operator must include the reduced amount of the access fee in the calculation of the TNAC.<sup>41</sup> Therefore, in calculating the TNAC in respect of the relevant financial year, the operator must:

- not include any access fees that have been suspended by the operator, and
- include only a reduced amount of the access fee if the amount payable by the irrigator has been reduced due to a discount, rebate or concession given by the operator.

#### **Example 6: Calculating the TNAC when a rebate on access fees has been given to an irrigator**

An irrigator's delivery contract provides for a right to the delivery of 100ML of water. In July 2010, the operator notifies all the irrigators (by providing them with its schedule of charges) that in 2010/11 they will be liable to pay an access fee of \$20 per each ML of water under their water delivery right.

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<sup>41</sup> The reduced amount is to be included even if the full amount of a particular access fee or a charge is payable by an irrigator at the start of the relevant financial year and is listed in the operator's published schedule of charges.

In August 2010, the operator issues access fee invoices to all irrigators for the full amount owing for 2010/11. The irrigator pays the amount owing in full by the due date.

On 1 March 2011, the operator announces that due to the drought, the operator will give all irrigators a rebate of 10% in respect of the total amount of access fees paid by the irrigators for 2010/11. On 12 March, the operator pays to the irrigator a rebate equivalent to 10% of the access fees paid by the irrigator in respect of 2010/11.

On 5 April 2010, the irrigator gives written notice to the operator that the irrigator intends to terminate a right to the delivery of 30 ML of water under their water delivery right.

For the purpose of calculating the TNAC, the operator must include an amount of access fee net of the rebate (i.e. \$18 per each ML of delivery right being terminated). Therefore, the TNAC for the terminated irrigator equates to \$540 (i.e. \$18 x 30).

### 5.1.5 Fees that must be excluded from the calculation of the TNAC

Operators must exclude the following from the calculation of the TNAC:<sup>42</sup>

- (a) Variable charges – amounts calculated by reference to the number of units or volume of water actually delivered to the terminating irrigator.
- (b) Storage charges – amounts in respect of the service for the storage of water provided in addition to the service for the delivery of water (e.g. bulk water charges).
- (c) Connection and disconnection fees – fees imposed in respect of the costs of connecting or disconnecting the terminating irrigator to the operator's irrigation network:
  - connection fees – operators must exclude fees for the recovery of costs associated with the physical connection of a new customer (or an additional service point for an existing customer) to the operator's irrigation network, including the cost of a new meter and installation, tapings, and other outlet infrastructure.
  - disconnection costs – operators must exclude fees for the recovery of costs associated with disabling the irrigator's physical connection to the operator's irrigation network, including the cost of removing the meter, removing the tapping, closing-off the channel etc.<sup>43</sup>

Operators can include ongoing fees associated with the infrastructure (e.g. replacement, maintenance of the outlet) in the calculation of the TNAC.

- (d) Any amount that exceeds an amount based on the recovery of costs for provision of access to the operator's irrigation network, including amounts for the recovery of:

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<sup>42</sup> Rule 3 of the water charge (termination fees) rules.

<sup>43</sup> Operators can charge a fee for disconnection separately to a fee for termination (see section 3.3.2).

- water planning and management costs that are not related to the provision of access (e.g. the extraction and harvesting of water and the application of water to land, which may take the form of cost pass-throughs from government or bulk water suppliers); and
- costs associated with urban water activities (including the allocation of common costs).

Operators are encouraged to charge fees for activities that are not related to access separately from access fees. In circumstances where pricing arrangements are unclear (e.g. where access and non-access related fees are bundled into a single access fee), it is the ACCC's expectation that operators will substantiate the components of the bundled fee (i.e. allocation of access and non-access related costs) that are included in the TNAC.

Operators are required to exclude from the calculation of the TNAC any amount of a particular fee that exceeds an amount based on the recovery of the costs (whether recurrent or capital) incurred by the operator in relation to the provision of access to the operator's irrigation network. However, the ACCC is of the view that operators can include access fees that are set in accordance with uniform or postage stamp pricing policy without having to adjust for the amount of the cost that is actually incurred by the operator in providing access to the particular terminating irrigator.

- (e) Charges for recovery of expenditure on capital works in respect of which an additional termination fee has been approved by the ACCC under rule 8 of the water charge (termination fees) rules (chapter 6).
- (f) Any amount of GST.<sup>44</sup>

The water charge (termination fees) rules do not contemplate the exclusion of an access fee in its entirety where the fee includes amounts that must be excluded from the calculation of the TNAC. Rather, operators are required to net out those excluded amounts prior to including the access fee in the calculation of the TNAC.<sup>45</sup>

Operators are also not required to exclude any costs that are avoided as a result of termination in calculating the TNAC.

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<sup>44</sup> Water Charge (Termination Fees) Amendment Rules 2011.

<sup>45</sup> The exception to this is where storage charges are included as part of an access fee (see section 4.2.1).

### Example 7: Calculating the TNAC

An irrigator's delivery contract provides for a right to the delivery of 100ML of water. The irrigator's farm is connected to the operator's irrigation network via a single outlet and the water used by the irrigator is drained through the operator's drainage infrastructure. The irrigator has paid to the operator fees set out below in respect of the current financial year.

| Title                                    | Charging unit               | \$  |   |
|--|-----------------------------|-----|---|
| Outlet charge                            | Per outlet                  | 150 | A |
| Account administration fee <sup>46</sup> | Per customer                | 100 | B |
| Access fee                               | Per ML of delivery right    | 20  | C |
| Drainage charge                          | Per ML of delivery right    | 10  | D |
| Renewals charge                          | Per ML of delivery right    | 8   | E |
| Usage charge                             | Per ML of water delivered   | 5   | F |
| Government planning fee                  | Per ML of water entitlement | 2   | G |
| Bulk water charge                        | Per ML of water entitlement | 15  | H |
| Disconnection fee                        | Per property connection     | 120 | I |

The irrigator provides notice in writing to the operator for termination of the entire access to the operator's irrigation network.

The operator can include charges A, B, C, D and E in the calculation of the TNAC for the purpose of determining the maximum termination fee that the operator can impose on the irrigator under rule 6 of the water charge (termination fees) rules. These fees can be included in full as they do not include any amounts that must be excluded under the water charge (termination fees) rules and were paid by the irrigator in full.

The remaining fees (i.e. F, G, H, I) must be excluded from the calculation of the TNAC.

#### 5.1.6 Calculation of the TNAC for termination of a part of a right of access

Under a contract or arrangement between an operator and an irrigator, the irrigator may be entitled to terminate a portion of their right of access (e.g. a portion of their delivery and/or drainage right). However, there may also be some rights or services that will only be terminated upon full cessation of the irrigator's access to the operator's irrigation network (e.g. account administration or services associated with an outlet connection).

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<sup>46</sup> Includes only administration activities associated with provision of access.

Where an operator is calculating the maximum termination fee it can impose on an irrigator for the termination of a part of the irrigator's right of access, the operator must base those calculations on the proportion of the TNAC applicable to the part of the right being terminated.<sup>47</sup> This means that an operator can only include in the calculation of the TNAC those fixed access fee components that will no longer be imposed by the operator following, and directly resulting from, the termination of that part of the right.<sup>48</sup>

**Example 8: Calculating the TNAC for a partial termination of an irrigator's access**

An irrigator's delivery contract provides for a right to the delivery and drainage of 100ML of water. The irrigator's farm is connected to the operator's irrigation network via 2 outlets. The irrigator has paid to the operator fees set out in Example 7 above in respect of the current financial year.

An irrigator provides notice in writing to the operator for the termination of a right to the delivery and drainage of 30ML of water under their water delivery right. The irrigator wishes to maintain a right to the delivery and drainage of 70ML of water and both connection outlets.

In calculating the TNAC, the operator can only include charges C, D and E (as listed in Example 7). The outlet charge (i.e. A) and the account administration fee (i.e. B) will continue to be paid by the irrigator in full following the termination (until the irrigator decides to terminate each outlet or terminate the remainder of their access to the operator's irrigation network) and must therefore be excluded from the calculation of the TNAC. Further, charges F, G, H and I must also be excluded from the calculation of the TNAC (for the same reasons as discussed in Example 7).

In including charges C, D and E, the operator must only include the proportion of each charge applicable to the right to the delivery and drainage of 30ML of water being terminated. For example, the operator can include \$600 for the access fee component (being an amount calculated as \$20 per ML of delivery right multiplied by 30 ML of delivery rights).

Once the operator imposes a termination fee and it is paid in full by the irrigator, the operator can no longer impose charges C, D or E in respect of the 30ML of terminated delivery right (section 3.3.1).

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<sup>47</sup> Subrule 7(1)(a)(ii) of the water charge (termination fees) rules.

<sup>48</sup> That is, those access fee components that relate to an irrigator's rights that will cease to exist (or services that will no longer be provided by the operator) following partial termination of an irrigator's access to the operator's irrigation network.

## 5.2 Termination fee provided for in a contract or arrangement

An operator and an irrigator may reach an agreement (set out in a contract or arrangement between the parties) for an amount<sup>49</sup> of termination fee payable by an irrigator to the operator upon termination of the irrigator's access to the operator's irrigation network. In such circumstances, an operator:

- must not charge in excess of the agreed amount
- may charge the agreed amount if it does not exceed the amount of 10 x TNAC, and
- must only charge the amount equal to or less than 10 x TNAC if the agreed amount is greater.

The implication for an operator is that it must calculate the amount of 10 x TNAC for each termination transaction irrespective of whether a specific termination fee (or a means for calculating the fee) has been agreed between the parties, in order to determine the permissible termination fee.

## 5.3 Termination fees and GST

An operator can gross up a termination fee imposed under rule 6 by an amount of GST payable in respect of the termination of the irrigator's access to the operator's network.<sup>50</sup> However, an operator must:

- ensure that a GST exclusive amount of the termination fee does not exceed the maximum termination fee (also GST exclusive) determined in accordance with subrule 7(1)
- only include GST exclusive amounts of access fees in the calculation of the TNAC,<sup>51</sup> and
- not gross up a termination fee above the maximum termination fee for any other taxes (e.g. income tax).

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<sup>49</sup> Or a mechanism to determine the amount.

<sup>50</sup> Subrule 7(2) of the Water Charge (Termination Fees) Amendment Rules 2011.

<sup>51</sup> Water Charge (Termination Fees) Amendment Rules 2011.

## **6 Can operators impose an additional termination fee?**

Rule 8 of the water charge (termination fees) rules permits the ACCC to give its approval to an operator to charge irrigators a termination fee for the recovery of expenditure on capital works in addition to the termination fee charged under rule 6 (discussed in chapters 4 and 5).

The termination fees imposed by an operator under rule 6 will generally allow it to recover operating and capital costs associated with the provision of access to its existing irrigation network. An operator and its customers may also reach an agreement for major capital works to be undertaken by the operator which may involve, for instance, an upgrade or reconfiguration of the operator's irrigation network for the purpose of improving the quality and reliability of water delivery and/or drainage.

Rule 8 of the water charge (termination fees) rules provides flexibility for parties to enter into a contractual agreement for the recovery of capital expenditure undertaken by the operator in relation to those capital works, which may include an agreement for an additional termination fee to be paid by an irrigator.

This chapter provides a discussion of the requirements set out in Rule 8, in particular:

- the circumstances in which an application to the ACCC for an additional termination fee can be made (section 6.1)
- the supporting information and documents the applicant must provide to the ACCC for its consideration of the application for an additional termination fee (section 6.1.4 and the Appendix)
- the process the ACCC must follow and the considerations the ACCC will take into account in making its decision to approve or reject the application for an additional termination fee (section 6.2)
- the circumstances in which an operator can charge an additional termination fee approved by the ACCC (section 6.3), and
- the amount of the additional termination fee that an operator can charge (section 6.4).

### **6.1 In what circumstances can an application for an additional termination fee be made?**

#### **6.1.1 Who can apply for an additional termination fee?**

An application to the ACCC for an additional termination fee can be made by a party to the contract between an operator and one or more irrigators who are provided with

access to the operator's irrigation network.<sup>52</sup> The ACCC encourages all the parties to the contract to submit a joint application as this increases the ACCC's accessibility to information and demonstrates that the parties are likely to have agreed to the additional termination fee in the course of fair and reasonable negotiation (section 6.2).

Where an application is not made jointly by all the parties to the contract, the ACCC will provide the other party (non-applicant) with an opportunity to comment on the application before making a decision on whether to approve the additional termination fee.

### **6.1.2 What requirements must be satisfied for the ACCC to consider the application for an additional termination fee?**

The ACCC is only required to consider an application for an additional termination fee if:

- an operator has entered into a contract with 1 or more irrigators for carrying out of capital works
- the capital works are to be carried out within 5 years after the contract is entered into
- the additional termination fee is provided for under the contract
- the additional termination fee is for the recovery of the operator's expenditure on capital works relating to the provision of access to the operator's irrigation network
- the applicant is a party to this contract
- the application is lodged on time (section 6.1.3), and
- the application is supported by sufficient materials (section 6.1.4).

If all of these criteria are met, the ACCC will consider an application for an additional termination fee and make a decision to approve or reject the application within a prescribed timeframe (section 6.2).

### **6.1.3 Is there a deadline for making the application for an additional termination fee?**

An application to the ACCC for an additional termination fee must be made no later than 3 months after the date on which the contract for capital works is entered into by the parties.<sup>53</sup> The ACCC cannot accept any applications for an additional termination fee made after the expiry of this period.

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<sup>52</sup> Subrule 8(1) of the water charge (termination fees) rules.

<sup>53</sup> Subrule 8(2) of the water charge (termination fees) rules.

The ACCC recognises that parties may wish to seek the ACCC's 'pre-approval' prior to entering into contract negotiations, particularly in relation to the calculation of the additional infrastructure charge and the additional termination fee. The ACCC cannot provide any assurances or approval without a legally binding contract. Upon request, the ACCC will endeavour to provide parties with a 'without prejudice' informal assessment of the relevant matters, including the calculation of the additional infrastructure charge and the additional termination fee.

#### **6.1.4 What materials must an applicant provide in support of their application for an additional termination fee?**

The application to the ACCC for an additional termination fee must be supported by:

- a) a copy of the contract entered into by the parties in relation to the capital works
- b) the contact details of the parties to the contract
- c) sufficient details to confirm that the capital works have been, are being or are to be carried out, and
- d) any further information requested by the ACCC.<sup>54</sup>

The appendix of this guide contains a checklist of additional information the ACCC is likely to require for the purpose of assessing an application for an additional termination fee. The ACCC encourages all applicants to provide all the information relevant to a particular application upfront to facilitate the process of approval of the additional termination fee by the ACCC.

## **6.2 ACCC approval of an additional termination fee**

### **6.2.1 What factors will the ACCC take into account in making its decision to approve or reject an application for an additional termination fee?**

If the requirements discussed in section 6.1 are satisfied, the ACCC will make a decision whether to approve or reject the additional termination fee provided for under the contract between the parties. In making its decision, the ACCC will assess:

- the program of capital works specified in the contract (section 6.2.1.1)
- the infrastructure charges specified in the contract (section 6.2.1.2)
- the additional termination fee specified in the contract (section 6.2.1.3), and
- the negotiation process between the parties to the contract (section 6.2.1.4).

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<sup>54</sup> Subrule 8(4) of the water charge (termination fees) rules.

The ACCC will make its decision in accordance with the water charge (termination fees) rules and having regard to the Basin water charging objectives and principles set out in Schedule 2 of the Water Act.

#### **6.2.1.1 Assessment of the program of capital works specified in the contract**

The contract entered into by the operator and the irrigators which provides for an additional termination fee must relate to (or be made in anticipation of) capital works, which are to be carried out within 5 years after the contract is entered into and which must relate to the operator's irrigation network.<sup>55</sup>

In making this assessment, the ACCC will consider (but will not be limited to):

- whether the contract between the parties for the carrying out of capital works is in writing and signed by all the relevant parties
- how the program of capital works relates to access to the operator's irrigation network, including how the nature of the irrigators' access and services provided by the operators are likely to change as a result of the capital works, and
- whether all of the expenditure on the program of capital works is likely to occur within 5 years of the parties' entering into the contract.<sup>56</sup>

#### **6.2.1.2 Assessment of the additional infrastructure charge specified in the contract**

The contract for capital works must specify a separate infrastructure charge (or access fee) payable by the irrigators that relates to the actual or estimated expenditure on capital works for an amount not exceeding the actual (or a reasonable estimate of) expenditure incurred (or to be incurred) by the operator.<sup>57</sup>

In making this assessment, the ACCC will consider (but will not be limited to):

- the nature of the expenditure and whether the application provides sufficient detail to satisfy the requirement that the expenditure is limited to a program of capital works
- the basis for the estimate of the level of expenditure required to deliver the program of capital works, including whether an independent assessment has been undertaken, whether board approval has been given, whether government or regulatory approval has been given and the current stage of the capital works program (as an indication of the scope for variation)

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<sup>55</sup> Subrule 8(3)(b)(i) of the water charge (termination fees) rules.

<sup>56</sup> Rule 8 of the water charge (termination fees) rules does not preclude operators from staging capital works beyond the five-year term, however, the amount of the additional termination fee must relate only to the recovery of expenditure on capital works incurred within the five-year period.

<sup>57</sup> Subrule 8(3) (b)(ii) of the water charge (termination fees) rules.

- whether the additional infrastructure charge is clearly set out in the contract and is separate to others fees payable by irrigators to the operator
- whether the additional infrastructure charge reasonably relates to the recovery of expenditure on capital works under the contract
- whether irrigators have been made aware of their proportion or share of the total expenditure on capital works and the basis for the allocation or apportionment, and
- whether the additional infrastructure charge recovers expenditure financed by the operator (e.g. debt- or equity-financed as opposed to contributions by government or customers).

### **6.2.1.3 Assessment of the additional termination fee specified in the contract**

The contract for capital works must clearly specify a separate termination fee payable to the operator by a terminating irrigator in relation to the recovery of the operator's expenditure for capital works, which is not subject to variation without the agreement of the parties to the contract.<sup>58</sup>

In making this assessment, the ACCC will consider (but will not be limited to):

- whether the termination fee is clearly set out in the contract and is separate to any other fees payable by the irrigators to the operator
- whether the termination fee was agreed to by each party to the contract
- whether the termination fee relates to the recovery of expenditure on capital works under that contract
- the transparency of the calculation or determination of the termination fee
- the ability for each party to calculate or determine the maximum amount the irrigator would be liable to pay under the contract upon termination
- whether the terms of the contract allow the operator to vary the termination fee unilaterally or only by agreement with each party to the contract
- consistency with the water charge (termination fees) rules generally (where appropriate), and
- how the arrangement contributes to the Basin water charging objectives and principles in Schedule 2 of the Water Act.

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<sup>58</sup> Subrule 8(3)(b)(iii) of the water charge (termination fees) rules.

#### **6.2.1.4 Assessment of the process of negotiation of the contract**

The additional termination fee specified in the contract between the parties must be agreed to by each party to the contract in the course of fair and reasonable negotiation.<sup>59</sup>

The ACCC will make an assessment of whether contract negotiations were fair and reasonable on a case by case basis. The factors the ACCC will consider include (but are not limited to):

- whether either party has engaged in unconscionable conduct (i.e. whether there was coercion or pressure exerted on any party to enter into an agreement)
- whether each party to the contract had a reasonable opportunity to consider the offer, including the ability to obtain legal, financial and other advice
- whether all the relevant information was provided by the operator to the irrigators in the course of the contract negotiations, and
- the extent to which the operator was willing to negotiate the terms of the contract.

In assessing the information provided by an operator to the irrigators in the course of contract negotiation, the ACCC will take into account whether the operator informed the irrigators of the general effect of the water charge (termination fees) rules.<sup>60</sup> In particular, the ACCC will consider whether the operator clearly communicated to the irrigators that the termination fee specified in the contract is:

- in addition to the termination fee that the irrigator would be likely to be liable for under rule 6 of the water charge (termination fees) rules upon termination of their right of access, and
- subject to the approval of the ACCC on the basis of requirements set out in rule 8 of the water charge (termination fees) rules (and discussed in this guide).

#### **6.2.2 What procedure must the ACCC follow in approving or rejecting an application for an additional termination fee?**

If a valid application for an additional termination fee is made to the ACCC in accordance with requirements discussed in section 6.1 of this guide, the ACCC will:

- give notice in writing of its decision to approve or reject the additional termination fee to each of the parties to the contract,<sup>61</sup> and
- if it decides to reject the additional termination fee, provide reasons for refusing to approve in the written notice of its decision.<sup>62</sup>

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<sup>59</sup> Subrule 8(3)(b)(iii) of the water charge (termination fees) rules.

<sup>60</sup> Subrule 8(3)(c) of the water charge (termination fees) rules.

<sup>61</sup> Subrule 8(4)(f) of the water charge (termination fees) rules.

<sup>62</sup> Subrule 8(4)(g) of the water charge (termination fees) rules.

The ACCC will typically make its decision and give written notice to each party to the contract within a period of 30 business days after receiving a valid application. If the ACCC requests additional information for the purpose of making its assessment of the application, the period of 30 days will not include any days during which any part of the ACCC's request remains unfulfilled.<sup>63</sup>

If the ACCC is unable to make a decision within 30 business days, the ACCC can extend the period for making its decision by a further 30 business days by giving written notice to the applicant setting out its reasons for the extension.<sup>64</sup>

If the ACCC does not make a decision on whether to approve an application for an additional termination fee within a period of 30 business days (or within a period of 60 business days if the ACCC has extended its decision making period by written notice), the ACCC is deemed to have approved the additional termination fee and to have given written notice of its approval to each party to the contract.<sup>65</sup>

The ACCC will provide all parties to the contract (whether the application is made jointly by all the parties to the contract or not) with an opportunity to comment on the application for an additional termination fee and, in certain circumstances, an opportunity to comment on a proposal not to approve the additional termination fee.

### **6.3 When can an additional termination fee be imposed?**

If the ACCC approves the additional termination fee and provides written notice to each party to the contract of its approval:

- the operator can impose the additional termination fee on a terminating irrigator for an amount determined in accordance with the contract between the parties, provided that the termination notice is given by the irrigator to the operator (or by the operator to the irrigator),<sup>66</sup> and
- each terminating irrigator who is a party to the contract is liable to pay the termination fee imposed by the operator.

An operator should identify and impose the additional termination fee separately to any termination fees imposed under rule 6 of the water charge (termination fees) rules.

If a variation is made to the contract between the parties for capital works in relation to which the approval for additional termination fee has been granted by the ACCC and this variation affects the amount of the additional termination fee that an operator would impose on a terminating irrigator, the operator must seek re-approval of the varied additional termination fee from the ACCC.

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<sup>63</sup> Subrule 8(6) of the water charge (termination fees) rules.

<sup>64</sup> Subrule 8(7) of the water charge (termination fees) rules.

<sup>65</sup> Subrule 8(5) of the water charge (termination fees) rules.

<sup>66</sup> Refer to definition of 'terminating irrigator' in rule 3 of the water charge (termination fees) rules.

## 6.4 How must the additional termination fee be calculated?

This section provides guidance to operators on how the additional infrastructure charge and the additional termination fee should be calculated for the purpose of seeking approval of the additional termination fee by the ACCC. While an application that calculates an additional infrastructure charge or an additional termination fee in a manner that varies from the approach detailed in this section may still be approved, fees calculated in accordance with this guide are more likely to be of the type approved by the ACCC.

The water charge (termination fees) rules require operators to set their additional infrastructure charge and the additional termination fee to recover the expenditure incurred by the operator on the capital works carried out within 5 years after the date the contract is entered into by the parties.<sup>67</sup>

Therefore, as a first step, operators must set an annual additional infrastructure charge, payable over the term of the contract, to recover an amount not exceeding the actual or estimated expenditure on capital works. This would be achieved if the present value of the revenue from the additional infrastructure charge over the term of the contract (e.g. 30 years) does not exceed the present value of expenditure on capital works (incurred over 5 years). This condition applies in aggregate and for each terminating irrigator.

Secondly, the additional termination fee must be set so as not to exceed the difference between the expenditure on capital works incurred over the 5 year period and the revenue already collected by the operator through the additional infrastructure charge. This is achieved if the additional termination fee does not exceed the present value of outstanding additional infrastructure charges (based on zero water deliveries), which can be expressed as:

$$\text{Termination fee}_t^* = \left[ \text{additional infra charge}_t + \dots + \frac{\text{additional infra charge}_{t+k}}{(1+i)^k} \right]$$

Where:

*additional infra charge* means:

- the total amount payable in a financial year (based on zero water deliveries) for access to the operator's irrigation network that relates to the recovery by the operator of expenditure on those capital works.\*\*
- $i$  is the discount rate
- $t$  is the financial year in which termination occurs
- $k$  is number of outstanding additional infrastructure charge periods (financial years).

\* Assuming the additional infrastructure charge has not been paid in the year of termination.

\*\* Equates to the additional infrastructure charge calculated according to paragraph 5.8 based on zero water deliveries. If the additional infrastructure charge is 100 per cent fixed, the two calculations should equate.

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<sup>67</sup> Subrule 8(3)(b)(ii) of the water charge (termination fees) rules.

**Example 9: Calculating an additional termination fee**

An irrigator's delivery contract provides for a right to the delivery of 100ML of water.

The irrigator requests the operator to upgrade delivery capacity to provide for an additional 1 ML per day (equating to a right to the delivery of additional 100ML of water). Neighbouring irrigators also request an upgrade of delivery capacity of 1ML per day (equating to a right to the delivery of additional 100ML of water). The operator and each of the irrigators agree to a schedule of capital works for the upgrade (200ML additional capacity) and the imposition of an additional infrastructure charge and an additional termination fee. The irrigator in this illustration must contribute towards 50 per cent of the costs as they have requested (and have been provided with rights for) 50 per cent of the additional capacity.

The expenditure on capital works totals \$50,000 over two years (within the 5 years for inclusion in termination fee) and the contract term is for 25 years. The expenditure on capital works is recovered through the additional infrastructure charge over the 25-year term of the contract.

The results from table 2 show that the present value of the irrigator's share of the capital works (at 50 per cent) is \$24,519. By imposing an additional infrastructure charge of \$15.09 per ML (per annum for 25 years) on the additional right to the delivery of 100ML of water, the operator recovers, in present value terms, \$24,519 of revenue.

The maximum additional termination fee payable by the irrigator is \$24,519, assuming that termination occurs in year 1 and the additional infrastructure charge has not been paid for year 1. This equates to a multiple of 16 times the additional infrastructure charge (\$15.09).

As the additional termination fee is calculated as the present value of outstanding additional infrastructure charges (from the year of termination until the end of the contract term), the termination fee reduces over the term of the contract. Where termination occurs in the final year of the contract (year 25), the termination fee equals the final payment of the additional infrastructure charge.

The analysis assumes that in the year of termination, the additional infrastructure charge has not been paid.

| <b>TABLE 2 - calculation of additional infrastructure charge and additional termination fee</b> |                       |                       |                     |                     |
|---|-----------------------|-----------------------|---------------------|---------------------|
| <b>INPUTS</b>   |                       |                       |                     |                     |
| Expenditure on capital works (stage 1)  | \$25,000              |                       | Year 1              |                     |
| Expenditure on capital works (stage 2)  | \$25,000              |                       | Year 2              |                     |
| Contract term   | 25 Years              |                       |                     |                     |
| Total additional delivery (capacity/rights)   | 200ML                 |                       |                     |                     |
| Terminating irrigators additional delivery (capacity/rights)                                    | 100ML                 |                       |                     |                     |
| Terminating irrigators allocation of expenditure  | 50%                   |                       |                     |                     |
| Discount rate   | 4%                    |                       |                     |                     |
|   |                       |                       |                     |                     |
|   | <b>Year 1</b>         | <b>Year 2</b>         |                     |                     |
| Expenditure on capital works  | \$25,000              | \$25,000              |                     |                     |
|   |                       |                       |                     |                     |
| Present value capex (all customers)   | \$49,038              |                       |                     |                     |
| Terminating irrigator cost allocation   | 50%                   |                       |                     |                     |
| Present value capex (terminating irrigator)   | \$24,519              |                       |                     |                     |
|   |                       |                       |                     |                     |
|   | <b>Year 1</b>         | <b>Year 2</b>         | <b>Year 24</b>      | <b>Year 25</b>      |
| <b>Additional infrastructure charge (per ML delivery right)</b>                                 | \$15.09               | \$15.09               | \$15.09             | \$15.09             |
| ML of additional delivery rights  | 100                   | 100                   | 100                 | 100                 |
| Revenue from additional infrastructure charge   | \$1,509               | \$1,509               | \$1,509             | \$1,509             |
|   |                       |                       |                     |                     |
| Present value of revenue infra. charge  | \$24,519              |                       |                     |                     |
|   |                       |                       |                     |                     |
| <b>Additional termination fee</b>   | <b>Year 1</b>         | <b>Year 2</b>         | <b>Year 24</b>      | <b>Year 25</b>      |
| Year of termination*  |                       |                       |                     |                     |
| Year 1 (outstanding add. infra. charge)   | \$1,509               | \$1,509               | \$1,509             | \$1,509             |
| Additional termination fee equivalent multiple  | <b>\$24,519</b><br>16 |                       |                     |                     |
| Year 2 (outstanding add. infra. charge)   |                       | \$1,509               | \$1,509             | \$1,509             |
| Additional termination fee equivalent multiple  |                       | <b>\$23,930</b><br>15 |                     |                     |
| Year 24 (outstanding add. infra. charge)  |                       |                       | \$1,509             | \$1,509             |
| Additional termination fee equivalent multiple  |                       |                       | <b>\$2,960</b><br>2 |                     |
| Year 25 (outstanding add. infra. charge)  |                       |                       |                     | \$1,509             |
| Additional termination fee equivalent multiple  |                       |                       |                     | <b>\$1,509</b><br>1 |

\* assume add. infra. charge has not been paid in year of termination

## Appendix: Checklist for information provided in support of an application to the ACCC for approval of an additional termination fee

This list is not intended to cover all applications. It is to be used as a guide for applications only.

| Topic                          | Information   |
|--------------------------------|---|
| <b>Mandatory information</b>   |   |
|                                | Copy of the contract.   |
|                                | Details of the parties to the contract.   |
|                                | Such details of contracts entered into, and arrangements made, for the carrying out of capital works relating to the operator's irrigation network as are sufficient to confirm that the works have been, are being or are to be, carried out.          |
| <b>Recommended information</b> |   |
| Negotiation process            | Details of the negotiation process, including the number of meetings and information provided to the irrigator(s).  |
| Negotiation process            | Evidence that the irrigator has been consulted and does not have any issues with the application.   |
| Negotiation process            | Evidence that the irrigator has been made aware of the general effect of these rules (including being provided with a copy of the rules and relevant guides in a timely manner consistent with the negotiation process).                                |
| Negotiation process            | Evidence that the irrigator has been made aware of their maximum financial obligation should they terminate before the term of the contract ends.   |
| Assessment of capital works    | Copies of board approvals detailing the commencement of the program of capital works.   |
| Assessment of capital works    | Copies of contracts relating to the planning, design and construction of capital works.   |
| Assessment of capital works    | Copies of network service plans or other network planning documentation (internal or external).   |
| Assessment of capital works    | Evidence that the proposed program (or relevant part thereof) is deliverable within five years having regard to the required lead times, approval processes, resource constraints and the operators ability to deliver previous capital works programs. |

| <b>Topic</b>                     | <b>Information</b>   |
|----------------------------------|--|
| Additional infrastructure charge | Copies of board, government agency or regulatory approvals of the quantum and timing of expenditure.   |
| Additional infrastructure charge | Copies of any independent assessment of the quantum and timing of expenditure.   |
| Additional infrastructure charge | <p>A spreadsheet detailing the calculation of the additional infrastructure charge, including (but not limited to):</p> <ul style="list-style-type: none"> <li>• The timing of the expenditure on capital works.</li> <li>• Details of the engineering asset life or the rate of depreciation included for pricing purposes. Does it align with the term of the contract?</li> <li>• The structure of the additional infrastructure charge (e.g. fixed and variable charges).</li> <li>• Forecasts of demand associated with the charge (or charges in the case of a two-part fixed and variable charge).</li> <li>• The basis of the allocation of expenditure on capital works to each irrigator and how this relates to the additional infrastructure charge imposed on each irrigator.</li> <li>• The discount rate used to determine the present value of expenditure on capital works and the present value of revenue from the additional infrastructure charge.</li> <li>• Calculations to demonstrate that the present value of revenue from the imposition of an additional infrastructure charge over the term of the contract does not exceed the present value of expenditure on capital works (occurs within five years of contract inception). This condition applies in aggregate and for each terminating irrigator.</li> </ul> |
| Additional termination fee       | <p>A spreadsheet detailing the calculation of the additional termination fee, including (but not limited to):</p> <ul style="list-style-type: none"> <li>• all the information provided under section 6.2.1.3;</li> <li>• calculation to reflect the formula detailed in section 6.4.</li> </ul>   |
| Additional termination fee       | Where an additional infrastructure charge includes a variable component (e.g. per ML of water delivered), reconcile the additional infrastructure charge applied in the calculation of the additional termination fee (zero water deliveries) and the additional infrastructure charge imposed for the recovery of expenditure on capital works. If the additional infrastructure charge is 100 per cent fixed, the two should equate.   |