



Australian  
Competition &  
Consumer  
Commission

# Review of the Water Charge Rules Final Advice

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September 2016

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

First published by the ACCC 2016

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## Glossary

<b>Basin State</b>	means New South Wales, Victoria, Queensland, South Australia, or the Australian Capital Territory
<b>bulk water charge</b>	a charge payable for either or both the storage of water for, or the delivery of water to any of the following: <ul style="list-style-type: none"> <li>• infrastructure operators</li> <li>• other operators of reticulated water systems</li> <li>• other persons prescribed by the regulations (including private diverters and environmental water holders)</li> </ul>
<b>bulk water service</b>	one or more of the following: <p>(a) a service that is provided for the storage of water that is primarily stored on-river;</p> <p>(b) a service that is provided for the delivery of water that is primarily delivered on-river.</p>
<b>bulk water supplier</b>	a person who imposes a bulk water charge for a bulk water service
<b>infrastructure charge</b>	a charge of a kind referred to in paragraph 91(a), (b) or (d) of the Act but does not include: <ul style="list-style-type: none"> <li>• fees in relation to transformation applications (to which rule 13 of the Water Market Rules 2009 applies)</li> <li>• a termination fee</li> </ul>
<b>infrastructure operator (IO)</b>	any person or entity who owns or operates infrastructure for one or more of the following purposes: <ul style="list-style-type: none"> <li>• the storage of water</li> <li>• the delivery of water</li> <li>• the drainage of water</li> </ul> for the purpose of providing a service to someone who does not own or operate the infrastructure.
<b>infrastructure service</b>	access, or a service provided in relation to access, to water service infrastructure and includes the storage, delivery, drainage and taking of water
<b>irrigation infrastructure operator (IIO)</b>	an infrastructure operator who operates water service infrastructure for the purpose of delivering water for the primary purpose of being used for irrigation
<b>irrigation network</b>	The water service infrastructure of an irrigation infrastructure operator. A network (typically open channels, pipes and/or natural waterways) used to convey water from a water source through customer service points to customer properties—an irrigation network may be either a gravity-fed network (typically using channels and / or natural waterways) or a pressurised network (using pipes)
<b>irrigation network charge</b>	a charge levied by an IIO in relation to their irrigation network
<b>irrigation right</b>	a right that a person has against an IIO to receive water which is not a water access right or a water delivery right—an irrigation right can usually be transformed into a water access entitlement

<b>planning and management charge</b>	a charge for water planning and water management activities
<b>private diverter</b>	an irrigator that extracts water directly from a natural watercourse (either a regulated or unregulated river)
<b>regulated water charge</b>	includes an: <ul style="list-style-type: none"> <li>• infrastructure charge</li> <li>• planning and management charge</li> <li>• termination fee</li> </ul> See section 91 of the Act for a full definition.
<b>termination</b>	when a person terminates or surrenders the whole or part of a right of access to the infrastructure operator's network, typically by terminating water delivery right
<b>termination fee</b>	a fee that may be imposed by an infrastructure operator when a customer terminates or surrenders their right of access
<b>total network access charge (TNAC)</b>	the amount on which the termination fee multiple is applied in order to calculate a maximum termination fee. The TNAC is the sum of all amounts that would have been payable for access to an operator's irrigation network by an irrigator in respect of a full financial year if termination or surrender had not occurred, excluding: <ul style="list-style-type: none"> <li>• any amount calculated by reference to the amount of water actually delivered to the terminating irrigator (that is, variable irrigation network charges)</li> <li>• any amount in respect of a service for the storage of water</li> <li>• connection/disconnection fees</li> <li>• any amount that exceeds the cost of providing irrigators with access to an operator's irrigation network</li> <li>• fees under ACCC approved contracts</li> </ul>
<b>transformation</b>	the process by which an irrigator permanently transforms their entitlement to water under an irrigation right against an IIO into a water access entitlement held by the irrigator (or anybody else other than the IIO), thereby reducing the share component of the operator's water access entitlement
<b>water access entitlement</b>	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
<b>water access entitlement trade</b>	the change of ownership and / or location of a water access entitlement (including through the establishment of a tagging arrangement)
<b>water access right</b>	any right conferred by or under a law of a state to hold and / or take water from a water resource, and includes: <ul style="list-style-type: none"> <li>• stock and domestic rights</li> <li>• riparian rights</li> <li>• a water access entitlement</li> <li>• a water allocation</li> </ul>
<b>water allocation</b>	the specific volume of water allocated to water access entitlements in a given water accounting period
<b>water allocation trade</b>	the change of ownership and / or location of a particular volume of water allocation

<b>Water Charge (Infrastructure) Rules 2010 (WCIR)</b>	water charge rules for fees and charges payable to an infrastructure operator for: <ul style="list-style-type: none"> <li>• bulk water charges</li> <li>• access to the irrigation infrastructure operator’s network or services provided in relation to that access</li> <li>• matters specified in regulations made for the purposes of subsection 91(1)(d) of the <i>Water Act 2007</i></li> </ul>
<b>Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)</b>	rules relating to charges for water planning and water management activities in the Murray-Darling Basin and requiring the publication of information on the details of the charge and the process for determining the charge
<b>Water Charge (Termination Fees) Rules 2009 (WCTFR)</b>	water charge rules for fees or charges payable to an IIO in relation to terminating access to an operator’s irrigation network (or services relating to such termination), or surrendering a right to delivery of water through the operator’s irrigation network
<b>water delivery right</b>	a right to have water delivered by an infrastructure operator—a water delivery right typically represents some or all of the holder’s right of access to an irrigation network (there may also be a right to drainage), and can be terminated
<b>Water Market Rules 2009</b>	rules dealing with actions or omissions of an IIO that prevent or unreasonably delay transformation arrangements or trade
<b>water service infrastructure</b>	infrastructure owned or operated by an infrastructure operator for one or more of the following purposes: <ul style="list-style-type: none"> <li>• the storage of water</li> <li>• the delivery of water</li> <li>• the drainage of water</li> </ul> for the purpose of providing a service to someone who does not own or operate the infrastructure.

## Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ADJR Act	<i>Administrative Decisions Judicial Review Act 1977 (Cth)</i>
The Act	The <i>Water Act 2007 (Cth)</i>
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
AER	Australian Energy Regulator
AWBA	Australian Water Brokers Association
BRC	Border Rivers Commission
BWCOP	Basin Water Charging Objectives and Principles
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CEWH	Commonwealth Environmental Water Holder
CICL	Coleambally Irrigation Cooperative Limited
CIT	Central Irrigation Trust



CSO	Community Service Obligation
DNRM	Queensland Department of Natural Resources and Mines
DPI Water	NSW Department of Primary Industries—Water (formerly NSW Office of Water)
ESCOSA	Essential Services Commission of South Australia
ESCV	Essential Services Commission of Victoria
EWON	Energy and Water Ombudsman of NSW (EWON)
EWOOSA	Energy and Water Ombudsman of SA
EWOQ	Energy and Water Ombudsman of Queensland
EWOV	Energy and Water Ombudsman of Victoria
GL	Gigalitre (one billion litres)
GMW	Goulburn-Murray Water
IPART	Independent Pricing and Regulatory Tribunal (NSW)
IIO	Irrigation infrastructure operator
LGAQ	Local Government Association of Queensland
LMW	Lower Murray Water
MDB	Murray-Darling Basin
MDBA	Murray-Darling Basin Authority
MI	Murrumbidgee Irrigation Limited
MIL	Murray Irrigation Limited
ML	Megalitre (one million litres)
NFF	National Farmers' Federation
NIBM	Narromine Irrigation Board of Management
NIC	National Irrigators' Council
NSP	Network Service Plan
NSW	New South Wales
NSWIC	New South Wales Irrigators' Council
NWI	National Water Initiative
OBPR	Office of Best Practice Regulation
OEH	NSW Office of Environment and Heritage
PVWUA	Peel Valley Water Users Association
QCA	Queensland Competition Authority
QTDEWS	Queensland Treasury and Department of Energy and Water Supply
QFF	Queensland Farmers' Federation
RAB	regulatory asset base
RIT	Renmark Irrigation Trust
RMO	River Murray Operations
SA	South Australia

SA Third Party Access Act	<i>Water Industry (Third Party Access) Amendment Act 2015</i>
SDL	Sustainable Diversion Limit
TNAC	Total network access charge
The Panel	The Independent Expert Panel (reviewing the <i>Water Act 2007</i> )
RAB	Regulatory Asset Base
RMO	River Murray Operations
SAMI	South Australian Murray Irrigators
TNAC	Total Network Access Charge
VEWH	Victorian Environmental Water Holder
VFF	Victorian Farmers' Federation
WAE	Water access entitlement
WCIR	Water Charge (Infrastructure) Rules 2010
WCPMIR	Water Charge (Planning and Management Information) Rules 2010
WCTFR	Water Charge (Termination Fees) Rules 2009
WMI	Western Murray Irrigation
WMR	Water Market Rules 2009
WPM	Water Planning and Management

## Summary

The Australian Competition and Consumer Commission (ACCC) has reviewed the three sets of water charge rules made under section 92 of the *Water Act 2007 (Commonwealth)* (the Act) at the request of the Minister. These are:

- The Water Charge (Infrastructure) Rules 2010 (WCIR), which set requirements relating to the charges payable to infrastructure operators for infrastructure services.
- The Water Charge (Termination Fees) Rules 2009 (WCTFR), which regulate the maximum amount of termination fee payable to an operator when a customer terminates access to water service infrastructure.
- The Water Charge (Planning and Management Information) Rules 2010 (WCPMIR), which place information requirements on persons determining charges for water planning and management activities.

The rules were introduced at a time of significant reform within the Murray-Darling Basin (MDB) and have now been in place for around five years. During this time, charging practices and water markets in the MDB have continued to evolve and develop.

The ACCC has found that there are opportunities to streamline the rules and reduce regulatory costs for infrastructure operators. At the same time, customer protections and pricing transparency can be strengthened, which will help ensure a level playing field for irrigators and other water market participants. Improvements can also be made to help ensure the rules remain relevant and robust as the rural water sector continues to evolve—particularly in terms of ensuring that the rules are able to continue to function effectively as operators’ customer bases change over time, and as innovative charging arrangements are introduced.

### Overview of the ACCC’s Final Advice

The ACCC’s advice is targeted at promoting efficient and sustainable use of water infrastructure, facilitating effective water markets and improving transparency of charging arrangements, while addressing the need to reduce the regulatory burden on the sector. The proposed amendments to the water charge rules in the Final Advice seek to achieve a number of outcomes, as set out below.

#### *Streamlining the application of the rules to ensure a consistent approach*

The proposed water charge rules will ***streamline the application of the rules and ensure a consistent approach*** by:

- ensuring rules apply consistently across infrastructure operators by moving away from the tiered and fragmented approach which currently relies on operator ownership and customer characteristics.
- consolidating the rules into a single instrument.

Currently, the application of the water charge rules depends on an operator’s size, ownership status and the purpose for which they deliver water. This means the level of regulation an operator faces can change substantially over time. This arrangement is not robust to likely future developments in rural water markets, such as the increase in non-irrigation customers and the formation of new operators. Also, current regulatory requirements are spread over three sets of rules, making it difficult for operators and their customers to understand how the rules work together as a whole.

The ACCC proposes removing unnecessary distinctions between infrastructure operators to ensure that there is a consistent level of regulation of charges across the MDB. This will help ensure that all

customers, regardless of their infrastructure operator, industry or region within the MDB, are afforded protection from the potential for discriminatory or distortionary charging practices (see section 5.3), and that there is adequate transparency in charging arrangements (see section 5.4). This also ensures that irrigators will continue to receive these protections as the make-up of operators' customer bases changes (for example, as environmental water holders and commercial entities play a bigger role in the water market), and as operators continue to innovate in terms of the services they provide and their charging arrangements. The ACCC considers that promoting consistency in these fundamental customer protections (while still requiring charge approvals / determinations where necessary) appropriately maintains a measured approach to regulation in terms of the regulatory costs that infrastructure operators face (see sections 5.2, 5.5, 5.7, 5.10 and 6.1).

The Final Advice also proposes to combine the three sets of water charge rules (see section 4.3.1). This will streamline the operation of the rules and remove unnecessary duplication and inconsistency, making it easier for stakeholders to understand their obligations and protections under the rules.

### *Improving pricing transparency and customer engagement*

The proposed water charge rules will **improve pricing transparency and customer engagement** by:

- harmonising information requirements for infrastructure operators and other entities in relation to infrastructure charges and planning and management charges.
- ensuring Schedule of Charge requirements are clear and specific.
- requiring operators to provide customers with information on:
  - how charges are decided
  - how a customer can be involved in processes for deciding charges
  - how termination fees are calculated
  - how charges incurred by an operator are passed through to customers
  - how a customer can make an enquiry or seek to resolve a dispute about charges
- removing the requirement to produce Network Service Plans.

Under the current rules, different types of entities face significantly different requirements about the information they need to provide to customers. For example, Schedule of Charges requirements for infrastructure operators are phrased in broad and general terms that make it difficult for operators and their customers to have confidence that all the required information has been provided. In contrast, entities such as water authorities that determine planning and management charges have specific requirements for providing information about charges they levy. Further, larger member-owned operators and medium-sized non-member-owned operators (known as 'Part 5 operators') are required to prepare Network Service Plans (NSPs) and network consultation papers, which are both highly prescriptive and costly to provide. Finally, large non-member-owned operators ('Part 6 operators') are required to undertake consultation and provide highly detailed cost and charge information to the regulator in the course of having their charges approved or determined.

Despite these varied information requirements, the current rules do not clearly require operators to provide information that is important for customer decision-making: in particular, to clearly set out how charges incurred by the operator are 'passed through' to customers, or explain termination fee calculations prior to a customer making a decision to terminate their access to an operator's network. Also, the rules do not require operators to inform customers about how they decide on the infrastructure charges they levy, or how a customer can seek to resolve a dispute about a charge.

The ACCC's advice is that information requirements applying to infrastructure charges and planning and management charges should be harmonised as far as possible, and should make clear the information required. This improved consistency and specificity will make it easier for operators to ensure they have complied, which will reduce the regulatory burden of these requirements. It will also assist customers to better understand their operators' charging arrangements. The proposed amendments will also better facilitate comparisons across infrastructure operators and assist water users to understand how charges they face might change if their circumstances change (e.g. if they trade, terminate or transform).

The ACCC considers that this greater transparency can be provided while ensuring that operators have sufficient flexibility in how they set their charges and charging arrangements, and without imposing a significant regulatory burden on particular infrastructure operators. Therefore, the ACCC's advice is that Part 5—NSPs—should be repealed (see section 5.5). The ACCC's assessment is that NSPs are a costly and prescriptive way to facilitate customer awareness of, and participation in, operators' processes for setting charges. This will result in substantial reductions in regulatory costs for current Part 5 operators.

The Final Advice proposes amendments to ensure that *all* customers (not only customers of Part 5 operators) are informed about their operator's process for determining charges and termination fees, and are aware of the avenues for engaging in these processes (see sections 5.4.1, 6.2.1, 6.3). This means that the level of transparency for customers (including customers of existing Part 5 operators) will increase, which will help customers to make better decisions regarding the tradeable water rights they hold.

The proposed amendments will also provide greater transparency about 'pass-through' of charges incurred by operators and ensure that such costs cannot be passed through in a way that unreasonably inflates termination fees or in a way that could distort irrigator decision-making (see section 5.13).

The ACCC considers that these proposed amendments will significantly improve transparency of water charging arrangements and customers' understanding of charging processes. This will reduce information asymmetries between operators of monopoly infrastructure and their customers, improve customer decision-making and facilitate the efficient functioning of water markets and use of water resources and infrastructure.

#### ***Ensuring ACCC charge approvals / determinations only where necessary***

The proposed water charge rules will ***ensure ACCC charge approvals / determinations only where necessary*** by:

- modifying the criteria for Part 6 to apply only:
  - to operators who provide bulk water services or infrastructure services necessary for State water sharing arrangements (and levy infrastructure charges in relation to these services); and
  - where State law does not provide for the regulation of the operator's charges in a way that is consistent with the rules.
- ensuring, via the above modifications to the Part 6 criteria, that the rules are able to regulate inter-jurisdictional infrastructure operators (e.g. the MDBA) if they levy infrastructure charges.
- including an exemption process in the rules.

Part 6 of the current WCIR provides for a regulator to approve or determine the infrastructure charges of certain operators. The key function of this kind of regulatory oversight is to ensure, at an aggregate level, that an operator's charges recover no more than the prudent and efficient costs (where those costs are not met by other sources such as government funding). Whether an operator needs to have its charges set under Part 6 is currently determined by a combination of the operator's size and ownership characteristics. Given this, the current rules do not provide for regulatory oversight of costs and cost recovery for small to medium sized operators or member-owned operators. This is despite the fact that the degree of monopoly power, and therefore lack of incentives to ensure only prudent and efficient costs are recovered, may be just as great for these operators as for operators who do meet the current criteria.

The ACCC advises that regulatory oversight in the form of charge approvals / determinations should apply where there is the least meaningful competitive pressure. In the ACCC's view, this occurs where operators provide bulk water services to water access right holders or provide infrastructure services to give effect to water sharing arrangements between Basin States. Therefore, the Final Advice proposes amendments to the criteria for Part 6 to capture these situations. This amended approach will also ensure that there will be regulation over any infrastructure charges levied by an interjurisdictional infrastructure operator (such as the Murray-Darling Basin Authority (MDBA)). This approach will also include the ability for the ACCC to exempt an operator who meets the criteria from the full application of Part 6 where the ACCC is satisfied that the application of those requirements would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles (BWCOP).

Also, the current rules apply despite the fact that most Basin States already have in place some kind of process for approving or determining the charges of monopoly operators. This means that there is potential for duplication of regulatory regimes, particularly for operators who provide infrastructure services both inside and outside the MDB, or who provide both rural and urban services (as the rules cannot regulate urban water charges).

The Final Advice therefore proposes to move away from charge approvals / determinations under the water charge rules, where this role can and will be effectively performed at the Basin State level. Under this approach the water charge rules will act as a regulatory 'fall-back' when a Basin State cannot or will not require the approval / determination of these operators' charges in a manner that is likely to ensure only prudent and efficient costs are recovered. This approach recognises that the scope of the water charge rules is limited to charging arrangements within the rural MDB, and the role and existing processes that Basin State regulators have in the regulation of infrastructure operators across their jurisdictions (both within and outside the MDB). Thus, the Final Advice seeks to remove unnecessary duplication in regulatory effort and the costs associated with having dual processes for approvals / determinations operating within a State, while providing certainty for water users that an appropriate level of scrutiny *will* be applied to all operators who possess the highest degree of monopoly power (see sections 5.6, 5.9 and 5.12).

#### ***Addressing charging arrangements that unreasonably favour some customers over others***

The proposed water charge rules will ***address charging arrangements that unreasonably favour some customers over others*** by:

- strengthening protections against unreasonable differences in charges between customers
- preventing unreasonable limitations on infrastructure service availability
- improving regulation of operator distributions to ensure distributions (including distributions

of water) are made in an equitable manner

- ensuring that maximum termination fees are set in proportion to a terminating customer's right of access.

The ACCC has long recognised that most infrastructure operators within the MDB have a degree of monopoly power over their customers. As such, customers are at risk from a variety of charging arrangements that favour some customers, or customer groups, over others.

The existing WCIR contain a non-discrimination rule that requires operators not to differentiate between customers who hold irrigation right and those who do not (unless differences in charges reflect underlying cost differences). This arose in the context of the newly-formed water market rules, which regulate the process by which an irrigator can 'transform' their irrigation right and trade outside an operator's network. It was recognised that member-owned operators have incentive to dissuade customers from trading externally, and that therefore there was a risk of transformed customers (and others who do not hold irrigation right) being disadvantaged in operators' charging arrangements and trading policies. At the time the WCIR were formed, the ACCC considered that this type of discriminatory behaviour posed the greatest risk to customers. As such, the current rules only apply to member-owned operators and only prohibit charge discrimination in relation to whether customers hold irrigation right or not.

In the course of monitoring regulated water charges since the rules were first made the ACCC has found that many operators currently differentiate between customers in various other ways, for example by:

- limiting customers' choice of infrastructure services according to the purpose for which customers use water
- applying tiered tariff structures that advantage larger customers
- providing targeted discounts without notifying customers generally (despite such notice being currently required by the rules)
- providing customised services to environmental water holders which are not available to all customers.

The ACCC considers it is appropriate for the water charge rules to place limits on how infrastructure operators are able to exercise their market power over irrigators and other customers. However, while the rationale for the existing non-discrimination rule remains valid, the ACCC believes it does not provide sufficient protection for irrigators and other customers. Also, due to the targeted nature of the current rule, it does not provide for the range of charging practices which have and may continue to emerge.

The ACCC's advice is that the rules should not allow charge differences or restrictions on the availability of infrastructure services unless they are reasonable in the circumstances. Therefore, the Final Advice proposes amendments to strengthen the current non-discrimination provisions to better give effect to the general principle that customers should be treated in a non-discriminatory manner.

The ACCC also proposes extending these protections to apply to customers of all infrastructure operators, not only member-owned operators (see section 5.3.1). The ACCC considers that this kind of 'level playing field' is consistent with, and will contribute to the achievement of, the Basin Water Charging Objectives and Principles (BWCOP). The ACCC also considers that the need for strengthened non-discrimination rules will only increase in the future as innovative infrastructure services or charging arrangements are introduced and as customer characteristics change over time.

The ACCC considers that, in light of its proposed strengthening of the non-discrimination rules and the introduction of a ‘reasonableness test’, it is appropriate to remove the right of private action from the rules. This change means that the ACCC would be the sole entity who may take action in response to a contravention of the rules. The ACCC considers that this provides a balance of ensuring customers are protected while mitigating risks to operators

Amendments are also proposed to improve the operation and effectiveness of the rules relating to distributions and termination fees, which will contribute to ensuring irrigators and other water users are adequately protected against unreasonable charging practices (see sections 5.7 and 6.2.1). Proposed amendments relating to operator distributions will provide for operators to make ‘standard distributions’ which suitably reflect customers’ contributions or share of an operator’s network (as applicable), thereby ensuring that distributions cannot be an avenue for inappropriately favouring some customers over others. Proposed amendments to the calculation of the maximum termination fees will address the potential for operators to inflate termination fees for smaller customers through the structure of their tariffs.

### *Facilitating the efficient functioning of water markets*

The proposed water charge rules will **facilitate the efficient functioning of water markets** by:

- preventing certain charges being applied to trade.
- ensuring that operators’ administrative charges levied in relation to trade and termination only reflect the reasonable and efficient transaction costs of trade / termination processing
- providing incentives to develop markets for water delivery rights.

There are important relationships between the level, structure and imposition of regulated water charges, tradeable water rights and water markets more generally. The ACCC considers that it is imperative that the water charge rules properly account for these interactions. However, other than via the limited non-discrimination rule, the current rules do not directly address the effect of charging arrangements on costs and incentives to participate in water markets.

The Final Advice proposes amendments that seek to ensure that infrastructure charges do not distort water markets or act as a barrier to trade by prohibiting the levying of infrastructure charges on trade, or as a condition of trade, in most circumstances (see section 5.3.2). Further, the current requirement (in the water market rules) that administrative charges for processing transformation should reflect the reasonable and efficient costs of processing transformations should also apply (via the water charge rules) to where operators process trades and terminations. The Final Advice also promotes water delivery right trade as an alternative to terminating those rights and paying a termination fee (see section 6.2.2). These amendments will facilitate the efficient functioning of water markets by improving market accessibility (particularly in relation to trade of water delivery rights), reducing ‘transaction costs’ in the form of trade-related charges and ensuring that water market participants are not unfairly disadvantaged in charging arrangements.

These recommended improvements are supported by other amendments proposed in the Final Advice. For example, improved pricing transparency will promote more informed and timely water trading decisions (section 5.4), and the enhanced non-discrimination provisions will contribute to removing distortionary charging arrangements that may create artificial barriers or disincentives for particular customers or groups of customers to participate in water markets (see section 5.3.1).



### ***Improving the interaction of the rules with other relevant legislation***

The proposed water charge rules will ***improve the interaction of the rules with other relevant legislation*** by:

- providing a targeted exemption from the proposed non-discrimination rule for infrastructure charges arising from regimes under Part IIIA of the CCA.
- repealing rule requirements relating to planning and management activity cost information.
- reserving the application of Part 6 as a ‘regulatory fall-back’ for where adequate State processes are not in place.

The water sector is subject to a range of industry-specific as well as general legislative requirements. The ACCC has sought opportunities throughout the review to identify ways to ensure that the water charge rules appropriately interact with other legislative requirements within the water sector. In particular, the Final Advice acknowledges that certain features of regimes under Part IIIA of the *Competition and Consumer Act 2010* (CCA)—which facilitate third-party access to monopoly infrastructure—in combination with the pricing transparency requirements in the water charge rules will ensure that customers generally are protected from unreasonable charging arrangements. The Final Advice therefore proposes a limited exemption from the proposed non-discrimination rule, for access arrangements or regimes pursuant to Part IIIA of the CCA (see section 5.11).

The ACCC supports the principle that planning and management charges should be cost-reflective. However, the ACCC considers that the water charge rules are not the most appropriate instrument for ensuring that Basin State governments achieve their National Water Initiative (NWI) commitment in relation to annual reporting on cost recovery for WPM activities. The Final Advice therefore proposes to simplify the requirements relating to the information that must be published about planning and management charges (see chapter 7).

The ACCC also recognises that Basin States have established regimes and legislation for the approval / determination of certain operator’s infrastructure charges. As described above, the Final Advice proposes that the approval / determination provisions within the water charge rules should be reserved for where such regulation at the Basin State level does not or cannot provide for the necessary level of regulatory oversight (see sections 5.6 and 5.9).

#### **Development of the Final Advice**

The ACCC’s review has been guided by the terms of reference set out in the Minister’s request for advice (the terms of reference are set out at Attachment A). More generally, the ACCC has considered the extent to which proposed rule amendments and recommendations promote the achievement of the BWCOP.

The ACCC’s Final Advice reflects the feedback from extensive stakeholder consultation, including written submissions to the ACCC’s Issues Paper and Draft Advice, public forums and targeted stakeholder meetings. Where relevant, the ACCC has also taken into account the views put forward in the 2014 review of the Water Act and drawn from the information gathered through six years of monitoring regulated water charges and compliance with the rules. The feedback and information received has been used to ensure that the ACCC’s advice is robust and appropriately takes into account historical, current and future charging and governance arrangements of operators, as well as other relevant circumstances within the water sector.

The ACCC released its Draft Advice for public consultation in November 2015. Stakeholder feedback and the substantial amount of new information received since the Draft Advice have resulted in

amendments to the ACCC's rule advice. This process has helped the ACCC refine its advice and achieve a better balance between improving protections for customers and incentivising charging practices which promote effective water markets, and minimising regulatory costs to operators.

Key positions that have been revised since the Draft Advice to better address stakeholder concerns or in light of new information provided are:

- Re-framing of the proposed non-discrimination rule to apply a general 'reasonableness test', together with a list of factors to be taken into account when considering what is reasonable. This new approach is similar to the current Basin Plan water trading rules approach to the trade of water delivery rights and takes into account the concerns of stakeholders that the approach proposed in the Draft Advice was too rigid and would prohibit practices or charging arrangements that are not discriminatory or otherwise problematic.
- Providing for operators to be able to levy infrastructure charges in relation to trade where they provide certain infrastructure services in relation to traded water access rights. This recognises that an operator may incur costs in providing certain services in respect of traded water access rights which they may not adequately be able to recover after a trade.
- Revising Schedule of Charges information requirements to provide clear additional exemptions for certain charge types.
- Amending the criteria for Part 6 to make clear that infrastructure operators that do not provide bulk water services or infrastructure services needed to give effect to State water sharing arrangements are not captured (e.g. infrastructure operators who only provide off-river infrastructure services would not meet the Part 6 criteria).
- Clarifying the scope of what can be considered a 'distribution' and expanding the definition of 'standard distribution' to reduce the circumstances where Part 7 may apply.
- Streamlining of the proposed 'pass-through rules' to make compliance simpler while maintaining the policy intent of achieving pricing transparency in relation to such charges.
- Removing the proposed link between compliance with the 'pass-through rules' and the ability to levy a termination fee using a 10x multiple.
- Removing the right of private action—this will ensure that operators will not incur the risks or legal costs of action by private parties (e.g. aggrieved customers) to recover amounts of loss or damage in relation to a contravention of the rules. The ACCC will be the only entity able to take action for a contravention of the rules, and will continue to work closely with stakeholders to develop clear guidance material and ensure a culture of compliance.

The following section, 'ACCC rule advice and recommendations', sets out how the ACCC's rule advices have been revised since the Draft Advice to take account of new information and additional stakeholder views. The revisions listed above are highlighted in blue in the table.

The Final Advice also takes account of a range of concerns expressed by stakeholders during consultation on issues outside the scope of the water charge rules. These include concerns about transparency of water markets, unbundling of water rights, the effect of the Basin Plan and water quality concerns. Where appropriate, the ACCC has made Recommendations (but not rule advice) in relation to these matters (see chapter 8).

The ACCC has also updated its estimates of the change in regulatory burden in light of new information from stakeholders, and to reflect revisions made to the proposed rule amendments (from the Draft Advice to the Final Advice). The ACCC estimates the change in regulatory burden that would result from the adoption of the proposed rule amendments is a net reduction of approximately

\$70 000 per annum. This has been estimated in accordance with process required, and guidelines produced, by the Office of Best Practice Regulation (OBPR) (see chapter 9).

The ACCC is committed to continuing to work closely with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from this review. The ACCC's approach to compliance and enforcement of the rules is designed to educate stakeholders about their rights and obligations under the rules and avoid unnecessary costs for infrastructure operators. As in the past, the ACCC will generally seek to resolve instances of potential or actual non-compliance administratively. The ACCC will also work with operators, irrigators and other stakeholders in updating its guidance on the rules, to ensure that future guidance is clear and concise and meets stakeholders' needs.

The ACCC considers that this review is an important contribution to the regulation of the rural water sector, as it will help ensure that the intent of the rules remain relevant and fit-for-purpose as charging practices and water markets in the MDB continue to evolve. It has also provided stakeholders with an opportunity to comment on the efficiency of the rules, both in terms of the extent to which they are achieving the original policy intent and in terms of providing feedback to improve the operation and implementation of the rules. The ACCC thanks all stakeholders who have participated in the review of the water charge rules and the development of its Final Advice.

## ACCC rule advice and recommendations

**Substantial changes** are highlighted in blue in the table below. Additional, **less substantial changes** to the ACCC’s advice appear in green. **New rule advices / recommendations** are highlighted in purple.

Rule advice	Changes since Draft Advice
<b>Chapter 4—general matters</b>	
<p><b>Rule advice 4-A</b> (section 4.3.1)</p> <p>The three sets of water charge rules:</p> <ul style="list-style-type: none"> <li>• Water Charge (Infrastructure) Rules 2010 (WCIR)</li> <li>• Water Charge (Termination Fees) Rules 2009 (WCTFR)</li> <li>• Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)</li> </ul> <p>should be combined into a single instrument by incorporating the relevant provisions of the WCTFR and WCPMIR into the WCIR and renaming this as the Water Charge Rules. The Water Market Rules 2009 (WMR) should not be combined with the water charge rules. This rule advice affects all three sets of water charge rules (WCIR, WCTFR and WCPMIR).</p>	<b>No change<sup>1</sup></b>
<p><b>Rule advice 4-B</b> (section 4.3.1)</p> <p>The proposed single set of water charge rules should apply to ‘regulated water charges’ as set out in the Act and Regulations, with separate definitions for:</p> <ul style="list-style-type: none"> <li>• <i>infrastructure charge</i>—corresponding with the definition of ‘regulated charge’ in the WCIR.</li> <li>• <i>planning and management charge</i>—corresponding with the definition of ‘regulated charge’ in the WCPMIR, but limited to such charges determined by or on behalf of an agency of the Commonwealth or an agency of a State excluding charges determined by a local government body.</li> <li>• <i>termination fee</i>—corresponding with a charge allowed for under the current WCTFR rule 6 or rule 8 (proposed rule 71).</li> </ul> <p>This rule advice is reflected throughout the proposed Water Charge Rules, and terms are defined in Part 1, rule 3.</p>	<b>No change</b>
<p><b>Rule advice 4-C</b> (section 4.5)</p> <p>The private right of action (to recover loss or damage resulting from a breach of the rules) which currently applies to the Water Charge (Infrastructure) Rules 2010 (WCIR) should be removed, and should not apply to the water charge rules more generally.</p>	<b>Substantial change</b> The Draft Advice recommended <i>extension</i> of private right of action

<sup>1</sup> Where the draft and final rule advice / recommendation differs due only to the use of acronyms or other non-substantive changes, this has been marked as ‘no change’.

<p>This rule advice is implemented by the repeal of rule 57 of the current WCIR.</p>	<p>to all water charge rules. The Final Advice recommends removal of private right of action entirely.</p>
<p><b>Chapter 5—Water Charge (Infrastructure) Rules</b></p>	
<p><b>Rule advice 5-A</b> (section 5.3.1)  The rules should be amended such that Part 3 applies to all infrastructure operators instead of only to member-owned operators.  This rule advice is implemented in rule 10 and rule 10A of the proposed Water Charge Rules.</p>	<p><b>No change</b></p>
<p><b>Rule advice 5-B (replaces draft rule advices 5-B and 5-C)</b> (section 5.3.1)  The rules should be amended to expand the current limited protections in rule 10 to prohibit infrastructure operators from unreasonably levying different charges (including different rates or discounts) for an infrastructure service or unreasonably restricting the availability of infrastructure services it offers.</p> <p><i>Factors to be taken into account</i></p> <p>This rule should also include a non-exhaustive list of factors to be taken into account when deciding whether a particular difference in charges or restriction on the availability of infrastructure services is reasonable, as follows:</p> <ol style="list-style-type: none"> <li>a) The necessary infrastructure required to provide the infrastructure service, including any capacity constraints in general, in applicable areas or at particular times;</li> <li>b) The costs to the infrastructure operator of providing an infrastructure service, including the extent to which differences in charges for the service reflect differences in the estimated costs of providing the service in different circumstances;</li> <li>c) The extent to which different infrastructure charges are applied based on the ratio of a customer’s actual usage of infrastructure services relative to the customer’s right of access to the operator’s water service infrastructure;</li> <li>d) Payment of fees or charges of the type described in section 91 of the <i>Water Act 2007</i> [regulated water charges];  <i>Note: this replicates Basin Plan water trading rule 12.29(1)(e).</i></li> <li>e) The extent to which a difference in charges reflects a Community Service Obligation provided by a Basin State;</li> <li>f) Where a discount is provided for an infrastructure service to customers affected by hardship such as a natural disaster (e.g., flood, fire or drought), whether: <ol style="list-style-type: none"> <li>i. the discount is appropriate in relation to the kind of hardship;</li> <li>ii. the discount appropriately reflects the duration and scope of the hardship;</li> <li>iii. the operator specifies reasonable circumstances for the discount, and the discount applies to all customers in those</li> </ol> </li> </ol>	<p><b>Substantial change</b></p> <p>The Draft Advice recommended prohibiting all differences in charges or limits on service availability on <i>five grounds</i><sup>2</sup>, except where differences in charges reflected differences in costs, or where one of the targeted exemptions applied.</p> <p>The Final Advice proposes instead requiring that any differences in charges / restrictions on service availability must be <b>reasonable</b>, and provides a list of factors that should be taken into account when determining what is ‘reasonable’.</p> <p>Further, ‘prudent discounts’ and limiting availability of a service to be available only to customers using water for stock or domestic purposes are deemed to be ‘reasonable’.</p> <p>Exemption for charges arising under Part IIIA arrangements</p>

<sup>2</sup> The five grounds recommended for this rule in the Draft Advice were: (i) the purpose for which water has been, is, or will be, used; (ii) whether a tradeable water right has been traded or transformed; (iii) the holding, volume or use of a tradeable water right or separate location-related right; (iv) whether there is an association between a separate location-related right and a water access right; (v) the area of land owned or occupied.

circumstances;

- g) For an infrastructure operator whose infrastructure charges are approved or determined under Part 6, or are otherwise approved or determined by a Basin State Agency, whether there is an established transition path to a full cost recovery or upper bound pricing charge level for particular customers / classes of customers;
- h) The existence of any pre-existing contracts setting out a specific infrastructure charge, the terms on which such contracts can be amended and whether any amendments reduce unreasonable charge differences or limitation of infrastructure services;
- i) Whether it is reasonably necessary for a customer to hold a particular type of tradeable water right or separate location-related right, or obtain other infrastructure services, in order to receive an infrastructure service;  
*Note:* An example is where a person must have water allocation available (e.g. under an irrigation right or water access right) in order to be able to have water delivered.
- j) Whether an operator provides water to a customer other than in relation to a volumetric irrigation right or a water access right held by the customer;
- k) The extent to which the operator’s charges are necessary to comply with the proposed pass through rules (rule 9A).
- l) The need to comply with a requirement under a law of a State to limit the availability of a service;  
*Note:* An example is where an infrastructure operator is required to limit delivery of water to customers who hold non-volumetric rights (e.g. non-volumetric stock and domestic rights) in order to give effect to state-mandated water restrictions during a period of drought.

See also rule advice 5-Y.

This rule should provide that a difference in charges arising from the operator offering a **prudent discount** is taken to be reasonable.

#### *Definitions*

For this rule, the term “prudent discount” should be defined based on the following:

A prudent discount is where an infrastructure operator offers an infrastructure service at a discounted **rate to** a particular customer or group of customers which can reasonably be expected to result in charges for the infrastructure operator’s other customers being lower than they would otherwise have been. This includes where an operator credibly believes that a customer or group of customers would not obtain infrastructure services at the standard charge for that infrastructure service, but would, with the provision of a discount, obtain infrastructure services and pay charges that would contribute towards the operator’s fixed costs.

#### *Exemptions*

The rules should provide a restriction of a kind where an operator limits the availability of an infrastructure service to customers only using water for stock or domestic purposes is taken to be reasonable.

As per rule advice 5-X, the rules should provide for certain arrangements under Part IIIA of the Competition and Consumer Act 2010 to be permitted despite the non-discrimination requirements in rule 10.

See also rule *advice 5-D, rule advice 5-X.*

(proposed in the Draft Advice) has been maintained.

<p>This rule should be a civil penalty provision.</p> <p>This rule advice is implemented in rule 10 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-D</b> (section 5.3.2)</p> <p>The rules should be amended to prohibit an infrastructure operator from levying an infrastructure charge:</p> <ul style="list-style-type: none"> <li>• upon an application to trade or terminate a tradeable water right (including where the application is not made to the infrastructure operator);</li> <li>• as a condition of the infrastructure operator granting its consent or approval to a trade or termination of a tradeable water right</li> <li>• when or because a tradeable water right is traded or terminated;</li> </ul> <p>However, the rules should not prohibit an infrastructure operator from levying an infrastructure charge <i>in relation to trade</i>, when:</p> <ul style="list-style-type: none"> <li>• the operator’s approval or consent to trade is required and that infrastructure charge reflects the reasonable and efficient administrative costs of processing the trade.</li> <li>• the customer seeks to have a volume of water delivered that is in excess of the volume provided for under the water delivery right held by the customer with the operator.</li> <li>• the operator has provided an infrastructure service for the harvesting or storage of water relating to the water access right being traded; or</li> <li>• the operator is required to provide a service for the storage or delivery of water to give effect to the trade; or</li> <li>• the operator is required to provide a service for the storage or delivery of water to the buyer after a trade occurs and the operator is unable to levy a charge on the person receiving the service because the operator has no authority to levy a charge on that person (for example, because that person is located in a different jurisdiction to the infrastructure operator).</li> </ul> <p>Also, the rules should not prohibit an infrastructure operator from levying <i>in relation to termination</i>:</p> <ul style="list-style-type: none"> <li>• a termination fee levied consistently with the rules; or</li> <li>• an infrastructure charge which reflects the reasonable and efficient administrative costs incurred in processing the termination.</li> </ul> <p>Finally, the rules should not prevent an infrastructure operator from requiring payment of any outstanding infrastructure charges as a condition of the operator providing their consent or approval to a trade or termination (provided those fees or charges were levied consistently with the rules).</p> <p>This rule should be a civil penalty provision.</p> <p>This rule advice is implemented in rule 10A of the proposed Water Charge Rules.</p>	<p style="text-align: center;"><b>Substantial change</b></p> <p>The Final Advice maintains the proposed rule as per the Draft Advice but adds some additional categories of conduct which would not contravene the rule in relation to trade. These additions recognise that an operator may incur costs in providing certain services in respect of traded water access rights which they may not otherwise be able to adequately recover after a trade.</p> <p>Also, the Final Advice clarifies that the rules should not prevent an operator from requiring payment outstanding fees and charges as a condition of approving a trade or termination.</p>
<p><b>Rule advice 5-E</b> (section 5.4.1)</p> <p><i>Schedule of Charge requirements for infrastructure operators</i></p> <p>The rules should be amended to provide that an infrastructure operator must adopt a Schedule of Charges which sets out its</p>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice requires an operator to set out in general</p>

infrastructure charges and planning and management charges in accordance with the rules.

The rules should provide that the Schedule of Charges may not come into effect, and the listed charges should not apply, earlier than the date the operator adopts its Schedule of Charges, except in the limited circumstances described in rule advice 5-I.

The rules should require that the Schedule of Charges ceases to be in effect for the operator when another Schedule of Charges that has been adopted by the infrastructure operator comes into effect.

This rule advice is implemented in rule 11 of the proposed Water Charge Rules.

*Information that must be included on a Schedule of Charges*

The rules should require that a Schedule of Charges adopted by an infrastructure operator must contain the following information.

- (a) For each infrastructure charge or planning and management charge:
- (b) the name of the charge (and the period during which the charge applies, if that period is different from the period that the Schedule of Charges is in effect);
- (c) the circumstances in which the charge is payable including, if applicable, the following:
  - i. the class of person required to pay the charge;
  - ii. the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;
  - iii. the class of water access right, water delivery right or irrigation right to which the charge relates;
- (d) either:
  - i. the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine that amount; or
  - ii. for a charge that reflects the costs of physically connecting, or physically disconnecting a customer from the operator's water service infrastructure—a statement that the charge will be determined at the time of the connection or disconnection;
- (e) the details of any general discount or surcharge, including the circumstances under which the discount or surcharge applies (e.g. a discount for early payment);
- (f) when the charge is payable and, if payable by instalments, the number of instalments and intervals at which the charge is payable;
- (g) if applicable, the following:
  - i. who determined the charge (if it was not determined by the operator or person adopting the Schedule of Charges);
  - ii. who the charge is payable to (if it is not payable to the operator or person adopting the Schedule of Charges);
  - iii. the name of the agency or person for whom the charge is being collected.

For each infrastructure charge:

terms on its Schedule of Charges how it determined its own charges to recover the cost of infrastructure charges and planning and management charges that it incurs, rather than doing so for each charge.

The Final Advice also makes clear that charges should not be levied inconsistently with a relevant Schedule of Charges. Also, infrastructure charges should in general not be levied before the relevant infrastructure service is provided. Some exemptions are also set out.



- (h) a description of the infrastructure service to which the charge relates;
- (i) if applicable, the information required by (proposed) subrule 9(13A) (see rule advice 5-K);

For each planning and management charge:

- (j) the legislative, contractual or other authority for the charge.

The Schedule of Charges should also include the following general information:

- (k) the date on which the Schedule of Charges comes into effect (or will be taken to have come into effect);
- (l) a statement setting out the following:
  - i. the process used to determine the infrastructure charges or planning and management charges (this should be at the general level, rather than for each individual charge);
  - ii. how a person may participate in the process to determine the infrastructure charges or planning and management charges;
  - iii. how a person can make an enquiry or resolve a dispute with the infrastructure operator in relation to a regulated water charge;
  - iv. if applicable—any generally available discounts, surcharges or hardship policies;
  - v. if applicable—how the infrastructure operator has determined or calculated the infrastructure charges it levies to recover charges in accordance with rule advice 5-Y;
  - vi. any other information the operator considers reasonably necessary or desirable to explain the charges to the customer.

*See also rule advice 5-J, 5-K and rule advice 5-Y.*

This rule should be a civil penalty provision.

This rule advice is implemented in rules 11 and 13 of the proposed Water Charge Rules.

#### *Conditions applying to infrastructure charges and planning and management charges*

The rules should clarify that an infrastructure operator must not levy an infrastructure charge or planning and management charge that is not specified, for the circumstances in which it is levied, in a Schedule of Charges that is in effect for the operator when:

- for an infrastructure charge – the relevant infrastructure service was provided;
- for a planning and management charge – the circumstances set out in the Schedule of Charges for incurring the charge are met.

This rule should be a civil penalty provision.

The rules should ensure that an infrastructure operator does not contravene this provision if:

- the charge is exempt (see proposed subrule 11(7), rule advice 5-J); or
- the charge is levied retrospectively in accordance with the relevant rules which allow for retrospectivity (see rule advices 5-I and 5-Y).

<p><i>Note:</i> The effect of these rules is that, in order to be able to levy a infrastructure charge or a planning and management charge, a Schedule of Charges must be adopted in accordance with the rules (see proposed rule 11) and include the information set out above (see proposed rule 13).</p> <p>This rule advice is implemented in rules 7 and 11(7) of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-F</b> (section 5.4.1)</p> <p><i>Schedule of Charge requirements for persons other than infrastructure operators</i></p> <p>The rules should be amended to provide that a person, other than an infrastructure operator, who determines or levies planning and management charges, or on whose behalf such charges are collected, may adopt a Schedule of Charges which sets out planning and management charges in accordance with the rules.</p> <p>The rules should provide that the Schedule of Charges may not come into effect and the listed charges should not apply earlier than the date the Schedule of Charges is adopted, except in the limited circumstances described in rule advice 5-l.</p> <p>The rules should provide that the Schedule of Charges ceases to be in effect for the person who levies the charges when another Schedule of Charges that has been adopted in accordance with the rules comes into effect for the person.</p> <p>This rule advice is implemented in rule 12 of the proposed Water Charge Rules.</p> <p><i>Information that must be included on a Schedule of Charges</i></p> <p>The rules should require that a Schedule of Charges adopted by a person (other than an infrastructure operator) must include the following information for each planning and management charge on its Schedule of Charges:</p> <ul style="list-style-type: none"> <li>(a) the name of the charge (and the period during which the charge applies, if that period is different from the period that the Schedule of Charges is in effect);</li> <li>(b) the circumstances in which the charge is payable, including, as applicable, the following: <ul style="list-style-type: none"> <li>i. the class of person required to pay the charge;</li> <li>ii. the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;</li> <li>iii. the class of water access right, water delivery right or irrigation right to which the charge relates;</li> </ul> </li> <li>(c) the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine that amount;</li> <li>(d) the details of any general discount or surcharge, including the circumstances under which the discount or surcharge applies (e.g. a discount for early payment);</li> <li>(e) when the charge is payable and, if payable by instalments, the number of instalments and intervals at which the charge is payable;</li> <li>(f) if applicable, the following:</li> </ul>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice further harmonises the publication requirements applying to persons other than infrastructure operators determining / levying planning and management charges with the requirements applying to infrastructure operators, by requiring those persons to set out on their Schedule of Charges the details of any generally available discounts or surcharges.</p> <p>The Final Advice also generalises who may adopt a Schedule of Charges, and who the prohibition relating to levying charges not on a relevant Schedule of Charges applies to.</p>

<ul style="list-style-type: none"> <li>i. who determined the charge (if it was not determined by the person adopting the Schedule of Charges)</li> <li>ii. the name of the agency or person for whom the charge is being collected</li> <li>iii. who the charge is payable to (if it is not payable to the person adopting the Schedule of Charges);</li> </ul> <p>(g) the legislative, contractual or other authority for the charge.</p> <p>The Schedule of Charges should also include the following general information:</p> <ul style="list-style-type: none"> <li>(h) the date that the Schedule of Charges comes into effect (or will be taken to have come into effect);</li> <li>(i) a statement setting out the following: <ul style="list-style-type: none"> <li>i. the process used to determine the planning and management charges (this should be at the general level, rather than for each individual charge);</li> <li>ii. how a person may participate in the process used to determine the planning and management charges;</li> <li>iii. how a person can make an enquiry or resolve a dispute with the person who adopted the Schedule of Charges in relation to a regulated water charge;</li> <li>iv. if applicable – any generally available discounts, surcharges or hardship policies;</li> <li>v. any other information that is reasonably necessary or desirable to explain the charges to the customer.</li> </ul> </li> </ul> <p>This rule should be a civil penalty provision.</p> <p>This rule advice is implemented in rules 12 and 13 of the proposed Water Charge Rules.</p> <p><i>Conditions applying to planning and management charges</i></p> <p>The rules should clarify that a person, other than an infrastructure operator, must not levy a planning and management charge that is not specified, for the circumstances in which it is levied, in a Schedule of Charges that is in effect for the person at the time when the circumstances set out in the Schedule of Charges for incurring the charge are met.</p> <p>This rule should be a civil penalty provision.</p> <p>The rules should ensure that person levying a planning and management charge does not contravene this provision if the charge is levied retrospectively in accordance with the relevant rules which allow for retrospectivity (see rule advice 5-I).</p> <p><i>Note:</i> For a Schedule of Charges to come into effect, it must be adopted in accordance with the rules (see proposed rule 12) and include the information set out above (see proposed rule 13).</p> <p>This rule advice is implemented in rule 7 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-G</b> (section 5.4.2)</p> <p>The rules should be amended to require all infrastructure operators who have a website to publish their Schedule of Charges on a page on their website that is easily and publicly accessible (not only operators servicing over &gt;10 GL of water access entitlement).</p> <p>This rule advice is implemented in rule 15 of the proposed Water Charge Rules.</p>	<b>No change</b>

<p><b>Rule advice 5-H</b> (section 5.4.2)</p> <p>The rules should be amended to remove requirements to publish a Schedule of Charges in a local newspaper or in the <i>Gazette</i>.</p> <p><i>See also rule advice 5-L.</i></p> <p>This rule advice is implemented in the repeal of current WCIR rule 15(1)(b) and (c).</p>	<p style="text-align: center;"><b>No change</b></p>
<p><b>Rule advice 5-I</b> (section 5.4.2)</p> <p><i>Timeframes to give / publish the Schedule of Charges</i></p> <p>The rules should be amended to change the current timeframes for when a Schedule of Charges that has been adopted by a person (including infrastructure operator) must be given (see below advice on the meaning of “give” in this context):</p> <ul style="list-style-type: none"> <li>• For an infrastructure operator who levies an infrastructure charge in relation to either: <ul style="list-style-type: none"> <li>○ a bulk water service in respect of water access rights; or</li> <li>○ infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State;</li> </ul> <p>the operator must give a copy of its Schedule of Charges to its customers, and publish it on its website (if it has a website), 25 business days or more before the Schedule of Charges comes into effect.</p> </li> <li>• For an infrastructure operator of any other kind who adopts a Schedule of Charges, the operator must give a copy of the Schedule of Charges to its customers, and publish on its website (if it has a website), 10 business days or more before the Schedule of Charges comes into effect.</li> <li>• A person, other than an infrastructure operator, who adopts a Schedule of Charges must: <ul style="list-style-type: none"> <li>○ publish the Schedule of Charges on its own website, or cause the Schedule of Charges to be published on the website of: <ul style="list-style-type: none"> <li>▪ the person who determined the charge; or</li> <li>▪ the agency or person to whom the charge is payable; or</li> <li>▪ the agency or person on whose behalf the charge is collected; and</li> </ul> </li> <li>○ ensure that the Schedule of Charges is made available at its principal place of business, or the principal place of business of: <ul style="list-style-type: none"> <li>▪ the person who determined the charge; or</li> <li>▪ the agency or person to whom the charge is payable; or</li> <li>▪ the agency or person on whose behalf the charge is collected;</li> </ul> <p>25 business days or more before the Schedule of Charges takes effect for the person who levies the charges.</p> </li> </ul> </li> </ul> <p><i>Note:</i> As indicated above, the person who is required to publish the Schedule of Charges should be the person who adopts a Schedule of Charges.</p> <p>These rules should be civil penalty provisions.</p>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice provides for flexibility in timing requirements for the publication and giving of the Schedule of Charges to customers due to the timing of a regulatory decision, or when charges incurred by an operator change.</p> <p>The Final Advice also provides operators with a longer timeframe for sending a Schedule of Charges to a new customer.</p> <p>The Final Advice generalises the approach taken in the current WCPMIR, such that the requirements for a person (other than an infrastructure operator) to adopt and publish a Schedule of Charges may be fulfilled by the person who determines planning and management charges, the person who levies the charges, or the person on whose behalf the charges are collected.</p>

*Delays due to determination / approval requirements*

The rules should provide that if a person (including an infrastructure operator) is required under the rules to give / publish a Schedule of Charges which:

- includes charges that were approved or determined by another person that was either the ACCC or a State Agency; and
- the approval or determination is delayed such that the person is unable to comply with the timeframes for giving / publishing its Schedule of Charges

the operator is taken to have complied with the timing requirements if they give / publish their Schedule of Charges as soon as practicable after the charges have been approved or determined (e.g. after the regulator publishes its final decision), and the operator's charges may take effect from the date specified in the regulatory decision, including if this date is before the date the operator gives / publishes its Schedule of Charges.

*Changes in charges being passed through*

When the infrastructure charges and / planning and management charges incurred by an operator (and which rule advice 5-Y requires the operator to pass-through) have changed or will change, and this is the only reason an infrastructure operator needs to adopt a new Schedule of Charges, the rules should allow an infrastructure operator to adopt the new Schedule without triggering the obligation to give the Schedule to all its customers prior to the charges coming into effect. However, the infrastructure operator should still be required—in relation to the newly adopted Schedule of Charges—to:

- publish the Schedule on their website (if they have one) as soon as practicable after adoption;
- make the Schedule available on request;
- give the Schedule, or a notice regarding the details of the updates, when the operator next invoices customers.

The rules should allow an updated charge to commence on the same date the infrastructure charge or planning and management charge incurred by the operator commences (even if this was before the new Schedule of Charges is adopted).

*Note:* rule advice 5-Y allows an operator to defer updating any infrastructure charge(s) that it levies to recover the cost of charges it incurs for up to three months after the charges it incurs are changed.

*Requirement to give the Schedule of Charges to new customers or on request*

The rules should be amended to change the current timeframes for an infrastructure operator to give a copy of its Schedule of Charges:

- to a new customer—to within 10 business days of the day that the operator first receives notice or otherwise becomes aware that the person is a customer.
- on request—within 10 business days of the request (reduced from 20 business days).

The rules should also require that the operator not only provide its current Schedule of Charges but also any Schedule of Charges which is not yet in effect but has been given to the operator's other customers in accordance with the rules.

These rules should be civil penalty provisions.

<p><i>The meaning of 'give'</i></p> <p>The rules should be amended such that an operator is taken to have given a Schedule of Charges to its customers on the day that it is posted or otherwise sent. That is, an infrastructure operator should not be required to ensure that a customer has <i>received</i> the Schedule of Charges within the timeframe specified in the rules.</p> <p>Further, the rules should clarify that an infrastructure operator:</p> <ul style="list-style-type: none"> <li>• does not need to send the Schedule of Charges to all customers via the same means</li> <li>• may send the Schedule of Charges in electronic form including via fax, email or text message including by attaching the document to an email or referring to an Internet address where the document can be found in an email or text message.</li> </ul> <p>This rule advice is implemented in rules 3, 11, 12 and 15 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-J</b> (section 5.4.3)</p> <p><i>Amendments to the exemption process relating to infrastructure charges specified in contracts (Rule 9)</i></p> <p>The rules should be amended to allow for an application for an exemption from the requirement to include infrastructure charges specified in a contract between the operator and one or more customers in the operator's Schedule of Charges:</p> <ul style="list-style-type: none"> <li>• in a situation where publication would have a material financial loss for, or material detriment to, the operator or the customer (as opposed to the current rules, which require that there be a 'material and adverse effect' on either both the operator <i>and</i> the customer, or the customer only);</li> <li>• within 12 months of the rules being amended, for contracts that were entered into before the rules were amended (despite the existing rules under which an application should have already been made);</li> <li>• on behalf of a group of customers subject to the same contract with the infrastructure operator (including the same infrastructure charges) where it can be shown that publication of the amount of the charge(s) would result in a material financial loss for, or material detriment to, the operator and / or each customer;</li> <li>• in a situation where the contract specifies a formula by which the charge would be determined (this clarifies the existing rule, which may have the effect that an application could only be made where the amount of a charge is directly specified).</li> </ul> <p>This rule advice is implemented in rules 9 and 78 of the proposed Water Charge Rules.</p> <p><i>Other exemptions from Schedule of Charges requirements for infrastructure operators</i></p> <p>The rules should be amended such that a Schedule of Charges need not include the following:</p> <ul style="list-style-type: none"> <li>• for a charge in relation to which an exemption has been granted under rule 9—details of the charge other than the information specified in rule advice 5-K below.</li> <li>• where a discount on an infrastructure charge is provided to an individual customer or customers for reasons of the customers' hardship (e.g. a natural disaster), or in recognition of a service disruption they have experienced (e.g. temporary channel closure)—the amount of the discount and any other information relevant to that discount.</li> </ul>	<p style="text-align: center;"><b>Substantial change</b></p> <p>The Final Advice proposes to enhance the opportunities for operators and customers to apply for an exemption to contribute to addressing stakeholder concerns about regulatory burden.</p> <p>The Final Advice also proposes that the rules automatically allow operators to levy certain infrastructure charges without listing the charge (or the amount of the charge) on its Schedule of Charges (i.e. without having to obtain an exemption).</p>

<ul style="list-style-type: none"> <li>for an infrastructure charge the infrastructure operator levies in accordance with proposed rule 9A (see rule advice 5-Y) to recover the amount of any infrastructure charge or planning and management charge incurred by the operator in relation to a transaction undertaken on behalf of a customer, such as a trade application charge—all details of the charge.</li> </ul> <p>The rules should also provide that if an operator levies or proposes to levy an infrastructure charge for an infrastructure service (other than a service in relation to the physical connection to, or disconnection from the operator’s water service infrastructure) and:</p> <ul style="list-style-type: none"> <li>the nature of the service is known, but the information regarding the amount of the charge or details of rates and all other details necessary to determine that amount cannot be reasonably determined; or</li> <li>the nature of the infrastructure service is not known sufficiently in advance in order for it to be practicable to expect that the charge could be included in a Schedule of Charges;</li> </ul> <p>then the operator does not need to include any details about the charge on that Schedule of Charges. However, the operator must adopt a new Schedule of Charges which includes details of that charge within 12 months of the infrastructure charge being levied.</p> <p>Note: In practice, if the operator would ordinarily have adopted a new Schedule of Charges within 12 months (e.g. because it updates its infrastructure charges each year), the operator may include the required details on that new Schedule. However, if this were not to occur, an operator would still be required by this rule to adopt a new schedule which includes the relevant details within the required timeframe.</p> <p>Note: this rule advice is relevant to proposed rule 7 in rule advice 5-E because it allows infrastructure charges in these circumstances to be levied despite the charges (and all other details of those charges) not being on a Schedule of Charges at the time the infrastructure service is provided.</p> <p>This rule advice is implemented in rules 9 and 11 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-K</b> (section 5.4.2)</p> <p>The rules should be amended to require infrastructure operators who have received an exemption under rule 9 to include:</p> <ul style="list-style-type: none"> <li>a notice of the exemption on their Schedule of Charges;</li> <li>the name of the customer(s);</li> <li>the time period of the contract;</li> <li>the nature of the infrastructure service to which the charge exempt from disclosure relates.</li> </ul> <p>The rules should require the operator to provide this information on a Schedule of Charges within 12 months after the exemption is granted.</p> <p>Rule 55 should be amended to allow the ACCC to publish the name of the parties who are the subject of the exemption, and the type of infrastructure service to which the exemption relates.</p> <p>This rule advice is implemented in rules 9 and 55 of the proposed Water Charge Rules.</p>	<b>No change</b>
<p><b>Rule advice 5-L</b> (section 5.5)</p>	<b>Some change</b>

<p>The rules should be amended to repeal the Network Service Plan (Part 5) requirements. Effective standards can be ensured through rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions.</p> <p><i>Note:</i> there is merit in repealing the Part 5 requirements in the near term to avoid operators incurring unnecessary expenditure. This rule advice is implemented in the repeal of Part 5 of the current WCIR and related provisions referencing Part 5 operators.</p>	<p>The Final Advice maintains that Part 5 should be repealed, but removes the advice that Rule Advice 5-L <i>is conditional on</i> acceptance of Rule Advice 5-A to 5-E.</p> <p>The Final Advice also notes there is merit in repealing the Part 5 requirements in the near term to avoid unnecessary expenditure being incurred by operators given new network service plans are due to commence in mid-2017.</p>
<p><b>Rule advice 5-M</b> (section 5.6)</p> <p><i>Application of Part 6</i></p> <p>The rules should be amended such that Part 6 applies based on the following criteria.</p> <p>Where an infrastructure operator levies an infrastructure charge in relation to either:</p> <ul style="list-style-type: none"> <li>(a) a bulk water service in respect of water access rights; or</li> <li>(b) infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State; and:</li> <li>(c) the infrastructure operator is not required to have all its infrastructure charges approved or determined by a single State Agency under a law of the State in a way that is consistent with proposed subrule 29(2)(b);</li> </ul> <p>that infrastructure operator is a <i>Part 6 operator</i>.</p> <p>The rules should be amended to allow for the ACCC to provide an exemption to the requirement on a Part 6 operator to have its infrastructure charges approved or determined under Part 6 of the rules.</p> <p>The ACCC should only give such an exemption if it is satisfied that the application of those requirements would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles, taking into account:</p> <ul style="list-style-type: none"> <li>(a) the total volume of water access rights in relation to which bulk water services are provided by the operator, if applicable;</li> <li>(b) the total volume of water subject to water sharing arrangements in relation to which the operator provides infrastructure services, if applicable;</li> <li>(c) the infrastructure services provided by the operator;</li> </ul>	<p style="text-align: center;"><b>Substantial change</b></p> <p>The Final Advice maintains the policy intent of the Draft Advice but makes the following changes:</p> <ul style="list-style-type: none"> <li>• modify the wording of the criteria in rule 23(b)(i) to refer to operators who levy infrastructure charges in relation to ‘bulk water services’, to make clear that Part 6 would not ordinarily capture off-river infrastructure operators</li> <li>• clarify that an operator who provides infrastructure services to give effect to a state water sharing arrangement would only be captured under Part 6 if it levies infrastructure charges in relation to these services</li> <li>• revise criteria for Part 6 to more clearly define the type of Basin State regulatory mechanism that would be a satisfactory</li> </ul>



<p>(d) any preferences expressed by the operator’s customers to the ACCC;</p> <p>(e) any views expressed by a State Agency to the ACCC;</p> <p>(f) whether the relevant law of the State is being transitioned so that the operator’s infrastructure charges will at a future date be approved or determined by a single State Agency in a way that is consistent with the regulatory test for Part 6 operators (set out in subrule 29(2)(b) of the proposed water charge rules);</p> <p>(g) the proportion of the infrastructure operator’s revenue to be recovered from infrastructure charges; and</p> <p>(h) any other matters that the ACCC considers relevant.</p> <p>The exemption should be granted for a specific period, or for an unspecified period if the decision to exempt is subject to review at a specific time.</p> <p>In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.</p> <p><i>Transitional arrangements for existing Part 6 operators</i></p> <p>The rules should include transitional provisions to provide that, when the amended rules commence (referred to in the proposed water charge rules as the ‘transition date’), Part 6 of the proposed rules continues to apply to an existing Part 6 operators (even if it would not meet the proposed new criteria) until the conclusion of any regulatory period in effect on the transition date.</p> <p>If, however, a Part 6 operator had made an application under Part 6 before the transition date, but the regulator had not yet approved or determined the charges, the approval or determination should be made according to the current Part 6 criteria. However, Part 6 as amended should then apply to the operator until the end of the ‘regulatory period’ for which the application was made.</p> <p>After the transition date, the ACCC will consider whether existing Part 6 operators meet the proposed new criteria for the application of Part 6 and, if they do or will, whether an exemption from the requirements of Part 6 as amended should be given for after the transition period.</p> <p>Note: If rule advice 5-M is adopted, rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions, should also be adopted to ensure effective standards are maintained.</p> <p>Note: If rule advice 5-M is adopted, rule advice 5-W (winding back accreditation requirements) should also be adopted.</p> <p>Regulator for Part 6</p> <p>Due to the proposed amendments to the criteria for Part 6, the regulator for Part 6 after the transition period should be the ACCC (rather than an accredited state regulator or the ACCC, as under the current rules).</p> <p>See also rule advice 5-W.</p> <p>This rule advice is implemented in rules 23 to 23D and Part 11 of the proposed Water Charge Rules.</p>	<p>alternative to Part 6</p> <ul style="list-style-type: none"> <li>• expand the matters the ACCC can take into account when considering whether to exempt a Part 6 operator from the Part 6 requirements</li> <li>• clarified the transitional provisions for current Part 6 operators which cease to meet the proposed Part 6 criteria.</li> </ul>
<p><b>Rule advice 5-N</b> (section 5.6.2)</p> <p>The rules should be amended such that timeframes that apply to Part 6 processes are as per Table 5.5.</p>	<p><b>No change</b></p> <p>(Note, however, that Table 5.5</p>

<b>Table 5.5: Proposed Regulatory Timelines for Part 6 operators</b>			previously included Schedule of Charge publication requirements, which have been replaced by a cross-reference to Rule Advice 5-I.)
	Original approval / determination	Annual review approval / determination	
Application for approval / determination lodged	15 months before the start of the regulatory period to which the approval / determination relates.	4 months before the start of the year of the regulatory period to which the approval / determination relates.	
Regulator provides notice of its final decision	30 business days before the start of regulatory period to which the approval / determination relates.	30 business days before the start of the year of the regulatory period to which the approval / determination relates.	

*Note:* Rule advice 5-I sets out Schedule of Charge publication requirements (see section 5.4.2).  
This rule advice is implemented in Part 6, Divisions 2 and 3 of the proposed Water Charge Rules.

<p><b>Rule advice 5-O</b> (section 5.6.2)</p> <p>The rules should be amended to alter the definition of “regulatory period” (rule 3 in Part 1) to provide for a default regulatory period of three years (instead of four years) for Part 6 operators.</p> <p>Rule 24 should be amended to allow the ACCC to lengthen a regulatory period from the proposed default period of three years to up to five years upon the request of an operator in order to align the regulatory period with:</p> <ul style="list-style-type: none"> <li>• a regulatory period that applies to the Part 6 operator in relation to urban water services (as is currently provided for); or</li> <li>• a regulatory period that applies to the Part 6 operator in relation to non-Murray-Darling Basin (MDB) (rural) water services.</li> </ul> <p>The rules should also be amended to provide the ACCC with a general discretion to lengthen a regulatory period up to a maximum of 5 years (including for reasons other than aligning regulatory periods). The ACCC should obtain, and have regard to, the views of the Part 6 operator prior to making a decision to lengthen a regulatory period.</p> <p>The rules should not allow the ACCC to decide to change a regulatory period after the date the ACCC publishes its draft approval or determination in relation to the regulatory period (under rule 28).</p> <p>This rule advice is implemented in rules 3 and 24 of the proposed Water Charge Rules.</p>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice maintains the draft rule advice but has been updated due to relevant amendments to the Act. Therefore, Rule Advice 5-O is no longer conditional upon the Act being amended, and advises that the rules should give the ACCC a general discretion to lengthen (but not shorten) the duration of an upcoming regulatory period from the default regulatory period of 3 years.</p> <p>Also, the rule advice now makes clear that a regulator should not be able to change a regulatory period after the date that a draft approval or determination is published.</p>
<p><b>Rule advice 5-P</b> (section 5.6.3)</p> <ul style="list-style-type: none"> <li>• Subrule 29(2) should be amended to more clearly take into account government subsidies and Community Service Obligations (CSOs), as well as revenue from sources other than infrastructure charges that is derived from the water service infrastructure used to deliver infrastructure services.</li> </ul>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice maintains the draft rule advice but provides that the following elements should also</p>

<ul style="list-style-type: none"> <li>• In particular, subrule 29(2) should require the regulator to be satisfied that the forecast revenue from infrastructure charges is reasonably likely to meet, and will not materially exceed the prudent and efficient costs of providing infrastructure services, less: <ul style="list-style-type: none"> <li>○ any amount to be contributed by governments in relation to providing the infrastructure services; and</li> <li>○ any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and</li> <li>○ any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services.</li> </ul> </li> <li>• Rule 29 should be amended to also require the ACCC not to approve the infrastructure charges set out in an application unless it is satisfied that the infrastructure charges contained in the application are also consistent with the requirements of other provisions of the water charge rules.</li> <li>• Rule 37 should be amended to allow a regulator to amend the infrastructure charges in the initial determination to the extent that it is reasonably necessary to make variations, having regard to the consistency of the infrastructure charges with the requirements of other provisions of the water charge rules.</li> <li>• Schedule 1 of the rules (information to be provided in an application under Part 6) should be amended to: <ul style="list-style-type: none"> <li>○ require an operator to set out details of differences between its actual / forecast capex for the current period and the capex approved by the regulator for that period (in terms of both the amount of capex and the selection / scope of projects undertaken).</li> <li>○ require an operator to include the actual and forecast revenue from sources other than infrastructure charges</li> <li>○ include a provision to make clear that where actual figures are unavailable, an operator must provide forecast figures.</li> </ul> </li> <li>• Schedule 2 of the rules (calculation of the regulatory asset base) should be amended to provide that <i>actual</i> capex in relation to: <ul style="list-style-type: none"> <li>○ a major project not previously approved; or</li> <li>○ a project whose scope as undertaken materially differed from what was approved; or</li> <li>○ a project on which expenditure materially exceeded the amount previously approved;</li> </ul> may not be rolled into the RAB if the ACCC is not satisfied that the capex was prudent and efficient. </li> </ul> <p><i>See also section 5.6.4.</i></p> <p>This rule advice is implemented in rules 29 and 37, and Schedules 1 and 2, of the proposed Water Charge Rules.</p>	<p>be subtracted from the prudent and efficient costs of providing infrastructure services for the purposes of Subrule 29(2):</p> <ul style="list-style-type: none"> <li>• any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator, and</li> <li>• any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services.</li> <li>• These additions allow more clearly for a regulator to take into account other revenues / forgone costs when considering the amount of revenue required to meet prudent and efficient costs.</li> <li>• Additionally, the Final Advice adds the ability for the regulator to exclude certain past capex from the RAB if it is not satisfied that the capex was prudent and efficient.</li> </ul>
<p><b>Rule advice 5-Q</b> (section 5.6.5)</p> <p>The rules should be amended to provide the regulator with the discretion to specify a capital expenditure project as a ‘contingent project’ in an initial approval / determination if:</p> <ul style="list-style-type: none"> <li>• the infrastructure operator submits a project to the regulator in its application for the initial approval / determination, and</li> <li>• the regulator is sufficiently uncertain about the cost, timing, necessity, likelihood or feasibility of the project, and</li> <li>• the inclusion of the project in a Part 6 operator’s revenue requirement would have a material impact on the infrastructure charges</li> </ul>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice maintains the draft rule advice, but adds:</p> <ul style="list-style-type: none"> <li>• a materiality test that must be met for a capital expenditure project to be considered a</li> </ul>

<p>to be approved or determined.</p> <p>Infrastructure charges for the operator should be determined in the initial approval / determination on the basis that funding such a project would not be a prudent and efficient cost of providing infrastructure services.</p> <p>However, the regulator may specify the criteria (or ‘trigger event’) that—if met—would enable the infrastructure operator to apply for a variation of the approved / determined charges based on the inclusion of the cost of a contingent project in the revenue requirement for the remainder of the regulatory period.</p> <p>The inclusion of the prudent and efficient cost of a contingent project in the revenue requirement for the remainder of the regulatory period should be subject to regulatory scrutiny to ensure:</p> <ul style="list-style-type: none"> <li>• the trigger event has been met</li> <li>• the contingent project is prudent and efficient</li> <li>• the regulator is satisfied of the matters set out in subparagraphs 29(2)(b) and (c) of the proposed rules.</li> </ul> <p>If the regulator varies an approval or determination, it must decide what infrastructure charges should be varied and the amount of the variation, as well as when the varied charges should commence, but this should be no earlier than the beginning of the next year of the regulatory period.</p> <p>This rule advice is implemented in rules 29 and 31, and Part 6, Division 4 of the proposed Water Charge Rules.</p>	<p>contingent project.</p> <ul style="list-style-type: none"> <li>• a specific requirement that the project is prudent and efficient before a variation can be made.</li> </ul>
<p><b>Rule advice 5-R</b> (section 5.6.5)</p> <p>The rules should be amended to provide for the following in relation to variations of approvals or determinations for certain events:</p> <ul style="list-style-type: none"> <li>• The regulator should be allowed to vary an approval / determination where it is satisfied that a taxation or regulatory event provides a benefit to an infrastructure operator of more than 1 per cent of the operator’s aggregate revenue requirement for the regulatory period.</li> <li>• For a taxation or regulatory event, the current materiality threshold should be changed to 1 per cent of the aggregate revenue requirement for the regulatory period, and the current requirement for the event to have been ‘unforeseen’ should be removed.</li> <li>• For other events, the current materiality threshold should be changed to 3 per cent of the aggregate revenue requirement for the regulatory period.</li> <li>• The term ‘aggregate revenue requirement’ should be defined to be the sum of revenue from infrastructure charges and government contributions that was forecast for the regulatory period at the time that the ACCC made the initial approval or determination of the charges under rule 29.</li> <li>• The requirement for an operator to demonstrate that it is not able to reduce its expenditure to meet the cost of an event should be amended to be a requirement to demonstrate that reductions are not able to be done without <i>materially</i> and adversely affecting the reliability or safety (instead of reliability and safety) of its water service infrastructure.</li> </ul> <p>This rule advice is implemented in Rule 3 and Part 6, Division 4 of the proposed Water Charge Rules.</p>	<p style="text-align: center;"><b>Some change</b></p> <p>The Final Advice proposes three amendments to the definition of ‘aggregate revenue requirement’ set out in the Draft Advice, to:</p> <ul style="list-style-type: none"> <li>• include revenue from infrastructure charges and government contributions, rather than just from infrastructure charges.</li> <li>• refer to forecast revenue for the entire regulatory period rather than only the remaining part of the period (with the result that thresholds are constant over the regulatory period).</li> </ul>

	<ul style="list-style-type: none"> <li>clarify that the aggregate revenue requirement is calculated based on forecasts at the time of the initial approval or determination.</li> </ul> <p>The Final Advice recommends that the materiality threshold for ‘other events’ should be 3 per cent of the aggregate revenue requirement (compared to 5 per cent in the Draft Advice).</p>
<p><b>Rule advice 5-S</b> (section 5.7)</p> <p><i>Application of Part 7</i></p> <p>Part 7 should be amended to adapt the “triggering” provisions (Part 7, Division 1) to apply to all distributions by an infrastructure operator, other than <b>standard distributions</b>.</p> <p>The test for the application of Part 7 should refer to “infrastructure operators” (rather than only to member-owned infrastructure operators as in the existing rules). (see section 5.2 for further discussion).</p> <p><i>See also rule advice 5-U</i> in relation to when an operator should be taken to have made a distribution.</p> <p><b>Standard distributions</b> are those:</p> <ul style="list-style-type: none"> <li>made or offered in proportion to the volume of all the operator’s customers’ rights of access (typically represented by their water delivery right);</li> <li>made or offered in proportion to each customer’s contribution to the total revenue from all customers from charges levied per unit of water delivery right held;</li> <li>made to customers that had previously contributed to a fund for the replacement / upgrade of infrastructure when this money is no longer required because the replacement / upgrade of the infrastructure is no longer required, or has been undertaken at a lower cost than forecast, in proportion to the contributions made by each customer;</li> <li>made in the form of reasonable honorariums;</li> <li>made in the form of a trade or allocation of water that was offered to all customers on the same terms, whether or not the offer was in return for consideration;</li> <li>made or offered to all customers in a specific part of the area serviced by the infrastructure operator in relation to water savings achieved by the operator in that part, in proportion to each customer’s right of access to that part or in proportion to each customer’s contribution to the total revenue from all customers in that part from charges levied per unit of water delivery right held; or</li> </ul>	<p style="text-align: center;"><b>Substantial change</b></p> <p>The Final Advice expands the definition of ‘standard distribution’ to include where the distribution is made in proportion to each customer’s contribution to the total revenue from all customers from charges levied per unit of water delivery right held. This means that operators have the option to make a distribution based on charges levied in addition to making a distribution based on the relative proportion of customers’ rights of access to the operator’s network.</p> <p>Several other elements of the definition have also been refined to address stakeholder concerns about the rule wording.</p>

<ul style="list-style-type: none"> <li>made by an infrastructure operator to its owners but only if the infrastructure operators’ infrastructure charges are approved or determined under Part 6 or by a State Agency under a law of the State.</li> </ul> <p>The rules should also provide that, where an infrastructure operator withholds a distribution up to the amount of any arrears owed by a customer (where that amount would otherwise have formed part of a distribution), that amount is taken to have been made as a distribution, or part of a distribution, as appropriate.</p> <p><i>Note:</i> This would have the effect that the assessment of whether a distribution would be considered a standard distribution is not affected by an operator withholding a distribution (or part of a distribution) for the purpose of paying off arrears owed.</p> <p>This rule advice is implemented in Part 7, Division 1 of the proposed Water Charge Rules.</p> <p><i>Regulator for Part 7</i></p> <p>Consistently with the rule advice for amending the application of Part 6 and the consequent removal of the need for accreditation, the regulator for Part 7 following the transition period will be the ACCC.</p> <p><i>See also rule advices 5-M and 5-W.</i></p> <p>This rule advice is implemented in Part 7 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-T</b> (section 5.7)</p> <p>The rules should require that an infrastructure operator must notify the ACCC as soon as practicable if:</p> <ul style="list-style-type: none"> <li>it becomes aware that it is a Part 7 operator; or</li> <li>it becomes aware of a distribution it will make that may result in the operator becoming a Part 7 operator.</li> </ul> <p>The rules should be amended to allow for the ACCC to grant an exemption to the requirement for a Part 7 operator to have its infrastructure charges approved or determined.</p> <p>The rules should allow the ACCC to make the exemption in relation to a specific distribution or a distribution to be made in the future that meets particular conditions specified by the ACCC.</p> <p>The ACCC should only give such an exemption if it is satisfied that providing the exemption is unlikely to have a negative impact on the achievement of the Basin Water Charging Objectives and Principles, taking into account:</p> <ul style="list-style-type: none"> <li>the nature of the operator’s infrastructure services;</li> <li>the nature of the distribution made by the operator to its customers;</li> <li>the preferences of the operator’s customers; and</li> <li>any action taken by the operator in response to the ACCC’s concerns about distributions that the operator has made or intends to make; and</li> <li>any terms, conditions, or obligations associated with the distribution.</li> </ul> <p>In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the</p>	<p style="text-align: center;"><b>Some change</b></p> <p>The cross-reference in this rule advice to the proposed non-discrimination rule has been updated to reflect changes made to that rule advice.</p> <p>The Final Advice adds an additional factor which the ACCC must have regard to when deciding whether to provide an exemption to a Part 7 operator: any terms, conditions or obligations associated with the distribution.</p> <p>The Final Advice clarifies the requirements for approving / determining infrastructure charges of a Part 7 operator by expressly providing that, when undertaking an approval or determination under Part 7, the ACCC may have</p>

<p>operator.</p> <p><i>Approvals or determinations under Part 7</i></p> <p>The rules should also be amended to allow the ACCC, in approving or determining infrastructure charges set out in an application under Part 7, to also:</p> <ul style="list-style-type: none"> <li>• have regard to any distributions previously made and / or proposed by the infrastructure operator.</li> <li>• specify terms and conditions in relation to particular charges.</li> </ul> <p>This rule advice is implemented in Part 7 of the proposed Water Charge Rules.</p>	<p>regard to distributions made and / or proposed to be made by the operator, and may specify terms and conditions in relation to particular charges.</p>
<p><b>Rule advice 5-U</b> (section 5.7)</p> <p>The water charge rules should be amended to provide that an infrastructure operator should be taken to have made a <b>distribution</b> to a customer if it has:</p> <ul style="list-style-type: none"> <li>• declared a dividend for a customer; or</li> <li>• distributed profits, or any part of its profits, whether in the form of dividends or otherwise to a customer; or</li> <li>• distributed its reserves, or any part of its reserves to a customer; or</li> <li>• issued bonus shares to a customer.</li> </ul> <p>However, the rules should clarify that an infrastructure operator is not taken to have made a distribution where it makes a payment to a customer as an incentive for the customer to agree to the reconfiguration or decommissioning of relevant water service infrastructure.</p> <p>The rules should provide that an infrastructure operator is also taken to have made a distribution where it trades or allocates water to a customer in the form of a ‘water allocation’ or an allocation of water to an irrigation right other than:</p> <ul style="list-style-type: none"> <li>• the allocation of water from an irrigation infrastructure operator to the holder of an irrigation right to fulfil its contractual obligations in relation to irrigation rights held by its customers;</li> <li>• those necessary to give effect to a trade of water access right or irrigation right by a customer.</li> </ul> <p>However, even where the trade or allocation of water to a customer is considered a distribution, it should not trigger the potential application of Part 7 if it also meets the definition of a <b>standard distribution</b> as proposed in rule advice 5-S.</p> <p>This rule advice is implemented in Part 7, Division 1 of the proposed Water Charge Rules.</p>	<p style="text-align: center;"><b>Substantial change</b></p> <p>The Final Advice sets out in full the circumstances in which an operator should be taken to have made a distribution.</p> <p>The Final Advice also refines the provisions relating to where an operator trades or allocates water to customers.</p> <p>Several other elements of this rule advice have also been refined to address stakeholder concerns about the rule wording.</p>
<p><b>Rule advice 5-V</b> (section 5.7)</p> <p>The water charge rules should be amended such that an infrastructure operator ceases to be a Part 7 operator three years after:</p> <ul style="list-style-type: none"> <li>• the day the operator last made a distribution (other than standard distribution); or</li> <li>• the start of the regulatory period for the operator;</li> </ul>	<p style="text-align: center;"><b>No change</b></p>

<p>whichever occurs later.</p> <p>(The current rules state that an operator is no longer a Part 7 operator five years after it last made a distribution, or when it ceases to be a member-owned operator.)</p> <p>This rule advice is implemented in Part 7, Division 1 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 5-W</b> (section 5.9)</p> <p>The rules should be amended so that the current Part 9 continues only as far as is necessary to transition from the current application of Part 6 (and no further).</p> <p>In particular, accreditation arrangements under the existing Part 9 should cease to apply in relation to approvals and determinations for:</p> <ul style="list-style-type: none"> <li>• infrastructure operators not currently subject to Part 6 or Part 7: when the amendments (including the repeal of existing Part 9) commence;</li> <li>• infrastructure operators subject to existing Part 6: at the end of the regulatory period underway on the transition date (when amendments to the rules take effect) or, if the operator has lodged an application for an upcoming regulatory period, at the end of that regulatory period;</li> <li>• infrastructure operators subject to existing Part 7: when those operators cease to be Part 7 operators;</li> </ul> <p>unless the accreditation is revoked, withdrawn by a Basin State or expires earlier.</p> <p>This rule advice is implemented in the repeal of Part 9 of the current WCIR, and through Part 11 of the proposed Water Charge Rules.</p>	<p style="text-align: center;"><b>Some change</b></p> <p>This rule advice has been updated to clarify that Part 9 should continue to apply for the full duration of the relevant regulatory period in the event that a current Part 6 operator has already lodged an application to have its infrastructure charges approved or determined at the time amended rules come into effect.</p>
<p><b>Rule advice 5-X</b> (section 5.11)</p> <p>The rules should be amended to provide an exemption such that proposed rule 10 does not apply in relation to charges, or restrictions on the availability of infrastructure services, that are negotiated, offered, arbitrated or otherwise specified under the following arrangements (or arrived at under a dispute resolution process undertaken consistently with such an arrangement) under Part IIIA of the <i>Competition and Consumer Act 2010</i>:</p> <ol style="list-style-type: none"> <li>(a) an access undertaking or access code;</li> <li>(b) a declared service;</li> <li>(c) an effective access regime;</li> <li>(d) a competitive tender process.</li> </ol> <p>There should not be any general exemption for other ‘commercially negotiated’ infrastructure charges.</p> <p><i>See rule advice 5-B (in section 5.3.1) for the proposed non-discrimination requirements.</i></p> <p>This rule advice is implemented in rule 10(7) of the proposed Water Charge Rules.</p>	<p style="text-align: center;"><b>No change</b></p>
<p><b>Rule advice 5-Y</b> (section 5.13)</p> <p>The rules should be amended to regulate the manner in which an infrastructure operator can recover amounts incurred by the operator</p>	<p style="text-align: center;"><b>Substantial change</b></p> <p>This rule advice has been revised to</p>



through infrastructure charges or planning and management charges levied on the operator, through infrastructure charges that the operator imposes on its own customers.

#### *Definitions*

The rules should define **network operation charges** to mean infrastructure charges and planning and management charges levied on an infrastructure operator on the basis of:

- water access rights held or used by an infrastructure operator specifically for the purpose of meeting distribution losses; or
- infrastructure used by the operator to extract water from a watercourse or discharge water to a watercourse in the course of providing a service to their customers (for example: charges levied on off-take works used by the operator to extract water from or deliver water to a natural watercourse)

All other infrastructure charges and planning and management charges incurred by an infrastructure operator should be deemed **ancillary charges**.

#### *Rule for passing through the cost of network operation charges*

The rules should be amended so that:

- An operator may (but is not required to) levy a separate charge(s) to recover the amount of any network operation charges it incurs from its customer.
- If the operator chooses to levy separate charges to recover network operation charge, these charges must not recover in total more than the total amount of the network operation charges.

This rule should be a civil penalty provision.

*Note:* These rules should have the effect that an operator may choose the basis on which it levies such charges, including through charges per unit of water delivery / drainage right held (in which case these charges are able to be included in termination fees).

#### *Rule for passing through the cost of ancillary charges*

The rules should be amended so that:

- An operator must levy one or more separate charges on its customers to recover the costs of ancillary charges it incurs.
- These charges the operator levies must be *separate* from its other infrastructure charges, but can recover the cost of more than one 'ancillary charge' as long as, as far as practicable, those charges recover the same total amount as the ancillary charges.
- The operator must not levy these separate charge(s) on the basis of the number of units of water delivery right or water drainage right held.

*Note:* this has the effect that such charges cannot form part of the basis for calculation of the maximum termination fee payable.

- An operator must as far as practicable levy charges on the same basis on which the operator incurred the ancillary charges, or otherwise must levy charges on a basis that is reasonably similar to the basis on which the operator incurred the ancillary charges.

Example: a volumetric charge incurred by an operator in relation to the water access entitlement held by the operator should be

be less prescriptive and more flexible while still achieving the policy intent. In particular:

- The rule now covers all infrastructure charges and planning and management charges incurred by an operator (compared to only such charges levied on the basis of water / water access rights in the Draft Advice).

- The rule advice now only distinguishes between two types of charges an operator may incur ('network operation charges'— replacing and expanding the definition of 'distribution loss charges' used in the Draft Advice; and 'ancillary charges'— replacing the definitions of 'directly attributable charges' and 'other shared charges' used in the Draft Advice)

- The only requirement for how an operator should pass through 'network operation charges' is that the operator provide information to customers on its chosen method (in its Schedule of Charges).

- The rule for passing through 'ancillary charges' is more flexible and general than the corresponding rule in the Draft Advice

- The Final Advice adds a

<p>recovered through similar charges on customers' irrigation rights.</p> <ul style="list-style-type: none"> <li>Where an infrastructure operator incurs a charge as a direct result of the actions of a particular customer or customers, the infrastructure operator should levy its charge, as far as practicable, only on that customer or those customers.</li> </ul> <p>Example: if an operator incurs a transaction charge determined by or on behalf of government (a type of planning and management charge) when facilitating a trade or transformation for a customer, the cost of the charge should be passed through directly to that customer. See also section 5.4.3.</p> <p>This rule should be a civil penalty provision.</p> <p><i>General rules for the pass-through of network operation charges and ancillary charges</i></p> <ul style="list-style-type: none"> <li>The amounts of any charges levied by an infrastructure operator to recover the cost of network operation charges or ancillary charges should take into account any discounts received by the operator.</li> <li>An operator may continue to levy, in accordance with the current Schedule of Charges, any (separate) infrastructure charge(s) that recover network operation charges or ancillary charges for up to three months after the charge(s) it incurs (or the circumstances in which it incurs the charge) are changed.</li> </ul> <p>See also:</p> <ul style="list-style-type: none"> <li>Rule advice 5-E (section 5.4.1) for Schedule of Charges information requirements</li> <li>Rule advice 5-I (section 5.4.2) in relation to timing requirements.</li> <li>Rule advice 5-J (section 5.4.3) for an exemption from publication requirements for charges in relation to certain 'ancillary charges'.</li> </ul> <p>This rule advice is implemented in rule 9A of the proposed Water Charge Rules.</p>	<p>'grace period' of 3 months for an operator who incurs 'network operation charges' or 'ancillary charges' to update its Schedule of Charges to comply with the pass-through requirements, after a change in the charges that it incurs.</p>
<p><b>Draft Rule advice 5-Z</b> (section 5.13)</p> <p><i>The Draft Advice recommended that if an operator did not comply with the proposed 'pass-through rules' (see rule advice 5-Y), the relevant termination fee multiple should be 1x (instead of 10x).</i></p>	<p><b>Substantial change - Removed</b></p> <p>The ACCC has removed this rule advice in light of stakeholder concerns, and given that there are other avenues for ensuring compliance with the proposed pass-through requirements.</p>
<p><b>Chapter 6—Water Charge (Termination Fees) Rules</b></p>	
<p><b>Rule advice 6-A</b> (section 6.1)</p> <p>The rules should be amended to regulate termination fees levied by all infrastructure operators, not only irrigation infrastructure operators.</p> <p>This rule advice is implemented in Part 10 of the proposed Water Charge Rules.</p>	<p><b>No change</b></p>

<p><b>Rule advice 6-B</b> (section 6.2.1)</p> <p>The rules should be amended such that the calculation of the maximum general termination fee should only include fixed volumetric infrastructure charges imposed:</p> <ul style="list-style-type: none"> <li>(a) per unit of water delivery right; or</li> <li>(b) per unit water drainage right (where this is separate from the water delivery right);</li> </ul> <p style="padding-left: 40px;">to the extent that these aspects of a customer’s right of access are being terminated.</p> <p>However, the maximum general termination fee may also include an amount to <i>account</i> for charges dealt with under <i>rule</i> advice 6-C.</p> <p><i>Note:</i> an infrastructure operator may impose a termination fee that is less than the maximum amount, or waive a termination fee.</p> <p><i>See also rule advices 6-C, 6-D and 6-E.</i></p> <p>This rule advice is implemented in rule 72 of the proposed Water Charge Rules.</p>	<p><b>No change</b></p>
<p><b>Rule advice 6-C</b> (section 6.2.1)</p> <p><i>Separate charges for infrastructure that is dedicated for the exclusive use of the terminating customer</i></p> <p>The rules should be amended to provide that, if a separate charge is imposed in respect of infrastructure that is dedicated to the exclusive use of the terminating customer, the maximum general termination fee that the infrastructure operator may impose can include an amount, which is the lesser of:</p> <ul style="list-style-type: none"> <li>(a) a reasonable estimate of the cost of the dedicated infrastructure, net of a reasonable estimate of any contribution towards that cost made by the terminating customer, whether via direct contribution (e.g. lump sum payment) or via the payment of the separate infrastructure charge; or</li> <li>(b) 10x the amount of the annual relevant infrastructure charge (i.e. the separate charge that relates to the specific infrastructure).</li> </ul> <p>This rule advice is implemented in rule 72 of the proposed Water Charge Rules.</p>	<p><b>Some change</b></p> <p>The Final Advice provides that an operator may use a ‘reasonable estimate’ of the costs and customer contributions relevant to dedicated infrastructure, compared to more prescriptive accounting requirements proposed in the Draft Advice.</p>
<p><b>Rule advice 6-D</b> (section 6.2.1)</p> <p>The rules should be amended to provide more clarity about which infrastructure charges an operator should use when calculating the maximum general termination fee.</p> <p><i>General rule</i></p> <p>Where a customer has provided notice of their intention to terminate or otherwise made an information request, the infrastructure operator must use:</p> <ul style="list-style-type: none"> <li>(a) the infrastructure charges specified in the Schedule of Charges currently in effect at the time the customer provides notice or makes their request; or</li> <li>(b) if the infrastructure operator has adopted a new Schedule of Charges within the previous 25 business days—the infrastructure charges specified in the earlier Schedule of Charges;</li> </ul>	<p><b>Some change</b></p> <p>The Final Advice more clearly specifies which Schedule of Charges should be used for calculating termination fees in the situation where a customer seeks information on termination fees or initiates a termination / surrender around the time a new Schedule of Charges has been adopted, or specifies a future date for a</p>

<p>whichever produces the lower maximum general termination fee.</p> <p><i>Specific rule for when customer specifies future date for termination / surrender</i></p> <p>Where a customer terminates / surrenders their right of access by submitting written notice to the operator, but specifies in that notice a future date on which the termination / surrender is to take effect which is more than 6 months after the date of the notice, the infrastructure operator must use the infrastructure charges specified in the Schedule of Charges in effect at the time of the termination / surrender.</p> <p><i>Specific rule for when operator terminates due to breach of contract</i></p> <p>Where an operator terminates a customer's right of access due to a customer's breach of contract, the infrastructure operator must use the infrastructure charges specified in the Schedule of Charges in effect at the time the operator provides notice of the termination to the customer.</p> <p><i>See also rule advice 6-F.</i></p> <p>This rule advice is implemented in rule 72 of the proposed Water Charge Rules.</p>	<p>termination / surrender to take effect.</p>
<p><b>Rule advice 6-E</b> (section 6.2.2)</p> <p>The rules should be amended to provide that, when calculating the maximum general termination fee applicable to a termination / surrender of a right of access, if an infrastructure operator does not allow for the trade of water delivery right (of a kind relevant to the termination) separately from the trade of a water access right or irrigation right, the multiple applied to the fixed volumetric charge levied per unit of water delivery right or unit of water drainage right should be 1x rather than 10x.</p> <p><i>Note:</i> an operator 'allows for the trade of water delivery right' if water delivery right of a kind relevant to the termination is generally permitted to be traded, rather than whether any particular proposed trade of a water delivery right is approved or not.</p> <p><i>See also rule advice 6-F.</i></p> <p>This rule advice is implemented in rule 72 of the proposed Water Charge Rules.</p>	<p><b>Some change</b></p> <p>The Draft Advice used the terminology of an operator needing to 'provide for' the trade of water delivery right. The Final Advice amends this to 'allow for', in response to stakeholder concerns that 'provide' could mean actively facilitate (e.g. by providing an online trading exchange).</p> <p>Also, the Final Advice makes clear that an operator needs to generally allow for trade of water delivery right 'of a kind relevant to the termination'.</p>
<p><b>Rule advice 6-F</b> (section 6.2.3)</p> <p>The rules should be amended as set out below to clarify when an operator can levy a termination fee and improve the availability of information to customers considering terminating.</p> <p>Operator to provide information in response to customer seeking to terminate</p> <p><i>The rules should continue to allow for a customer to terminate some or all of their right of access by submitting a</i></p>	<p><b>Some change</b></p> <p>The Final Advice adds the following elements:</p> <ul style="list-style-type: none"> <li>• An operator may require that a request for information be</li> </ul>

*written notice to their infrastructure operator.*

Upon receiving such a notice, the infrastructure operator must, within 25 business days, provide the customer with a written statement (referred to in the proposed water charge rules as a '**termination information statement**'):

setting out the value of the maximum general termination fee that would be payable upon termination (binding on the operator and the customer for 6 months—see below), and how **that fee was** calculated;

- (a) notifying the customer if they are able **to trade water** delivery right of the kind relevant to the customer's right of access, and any rules governing such trade;
- (b) if applicable—setting out the amount of any disconnection fee that would apply under Rule 76, or providing information on how a disconnection fee would be calculated;
- (c) if applicable—setting out the amount of any additional termination fee relating to capital works, approved by the ACCC under rule 73.
- (d) Operator to confirm that customer wishes to proceed with termination after providing termination information statement
- (e) After providing the termination information statement containing the information in (a)–(d) above, the rules should require the operator to confirm that the customer wishes to proceed with the termination in order to be able to levy a termination fee.
- (f) In the case where the operator had provided **the statement to** the customer in response to an information request (see below) within the period beginning 6 months before the operator received the customer's written notice to terminate, the customer's written notice should be taken as confirmation that they wish to proceed with the termination (and the maximum general termination fee would be that previously provided to the customer in the statement).

*Operator to provide information in response to customer information request*

*An infrastructure operator should also be required to provide a termination information statement to a customer upon receiving a request from a customer for information on the termination fee that would be payable if the customer were to terminate some or all of their right of access (an 'information request').*

An operator may require an information request to be submitted in writing, but if it does so must advise any customer who submits a non-written information request of this requirement as soon as is practicable. Where an operator has such a policy, the rule requirement for the operator to provide a termination information statement should apply only in relation to written information requests received by that operator.

Operator only permitted to levy a termination fee when customer terminates if information has been provided within required timeframe

The rules should provide that, where the customer instigates a termination by submitting written notice to the operator, the operator

submitted in writing (but if it does so, it must tell customers that this is the case).

- The Final Advice makes clear that the operator does not need to provide information again if a customer wants to proceed with termination within six months of being given a 'termination information statement' from the operator.

- The Final Advice makes clear that the general termination fee "quote" provided in a termination information statement may not be exceeded if the customer proceeds with termination / surrender within 6 months.

<p>may not levy a termination fee unless it has already provided the customer with a termination information statement setting out the information in items (a)–(d) above within the previous 6 months. However, in the case where the customer specifies a future date on which the termination is to take effect, the termination information statement must have been given within the period beginning 6 months before that future date.</p> <p><i>If the operator had not previously provided the termination information statement within the relevant time, they must do so after receiving the notice from the customer, and may only levy a termination fee if a customer, having been given the termination information statement, confirms that they wish to proceed with the termination.</i></p> <p>The maximum general termination fee the operator can levy is that set out in the termination information statement. If applicable, the maximum additional termination fee is the relevant fee approved by the ACCC under rule 73.</p> <p>Note: If an operator instigates a termination due to a customer’s breach of contract (as is provided for in subrule 71(3), an operator should not be required to provide a termination information statement.</p> <p>These rules <i>should</i> be a civil penalty provision.</p> <p>See also rule advice 6-E.</p> <p>This rule advice is implemented in rules 71 and 74 of the proposed Water Charge Rules.</p>	
<p><b>Rule advice 6-G</b> (section 6.2.3)</p> <p>The rules should be amended to make clear that the operation of proposed subrule 71(9)(b) (current rule WCTFR 6(2)(b)) should be confined to where an operator provides a service for the storage of water using its own water service infrastructure.</p> <p>This rule advice is implemented in subrule 71(9)(b) of the proposed Water Charge Rules.</p>	<p><b>New rule advice</b></p> <p>This new rule advice responds to stakeholder concerns with the current rules and Draft Advice regarding whether a termination fee may be imposed in a situation where an off-river IO facilitates customers’ access to carryover services provided by another operator.</p>
<p><b>Chapter 7—Water Charge (Planning and Management Information) Rules</b></p>	
<p><b>Rule advice 7-A</b> (section 7.3)</p> <p>The requirement to disclose the nature and cost of water planning and management activities related to planning and management charges (rules 5(2)(d) and 5(2)(j) of the WCPMIR) should be repealed.</p> <p>This rule advice is implemented in the proposed repeal of the WCPMIR.</p>	<p><b>No change</b></p>

<p><b>Rule advice 7-B (section 7.3)</b></p> <p>The rules should be amended such that remaining requirements in the WCPMIR to disclose information about planning and management charges are retained and harmonised with the general pricing transparency requirements for infrastructure charges. These requirements are set out in rules advices 5-E and 5-F.</p> <p>This rule advice is implemented in rule 11, 12 and 13 of the proposed Water Charge Rules.</p>	<p><b>No change</b></p>
<p><b>ACCC Recommendations</b></p>	
<p><b>Recommendation 4-A (section 4.2)</b></p> <p>The ACCC will review its existing guidance material and, if any amendments are made to the water charge rules, develop new guidance material to help ensure stakeholders understand their rights and obligations under the rules. Future reviews of the ACCC’s guidance material will be undertaken in close consultation with industry stakeholders.</p> <p>The ACCC will work with Basin State economic regulators to ensure the Pricing Principles reflect regulatory best practice. The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector.</p>	<p><b>No change</b></p>
<p><b>Recommendation 4-B (section 4.4)</b></p> <p>The ACCC will review its existing guidance material and, if any amendments are made to the water charge rules, develop new guidance material to help ensure stakeholders understand their rights and obligations under the rules. Future reviews of the ACCC’s guidance material will be undertaken in close consultation with industry stakeholders.</p> <p>The ACCC will work with Basin State economic regulators to ensure the Pricing Principles reflect regulatory best practice. The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector.</p>	<p style="text-align: center;"><b>Some change</b></p> <p>The recommendation has been expanded to include the ACCC’s guidance material for the rules more generally (beyond the ACCC Pricing Principles).</p>
<p><b>Recommendation 4-C (section 4.5)</b></p> <p>The ACCC will continue to monitor the necessity and benefit of asking for particular compliance information through its compliance monitoring processes and, in specific investigations, will continue to consider requests for extensions of time to respond to the ACCC where resourcing is a concern.</p>	<p><b>No change</b></p>
<p><b>Recommendation 4-D (section 4.5)</b></p> <p>The ACCC will continue to work closely with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from the ACCC’s review.</p>	<p><b>No change</b></p>
<p><b>Recommendation 4-E (section 4.7)</b></p> <p>Should the Minister decide to adopt the ACCC’s advice for amendments to the water charge rules, and such amendments are introduced (through an amending instrument) before 1 March 2017, the ACCC recommends that the transition date (the date the amendments take effect) should be 1 July 2017. In the event that the proposed amendments to the rules are not introduced until a later</p>	<p style="text-align: center;"><b>New recommendation</b></p> <p>The Final Advice now includes an express recommendation regarding the preferred transition date for</p>

<p>date, the transition date for the amendments should be adjusted accordingly.</p> <p><i>Note:</i> the ACCC has recommended that the proposed amendments to rule 10 (non-discrimination) apply from a later date—see recommendation 5-A.</p> <p><i>Note:</i> particular timing issues relating to Network Service Plans (NSPs) (Part 5) are considered in section 5.5.</p>	<p>the proposed rule amendments.</p>
<p><b>Recommendation 5-A (section 5.3.1)</b></p> <p>The proposed amendments to rule 10 (set out in rule advices 5-A and 5-B) should not apply before 1 July 2018, even if the ACCC’s recommendation 4-E is adopted and other amendments to the rules commence on 1 July 2017.</p> <p><i>See also recommendation 4-E.</i></p>	<p><b>New recommendation</b></p> <p>The Final Advice recommends a later commencement date in relation to proposed rule 10 in response to operator concerns with implementation issues.</p>
<p><b>Recommendation 6-A (section 6.2.1)</b></p> <p>Infrastructure operators should provide information to their customers on how they have used and intend to use revenue from termination fees.</p> <p><i>See also rule advice 5-E.</i></p>	<p><b>No change</b></p>
<p><b>Recommendation 7-A (section 7.2)</b></p> <p>The ACCC supports the ongoing commitment made by governments to greater cost recovery for water planning and management activities, as part of the National Water Initiative, but recommends that the water charge rules are not an effective policy tool to ensure these commitments are met.</p>	<p><b>No change</b></p>
<p><b>Recommendation 8-A (section 8.1.1)</b></p> <p>The ACCC recommends that the Australian Government work with Basin States to improve the accuracy and consistency of water trade reporting. In particular, water trading price data should be collected on a consistent basis in a way that can allow for the separation of market-based trades from other types of trades.</p>	<p><b>No change</b></p>
<p><b>Recommendation 8-B (section 8.1.2)</b></p> <p>Basin States, infrastructure operators, the MDBA and the ACCC should make it a priority to better inform rights holders of the benefits and obligations on right holders conferred by each type of tradeable water right, particularly in relation to charges payable and trading options.</p>	<p><b>No change</b></p>
<p><b>Recommendation 8-C (section 8.3)</b></p> <p>The ACCC recommends that governments consider the merits of:</p> <ul style="list-style-type: none"> <li>expanding the jurisdiction of existing ombudsmen schemes or small business commissioners to resolve disputes between infrastructure operators and their customers; or</li> </ul>	<p><b>No change</b></p>



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| <ul style="list-style-type: none"><li>• the creation of a new scheme to perform these roles.</li></ul> |  |
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## 1 Introduction

During 2014, an independent panel of experts reviewed the *Water Act 2007* (the Act) and made a number of recommendations and conclusions. These included recommendation 11, that the Australian Competition and Consumer Commission (ACCC), in consultation with industry and Basin State governments, review the three sets of water charge rules that have been made under the Act:

- Water Charge (Infrastructure) Rules 2010 (WCIR)<sup>3</sup>
- Water Charge (Termination Fees) Rules 2009 (WCTFR)<sup>4</sup>
- Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)<sup>5</sup>

In its interim response to the review of the Act, the Government accepted this recommendation (see section 3.2 for other recommendations and conclusions).

### 1.1 Terms of reference

On 17 December 2014, the Minister requested that the ACCC undertake a review of the water charge rules and, where appropriate, provide advice on possible amendments to the water charge rules.

The review is considering a wide range of issues relating to these rules, as required by the terms of reference, including:

- the consistency of water charging regimes across the Murray-Darling Basin (MDB)
- the appropriateness of the tiered regulatory approach in the WCIR
- ensuring the WCIR are able to appropriately regulate charges imposed by intergovernmental entities such as the Murray-Darling Basin Authority (MDBA)
- the interaction between the WCIR and third party access regimes
- options for improving the effectiveness of the WCPMIR
- the clarity of drafting in the rules, and the potential for their combination into one instrument.

The Minister's terms of reference specifically request the ACCC to provide advice on the merits of amending the rules in response to the matters set out by the Independent Expert Panel reviewing the Act (the Panel) in recommendation 11.<sup>6</sup>

The Minister also requested the ACCC's advice on any other opportunities for amending the rules to improve regulatory clarity or efficiency or to reduce regulatory burden while maintaining effective standards.

Table 1.1 below notes which sections in the ACCC's Final Advice are relevant to particular Terms of Reference for the review of the water charge rules.

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<sup>3</sup> Available at: <http://www.comlaw.gov.au/Details/F2011L00058>

<sup>4</sup> Available at: <http://www.comlaw.gov.au/Details/F2013C00160>

<sup>5</sup> Available at: <http://www.comlaw.gov.au/Details/F2010L02133>

<sup>6</sup> See recommendation 11: Independent Expert Panel reviewing the Water Act 2007, *Report of the Independent Review of the Water Act 2007*, 2014.

**Table 1.1: Relation of ACCC Final Advice to water charge rules review Terms of Reference**

Term of Reference	Relevant Section of the Draft Advice
1 The Australian Competition and Consumer Commission (ACCC) is requested to provide advice on possible amendments to the Water Charge (Infrastructure) Rules 2010, Water Charge (Planning and Management Information) Rules 2010 and Water Charge (Termination Fees) Rules 2009, in accordance with section 93 and section 98 of the <i>Water Act 2007</i> .	3.2
2 Preamble: The advice should address the merits of amending the rules in response to matters raised in the Report of the Independent Review of the Water 2007, as tabled on 19 December 2014; specifically, recommendation 11 in the report, proposing that the rules be reviewed to assess opportunities to reduce cost to industry and governments.	4.1
2(a) The continuing appropriateness of tiered regulation of infrastructure operators and the potential for streamlining or eliminating regulation, including whether to remove the current requirements for member-owned operators under Part 5 of the Water Charge (Infrastructure) Rules.	5.2, 5.3, 5.5
2(b) The current process for accreditation of Basin States' regulators, the effectiveness in applying water charging regimes by different regulators, and the form and content of charge determinations by all regulators.	5.6, 5.9, 5.10, 5.12, 5.13
2(c) Opportunities for advancing the consistent application of the water charging objectives and principles, including options to rank objectives and define terms.	4.2 5.6.3, 5.9, 5.10
2(d) Lessons learned from other sectors in relation to appeal mechanisms.	5.8
2(e) Opportunities to combine the water charge rules and Water Market Rules in one instrument.	4.3.1
2(f) Consistency with the Australian Government's deregulation objectives.	All issues throughout chapters 4-9, but especially: 5.5, 5.6
2(g) The effectiveness of the Water Charge (Planning and Management Information) Rules, the extent to which their effectiveness could be enhanced and the likely impacts if they were to be repealed.	4.4 7.2, 7.3, 7.4
3 The ACCC's advice is also requested on other opportunities for amending the rules to improve regulatory clarity or efficiency, or to reduce regulatory burdens while maintaining effective standards.	All issues throughout chapters 4-9, but especially: 4.3, 4.5, 4.6 5.3, 5.4, 5.5, 5.6, 5.7, 5.11, 5.13 6.2, 6.3, 6.4

A copy of the Minister's request for advice and the complete terms of reference for the review are included at **Appendix A**.

## 1.2 Consultation process and timeline

The ACCC has engaged in extensive consultation with stakeholders in the process of developing its advice.

Throughout the consultation process, the ACCC has held meetings with various industry stakeholders, including: infrastructure operators, irrigators, Basin State governments and regulators, industry groups and other stakeholders. The ACCC also surveyed irrigators directly, first in the early part of 2015 and again in March / April 2016.<sup>7</sup> The purpose of this consultation was to engage with stakeholders throughout the review process and to inform the drafting of the Final Advice and proposed water charge rules.

The Water Regulations 2008 set out consultation requirements in relation to proposals to amend the water charge rules.<sup>8</sup> These include requirements to consult with relevant minister for each Basin State, infrastructure operators and the broader public. Details of key steps in the consultation process are below.

### Issues Paper

On 4 May 2015, the ACCC released an Issues Paper<sup>9</sup> to facilitate stakeholder input to the advice. The Issues Paper:

- outlined the rationale for the water charge rules
- discussed concerns and issues with these rules, including those raised during the Water Act Review, and
- invited interested parties to respond to questions about these and any other relevant issues.

Stakeholder submissions were due on 29 June 2015. The ACCC received 28 public submissions from a range of stakeholders. These submissions are available on the ACCC website.<sup>10</sup> The ACCC also received one confidential submission.

### Public forums

During July and August 2015, the ACCC held public forums in a number of regional areas throughout the Murray-Darling Basin (MDB). Public forums were held in: Mildura (27 July), Renmark (28 July), Shepparton (3 August), Deniliquin (3 August), Griffith (4 August), St George (5 August), Tamworth (24 August) and Dubbo (25 August). These public forums were an opportunity to discuss water charging arrangements and contribute to the ACCC's advice on possible amendments to the water charge rules.

### Draft Advice

On 24 November 2015, the ACCC released its Draft Advice<sup>11</sup> and draft proposed water charge rules<sup>12</sup> for consultation. Stakeholder submissions were initially due on 5 February 2016, but this was extended to 4 March 2016. The ACCC received 34 public submissions on its Draft Advice.<sup>13</sup>

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<sup>7</sup> Dale Ashton, *Water trading and water charge rules: a survey of irrigators in the Murray–Darling Basin*, ABARES report to client prepared for the Australian Competition and Consumer Commission, Canberra, June 2016, viewed June 2016, <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development/issues-paper>; A Zuo, S Wheeler and A Loch, *Short survey of southern Murray-Darling Basin irrigators' views on the review of the water charge rules – Final Report*, University of Adelaide report to client prepared for the ACCC, Adelaide, May 2016.

<sup>8</sup> Division 4.1, *Water Regulations 2008*.

<sup>9</sup> ACCC, *Water Charge Rules Review Issues Paper*, Canberra, May 2015, viewed June 2016, <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development/issues-paper>.

<sup>10</sup> *ibid.*

## **Timing**

The original terms of reference requested the ACCC's Final Advice by the end of December 2015. The Minister has extended this period to the end of May 2016 to ensure irrigators and other stakeholders have sufficient time to respond to this Draft Advice, and that the ACCC had sufficient time to incorporate these views.

In early May, the Government entered caretaker mode and the ACCC wrote to the Minister to advise that the Final Advice would be deferred until after the caretaker period.

### **1.3 Structure of the Final Advice**

Generally, the Final Advice follows the same structure as the Draft Advice. As in the Draft Advice, the Final Advice contains numbered 'rule advice' and 'recommendations':

- Rule advice: the ACCC's proposed amendments to the water charge rules to address the issues identified (where rule amendments are considered the preferred course of action).
- Recommendations: the ACCC's view on some other course of action that should be taken in order to address the issues identified.

The Final Advice contains the following chapters:

#### **Chapter 2—Overview of water charging arrangements**

This chapter provides an overview of water charging arrangements in the Murray-Darling Basin (MDB). In particular, this chapter explains the interrelationships between types of:

- infrastructure operators and other charging entities
- infrastructure services
- customers
- regulated water charges, and
- tradeable water rights.

#### **Chapter 3—Legislative framework**

This chapter provides information on the legislative framework applicable to the water charge rules, including the interaction between this review process and the Government's response to the recommendations of the Water Act Review.

#### **Chapter 4—General issues**

#### **Chapter 5—Water Charge (Infrastructure) Rules 2010**

#### **Chapter 6—Water Charge (Termination Fees) Rules 2009**

#### **Chapter 7—Water Charge (Planning and Management Information) Rules 2010**

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<sup>11</sup> ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, viewed July 2016, <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development/draft-advice>.

<sup>12</sup> The 'Proposed Water Charge Rules' is the legislative instrument that would result if the amendments proposed by the ACCC were adopted.

<sup>13</sup> The ACCC has published submissions to the Draft Advice at: <http://acc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development/draft-advice#public-submissions-to-the-draft-advice>.

Chapters 4 to 7 describe the key issues considered by the review in relation to each of the three sets of water charge rules, and for the rules generally. Each section within these chapters includes:

- where relevant, rule advice and / or recommendations.
- background information
- a summary of stakeholder views, and
- ACCC assessment.

The ACCC's assessment considers options and alternatives put forward by stakeholders or otherwise considered by the ACCC. Further, it sets out the reasons for the proposed rule amendments made by the ACCC. The ACCC has proposed amendments to the water charge rules where it considers such amendments to be the best option contributing to the achievement of the Basin Water Charge Objectives and Principles, taking into account the need to reduce or avoid regulatory costs wherever practical.

### **Chapter 8—Other issues of concern**

This chapter discusses issues raised by stakeholders, particularly at the public forums, which fall outside the scope of the water charge rules review. Some recommendations are made in relation to these issues.

### **Chapter 9—Assessment of the change in regulatory cost under the proposed amendments to the water charge rules**

Where the ACCC has made rule advice (proposing amendments to the water charge rules), it has estimated the change in the regulatory cost of the proposed amendments. This chapter sets out the methodology the ACCC has used, as well as the estimated change in regulatory cost for the proposed amendments.

## **Appendices**

### **A – Request for advice and terms of reference**

### **B – Basin water charging objectives and principles**

The terms of reference requested the ACCC provide draft rule amendments as part of its advice. The ACCC has done so in a separate document—the 'Proposed water charge rules—amending instrument' sets out the legislative amendments required to give effect to the rule advices set out in the Final Advice. The ACCC has provided an additional document—the 'Proposed water charge rules'—to show the legislative instrument that would result if these amendments were adopted.

## 2 Water charging arrangements

The water charge rules, and this review, relate to regulated water charges (as defined in section 91 of the *Water Act 2007*). These charges are imposed at various stages of the rural water supply chain. This chapter provides an overview of the characteristics of, and inter-relationships between:

- participants in the rural water supply chain
- tradeable water rights
- regulated water charges.

### 2.1 Rural water supply chain participants

#### *Government departments and authorities involved in planning and management*

Government departments and water authorities undertake water planning and management (WPM) activities to plan for and manage water resources. These activities include:

- managing water access entitlements
- managing trade registers
- making water allocation decisions
- water monitoring
- environmental works to minimise the negative impacts of consumptive use.

Governments may recover some or all of these costs through planning and management charges. These charges may be levied on infrastructure operators or on water users directly.

#### *Infrastructure operators*

Infrastructure operators are those entities that own or operate infrastructure for the purpose of:

- storing water
- delivering water
- draining water

for the purpose of providing a service to another person.

This infrastructure can include dams, weirs, channels, pipes and associated equipment, and is collectively referred to as the infrastructure operator's ***water service infrastructure***.

An infrastructure operator provides ***infrastructure services*** to its customers in the form of access, or service provided in relation to access, to water service infrastructure. This includes services for the storage, delivery, drainage and taking of water.

In some cases, this Final Advice refers to a particular subset of infrastructure operators that deliver water for the primary purpose of being used for irrigation: this type of infrastructure operator is an ***irrigation infrastructure operator*** (IIO) and its water service infrastructure is considered an ***irrigation network***.

An infrastructure operator's customers can include irrigators, environmental water holders, commercial operations, or other infrastructure operators (including urban water supply networks).

The infrastructure services that an infrastructure operator provides can be considered either ‘on-river’ or ‘off-river’:

- ***On-river infrastructure services*** include harvesting and storing water through infrastructure such as dams, lakes, weirs and reservoirs, and delivering water, primarily through natural watercourses, to a point of extraction on a natural watercourse; or
- ***Off-river infrastructure services*** include the delivery of water from the natural watercourse through a network consisting of channels and / or pipes (which can be gravity-fed or pressurised) to a customer’s extraction point.<sup>14</sup>

On-river infrastructure services are sometimes referred to as ‘bulk water services’. Infrastructure operators providing these services are sometimes referred to as ‘bulk water suppliers’, and the charges are sometimes referred to as ‘bulk water charges’. Similarly, infrastructure operators providing off-river infrastructure services are often referred to as IIOs and the charges they impose have been referred to as ‘irrigation network charges’. IIOs typically only provide off-river infrastructure services, however this is not always the case.

In general, this Final Advice simply refers to ‘infrastructure operators’ and, where necessary will differentiate between infrastructure operators providing on-river infrastructure services, infrastructure operators providing off-river infrastructure services and infrastructure operators that provide both on-river and off-river infrastructure services.

Similarly, charges that an infrastructure operator imposes for on-river and off-river infrastructure services are referred to respectively as ‘on-river infrastructure charges’ and ‘off-river infrastructure charges’ where relevant.

### *Water users*

The overwhelming majority of water use in the Murray-Darling Basin (MDB) is for irrigation.<sup>15</sup>

Irrigators can be located either on-river (and are therefore considered ‘private diverters’) or off-river and rely on channels / pipes for the delivery of water to their property.

In recent years, the proportion of water held and used by environmental water holders has increased significantly. Other water users include:

- rural stock and domestic users
- manufacturing and processing operations
- commercial plantations (e.g. forestry)
- mining operations
- operators of urban water supply networks.<sup>16</sup>

Just like irrigators, these other water users require infrastructure services for the storage and delivery of water access rights that they hold. Typically, they will incur the same types of charges as irrigators where they use the same infrastructure services.

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<sup>14</sup> Some infrastructure operators that provide an off-river infrastructure service for the delivery of water will also provide a service for the (off-river) storage of water or drainage of water.

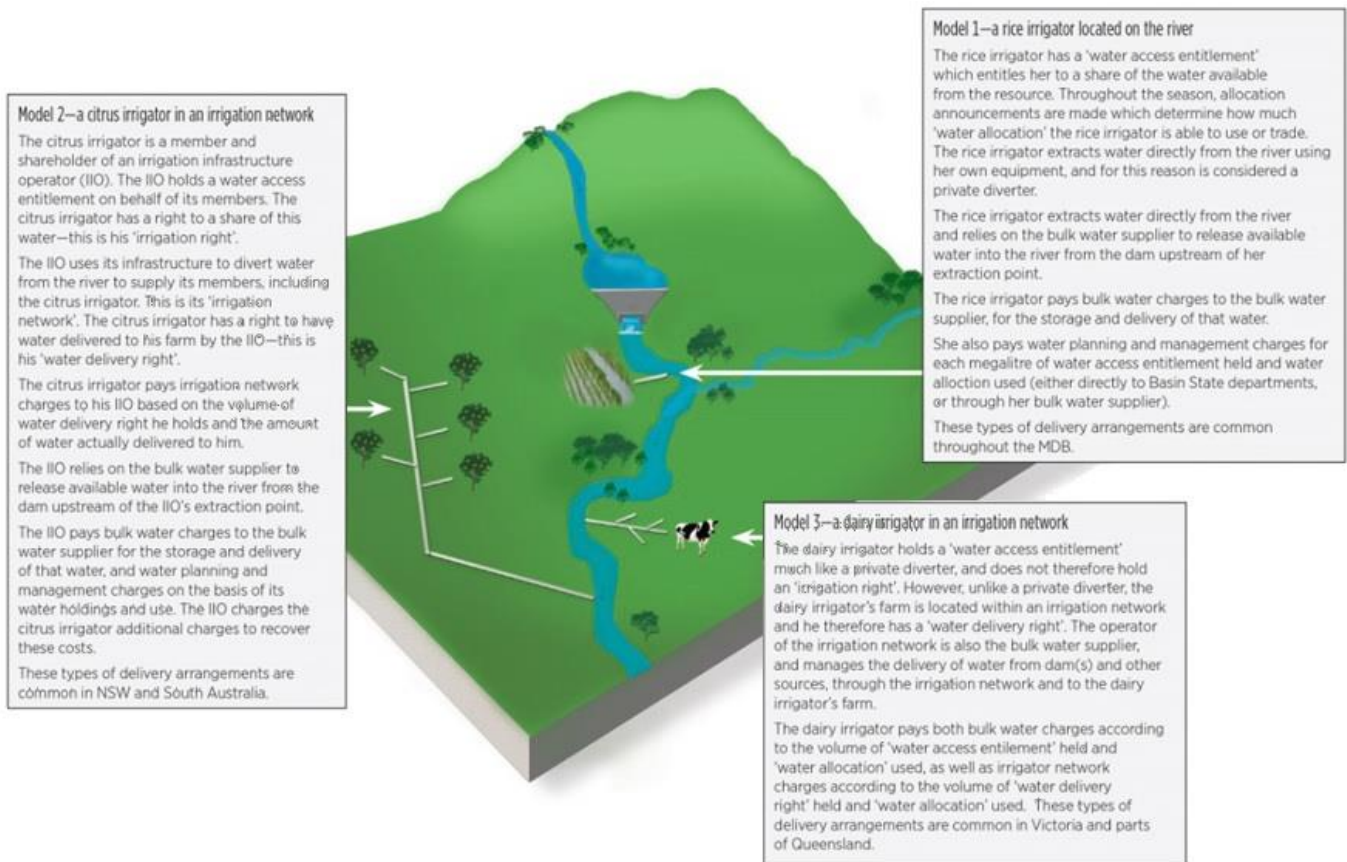
<sup>15</sup> Australian Bureau of Statistics, *Water use on Australian Farms, 2014-15*, Cat. No. 4618.0, viewed October 2015, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/A5A4DA2DF9F997A0CA2571AD007DDFD4?opendocument>.

<sup>16</sup> Charges in respect of urban water supply activities beyond the point at which water has been removed from a Basin water resource are not covered by the water charge rules. However, regulated water charges incurred by an urban water supplier (and imposed by another infrastructure operator) may nevertheless be subject to the water charge rules.



Figure 2.1 below provides a pictorial representation of the rural water supply chain for three irrigators with different infrastructure service needs.

**Figure 2.1 Rural water users**



## 2.2 Types of tradeable water rights

Water markets in the Murray-Darling Basin (MDB) enable the following types of rights to be traded between different water users and different locations:

- Water access right—a statutory right to hold / take water (includes *water access entitlement* and *water allocation*).
- Irrigation right—a right that a person holds against an irrigation infrastructure operator (IIO) to receive water (which is not a water access right or a water delivery right).
- Water delivery right—a right to have water delivered by an infrastructure operator.

Water markets across the MDB have differing levels of maturity. Some markets are well-established and have high trade volumes (for example, trade of water allocation) and other markets are relatively new (for example, trade of water delivery right).

More detail on each of these types of tradeable water rights is provided in the following sections.

### 2.2.1 Water access rights

The term 'water access right' includes:

- water access entitlement (WAE)—a perpetual or ongoing entitlement to exclusive access to a share of a water resource. Trade of a WAE is sometimes referred to as a 'permanent trade'. It is also possible to lease a WAE.

- water allocation—a specific volume of water allocated to a WAE in a given water accounting period. Trade of a water allocation is sometimes referred to as a 'temporary trade'.<sup>17</sup>

When water access rights are traded, the Basin Plan water trading rules require the seller to notify the approval authority or registration authority in writing of the price agreed for the trade.<sup>18</sup> These trade prices are not regulated water charges but instead represent the value of the water access right in question.

Similarly, infrastructure charges imposed by infrastructure operators are not charges for the physical water or water access rights, but are instead charges for infrastructure services (see section 2.3.2). However, infrastructure operators often use the volume of a water access right held or used by a customer as a proxy for that customer's consumption of infrastructure services and therefore their liability for infrastructure charges (see section 2.3).

**Box 2.1 Case study—a private diverter with a NSW with a water access entitlement (WAE)**

Ella Howard owns a farm near the town of Gundagai in NSW, which she primarily uses to grow wheat, barley and hay. Ella relies on the water available in the Murrumbidgee catchment to water her crops.

Ella holds a WAE issued under NSW water management law. This is in the form of a NSW water access licence with a 'share component' of 100 ML. This provides Ella with an ongoing right to a specified proportion of water available in the Murrumbidgee regulated river water source. The amount of water allocation that Ella has access to in a particular water year depends on the announced allocation made by NSW Department of Primary Industries—Water (DPI Water) (formerly NSW Office of Water) for the Murrumbidgee regulated river water source. If the announced allocation is 100 per cent, Ella's account will be credited with 100 ML of water allocation.

Ella's farm is located near the Murrumbidgee River, so Ella uses her own equipment to extract the available water from the river for use on her farm. WaterNSW (formerly known as State Water) is responsible for delivering water in the Murrumbidgee and manages Burrinjuck and Blowering dams for this purpose. Ella pays infrastructure charges to WaterNSW for the storage and delivery of her water.

In a particular year the announced allocation is 70 per cent. This means that Ella can extract, trade or carryover 70 ML of water allocation.

Ella is considering selling her water to reduce debt. Ella has the following options available to her:

- Sell her entire WAE. The perpetual right to 100 ML of water will pass on to the purchaser. Ella will no longer be entitled to water allocations announced in future years.
- Sell a portion of her WAE (for example 50 ML). Ella's perpetual right under the WAE will reduce to 50 ML. Ella will be entitled to receive 50 ML in future years when the announced allocation is 100 per cent.
- Sell her entire water allocation for this year (70 ML). Ella will not be able to use her WAE to receive water this year. However, she will be entitled to any water allocations announced in future years.
- Sell a portion of her water allocation for this year (for example 30 ML of the 70 ML available in that particular year). Ella can divert the remaining 40 ML for use on her farm this year.

In each of these scenarios, once Ella finds a buyer she would need to obtain approval for the trade from the relevant NSW approval authority.

**2.2.2 Irrigation rights and transformation**

Irrigators who hold irrigation rights can transform these rights into a WAE held in their own name. This allows the irrigator to sell or lease some or all of their WAE or water allocation, without seeking their IIO's approval. Water allocated to a WAE can also be used in areas outside the IIO's irrigation

<sup>17</sup> The definition of 'water access right' in the *Water Act 2007* also includes stock and domestic rights, riparian rights and any other right to the take or use of water prescribed by the *Water Regulations 2008*.

<sup>18</sup> Basin Plan water trading rules, rule 12.48.

network. The irrigator can also use the WAE as a form of security in obtaining finance and gaining greater control over carryover decisions.

Alternatively, an irrigator can transform their irrigation right into a WAE held in the name of another person. This can be done as part of a trade of water for use outside of the IIO's irrigation network. In either case, this process is known as transformation and is regulated by the Water Market Rules 2009 (WMR).

Box 2.2 below sets out a simplified example of the process of transformation.

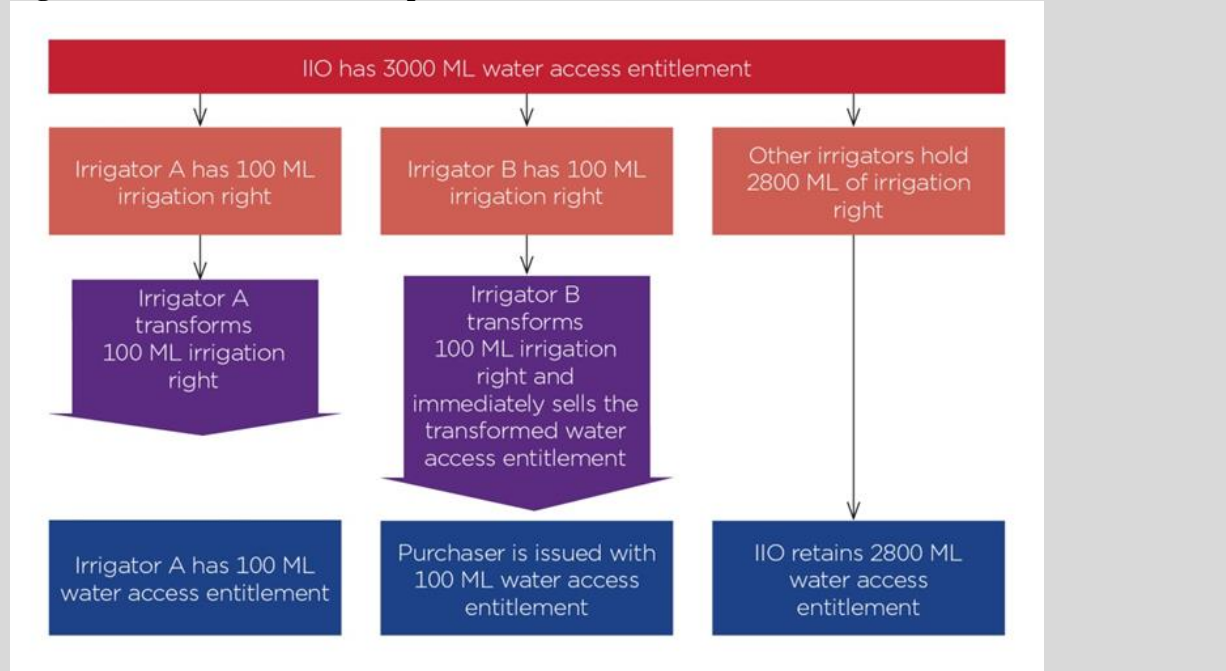
**Box 2.2 Transformation process**

An IIO holds 3000 ML of WAE and its customers hold an entitlement to this water in the form of irrigation rights against the IIO. Irrigators A and B both hold 100 ML of irrigation right, while other customers hold a combined total of 2800 ML of irrigation right.

Irrigator A wishes to transform all of their irrigation right without selling their water. Figure 2.2 below shows that irrigator A transforms all of their irrigation right and is issued with a 100 ML WAE.

Irrigator B wishes to transform all of their irrigation right and immediately sell it to another person. Figure 2.2 below shows that irrigator B transforms all of their irrigation right and the purchaser is issued with 100 ML of WAE. The WAE held by the IIO has been reduced by 100 ML from each respective transformation, leaving the IIO with 2800 ML of WAE. The volume of irrigation right held against the IIO has also been reduced from 3000 ML to 2800 ML.

**Figure 2.2 Transformation process**



**Box 2.3 Case study – an IIO customer with irrigation right**

Harry Smith owns a farm near the town of Leeton NSW, which he uses to grow rice. Harry is a member and shareholder of Murrumbidgee Irrigation Limited (MI).

Harry does not hold a WAE. The WAE is held by MI and entitles MI to an ongoing right to a specified proportion of water available in the Murrumbidgee regulated river water source.

Each of MI's members is entitled to a share of this water specified under their water entitlement contract with MI. MI has issued Harry an Entitlement Certificate which specifies that Harry has a right to a share of 100 ML of water from MI's WAE. This is Harry's 'irrigation right'. If DPI Water announces 100 per cent water allocation

Harry is entitled to receive 100 ML of water. If DPI Water only announces 50 per cent water allocation, Harry will only be entitled to receive 50 ML of water. However, the exercise of this irrigation right is subject to the terms and conditions of Harry's water entitlement contract with MI.

Harry does not have an individual right to extract water from the Murrumbidgee River himself. Rather, Harry has entered into a water delivery contract with MI, which obliges MI to use its infrastructure to extract water from the Murrumbidgee River and deliver it to Harry's farm (this is an off-river infrastructure service). The delivery contract specifies Harry's share of the capacity of MI's network (expressed in the units of water delivery rights).

Harry pays infrastructure charges to MI based on the number of units of water delivery right held, the volume of water actually delivered and other factors such as the number of connections to the irrigation network.

MI pays infrastructure charges to WaterNSW for the storage and delivery of water to its point of extraction on the Murrumbidgee River (this is an on-river infrastructure service). MI also incurs planning and management charges collected by WaterNSW on behalf of DPI Water. MI imposes charges on Harry to recover these WaterNSW and DPI Water costs.

In a particular year, the announced allocation is 70 per cent. MI has informed Harry that under his water entitlement contract, he is entitled to receive 70 ML of water.

Harry is considering selling his water to upgrade his on-farm infrastructure. Harry has the following options available to him:

- sell some or all of his ongoing irrigation right (for example 100 ML) to another member of MI. Harry must obtain MI's approval for this internal ('permanent') trade.
- sell some or all of his share of MI's internal water allocation (for example, 70 ML) to another member of MI or a person outside MI's irrigation network. This trade requires the approval of both MI and the relevant Basin State approval authorities.
- sell some or all of his ongoing irrigation right (for example 100 ML) to a person outside MI's irrigation network. Harry must apply to MI to 'transform' his irrigation right into a separately held WAE to be held by a person outside MI's irrigation network.

Even though Harry has sold some or all of his water, Harry may wish not to make any changes to his water delivery contract with MI. In these circumstances, Harry will continue to pay the same fixed infrastructure charges to MI. If Harry decides to reduce his right of access to MI's infrastructure, Harry would have to apply to MI to terminate a specified number of units of water delivery rights and pay a corresponding termination fee (see section 2.2.3).

### **2.2.3 Water delivery rights and termination**

Many irrigators in the MDB use the services of an infrastructure operator to deliver their water from the watercourse extraction point specified on the WAE (held by the irrigator or the operator) to their property. This is an off-river infrastructure service. For this purpose, these irrigators have a contractual and / or statutory right of access to the operator's infrastructure, which typically includes the right to the delivery of water through the infrastructure (a water delivery right)<sup>19</sup> and may also include a right to the drainage of water.

An irrigator may decide to modify their right of access. For example an irrigator that sells a WAE and switches to dryland farming may no longer require water to be delivered to their property. As such, they may no longer require access to the operator's infrastructure and wish to cease paying ongoing fixed infrastructure charges to the operator. In such circumstances, the customer may want to terminate their right of access and the operator may impose a termination fee (see section 2.3.3).

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<sup>19</sup> A water delivery right may be measured in a number of different ways, including in ML or number of delivery entitlements (where a delivery entitlement may entitle the irrigator to the delivery of a particular volume of water in ML/day, or as a share of capacity of the network). Water delivery rights can also be held against infrastructure operators.

Alternatively, instead of terminating their right of access an irrigator may want to sell water delivery rights to other irrigators located in the area serviced by their infrastructure operator. From 1 July 2014, the Basin Plan water trading rules prohibit IIOs<sup>20</sup> placing unreasonable restrictions on the trade of water delivery rights. The Murray-Darling Basin Authority (MDBA) enforces the Basin Plan water trading rules.

### 2.3 Types of regulated water charges

Regulated water charges can be characterised as either *volumetric* or *non-volumetric*, based on how they are levied.

A *volumetric charge* is one, which is set according to the volume of a right or physical amount of water. It can in turn be a:

- *fixed volumetric charge*: a charge which is based on the volume of a water right<sup>21</sup> held;
- *variable volumetric charge*: instead of referencing the volume of a water right *held*, a variable volumetric charge references the volume of the right that is utilised in a particular manner, for example, the volume of physical water delivered, the volume of water allocation traded, the volume of water carried over, volume of water allocation that is allocated to a customer, etc.<sup>22</sup>

For example, an infrastructure operator may levy a fixed volumetric charge based on the volume of a customer's water access entitlement (WAE), irrigation right or water delivery right holdings; and a variable volumetric charge based on the volume of water *delivered* to the customer under their water allocation or irrigation right.

A *non-volumetric charge* is one that does not reference a volume of a water right.

For example, a customer may incur a non-volumetric charge levied:

- per account (regardless of the volume of water right they hold)
- per outlet or meter
- based on the size of their landholdings
- when they undertake a transaction (for example, a trade application fee)
- as a flat charge on all customers with a particular characteristic.

The three broad types of regulated water charges covered by the water charge rules are set out in the sections that follow.

#### 2.3.1 Planning and management charges

Basin State ministers, water departments and water authorities determine planning and management charges to recover the costs of water planning and management (WPM) activities.

Volumetric planning and management charges are usually levied on the basis of WAE held or water allocation used.

Non-volumetric planning and management charges can be a mix of:

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<sup>20</sup> The Basin Plan water trading rules are limited to those water delivery rights held against infrastructure operators that meet the definition of 'irrigation infrastructure operator'.

<sup>21</sup> This would include water access right, irrigation right, water delivery right and other water-related rights, such as a right to drainage or a water use approval or a works approval. It would not include, for example, a holding of land.

<sup>22</sup> Variable volumetric charges could also be levied on the basis of the volume of water allocation (pursuant to a water access entitlement or an irrigation right) that is credited as a result of an allocation announcement, stored, carried over, forfeited, surrendered or traded.

- broad based levies which apply directly or indirectly on water users to fund a specific set of WPM activities and
- transaction charges, including include fees for applications for the trade, transfer or variation of water access rights or lodgement of a transaction with a water registry.

Infrastructure operators and water users pay these charges. Where planning and management charges are imposed on an infrastructure operator, the charges (or the costs incurred by the infrastructure operator because of these charges) are typically passed on to their customers.

Planning and management charges are currently regulated by the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR), and are discussed in chapter 7.

### **2.3.2 Infrastructure charges**

Infrastructure charges are the charges infrastructure operators impose for access to their water service infrastructure, and services provided in relation to that access—collectively referred to as ‘infrastructure services’.

#### *Infrastructure charges for on-river infrastructure services*

Infrastructure operators that provide on-river infrastructure services impose infrastructure charges to recover the costs associated with:

- water harvesting and storage<sup>23</sup> and
- water transportation and delivery.<sup>24</sup>

Although these costs relate to water service infrastructure, infrastructure charges for on-river infrastructure services generally take the form of:

- fixed volumetric infrastructure charges levied on the volume of WAE held by the customer
- variable volumetric infrastructure charges levied according to the amount of water allocation delivered to a customer’s extraction point
- non-volumetric charges levied per account or per meter / outlet

Infrastructure operators rely overwhelmingly on volumetric charges to obtain their required revenue; however, the amount of revenue recovered via fixed volumetric charges relative to revenue from variable volumetric charges differs considerably across operators.

#### *Infrastructure charges for off-river infrastructure services*

Infrastructure operators that provide off-river infrastructure services—usually for the delivery of water from a natural watercourse through channels / pipes to a customer—impose infrastructure charges to recover their costs. These costs are associated with:

- the day to day operation of their infrastructure
- maintaining and renewing their infrastructure, and
- meeting overheads.

Charges for off-river infrastructure services generally take the form of:

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<sup>23</sup> This includes flood mitigation and asset management of dams, lakes, weirs and other water storage structures.

<sup>24</sup> This includes taking customers’ orders, determining and implementing storage releases, monitoring water usage and administering customers’ water accounts.

- fixed volumetric charges levied on the volume of water delivery right held by the customer
- variable volumetric charges levied on the volume of water delivered to the customer (under a water access right or irrigation right) up to the volume of water delivery right held (with higher charges applying to volumes delivered over this amount)<sup>25</sup>
- non-volumetric charges levied per account, per meter / outlet or with reference to landholdings.

As is the case for infrastructure operators who provide on-river infrastructure services, infrastructure operators providing off-river infrastructure services also rely on volumetric charges to obtain their required revenue. Again their relative reliance on fixed and variable volumetric charges may differ considerably.

Infrastructure operators that only provide off-river infrastructure services may levy other charges on their customers to pass through, or recover the cost of, infrastructure charges for on-river infrastructure services, or planning and management charges, that they have incurred on behalf of their customers or otherwise in the course of providing infrastructure services to them (see section 5.13).

In some cases, infrastructure operators may also collect infrastructure charges or planning and management charges on behalf of other entities.

Infrastructure charges are currently regulated by the *Water Charge (Infrastructure) Rules 2010 (WCIR)*, discussed in chapter 5.

### **2.3.3 Termination fees**

Infrastructure operators face costs for operating their infrastructure. Many of these costs are ongoing—that is, the operator incurs these costs whether or not a particular irrigator chooses to terminate access. The imposition of a termination fee on an irrigator that is terminating their right of access ensures a contribution from exiting irrigators for the ongoing fixed costs of operating the infrastructure. This provides a degree of revenue certainty for infrastructure operators. Operators can use the revenue from termination fees to limit future increases in charges for those customers who maintain their connection or to fund network rationalisation to lower ongoing costs.

The level of termination fees and the circumstances in which they can be charged are currently regulated by the *Water Charge (Termination Fees) Rules 2009 (WCTFR)*, discussed in chapter 6.

## **2.4 Summary of water charging arrangements**

The regulated water charges that apply to a person will depend upon the nature of their activities and the type of tradeable water right they hold or use. Regulated water charges are ultimately borne by water users, either directly or indirectly.

Figure 2.3 below provides an overview of the relationship between the types of regulated water charges and the entities imposing / paying them.

Planning and management charges can apply directly to water users as well as to infrastructure operators. Infrastructure operators typically pass such charges on to their customers alongside the charges they impose to fund their own activities (these are shown as grey lines in Figure 2.3).

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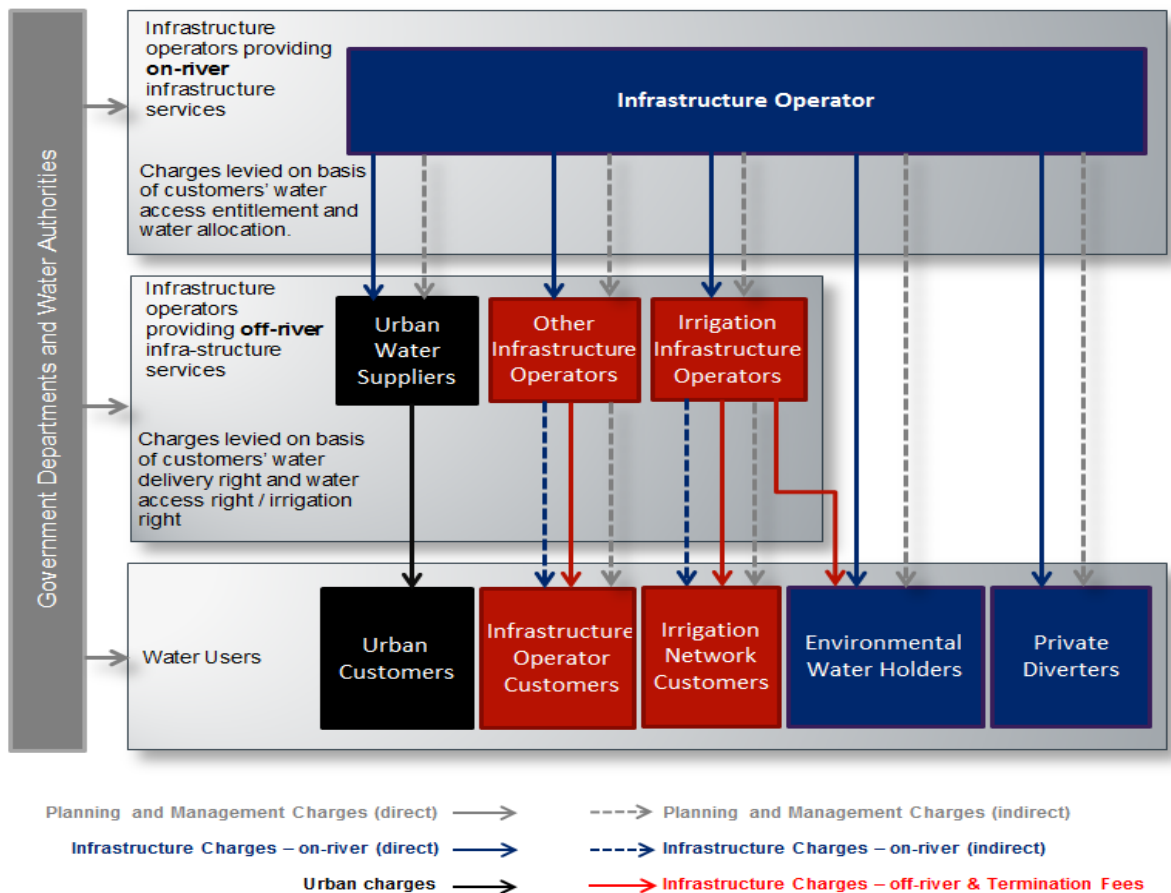
<sup>25</sup> Usually with higher charges for volumes delivered in excess of the volume of water delivery right held (sometimes referred to as casual usage charges).

Infrastructure operators impose charges on to their customers. The figure below distinguishes between infrastructure charges for on-river infrastructure services (shown as dark blue lines) and off-river infrastructure services (shown as red lines in Figure 2.3).

Some infrastructure operators are vertically integrated. That is, they provide both on-river and off-river infrastructure services (this is not shown in Figure 2.3). Separate charges should be levied for these two types of infrastructure services.

It should also be noted that the regulation of charges under the *Water Act 2007* (the Act) does not extend to charges in respect of urban water supply activities beyond the point at which water has been removed from a Basin water resource (shown as black lines in Figure 2.3).<sup>26</sup>

**Figure 2.3 Overview of regulated water charge arrangements**



<sup>26</sup> *Water Act 2007 (Cth)*, subsection 91(3).



### 3 Legislative framework

#### 3.1 Development of the water charge rules

The *Water Act 2007* (the Act) has an objective of enabling the Commonwealth, in conjunction with the Basin States, to manage Murray-Darling Basin (MDB) water resources in the national interest. This includes by promoting the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.

Section 92 of the Act allows the relevant Minister to make water charge rules that:

- relate to ‘regulated water charges’ as defined in section 91 of the Act
- deal with particular matters as set out in subsection 92(3) of the Act
- contribute to achieving the Basin Water Charging Objectives and Principles (BWCOP), as set out in Schedule 2 of the Act (see section 4.2 and appendix B).

If the Minister chooses to make, amend or repeal the water charge rules, they are required to seek the ACCC’s advice.

The Minister first sought ACCC advice on making water charge rules in December 2007. The ACCC’s earlier advice on the water charge rules is available on the ACCC website.<sup>27</sup>

To date, three sets of water charge rules have been made:

- Water Charge (Infrastructure) Rules 2010 (WCIR)
- Water Charge (Termination Fees) Rules 2009 (WCTFR)
- Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)

The ACCC has also provided advice on, and the Minister has made, the Water Market Rules 2009 (WMR) relating to the transformation of an irrigator’s irrigation right into a statutory water access entitlement (WAE).

The Basin Plan water trading rules have also been made as part of the Murray-Darling Basin Plan 2012 following ACCC advice to the Murray-Darling Basin Authority (MDBA).<sup>28</sup>

Under the Act, the ACCC is the ‘appropriate enforcement agency’ for the water charge rules and the WMR.<sup>29</sup> The ACCC has produced a range of guidance material for infrastructure operators, irrigators and governments on the water charge rules (this is further considered in section 4.4).<sup>30</sup>

#### 3.2 Water Act Review recommendations and conclusions

In May 2014 the Australian Government announced that the *Water Act 2007* (the Act) would be reviewed by an Independent Expert Panel (the Panel). The Act Review focused on the operation of the Act and the extent to which the objects of the Act were being achieved.

In the course of the Act Review, the Panel received submissions from stakeholders on a wide range of matters, including issues that related to the requirements and operation of the water charge rules.

<sup>27</sup> Available at <http://www.accc.gov.au/regulated-infrastructure/water/water-projects>, viewed June 2016.

<sup>28</sup> *Basin Plan 2012*, part 12, <http://www.comlaw.gov.au/Details/F2012L02240>, viewed June 2016.

<sup>29</sup> *Water Act 2007 (Cth)*, section 137. The Murray-Darling Basin Authority enforce the Basin Plan water trading rules.

<sup>30</sup> Available at: <http://www.accc.gov.au/regulated-infrastructure/water/water-guides>, viewed June 2016.

Generally, the Panel considered that those issues relating to the water charge rules were outside the scope of the Act Review's terms of reference. Nonetheless, the Panel was concerned to ensure that appropriate consideration was given to stakeholders' concerns.

The *Report of the Independent Review of the Water Act 2007*, tabled in Parliament in December 2014, recommended that the ACCC conduct a review of the water charge rules. The Australian Government's interim response to the Report accepted this recommendation and, as described in chapter 1, the Minister has asked that the ACCC undertake this review and provide advice on possible amendments to the water charge rules.

On 3 December 2015, the Australian Government tabled the *Government's Response to the Report of the Independent Review of the Water Act 2007* and introduced a bill to implement the Government's response.<sup>31</sup>

The *Water Amendment (Review Implementation and Other Measures) Act 2016* received royal assent on 4 May 2016, and makes a number of amendments to provisions relevant to the water charge rules.

The definitions of 'infrastructure operator' and 'irrigation infrastructure operator (IIO)' (in section 7 of the Act) were amended to clarify that:

- if a person owns or operates infrastructure for the purposes of storing, delivering or draining water (or for more than one of those purposes) for the purpose of providing a service to a person who is not the owner or operator of the infrastructure, the person is an infrastructure operator and the infrastructure is water service infrastructure
- if a person is an infrastructure operator by virtue of being an owner of water service infrastructure (according to subsection 7(1)) but their infrastructure is operated by another person for the purpose of delivering water for the primary purpose of being used for irrigation, the owner will also be an IIO.

The definition of 'bulk water charge' has been revised to clarify that it means charges that are payable for either or both the storage of water for, or the delivery of water to, the persons described in the definition.

The ACCC acknowledges that the amendments to these definitions are not intended to alter the meaning of these terms, but rather reduce or eliminate the scope for confusion or uncertainty among stakeholders, which will in turn assist with the efficient operation of the water charge rules.

Subsection 92(4) of the Act was also amended to give the ACCC, in applying the Water Charge (Infrastructure) Rules 2010 (WCIR), the discretion to extend the period of a determination beyond the default period set in the rules. The length of the regulatory period is considered further in section 5.6.2.

Where relevant, the Final Advice also references other recommendations and conclusions of the Panel, consistent with item 5 in the Terms of Reference for the review of the water charge rules. These references are set out in table 3.1 below.

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<sup>31</sup> Department of Agriculture and Water Resources, *Report of the Independent Review of the Water Act 2007 Australian Government Response*, Canberra, 2015, viewed June 2016, <https://www.environment.gov.au/water/publications/water-act-review-govt-response>.

**Table 3.1 – Review of the Act: other recommendations and conclusions referenced in the Final Advice**

<b>Recommendation / Conclusion</b>	<b>Subject matter</b>	<b>Relevant section of the Final Advice</b>
<b>Recommendation 9</b>	The regulation of water market intermediaries	8.1.1
<b>Recommendation 18</b>	Inter-agency working group on water information reporting	4.5
<b>Recommendation 19</b>	The prescription of types of enforceable undertakings	4.5
<b>Conclusion 4.3</b>	Interoperability and efficiency of Basin State water registers	8.1.1
<b>Conclusion 4.6</b>	Electronic access to water charge information	5.4.2
<b>Conclusion 7.2</b>	Water information: reporting requirements	4.5
<b>Conclusion 8.1</b>	Enforcement	4.5
<b>Conclusion 9.1</b>	Murray-Darling Basin Authority: Transparency of Basin Plan and River Murray Operations' functions	5.12
<b>Conclusion 9.3</b>	Murray-Darling Basin Authority: River Murray Operations' budget and costs	5.12

## 4 General matters

The terms of reference require the Australian Competition and Consumer Commission (ACCC) to consider a number of matters that apply to all three sets of water charge rules. This section sets out the ACCC's advice and recommendations on these overarching issues.

### 4.1 Opportunities to reduce cost to industry and governments

#### *Background*

The terms of reference for the ACCC's review of the water charge rules include requirements to consider the Australian Government's deregulation objectives and to identify opportunities for amending the rules to improve regulatory clarity or efficiency, or to reduce regulatory burdens while maintaining effective standards.

The objects of the *Water Act 2007* (the Act) include 'promot[ing] the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes;' and 'achiev[ing] efficient and cost-effective water management and administrative practices in relation to Basin water resources.'

In reviewing the water charge rules, the ACCC is interested to identify opportunities to simplify and clarify the requirements of the rules in a way that will reduce unnecessary regulatory burden while still achieving effective regulation that promotes the objects of the Act.

In the Issues Paper, the ACCC specifically asked stakeholders to identify areas where they thought the rules could be simplified or shortened, and where the costs of compliance outweigh the benefits achieved by the water charge rules.

#### *Stakeholder feedback*

In response to the ACCC's issues paper, stakeholders provided a range of examples where they felt the regulatory burden of the water charge rules should be reduced.

In particular, stakeholders expressed strong concerns regarding the regulatory burden of requirements relating to publishing Schedules of Charges (see section 5.4), Network Service Plans (NSPs) (see section 5.5) and in relation to planning and management charges (see chapter 7).

The ACCC also received feedback from stakeholders on the regulatory burden imposed by its requests for information as part of the ACCC's statutory water monitoring role. The ACCC's approach to compliance and enforcement is considered in section 4.5.

In response to the Draft Advice, the National Irrigators' Council (NIC), National Farmers' Federation (NFF) and NSW Irrigators' Council (NSWIC) submitted that the proposed amendments to the water charge rules represent an increase in regulatory burden for member-owned operators and irrigation infrastructure operators (IIO) which, the NFF argued, could result in higher customer charges.<sup>32</sup>

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<sup>32</sup> National Farmers' Federation, Draft Advice Submission, March 2016, p.2.

The NIC and NSWIC argue that the increase in regulatory burden is inconsistent with the terms of reference.<sup>33</sup>

The NIC noted that smaller operators may face increased regulatory costs without the offsetting savings accruing to larger operators.<sup>34</sup> The NIC also submitted its view that the ACCC has not “effectively engaged” all infrastructure operators during the review of the water charge rules, adding that “many of the smaller operators are either unaware of the existence of the ACCC’s Draft Advice or do not understand it”.<sup>35</sup>

The NIC considers that the ACCC has underestimated regulatory costs in terms of the (initial and ongoing) costs that IIOs will incur to modify their charging arrangements and Schedule of Charges to achieve compliance with the proposed amendments.<sup>36</sup> The NIC also noted that the estimates of regulatory costs do not include the compliance costs incurred by governments or infrastructure operators’ legal costs to implement, and ensure compliance with, the proposed amendments.

More specific stakeholder feedback regarding the regulatory cost of proposed rule amendments is set out where relevant throughout the Final Advice.

### *ACCC assessment*

The ACCC has taken into account stakeholder views throughout the Final Advice. Where rule advice proposes an amendment to the water charge rules, the ACCC has estimated the change in the regulatory cost of the proposals. The methodology used by the ACCC, which is consistent with the Office of Best Practice Regulation (OBPR) guidelines, is set out in chapter 9, along with estimates of the likely change in regulatory costs.

A number of the ACCC’s proposed rule amendments will result in significant reductions in regulatory costs. The ACCC also acknowledges that some of the rule advice in this Final Advice will, if implemented, involve both up-front and ongoing regulatory costs on infrastructure operators. However, the ACCC does not consider that these proposals are therefore inconsistent with the terms of reference for the review.

The terms of reference for the ACCC’s review (set out at Attachment A) are not limited to only considering amendments involving a reduction in regulatory costs. The terms of reference specifically request the ACCC’s advice on other opportunities to amend the rules to improve regulatory clarity or efficiency.

The proposals set out in the Final Advice represent significant reforms to the regulation of regulated water charges. They will, if implemented, improve the operation of the water charge rules, increase safeguards for irrigators and other customers, improve pricing transparency or otherwise contribute to the achievement of the Basin Water Charging Objectives and Principles (BWCOP).

Nevertheless, in response to general stakeholder feedback, the estimated time infrastructure operators will need to comply with the proposed amendments has been increased in the costings set out in chapter 9.

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<sup>33</sup> NSWIC was also of the view that the ACCC’s Draft Advice is inconsistent with the intent of the Review of the *Water Act 2007* “to simplify the current regulatory framework – including the WCR [water charge rules]”. NSW Irrigators’ Council, Draft Advice Submission, March 2016, pp.1-2; National Irrigators’ Council, Draft Advice Submission, March 2016, pp.5,8.

<sup>34</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>35</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.6.

<sup>36</sup> *ibid*, p.16.

The ACCC also acknowledges that operators may incur costs in obtaining legal advice on the implementation of rule amendments. Such costs have been included in the revised estimates of the change in regulatory cost.

The ACCC notes that the need for operators to obtain legal advice, and regulatory costs generally, are reduced where:

- the rules are drafted in clear terms (see section 4.3)
- there is accessible and comprehensive guidance material available (see section 4.4)
- infrastructure operators are able to inquire directly with the ACCC regarding their current or proposed arrangements (see section 4.5)
- the private right of action in relation to the rules is reduced or removed (see section 4.5)

Compliance costs incurred by Governments are specifically excluded from the OBPR guidelines.

The Draft Advice is a large document that considers a very wide range of issues and responds to each argument put forward by stakeholders. The ACCC has sought to engage with stakeholders at various stages throughout the course of its review, including with smaller infrastructure operators (that are not generally members of industry groups such as the NSWIC or NIC). The ACCC will continue to work closely with smaller infrastructure operators to provide the assistance necessary to ensure compliance with the water charge rules.

## 4.2 The Basin Water Charging Objectives and Principles

### **Recommendation 4-A**

The ACCC will review its guidance materials and work with Basin State regulators and other industry stakeholders to develop more practical and detailed guidance on the interpretation of, and the interaction between, the Basin Water Charging Objectives and Principles.

This will include:

- interpretation of key terms such as “perverse or unintended pricing outcomes”;
- improved identification of and links between the infrastructure services provided and how infrastructure charges are determined to recover the costs of service provision; and
- cost allocation and the basis for determining charging areas (for example, where charging areas are based on geographic areas).

### *Background*

The water charge rules are required to contribute to the achievement of the Basin Water Charging Objectives and Principles (BWCOP) set out in Schedule 2 of the *Water Act 2007* (the Act).

These objectives and principles are based on those set out in clauses 64 to 77 of the National Water Initiative (NWI), an intergovernmental agreement signed by all states and territories, and the Commonwealth. The water charging objectives are:

- to promote the economically efficient and sustainable use of:
- water resources; and
- water infrastructure assets; and

- government resources devoted to the management of water resources; and
- to ensure sufficient revenue streams to allow efficient delivery of the required services; and
- to facilitate the efficient functioning of water markets (including inter-jurisdictional water markets, and in both rural and urban settings); and
- to give effect to the principles of user-pays and achieve pricing transparency in respect of water storage and delivery in irrigation systems and cost recovery for water planning and management; and
- to avoid perverse or unintended pricing outcomes.

There are 16 water charging principles, divided into four groupings:

- water storage and delivery
- cost recovery for planning and management
- environmental externalities
- benchmarking and efficiency reviews.

The terms of reference for the review of the water charge rules specifically requests the ACCC to provide advice on the merits of several matters raised by the Independent Expert Panel's review of the Act, one of which was opportunities for advancing the consistent application of the BWCOP, including options to rank objectives and define terms. Neither the objectives nor principles are currently ranked in any way.

In its Issues Paper, the ACCC sought feedback on ways that the water charge rules could more effectively contribute to achieving the BWCOP (Question 3).

### *Stakeholder feedback*

Several submissions to the Act review recommended that the Act be amended to provide a hierarchy in BWCOP in order to indicate which objectives should be given greater weight in charge determinations.<sup>37</sup>

Several submissions to the ACCC's Issues Paper also supported ranking the BWCOP.<sup>38</sup> These submitters were generally concerned that the current BWCOP are conflicting, and do not provide sufficient guidance for a regulator in interpreting them. Also, several submitters commented that the ACCC's existing guidance on the interpretation of the BWCOP was insufficient, either because the nature of this material as guidance material only resulted in the BWCOP being interpreted on an ad hoc basis, or because the guidance provided is too broad.

Other submissions to the Issues Paper opposed ranking the BWCOP, arguing that this provides less discretion for the regulator to take into account specific circumstances.

Finally, some submitters commented on whether specific objectives or principles were being achieved under the current rules, particularly in relation to the objectives of full cost recovery and avoiding perverse or unintended pricing outcomes, and implementing the principle of 'user pays'. Several submitters requested the ACCC to provide definitions and further guidance on the BWCOP in its Pricing Principles.

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<sup>37</sup> Frontier Economics, Submission to the Independent Review of the Water Act 2007, June 2014, p.1; State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.12-24.

<sup>38</sup> See 'stakeholder feedback' in section 4.2 of the ACCC's Draft Advice: ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.37-38.

In response to the ACCC's Draft Advice, Goulburn-Murray Water (GMW) submitted that it supports Recommendation 4-A, noting that it would particularly support guidance in relation to pricing and cost-reflectivity.<sup>39</sup> GMW added that the BWCOP (or the ACCC's guidance material) should allow "sufficient flexibility" for infrastructure operators to:

- identify an "appropriate trade-off" between the simplicity of the charging structure and cost-reflectivity.<sup>40</sup> GMW considers that this is particularly important in relation to the modernisation of irrigation services.
- "adequately address the unique geographical and historical circumstances to improve efficiency".

Three stakeholders commented on Recommendation 4-A. Peel Valley stakeholders (Peel Valley Water Users Association (PVWUA) and Tamworth Regional Council) remain concerned about the level of charges in the Peel Valley. Tamworth Regional Council noted that it was pleased to see that the ACCC had devoted a section to the Draft Advice for addressing water charges in the Peel Valley.<sup>41</sup> However, Tamworth Regional Council is of the view that the ACCC had not proposed any amendments which would positively affect the level of charges in the Peel Valley. Similarly, the PVWUA remains critical of interpretations, and explanations about the application, of the BWCOP in relation to avoiding perverse or unintended consequences.<sup>42</sup> The PVWUA considers that the recommendation "is too vague to be helpful".

Both entities discussed their preferred approaches for dealing with the level of charges in the Peel Valley, which includes departing from the current approach of valley-based pricing. This feedback is discussed in section 5.10.

More generally, stakeholders also provided feedback on the extent to which specific amendments support, or are in contrast to, one or more of the BWCOP. Where this feedback was provided, it is summarised or noted in each relevant section of the Final Advice.

Stakeholder views on ACCC guidance material more generally are considered in section 4.4.

### *ACCC assessment*

As noted in the Draft Advice, considerations of how to improve the consistent application of the BWCOP and whether there is a need to rank them, acknowledge that the individual objectives and principles may not always be mutually reinforcing. For example, there may be significant costs involved in fully implementing the objective of user pays, and it is possible that the costs would outweigh the benefits. If this occurred, full implementation of the user pays principle could come at a cost to economic efficiency.

Furthermore, transitioning towards the objective of user pays and the principle of full cost recovery raises difficult questions of how to deal with legacy issues and the costs of adjustments. Principles (3) and (4) under section 3 (water storage and delivery), in particular, acknowledge some of these practical issues by directly including feasibility considerations:

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<sup>39</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, pp.1-2.

<sup>40</sup> GMW noted that the Essential Services Commission of Victoria approved in its Draft Decision common prices between districts where the difference in costs is up to 19 per cent. This is the case in five of GMW's districts.

<sup>41</sup> Tamworth Regional Council, Draft Advice Submission, March 2016, p.5.

<sup>42</sup> Peel Valley Water Users Association, Draft Advice Submission, March 2016, pp.3-4.



*(3) Water charges are to be based on full cost recovery for water services to ensure business viability and avoid monopoly rents, including recovery of environmental externalities where feasible and practical.*

*(4) Water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.*

Given the costs of fully achieving all the objectives and principles, as well as the possibility of conflict or tension between them, there is a need to balance efforts to achieve any single objective or principle with a consideration of the BWCOP as a whole. This means that there is no single objective or principle which takes precedence over others, which precludes ranking or otherwise providing a hierarchy. However, the ACCC acknowledges that the lack of a clear hierarchy can create uncertainty in cases where one objective or principle appears to be in opposition to another. The ACCC therefore recognises the importance of adequate guidance material on the interpretation of the BWCOP, and how they should be balanced.

The ACCC considers that infrastructure charging for on-river infrastructure services is one example of an area where it has proved difficult to apply the BWCOP. This has been the case particularly in relation to implementing ‘user-pays’ and achieving pricing transparency for the operation of large storages which contribute to general water availability and / or improve reliability for water access entitlements and provide other services such as carryover. Box 4.1 presents a case study of how issues with implementing the BWCOP have arisen in relation to on-river infrastructure charges in the Peel Valley in NSW. Examples where full user pays and / or full pricing transparency has yet to be implemented in relation to on-river infrastructure services include:

- no direct charges for carryover
- water users who forfeit water do not pay variable charges relating to storage services received
- lack of clarity and clear charging structure in relation to water for the environment, particularly in relation to infrastructure services provided for environmental flows mandated by water resource plans but having the characteristics of held environmental water (for example, the ability to order water).

Moreover, infrastructure operators who provide on-river infrastructure services may also provide a range of other services for which there is no clear charging structure, for example recreational services and amenity values.

#### **Box 4.1: On-river infrastructure charges in the Peel Valley**

One prominent example raised by stakeholders of the need to have adequate guidance on the interpretation and balancing of the BWCOP is the level of charges payable for on-river infrastructure services in the Peel Valley in NSW. The Peel Valley Water Users Association (PVWUA), in both their submission to the Issues Paper and via the ACCC’s public forum in Tamworth, argued that the current infrastructure charges for the Peel Valley, levied by WaterNSW and determined by the ACCC, ignore the principle of “avoid[ing] perverse or unintended pricing outcomes” because they are high relative to charges paid by water users in other MDB valleys (for example, the adjacent Namoi valley).<sup>43</sup> The Hon. Kevin Anderson, State MP for Tamworth contended at the Tamworth public forum that Chaffey Dam, which provides water storage for certain Peel water users, was never built for cost recovery, and outlined the legacy issues involved with moving towards full cost recovery.<sup>44</sup>

<sup>43</sup> Peel Valley Users Association, Issues Paper Submission, May 2015.

<sup>44</sup> ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015.

Stakeholders attending the Tamworth public forum also submitted that the principle of user pays was not achieved in the charging arrangements for the Peel because, in their view, a significant proportion of flows through the Peel River (whether from Chaffey Dam or from non-regulated tributary inflow<sup>45</sup>) were used by downstream water users, such as irrigators in the Namoi Valley, who are not required to pay infrastructure charges in relation to water service infrastructure in the Peel Valley.<sup>46</sup> In contrast, a letter received by the ACCC from the Split Rock Water Users Association<sup>47</sup> (located in the Namoi Valley) raised strong objections to the prospect of paying infrastructure charges relating to Peel Valley infrastructure, arguing that Namoi water users already pay charges in relation to other storages but did not use the Chaffey Dam or associated Peel Valley infrastructure. Another stakeholder also pointed out that recreational users of Chaffey Dam are not required to pay infrastructure charges, which in their view is also inconsistent with the user-pays objective.<sup>48</sup> These differing perspectives highlight the practical difficulties that can arise in identifying who exactly is a “user” of infrastructure services. In particular, the demarcation of geographical areas such as valleys for charging purposes is an important parameter that can have significant consequences for the incidence of charges (i.e. who pays for which infrastructure services). This issue is discussed further in section 5.10.2.

The ACCC acknowledges the high on-river infrastructure charges levied in the Peel Valley relative to other valleys in NSW, and the impacts on stakeholders required to pay these charges. In its 2014 final decision on State Water’s (now WaterNSW) infrastructure charges, the ACCC decided to implement a 10 per cent cap on real annual price increases in the Peel valley.

However, stakeholders in the Peel have submitted that even the current level of cost recovery has produced infrastructure charges in that valley which are unduly burdensome. This concern has been raised both in relation to the actual level of charges levied on Peel users, and the relative level of charges compared to those levied in other valleys.

As discussed in section 5.10.2, the ACCC considers the current valley-based approach to pricing on-river infrastructure services in NSW to be appropriate. As such, the ACCC does not consider that relative differences in infrastructure charges should necessarily be cause for concern. The ACCC emphasises that infrastructure charges do not represent charges for water as an input or a commodity, but are set to recover the costs of operating and maintaining water service infrastructure. Where these costs differ across valleys, infrastructure charges should likewise differ.

In relation to the absolute level of infrastructure charges levied in the Peel Valley, as detailed above, some stakeholders have submitted that legacy issues have resulted in charges for current users being higher. Much of the current infrastructure cost can be related to decisions made prior to NWI commitments by Basin States (particularly the commitment to move towards full cost recovery), and as such may not have given full consideration as to the amount of costs that would be recovered from future users. The ACCC notes the previous decision by IPART to adopt a ‘line-in-the-sand’ approach to write down all pre 1 July 1997 assets to zero value for pricing purposes,<sup>49</sup> which has had the effect of lessening the impact of such legacy issues on current infrastructure charges. The high current level of charges are largely the result not of legacy capital costs, but rather of high operating costs in per user terms of operating Chaffey Dam and providing associated infrastructure services.<sup>50</sup>

The ACCC notes that one potential option to decrease charges faced by individual users is to expand the user base from which costs are recovered. There may be users who pay relatively less of the total share of costs recovered from users than is consistent with the principle of user pays. An example of such a user could be a person who avoids payment of variable infrastructure charges by forfeiture of water, in a context where variable charges are used to recover fixed costs (as is the case in NSW). There may also be other categories of users that do not pay the full cost of the infrastructure services they use. The ACCC considers that it may be appropriate for WaterNSW to reassess its charging structure with a view to identifying whether all users are appropriately charged for the infrastructure services they receive.

The ACCC also recognises the concerns submitted by water users in the Peel Valley about lack of pricing transparency about water charges, in terms of ‘who is paying’ and ‘what are users paying for’. These concerns

<sup>45</sup> In this case, ‘non-regulated tributary inflow’ refers to flows from tributaries entering the Peel River below Chaffey Dam.

<sup>46</sup> ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015.

<sup>47</sup> Email from David Gee (Split Rock Water Users Association) to Mr Barnaby Joyce (Minister for Agriculture), ‘Peel/Namoi Water Pricing: Split Rock Water Users Assoc. comment’, 27 August 2015.

<sup>48</sup> ACCC public forum on the review of the water charge rules, Tamworth, 24 August 2015.

<sup>49</sup> IPART, *Department of Land and Water Conservation Bulk Water Prices from 1 October 2001*, 2001, p.69.

<sup>50</sup> ACCC, *Final decision on State Water Pricing Application: 2014-15 – 2015-17*, Canberra, June 2014, p.49. As detailed in its 2014 final decision on State Water’s infrastructure charges, operating expenditure (“opex”) represents the vast majority of costs in this valley.

are discussed in section 5.13 of this paper; however, it is appropriate to note here that the ACCC's proposed pass through rules and other pricing transparency reforms should improve clarity on these issues for Peel users.

Finally, the ACCC notes that WaterNSW's infrastructure charges for the 2017-21 regulatory period will be approved / determined by IPART pursuant to their accreditation under Part 9 of the Water Charge (Infrastructure) Rules 2010 (WCIR).

The discussion above has used examples relating to on-river infrastructure services, but issues of balancing and interpretation of the BWCOP are relevant to infrastructure charges for both on-river and off-river infrastructure services. To ensure the full implementation of user pays via the water charge rules would require the regulator to approve or determine the charges of each and every infrastructure operator; however, the ACCC does not consider this to be appropriate. First, considerable cost would be incurred in undertaking the approvals / determinations, much of which would ultimately be borne by the operator and its customers. Second, it is not clear that the benefit gained would outweigh the cost, meaning that the outcome may detract from the objective of promoting economic efficiency and sustainability in the rural water sector.

The ACCC considers that a more appropriate course is for the water charge rules to promote the BWCOP as a whole by enhancing pricing transparency and prohibiting key forms of discriminatory charging practices. In order to promote consistency in operators' approaches to setting charges, the ACCC considers that such requirements should apply to all infrastructure operators, regardless of the mix of infrastructure services (e.g. on-river versus off-river, or both) a particular operator provides.

Clarity on how charges are determined, what infrastructure services they relate to, and by whom they are payable will assist customers, operators and the regulator in evaluating progress towards the user pays and economic efficiency objectives, and the principle of full cost recovery. Specific rule advice and recommendations to enhance pricing transparency are discussed in sections 5.4 and 5.13.

Pricing discrimination arises in cases where an operator systematically sets charges with reference to a particular underlying characteristic (such as the class of user, or according to the purpose for which water is used), such that a particular person or group pays more (or less) than if charges were allocated according to the principle of user pays. The ACCC acknowledges that, due to the costs involved, it is not feasible to ensure that no price discrimination can occur (or, put differently, that the principle of user pays is fully implemented), but has made rule advice to prohibit operators from unreasonably levying different charges between their customers, or unreasonably limiting the availability of their infrastructure services. This is discussed in section 5.3.1.

On balance, the ACCC believes that any additional clarity that could be obtained by ordering or prescribing a hierarchy within the BWCOP, either in the water charge rules or otherwise, would be outweighed by the loss of flexibility for regulators to respond to circumstances specific to particular infrastructure operators and their customers. However, the ACCC also acknowledges the importance of guidance material on the interpretation of the BWCOP and how they should be applied. In particular, the ACCC agrees with stakeholders in the Peel Valley that interpretation of the term 'perverse or unintended pricing outcomes' requires further guidance.

### 4.3 Drafting amendments to improve clarity

#### *Background*

Legislative drafting that is difficult to understand can increase the burden on regulated entities and can create uncertainty for regulators. The ACCC has produced a range of guidance material seeking to explain its interpretation of the rules and how the requirements can be satisfied (see section 4.4). However, there may be some areas where the rules could be re-drafted to improve clarity. If done carefully, such an exercise should decrease the regulatory burden imposed on regulated entities.

#### *Stakeholder feedback*

The Issues Paper asked stakeholders to identify if there were any particular provisions of the water charge rules that are not clearly drafted, unnecessarily complex or otherwise ambiguous.

During its consultation, the ACCC heard that some stakeholders had difficulties in clearly understanding the current drafting of the rules.<sup>51</sup> Specific feedback on areas of the water charge rules that should be re-drafted to improve clarity is included throughout this Final Advice (for example, ambiguity about the publication requirements in relation to Schedules of Charges is discussed in section 5.4).

#### *ACCC assessment*

As noted above, a number of key areas of the rules will be re-drafted as a consequence of the proposed advice (if adopted), which provides an opportunity to improve the clarity of the rules. This is particularly the case in relation to requirements for an infrastructure operator's Schedule of Charges (see section 5.4) and the calculation of termination fees (see section 6.2).

While the ACCC acknowledges an upfront regulatory cost for infrastructure operators to become familiar with the proposed new legislative drafting (giving effect to either new / amended requirements, or more clearly setting out existing requirements), it considers the ongoing benefits of improved clarity outweigh these costs.

#### 4.3.1 Combining the water charge rules and water market rules

##### **Rule advice 4-A**

The three sets of water charge rules:

- Water Charge (Infrastructure) Rules 2010 (WCIR)
- Water Charge (Termination Fees) Rules 2009 (WCTFR)
- Water Charge (Planning and Management Information) Rules 2010 (WCPMIR)

should be combined into a single instrument by incorporating the relevant provisions of the WCTFR and WCPMIR into the WCIR and renaming this as the Water Charge Rules. The Water Market Rules 2009 (WMR) should not be combined with the water charge rules.

This rule advice affects all three sets of water charge rules (WCIR, WCTFR and WCPMIR).

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<sup>51</sup> See 'stakeholder feedback' in section 4.3 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.44.

## Rule advice 4-B

The proposed single set of water charge rules should apply to 'regulated water charges' as set out in the Act and Regulations, with separate definitions for:

- *infrastructure charge*—corresponding with the definition of 'regulated charge' in the WCIR.
- *planning and management charge*—corresponding with the definition of 'regulated charge' in the WCPMIR, but limited to such charges determined by or on behalf of an agency of the Commonwealth or an agency of a State excluding charges determined by a local government body.
- *termination fee*—corresponding with a charge allowed for under the current WCTFR rule 6 or rule 8 (proposed rule 71).

This rule advice is reflected throughout the proposed Water Charge Rules, and terms are defined in Part 1, rule 3.

### *Background*

The terms of reference require the ACCC to consider whether the water charge rules should be combined into a single instrument and / or combined with the Water Market Rules 2009 (WMR).

The three sets of water charge rules, and the WMR were made at different times between 2009 and 2010. The rules share a number of common terms and in some cases, charges regulated under one set of rules may be referred to in another set of rules (for example, termination fees).

The Water Charge (Infrastructure) Rules 2010 (WCIR) apply to all infrastructure operators, while the WMR and the Water Charge (Termination Fees) Rules 2009 (WCTFR) currently apply only to irrigation infrastructure operators (IIOs), and not infrastructure operators generally. The Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) apply to persons determining a planning and management charge (which could include Basin State departments or certain infrastructure operators in their capacity as delegates of a Minister).

The ACCC's Draft Advice proposed that the three sets of water charge rules should be combined into a single legislative instrument (draft rule advice 4-A). In making this draft advice, the ACCC considered that combining separate sets of rules into one instrument may offer opportunities to:

- improve understanding of these rules and how they interact
- reduce the compliance burden for regulated entities
- ensure that there are no 'regulatory gaps'
- eliminate redundant transition clauses.

In developing this position, the ACCC noted that the *Water Act 2007* (the Act) refers simply to 'water charge rules' and does not require separate sets of rules for different types of regulated water charges.<sup>52</sup> The ACCC considered that this review of the water charge rules provides a good opportunity to combine the three sets of water charge rules that were made in succession in 2009 and 2010 into one legislative instrument, being mindful that this should be done in such a way that it does not inadvertently change the scope of the rules or what is required by the rules.

The ACCC also considered the extent of any overlap or duplication in the definitions used in the three sets of water charge rules. For example, the WCIR and WCPMIR both use the term 'regulated charge', but refer to very different sub-categories of regulated water charges as defined by section 91

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<sup>52</sup> *Water Act 2007* (Cth), section 92.

of the Act. As part of combining the three sets of water charge rules, definitions in the water charge rules should also be revised to remove duplication and inconsistencies in order to improve clarity.

The ACCC's Draft Advice also proposed that the terms 'infrastructure charge', 'planning and management charge'<sup>53</sup> and 'termination fee' be defined to refer to the specific types of regulated water charges currently regulated by the WCIR, WPMIR and WCTFR respectively (draft rule advice 4-B). The ACCC considered the definition of 'infrastructure charge' to be particularly important as it may help dispel the widely held, but generally incorrect, notion that such charges are for the water stored and delivered through the infrastructure.

The ACCC considered there would be little merit in combining the water charge rules with the WMR, as the WMR are more closely related to the Basin Plan water trading rules than the water charge rules.

The ACCC acknowledged that refinements in drafting are required throughout the proposed rules to further improve clarity or minimise the chance of stakeholders misinterpreting the effect of the provisions (see also section 4.3 above).

### *Stakeholder feedback*

The majority of stakeholder submissions received in response to the ACCC's Issues Paper and feedback from the ACCC's public forums was generally in favour of combining the three sets of water charge rules into one instrument.<sup>54</sup>

In response to the Draft Advice, a number of stakeholders submitted that they support combining the three sets of water charge rules (Goulburn-Murray Water (GWM), Queensland Treasury and Department of Energy and Water Supply (QTDEWS), Commonwealth Environmental Water Holder (CEWH), Queensland Farmers' Federation (QFF) and Waterfind). Some of the reasons provided by stakeholders as to why they support combining these rules include:

- greater clarity<sup>55</sup>
- consistency in the regulation of water charges<sup>56</sup>
- simplification in the regulation of water charges<sup>57</sup>
- an opportunity to revise terminology across the three sets of existing water charge rules to ensure consistency.<sup>58</sup>

The National Irrigators' Council (NIC) was the only stakeholder that did not support combining the three sets of water charge rules.<sup>59</sup> The NIC put forward its view that the benefits are "marginal, and it appears that the ACCC is instead taking the opportunity to rewrite and expand the rules significantly".

The CEWH supported the Draft Advice approach of *not* combining the WMR with the water charge rules.<sup>60</sup> Waterfind<sup>61</sup> requested "addition clarification and justification" for this position. Waterfind is of the view that the water charge rules should be combined with the WMR for the following reasons:

- to provide clarity to end users by reducing the need to refer to multiple documents.

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<sup>53</sup> Note, however, the proposed further clarification of the meaning of 'planning and management charge' proposed in section 7.2.

<sup>54</sup> See 'stakeholder feedback' in section 4.3.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.45.

<sup>55</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>56</sup> QTDEWS, Draft Advice Submission, March 2016, p.3.

<sup>57</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>58</sup> *ibid.*

<sup>59</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.9.

<sup>60</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>61</sup> Waterfind, Draft Advice Submission, March 2016, p.2.

- the WMR “have very little merit as standalone rules”.
- rules dealing with termination fees are very similar in nature to the WMR; the ACCC’s justification for extending the application of the WCTFR to all infrastructure operators can be applied to the case for combining the water charge rules with WMR.
- Waterfind “cannot see any clear negatives to this”.

Waterfind suggested that an alternative could be to combine the WMR with the Basin Plan water trading rules, noting that there is some overlap between the matters dealt with in each of these sets of rules.

Some stakeholders also commented on draft rule advice 4-B—including separate definitions for ‘infrastructure charge’, ‘planning and management charge’ and ‘termination fee’ in the combined water charge rules. The QFF submitted that it supports this rule advice. Waterfind asked for greater clarity about the types of charges that would constitute a planning and management charge.<sup>62</sup>

### *ACCC assessment*

For the reasons set out in the Draft Advice, as summarised in the ‘Background’ section above, the ACCC considers there is benefit in combining the three sets of water charge rules by:

- incorporating the provisions of the current WCTFR as a new Part (Part 10) of the WCIR
- combining most of the pricing transparency requirements of the WCPMIR into the pricing transparency requirements in Part 4 of the WCIR
- retaining the existing part and section numbers of the WCIR; and
- renaming the WCIR so they are simply referred to as the Water Charge Rules.

In relation to the NIC’s concerns, the ACCC notes that other changes to the rules are considered in detail in other parts of this Final Advice.

The ACCC also maintains the view that there is little benefit in combining the WMR with the water charge rules. The Act provides for WMR separately from water charge rules. In addition, the WMR will necessarily only apply to certain IIOs, rather than infrastructure operators more generally.

Finally, while the ACCC acknowledges some similarity between the WMR and the Basin Plan water trading rules, the ACCC did not consider the merits of combining these two sets of rules as this fell outside the scope of the terms of reference for this review.

The single set of water charge rules should contain separate definitions for different types of charges, to provide greater clarity. For example, the WCIR and WCPMIR currently both employ the term ‘regulated charge’ but to mean different things. The WCTFR does not define ‘termination fee’ at all. These definitions will add clarity and certainty for stakeholders.

The ACCC also notes that the current definition of ‘regulated charge’ in the WCPMIR is not limited to charges determined by or on behalf of government. The proposed Water Charge Rules included with the Draft Advice addressed this by limiting the definition of ‘planning and management charge’ to charges for water planning and management (WPM) activities, determined by or on behalf of an agency of either the Commonwealth or a State (excluding charges determined by a local government body). This aligns the definition with how this type of charge is commonly understood by stakeholders and with the ACCC’s existing guidance material. It is also consistent with the origins of

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<sup>62</sup> *ibid*, p.3.

the term in the National Water Initiative (NWI), an intergovernmental agreement between the Commonwealth and the states / territories.<sup>63</sup> The ACCC has updated its rule advice to directly acknowledge this clarification.

#### 4.4 ACCC guidance material and ACCC WCIR pricing principles

##### **Recommendation 4-B**

The ACCC will review its existing guidance material and, if any amendments are made to the water charge rules, develop new guidance material to help ensure stakeholders understand their rights and obligations under the rules. Future reviews of the ACCC's guidance material will be undertaken in close consultation with industry stakeholders.

The ACCC will work with Basin State economic regulators to ensure the Pricing Principles reflect regulatory best practice. The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector.

##### *Background*

The ACCC has published a number of guides to assist operators, irrigators and Basin State Governments to understand their rights and obligations under the water charge rules, including the *Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010* (Pricing Principles). These are available on the ACCC's website.<sup>64</sup>

In its Draft Advice, the ACCC made a draft recommendation that future reviews of the ACCC's Pricing Principles should be undertaken in close consultation with industry stakeholders, and that the ACCC will work with Basin State economic regulators to ensure the Pricing Principles reflect regulatory best practice (recommendation 4-B).

The ACCC noted in its Draft Advice that, following a decision by the Minister on any amendments to the water charge rules, the ACCC will revise its existing guidance material or prepare new material, as required. The ACCC also noted that, under the Australian Government's new Regulator Performance Framework,<sup>65</sup> the ACCC will also report publicly on how it has sought to ensure that 'communication with regulated entities (and other stakeholder groups) is clear, targeted and effective.'<sup>66</sup>

##### *Stakeholder feedback*

A small number of stakeholders provided feedback on the ACCC's guidance materials in written submissions to the ACCC's Issues Paper.<sup>67</sup> Many of these stakeholders commented that the ACCC's guidance, while useful, was overly complex in some areas. The ACCC also received verbal feedback confirming the usefulness of existing guidance materials in consultation discussions with various Basin State government departments.

<sup>63</sup> See in particular clauses 67 and 68 in the Intergovernmental Agreement on a National Water Initiative, 2004, viewed July 2016, [http://www.nwc.gov.au/\\_data/assets/pdf\\_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf](http://www.nwc.gov.au/_data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf).

<sup>64</sup> Available at: <http://acc.gov.au/regulated-infrastructure/water/water-guides>, viewed October 2015.

<sup>65</sup> The Regulatory Performance Framework, released by the Australian Government in October 2014, aims to reduce the cost of regulation imposed on individuals, business and community organisations. It sets out a framework for Commonwealth regulators to consider as part of policy making and regulatory processes.

<sup>66</sup> Targeted communication is one of the key performance indicators listed in the Regulatory Performance Framework. The ACCC will be required to consider and report to the Australian Government on how it is meeting this indicator in creating new guidance material.

<sup>67</sup> See 'stakeholder feedback' in section 4.4 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.47-48.



Some stakeholders provided suggestions on how guidance could be made of greater relevance, including through reducing complexity and by complementing written materials with targeted, face-to-face conversations. The ACCC has noted these comments, which will help inform its approach to revising existing guides and developing new guidance materials.

Two submissions to the Draft Advice (Queensland Treasury and Department of Energy and Water Supply (QTDEWS), and the Local Government Association of Queensland (LGAQ)) commented that they support the ACCC providing additional guidance material on the water charge rules.<sup>68</sup> Mr Tom Loffler submitted that the “[w]ater consumer should have ready access to all relevant ACCC and infrastructure operators’ policies etc. so as to be able to make informed decisions”.<sup>69</sup> The Commonwealth Environmental Water Holder (CEWH) supported the development of guidance material to assist in the implementation of the Basin Water Charging Objectives and Principles (BWCOP). The CEWH considered that the guidance could draw on materials provided for existing principles such as the COAG Water Resource Pricing Principles and the National Water Initiative (NWI) Pricing Principles.<sup>70</sup>

Three submissions to the Draft Advice supported retaining the ACCC’s Pricing Principles. More specifically, Goulburn-Murray Water (GMW) and the CEWH supported the ACCC’s draft recommendation to work with industry stakeholders and Basin State regulators to use those principles to support consistency across jurisdictions and as a means for regulatory best practice.<sup>71</sup> The LGA Q agreed that there should be support in implementing and interpreting ACCC Pricing Principles.<sup>72</sup>

The LGAQ noted that there are other pricing principles for example, from the NWI and the Queensland Competition Authority (QCA).<sup>73</sup> The LGAQ argues that there should be an agreement, and a balanced and holistic approach, between principles to promote more consistency in regulatory approaches. The LGAQ further clarified that the objective should be to achieve consistency in principle, not in the actual charges given the differing circumstances in each local area.

### *ACCC assessment*

The ACCC acknowledges the importance of clear, practical and accessible guidance material for infrastructure operators and other stakeholders. Guidance material can also greatly reduce the cost to operators of familiarising themselves with the requirements set out in the rules and ensuring compliance on an ongoing basis. While guidance material cannot deal with every conceivable set of circumstances, it can and should consider how the rules will be interpreted by the ACCC in a range of common scenarios.

As noted in the Draft Advice, the ACCC will revise its existing guidance material or prepare new material, as required, following a decision by the Minister on any amendments to the water charge rules. In doing so, we will consider format and content and will consult with stakeholders affected by the changes, including Basin State regulators, infrastructure operators and irrigators, to ensure that future guidance is clear and concise and meets their needs.

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<sup>68</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.6.

<sup>69</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.2.

<sup>70</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.3.

<sup>71</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2; Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.3.

<sup>72</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.6.

QTDEWS, Draft Advice Submission, March 2016, p.3.

<sup>73</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.6; QTDEWS, Draft Advice Submission, March 2016, p.3.

The ACCC has updated its recommendation to expressly acknowledge this commitment.

While the rule advice set out in sections 5.5 and 5.6 will, if implemented, limit the scope for the ACCC Pricing Principles to directly affect the approval or determination of infrastructure charges, the ACCC still intends to thoroughly review the Pricing Principles to ensure they continue to reflect regulatory best practice. The Pricing Principles will still guide any ACCC determinations for Part 6 or Part 7 operators. They will also deal with the interpretation of BWCOP, which were drawn directly from the NWI committed to by the Commonwealth and all Basin States. Recognising the significant experience of Basin State economic regulators in the rural water sector, the ACCC will consult closely with Basin State regulators during its review of the Pricing Principles. In particular, the ACCC hopes this can assist in the development of nationally consistent approaches to regulatory issues in the rural water sector.

#### **4.5 Enforcement and compliance approach**

##### **Rule advice 4-C**

The private right of action (to recover loss or damage resulting from a breach of the rules) which currently applies to the Water Charge (Infrastructure) Rules 2010 (WCIR) should be removed, and should not apply to the water charge rules more generally.

This rule advice is implemented by the repeal of rule 57 of the current WCIR.

##### **Recommendation 4-C**

The ACCC will continue to monitor the necessity and benefit of asking for particular compliance information through its compliance monitoring processes and, in specific investigations, will continue to consider requests for extensions of time to respond to the ACCC where resourcing is a concern.

##### **Recommendation 4-D**

The ACCC will continue to work closely with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from the ACCC's review.

#### *Background*

##### **ACCC enforcement and compliance approach**

The ACCC is the responsible enforcement agency for the water charge rules and Water Market Rules 2009 (WMR). The ACCC uses the information that it collects through routine monitoring, specific information requests and the complaints and inquiries it receives to monitor compliance with the rules. It takes follow-up investigative and enforcement action, where appropriate.

The ACCC's approach to monitoring and enforcing compliance is outlined in its *Guide to compliance and enforcement of the water market rules and water charge rules* (2009; revised 2011). This document sets out the process that the ACCC will follow and the factors that the ACCC will consider when investigating complaints about operators and concerns about compliance with the water charge

rules.<sup>74</sup> The approach outlined is designed to educate water stakeholders about their rights and obligations under the rules and to minimise compliance costs.

In the *Water Act 2007* (the Act) review report, the Independent Expert Panel (the Panel) commented on enforcement approaches, noting that ‘a sensible and cooperative approach to monitoring and compliance activities should be applied by regulators under the Act’,<sup>75</sup> and made one recommendation relating to enforcement powers in the Act.<sup>76</sup> The Panel also noted that, since the water charge and market rules were made, the ACCC had used its formal enforcement powers against two operators (in relation to 5 instances of non-compliance) and had resolved a number of other cases administratively where breaches of the rules were likely but were considered minor or resulting from a genuine misunderstanding of the rules. It commented that feedback from industry indicated the ACCC had modified its approach over time to take a more educative role in compliance matters, including through the provision of targeted guidance to operators (especially smaller operators).

The ACCC reports on the compliance and enforcement activities it has undertaken in its annual water monitoring report. Additionally, it will sometimes issue media releases or publish newspaper articles or other targeted information about the outcomes of specific investigations it has undertaken. Generally, these publications are designed to educate stakeholders and to deter others from engaging in similar, non-compliant conduct and are not principally designed to punish the subject of the investigation. Additionally, under the Regulator Performance Framework, the ACCC will now report annually on its measures to demonstrate that its compliance and monitoring approaches are streamlined and coordinated.

Noting stakeholder concerns as to the financial impacts on customers of penalties, the ACCC has not generally sought to impose monetary penalties on operators where non-compliance has been detected (only issuing three infringement notices totalling \$66,000 to Murrumbidgee Irrigation Limited (MI) in 2011 in circumstances of multiple breaches of the Water Charge (Termination Fees) Rules 2009 (WCTFR)).

The ACCC recognises that responding to specific information requests and investigation of complaints and compliance concerns imposes costs on operators (and ultimately customers), regardless of whether non-compliance is identified or penalties are sought. However, these costs form part of the (reasonable) costs of doing business. In specific investigations, the ACCC will generally allow operators’ requests for extensions of time to respond or provide information to mitigate the burden of response. The risk that compliance costs will be excessive will also be mitigated at a high level by the operation of the Australian Government’s Regulator Performance Framework and through the government’s ongoing commitment to reducing regulatory burden.

More generally, the ACCC collects data from infrastructure operators annually as part of its monitoring role under the Act. The ACCC recognises the costs incurred by operators in responding to its requests for information. The ACCC also agrees with the conclusion of the Panel that, “Australian Government agencies should ensure that data collected under the Act is collected in the right form at the right time for the right purpose and used to create information that is of value, while minimising

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<sup>74</sup> See section 6.1 of the ACCC, *Enforcement Guideline - Water Market and Water Charge Rules*, Canberra, April 2011, viewed October 2015, <https://www.accc.gov.au/system/files/ACCC%20enforcement%20guide%20to%20water%20rules.pdf>.

<sup>75</sup> *Report of the Independent Review of the Water Act 2007*, Conclusion 8.1.

<sup>76</sup> *Report of the Independent Review of the Water Act 2007*, Recommendation 19 proposed that regulations prescribe (specific) types of enforceable undertakings, in consultation with stakeholders. The Australian Government agreed with this recommendation in its response to the Review, see: Department of Agriculture and Water Resources, *Report of the Independent Review of the Water Act 2007 Australian Government Response*, Canberra, 2015, p.12.

regulatory burdens and any duplication of requests imposed on data providers”.<sup>77</sup> The ACCC takes regular steps to refine, reduce and improve its annual requests for information, while bearing in mind the transitional costs imposed on operators when information requests are altered. The ACCC has also participated in the Interagency Working Group on Review of Water Information Reporting Burdens, chaired by the Bureau of Meteorology, which was formed based on Recommendation 18 of the Panel’s report.<sup>78</sup>

The ACCC also indicated it would continue to monitor the necessity and benefit of its information requests, and to work with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from the ACCC’s review (draft recommendations 4-C and 4-D).

### **Private right of action**

Noting the limits on the ACCC’s ability to fully investigate complaints and respond to the concerns raised with it by individual irrigators, the ACCC made draft rule advice that the private right of action (to recover loss or damage resulting from a breach of the rules) which currently applies to the Water Charge (Infrastructure) Rules 2010 (WCIR) should be extended to apply to the water charge rules more generally (draft rule advice 4-C). The ACCC also recommended that Basin States consider expanding the jurisdiction of their ombudsman schemes (where not already provided for) to include capacity to review complaints relating to State water management law (draft recommendation 8-C).

### *Stakeholder feedback*

#### **ACCC enforcement and compliance approach**

A number of submissions on the ACCC’s Issues Paper, from infrastructure operators and peak industry bodies, commented on the ACCC’s enforcement and compliance approach, with several submissions proposing that the ACCC take an ‘exception-based approach’ to compliance monitoring, and employ a ‘collaborative approach’ to educating stakeholders about their obligations, with penalties being applied as a last resort. Several stakeholders also recommended moving towards an ombudsman-type system for investigating and resolving complaints, disputes or compliance issues.<sup>79</sup>

In discussions at several public forums, a number of operators, especially smaller operators who had been subject to investigation by the ACCC on compliance issues, noted the time involved and the costs they faced in responding to such investigations, with a concern that any penalties imposed were effectively passed on to operators’ customers.

In response to the Draft Advice, Lower Murray Water (LMW) provided some commentary about its views on an ideal compliance and enforcement approach, rather than commenting on the ACCC’s approach specifically.<sup>80</sup> In LMW’s view:

- fines and penalties should be “an outcome of last resort”. In a not-for-profit, government business entity, fines are paid by the taxpayers/customers, “the very people LMW and the ACCC are attempting to service and protect”
- the approach to compliance should be one of “cooperative rectification”.

<sup>77</sup> *Report of the Independent Review of the Water Act 2007*, Conclusion 7.2.

<sup>78</sup> *Report of the Independent Review of the Water Act 2007*, Recommendation 18. See also: ‘Interagency Working Group on Review of Water Information Reporting Burdens’, viewed November 2015, <https://www.environment.gov.au/system/files/pages/117d6268-6372-42dc-9ed5-e3f5be5dfa15/files/review-water-information-reporting-18-tor.pdf>.

<sup>79</sup> See ‘stakeholder feedback’ in section 4.5 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.49-50.

<sup>80</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.7.

LMW added that these approaches should be applied “even more so in an environment where regulation is very high and the legal instruments can be technical and the intent of the regulation is not always clear”.

The Local Government Association of Queensland (LGAQ) submitted its support for the ACCC to take “measured regulatory enforcement actions”.<sup>81</sup> This comment was provided within the context of the Association’s position on the level of regulation by Commonwealth agencies, and what it views should be the role of the ACCC. In particular, the Association supports the ACCC being a “point of recourse in the implementation of the rules”.

### **Private right of action**

During the ACCC’s consultation meetings following the release of the Draft Advice, some infrastructure operators argued that existence of the private right of action exposes them to legal risk, even in cases where charging arrangements are consistent with ACCC guidance (this concern was expressed particularly in relation to the non-discrimination provisions proposed in the Draft Advice). Operators argued that they would incur costs in responding to threats of private action by aggrieved customers.

### *ACCC assessment*

#### **ACCC enforcement and compliance approach**

The ACCC maintains that its approach to enforcement and compliance—set out in the Draft Advice—provides a sensible balance between ensuring compliance with the rules and not imposing unnecessary costs on infrastructure operators.

Where necessary, the ACCC will continue to seek further information from infrastructure operators to investigate potential contraventions of the rules. The ACCC acknowledges that such information requests impose costs on infrastructure operators which in most cases are ultimately met by customers. As such, the ACCC maintains recommendation 4-C from the Draft Advice—that it continues to monitor the necessity and benefit of these information requests.

Infrastructure operators periodically approach the ACCC to ask whether their current or proposed charging practices raise any concerns under the water charge rules. The ACCC will continue to welcome these inquiries as an opportunity to work with infrastructure operators to better understand their arrangements and provide guidance on the requirements of the rules. While the ACCC cannot provide legal advice to infrastructure operators, it is able to explain how the ACCC’s interpretation of the rules would apply in the circumstances presented. This can provide infrastructure operators with a degree of assurance about their arrangements, or otherwise highlight areas of concern that the infrastructure operator may wish to reconsider.

Given the strong benefits of such an approach, the ACCC maintains recommendation 4-D from the Draft Advice, for the ACCC to continue to work closely with infrastructure operators to assist them in understanding and complying with any new rule requirements resulting from the ACCC’s review.

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<sup>81</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.6.

## Private right of action

While the WCIR currently provides for a private right of action, where a person can take action to recover loss or damage resulting from a contravention of the rules, the ACCC is not aware of any such actions occurring. The ACCC is also not aware of any specific instances where a customer has threatened such action against an infrastructure operator (however this is not something the ACCC is able to monitor).

The ACCC acknowledges that the proposed amendments to the water charge rules set out elsewhere in this Final Advice (in relation to non-discrimination in particular) would broaden the potential grounds for such action (or the threat of such action) by customers against infrastructure operators. This may lead to operators taking an overly conservative approach to the interpretation of the rules, even in situations where their practices are fully consistent with ACCC guidance.

While a general private right of action does provide some benefits, it also increases uncertainty and risk for infrastructure operators, which in turn can increase up-front and ongoing regulatory costs for infrastructure operators. The ACCC will continue to receive and consider complaints and inquiries from customers and other stakeholders. As such, the ACCC has amended its rule advice 4-C, to instead recommend the removal of the private right of action from all water charge rules.

The ACCC also notes that many disputes between infrastructure operators and their customers do not involve a potential contravention of the water charge (or market) rules, such as billing / metering disputes. Section 8.3 sets out these issues in greater detail.

## 4.6 Future reviews of the water charge rules

### *Background*

The ACCC's current review was initiated by the Minister in response to a recommendation to the Australian Government following an independent review of the *Water Act 2007* (the Act).

The water charge rules do not contain provisions requiring future reviews of the water charge rules or specifying dates by which future reviews of the water charge rules should occur. However, the Minister can request advice from the ACCC at any time.

The Draft Advice noted that a key principle in the *Australian Government guide to regulation*<sup>82</sup> is that all regulation should be periodically reviewed to test its continuing relevance. Reviews provide an opportunity to consider whether regulation remains relevant, effective and efficient, and for stakeholders to comment on any issues with the operation and implementation of the rules.

Because reviews can be time-consuming and resource-intensive for government and for participating stakeholders, it is important that they are undertaken at an appropriate time and, where possible, are coordinated with other relevant processes and milestones to maximise their effectiveness. However, it can be difficult to anticipate the optimum timing of a review ahead of implementation of the legislative instrument.

As this review illustrates, the current framework provides discretion to coordinate processes or to respond to issues as they arise. Under the Act, if the Minister seeks to make, amend or repeal the

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<sup>82</sup> Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation*, Canberra, 2014, viewed June 2016, <https://www.cuttingredtape.gov.au/handbook/australian-government-guide-regulation>.

water charge rules or Water Market Rules 2009 (WMR), they must first obtain the advice of the ACCC.<sup>83</sup>

The *Legislative Instruments Act 2003* sets out rules relating to sunseting, with legislative instruments ordinarily automatically repealed on the 1 April or 1 October falling on or after the tenth anniversary of registration of the instrument. The proposal to consolidate the three sets of water charge rules into the current Water Charge (Infrastructure) Rules 2010 (WCIR) means that, unless that instrument is exempted, the rules will sunset on 1 April 2021. Review of the water charge rules prior to this date may therefore be appropriate but can be assessed closer to that time.

The ACCC's Draft Advice did not propose any rule amendments, or make any recommendations in relation to this issue.

### *Stakeholder feedback*

Submissions on the Issues Paper expressed mixed views regarding future reviews of the water charge rules, with stakeholders suggesting different time periods and differing on the need for scheduled reviews to be 'hard wired' into the rules. However, stakeholders all supported transparency around the scope and timing of reviews.<sup>84</sup>

There was no stakeholder feedback on this issue in response to the Draft Advice.

### *ACCC assessment*

The ACCC maintains the views set out in the Draft Advice (see 'Background' section above), and does not propose any rule advice or recommendations regarding future reviews of the water charge rules. The timing and scope of any future reviews are ultimately a matter for the Minister.

## **4.7 Timing of rule amendments**

### **Recommendation 4-E**

Should the Minister decide to adopt the ACCC's advice for amendments to the water charge rules, and such amendments are introduced (through an amending instrument) before 1 March 2017, the ACCC recommends that the transition date (the date the amendments take effect) should be 1 July 2017. In the event that the proposed amendments to the rules are not introduced until a later date, the transition date for the amendments should be adjusted accordingly.

*Note:* the ACCC has recommended that the proposed amendments to rule 10 (non-discrimination) apply from a later date—see recommendation 5-A.

*Note:* particular timing issues relating to Network Service Plans (NSPs) (Part 5) are considered in section 5.5.

### *Background*

As noted in section 3.1, the *Water Act 2007* (the Act) requires the Minister to obtain and have regard to the ACCC's advice before making, amending or revoking the water charge rules.<sup>85</sup>

<sup>83</sup> *Water Act 2007 (Cth)*, section 93.

<sup>84</sup> See 'stakeholder feedback' in section 4.6 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.52.

<sup>85</sup> See section 93 of the *Water Act 2007* (Cth).

The Water Regulations (2008) (the Regulations) set out further procedural requirements applying to the Minister in relation to rule amendments. For example, in proposing to make, amend or revoke the water charge rules, the Minister:

- must have regard to any records of consultation provided by the ACCC
- may adopt the ACCC's draft rules with or without variation
- if the Minister decides not to adopt the ACCC's draft rules – may develop, amend or revoke the rules, having regard to the ACCC's advice.<sup>86</sup>

The Regulations also set out that the Minister, after receiving the ACCC's advice, does not have to consult if they are satisfied that the ACCC has consulted as required.<sup>87</sup> In such cases, the Regulations do not *require* the Minister to consult; however, the Minister has the option to do so.<sup>88</sup>

If the Minister is considering departing from the ACCC's advice, the Minister may also request further advice from the ACCC.<sup>89</sup>

Neither the Act nor the Regulations specify when, or if, the Minister must respond to the ACCC's advice. However, if the Minister proposes making, amending or revoking water charge rules after receiving the ACCC's advice, the Regulations require the Minister to publish the ACCC's advice on the Department's website.<sup>90</sup>

### *ACCC assessment*

The ACCC notes that it is ultimately the decision of the Minister as to whether to proceed with the ACCC's proposed rule amendments and if so, the timing with which those amendments should come into effect. As outlined above, the Act and the Regulations set out specific procedural matters that the Minister must follow in making, amending or revoking the water charge rules.

Any amendments to the rules would occur through the making of an amending instrument, which would have the effect of amending the existing water charge rules on a specified date. This specified date is referred to in the proposed water charge rules as the 'transition date'.

The ACCC recommends that in the event that amendments to the water charge rules are introduced in response to the ACCC's advice before 1 March 2017 (through the making of amending instrument), the transition date should be 1 July 2017 (with a later start date for amendments to rule 10—see below). In the event that the proposed amendments to the rules are not introduced until a later date, the transition date for the amendments should be adjusted accordingly.

The ACCC considers that providing at least four months between when amendments to the rules are introduced (through an amending instrument) and the transition date from which the amendments will take effect would allow the ACCC sufficient time to work with infrastructure operators and other industry stakeholders to assist regulated entities in understanding and complying with their obligations under the amended water charge rules.

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<sup>86</sup> See regulation 4.02 of the Water Regulations 2008.

<sup>87</sup> See regulation 4.03 and regulation 4.06 of the Water Regulations 2008.

<sup>88</sup> See regulation 4.07 of the Water Regulations 2008.

<sup>89</sup> See regulation 4.08 of the Water Regulations 2008.

<sup>90</sup> See regulation 4.04 of the Water Regulations 2008.



Updated and practical guidance material will be an important part of the ACCC's compliance approach to assist infrastructure operators in understanding and complying with any new rule requirements (see section 4.5 for further discussion).

The ACCC notes that many charging arrangements within the rural water sector in the Murray-Darling Basin (MDB) are aligned with the start of the financial year. The ACCC therefore considers that it is appropriate that the transition date for any amendments to the water charge rules should align with the financial year where possible to reduce the burden on infrastructure operators in needing to change their charging practices mid-way through the financial year and irrigation season.<sup>91</sup>

Section 5.3.1 recommends that the proposed new non-discrimination rule (proposed rule 10, giving effect to rule advice 5-A and 5-B) should commence no earlier than 1 July 2018 (one year after the recommended transition date for the rules generally). This is in order to give infrastructure operators ample time to work with the ACCC to understand these new requirements and, if necessary, adapt their charging arrangements to ensure compliance.

Section 5.5 contains advice that, on balance, requirements in relation to Network Service Plans (NSPs) should be removed from the rules. Repealing Part 5 would significantly reduce the regulatory requirements and associated compliance costs of the current Part 5 operators. Much of these costs are incurred in the development of new NSPs. The ACCC notes that the NSPs of infrastructure operators subject to Part 5 of the current Water Charge (Infrastructure) Rules 2010 (WCIR) will expire on 1 July 2017. Section 5.5 of this advice notes that the Minister may wish to consider an interim response to the ACCC's rule advice in relation to this issue to the extent that the Minister is inclined to accept the ACCC's rule advice 5-L to repeal the Part 5 NSP requirements.

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<sup>91</sup> The proposed Water Charge Rules also contain transitional provisions for any Schedules of Charges given to customers in accordance with rules 11, 12 or 13 of the existing Water Charge (Infrastructure) Rules 2010 (see Part 11 of the proposed Water Charge Rules).

## 5 Water Charge (Infrastructure) Rules 2010

### 5.1 Rationale for the WCIR and operator ownership arrangements

*Rationale for the WCIR – regulating charges for water infrastructure levied by operators of monopoly infrastructure*

The Water Charge (Infrastructure) Rules 2010 (WCIR) set requirements relating to the fees and charges payable to infrastructure operators for infrastructure services.

Throughout the Murray-Darling Basin (MDB), water service infrastructure involves large and lumpy capital investments in long-lived assets such as dams, weirs and channels. This infrastructure is used to capture, store and deliver water to a range of users.

Services related to the storage and delivery of water that is primarily stored or delivered on-river ('bulk water services') tend to be provided by larger infrastructure operators owned by Basin State governments. These infrastructure operators deliver water to a range of customers, including environmental water holders, private diverters, and other infrastructure operators. These other infrastructure operators then deliver water through gravity-fed and / or pressurised networks operating primarily off-river.

The assets of an infrastructure operator tend to have few alternative uses and the investment, once made, is largely sunk. These characteristics can serve as a barrier to entry (and exit), deterring new entrants from entering the market and creating competition.

These natural monopoly characteristics mean that direct competition is unlikely to develop between infrastructure operators. In the absence of competition, infrastructure operators hold market power, which can result in prices, quality, service levels or innovation diverging from competitive levels. As customers are not able to change service providers without incurring substantial costs, these infrastructure operators may have the ability to engage in discriminatory behaviour against customers, certain customer types or potential customers. This may undermine the efficient use of water resources and water infrastructure.

Water infrastructure charges send signals about the efficiency of water storage and delivery infrastructure throughout the MDB. Differences in charging practices throughout the MDB have the potential to distort these signals. In turn, they can distort water markets. Distortions to water markets will result in less efficient water use and investment in water-related infrastructure.

Infrastructure charges regulated by the WCIR are levied in order to recover (at least partially) capital and operational costs incurred in relation to building, maintaining, and managing the storage and delivery of water through infrastructure. Infrastructure charges do not equate to payments for the consumption or use of water directly.<sup>92</sup> Rather, such charges relate to the provision of infrastructure that enables holders of water access rights and irrigation rights to receive water they are able to access under those rights. This includes water service infrastructure used to provide on-river infrastructure services (such as dams and weirs) and purpose-built infrastructure that is used to provide off-river infrastructure services (primarily to deliver water to irrigators). As such, charges for water infrastructure vary considerably across the MDB.

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<sup>92</sup> Water infrastructure charges should be distinguished from commodity input prices paid by agricultural businesses, such as prices for fertiliser, seed, feed and other inputs for agricultural business.

Fundamentally, these differences are caused by differences in the types of infrastructure and infrastructure services provided, and it is appropriate that these differences should be reflected in different infrastructure charges. Further, infrastructure charges differ due to factors such as the number of customers who receive services relating to particular infrastructure, and the degree to which infrastructure operators recover their costs from users.

Prior to the introduction of the WCIR, larger infrastructure operators were generally regulated by state-based regulators, although the nature of that regulation varied across the MDB. Further, member-owned operators in NSW and SA were not subject to any substantive state government or independent economic regulation.

Under the WCIR, larger infrastructure operators are regulated either by the ACCC or by state regulators, where the state regulator is accredited by the ACCC under the WCIR (see sections 5.6 and 5.9). Accredited state regulators are required to act consistently with the ACCC's Pricing Principles as a condition of their accreditation. Infrastructure charges of member-owned operators in NSW and SA, as well as SunWater in Queensland, are subject to more light-handed regulation under the WCIR. All irrigation infrastructure operators (IIOs) in the MDB are also subject to the Water Charge (Termination Fees) Rules 2009 (discussed in chapter 6).

#### *Infrastructure operator ownership and governance arrangements*

There are a range of different governance and ownership arrangements for operators in the MDB. In Queensland and Victoria, irrigation water delivery activities are generally vertically integrated into a larger infrastructure operator that also provides on-river infrastructure services.<sup>93</sup> Infrastructure operators in NSW and SA are typically member-owned (see section 5.2).

Ownership and governance arrangements of infrastructure operators may affect an operator's ability or willingness to exercise its monopoly power in certain contexts. For example, where boards of member-owned operators are directly accountable to member customers, this may help create incentives for member-owned operators to pursue efficiency in their service delivery in order to reduce costs and resulting infrastructure charges. However, these operators still hold market power as a result of their natural monopoly infrastructure, and governance structures may not be a sufficient deterrent against the exercise of monopoly power in all cases. In particular, pricing discrimination by infrastructure operators in favour of particular customer groups or classes remains a significant concern, and can occur whether or not an infrastructure operator is earning monopoly rents in aggregate. Pricing discrimination is considered further in sections 5.2 and 5.3.

Where infrastructure operators are not exposed to any material competitive pressure (for example, where they enjoy an effective statutory monopoly in relation to the provision of bulk water services) then there is also reduced incentives to operate efficiently. This is because higher costs can easily be passed on to customers with little prospect of reducing demand. The potential for such monopoly pricing by infrastructure operators is considered in section 5.6.

The impact of differences in charging arrangements between infrastructure operators is considered further in section 5.10.

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<sup>93</sup> The Queensland Government is currently implementing local management arrangements under which SunWater will transfer ownership and operation of eight irrigation areas to a corporate entity run by local irrigators. The new entities are likely to meet the definition of irrigation infrastructure operator under the *Water Act 2007* and, where they operate within the Murray-Darling Basin, such as the St George irrigation scheme, will be subject to regulation under the water charge rules.

## 5.2 Tiered regulation of infrastructure operators

### Background

Different parts of the existing Water Charge (Infrastructure) Rules 2010 (WCIR) apply to different operators, based on the operator's ownership structure (whether they are 'member-owned' or not) and its size (in terms of the volume of Basin water resources that the operator provides infrastructure services in relation to), as follows:

- Part 3 non-discrimination requirements apply to all *member-owned* operators
- Part 4 requirements relating to the operator's Schedule of Charges generally apply to all operators, except that only irrigation infrastructure operators (IIOs) are required to provide a statement as per rule 4(d), and operators less than 10 gegalitres (GL) in size are exempt from Schedule of Charge publication requirements.
- Part 5 Network Service Plan (NSP) requirements apply to member-owned operators larger than 125 GL and non-member-owned operators between 125 GL and 250 GL
- Part 6 price approval/determination requirements apply to non-member-owned operators over 250 GL in size.

The table 5.1 below summarises the application of these parts of the WCIR.

**Table 5.1: Existing structure of application of the WCIR**

Ownership	Member-owned operators				Non-member-owned operators				
	Size (GL)	< 10	10 –125	125 –250	250+	< 10	10 –125	125 –250	250+
Part 3		✓	✓	✓	✓				
Part 4		✓*	✓	✓	✓	✓*	✓	✓	✓
Part 5				✓	✓			✓	
Part 6									✓
Part 7		✓^	✓^	✓^					

\* Exempt from the requirement to publish.

^ Only applies if triggered by the making of a relevant distribution.

Consistent with the terms of reference, the ACCC has considered the continued appropriateness of tiered regulation of infrastructure operators, and the potential to streamline or eliminate regulation. In its Issues Paper, the ACCC sought stakeholders' views on the advantages and disadvantages of the current tiered regulatory approach in the WCIR and whether the distinction between member-owned and non-member-owned operators is still appropriate.

The ACCC's Draft Advice proposed streamlining the application of the WCIR by removing references to the ownership structure or size of an operator in determining the application of many of the rules. This advice was made on the basis that concerns relating to the exercise of monopoly power, such as discrimination between certain types or classes of customers, apply equally or even more so to member-owned operators than non-member-owned operators in certain circumstances.

Further, the ACCC advised that full charge approval / determination be applied only to the infrastructure charges of certain monopoly infrastructure operators. Rather than setting criteria based on whether the operator was privately or publicly owned, or the volume of water access entitlement

serviced, the Draft Advice proposed limiting this intensive form of regulation to those operators which have a monopoly on the provision of infrastructure services for the storage or delivery of water in respect of water access rights or in relation to water sharing arrangements between states (see sections 5.6 and 5.12).

The streamlined approach, together with the strengthened non-discrimination provisions (see section 5.3) and pricing transparency provisions (see section 5.4), would provide an appropriate level of regulation while decreasing the regulatory burden faced by many operators.

The intent of the proposed new structure of the water charge rules set out in the Draft Advice was that operators would be subject to a more consistent set of requirements, and the customers of the operators afforded a consistent level of protection. Moreover, since the test for whether an infrastructure operator is member-owned relates to whether the majority of the operator's customers are 'related customers',<sup>94</sup> it is possible for the structure of an operator's demand or customer base to change such that under this test, a non-member owned operator becomes a member-owned operator and vice versa. The ACCC considers that the application of the rules should not suddenly alter due to such factors as an operator's changing customer base or demand profile.

### *Stakeholder feedback*

The ACCC received a range of views on the current tiered application of the WCIR in response to its Issues Paper; however, there was general support for a more light-handed approach such as is currently applied in regulation of member-owned operators, as opposed to requirements imposed on certain non-member-owned (generally government-owned) operators via Part 6 of the WCIR. Several stakeholders supported there being a distinction between member-owned operators and non-member-owned operators, based on the arguments that member-owned operators do not have incentives to seek monopoly rents and / or that member-owned operators act in the interests of their members.<sup>95</sup>

In response to the Draft Advice, a number of stakeholders submitted that they support the ACCC's approach to streamline the tiered application of the water charge rules. Goulburn-Murray Water (GMW) noted that it would promote greater consistency and simplicity, and contribute to the principle of competitive neutrality.<sup>96</sup> The Commonwealth Environmental Water Holder noted that the consistent application of the rules would facilitate and support an efficient water market.<sup>97</sup> Lower Murray Water (LMW) welcomed a consistent approach "aimed at minimising the cost to its customers".<sup>98</sup>

The Victorian Farmers' Federation (VFF) and LMW commented on the tiered regulatory approach as it applies to Victorian infrastructure operators. The VFF noted that it supports the existing tiered approach because of its view that "a higher level of regulation is appropriate for non-member owned infrastructure operators", and in view of the fact that operators in Victoria are not member-owned.<sup>99</sup> However, the VFF noted that the proposed amendments, which remove the tiered approach, affect the mechanisms, but not the level, of regulation applying to Victorian operators. In comparison, LMW commented on what it viewed as a "discrepancy" in the existing tiered approach to regulation.<sup>100</sup> LMW noted that under the ownership criteria of the tiered structure, it is a Tier 3 operator; yet larger

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<sup>94</sup> WCIR rule 6

<sup>95</sup> See 'Stakeholder feedback' in section 5.2 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.56-57.

<sup>96</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>97</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>98</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>99</sup> Victorian Farmers' Federation, Draft Advice Submission, March 2016, p.5.

<sup>100</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.2.

(in terms of customers and volume of water use) member-owned infrastructure operators (Murray Irrigation Limited (MIL) and Murrumbidgee Irrigation Limited (MI)) are only Tier 2 operators.<sup>101</sup>

The levels of regulation applying to member-owned operators was a key issue for the National Irrigators' Council (NIC).<sup>102</sup> The NIC argued:

- the ACCC had not had regard to the governance arrangements of member-owned operators and their historical and current charging arrangements. Therefore, in providing its advice, the ACCC had not complied with subsection 93(3) of the *Water Act 2007*.<sup>103</sup>
- “the public policy position has always been that member-owned operators... should be less heavily regulated”—and that the ACCC should maintain this position unless there is evidence of member-owned operators taking advantage of their market power. The NIC is of the view that the ACCC has not provided this evidence.<sup>104</sup>
- the effect of the proposed amendments will be reduced innovation and flexibility (i.e. “tell[ing] member-owned operators how to charge”).<sup>105</sup>

The NIC noted that current charging arrangements of its members:

- have been developed and refined over long periods by elected representatives of each operator's customers
- have long histories which explain their current structures
- should not be disturbed lightly.

The NIC concluded that the Marsden Jacob report, and Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) survey report cited in the Draft Advice support the argument that member-owned operators should be less heavily regulated and that “there is a compelling case for reducing the regulatory burden on member-owned operators”.<sup>106</sup>

The NIC disagreed that the ACCC has simplified the regulatory framework as, in its view, the proposals would be “[a]dding voluminous new regulations and applying them to all infrastructure operators”.<sup>107</sup>

Western Murray Irrigation (WMI) and the National Farmers' Federation (NFF) also submitted that:

- the governance arrangements in member-owned operators support reduced regulation. WMI noted that it is owned and governed by its customers and is not-for-profit.<sup>108</sup> The NFF also noted that the governance arrangements provide a “sufficient avenue for end users to debate issues on service and price” and “provide customers with the opportunity to have their say”.

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<sup>101</sup> LMW notes that under the existing tiered approach, it does not meet the volumetric criteria for Tier 2 or Tier 3. This is based on LMW's assertion that the 300 GL of water extracted by private diverters from Nyah to the South Australian border, which it manages under delegated powers, should not be included in the assessment of the volume of water LMW manages. LMW argues that this water should not be included because the private diverters own and operate their own infrastructure.

<sup>102</sup> The NIC argues that smaller operators do not benefit from some offsets in regulatory costs as a result of the repeal of the Network Service Plan requirements.

<sup>103</sup> The NIC considers that this is the case in relation to proposed, or amendments to existing, rules: 10, 9A, 72, 74, 45, 45A, 45B, 45C, 46. National Irrigators' Council, Draft Advice Submission, March 2016, pp.6-7.

<sup>104</sup> National Irrigators' Council, Draft Advice Submission, March 2016, pp.7,17. The NIC refers in particular to the ACCC's views on pages 57, 58 and 187 of the Draft Advice about member-owned operators and their use of market power.

<sup>105</sup> This comment was echoed by Western Murray Irrigation who added that the additional proposed regulations will increase both costs and complexity. Western Murray Irrigation noted that this is inconsistent with the terms of reference for the review and the water charge rules. National Irrigators' Council, Draft Advice Submission, March 2016, p.8; Western Murray Irrigation, Draft Advice Submission, March 2016, p.1.

<sup>106</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.7.

<sup>107</sup> *ibid*, p.8.

<sup>108</sup> Specifically, Western Murray Irrigation noted that its charges only recover the “long-term costs of doing business”.

The NFF was concerned that the governance arrangements have been “discounted by the ACCC”.

- the ACCC has not provided evidence to support changes to the regulations that apply to member-owned operators (WMI).
- the proposed amendments represent an increase in regulatory burden and consequently, increased costs for customers. WMI added that new regulation “...stifles innovation, and renders Australian industry increasingly globally uncompetitive”.

Mr Tom Loffler and the South Australian Murray Irrigators (SAMI) also commented on governance arrangements in member-owned operators, providing a different perspective to that of the NIC, NFF and WMI.

SAMI submitted:

*“Trust infrastructure will always be protected by its management board as it should. However, sometimes this is in conflicting interest to the financial and delivery constraints of the individual irrigation business. The democratic system of majority rule is not protecting the rights of the individual landholder due to apathy, ignorance and defeatism. Many members approached [by SAMI] ensured anonymity before giving comment for this submission”.*<sup>109</sup>

Mr Tom Loffler submitted:

*“[Central Irrigation Trust] CIT Policies and Rules are generally complied and implemented by the Board and/or CIT management with little, or in some instances, no consumer involvement.*

*In 10 out of 12 CIT districts, only irrigators with permanent irrigation rights are able to vote at the AGM. Generally, this may be done by a limited number of persons attending. The CIT 2015 AGM was only attended by about 50 persons. There are approximately 6,500 CIT consumers (domestic, irrigation, industrial, parks). In two CIT districts, irrigators with permanent and temporary water rights may vote. AGM voting is on CIT’s/Board suggested asset maintenance etc. and water pricing. Domestic consumers have no vote”.*<sup>110</sup>

The Queensland Farmers’ Federation (QFF) also commented on the removal of the tiered approach to regulation, identifying that it has concerns that the rules “will no longer recognise the difference between private and public operators”.<sup>111</sup> The QFF’s comments are provided within the context that distribution schemes, currently managed by SunWater, are transitioning to local management. The QFF noted in respect of these distribution schemes that they will not be profit maximising and that additional regulation will be “unnecessary”. The QFF further noted that additional regulation will create uncertainty for the processes, which are currently underway, to transition these schemes to local management.

The ACCC engaged researchers at the University of Adelaide to survey irrigators in the southern Murray-Darling Basin (MDB) (both private diverters and customers of off-river infrastructure operators). The survey report<sup>112</sup> noted that only 42 per cent of irrigators thought that, in water charging matters, their interests aligned with those of their operators all or most of the time. Customers of off-river infrastructure operators indicated a closer degree of alignment, especially in SA. However, the proportion of irrigators indicating that their interest aligned with their off-river

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<sup>109</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.3.

<sup>110</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.1.

<sup>111</sup> Queensland Farmers’ Federation, Draft Advice Submission, March 2016, pp.3-4.

<sup>112</sup> The report is available on the ACCC’s website.

infrastructure operator's only some of the time or never was still relatively high: 26 per cent in SA, 48 per cent in the NSW Murray System, 57 per cent in the NSW Murrumbidgee System and 75 per cent in Victorian systems.

### *ACCC assessment*

Infrastructure operators throughout the MDB vary enormously in terms of their size (by volume of water access entitlement (WAE) serviced), geographic reach, customer numbers and water usage requirements, type of infrastructure, ownership and governance arrangements.

However, as set out in section 5.1, infrastructure operators tend to have natural monopoly characteristics, irrespective of their ownership status or particular governance arrangements.

These natural monopoly characteristics mean that direct competition is unlikely to develop between infrastructure operators. In the absence of competition, infrastructure operators hold market power, which can result in prices, quality, service levels or innovation diverging from competitive levels.

The level of regulation applying to operators has historically varied by Basin State (and sometimes within Basin States). In making its initial advice on the formation of the WCIR, the ACCC considered that member-owned infrastructure operators were less likely to take advantage of their market power to the detriment of their customers. In particular, the ACCC identified that the rationale for applying different levels of regulation to infrastructure operators based on their ownership structure is that member-owned operators:

- are less likely than non-member-owned operators to exercise their market power to extract monopoly rents from their customers;
- are accountable to their members;
- are more likely to pursue efficiencies in the level of prices, services and investment for their member customers; and
- tend to be not for profit because of governance / constitutional arrangements or the way they operate their business.

However, in its initial advice, the ACCC also identified certain concerns regarding member-owned operators, such as:

- the incentive to discriminate against non-member and non-irrigation right customers (Parts 3 and 7 of the WCIR) and
- whether there is adequate transparency around infrastructure investment and the price setting process (Parts 4 and 5 of the WCIR).

Since the commencement of the rules, the ACCC has observed that while member ownership of an operator may limit incentives to charge prices that result in monopoly profits at an *aggregate* level (for example, because the operator is not-for-profit), there remain concerns about use of monopoly power to discriminate in favour of certain customer groups.

The vast majority of customers will have little or no countervailing power against their infrastructure operator, even if that infrastructure operator is member-owned. Operators may have incentive to discriminate against customers who trade water out of irrigation districts, or against customers who transform their right to receive water under an irrigation right into a WAE. Further, the use of tiered pricing structures may benefit large users over small users in a way that is not commensurate with underlying differences in costs of service provision to these users.



The ACCC notes that the current WCIR requirements in relation to distributions (Part 7 of the WCIR) and non-discrimination (Part 3) apply specifically to member-owned operators.

The ACCC’s recent Draft Advice noted the significant disadvantages of different regulatory approaches applying based on the ownership of an infrastructure operator, and sought to harmonise the rule requirements applying across all infrastructure operators throughout the MDB.

The ACCC maintains its position from the Draft Advice that the concerns relating to the exercise of monopoly power and the objectives of the proposed rules apply across infrastructure operators generally, regardless of their ownership structure or particular governance arrangements.

The proposals set out in the Draft Advice extended the application of rules relating to distributions (Part 7) and non-discrimination (Part 3) to non-member-owned operators, and also provide for enhanced safeguards against the exercise of market power against customers (see sections 5.3 and 5.7).

Extending the application of Part 6 of the rule (full determination / approval of charges by a regulator) to all infrastructure operators would also have addressed these market power concerns, but at an unacceptably high regulatory cost. Instead, the ACCC has proposed that this form of intensive regulation only apply in limited circumstances, not directly related to an operator’s ownership status or overall size (see section 5.6 and also section 5.7).

Importantly, under the proposed new water charge rules, infrastructure operators will still be able to determine charges and consult with their customers in a way that best meets the individual needs of their business and customers, subject to some basic customer protections and transparency requirements (set out throughout chapter 5). The ACCC believes that these protections should apply to all customers of infrastructure operators.

The proposed new structure reflecting the Final Advice is summarised in Table 5.2, using the categories relevant to the current rules (summarised in Table 5.1 above) to enable clear comparison.

**Table 5.2: Proposed new structure for application of rules in relation to infrastructure charges**

Ownership	All infrastructure operators (regardless of ownership)			
Size (GL)	< 10	10 –125	125 –250	250+
Part 3	✓			
Part 4	✓			
Part 5	Repeal			
Part 6	Limited application, with an exemptions process (see section 5.6 for more detail).			
Part 7	Limited application, with an exemptions process (see section 5.7 for more detail).			

## 5.3 Non-discrimination requirements (Part 3)

### 5.3.1 Expanded non-discrimination requirements—proposed rule 10

#### Rule advice 5-A

The rules should be amended such that Part 3 applies to all infrastructure operators instead of only to member-owned operators.

This rule advice is implemented in rule 10 and rule 10A of the proposed Water Charge Rules.

#### Rule advice 5-B (replaces draft rule advices 5-B and 5-C)

The rules should be amended to expand the current limited protections<sup>113</sup> in rule 10 to prohibit infrastructure operators from unreasonably levying different charges (including different rates or discounts) for an infrastructure service or unreasonably restricting the availability of infrastructure services it offers.

#### *Factors to be taken into account*

This rule should also include a non-exhaustive list of factors to be taken into account when deciding whether a particular difference in charges or restriction on the availability of infrastructure services is reasonable, as follows:

- a) The necessary infrastructure required to provide the infrastructure service, including any capacity constraints in general, in applicable areas or at particular times;
- b) The costs to the infrastructure operator of providing an infrastructure service, including the extent to which differences in charges for the service reflect differences in the estimated costs of providing the service in different circumstances;
- c) The extent to which different infrastructure charges are applied based on the ratio of a customer's actual usage of infrastructure services relative to the customer's right of access to the operator's water service infrastructure;
- d) Payment of fees or charges of the type described in section 91 of the *Water Act 2007* [regulated water charges];  
*Note:* this replicates Basin Plan water trading rule 12.29(1)(e).
- e) The extent to which a difference in charges reflects a Community Service Obligation provided by a Basin State;
- f) Where a discount is provided for an infrastructure service to customers affected by hardship such as a natural disaster (e.g., flood, fire or drought), whether:
  - i. the discount is appropriate in relation to the kind of hardship;
  - ii. the discount appropriately reflects the duration and scope of the hardship;
  - iii. the operator specifies reasonable circumstances for the discount, and the discount applies to all customers in those circumstances;
- g) For an infrastructure operator whose infrastructure charges are approved or determined under Part 6, or are otherwise approved or determined by a Basin State Agency, whether there is an established transition path to a full cost recovery or upper bound pricing charge level for particular customers / classes of customers;

<sup>113</sup> As explained further below, the current non-discrimination rule prevents a member-owned operator from levying a different infrastructure charge to a customer based on whether or not that customer holds an irrigation right against the operator, unless differences in charges reflect underlying differences in the cost of providing an infrastructure service to a customer who holds an irrigation right compared to one who does not.

h) The existence of any pre-existing contracts setting out a specific infrastructure charge, the terms on which such contracts can be amended and whether any amendments reduce unreasonable charge differences or limitation of infrastructure services;

i) Whether it is reasonably necessary for a customer to hold a particular type of tradeable water right or separate location-related right, or obtain other infrastructure services, in order to receive an infrastructure service;

*Note:* An example is where a person must have water allocation available (e.g. under an irrigation right or water access right) in order to be able to have water delivered.

j) Whether an operator provides water to a customer other than in relation to a volumetric irrigation right or a water access right held by the customer;

k) The extent to which the operator's charges are necessary to comply with the proposed pass through rules (rule 9A).

l) The need to comply with a requirement under a law of a State to limit the availability of a service;

*Note:* An example is where an infrastructure operator is required to limit delivery of water to customers who hold non-volumetric rights (e.g. non-volumetric stock and domestic rights) in order to give effect to state-mandated water restrictions during a period of drought.

*See also rule advice 5-Y.*

This rule should provide that a difference in charges arising from the operator offering a **prudent discount** is taken to be reasonable.

#### *Definitions*

For this rule, the term "prudent discount" should be defined based on the following:

A **prudent discount** is where an infrastructure operator offers an infrastructure service at a discounted rate to a particular customer or group of customers which can reasonably be expected to result in charges for the infrastructure operator's other customers being lower than they would otherwise have been. This includes where an operator credibly believes that a customer or group of customers would not obtain infrastructure services at the standard charge for that infrastructure service, but would, with the provision of a discount, obtain infrastructure services and pay charges that would contribute towards the operator's fixed costs.

#### *Exemptions*

The rules should provide a restriction of a kind where an operator limits the availability of an infrastructure service to customers only using water for stock or domestic purposes is taken to be reasonable.

As per rule advice 5-X, the rules should provide for certain arrangements under Part IIIA of the *Competition and Consumer Act 2010* to be permitted despite the non-discrimination requirements in rule 10.

*See also rule advice 5-D, rule advice 5-X.*

This rule should be a civil penalty provision.

This rule advice is implemented in rule 10 of the proposed Water Charge Rules.

### **Recommendation 5-A**

The proposed amendments to rule 10 (set out in rule advices 5-A and 5-B) should not apply before 1 July 2018, even if the ACCC's recommendation 4-E is adopted and other amendments to the rules commence on 1 July 2017.

*See also recommendation 4-E.*

## *Background*

Currently under Part 3 of the WCIR, a member-owned operator (of any size) is prevented from levying a different infrastructure charge to a customer based on whether or not that customer holds an irrigation right against the operator. This rule does not prevent differential charging where this difference reflects actual cost differences.

The purpose of the existing rule is “to ensure that price signals received by irrigators and operators are consistent with the economically efficient use of water resources and infrastructure”,<sup>114</sup> and to prevent price discrimination against transformed customers which may deter transformation of irrigation rights more generally.<sup>115</sup>

The broader policy intent of the current rule is to ensure that price signals received by customers and operators are consistent with the economically efficient use of water resources and infrastructure,<sup>116</sup> by prohibiting certain types of price discrimination which could act as a barrier to transformation and trade, and detract from progress towards implementing the principle of user-pays.<sup>117</sup> In short, there was seen to be a need to provide some protection to a discrete subset of customers (those who do not hold irrigation rights) from the exercise of market power by member-owned (monopoly) operators. This rationale remains valid, and has not been challenged by stakeholders. However, the ACCC considers that the existing clause is too limited in scope and application.

In its Draft Advice, the ACCC noted that infrastructure operators that are not member-owned also enjoy a degree of market power but may arguably face fewer restrictions (through accountability to their customers) on the exercise of that power than member-owned operators. Further, the ACCC identified other forms of price discrimination that are of concern.<sup>118</sup> The ACCC also considered that operators’ governance arrangements can act to reinforce price discrimination, for example where voting rights are distributed within member-owned operators based on particular irrigator attributes such as the volume of water holdings.

The ACCC made draft rule advice to extend the current non-discrimination provisions to limit the potential exercise of market power by *all* infrastructure operators by limiting their ability to discriminate on five proscribed grounds, both in terms of the charges they levy for infrastructure services, and in relation to customers’ access to these services (draft rule advices 5-A to 5-C). Further, the ACCC proposed that operators should be prevented from levying charges in relation to the trade of tradeable water rights, in recognition that such charging practices can discriminate against users who participate in water markets (draft rule advice 5-D).<sup>119</sup>

## *Stakeholder feedback*

### **Feedback on the Issues Paper**

While there were few Issues Paper submissions that commented directly on the operation of Part 3, member-owned operators broadly commented that they consider they already have sufficient incentives to provide outcomes that are in the interests of their members, and that there are

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<sup>114</sup> ACCC, *Water infrastructure charge rules – Advice to the Minister for Climate Change and Water*, Canberra, June 2009, p.54.

<sup>115</sup> *ibid*, p.55. Note: transformation of irrigation rights is dealt with in the Water Market Rules 2009.

<sup>116</sup> *ibid*, p.54.

<sup>117</sup> *ibid*, p.28.

<sup>118</sup> See: ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.62-65 for the ACCC’s rationales for each of these proposed grounds.

<sup>119</sup> Note: rule advice 5-D, while forming part of the proposed non-discrimination provisions, is discussed separately in section 5.3.2.

mechanisms in place for the operators to be accountable to their members.<sup>120</sup> Also, the National Irrigators' Council (NIC) argued that "IIOs [irrigation infrastructure operators] should be free to construct their prices according to their particular circumstances in full knowledge that their customers have recourse to the ACCC if they consider the prices unreasonable."<sup>121</sup> Such arguments suggest there is no need for rules to specifically address price discrimination. However, the ACCC noted in its Draft Advice that there may be little benefit to customers from having accountability mechanisms or having recourse to the ACCC if there are no legislative protections against the conduct in question.

Further, some submissions to the Issues Paper and comments made by stakeholders attending the ACCC's public forums did raise concerns about operators unfairly providing preferential treatment to some customers over others. In particular, the ACCC heard concerns about the selective discounting of termination fees, differential treatment of environmental water holders, preferential treatment of favoured customer groups such as major shareholders at the expense of other customers, and unfair restrictions or charges on trade out of irrigation districts.

### **Feedback on the Draft Advice**

Stakeholder feedback in response to the Draft Advice on the non-discrimination provisions addressed a range of issues, which can be broadly grouped under the following categories:

- Feedback on the intent and need for expanded non-discrimination provisions; and
- Feedback on the draft rule advices, including specific concerns and broader implementation issues such as interaction with other regulatory frameworks and transitional arrangements.

### **The intent and need for expanded non-discrimination provisions**

Several stakeholders broadly supported the ACCC's rationale for expanding the non-discrimination provisions.

Goulburn-Murray Water (GMW) submitted that applying the provisions across all infrastructure operators will "encourage a more economically efficient allocation of water resources and infrastructure, by ensuring tariffs are designed to encourage efficient water use".<sup>122</sup>

The Local Government Association of Queensland (LGAQ) also supported the proposals, noting that all infrastructure operators have an incentive to engage in discriminatory pricing practices even if "the potential...is more obvious in member-owned water infrastructure operators". The LGAQ added that "non-discriminatory pricing should ensure that no community is substantially disadvantaged in terms of basic access to, and price of, a reasonable supply of water".<sup>123</sup>

Similarly, the Victorian Farmers' Federation (VFF) submitted that the proposed rules would ensure that "water users are treated more consistently".<sup>124</sup> In particular, the VFF supported the notion that greater consistency in water charges, as facilitated by the non-discrimination provisions, will promote fewer differences in termination fees payable by different users.

The Murray-Darling Basin Authority (MDBA), the Commonwealth Environmental Water Holder (CEWH) and Waterfind supported the proposed non-discrimination provisions for the positive

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<sup>120</sup> See 'stakeholder feedback' in section 5.3 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.60-62.

<sup>121</sup> National Irrigators' Council, Issues Paper Submission, July 2015, p.3.

<sup>122</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>123</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.7.

<sup>124</sup> Victorian Farmers' Federation, Draft Advice Submission, March 2016, p.5.

impacts they believe the proposed rules will have on water markets.<sup>125</sup> Waterfind submitted that it “fully supports” the provisions and noted that trade barriers can also be imposed by non-member-owned infrastructure operators.<sup>126</sup> The MDBA also commented in general that it supports amendments that will “facilitate water markets”, identifying in particular the proposed non-discrimination provisions to “remove discriminatory charging on the basis of water being traded”.<sup>127</sup>

The CEWH also argued that similar rules should be implemented in relation to planning and management charges. The CEWH commented that it does not support, and the water charge rules should prevent, price discrimination, both favourable and unfavourable, in planning and management charges based on the class of entitlement holder or purpose of water use.<sup>128</sup>

Data from the University of Adelaide irrigator survey<sup>129</sup> also showed support for the notion that operators should not vary infrastructure charges on various grounds. The results show that, on average for irrigators in the southern Murray-Darling Basin (MDB):

- 83% of irrigators believe that customers receiving the same infrastructure service from an operator should pay the same water infrastructure charges.
- 59% of irrigators believe that an operator should not vary the amount of a water infrastructure charge based on whether the customer is small or large.
- 73% of irrigators believe that an operator should not vary the amount of a water infrastructure charge based on what the customer uses water for.
- 71% of irrigators believe that an operator should not vary the amount of a water infrastructure charge based on whether the customer has traded water.

In contrast, the NIC strongly opposed the proposed non-discrimination amendments. The NIC<sup>130</sup> submitted that the ACCC has not provided evidence on the need for “increasing regulation of member-owned operators”, and considered that the proposed non-discrimination rules will see a simple rule replaced with a complex rule. The NIC was of the view that the ACCC is proposing non-discrimination provisions to protect against circumstances where infrastructure operators *may* have incentives to price discriminate, but has not provided examples of where it has *actually occurred*. The NIC responded to what it saw as the three arguments / examples used by the ACCC to support the proposed non-discrimination provisions:

- The ACCC does not identify any actual instances that support its claims about the incentive that infrastructure operators have to discriminate against customers who trade water out of irrigation districts.
- Rule 10 of the Water Charge (Infrastructure) Rules 2010 (WCIR) already prohibits discrimination against customers who transform their irrigation rights.
- Murrumbidgee Irrigation Limited (MI) and Murray Irrigation Limited (MIL) provide members with one vote per landholding, giving small customers “significant voting power”. Therefore, the ACCC’s argument that tiered tariff structures are used as a means for the infrastructure

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<sup>125</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.1.

<sup>126</sup> Waterfind, Draft Advice Submission, March 2016, p.3.

<sup>127</sup> Murray-Darling Basin Authority, Draft Advice Submission, March 2016, p.2.

<sup>128</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, pp.2-3.

<sup>129</sup> A Zuo, S Wheeler and A Loch, *Short survey of southern Murray-Darling Basin irrigators’ views on the review of the water charge rules – Final Report*, University of Adelaide report to client prepared for the ACCC, Adelaide, May 2016, p. 4.

<sup>130</sup> See also section 5.2, which discusses the NIC’s arguments that the ACCC is proposing increased regulation on member-owned operators despite certain results from the ABARES irrigator survey, conclusions from the Marsden Jacob Associates report in relation to member-owned operators (quoted on pp.57- 58 of the Draft Advice) and the ACCC’s assessment (stated on p.187 of the Draft Advice), that “[t]he ACCC has not found evidence that the general price level of operators are being set to achieve monopolistic profits at the expense of irrigators”. National Irrigators’ Council, Draft Advice Submission, March 2016, pp.7-8.

operator to favour large customers over small customers, particularly when voting rights are based on the size of holdings, is “not persuasive”.

The NIC also argued that businesses in other industry sectors (such as electricity retailers, urban water utilities and local governments in relation to rates) are not subject to such “extensive” non-discrimination provisions, and that the ACCC has provided no justification for why the irrigation sector should be treated any differently.<sup>131</sup>

WaterNSW similarly identified that it was unclear whether the proposed amendments were in response to a “specific problem”. However, WaterNSW noted that it is generally supportive of the provisions “to promote consistent charging arrangements across the MDB”.<sup>132</sup>

SunWater contended that, in principle, price discrimination “is not necessarily undesirable or inefficient” if prices are set between the incremental and stand-alone costs of supply.<sup>133</sup> SunWater noted its view that through the non-discrimination provisions, the ACCC is seeking to address concerns about equity in water charging; however, the Draft Advice has not contemplated that an infrastructure operator might, in SunWater’s view, legitimately impose different charges on different customers:

- in response to a government policy or subsidy; or
- as a result of individual negotiations on price paths to transition customers to the upper-bound level of cost recovery.

#### **The coverage of the non-discrimination rules—draft rule advice 5-A**

Several stakeholders submitted that they *do* support the non-discrimination provisions applying across all infrastructure operators:

- CEWH, Waterfind, LGAQ and GMW<sup>134</sup> supported expanding these rules to apply to all infrastructure operators (rather than only member-owned operators).
- WaterNSW and IPART<sup>135</sup> supported expanding these rules to all infrastructure operators except those whose charges are approved or determined by an independent economic regulator.
- The VFF<sup>136</sup> supported expanding these rules to all infrastructure operators except very small operators if the regulatory costs are “cost prohibitive” for these smaller operators.

As detailed above, the NIC did not support the proposed non-discrimination rules applying to member-owned infrastructure operators. The National Farmers’ Federation (NFF) similarly did not support the proposed rules applying to member-owned operators, submitting that, “[w]hile the idea of protecting the consumer is admirable, the adoption of this principle in the context of private irrigation

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<sup>131</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, pp.5,9,17.

<sup>132</sup> WaterNSW, Draft Advice Submission, March 2016, p.3.

<sup>133</sup> To support this observation, SunWater referred to:

- the 2006 COAG Competition and Infrastructure Reform Agreement, which allowed for price discrimination and multi-part pricing “where it aids efficiency”.
- the Harper Review recommendation that price discrimination prohibitions should not be re-introduced into the *Competition and Consumer Act 2010*.

SunWater, Draft Advice Submission, March 2016, p.2.

<sup>134</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2; Waterfind, Draft Advice Submission, March 2016, p.3; Local Government Association of Queensland, Draft Advice Submission, March 2016, p.7; Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>135</sup> WaterNSW, Draft Advice Submission, March 2016, pp.2-3; IPART, Draft Advice Submission, March 2016, p.1.

<sup>136</sup> Victorian Farmers’ Federation, Draft Advice Submission, March 2016, p.6.

infrastructure operators will be in the NFF's view to the detriment of the customers of these businesses in the short, medium and long term."<sup>137</sup>

### **The proscribed grounds for price discrimination—draft rule advice 5-B**

#### *Purpose for which water has been, or will be, used*

Several stakeholders identified circumstances where, in their view, the proposed non-discrimination rules would inappropriately capture practices which were not discriminatory, but where different charges are imposed based on the purpose of water use. For example:

- different charges for different sized outlets—the NIC noted that the different sized outlets reflect a different level of service and (typically) purpose of water use.<sup>138</sup>
- different charges for infrastructure services provided to environmental water holders (see below).

#### *Environmental flows and Environmental Water Holders*

Two stakeholders identified the non-discrimination provisions (particularly the proposed proscribed ground of 'purpose of water use') as an issue for the provision of discounts to environmental water holders (EWHs) and/or for the delivery of environmental water.

The NIC identified that the proposed non-discrimination provisions could preclude "mutually beneficial" arrangements with non-member customers.<sup>139</sup> The example that the NIC provided is where an infrastructure operator may provide a per ML discount (relative to the charge paid by irrigators) to an entity for the bulk delivery of environmental water at a time when the operator's infrastructure would otherwise remain unused. The NIC considered that prohibition of such an arrangement would be a "perverse outcome for both parties". In response, the ACCC notes that, since off-season watering could be characterised as a different infrastructure service to in-season deliveries (due to differences in capacity and other service characteristics), levying a different charge for such a service would be unlikely to pose an issue under the rules (either the rules as proposed in the Draft Advice or the Final Advice). What could be a concern is if the availability of such an off-season delivery service were to be unreasonably restricted such that only certain customers (e.g. EWHs) could receive it.

The NFF submitted its concern that the proposed non-discrimination provisions "will stifle the types of innovation in service delivery that are in the interests of all customers".<sup>140</sup> The NFF contended that the proposed non-discrimination provisions could "risk innovation" in negotiations between operators and the CEWH, and that discounts may not be allowed "even where there may be efficiency in the provision of service".

Stakeholders also commented on the level and types of charges paid by environmental water holders and for environmental water flows. Three stakeholders raised concerns about the potentially different or preferential treatment of environmental water holders.

The South Australian Murray Irrigators (SAMI) submitted that irrigators should "never" be used as a source of revenue to fund the CEWH's costs.<sup>141</sup> The SAMI added that the CEWH's revenue should be derived from taxpayers or from using the CEWH's own assets.

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<sup>137</sup> National Farmers' Federation, Draft Advice Submission, March 2016, p.1.

<sup>138</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.9.

<sup>139</sup> *ibid.*, p.9.

<sup>140</sup> National Farmers' Federation, Draft Advice Submission, March 2016, pp.1-2.

<sup>141</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.3.



Additionally, the VFF referred to its submission to the ACCC's Issues Paper in relation to its concerns about the impact to an infrastructure operator's revenue base as the ownership of licences transfer from irrigators to environmental water holders.<sup>142</sup> The VFF noted that the proposed non-discrimination amendments may alleviate some of its concerns, "by ensuring that all water users are treated consistently". However, the VFF asked the ACCC to demonstrate the potential changes in the treatment of environmental water holders as a result of the proposed non-discrimination provisions.

Mr Connolly alleged that GMW would contravene the proposed non-discrimination provisions on the grounds of the purpose of water use and location-related rights, with respect to the Victorian Environmental Water Holder (VEWH).<sup>143</sup> Mr Connolly noted that GMW, in its application to the Essential Services Commission of Victoria (ESCV) for the approval or determination of its charges ('Water Plan 4'), refers to a supply arrangement with the VEWH. Mr Connolly stated that those charges are levied according to a 'delivery share equivalent approach', however there is no explanation of the 'delivery share equivalent' "which can be accessed by all customers in the [2015-16] Schedule of Charges". Mr Connolly alleged therefore that the VEWH "does not pay the same as irrigators for their water delivered through the IIO delivery system".

In contrast to the above submissions, the CEWH and the NSW Office of Environment and Heritage (OEH) noted that they pay the same fixed and variable charges, and are subject to the same conditions (e.g. carryover), as other water users holding equivalent licences.<sup>144</sup> The OEH added that it supports all licence holders sharing costs for operating, monitoring and managing water resources and infrastructure. Similarly, the VEWH considered that there is scope for clarifying in the Final Advice that environmental water holders *do* pay off-river infrastructure charges, headworks and delivery charges, and that they might receive a lower priority delivery service.<sup>145</sup> The VEWH also submitted that in some cases, the infrastructure services obtained by environmental water holders can be the same or different to the service received by irrigators.<sup>146</sup> The VEWH called for these differences to be acknowledged, where they exist. The ACCC notes in response that it agrees it is important for stakeholders understand what charges EWHs pay and what infrastructure service(s) they receive, including how these services might differ from other services provided to customers such as irrigators.

More generally, the CEWH and the OEH submitted that they support the non-discrimination provisions particularly in relation to preventing discriminatory charging based on the purpose of water use. The CEWH considers that the water charge rules play an important role in "preventing the

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<sup>142</sup> Victorian Farmers' Federation, Draft Advice Submission, March 2016, pp.5-6.

<sup>143</sup> Patrick Connolly, Draft Advice Submission 1, February 2016, p.1.

<sup>144</sup> OEH also noted that it does not receive any reimbursements from the NSW Department of Primary Industries. OEH noted that the portion of planning and management charges that it pays benefits consumptive water users because it contributes to the costs associated with mitigating the environmental impacts of consumptive water use. NSW Office of Environment and Heritage, Draft Advice Submission, March 2016, p.1; Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.1.

<sup>145</sup> Victorian Environmental Water Holder, Draft Advice Submission, March 2016, p.1. The VEWH submitted that these points can be clarified within the context of the figure on page 32 of the Draft Advice, which the VEWH argued is "potentially misleading" as to whether environmental water holders do pay off-river infrastructure charges. In response, the ACCC has updated the relevant figure (figure 2.3). Similarly, the VEWH responded to a statement made in a submission to the Issues Paper, an excerpt of which was provided in the Draft Advice, that "environmental flows are prioritised" and "environmental flows are not paid for and [the environmental water holder] does not have to pay storage costs or per megalitre". The VEWH commented that "[t]his is also incorrect. Water delivered for environmental water holders sometimes receives lower priority than other water users, and environmental water holders do pay headworks and delivery charges. As mentioned above, environmental water holders (including VEWH) paid around \$12.1 million in infrastructure charges in Victoria in 2014-15." The ACCC notes in relation to this stakeholder feedback, that some stakeholders did not appear to distinguish between 'planned environmental water' (also known as 'rules-based water') and 'held environmental water'. 'Planned environmental water' is defined in section 6 of the Act and is water that is committed by relevant water laws, plans or other instruments to achieving environmental outcomes and other environmental purposes, and which cannot be used for any other purpose (see section 6 of the Act for the complete definition). In contrast, 'held environmental water' is defined under the Act as water available under (a) a water access right; (b) a water delivery right; or (c) an irrigation right; for the purposes of achieving environmental outcomes. Held environmental water retains the same characteristics as tradeable water rights used for consumptive uses. Stakeholder perceptions about preferential treatment for environmental water may not take the different types of environmental water into account.

<sup>146</sup> Victorian Environmental Water Holder, Draft Advice Submission, March 2016, p.1.

potential for discriminatory pricing practices”, and that “consistent and non-discriminatory application of the rules”, in addition to rules that ensure charges are not levied according to purpose of water use, will facilitate and support an efficient water market.<sup>147</sup> The CEWH added that:

*[The rules, as a complement to the Basin Plan water trading rules] should provide a framework that enables all market participants to operate within the market with confidence that tariff structures send clear signals on the real cost of services provided by water authorities to their customers, whilst ensuring that charges imposed do not discriminate based on the purpose for which water is being used.*<sup>148</sup>

#### *Irrigators versus non-irrigators—arrangements in SunWater water supply schemes*

A number of Queensland stakeholders commented on the interaction between charging arrangements for SunWater’s irrigation customers and the proposed non-discrimination provisions.

The submissions of SunWater and the Queensland Treasury and Department of Energy and Water (QTDEWS) set out in detail the history of charging arrangements in SunWater’s water supply schemes (see Box 5.1). Of relevance to the proposed non-discrimination rules, these submissions identified that, reflecting longstanding policy of the Queensland government, irrigators pay different charges than non-irrigators for water infrastructure services, even if they receive the same services as other customers.

SunWater contended that the existing arrangements, and therefore differences in setting irrigation and non-irrigation charges, should not be prohibited under the proposed non-discrimination provisions. SunWater identified that, in relation to irrigation customers, the non-discrimination provisions are inconsistent with the Basin Water Charging Objectives and Principles (BWCOP) and could “frustrate” Queensland Government policy and the Government’s “legitimate right” to provide a subsidy / Community Service Obligation (CSO).<sup>149</sup>

QTDEWS sought clarification about the impact of the proposed amendments on the ‘lower-bound’ target for irrigation customers, and whether the proposed amendments could require SunWater to set an ‘upper-bound’ target for irrigation customers.<sup>150</sup> QTDEWS noted that if an upper-bound target was required to be set, then the Queensland Government would continue to subsidise prices, but then would have to pay a direct cash subsidy to SunWater for the difference between the current (i.e. lower-bound price) and the upper-bound price. QTDEWS acknowledged that while this may provide greater transparency about the extent to which the government subsidises irrigation customers, it is concerned about administrative burdens, inefficiencies, confusion for customers and the potential for the costs of proposed reforms to outweigh the benefits.

Related to this, QTDEWS noted that only a small proportion of Queensland irrigation schemes and local councils (non-irrigation customers) are in the MDB and fall under the scope of the water charge rules, and commented that maintaining consistency across the state is a key issue for QTDEWS.<sup>151</sup> QTDEWS considered that “improving the pricing and regulatory environment in Queensland is an ongoing endeavour”, but that it is important that this occurs consistently across Queensland.

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<sup>147</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, pp.2,4.

<sup>148</sup> *ibid.*, p.1.

<sup>149</sup> SunWater, Draft Advice Submission, March 2016, p.4.

<sup>150</sup> QTDEWS, Draft Advice Submission, March 2016, p.6. QTDEWS explained ‘lower bound target’ and ‘upper bound target’ as follows: “The initial cost recovery target was set to the very minimum level of cost recovery for a water business to be viable. In essence, these are the ongoing cash costs of supply (lower bound costs). This is in contrast to an ‘upper bound’ pricing level which would include a rate of return on the existing asset base.”

<sup>151</sup> *ibid.*, pp.5-7.

Nonetheless, QTDEWS “welcome[d] the ACCC’s Draft Advice as a contribution to that ongoing endeavour”. QTDEWS added that any change to the pricing policies should be “well considered, involve customer consultation, and allow sufficient time for customers to adjust, lest it result in economic regulation with limited public support and immaterial benefit”.<sup>152</sup>

SunWater and QTDEWS put forward their case for an exemption in the non-discrimination provisions where there are differences in charges on one or more of the proscribed grounds, but where those differences are due to a government subsidy or CSO that is consistent with the BWCOP and National Water Initiative (NWI).<sup>153</sup> QTDEWS asked the ACCC to clarify the grounds under which an exemption could be provided. SunWater and QTDEWS submitted a number of arguments as to why the existing Queensland arrangements should be allowed to continue despite the proposed non-discrimination provisions, set out below.

First, these stakeholders argued that the differential charges are due to government policy or legacy issues rather than the exercise of monopoly power by SunWater.<sup>154</sup> They called on the ACCC to recognise the unique rationale for the different charges SunWater imposes, in order to ensure that the proposed non-discrimination provisions meet their “true objectives, and [are] of benefit to the entire Murray-Darling Basin and its member states”.<sup>155</sup> In support of this argument, these submissions noted the following.

- The lower-bound target for irrigation charges in Queensland is “far below any which could be interpreted as seeking monopoly rents”.<sup>156</sup>
- While the government policy does produce different charges, the policy has been developed:
  - to be consistent with the NWI objectives relating to consumption-based pricing, full cost recovery and removal of cross subsidies
  - in consultation with customers and industry
  - taking account of the Queensland Competition Authority’s (QCA) advice
  - taking account of customer capacity to pay
  - through an analysis of the costs and benefits of a sector or purpose of water use specific subsidy.<sup>157</sup>

Second, these stakeholders argued that state governments should have discretion to provide subsidies / CSOs. In particular, state governments should not be prevented from exercising their discretion in relation to the following matters:

- a judgement on the amount of price increases within a particular sector (SunWater).
- a decision to reduce irrigation prices in response to drought or low allocations (SunWater).
- an assessment of customers’ capacity to pay.
- an assessment of the potential for positive, flow-on, economy-wide effects.<sup>158</sup>

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<sup>152</sup> *ibid*, p.7.

<sup>153</sup> SunWater noted that the exemption could be supported with greater transparency about government subsidies and CSOs via further amendments to the information to be included on a Schedule of Charges. See section 5.4.1. SunWater, Draft Advice Submission, March 2016, pp.4-5; QTDEWS, Draft Advice Submission, March 2016, pp.6-7, 10.

<sup>154</sup> More generally, QTDEWS submitted that the non-discrimination provisions seek to address discrimination where the outcome can result in the inefficient allocation of resources, and water not being traded to its highest value use e.g. discrimination towards non-members or environmental water holders. QTDEWS submitted that these examples of price discrimination are not prevalent in the Queensland Murray-Darling Basin. QTDEWS, Draft Advice Submission, March 2016, pp.5, 7; SunWater, Draft Advice Submission, March 2016, pp.2,5.

<sup>155</sup> QTDEWS commented generally on the impact that all the proposed amendments, particularly in relation to non-discrimination and Part 6, may have on Queensland stakeholders. QTDEWS was concerned about the extent to which state specific policies and circumstances have been taken into consideration. These issues are discussed in section 4.2. QTDEWS, Draft Advice Submission, March 2016, p.5.

<sup>156</sup> *ibid*, p.6.

<sup>157</sup> *ibid*, p.5.

<sup>158</sup> SunWater, Draft Advice Submission, March 2016, p.5; QTDEWS, Draft Advice Submission, March 2016, p.7.

Moreover, QTDEWS suggested that there is already adequate transparency for these arrangements, since the transitional price paths and government CSOs / subsidies are disclosed at an aggregate level. QTDEWS called on the ACCC to acknowledge “the validity of using transitional price paths to achieve stated objectives”.<sup>159</sup>

Third, these stakeholders argued that arrangements in Queensland should not be viewed as discriminatory because, in their view, non-irrigation customers do not cross subsidise irrigation customers. SunWater pointed out that the QCA has a cost allocation mechanism for capital and operating costs which ensures that irrigation and non-irrigation customers, as a group, are paying their respective share of costs.<sup>160</sup> For irrigation customers, the QCA sets only the lower-bound level of cost recovery, with the Queensland Government providing a subsidy where necessary.

Fourth, QTDEWS noted that the proposed prohibition on discriminatory charges only applies to cases where an operator levies a different charge for the same infrastructure service. QTDEWS noted that council customers have “different arrangements compared to irrigation customers,” and that part of the differences in arrangements was attributable to the fact that, in general, irrigation customers hold medium priority water allocations while councils hold high priority water allocations.<sup>161</sup> As such, QTDEWS commented that its understanding was that differences between charges for these two groups do not constitute price discrimination, on the basis that holders of different entitlement classes receive different classes of infrastructure services.<sup>162</sup>

The Queensland Farmers’ Federation (QFF) sought clarification on the impact of the proposed amendments to Queensland MDB schemes.<sup>163</sup> The QFF, while understanding “the principles the Commission is seeking to address”, expressed concern about the impact of proposed non-discrimination rules on policies, and service delivery arrangements designed to promote efficiencies. The QFF called for implementation costs to be examined for “matters of price discrimination can be addressed without significant cost to schemes”. The QFF concluded that further investigation about implementation is needed before the provisions are accepted.

**Box 5.1: Process for setting irrigation and non-irrigation charges in SunWater schemes<sup>164</sup>**

*Irrigation customers*

The Queensland Government has directed SunWater to set charges for its irrigation customers at the maximum of lower-bound costs, or—where prices are currently above lower-bound costs—the current price. In some of SunWater’s schemes, charges are currently below the level of lower-bound cost recovery. The Queensland Government, consistently with the BWCO and NWI, has instructed SunWater to transition these customers to charges that recover lower-bound costs.<sup>165</sup> The Queensland Government pays SunWater a cash subsidy for the difference between the current price and the lower-bound level of costs. The cash subsidy is provided until charges reach lower-bound costs, at which time SunWater must retain the charge at that level

<sup>159</sup> QTDEWS, Draft Advice Submission, March 2016, pp.5-6.

<sup>160</sup> SunWater, Draft Advice Submission, March 2016, p.4.

The Local Government Association of Queensland (LGAQ) also commented on the cost allocation methodology that the Queensland Competition Authority adopted in recommending SunWater’s irrigation charges. The LGAQ has concerns about the approach, which allocates a greater proportion of costs to high priority licence holders, which are typically councils and non-irrigation customers, in the absence of the Queensland Competition Authority being able to consider the regulatory asset base and the impact of the recommendation on urban water customers. The LGAQ considers that the approach “is inherently tied to the valuation of storage assets, the Regulatory Asset Base, rather than the real or reasonably estimated costs to provide the difference classes of service”. LGAQ, Draft Advice Submission, March 2016, p.7.

<sup>161</sup> QTDEWS, Draft Advice Submission, March 2016, p.7.

<sup>162</sup> QTDEWS referred to the ACCC’s Draft Advice in making this argument.

<sup>163</sup> Queensland Farmers’ Federation, Draft Advice Submission, March 2016, p.4.

<sup>164</sup> SunWater, Draft Advice Submission, March 2016, pp.3-4,12; QTDEWS, Draft Advice Submission, March 2016, pp.6-7.

<sup>165</sup> QTDEWS noted that the Queensland Government set transitional price paths in a price review in 2000, and that these price paths have been updated in subsequent reviews thereafter, including the Queensland Competition Authority’s recommendation of SunWater’s irrigation charges for 2012-2017.

in real terms. For charges that were above the lower-bound level of cost recovery at the time that the policy was introduced, SunWater must retain these charges in real terms year-on-year and may not further transition customers paying these charges toward the upper-bound level of cost-recovery.

SunWater and QTDEWS labelled the forgone revenue/dividend associated with the difference between the lower-bound and upper-bound costs (or between the price and upper-bound costs in the case where prices are above lower bound) as a type of subsidy for irrigation customers, distinct from the cash subsidy that the Queensland Government provides SunWater when charges are below lower-bound cost recovery.

QTDEWS submitted that the Queensland Government subsidises irrigation charges (including via foregone dividends) “to support growth and development of the agricultural sector” and to “ensure balanced outcomes for affordable wholesale water prices, and to ensure the regulated water service provider is able to be financially sustainable”.<sup>166</sup>

It should also be noted that SunWater reported that environmental water holders also pay lower-bound charges for water access entitlements (WAEs) that they hold.

#### *Non-irrigation customers*

SunWater commercially ‘negotiates’ with non-irrigation customers to set non-irrigation charges; these charges are not subject to review or recommendation by the QCA and the Queensland Government does not set any restrictions on the way in which SunWater should set its charges for non-irrigation customers.

SunWater reported that, consistent with the BWCOP and NWI principles, it is transitioning charges for its non-irrigation customers towards the upper-bound level of cost recovery. Consequently, within each particular SunWater scheme, there can be, and currently are, differences in the level of charges paid by irrigation and non-irrigation customers.

In addition, charges can differ between individual non-irrigation customers. SunWater stated that such differences arise because non-irrigation customers are on a ‘price path’ toward upper bound pricing, but that each customer:

- had a different starting point
- has different contract expiry dates and
- has negotiated a different price path.

SunWater acknowledged that these differences between non-irrigation charges may be prohibited under the proposed non-discrimination provisions set out in the Draft Advice. SunWater’s concerns and proposed amendments to address these differences are discussed in section 5.11.

SunWater’s objective is to transition all non-irrigation customers to upper-bound pricing.<sup>167</sup> However, there can be differences between non-irrigation customers in the level of charges that they are currently paying. SunWater reports that this is because it is negotiating price paths to transition customers to upper-bound pricing as existing contracts expire or allow for price reviews but contracts are set for a long period and each customer is at different starting points. SunWater supported a continuation of negotiations on transitional provisions. SunWater considered that these negotiations will reduce price shocks for customers and provide the customer time to adjust to higher charges.

#### *Whether a tradable water right has been traded or transformed*

The NSW OEH and the MDBA supported the proposed amendments to the non-discrimination provisions relating to trade.<sup>168</sup>

The OEH added that as an entity that trades water allocation, it “support[s] methods for charging customers that do not affect the ability or the incentive of a potential customer to trade, by being as

<sup>166</sup> QTDEWS, Draft Advice Submission, March 2016, p.6.

<sup>167</sup> This is a different objective to the charging arrangements for irrigation customers. Under Queensland Government policy, irrigation charges must not exceed the lower-bound level of cost recovery, and where charges are above this level, they should be capped in real terms. The level and structure of irrigation charges are recommended by the Queensland Competition Authority, with the relevant Queensland Minister making the final decision.

<sup>168</sup> NSW Office of Environment and Heritage, Draft Advice Submission, March 2016, p.1; Murray-Darling Basin Authority, Draft Advice Submission, March 2016, p.2.

price neutral as possible”.<sup>169</sup> Further, the rules “should provide for the distribution of water charges that minimises the impacts on water use and trade decisions”. Similarly, the MDBA commented that it supports amendments that will “facilitate water markets”.<sup>170</sup>

The NIC and Western Murray Irrigation (WMI) identified several charging arrangements that, in their view do not constitute discrimination, but nevertheless may be inadvertently captured by the proposed non-discrimination provisions relating to trade.<sup>171</sup> In particular, these stakeholders considered that the provision may preclude a charge that recovers the administrative costs associated with a transformed customer transferring water back into the operator’s licence to have that water delivered within the irrigation network. The NIC and WMI argued that, if the infrastructure operator could not recover these costs from the transformed customer, then the infrastructure operator would need to transfer the cost burden to all of its customers.

#### *Holding, volume or use of a tradable water right or separate location related right*

The NSW OEH submitted that it supports the proposed amendments to the non-discrimination provisions relating to licence holdings.<sup>172</sup>

The NIC was critical of the proposed amendments, arguing that they would raise issues for the following charging arrangements:

- different charges for different categories of water delivery rights
- tiered tariff structures
- WaterNSW’s rebates to NSW IIOs—the NIC considered that without these rebates, IIOs will need to increase their charges<sup>173</sup>

For each of these charging arrangements, the NIC noted that it would incur costs and time to prove to the ACCC that the difference in charges either:

- was due to there being different classes of infrastructure services, or
- reflected underlying differences in costs.

The NIC also rejected the non-discrimination provisions as they would apply to tiered tariff structures. The NIC commented that tiered tariff structures are “not uncommon” in other industries for consumption-based pricing. Further, the NIC argued that the ACCC’s concerns that voting structures in some operators provided incentives for operators to favour large customers over smaller customers (for example by implementing declining tiered tariff structures) were unwarranted. The NIC stated that for the two infrastructure operators that the ACCC identify as having tiered tariff structures— MI and MIL—“shareholders have one vote per landholding, providing small users with very significant voting power [that is] disproportionately large in comparison to their shareholdings and tradeable water right holdings”.

In response to these statements, the ACCC notes that MI and MIL provide the following information on their voting arrangements, which appear to only partially agree with the NIC’s characterisation:

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<sup>169</sup> NSW Office of Environment and Heritage, Draft Advice Submission, March 2016, p.2.

<sup>170</sup> Murray-Darling Basin Authority, Draft Advice Submission, March 2016, p.2.

<sup>171</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.9; Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>172</sup> NSW Office of Environment and Heritage, Draft Advice Submission, March 2016, p.1.

<sup>173</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.10.

—MI voting arrangements:

*[C]ustomers holding WEs [water entitlements] may also own shares in MI, in the ratio of one share per megalitre of WE held. There are three categories of shares: A, B and C class shares. Only A and B class shareholders with landholdings which have DEs [delivery entitlements] attached are entitled to vote at General Meetings and vote for shareholder-elected directors of MI.*<sup>174</sup>

—MIL voting arrangements:

*When you purchase a landholding (with a minimum of four delivery entitlements and five shares) in Murray Irrigation's area of operations you will become a customer and a shareholder of the company. You will also have a landholding account...Every shareholder has one vote for each landholding that they are recorded as the registered proprietor for in the Share Register...(Only financial members are eligible to vote.)*<sup>175</sup>

The SAMI and Mr Tom Loffler provided a markedly different perspective on voting arrangements in member-owned operators. The SAMI submitted:

*Trust infrastructure will always be protected by its management board as it should. However sometimes this is in conflicting interest to the financial and delivery constraints of the individual irrigation business. The democratic governance system of majority rule is not protecting the rights of the individual landholder due to apathy, ignorance and defeatism. Many members approached ensured anonymity before giving comment for this submission.*<sup>176</sup>

Mr Tom Loffler submitted:

*[Central Irrigation Trust] CIT policies and Rules are generally compiled and implemented by the Board and/or CIT management with little, or in some instances, no consumer involvement.*

*In 10 out of 12 CIT districts, only irrigators with permanent irrigation rights are able to vote at the AGM. Generally this may be done by a limited number of persons attending...*

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<sup>174</sup> Murrumbidgee Irrigation Limited, 2015, 'Company Overview (printable factsheet)', viewed June 2016, <http://www.mirrigation.com.au/About-Us/Company-Overview>. Note: in this publication (last updated 10 June 2015), MI listed its number of shareholders by class as: A class: 1135; B class: 751; C class: 709.

MI's 2013 Annual Report (p.52) provides the following further information: "A Class and B Class shareholders have voting rights at general meetings and for the election of Member Directors in their voting college. Where a shareholder holds dual securities, being both 'A' Class and 'B' Class shares, the holder votes in the college in which they hold the greater number of shares. C Class shareholders generally have no voting rights other than in respect of matters affecting their class rights." See Murrumbidgee Irrigation Limited, 2015, Annual Reports, viewed June 2016, [www.mirrigation.com.au/About-Us/Annual-Reports](http://www.mirrigation.com.au/About-Us/Annual-Reports).

<sup>175</sup> Murray Irrigation Limited, 2011, 'Customer Information Kit – January 2011', p.3, viewed June 2016, <http://www.murrayirrigation.com.au/media/3552/Custom%20Infomation%20Kit.pdf>. Data on the current number of MIL non-shareholder customers is not available. However, MIL's 2012-2017 Network Service Plan lists the number of customers with <2 ML of water use as 246, and notes that "Murray Irrigation is currently finalising arrangements to provide domestic customers with the option of a consumer style contract for a domestic (untreated) water supply service which includes lower fees. This would also involve a domestic customer electing to no longer hold Murray Irrigation water entitlements, delivery entitlements and shares, and the customer owning and maintaining their own metered pipe outlet instead of the company." (p.16). This is likely to have the effect that domestic customers either have no vote (because they are not shareholders), or are required to retain 'delivery entitlements' (water delivery rights) that are at least double their actual water use, and pay ongoing fixed charges in relation to these rights. See: Murray Irrigation Limited, 2012, 'Network Service Plan – A requirement of the Water Charge (Infrastructure) Rules 2010 (Cth) 1 July 2012 – 30 June 2017', viewed June 2016, <http://www.murrayirrigation.com.au/media/1758/Network%20Service%20Plan.pdf>.

Further, during consultation discussions with MIL, MIL advised the ACCC that its town customers are generally not shareholders and as such also do not have a vote.

<sup>176</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.3.

*In two CIT districts, irrigators with permanent and temporary water rights may vote. AGM voting is on CIT's/Board suggested asset maintenance etc. and water pricing. Domestic consumers have no vote...*<sup>177</sup>

Further discussion about the feedback relating to governance arrangements in member-owned operators is provided in section 5.2.

#### *Casual use arrangements*

Mr Connolly questioned the appropriateness of the proposed “carve-out” in the non-discrimination provisions for casual use charges.<sup>178</sup> Mr Connolly argued that there is no consideration within the Draft Advice of the impacts of casual use charges and whether casual use charges are consistent with the BWCOP.

In Mr Connolly’s view, allowing casual use charges within rule advice 5-B is inconsistent with the BWCOP in relation to user-pays and facilitating the efficient functioning of water markets and renders the intent of the advice unclear.

Mr Connolly identified a number of other issues with casual use charges, including that:

- when considered proportionally relative to access fees, casual use charges vary across the MDB and between GMW’s irrigation districts (i.e. the ratio of casual usage charges to GMW’s Infrastructure Access Fee varies considerably across districts) and there is no calculation showing when the casual use charge is equivalent to user-pays, meaning that it is not clear when a casual user is under or over paying.<sup>179</sup>
- casual use charges violate draft rule advice 5-C on the ground of the purpose of water use, as they favour those customers who do not have to use the infrastructure as frequently as a horticulturalist e.g. an environmental water holder.
- it is not clear what an “acceptable” amount of casual use is. For example, Mr Connolly considered that rule Advice 5-C should prohibit a customer from being a casual user for all of the water that they have delivered, and suggested that a possible rule could be that 10 per cent [of water delivery right held] should be the “maximum allowable casual use”.

Mr Connolly also commented in detail on the impacts casual use charges can have on markets for water delivery rights. See section 6.2.2.

#### *Associations between water access rights and location-related rights*

Stakeholders did not comment directly on this proposed ground for the non-discrimination rules. However, during consultations with stakeholders in Victoria, it was identified that this proposed proscribed ground would likely be relevant to GMW’s transition from using a “system approach” to a “basin approach” for determining on-river infrastructure (“bulk”) charges (see Box 5.2).

#### **Box 5.2: GMW charging arrangements for on-river infrastructure services—“system approach” versus “basin approach”**

The ACCC understands that GMW has commenced a transitional change in the geographical basis on which it levies on-river infrastructure charges (e.g. charges related to storage). In the past, such charges were generally

<sup>177</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.1.

<sup>178</sup> Patrick Connolly, Draft Advice Submission 1, February 2016, pp.1-4.

<sup>179</sup> Mr Connolly also compares this to the termination fee, where there is consistency in the multiple of the termination fee, even though the amount of the termination fee can vary. Mr Connolly considers that this approach (to termination fees) is consistent with the Basin Water Charging Objectives and Principles.



levied on a broad “system” basis, where there were two systems—the Goulburn system and the Murray system. Under the system pricing approach, GMW “pool[ed] together its share of the costs for operating storages in the Goulburn, Loddon, Campaspe, Broken and Bullarook basins to produce one average bulk water price for the Goulburn system. A similar process [was] used to pool and average costs for storages on the Murray, Ovens and King basins to create a Murray system price.”<sup>180</sup>

Around 2008 GMW commenced a transition towards using individual ‘basins’ instead of systems as the basis for these charges. The transition is not yet complete, and currently on-river infrastructure charges for ‘water users’ (customers whose water shares remain ‘associated’<sup>181</sup> with a location-specific water use licence) remain determined under the ‘system’ approach, while those for ‘non-water users’, including environmental water holders and bulk entitlement holders, are determined under the basin approach. These arrangements are reflected in GMW’s Schedule of Charges, which lists different entitlement storage charges for ‘water users’ and ‘non water users’, and in some cases lists different ‘bulk water charges’ across different basins.<sup>182</sup> This approach has been approved to continue for the period 1 July 2016 to 30 June 2020 in the recent Essential Services Commission of Victoria (ESCV) determination of GMW’s infrastructure charges.<sup>183</sup>

Of relevance to the proposed non-discrimination rules, the ACCC understands that customers may transition between the ‘water user’ and ‘non-water user’ categories by applying to disassociate their water share (a practice which has been used in the past particularly in relation to avoiding prior trading restrictions). As such, it appears that this situation provides an important example of where users may face different charges for the same (on-river) infrastructure services, based on whether they choose to associate their water shares or not. It also has the outcome that environmental water holders, by virtue of their status as ‘non-water users’ (in the Victorian context), are likely to pay different<sup>184</sup> charges for storage services compared to irrigators who have ‘water user’ status. This matter was also raised via submissions to the ESCV’s recent determination of GWM’s infrastructure charges for the 2016-2020 period.<sup>185</sup> It is worth noting that environmental water holders do not appear to have the option of changing their non-water user status, and are therefore a ‘price taker’ in this context.

#### *Area of land owned, occupied or irrigated by a customer*

The NIC submitted that some infrastructure operators have a separate charge for ‘inactive’ or non-landholding customers.<sup>186</sup> The NIC noted that these charges would need to be assessed for consistency with the proposed amendments to the non-discrimination provisions on the ground of the area of land owned, occupied or irrigated, including where land is not owned, occupied or irrigated.

#### *Ability to offer discounts*

Some stakeholders identified that the proposed amendments could affect the ability for operators to negotiate discounts in certain circumstances; discounts which, stakeholders argued, aid efficiency.

<sup>180</sup> Goulburn-Murray Water, 20 September 2008, ‘G-MW Board defers start date for Basin Pricing to prepare transition program’, viewed June 2016, [http://www.g-mwater.com.au/news/media-releases/media-releases-2008/gmw\\_board\\_defers\\_start\\_date\\_basin\\_pricing.html](http://www.g-mwater.com.au/news/media-releases/media-releases-2008/gmw_board_defers_start_date_basin_pricing.html).

<sup>181</sup> The Victorian Water Register defines ‘un-associated’ water shares as “[w]ater shares whose owner does not also own or occupy land covered by a water-use licence and are nominated for the water allocation use.” See Victorian Water Register, viewed June 2016, <http://waterregister.vic.gov.au/about/water-dictionary?view=items&start=80>.

<sup>182</sup> See, for example, GMW’s 2015-16 Schedule of Charges, viewed June 2016, [http://www.g-mwater.com.au/downloads/gmw/Pricing\\_Table\\_June15.pdf](http://www.g-mwater.com.au/downloads/gmw/Pricing_Table_June15.pdf).

<sup>183</sup> Essential Services Commission of Victoria, *Goulburn-Murray Water Price Review 2016 — final decision*, June 2016, p.xi, viewed June 2016, <http://www.esc.vic.gov.au/wp-content/uploads/2016/06/Water-Price-Review-2016-20-G-MW-Final-Decision.pdf>.

<sup>184</sup> Since the ‘system’ charges are calculated as a weighted average of the ‘basin’ charges, whether non-water users face higher or lower charges than water users depends on which particular basin the non-water user’s entitlements relate to.

<sup>185</sup> Essential Services Commission of Victoria, *Goulburn-Murray Water Price Review 2016 — final decision*, June 2016, p.59, viewed June 2016, <http://www.esc.vic.gov.au/wp-content/uploads/2016/06/Water-Price-Review-2016-20-G-MW-Final-Decision.pdf>. The ESCV commented that “[s]takeholders were concerned basin and system charging enables customers who move from water to non-water user status to save on Entitlement Storage Fees. The [ESCV]’s view is that Goulburn-Murray Water is responsible for consulting with its customers to determine how to balance the system and basin charging approaches. The [ESCV]’s guidance indicated that where Goulburn-Murray Water proposed to retain its charges, a lower level of consultation was required. In addition, through consultation, the [ESCV] did not receive indications of widespread dissatisfaction with this method of charging.”

<sup>186</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.10.

The NFF submitted that there have been changes to customer profiles and demand because of the Murray-Darling Basin Plan and increased trading.<sup>187</sup> The NFF considered that in order to be able to attract new entrants, an infrastructure operator must be able to negotiate with these customers on all terms and conditions including price. The NFF concluded that new entrants “will ultimately deliver benefits to the customer base as whole as well as the flow of benefits to communities”.

Similarly, SunWater submitted that there should be an exemption from the non-discrimination provisions for discounts to charges where those discounts benefit all of the infrastructure operator’s customers.<sup>188</sup> SunWater called for the ACCC to consider the ‘prudent discount’ framework from the energy sector, which allows for discounts that provide a benefit for all customers, even though there may be some cross-subsidisation.<sup>189</sup> SunWater asked the ACCC to consider this framework with the precaution that it would be “fit for purpose” and not “overly onerous for infrastructure operators to apply”. SunWater considered that the benefits of allowing for these types of discounts include that the infrastructure operator is able to “manage bypass risk” and pursue business opportunities which, without the discount, would not otherwise arise.<sup>190</sup>

The LGAQ queried whether the rules would inadvertently preclude offering different charges in accordance with local government social policies and obligations, such as concessions offered to pensioners or incentives for water conservation and efficiencies. The LGAQ submitted that charges in accordance with these policies should be considered non-discriminatory when the charges are:

- transparent
- implemented after they have been disclosed
- are necessary for community benefit
- incentives for efficient use of water resources.<sup>191</sup>

### **The prohibition on limiting the availability of infrastructure services—draft rule advice 5-C**

#### *Limiting the availability of infrastructure services*

The NSW OEH submitted that it supports the proposed rule advice to prevent an infrastructure operator from limiting the availability of an infrastructure service on the grounds of licence holdings, use or trade.<sup>192</sup>

The NIC disagreed with the ACCC that the prohibitions on limiting the availability of access to services will ensure the efficacy of the other non-discrimination provisions. Rather, the NIC was highly critical of this proposed amendment (see also below) and identified several examples of cases where, in its view, this rule would apply and would produce a perverse or unintended outcome.<sup>193</sup>

- (a) *Purpose for which water can or will be used*—“any customer could demand any service offered to any other customer; for example, domestic customers could demand the type of irrigation outlet that is normally only available to irrigators”. The NIC added that the carve-out in proposed rule 10(3) only allows an operator to restrict infrastructure services to stock and domestic water users and not the other way around. The NIC added that the rule is “flawed” because it refers to a “stock and domestic purpose”, rather than a stock or domestic purpose.

<sup>187</sup> National Farmers’ Federation, Draft Advice Submission, March 2016, pp.1-2.

<sup>188</sup> SunWater, Draft Advice Submission, March 2016, pp.6-7.

<sup>189</sup> National Gas Rules, Part 9, rule 96, viewed June 2016, <http://www.aemc.gov.au/getattachment/8d0f72eb-7950-4b96-9a08-134e9de26b86/National-Gas-Rules-Version-27.aspx>.

<sup>190</sup> SunWater provided the qualification that the discounted price must be greater than incremental costs and contribute to fixed costs.

<sup>191</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.7.

<sup>192</sup> NSW Office of Environment and Heritage, Draft Advice Submission, March 2016, pp.1-2.

<sup>193</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.11.

- (b) *Holding or use of land*—“a customer whose landholding lies far distant from the nearest irrigation channel and receives domestic water through a pipe could demand the same service of water for irrigation purposes as the customers whose landholdings lie adjacent to that channel.”
- (c) *Holding of tradeable water right*—an infrastructure operator would be prevented from limiting the availability of:
- an infrastructure service when a customer does not have enough water allocation to fill a water delivery order.
  - carryover to be available to only customers holding general security irrigation rights. The NIC argued that this would “undermine the entire basis of the property right represented by tradeable water rights” and the objectives of state governments in relation to carryover. The NIC added that proposed rule 10(4) does not provide an exemption for this type of limitation because the rule only refers to water access entitlements, not irrigation rights, which is the basis on which the limitation on access to carryover occurs.
  - an infrastructure service in the form of imposing water restrictions (as required by state legislation) on domestic customers (with domestic tradable water rights). The NIC added that proposed rule 10(3) does not provide an exemption in this situation because the rule only relates to where access has been limited on the basis of purpose of water use and not to the holding of a tradeable water right.
- (d) *Association with a location-related right* – an infrastructure operator would be prevented from limiting the availability of water from a lake to customers who are located adjacent to the lake (i.e. customers with pumps and landholding adjoining to the lake). The NIC noted that proposed subrule 10(5) does not provide an exemption for this being a different class of infrastructure service because the rule only refers to cases where there are different infrastructure charges, not where the availability of the service has been limited.

*‘Consequence’ of failing to comply with proposed rule 10(2)*

The ACCC made draft rule advice that, if an infrastructure operator limits the availability of an infrastructure service based on any of the five proscribed grounds (subject to certain “carve-outs”), the operator may not levy *any* infrastructure charge in relation to that service.

The NIC considers that this consequence of non-compliance is “extreme” and the “most concerning” aspect of the proposed non-discrimination provisions.<sup>194</sup> The NIC argued that the inability to impose a charge for a service could have “severe” consequences; for example, the infrastructure operator could face insolvency if an access limitation that has been in place for many years was unable to continue under the proposed amendments. The NIC added that the civil penalty is also “excessive in any event”.

The NIC identified concerns that the proposed amendments could prohibit an infrastructure operator from charging for services if the availability of the service was limited on the basis that a customer holds a tradeable water right.<sup>195</sup> The NIC noted that the tradeable water right “define[s] the services, which they [the customer] are entitled to receive” and prohibiting charging for these services “undermines the entire contractual basis on which operators deal with their customers”. Some of the examples that NIC identified included restricting the availability of certain delivery services such as winter watering and priority access during supply limitations to customers who hold high security water delivery rights. The NIC conceded that this interpretation is likely not what the ACCC intended, but highlighted that “this is what the new regulation literally says”.

<sup>194</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, pp.10-11.

<sup>195</sup> *ibid.*

### *Access to domestic and irrigation infrastructure services*

Some stakeholders also commented specifically on the availability of irrigation services and / or the quality of domestic services, and the implications of the proposed non-discrimination rules on services provided to stock and / or domestic customers.

Mr Tom Loffler commented on a number of factors relevant to his access to domestic and irrigation infrastructure services. Mr Loffler's main concern was that his infrastructure operator, Central Irrigation Trust) (CIT), requires that he have both a domestic and irrigation meter.<sup>196</sup> Mr Loffler stated that this requirement applies despite his property having site approval for both purposes and the South Australian Natural Resources Act stating that he may use lawfully taken water for any purpose permitted by the site use approval.<sup>197</sup> Mr Loffler submitted that he has not used the domestic connection for at least 10 years but that CIT refuses to remove it and cease charging him the associated access charges.

Mr Loffler further stated the following concerns about the requirement to have a domestic meter:

- Domestic customers must pay the charges associated with the peak electricity period, whereas irrigators get to choose whether to have their water delivered in peak or off-peak periods. Mr Loffler put forward his view that when it is the same pressure, CIT's costs are the same because it is the same quality of water and using the same infrastructure. Mr Loffler stated that Renmark Irrigation Trust (RIT) does not impose different charges on domestic and irrigation customers.<sup>198</sup>
- CIT "claims" that higher charges are imposed on domestic customers because their water is available on demand, "24/7". However, Mr Loffler argued that in low pressure districts, where there is high demand for irrigation water, the water available for domestic customers is "severely limited or at insufficient pressure".

Mr Tom Loffler further identified a concern with a particular CIT Policy, which requires an irrigator who is selling all their irrigation right but wants to retain a domestic connection to their property to provide CIT with one ML of irrigation right.<sup>199</sup> Mr Loffler did not support this policy when there is a domestic supply in existence. Mr Loffler stated that CIT has this policy despite:

- the South Australian Government providing CIT with top-up water allocations for their domestic customers (in 2012)
- many irrigators initially paying for a domestic connection (before or after 2009).

The South Australian Murray Irrigators (SAMI) commented on the quality of domestic water and the associated cost.<sup>200</sup> In their view, "domestic river water is excessively priced for what is received". However, the SAMI noted that "many irrigators are willing to pay this cost as it is seen to be offsetting the cost of running the whole of trust irrigation infrastructure".

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<sup>196</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, pp.1-2.

<sup>197</sup> Mr Loffler noted that the requirement to have a domestic meter is in CIT's policies and rules. However, an exemption can be provided. Mr Loffler argued that the requirements in the Natural Resource Management Act exempt his property.

<sup>198</sup> The ACCC notes that, as per Renmark Irrigation Trust's 2015-16 Schedule of Charges, it appears that Renmark Irrigation Trust *does* in fact levy different charges for domestic and irrigation services.

<sup>199</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.1.

<sup>200</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, pp.3-4.

The SAMI also commented, similarly to Mr Loffler, that operator requirements to maintain “a minimum domestic entitlement on the block” have the effect that a customer is “limited from trading all of their water”.<sup>201</sup>

Mr Don Low commented on the basis on which fixed charges are levied in MI’s Wah Wah Stock and Domestic district (see also section 6.2.1).<sup>202</sup> Mr Low explained how the practice of levying infrastructure charges based on customers’ “holding reference numbers” can produce an outcome in which charges differ substantially across customers and do not reflect underlying fundamentals, such as the number of connections or outlets a customer has, or the volume of water used.

Mr Low gave examples of where a customer having multiple holding reference numbers would pay more than a customer who has only one holding reference number, despite having the same volume of water delivered. Mr Low further commented that a customer in MI’s ‘rated area’ will generally pay more than a customer in the ‘non-rated’ area.

Mr Low also identified that, while in theory it is possible to reduce the number of holding reference numbers that a customer has and subsequently reduce the amount of charges payable, in practice there are barriers to doing so.<sup>203</sup>

In comparison to the above views, the NFF submitted that the proposed non-discrimination provisions may “hinder the ability” for operators to recover the costs of providing infrastructure services “to small users, such as domestic blocks”.<sup>204</sup>

### **Implementation issues**

Apart from the concerns identified above, stakeholders also commented on implementation issues such as how the proposed rules would apply in practice and / or how an infrastructure operator could demonstrate compliance.

As with many other proposed amendments, the NIC and NFF were particularly concerned about the level of regulation and associated compliance costs applying to member-owned operators arising from the proposed non-discrimination provisions. The NIC’s views as to why member-owned infrastructure operators should be subject to less regulation are summarised and addressed in section 5.2.

The NFF argued that, while “the idea of protecting the consumer is admirable”, the proposed amendments will be “to the detriment of customers”.<sup>205</sup> The NFF considered that customers will be disadvantaged because the proposed amendments will:

- increase IIOs’ costs
- stifle innovation in service delivery and
- limit operators’ ability to attract new customers (through negotiating on the terms and conditions, including price, of the infrastructure service), which increases the utilisation of the infrastructure assets.

The NIC submitted its view that, “based on [its] members’ experiences with the ACCC”, demonstrating that the reason for a different charge relates to the class or cost of the service would be

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<sup>201</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, pp.3-4.

<sup>202</sup> Mr Don Low, Draft Advice Submission, March 2016, pp.1-2, 4.

<sup>203</sup> *ibid*, pp.3-4.

<sup>204</sup> National Farmers’ Federation, Draft Advice Submission, March 2016, pp.1-2.

<sup>205</sup> *ibid*.

time-consuming and expensive.<sup>206</sup> The NIC added that an operator might be able to justify the basis for the different charge based on the above criteria but then still be caught by the second ‘leg’ of the proposed rule, in relation to limiting the availability of the infrastructure service.

While supportive of the proposed provisions, the VFF recommended that the ACCC should be aware of the impact of the non-discrimination provisions on all infrastructure operators, especially smaller infrastructure operators. The VFF’s support for the non-discrimination provisions is therefore conditional on the proposed amendments not being “cost prohibitive for small Victorian infrastructure operators”.<sup>207</sup> The NIC submitted a similar concern about the impact on smaller infrastructure operators. The NIC identified that the proposed non-discrimination provisions will apply to smaller member-owned operators who do not benefit through some offsetting reductions in regulatory costs from the repeal of the Network Service Plan (NSP) requirements (discussed in section 5.5).<sup>208</sup>

Feedback from stakeholders indicates that there is scope for greater clarity to be inserted into the drafted rules. This would provide greater certainty about charging arrangements that comply with the rules, and in parallel, resolve some uncertainty about changes that might need to be made to an operator’s existing charging arrangements. For example, there was a view from the NIC and some member-owned infrastructure operators that they might need to scrutinise and re-consider their tariff structures and Schedules of Charges in order to comply with the proposed amendments, particularly in relation to charges levied on the basis of the purpose of water use.<sup>209</sup>

WaterNSW submitted that some of the terms in proposed rule 10 are unclear and open to interpretations that may not be consistent with the ACCC’s intent. WaterNSW was particularly concerned about uncertain interpretations of key terms / definitions given the penalties of non-compliance, which include the possibility for customers to take a private right of action (see draft rule advice 4-C). WaterNSW argued that greater clarity in the drafting would “reduce unnecessary compliance and court costs” and ensure consistency with the ACCC’s intent.<sup>210</sup> WaterNSW therefore recommended that “proposed Rule 10 be redrafted to include specific and narrow definitions for all key terms.” WaterNSW noted that the ACCC does not define ‘infrastructure service of the same class’ in the proposed rules and suggested two specific amendments:

- Redraft subrule 10(1) to prohibit price discrimination within the same class of infrastructure service *only*.
- In proposed subrule 10(5) replace the phrase ‘this rule is not intended to prevent...’ with the phrase ‘nothing in this rule prevents an infrastructure operator from specifying different infrastructure charges or discount[s] for different classes of infrastructure services’.

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<sup>206</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.9.

<sup>207</sup> Victorian Farmers’ Federation, Draft Advice Submission, March 2016, p.6.

<sup>208</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.9.

<sup>209</sup> Western Murray Irrigation (WMI) submitted that it will incur “significant costs” to implement the proposed non-discrimination provisions. These costs are related to:

- considering how the proposed amendments will affect its charging arrangements
- adapting its charging arrangements while maintaining its revenue
- amending its Schedule of Charges
- communicating changes to its customers
- “many other costs which are not yet foreseeable”.

For example, WMI submitted that it imposes different charges to different groups of customers that is based on their location and the nature of infrastructure service that they receive. WMI was of the view that it will need “to make the difficult and uncertain decision in reformulating its charging structures as to whether these constitute different classes of service”.

Western Murray Irrigation, Draft Advice Submission, March 2016, p.2; National Irrigators’ Council, Draft Advice Submission, March 2016, p.9.

<sup>210</sup> WaterNSW, Draft Advice Submission, March 2016, p.3.

### *Interaction with state-based regulatory regimes*

WaterNSW and IPART provided feedback on the interaction between the non-discrimination provisions and a state regulator's price approval / determination decision. WaterNSW expressed concern that "IPART and the ACCC may form conflicting views on whether the charges approved by IPART and levied by WaterNSW constitute price discrimination under the amended WCIR".<sup>211</sup> WaterNSW noted that the penalty for non-compliance with the proposed non-discrimination provisions is imposed on the infrastructure operator, yet the operator is also bound by the regulator's decision. While the regulator must have regard to the non-discrimination provisions in its decision, WaterNSW sought guidance on what would happen if IPART and the ACCC took a different view on what constitutes price discrimination.

Both IPART and WaterNSW support the proposed non-discrimination provisions in general, but called for a carve-out for charges that are approved / determined by a state regulator.<sup>212</sup> WaterNSW further put forward the argument that there are adequate protections from unfair price discrimination in IPART's price determination process,<sup>213</sup> adding that the non-discrimination provisions would constrain IPART's flexibility in making a price approval/determination decision.<sup>214</sup> WaterNSW added that the provisions would create "overlapping regulatory burdens" and "unnecessarily offset some of the cost savings identified in this review".<sup>215</sup>

### *Transitional arrangements*

As detailed previously, SunWater commented that the rules should provide that differences in charges paid by customers as a result of individual negotiations on price paths to transition customers to the upper-bound level of cost recovery should not be viewed as inappropriate or discriminatory. In SunWater's view, transitional price paths towards upper-bound pricing are consistent with the BWCOP and the NWI.<sup>216</sup>

SunWater also noted that in the Draft Advice, there is no transitional provision for the implementation of the proposed non-discrimination provisions.<sup>217</sup> SunWater submitted its views on the way in which the transitional provisions should apply to charges set under existing contracts. This feedback is discussed in section 5.11.

In relation to the application of the non-discrimination provisions to commercially negotiated charges, SunWater called for "the Rules [to] exempt prices already set under pre-existing contracts".<sup>218</sup> Further, SunWater proposed the following transition mechanisms:

- The rules should provide a carve-out from the non-discrimination provisions when differences in charges are due to negotiations to put customers on a transitional price path towards upper-bound pricing.
- The rules should provide a long transitional period for the application of the non-discrimination provisions to charges set under existing contracts.<sup>219</sup> The transitional period could be that the non-discrimination provisions do not apply:

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<sup>211</sup> *ibid*, pp.2-3.

<sup>212</sup> IPART, Draft Advice Submission, March 2016, pp.1-2; WaterNSW, Draft Advice Submission, March 2016, p.1.

<sup>213</sup> For example, section 15 of the *IPART Act 1992* requires IPART to give consideration to "the protection of customers from abuses of monopoly power in terms of prices, pricing policies and standard of services".

<sup>214</sup> For example, WaterNSW noted that IPART could be constrained in relation to setting different pricing methodologies (e.g. scarcity pricing), different fixed / variable tariff structures for different customer groups that are not necessarily cost-reflective and the ability to offer new services or use prices to provide incentives for certain customer behaviours.

<sup>215</sup> WaterNSW, Draft Advice Submission, March 2016, p.2.

<sup>216</sup> SunWater, Draft Advice Submission, March 2016, pp.4,5-6,12.

<sup>217</sup> *ibid*, p.15.

<sup>218</sup> *ibid*, p.1.

- until any existing contracts expire (SunWater’s preferred transitional provision), or
- for a reasonable amount of time that would allow SunWater and its customers to re-set charges and adjust to the changes.

SunWater provided the following arguments to support its proposals for transitional provisions:

- It would be “irregular for the ACCC to apply regulation retrospectively and not honour mutually agreed contractual arrangements already in place”.<sup>220</sup> SunWater commented that the lack of such a provision in the Draft Advice may have been an oversight.
- The transitional period would prevent the new provisions from affecting customers’ commercial and financial planning.
- Without the transitional provision, SunWater will face an “impossible choice” between complying with the water charge rules or dishonouring customer contracts.

SunWater also noted that despite the QCA not having a role in recommending non-irrigation charges, the Minister can direct the QCA to conduct a price investigation; therefore, SunWater negotiates charges under the ‘threat’ of regulation.<sup>221</sup>

Within the same context, QTDEWS sought clarification as to whether pre-existing contracts would be captured under the proposed non-discrimination provisions.<sup>222</sup>

### *ACCC assessment*

Several stakeholders supported the relevant draft rule advices without identifying any concerns. Also some stakeholders, while supporting the principle of non-discrimination, identified various practical issues with implementing the ACCC’s proposed approach. The ACCC notes that only member-owned infrastructure operators (including the NIC) entirely opposed the draft rule advice on proposed non-discrimination rules. The NFF opposed the application of the proposed rules to member-owned IIOs on the grounds of efficiency and flexibility.

Reflecting on this feedback as a whole, the ACCC considers that concerns raised by stakeholders can be categorised into two broad groups:

- Whether there is a need to expand the non-discrimination protections in the rules, particularly in the context of member-owned infrastructure operators, who, it is argued, have other sufficient mechanisms to ensure customers’ interests are appropriately taken into account; and
- Concerns that the ACCC’s proposed non-discrimination rules set out in the Draft Advice have operational issues, particularly because they contained an outright prohibition on infrastructure charge differences, or restrictions on the availability of infrastructure services, for the five proscribed grounds. Stakeholders argued that, as such, the proposed rules did not appropriately allow for a range of legitimate bases for infrastructure charge differences or restrictions on access to certain infrastructure services, or have the flexibility to deal with future innovations in infrastructure service offerings and charging arrangements.

The following sections consider these matters in turn.

<sup>219</sup> SunWater, Draft Advice Submission, March 2016, pp.4,6,15.

<sup>220</sup> *ibid*, pp. 6,15. SunWater identified two precedents where pre-existing contracts have been honoured when new regulations have been introduced; in relation to the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* and s 44W(1)(c) under Part IIIA of the *Competition and Consumer Act 2010 (CCA)*.

<sup>221</sup> *ibid*, pp.8,16.

<sup>222</sup> QTDEWS, Draft Advice Submission, March 2016, p.7.



## The need for expanded non-discrimination provisions

The ACCC considers that the general principle that customers should be treated in a non-discriminatory manner is consistent with, and will contribute to the achievement of, the BWCOP. In particular, the ACCC considers that non-discrimination rules contribute to the achievement of ‘user pays’ and full cost recovery, and assist in avoiding perverse pricing outcomes.

The ACCC notes that the *Water Act 2007* (the Act) enables the water charge rules to *require* all operators to implement charging arrangements which are fully cost-reflective and which implement the principle of user-pays. To date, the ACCC has not sought to implement this form of intensive regulation, on the basis that correctly attributing all costs to specific users under the ‘user pays’ approach is a complex task in practice, and that the Act also contemplates that transition to full cost recovery at upper bound prices may not always be ‘practicable’. The ACCC continues to support an approach whereby operators who exercise the highest degree of monopoly power have their charges approved or determined by a regulator (either by the ACCC under the water charge rules or under an alternative state-based framework), but that other operators are allowed more flexibility to determine their own charging arrangements.

The ACCC considers that non-discrimination rules represent a relatively ‘light-handed’ approach to the regulation of monopoly infrastructure operators which seeks to limit the differential impacts that departure from the principles of full cost recovery and user pays will have on customers. This approach helps ensure that customers who receive the same services will pay the same charges unless there is a sound reason for a charge difference, and that customers are able as far as practicable to freely choose between the infrastructure services offered by their operator. Such a ‘level playing field’ will also facilitate the effective functioning of water markets by removing distortionary effects of preferential charging arrangements.

The ACCC also notes that, contrary to the NIC’s view, non-discrimination rules are a feature in many other sectors where natural monopolies exist. For example, various forms of non-discrimination rules exist in regulations applying to the following Australian sectors: electricity,<sup>223</sup> gas,<sup>224</sup> wheat port access,<sup>225</sup> and telecommunications (NBNC0).<sup>226</sup> Non-discrimination rules have also been established in overseas regulation of sectors where substantial monopoly power exists.<sup>227</sup>

The ACCC acknowledges that non-discrimination rules are not in place in *all* sectors where monopoly power is of key concern, and also that it is possible for price discrimination to aid efficiency in more competitive sectors.<sup>228</sup> However, in these sectors concerns about potential for discriminatory charging arrangements are often mitigated by factors such as the countervailing power of customers, or competitive pressure from other businesses, or the presence of regulatory approaches which require full cost-recovery and user pays. Finally, while economic theory demonstrates that it is possible for price discrimination to increase welfare, this possibility relates to a context where price discrimination

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<sup>223</sup> See, for example, National Electricity Rules version 81, sections 2.11.1(b)(4); 7.2.3(g)(2); B2B principle (c)).

<sup>224</sup> See, for example, National Gas Rules Version 29, section 135CA.

<sup>225</sup> See, for example Access Undertakings (2009) for CBH and Graincorp accepted by the ACCC, viewed June 2016, [https://www.accc.gov.au/regulated-infrastructure/regulatory-projects?field\\_accc\\_industry\\_sector\\_tid\\_selective=339](https://www.accc.gov.au/regulated-infrastructure/regulatory-projects?field_accc_industry_sector_tid_selective=339).

<sup>226</sup> See Part XIC of the *Competition and Consumer Act 2010*.

<sup>227</sup> See, for example, Article 82 of the European Community Treaty (which forms part of EU energy law), viewed June 2016, [http://ec.europa.eu/competition/legislation/treaties/ec/art82\\_en.html](http://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html). See also the United States Robinson-Patman Act 15 U.S. Code § 13, viewed June 2016, <https://www.law.cornell.edu/uscode/text/15/13>.

<sup>228</sup> The Harper Review of Australian Competition and Consumer Law considered that—while it is not desirable to reinstate in the *Competition and Consumer Act 2010* (CCA) a direct provision of the former *Trade Practices Act 1974* which specifically prohibited all forms of price discrimination—in a competitive context price discrimination that substantially lessens competition should be illegal. However, the Review considered that such forms of price discrimination can be dealt with under section 46 of the CCA, which concerns abuse of monopoly power. See: *Competition Policy Review – Final Report*, March 2015, pp.351-354, viewed June 2016, [http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf).

increases output (although welfare effects must be assessed on a case-by-case basis even where this applies). It is questionable whether the possibility of welfare-enhancing price discrimination applies in the context of rural water service providers, who generally face static or declining demand and fixed capacity over the short to medium term (see however below the ACCC's consideration of the rationale for prudent discounts).

Given these considerations, the ACCC maintains the view that there would be benefit to customers of infrastructure operators,<sup>229</sup> and to water market participants more broadly, from creating expanded non-discrimination protections in the water charge rules. This rationale applies both:

- in the case where an operator is determining its own charges—the rules act as a check on conflict of interest and the incentive to achieve monopolistic outcomes through limiting service availability or setting different charges based on customer attributes;
- in the case where an operator's charges are approved or determined by a regulator—the rules act as an additional check on how the revenue requirement is to be recovered.

Some stakeholders have argued that member-owned operators should not be subject to the proposed non-discrimination rules because adequate alternative mechanisms exist to ensure customers' interests are properly taken into account. However, the ACCC queries this argument for several reasons.

First, the ACCC notes that, whatever protections are afforded voting members, not all customers are (or can be) members. In particular, stock and domestic water users, environmental water holders, and industrial or urban users often do not have a vote in member-owned operators. This consideration is particularly relevant in a context where the monopolist does not earn monopoly rents overall (e.g. because it is 'not-for-profit'); in this case discounts or preferential charges for one customer group will, except in limited circumstances,<sup>230</sup> result in higher charges for others, resulting in a welfare transfer between customers. Thus, there is a risk that charging arrangements will favour those customers who have significant voting power over those with limited or no voting power.

Second, the ACCC is concerned by the evidence that suggests that in some cases irrigation customers (even those in member-owned operators) do not feel that operators adequately consult customers when making decisions. In particular, the ACCC notes:

- the response of the South Australian Murray Irrigators (SAMI), who stated that operators face conflicts of interests in providing infrastructure services, and that "many members" approached by the SAMI to provide feedback required "anonymity before giving comment",<sup>231</sup>
- feedback received from member-owned operator customers via the ACCC's public forums regarding perceived unfair treatment by operators in various circumstances;
- the irrigator survey results<sup>232</sup> that (while there was significant variation across states) on average in the southern MDB:
  - an estimated 59 per cent of irrigators believe that their operator's interest aligns with their own in charging matters only "some of the time" or "never".
  - an estimated 57 per cent of irrigators believe that they have "no influence" over their operator's charging decisions.

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<sup>229</sup> The ACCC notes, relevantly, that off-river infrastructure operators are also customers of on-river operators to whom this rule would apply.

<sup>230</sup> See, however, the ACCC's recommendation to allow for 'prudent discounts' below.

<sup>231</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.3.

<sup>232</sup> A Zuo, S Wheeler and A Loch, *Short survey of southern Murray-Darling Basin irrigators' views on the review of the water charge rules – Final Report*, University of Adelaide report to client prepared for the ACCC, Adelaide, May 2016, p. 4.

The ACCC considers it significant that it did not hear any customers argue that the proposed non-discrimination rules are not necessary because operators adequately take into account customers' (or members') views. While the ACCC recognises that only some customers have chosen to give feedback, and that customers who have no concerns may be less likely to participate in consultation processes, the ACCC is of the view that the evidence suggests that governance processes cannot be relied upon to fully provide protections for customers.

Third, the ACCC considers that, while the number of complaints it receives in relation to price discrimination in rural water does not approach the number of complaints received in other industry sectors, this in part could be explained by the fact that the rural water sector overall is far smaller than other sectors, and also that, since the rules do not currently prohibit such charging practices (except in the limited context of transformation), customers currently have no grounds on which to contest such practices. Further, the ACCC has observed during its consultation and general monitoring and compliance activities that sometimes stakeholders have a lack of awareness about what protections are available (in relation to the water charge rules, Water Market Rules 2009 (WMR) and Basin Plan water trading rules), and / or are confused about which government agency has responsibility for which aspects of regulatory frameworks. This lack of awareness contributes to a situation where customers may have concerns but are deterred from voicing them by perceptions that no remedies are available.

Finally, while agreeing with NIC that customers should have recourse to the ACCC if they consider charges to be unreasonable, the ACCC reiterates that this is only a practical option for customers if there is an appropriate legislative protection against unreasonable charging arrangements in place.

Given the above considerations, the ACCC does not countenance the argument that non-discrimination protections are not required because sufficient alternatives already exist. As such, the ACCC maintains its advice that the expanded non-discrimination rules are necessary, and further, should apply to all infrastructure operators, regardless of ownership structure or governance arrangements.

The ACCC considers that, contrary to the views submitted by the NIC, the proposed rules will not require widespread changes to be made to most operators' charging arrangements. Based on an assessment of operators' current Schedules of Charges, some infrastructure operators' charging arrangements will require minimal change under the proposed rule.

Where infrastructure operators have relatively simple arrangements—for example, levying only fixed and variable volumetric charges for a single 'access and delivery' type infrastructure service<sup>233</sup>—the ACCC considers that no change will be required under the non-discrimination rules. Examples of operators whose Schedules of Charges currently fit this description<sup>234</sup> are: Bringan Private Irrigation Trust, Glenview Private Irrigation Trust; Buddah Lakes Irrigators' Association and Eagle Creek Pumping Syndicate.

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<sup>233</sup> Operators use a variety of terms to describe the charges they levy, and generally do not link charges with a specific infrastructure service. However, often operators levy a single fixed 'access' charge and a single volumetric 'variable' charge to recover costs of running their own business (possibly with additional fixed and variable charges for passing through on-river infrastructure charges and / or planning and management charges incurred by the operator) (see 5.13 for an assessment of arrangements for such 'pass-through charges'). The ACCC understands that this type of charging arrangement reflects the provision of a single infrastructure service used by all customers, which provides customers with access to the network and delivery of water through the network. The ACCC has used the term 'access and delivery service' to describe this situation.

<sup>234</sup> The ACCC has made this assessment based on the infrastructure charges specified in the operator's 2015-16 or 2014-15 Schedule of Charges. Where an operator fails to list charges (including discounted charges or commercially negotiated charges) on its Schedule of Charges, it is possible that the rules will require additional changes in relation to these currently un-listed charges.

Another common charging arrangement is where the operator provides a general ‘access and delivery service’ (which is used by most customers) plus a different service for stock and domestic users, possibly with several non-volumetric charges (e.g. outlet, account and/or metering charges), and possibly with ‘casual use charges’ which apply when customers use water above the volume of their water delivery right. The proposed non-discrimination rules will prevent operators from unreasonably restricting stock and domestic customers from obtaining the ‘access and delivery service’. Examples of operators whose Schedules of Charges currently fit this description<sup>235</sup> are: Narromine Irrigation Board of Management and Jemalong Irrigation Limited<sup>236</sup>.

Several other operators have relatively simple arrangements, but appear to levy different charges based on the status of the customer. An example is Hay Private Irrigation District, who levies different fees for ‘internal customers’ versus ‘external customers’. Whether such differences would cause concern under the proposed rules cannot be ascertained from the information provided on operators’ current Schedules of Charges.<sup>237</sup>

### **Operational issues with the proposed rule included in the Draft Advice**

The ACCC notes that information provided by stakeholders in response to the Draft Advice indicates that there is currently a wider range of pricing practices than the ACCC was previously aware of. In particular, information provided suggests that there are currently instances where operators have *not* listed *all* regulated charges on their Schedules of Charges (as is required by the current rules), and also that operators generally do not list where they provide discounts (and the circumstances relating to the discount).<sup>238</sup> Further, operators do not typically list applicable restrictions on infrastructure services it provides. Such unlisted charges / discounts and restrictions may raise concerns under the rules as proposed in the Draft Advice, even though in some cases the ACCC agrees with stakeholders that the relevant charge differences or restrictions on the availability of infrastructure services may be reasonable given the circumstances in which they occur. Further, in relation to where the ACCC had previously identified practices that were of concern, in some cases stakeholders have provided further details that explain why the practice is reasonable and should not be prohibited under the proposed rules.

The ACCC agrees that, based on the information provided by stakeholders, it is likely that the rules as proposed in the Draft Advice would have inappropriately prohibited charging arrangements or restrictions on service availability that are not unreasonable in the circumstances.

The ACCC notes that one option is to add additional targeted exemptions to the proposed rules to explicitly deal with legitimate stakeholder concerns. However, the ACCC does not consider that this approach is best, as:

- a long list of targeted exemptions from the rule proposed in the Draft Advice would be required to satisfactorily deal with stakeholder concerns. This would mean that the rules would be long and complex, which decreases the likelihood that operators will fully understand and comply with these rules (without significant regulatory cost).

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<sup>235</sup> The ACCC has made this assessment based on the infrastructure charges specified in the operator’s 2015-16 or 2014-15 Schedule of Charges. Where an operator fails to list charges (including discounted charges or commercially negotiated charges) on its Schedule of Charges, it is possible that the rules will require additional changes in relation to these currently un-listed charges.

<sup>236</sup> See, however, discussion in section 5.3.2 relating to Jemalong Irrigation Limited’s imposition of an ‘exit fee’ for temporary trade out of Jemalong Irrigation Limited’s irrigation area.

<sup>237</sup> The proposed amendments relating to Schedules of Charges will ensure operators provide information about the types of services their infrastructure charges relate to.

<sup>238</sup> The ACCC is working with operators to rectify the instances it is aware of where operators have not listed regulated charges and / or discounts on their Schedules of Charges as part of its ongoing compliance activities.

- there is a risk that such an exemption approach would be inappropriately rigid and would not be flexible enough to cater for the range of possible future circumstances and innovations in charging arrangements and infrastructure service offerings.

### Proposed approach

In light of these considerations, the ACCC is now of the view that the principle of non-discrimination could be better implemented by a more flexible approach than that taken in the Draft Advice. The ACCC therefore considers that the proposed non-discrimination rule should be recast as a more general rule which prohibits operators from:

- *unreasonably* levying or specifying different charges (or different rates or discounts) for an infrastructure service; or
- *unreasonably* restricting the availability of infrastructure services it offers.

The advantages of such an approach over that proposed in the Draft Advice are:

- it allows for discretion, which means the regulator can better consider individual operators' circumstances and available alternatives. In contrast, the approach taken in the Draft Advice rules out all differences in charges for the same infrastructure service, and all instances of restriction of infrastructure service availability on the basis of the five proscribed grounds, except where defined carve-outs apply.
- it allows the regulator to consider operators' arrangements more holistically – for example, in determining whether a particular arrangement is reasonable, consideration can be given to how charging arrangements interact with service availability.
- it allows assessment of charge differences and restrictions on service availability in general, rather than only on the five grounds proscribed in the Draft Advice—this has the effect of making the rule more robust to future developments. The ACCC acknowledges that operators are likely to consider that the broader coverage of this rule compared to that proposed in the Draft Advice is undesirable, but given the added flexibility afforded by the 'reasonableness test', together with operators' statements that the rules should not stifle innovation in charging arrangements and infrastructure service offerings, the ACCC considers that this broader, more flexible rule is more appropriate.
- it is similar to the approach taken in the Basin Plan water trading rules in relation to restrictions on trade of water delivery rights<sup>239</sup>—this has the benefit that most infrastructure operators have already been operating under a similar rule for several years, which will aid compliance as the rule format is familiar. Also, the ACCC can consider the approach of the MDBA (the appropriate enforcement agency for the Basin Plan water trading rules) in updating its own enforcement and compliance approach (see section 4.5), which will help ensure consistency in regulatory outcomes across different sets of water rules applying to operators.
- it is similar to the approach taken in other sectors.<sup>240</sup>

<sup>239</sup> The ACCC's revised rule advice follows the same general approach used in sections 12.28 and 12.29 of the Basin Plan water trading rules. Section 12.28 provides that 'An irrigation infrastructure operator must not unreasonably restrict the trade of a water delivery right'. Section 12.29 then provides a non-exhaustive list of 'factors to be taken into account whether a restriction is reasonable' for the purposes of section 12.28.

<sup>240</sup> Some examples are:

- Sections 152 ARA and 152AXC of the *Competition and Consumer Act* 2010 (Cth) preclude an NBN corporation and other network providers from discriminating between access seekers. The wording of the legislation is direct and high level, stating that: "*a carrier...must not...discriminate between access seekers*".
- Section 136 of the *National Gas (South Australia) Act* 2008 (SA) states that:
  - (1) A covered pipeline service provider must not engage in price discrimination when providing light regulation services.
  - (2) Subsection (1) does not apply if the covered pipeline service provider engages in price discrimination that is conducive to efficient service provision.

- the ‘consequence’ for non-compliance no longer includes a prohibition on levying infrastructure charges for a particular infrastructure service.

While the benefits are clear, the ACCC acknowledges that there is inherent uncertainty for operators in a general ‘reasonableness’ requirement. The ACCC considers that some measures can be taken to reduce this uncertainty and the related risks.

First, the rule should provide additional clarity by including the following elements (discussed further below) in the proposed rule:

- a non-exhaustive list of factors that can be taken into account when considering whether any differences in charges or restrictions on the availability of infrastructure services are reasonable; and
- limited, express exemptions from the application of the rule.

Second, as noted in section 4.5, the ACCC has amended its advice to recommend the *removal* of the private right of action in relation to the rules as a whole. This will have the effect of significantly reducing the risks to operators of any uncertainty relating to the proposed non-discrimination rules (and also other areas of the rules). In particular, operators will no longer face the risk of costly legal disputes with aggrieved customers in relation to practices that the ACCC does not consider to be problematic.

Third, the ACCC will consult with operators and other stakeholders when developing its guidance on what is considered ‘reasonable’ in relation to this rule. Assuming the right of private action is removed consistently with rule advice 4-C, the ACCC is the sole entity who may take action in relation to a contravention of the rules. The ACCC will continue to encourage operators to seek guidance and assistance in maintaining a culture of co-operative compliance. Further discussion of the ACCC’s general approach to guidance, compliance and enforcement is at sections 4.4 and 4.5.

*Factors to be taken into account when deciding whether the levying of a different charge or restricting the availability of an infrastructure service is reasonable*

The ACCC intends that including in the rules a list of ‘factors’ to be taken into account should serve to indicate the ACCC’s general approach to consideration of what is ‘reasonable’. However the “reasonableness” of specifying different charges, or restricting the availability of an infrastructure service, will necessarily depend on the circumstances. Also, the list of factors is *non-exhaustive*—this means that there may be cases where conduct is reasonable (or unreasonable), having regard to something not expressly listed as a factor.

The remainder of this section sets out the ACCC’s proposed ‘factors’. While the discussion below groups these factors according to whether they are more likely to be relevant to either a difference in charges or a restriction on the availability of infrastructure services, the ACCC proposes that the rule set out the list of factors as a combined list. This is because the ACCC considers the factors below could be relevant to either of the prohibitions.

In relation to the first part of the proposed rule 10, which concerns levying different charges for an infrastructure service, the ACCC maintains its view that the rule should generally not extend to a comparison of the ‘value for money’ of different infrastructure services<sup>241</sup>—that is, the first part of the

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<sup>241</sup> The ACCC notes, however, that if an operator restricts the availability of an infrastructure service, then it may be relevant to consider what other services (and the charges for those other services) a customer has access to.

rule should only prohibit unreasonable differences in charges *for an infrastructure service*, rather than any differences in charges paid by customers.

In considering whether a particular instance of an operator levying different charges is consistent with the rule, it is necessary to consider two questions: first, do the different charges relate to the same infrastructure service? Second, if the charges *do* relate to the same infrastructure service, is the difference in charges reasonable?

In answering these questions, it is necessary to consider the nature of the infrastructure service(s), including elements such as the infrastructure necessary to provide the service(s) and relevant capacity constraints. Also, an infrastructure operator may offer an infrastructure service that is only available in certain parts of its network, due to physical constraints or requirements. The ACCC has incorporated these elements into its recommended list of ‘factors to consider’. The ACCC will continue to provide guidance in relation to factors that can distinguish one infrastructure service from another. As identified in existing ACCC guidance, infrastructure services could differ due to differences in service standards such as those relating to priority of service, water pressure, level of treatment of water, ordering requirements / lags.

The ACCC also maintains its view that it is reasonable for infrastructure charges for an infrastructure service to differ to the extent that they reflect the differences in costs of providing the service to different customers. However, the ACCC recognises that the rule proposed in its Draft Advice set a high standard by prohibiting differences in charges that “exceed what is necessary to reflect the difference between the actual costs necessarily incurred” in providing the service to different customers. The ACCC accepts stakeholder feedback that the regulatory burden associated with this requirement could be onerous as it could require operators to account for their costs in a level of detail that they do not currently do. As such, the ACCC is recommending in its Final Advice that a factor to be considered is whether differences in charges for an infrastructure service *reasonably* reflect differences in the estimated costs of providing the service.

Further, stakeholders have provided examples of where they are required by law, or where it would be otherwise reasonable, to levy such different charges. In particular, the ACCC agrees with stakeholders that the following matters are particularly relevant to whether a *difference in charges* is reasonable:

- a requirement under the law of a Basin State for an operator to provide a certain service at a different (e.g. discounted) rate to a certain customer group.
- charge differences which are the result of a directed / targeted CSO.<sup>242</sup> The ACCC acknowledges that the BWCOP expressly provides for CSOs where full cost recovery is unlikely to be achieved.<sup>243</sup> The ACCC considers that governments are best placed to make decisions about ‘community benefits’ and broad categories of customers’ ability to pay and, if desired, fund a CSO. The ACCC considers that CSOs should be understood as a reduction in costs faced by the operator with respect to the relevant customers, as they represent a contribution towards costs from governments via a direct subsidy (rather than a cross subsidy between users). However, the ACCC considers that allowing an *operator* to make claims about specific customers’ or customer groups’ ability to pay, other than in cases of hardship, would undermine the efficacy of this rule, and could also be subject to conflict of interest. As such, this factor is limited to subsidies paid by governments only (see below in relation to: ‘hardship discounts’).

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<sup>242</sup> An example is where a different charge for the same infrastructure service applies for irrigation customers versus other users as a result of, and in proportion to, a state government subsidy to irrigators.

<sup>243</sup> Schedule 2, Part 3, subsection 3(6) of the *Water Act 2007* (Cth).

- offering a discount in a case where an unforeseen service interruption has occurred which results in a particular set of customers receiving a lower level of service than they are entitled to.
- offering a discount in a case where a customer (or group of customers) has faced hardship—e.g. as the result of flooding (i.e. a ‘hardship discount’).
- charge differences arising due to an operator being required to ‘transition’ customers towards upper-bound / full cost recovery pricing.
- charge differences which occur due to individually-negotiated charges for the same infrastructure service being set out in contracts negotiated prior to the commencement of the amended rules.
- charging arrangements where different charges apply depending on the ratio of the volume of water delivered or drained, to the volume of water delivery right or water drainage right held by a customer.<sup>244</sup>

The ACCC also considers that the rules should provide that certain discounts should be considered reasonable if they can be considered ‘prudent discounts’. This would be the case where an operator offers a discount to incentivise additional demand, where (i) the discount is necessary to incentivise the customer’s take-up of infrastructure services and (ii) where the customer’s contribution to ongoing fixed costs of the operator’s network has the effect of lowering charges for other customers. The ACCC has proposed the rules expressly allow such ‘prudent discounts’.

In relation to the second part of the proposed rule 10 in the Draft Advice, which concerns limiting the availability of infrastructure services on the basis of the proscribed grounds, the ACCC maintains its view that, in principle, customers should be able to choose the type and level of infrastructure services they receive. However, the ACCC acknowledges that at times there are practical reasons why a particular customer may not be able to receive a particular service that is offered to other customers.

An example is where an infrastructure operator is only able to offer a *finite amount* of an infrastructure service, for example, due to capacity constraints. The ACCC considers that if an infrastructure service is offered to all current customers on equal terms, an operator should not be held to have unreasonably limited the availability of that service if such a finite limit has been reached (e.g. it offers a service for the delivery of water to all customers, up to the maximum network capacity). As such (and as identified above), the ACCC has included capacity constraints and other service characteristics in its recommended list of ‘factors’ to consider.

Also, stakeholders have provided examples of where they are required by law, or where it would be otherwise reasonable, to restrict the availability of an infrastructure service. In particular, the ACCC agrees with stakeholders that the following factors are particularly relevant to whether a *restriction on the availability of a service* is reasonable:

- A requirement under a law of a State for an operator to restrict the availability of an infrastructure service (an example given was to impose water restrictions on customers holding tradeable water rights used for domestic purposes).
- An operator refusing to provide an infrastructure service when a customer does not hold water delivery right and / or when a customer does not have a right to water (e.g. an irrigation right or water access right)—note, however, that the ACCC considers that a requirement to hold a

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<sup>244</sup> As an example, the difference between a ‘standard’ usage charge applied for delivery of water up to the volume of a customer’s water delivery right, and a higher ‘casual’ usage charge applied to delivery of water above that volume would be likely to be reasonable. See also section 6.2.2 for further discussion.



particular tradeable water right in order to access a particular infrastructure service should itself not be unreasonable.

- An operator refusing service because a customer has contravened a contract requirement (e.g. a requirement to maintain a working meter) or because a customer has failed to pay outstanding regulated water charges<sup>245</sup> (assuming those charges were levied in accordance with the rules).

Additional factors that the ACCC considers relevant to whether a difference in charges, or restriction in the availability of infrastructure services, is reasonable are:

- Whether it is reasonable for the operator to require a customer to receive ‘bundled’ infrastructure services (e.g. whether it is reasonable to refuse access to drainage services to customers who do not also receive water delivery services; whether it is reasonable to require a customer to receive one infrastructure service in order to be eligible to receive another)
- Whether a difference in charges is required in order for the operator to comply with the ‘pass through’ requirements in proposed rule 9A (see section 5.13).
- Whether an operator provides water to a customer other than in relation to a volumetric irrigation right or a water access right held by the customer (see section below in relation to ‘stock and domestic’ services).

#### *Infrastructure services for customers using water for stock and/or domestic purposes*

The ACCC acknowledged in its Draft Advice that operators are in some cases required under State law to provide a service to stock and / or domestic users, and further, that they may be prohibited from providing a similar service to other users. The ACCC also notes that in some cases stock and / or domestic users may not hold their own volumetric water rights (whether water access rights or under an irrigation right), but may instead receive an ‘on demand’ or un-metered supply of water from the operator.

Where operators are themselves required to provide services in a particular manner (or required to limit such service provision in various ways), their ability to exercise monopoly power is lessened. In such cases, the ACCC remains of the view that it is not appropriate for the rules to require operators to provide services of this nature to all customers.

Rule advice 5-B proposes that a factor to consider under the recommended ‘reasonableness test’ is the extent to which different charges for an infrastructure service, or a decision to restrict the availability of a service, simply reflects requirements placed on operators under a law of a State. As such, this factor already acknowledges that such a restriction may be reasonable where an operator is required to provide a limited stock and / or domestic service under State law.

However, the ACCC acknowledges that in some cases an operator may provide a limited stock and / or domestic service *without* an underpinning explicit state requirement to do so. The ACCC understands that, in general, the nature of these services is such that the operator provides a nominally ‘unlimited’ or ‘on demand’ supply of water to stock and domestic users, with the implicit assumption that, due to the purposes for which the water is being used, on average only a relatively small volume of water will be used by each customer. It is unlikely that an operator would be able to supply such a service on such ‘unlimited’ terms to customers who routinely used large volumes of water (e.g. customers using water for irrigated agriculture). As such, in reality there *is* a finite limit on the amount

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<sup>245</sup> This ‘factor’ is similar to Basin Plan water trading rule 12.29(1)(e).

of such services the operator can provide, and therefore it is reasonable to allow the operator to limit the aggregate amount of these kinds of services.

The ACCC considers that, rather than applying the ‘reasonableness test’ to each instance where an operator limits the availability of a service to only customers who use water for stock and / or domestic purposes, an appropriate balance between regulatory burden and implementing the principle of non-discrimination can be achieved by providing a limited exemption to the proposed rule 10. This could be provided for by specifying in the rules that an operator does not contravene proposed rule 10 if it limits the availability of an infrastructure service to customers who use water for stock and / or domestic purposes, because such a restriction is taken to be reasonable.

The ACCC acknowledges that this exemption may have the result that a customer who uses water for purposes *other than* stock and / or domestic purposes may not be able to access services of a kind provided to stock and domestic users. However, the ACCC considers that, on balance, this approach is appropriate given the finite ability of operators to provide these services, the critical nature of these services (in some cases) and the availability of other infrastructure services for water used for other purposes.

The ACCC also emphasises that this exemption would not extend to cases where:

- an infrastructure operator sought to unreasonably limit (or altogether prevent) stock and / or domestic users from accessing other infrastructure services in general; or
- an operator sought to unreasonably levy different charges for an infrastructure service depending on whether the customer was a stock and / or domestic user or not.

That is, the proposed exemption is limited in nature and is simply aimed at expressly allowing operators to provide a specialised infrastructure service limited to customers using water for stock and / or domestic purposes.

Beyond this, and as noted in the previous subsection, the ACCC considers that a factor to be considered in the ‘reasonableness test’ is whether a customer’s right to receive water is a volumetric right, or another less well-specified kind of right which simply enables a customer to be supplied with an unspecified quantity of water through the operator’s infrastructure.

Where a customer has a non-volumetric right (e.g. a stock and domestic right under which a customer can take water ‘on demand’), it may be reasonable that different charges apply in respect of infrastructure services received. An example could be that the operator faces different opportunity costs or constraints in supplying delivery services to such right holders because it needs to forecast demand and ensure sufficient water supply is available for the operator to divert and deliver, in a different manner compared to the case where a customer has a defined amount of water allocated under their irrigation right and is required to place an order before delivery takes place.

#### *Interaction with arrangements arising under Part IIIA of the Competition and Consumer Act 2010*

The ACCC proposed, via draft rule advice 5-X, to provide an exemption to the proposed non-discrimination rule (rule 10) such that charges negotiated, arbitrated or otherwise arising under certain arrangements under Part IIIA of the *Competition and Consumer Act 2010*. For reasons set out in section 5.11 below, the ACCC is of the view that this position should be maintained.<sup>246</sup>

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<sup>246</sup> For this rule, the relevant Part IIIA arrangements are: (a) an access undertaking or access code; (b) a declared service; (c) an effective access regime; (d) a competitive tender process.

### *'Consequence' of failing to comply*

Upon further consideration, the ACCC agrees with concerns raised by the NIC that the Draft Advice's proposed 'consequence' where an operator limited the availability of an infrastructure services on one of the proscribed grounds—that the operator not be able to levy *any* charge for that infrastructure service—was overly burdensome.

The ACCC rule advice no longer includes this 'consequence' mechanism, but retained the advice that a civil penalty should apply where this rule is contravened. The ACCC considers that a civil penalty should continue to apply as a possible consequence for a breach of this rule, given that a breach could have material impacts on customers and on the operation of water markets more broadly.

In response to the NIC's feedback that the recommended civil penalty is 'excessive', the ACCC notes that the proposed civil penalty is 200 civil penalty units, consistent with all other civil penalty provisions in the rules. Further, subsections 92(8)-(9) of the Act provide that water charge rules may be specified as civil penalty provisions, but that where civil penalties are specified, the penalty must be 200 penalty units.

Litigation seeking the imposition of a civil penalty has not been and is not automatically pursued by the ACCC when a contravention is identified. As noted in section 4.5, the ACCC's approach to monitoring and enforcing compliance is outlined in its *Guide to compliance and enforcement of the water market rules and water charge rules* (2009; revised 2011).<sup>247</sup> The approach outlined is designed to educate water stakeholders about their rights and obligations under the rules and to minimise compliance costs.

### *Transitional arrangements*

The ACCC acknowledges that the proposed non-discrimination rules will require the development of new guidance material, and that operators will need time to assess their charging arrangements and in some cases make changes to comply with these rules. In view of these considerations, the ACCC recommends that a substantial transitional period be provided before the new non-discrimination provisions commence. The ACCC considers that the proposed amendments to rule 10 should not apply before 1 July 2018, even in the case where the remainder of the amended rules commence at an earlier date (as recommended in section 4.7, recommendation 4-E). This will allow a significant period of time for the ACCC to work with infrastructure operators in developing guidance material and addressing any charging practices of concern. The ACCC has made recommendation 5-A to this effect.

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<sup>247</sup> See section 6.1 of the ACCC, *Enforcement Guideline - Water Market and Water Charge Rules*, Canberra, April 2011, p.4, viewed October 2015, <https://www.accc.gov.au/system/files/ACCC%20enforcement%20guide%20to%20water%20rules.pdf>.

### 5.3.2 Prohibition of certain infrastructure charges—proposed rule 10A

#### Rule advice 5-D

The rules should be amended to prohibit an infrastructure operator from levying an infrastructure charge:

- upon an application to trade or terminate a tradeable water right (including where the application is not made to the infrastructure operator);
- as a condition of the infrastructure operator granting its consent or approval to a trade or termination of a tradeable water right
- when or because a tradeable water right is traded or terminated;

However, the rules should not prohibit an infrastructure operator from levying an infrastructure charge *in relation to trade*, when:

- the operator's approval or consent to trade is required and that infrastructure charge reflects the reasonable and efficient administrative costs of processing the trade.
- the customer seeks to have a volume of water delivered that is in excess of the volume provided for under the water delivery right held by the customer with the operator.
- the operator has provided an infrastructure service for the harvesting or storage of water relating to the water access right being traded; or
- the operator is required to provide a service for the storage or delivery of water to give effect to the trade; or
- the operator is required to provide a service for the storage or delivery of water to the buyer after a trade occurs *and* the operator is unable to levy a charge on the person receiving the service because the operator has no authority to levy a charge on that person (for example, because that person is located in a different jurisdiction to the infrastructure operator).

Also, the rules should not prohibit an infrastructure operator from levying *in relation to termination*:

- a termination fee levied consistently with the rules; or
- an infrastructure charge which reflects the reasonable and efficient administrative costs incurred in processing the termination.

Finally, the rules should not prevent an infrastructure operator from requiring payment of any outstanding infrastructure charges as a condition of the operator providing their consent or approval to a trade or termination (provided those fees or charges were levied consistently with the rules).

This rule should be a civil penalty provision.

This rule advice is implemented in rule 10A of the proposed Water Charge Rules.

#### *Background*

The ACCC's Draft Advice proposed that the rules should be extended to prohibit infrastructure charges imposed by an operator as a condition of, or as a result of, trade<sup>248</sup> of a tradeable water right that are beyond the operator's actual trade processing administrative costs.

<sup>248</sup> Where the ACCC refers to a trade of a tradeable water right, this includes a transfer. This is consistent with the definition of 'trade' in the Basin Plan water trading rules (see rule 1.07(2)-(3)).

The intent of this draft rule advice was to address market distortions that arise from unnecessarily increasing the transactions costs of trade. Transaction costs decrease the gains from trade to trading parties, and in some cases may be high enough that water users cease to trade altogether, or redirect trading activity towards markets where transactions costs are lower. A key example of this in rural water markets is where a seller located inside an off-river operator's area of operations is deterred from selling outside of this area due to transaction costs, and instead seeks to find a buyer located in the same area. Another example is where transactions costs associated with inter-state trade mean that water users prefer to trade *intrastate* instead.

The ACCC recognises that trade administration is not costless, and that as such there will always likely be some transaction costs associated with trading tradeable water rights. The task is therefore to incentivise only the minimum necessary transaction costs to be imposed, and to deter imposition of unnecessary charges as a condition of trade approval or as a result of trading activity. In view of this objective, the ACCC proposed in its Draft Advice to rule out *any* infrastructure charges being applied as a condition of, or result of, trade of tradeable water rights *other than* those which reflected the necessary costs actually incurred in processing trades.

This draft rule advice was also applied to where a water delivery right is terminated. This was because the ACCC considered that a similar rationale applies in relation to termination and as such transactions costs associated with the process of termination should also be minimised. The rationale is also applicable to transformation of irrigation rights; however a similar rule already applies in relation to transformation.<sup>249</sup> Accordingly, the proposed rule extended to *trade* or *termination* of a tradeable water right (but not transformation).

### *Stakeholder feedback*

#### **Feedback on the Issues Paper**

In its Issues Paper submission, Waterfind identified that operators' practice of charging transaction fees (in addition to state approval authority processing fees) when water is traded out of their area of operations forms a barrier to trade.<sup>250</sup> The Murray-Darling Basin Authority (MDBA)'s Issues Paper submission commented that "charging arrangements have the potential to distort the market and discriminate between water users", and that additional or higher charges should not apply to water that is traded into a state or district than would be payable for water associated with "local entitlements", except to account for the marginal cost of administering the trade.<sup>251</sup>

#### **Feedback on the Draft Advice**

Many submissions noted their support for water charge rules that would limit or remove the potential for water charging arrangements that create barriers to trade or distort trading decisions.

Waterfind submitted that it "fully supports this rule advice [i.e. rule advice 5-D] and...from a water market perspective it is the single most important advice" in the Draft Advice.<sup>252</sup> Waterfind added:

*Waterfind believes that it is of crucial importance that this rule advice is implemented as such [to prohibit volume-based transaction fees (e.g. trade-out fees for temporary water) charged by certain infrastructure operators], as Waterfind considers that such trade-out fees are not justified,*

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<sup>249</sup> Water Market Rules 2009, rule 13. Note also that a fee to which water market rule 13 applies is not included in the definition of infrastructure charge.

<sup>250</sup> Waterfind, Issues Paper Submission, July 2015, p.4.

<sup>251</sup> Murray-Darling Basin Authority, Issues Paper Submission, July 2015, pp.6-7.

<sup>252</sup> Waterfind, Draft Advice Submission, March 2016, p.3.

*and are also in breach of the National Water Initiative (NWI) objectives as well as the Basin water charging objectives and principles (BWCOP) to facilitate the efficient functioning of water markets. Furthermore, Waterfind considers that a volume-based trade-out fee cannot by definition be a 'reasonable administration cost' as administration cost of a single transaction would be the same regardless of the volume of the trade.*<sup>253</sup>

However, Waterfind was also of the view that the rule would potentially not go far enough to remove all trade barriers that relate to water charges. One area of concern to Waterfind is prohibitions put in place by IIOs to restrict irrigators from temporarily trading water out of their operator's irrigation network. Waterfind questioned whether irrigators have "any avenues of appeal" when operators impose these restrictions because they do not breach any current or proposed water charge rules, or Basin Plan water trading rules. Waterfind considered that this type of issue could be one that a water ombudsman, as suggested under Recommendation 8-C, could investigate. This issue is considered further in section 8.4.1.

The NSW Office of Environment and Heritage (OEH) submitted that as an entity that trades water allocation, it "support[s] methods for charging customers that do not affect the ability or the incentive of a potential customer to trade, by being as price neutral as possible".<sup>254</sup> It added that "[t]he water charge rules should provide for the distribution of water charges that minimises impacts on water use and trade decisions".<sup>255</sup>

In favour of the proposed amendments, the Commonwealth Environmental Water Holder (CEWH) submitted:

*The Water Charge (Infrastructure) Rules should promote variable use charges that reflect the prudent and efficient costs of using water and providing inter-valley and interstate trade services. The rules, however, should also discourage approaches to charging that have the potential to distort water market prices, distort use and transfer decisions, or present additional barriers to trade.*<sup>256</sup>

Similarly, South Australian Murray Irrigators (SAMI) submitted:

*First and foremost irrigators look forward to the removal of barriers to trade. Irrigators support an open fair and transparent water market with known transaction costs that don't double dip through the course of the trade. Water trade should be unencumbered with costs streamlined and fair for the service received. We believe an across catchment trades should reflect the price of a similar service elsewhere in the catchment.*<sup>257</sup>

Some submissions also commented on the scope of the proposed rule, particularly in relation to transaction fees levied by infrastructure operators to recover their costs of giving effect to the trade.

The National Irrigators' Council (NIC) was concerned that its members would need to go through a "time-consuming and expensive process" to 'satisfy' the ACCC that its application fees are reasonable and efficient.<sup>258</sup> The NIC argued that this will increase regulatory burden for the industry and government.

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<sup>253</sup> *ibid*, p.4.

<sup>254</sup> NSW Office of Environment and Heritage, Draft Advice Submission, March 2016, p.2.

<sup>255</sup> *ibid*.

<sup>256</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>257</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.2.

<sup>258</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.12.

Some of the processes and therefore costs that the NIC argues infrastructure operators will need to undertake include:

SAMI submitted that their members had provided feedback that internal trade fees imposed by trusts “are seen generally as fair for the service received”, although “[s]ome fixed charges and trust exit fees were also deemed excessive”.<sup>259</sup> Member feedback also noted that South Australian water users who trade water from NSW were being charged [NSW] usage fees, despite the water being used in SA rather than in NSW.

Waterfind submitted its view that there is a need for the ACCC to define ‘reasonable administration cost’ and/or ‘the administration costs necessarily incurred in processing the trade, transfer or termination’.<sup>260</sup> Waterfind identified that these definitions are necessary to provide transparency to water market participants. Waterfind also sought clarification that the rules would prohibit volume-based transaction fees, and called for greater regulation of transaction fees imposed by infrastructure operators.

Waterfind also argued the case for setting a cap on transaction fees.<sup>261</sup> They recognised concerns (e.g. those outlined by the MDBA in its Issues Paper submission) about the difficulties in setting a Basin-wide cap. Therefore, Waterfind suggested that operators’ transaction fees could be capped by comparing them to application fees imposed by Basin State governments in the same catchment or state. Waterfind was of the view that “under no circumstance” should an IIO’s customer pay more than a private diverter for an equivalent trade outside an irrigation district, noting that the IIO’s customer would typically be required to pay the Basin State water authority transaction fee on top of their operator’s internal transaction fee.

The NIC and Western Murray Irrigation (WMI) submitted their concerns that the proposed rule may not allow infrastructure operators to require payment of outstanding fees and charges as a condition of the infrastructure operator approving a trade.<sup>262</sup>

SAMI also submitted feedback on water transaction charges imposed by Basin State governments. This feedback is discussed in section 7.2, as planning and management charges are not proposed to be captured under this amendment.

### **WaterNSW’s practice of levying a variable charge on interstate water allocation trade**

In its Draft Advice, the ACCC identified that one example of current arrangements that appeared to be inconsistent with the proposed rule was WaterNSW’s practice of requiring payment of its valley-of-origin variable charge at the time of trade for all ‘allocation assignments’ (i.e. water allocation trades) involving a buyer<sup>263</sup> whose licence (water access entitlement) is not linked to a NSW works approval. This had the effect that interstate buyers of NSW water allocation pay NSW usage charges at the time of trade since they are passed through by the seller at the time of trade.

Several stakeholders provided feedback on draft rule advice 5-D specifically in relation to this practice.

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- “a very detailed analysis of all the steps in the process to which the fee relates”
  - “the appropriate levels of seniority of the personnel involved at each stage”
  - “the appropriate amount of time to be spent on each stage”
  - “the costs (and on-costs) associated with these personnel”.

<sup>259</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.3.

<sup>260</sup> Waterfind, Draft Advice Submission, March 2016, p.3.

<sup>261</sup> *ibid*, p.4.

<sup>262</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.12; Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>263</sup> This discussion uses the term ‘buyer’ to refer to the person that will hold the water allocation after the trade / transfer. The ACCC recognises that a trade may not involve any consideration, including where a person is trading to move water between their properties.

WaterNSW submitted that it does not support draft rule advice 5-D because WaterNSW:

- imposes this charge to recover “prudent and efficient infrastructure costs it incurs in holding and releasing bulk water” when it is traded out of NSW, a problem that is “exacerbated” by having a higher variable charge relative to other jurisdictions.
- considers that its current policy is “an equitable, transparent and administratively feasible solution” to recover these costs and it “improve[s] trade outcomes by preventing market distortions that exist when prudent and efficient infrastructure costs are not reflected in a trade transaction”.
- does not consider that the charging arrangement represents a barrier to trade and the ACCC should reconsider the ‘materiality’ of the ‘perceived’ barrier. WaterNSW qualifies this position based on the existence of net trade from NSW to Victoria; that is, WaterNSW makes the argument that trade is occurring despite the way in which this charge is levied.

Comparatively, Waterfind submitted its view that “it is an undeniable fact that this fee distorts the water market” and “[t]his opinion is also generally shared by Waterfind’s clients actively trading in the Southern Connected system”.<sup>264</sup>

WaterNSW suggested that if this advice is retained in the Final Advice, then it should be amended to allow infrastructure operators to levy infrastructure charges “in connection with trade (to recover prudent and efficient infrastructure costs)” but prohibit infrastructure charges being imposed “as a condition of trade”.<sup>265</sup> WaterNSW argued that its suggested amendment provides flexibility to the infrastructure operator to put in place a policy that addresses the “perceived problem” (associated with barriers to trade) while also ensuring that the operator is able to recover its prudent and efficient costs.

### **The ACCC’s suggestion to levy variable charges on water allocation as opposed to water use or trade**

As an alternative to WaterNSW’s practice of levying infrastructure charges as a condition of trade, the ACCC suggested in its Draft Advice that WaterNSW could instead levy its variable charges when water is *allocated* to users’ water access entitlements (rather than when it is subsequently used or traded). This approach would allow WaterNSW to still recover a portion of its costs in a manner that varies according to water availability, rather than recovering all of its costs via fixed charges that apply even in times of low (or no) water availability.

Waterfind submitted that it “fully supports” the ACCC’s suggested approach.<sup>266</sup> Waterfind put forward its view that the approach would:

- “level the playing field” for interstate trade between NSW, South Australian and Victorian irrigators as “NSW water sellers would be indifferent between selling water to buyers in any state”.
- not have a market distorting effect
- resolve another issue related to the imposition of WaterNSW’s variable usage charge on intrastate temporary trades, where the buyer’s licence is not linked to a NSW Works Approval.<sup>267</sup>

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<sup>264</sup> Waterfind also noted that it agrees with Marsden Jacob Associates finding that WaterNSW’s policy to levy its variable usage charge on interstate trade has led to a differential in the asking price (posted by NSW sellers) for NSW water allocations in NSW and Victorian / South Australian markets of around \$5-\$7. Waterfind, Draft Advice Submission, March 2016, p.4.

<sup>265</sup> WaterNSW, Draft Advice Submission, March 2016, p.5.

<sup>266</sup> Waterfind, Draft Advice Submission, March 2016, pp.4-5.



Comparatively, WaterNSW submitted that it did not support the ACCC's suggestion and identified the following issues with this approach:

- customers do not have to use all or even some of their water allocation. Therefore, it could result in customers paying for “unused water”.
- difficulties in adjusting accounts for carryover water to avoid double charging.
- it “would be difficult to apply as it is impossible to predict whether or not a customer will engage in trade at the point of allocation and before a trade transaction occurs”.
- it would create “a disincentive for customers to carry over their allocations and to allow them to self-manage their water supply and usage”.<sup>268</sup>

WaterNSW submitted that it is considering other options (as alternatives to levying its variable usage charge on interstate trade) to recover its infrastructure costs.<sup>269</sup> However, WaterNSW considers that other options are likely to have “adverse impacts” on non-trading customers. WaterNSW acknowledged that any other options it develops will need to be subject to customer consultation and submitted to IPART for approval. WaterNSW was concerned about being exposed to revenue risk in a situation where:

- IPART rejects its proposed alternatives and
- the water charge rules prohibit infrastructure charges being levied as a condition of trade.

WaterNSW's concern about this situation is that it will not be able to recover its prudent and efficient infrastructure costs and that this situation “would produce an even greater market distortion than the perceived market distortion that this recommendation [proposed rule advice] is proposing to address”.

There was also a concern from some stakeholders in meetings during the consultation process that this approach could result in a ‘price floor’ for water allocations.

### *ACCC assessment*

Infrastructure charges levied as a condition, or result, of trade of tradeable water rights are transactions costs which decrease the gains from trade to market participants. Imposition of such charges have the potential to distort trade flows and in extreme cases deter trade altogether. As such, the ACCC considers that the rules can directly contribute to the effective functioning of water markets by prohibiting inappropriate levying of trade-related infrastructure charges.

As noted in the Draft Advice, not all charges levied on trade are inappropriate. In particular, charges which recover the prudent and efficient administration costs associated with trade processing are appropriate and necessary to ensure market prices reflect the true costs involved. The ACCC therefore has maintained its rule advice that certain charges relating to trade should not be prohibited. It also considers that a similar rationale applies in the context of transaction charges for processing terminations, and has therefore maintained this aspect of its rule advice (see below for further discussion).

The ACCC notes that several stakeholders who identified themselves as having a particular emphasis on promoting efficient water markets, such as the MDBA, SAMI and Waterfind, recognised the need for such a rule and supported the draft rule advice.

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<sup>267</sup> Waterfind notes that while a buyer can claim the fee back, the process to do so is “overly cumbersome” and “too difficult” and therefore many people who could claim it, have not.

<sup>268</sup> WaterNSW, Draft Advice Submission, March 2016, pp.4-5.

<sup>269</sup> *ibid.*, p.5.

Recommendations by some stakeholders such as the NIC not to make any rule specific to trade-related charges are not supported, since continuing to allow such charges works against the objective of facilitating efficiently functioning water markets. However, stakeholders did raise some legitimate concerns about the ACCC's draft rule advice which can be addressed.

### **Application of the proposed rule to trade-related infrastructure charges levied by operators**

The ACCC recommends that proposed rule 10A should only apply to trade-related infrastructure charges. This includes where an infrastructure operator imposes their own trade application charges, or where an operator levies a charge as a result of trade (including where the amount of a charge differs according to whether a customer has traded).

In some cases, operators impose trade-related charges *on behalf of government*. An example is Goulburn-Murray Water (GMW) and Lower Murray Water (LMW), who are delegated trade approval authority and as such levy trade transaction fees on behalf of the Victorian Government. Such charges are planning and management charges rather than infrastructure charges.

While recognising that trade-related planning and management charges are also transaction costs that affect trade flows and the gains from trade, the ACCC advises that this rule should not extend to planning and management charges (including where such charges are levied by infrastructure operators). Since these charges are determined by or on behalf government, generally under processes set out in a law of a State,<sup>270</sup> the ACCC considers that Basin States are best placed to ensure these charges do not recover more than the prudent and efficient costs of trade processing.

### **Ability to recover outstanding fees and charges prior to approving a trade or termination**

The ACCC agrees that operators should have the ability to require payment of outstanding fees and charges as a condition of approving or processing trade or termination of tradeable water rights (where such charges were levied in accordance with the rules). The ACCC has previously adopted this policy in relation to termination,<sup>271</sup> and accepts the need to continue to cater for this in the amended rules.

Although operators likely have other contractual avenues for securing payment of outstanding charges (e.g. pursuing a customer for breach of contract), the ACCC acknowledges that in practice it may be costly for an operator to pursue these avenues, particularly in a context where trade or termination results in a customer ceasing to be a customer.

Accordingly, the ACCC amends its Draft Advice to allow for operators to require payment of any outstanding fees and charges as a condition of the operator providing their consent or approval to a trade or termination, rather than only those that were levied before the amendment date of the rules.

### **Ability to recover costs relating to infrastructure services actually provided**

The ACCC acknowledges that in many cases across the Murray-Darling Basin (MDB), charges levied on water access rights form the basis of cost recovery for a considerable range of infrastructure services, such as:

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<sup>270</sup>Queensland trade application charges are set under the *Water Regulations 2002* (Qld), Schedule 16, viewed June 2016, <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WaterR02.pdf>. Victorian trade application charges are set under the *Water (Resource Management) Regulations 2007* (Vic) and the *Water (Resource Management) Amendment Regulations 2009* (Vic), <http://waterregister.vic.gov.au/about/forms-and-fees/fees>; NSW trade application charges are set by IPART, viewed June 2016, <http://www.water.nsw.gov.au/water-management/fees-and-charges/price-setting>.

<sup>271</sup> See, for example, ACCC, *Permanently selling your water and terminating your delivery right—a guide for irrigators about the water market rules and rules on termination fees*, Canberra, 2009, p. 9, viewed June 2016, <https://www.accc.gov.au/system/files/Permanently%20selling%20your%20water%20and%20terminating%20your%20delivery%20right.pdf>

- water harvesting
- water storage (including carryover)
- on-river delivery of water
- water planning and management (WPM) activities.

The nature of the specific charges used to recover the costs of such infrastructure services varies considerably across Basin States. In particular, some operators rely much more on variable (usage) charges to recover these costs than others. A key example is WaterNSW, whose regulators (both IPART and the ACCC) have historically required WaterNSW to recover a substantial portion of its predominantly fixed costs incurred in harvesting and storing water via variable charges.

In a situation where variable charges (levied on the volume of water delivered) are used to recover fixed costs, a decision by a customer not to have water delivered has the potential to impact on the operator's cost recovery. Examples include where a customer forfeits water allocation, stores water instead of using it (via carryover), or trades water allocation such that the buyer is not able to be charged a variable charge by the operator providing the infrastructure service (for example, because the buyer is located beyond the jurisdiction of the operator). In all of these cases, the operator is not able to levy the relevant charge, and so faces revenue risk.

Various remedies to this situation are available. At the most fundamental level, the situation arises due to a non-alignment of charges and costs—in particular, because variable charges (levied on water delivery) are being used to recover fixed costs. Thus, one option is to move towards more cost-reflective tariff structures.

Another option, currently employed by WaterNSW, is to partially change the basis for when variable charges are levied, such that they are not only payable when water is delivered / used. WaterNSW has chosen to levy its variable charge when water is delivered / used *and* in certain cases<sup>272</sup> when water allocation is traded. WaterNSW currently does *not* levy a variable charge on forfeited water or when water is carried over.<sup>273</sup> This practice has the distortionary effect that NSW sellers who sell interstate and / or interstate buyers, who may choose to on-sell, carryover or forfeit their traded water allocation, are required to pay the WaterNSW usage charge 'up front' (i.e. before usage), while all other customers are not.

In a report commissioned by the ACCC for the water charge rules review, Marsden Jacob Associates<sup>274</sup> provided the following comments on WaterNSW's practice of levying its variable charge on interstate trade, after consulting operators, water brokers, and several other stakeholders:

- NSW allocation water consistently sells for \$5-\$7 less than Victorian allocation water in Victorian and South Australian water markets
- it has caused a 'two price' market (consisting of an internal NSW price and an interstate price), which has nonetheless 'been accommodated' by the market
- it has a 'third order' effect on market participants' decision-making

<sup>272</sup> As indicated previously, payment of the NSW valley-of-origin variable charge is payable when the buyer does not hold a NSW water access licence linked to a NSW works approval. In this discussion, the ACCC restricts attention to the case where the buyer does not hold the required NSW rights because they are located interstate.

<sup>273</sup> The ACCC acknowledges that, since stored water may eventually be used in a subsequent period, variable charges may be paid in a future period. Similarly, since forfeited water is returned to the consumptive pool and is available to be allocated in a future period, variable charges may also be paid in relation to previously forfeited water at a future date. Thus these mechanisms potentially have the effect of delaying (rather than foregoing) recovery of costs.

<sup>274</sup> Marsden Jacob Associates, *The Impact of Infrastructure Charge Structures on Water Trade in the Murray Darling Basin*, Report prepared for ACCC, June 2015, pp.15-17, 21, <https://www.accc.gov.au/system/files/Marsden%20Jacobs%20Associates%20-%20Impact%20of%20Infrastructure%20charges%20on%20water%20trade%20in%20the%20MDB.pdf>.

- it is likely that NSW sellers are suffering a welfare loss as a result of the VUC [variable use charge]
- the root cause of the trade distorting impact of the VUC is the reliance by Water NSW on the VUC to recover a share of fixed costs.

The ACCC considers that, while this practice does not altogether *preclude* trade from NSW interstate, it is likely to distort trade flows and the distribution of gains from trade. Further, the ACCC considers that this approach is not transparent because it is not clear what services interstate users are paying for.

In view of the distortionary effect of this practice on water markets, the ACCC supports future reform of WaterNSW's tariff structure towards less distortionary arrangements over the longer term. However, the ACCC also recognises that WaterNSW, as well as other operators who provide on-river infrastructure services, are generally required to have their charges approved or determined by economic regulators. Those regulators (one of which is the ACCC) are required to balance a range of objectives and do not necessarily implement fully cost-reflective charging arrangements. The ACCC acknowledges that while:

- regulators are able to impose such non-cost reflective tariff structures and
- a bundle of infrastructure services (i.e. harvesting, storage, carryover, delivery) may be encompassed into a single variable charge;

a water charge rule prohibiting *all* infrastructure charges levied in relation to trade (as proposed in the Draft Advice) may be too inflexible and involve significant regulatory costs.

This position acknowledges that current and previous regulatory decisions have required WaterNSW to rely heavily on variable charges. To the extent that WaterNSW is compelled to recover a portion of their fixed costs through variable charges, and are limited to a levying a single variable charge to encompass a bundle of infrastructure services, it could be considered reasonable to impose the variable charge on all customers receiving any relevant infrastructure service. Further, the ACCC acknowledges that WaterNSW does provide infrastructure services in relation to the water being traded: it harvests and stores the water to enable it to be allocated to customers' WAEs.

Additionally, WaterNSW may face additional costs when physically 'delivering' water to interstate buyers (e.g. by releasing water from WaterNSW-operated storages to deliver water that has been traded to downstream interstate users). Where this occurs, it is arguable that WaterNSW should be able to recover these costs from those interstate users. However, practically, WaterNSW cannot meter water deliveries to interstate users. As such, it is arguable that WaterNSW should be able to impose a charge that recovers the costs of interstate services provided in relation to the water at the time the water allocation is traded interstate. The ACCC's Draft Advice only proposed allowing for charges to recover the 'reasonable and efficient administrative costs of processing a trade' rather than the costs of other infrastructure services provided.

In view of these considerations, the ACCC revises its Draft Advice to provide for the imposition of infrastructure charges when water access rights are traded, where an operator provides infrastructure services for the:

- harvesting or storage of water before a trade;
- storage or delivery of water in the course of giving effect to a trade; or

- storage or delivery of water in relation to the traded water access right *after* a trade but is not able to levy a charge on the customer after the trade occurs.<sup>275</sup>

The revised advice will allow WaterNSW to continue its current practice of levying a charge equivalent to the valley-of-origin variable charge when water is traded interstate. However, this revised advice will continue to have the effect of preventing off-river infrastructure operators from imposing ‘exit fees’ when water is traded out of their area of operators (whether ‘temporarily’ or ‘permanently’). This is because the off-river infrastructure operator does not provide infrastructure services for the harvesting or storage of water before a trade, for the storage or delivery of water to give effect to the trade, or in relation to the storage or delivery of water after the trade.

### **Innovation in charging arrangements to avoid charges which distort trade**

The ACCC acknowledges that WaterNSW currently imposes its variable usage charge on interstate trade in order to recover its costs (particularly in the context of regulators requiring WaterNSW to recover 60 per cent of the user share of revenues from variable costs). However, as noted in the Draft Advice, WaterNSW does have other alternatives for imposing charges – for example, levying the variable charge when water is allocated. The ACCC understands that WaterNSW is considering options for new infrastructure services and charging arrangements generally (i.e. not solely in the context of rule advice 5-D).

The ACCC notes WaterNSW’s concern that the proposed amendments could require WaterNSW to restructure its tariff structure in new and different ways, which may not be accepted by the state regulator (IPART) and therefore could expose WaterNSW to revenue risk. In response, the ACCC acknowledges that, assuming IPART continues to approve WaterNSW’s specific charges (as opposed to setting a revenue cap and allowing WaterNSW to have discretion on charging structure), it is possible that IPART could reject charge proposals made by WaterNSW on a range of grounds. However, the ACCC considers that in rejecting a particular pricing proposal, IPART would nevertheless provide for WaterNSW to recover its prudent and efficient costs, by determining charges directly or allowing WaterNSW to submit a different proposal for approval.<sup>276</sup>

The ACCC also notes that its suggestion in the Draft Advice of levying a variable charge when water is allocated, rather than used, was supported by Waterfind but not by WaterNSW. The ACCC continues to consider that this suggestion may have merit, for the following reasons:

- The charge would be payable by customers whose NSW WAEs have water allocated to them, regardless of subsequent use, trade, or forfeiture decisions. This would mean that this charge would not distort decision-making as it would be treated as a ‘sunk cost’.<sup>277</sup> Also, it could help ameliorate the level of variable charges in NSW valleys (such as the Peel Valley) where there is a substantial amount of forfeiture.<sup>278</sup>
- This charging basis partially retains the characteristic of a ‘variable’ charge in that it is levied only when water is actually available (which better aligns with most customers’ income streams

<sup>275</sup> For example, because the buyer is located in a different jurisdiction to the infrastructure operator providing the service.

<sup>276</sup> Both the Water Charge (Infrastructure) Rules 2010 (WCIR) and NSW state legislation require IPART to be satisfied that the forecast revenue from regulated charges is reasonably likely to meet that part of prudent and efficient costs of providing infrastructure services that are not met from other sources.

<sup>277</sup> The ACCC does not share stakeholder views that this charging practice would introduce a ‘price floor’ into NSW water allocation markets. The ACCC notes that from a trade perspective this proposal is akin to moving towards a higher fixed-variable split. In Victoria, where on-river charges are 100 per cent fixed, a ‘price floor’ does not appear to have emerged—which is expected given that ‘fixed’ charges should be viewed as sunk costs when making trading decisions.

<sup>278</sup> Under current arrangements, users who forfeit can avoid contributions toward fixed costs that are recovered through variable charges. This has the effect of raising variable charges for customers in that valley who do use water.

than levying fixed charges), without being limited to only being paid by customers who actually *use* water.

- This charging basis avoids the potential for inter-temporal mismatch between when costs are incurred and when they are recovered.

However, the ACCC acknowledges feedback from consultation with WaterNSW that practical changes such as changes to information technology systems may be required to implement this change, and that in any case such a change would need to be approved by IPART. The ACCC supports further consideration of this possibility and consideration of other innovative arrangements, which lessen trade distortions.

### **Response to additional concerns raised by Waterfind**

The ACCC agrees with Waterfind that the water charge rules do not prevent outright prohibitions on temporary trade of irrigation right, and also that restrictions of this kind are not clearly dealt with under the Basin Plan water trading rules (or the water charge rules or Water Market Rules 2009 (WMR)), since they involve temporary trade of water allocated to an irrigation right. The ACCC considers that this is not a matter that can be dealt with under the water charge rules, but supports consideration during any future review of the Basin Plan water trading rules of the merits of making amendments to address these issues.

In relation to Waterfind's request that the rules define 'reasonable administration costs', the ACCC considers that it is more appropriate for the ACCC to issue guidance on what constitutes a reasonable / necessary administration cost, rather than defining such terms in the rules. This is the approach taken for the similar existing rule in the WMR.

The ACCC considers that its proposed rule 10A in the Draft Advice *would* prevent volume-based transaction charges being imposed by off-river infrastructure operators, unless such fees could be shown to reflect the reasonable and efficient administrative costs of processing a trade. However, as detailed above the ACCC's revised rule advice is to allow the levying of infrastructure charges at the time of trade in certain circumstances, which could include volume-based transaction charges. The ACCC notes that such charges should not be viewed as administration charges.

The ACCC does not share Waterfind's view that the rules should 'cap' transaction charges levied by infrastructure operators to being no more than those imposed by Basin States. The proposed rules already limit transaction fees by requiring them to reflect reasonable and efficient administrative costs of trade processing. Further, the ACCC considers that linking operator transaction fee maximums to state fees is not suitable because the costs of trade processing will differ between the operator and Basin States.

### **Regulatory burden of requiring that transaction charges reasonably reflect administrative costs**

In response to the NIC's argument that the proposed rule—limiting infrastructure charges to amounts reflecting the reasonable and efficient administrative costs of processing a trade or termination—will impose unreasonably high administration costs on operators, the ACCC notes that the WMR already impose a similar rule in relation to fees for processing transformation applications (WMR 13(2)). While the ACCC has examined operators' transformation application fees that appear too high on several occasions, on the whole operators do not appear to have been burdened by this WMR requirement.

Also, the ACCC notes that where a transaction charge on the trade of water *out* of an operator's area is the same as the transaction charge on the trade of water *into* an area, there would be a degree of comfort that the charges were not being inflated beyond an amount reflecting the reasonable and efficient administrative costs of the operator.

The ACCC does not consider that the regulatory costs of this rule will be as significant as NIC has argued.

### **Application of rule in relation to termination**

The ACCC maintains its view that this rule should extend to prohibit transaction charges being levied when a customer terminates their right of access, except where an infrastructure charge reflects the administration costs incurred in processing the termination. The ACCC has slightly amended its draft rule advice to allow for administration charges to reflect the 'reasonable and efficient costs' rather than the costs 'necessarily incurred'.

This rule will not limit an operator's ability to levy a termination fee consistently with rules governing termination fees; rather it will limit an operator's ability to levy an additional transaction charge beyond those which recover only the reasonable and efficient costs of processing a termination.

The ACCC notes that in many cases termination occurs together with transformation. Since the WMR already provide for an operator to levy an administration fee, which reflects the reasonable and efficient costs of processing transformation, an operator should take this into account and ensure that a fee levied in respect of a joint termination and transformation application recovers only the reasonable and efficient costs.

## 5.4 Schedule of Charges (Part 4)

### 5.4.1 Information to be included on a Schedule of Charges

#### **Rule advice 5-E**

##### *Schedule of Charge requirements for infrastructure operators*

The rules should be amended to provide that an infrastructure operator must adopt a Schedule of Charges which sets out its infrastructure charges and planning and management charges in accordance with the rules.

The rules should provide that the Schedule of Charges may not come into effect, and the listed charges should not apply, earlier than the date the operator adopts its Schedule of Charges, except in the limited circumstances described in rule advice 5-I.

The rules should require that the Schedule of Charges ceases to be in effect for the operator when another Schedule of Charges that has been adopted by the infrastructure operator comes into effect.

This rule advice is implemented in rule 11 of the proposed Water Charge Rules.

##### *Information that must be included on a Schedule of Charges*

The rules should require that a Schedule of Charges adopted by an infrastructure operator must contain the following information.

For each infrastructure charge or planning and management charge:

- (a) the name of the charge (and the period during which the charge applies, if that period is different from the period that the Schedule of Charges is in effect);
- (b) the circumstances in which the charge is payable including, if applicable, the following:
  - i. the class of person required to pay the charge;
  - ii. the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;
  - iii. the class of water access right, water delivery right or irrigation right to which the charge relates;
- (c) either:
  - i. the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine that amount; or
  - ii. for a charge that reflects the costs of physically connecting, or physically disconnecting a customer from the operator's water service infrastructure—a statement that the charge will be determined at the time of the connection or disconnection;
- (d) the details of any general discount or surcharge, including the circumstances under which the discount or surcharge applies (e.g. a discount for early payment);
- (e) when the charge is payable and, if payable by instalments, the number of instalments and intervals at which the charge is payable;
- (f) if applicable, the following:
  - i. who determined the charge (if it was not determined by the operator or



- person adopting the Schedule of Charges);
- ii. who the charge is payable to (if it is not payable to the operator or person adopting the Schedule of Charges);
- iii. the name of the agency or person for whom the charge is being collected.

For each infrastructure charge:

- (g) a description of the infrastructure service to which the charge relates;
- (h) if applicable, the information required by (proposed) subrule 9(13A) (see rule advice 5-K);

For each planning and management charge:

- (i) the legislative, contractual or other authority for the charge.

The Schedule of Charges should also include the following general information:

- (j) the date on which the Schedule of Charges comes into effect (or will be taken to have come into effect);
- (k) a statement setting out the following:
  - i. the process used to determine the infrastructure charges or planning and management charges (this should be at the general level, rather than for each individual charge);
  - ii. how a person may participate in the process to determine the infrastructure charges or planning and management charges;
  - iii. how a person can make an enquiry or resolve a dispute with the infrastructure operator in relation to a regulated water charge;
  - iv. if applicable—any generally available discounts, surcharges or hardship policies;
  - v. if applicable—how the infrastructure operator has determined or calculated the infrastructure charges it levies to recover charges in accordance with rule advice 5-Y;
  - vi. any other information the operator considers reasonably necessary or desirable to explain the charges to the customer.

*See also rule advice 5-J, 5-K and rule advice 5-Y.*

This rule should be a civil penalty provision.

This rule advice is implemented in rules 11 and 13 of the proposed Water Charge Rules.

#### *Conditions applying to infrastructure charges and planning and management charges*

The rules should clarify that an infrastructure operator must not levy an infrastructure charge or planning and management charge that is not specified, for the circumstances in which it is levied, in a Schedule of Charges that is in effect for the operator when:

- for an infrastructure charge – the relevant infrastructure service was provided;
- for a planning and management charge – the circumstances set out in the Schedule of Charges for incurring the charge are met.

This rule should be a civil penalty provision.

The rules should ensure that an infrastructure operator does not contravene this provision if:

- the charge is exempt (see proposed subrule 11(7), rule advice 5-J); or
- the charge is levied retrospectively in accordance with the relevant rules which allow

for retrospectivity (see rule advices 5-I and 5-Y).

*Note:* The effect of these rules is that, in order to be able to levy a infrastructure charge or a planning and management charge, a Schedule of Charges must be adopted in accordance with the rules (see proposed rule 11) and include the information set out above (see proposed rule 13).

This rule advice is implemented in rules 7 and 11(7) of the proposed Water Charge Rules.

## **Rule advice 5-F**

### *Schedule of Charge requirements for persons other than infrastructure operators*

The rules should be amended to provide that a person, other than an infrastructure operator, who determines or levies planning and management charges, or on whose behalf such charges are collected, may adopt a Schedule of Charges which sets out planning and management charges in accordance with the rules.

The rules should provide that the Schedule of Charges may not come into effect and the listed charges should not apply earlier than the date the Schedule of Charges is adopted, except in the limited circumstances described in rule advice 5-I.

The rules should provide that the Schedule of Charges ceases to be in effect for the person who levies the charges when another Schedule of Charges that has been adopted in accordance with the rules comes into effect for the person.

This rule advice is implemented in rule 12 of the proposed Water Charge Rules.

### *Information that must be included on a Schedule of Charges*

The rules should require that a Schedule of Charges adopted by a person (other than an infrastructure operator) must include the following information for each planning and management charge on its Schedule of Charges:

- (a) the name of the charge (and the period during which the charge applies, if that period is different from the period that the Schedule of Charges is in effect);
- (b) the circumstances in which the charge is payable, including, as applicable, the following:
  - i. the class of person required to pay the charge;
  - ii. the water resource, catchment or district, and the water resource plan or other plan, to which the charge relates;
  - iii. the class of water access right, water delivery right or irrigation right to which the charge relates;
- (c) the amount of the charge (whether expressed as a dollar amount or as fee units) or details of rates, and all other details necessary to determine that amount;
- (d) the details of any general discount or surcharge, including the circumstances under which the discount or surcharge applies (e.g. a discount for early payment);
- (e) when the charge is payable and, if payable by instalments, the number of instalments and intervals at which the charge is payable;
- (f) if applicable, the following:
  - i. who determined the charge (if it was not determined by the person adopting the Schedule of Charges)
  - ii. the name of the agency or person for whom the charge is being collected
  - iii. who the charge is payable to (if it is not payable to the person adopting the

### Schedule of Charges;

(g) the legislative, contractual or other authority for the charge.

The Schedule of Charges should also include the following general information:

(h) the date that the Schedule of Charges comes into effect (or will be taken to have come into effect);

(i) a statement setting out the following:

- i. the process used to determine the planning and management charges (this should be at the general level, rather than for each individual charge);
- ii. how a person may participate in the process used to determine the planning and management charges;
- iii. how a person can make an enquiry or resolve a dispute with the person who adopted the Schedule of Charges in relation to a regulated water charge;
- iv. if applicable – any generally available discounts, surcharges or hardship policies;
- v. any other information that is reasonably necessary or desirable to explain the charges to the customer.

This rule should be a civil penalty provision.

This rule advice is implemented in rules 12 and 13 of the proposed Water Charge Rules.

### *Conditions applying to planning and management charges*

The rules should clarify that a person, other than an infrastructure operator, must not levy a planning and management charge that is not specified, for the circumstances in which it is levied, in a Schedule of Charges that is in effect for the person at the time when the circumstances set out in the Schedule of Charges for incurring the charge are met.

This rule should be a civil penalty provision.

The rules should ensure that person levying a planning and management charge does not contravene this provision if the charge is levied retrospectively in accordance with the relevant rules which allow for retrospectivity (see rule advice 5-I).

*Note:* For a Schedule of Charges to come into effect, it must be adopted in accordance with the rules (see proposed rule 12) and include the information set out above (see proposed rule 13).

This rule advice is implemented in rule 7 of the proposed Water Charge Rules.

### *Background*

Part 4 of the Water Charge (Infrastructure) Rules 2010 (WCIR) currently requires all infrastructure operators to produce a Schedule of Charges (“Schedule”) to promote pricing transparency and enable customers (and potential customers) to make comparisons across infrastructure operators.

### **Information to be included about infrastructure charges and planning and management charges**

Part 4 prohibits infrastructure operators from imposing a regulated charge<sup>279</sup> relating to an infrastructure service unless that charge is listed in their Schedule and a copy of the Schedule has been

<sup>279</sup> The WCIR define a regulated charge as a subset of ‘regulated water charges’ as defined in section 91 of the *Water Act 2007* (Cth). More specifically, it means a charge of a kind referred to in paragraph 91(1)(a), (b) or (d) of the *Water Act 2007*, but does not include:

(a) a fee to which rule 13 of the Water Market Rules 2009 applies; or

(b) a fee to which rule 6 or 8 of the Water Charge (Termination Fees) Rules 2010 applies.

As set out in section 4.3.1, the ACCC has proposed to rename such charges as ‘infrastructure charges’.

given to the customer. Rule 4 provides the definition of what must be included for a document to be a Schedule of Charges that complies with the Rules:

- all regulated charges the infrastructure operator may levy in respect of an infrastructure service it provides
- details of the regulated charges sufficient to enable a customer to determine its liability
- details of discounts or surcharges applicable to regulated charges
- if the Schedule is issued by an irrigation infrastructure operator (IIO) and regulated charges are of the type referred to in subsection 91(1)(a) of the *Water Act 2007* (the Act),<sup>280</sup> the Schedule must include a statement which sets out the process for determining the amount of those regulated charges, showing separately components attributable to:
  - storage
  - bulk water charges (equivalent to charges for on-river infrastructure services)
  - connecting or disconnecting a customer
  - holding of, or management of, a water access entitlement (WAE) by the IIO.

The Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) also require a person who determines a planning and management charge (usually a Minister or another government executive or a delegate of that person) to publish certain information on that charge (see also section 5.4).

In its Draft Advice, the ACCC noted that the current rule requirements governing what information an infrastructure operator should provide to its customers (on the Schedule) are phrased in terms of *outcomes*. For example, under the current rules, an operator must “include details of the regulated charges sufficient to enable a customer...to determine the customer’s liability...”<sup>281</sup> In practice, to achieve this outcome, an operator must provide a range of information such as the amount of the charge, who is required to pay the charge, what type or class of right the charge is levied on, etc. The rules currently do not explicitly state what information must be provided for the operator to comply with the rule requirements. This formulation creates uncertainty for the operator, which could result in further regulatory costs. Additionally, it is likely to result in considerable differences in the level and type of information provided across operators, which provides less transparency for irrigators and other customers.

Accordingly, in the Draft Advice, the ACCC proposed a more direct approach, under which the rules will clearly specify what is required to achieve the intended outcomes. In setting out the information requirements, the ACCC proposed that the specific requirements for each charge (set out below) should be closely based on a subset of the current requirements in rule 4 of the WCPMIR. The ACCC considers that the current drafting of the WCIR already requires substantially similar information in relation to information to be provided by infrastructure operators, but by employing the approach of rule 4 of the WCPMIR, the information requirements for infrastructure operators (and other entities who determine planning and management charges) will be much clearer.<sup>282</sup>

#### *Application of Schedule of Charges rule*

Currently, the WCIR, in conjunction with the WCPMIR, require the publication of different types of information about charges, at different times, depending on whether the charges are infrastructure

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<sup>280</sup> Subsection 91(1)(a) refers to fees or charges payable to an IIO for access to the IIO’s irrigation network, changing or terminating access to the irrigation network, or surrendering a right to the delivery of water through the irrigation network.

<sup>281</sup> WCIR rule 4 subparagraph (b), definition of *schedule of charges*.

<sup>282</sup> Note: the ACCC proposes to repeal the requirements to publish information about water planning and management activities related to planning and management charges and the costs of those activities. See chapter 7 for further discussion.

charges or planning and management charges. Information requirements also differ depending on whether infrastructure charges or planning and management charges are imposed by an infrastructure operator, IIO or some other entity.

In its Draft Advice, the ACCC considered that the Schedule of Charges requirements should be standardised across all operators and should not differ based on the operator's size or ownership status. This will ensure that all customers are provided with the same access to information regardless of the size or ownership status of their operator. It will also streamline the application of the rules, making it simpler for operators to understand the rule requirements. In combining the three sets of water charge rules, the ACCC also sought to harmonise the requirements, related to the information to be included on a Schedule of Charges, which apply to infrastructure operators and entities other than infrastructure operators who determine planning and management charges.

### **General information**

One aim of the current Schedule of Charges requirements, in conjunction with the Network Service Plan (NSP) requirements of WCIR Part 5, is that customers be able to understand, and participate in, the operator's processes for setting charges. In the Draft Advice, the ACCC recognised stakeholder feedback that Part 5 requirements place too great a cost on operators in an attempt to achieve these (and other) ends. Also, the ACCC considered that the current information requirement specified in rule 4(b), which requires the infrastructure operator to "include details of the regulated charges sufficient to enable a customer...to determine the customer's liability under the regulated charges..." does not provide sufficient clarity for an operator to know whether the rule requirement has been fulfilled. The ACCC further noted that it is not always clear whether, and how, a customer can seek to participate in the operator's processes for setting charges.

Accordingly, the ACCC proposed that an infrastructure operator should be required to include on its Schedule of Charges a statement setting out the process(es) by which:

- (a) the infrastructure operator determined the regulated water charges contained in the Schedule of Charges (this should be at the general level, rather than for each individual charge);
- (b) a customer may participate in the infrastructure operator's processes for determining the regulated water charges in the Schedule of Charges;
- (c) a customer can make an enquiry or resolve a dispute with the infrastructure operator in relation to regulated water charges.

An entity other than an infrastructure operator who determines planning and management charges should also be subject to these requirements.

### **Prescribed template**

In the Draft Advice, the ACCC accepted feedback from a majority of stakeholders that a prescribed template for the Schedule of Charges would not provide a net benefit for infrastructure operators and their customers. Waterfind was the main stakeholder who supported a prescribed template on the grounds that it would be useful to customers (both existing and potential new customers) and operators (in achieving compliance with the rules).<sup>283</sup> The ACCC also noted the National Irrigators' Council's (NIC's) recommendation for the ACCC to produce a glossary of terms.<sup>284</sup> The ACCC considered that the concerns of Waterfind, the NIC and other stakeholders with similar views can better be addressed via guidance material than a specific rule requirement.

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<sup>283</sup> Waterfind, Issues Paper Submission, July 2015, p.3.

<sup>284</sup> National Irrigators' Council, Issues Paper Submission, July 2015, pp.8-9.

The ACCC will produce a Schedule of Charges template in its guidance material that operators *may* use. In producing this guidance template, the ACCC will provide a list or glossary of suggested terms that an operator may also use when forming its own Schedule of Charges.

### *Stakeholder feedback*

A number of submissions to the Act Review raised concerns over ‘government charges’ specifically in relation to open and transparent price determination of the Murray-Darling Basin Authority’s (MDBA’s) River Murray Operations (RMO) charges.<sup>285</sup> These submissions and associated issues are considered in more depth in section 5.12.

Eight submissions to the ACCC’s Issues Paper made comments relating to information to be included on a Schedule of Charges. Some submissions also made comments on other aspects relating to the Schedule of Charges such as publication requirements and transparency of ‘pass through’ charges. These are discussed in sections 5.4.2 and 5.13, respectively. Infrastructure operators who gave feedback generally agreed that Schedules of Charges were useful to customers but did not support the introduction of a mandatory template for Schedules of Charges. These operators were also generally of the view that their customers are happy with the information they provide. However, feedback from customers and from a water market intermediary indicated that in some cases the information provided by operators is difficult to understand, or that there is insufficient information provided. Several stakeholders participating in the ACCC’s first round of consultation supported transitioning to more consistent use of terminology across the Basin.<sup>286</sup>

There was a significant but varied response from stakeholders in response to the Draft Advice in relation to the proposed amendments to the rules relating to the information to be included on a Schedule of Charges.

Many stakeholders support the proposed amendments and the objective of improving pricing transparency.<sup>287</sup> The Commonwealth Environmental Water Holder (CEWH) and Goulburn-Murray Water (GMW) identified that pricing transparency is important for efficient decision-making and / or allocation of resources.<sup>288</sup> GMW added that the proposed amendments are consistent with, among other things, GMW’s intention to improve its Schedule of Charges.<sup>289</sup> The CEWH identified in particular, that the proposed amendments that seek to “clearly identify the purpose for which specific charges are being levied and the circumstances under which those charges will be applied”, support the objective of price transparency.<sup>290</sup> The CEWH added that he “recognise[s] the important role that the Water Charge Rules play in providing a framework for determining and transparently communicating relevant water charges...”.<sup>291</sup> The Local Government Association of Queensland

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<sup>285</sup> The National Farmers’ Federation submitted its view that the recovery of MDBA costs is the “greatest area of inconsistency in water charging”. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9, 16. Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, July 2014, p.8; NSW Government, Submission to the Independent Review of the Water Act 2007, 2014, p.2; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, 2014, pp.3, 9; Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, pp.2-3; State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41.

<sup>286</sup> See ‘stakeholder feedback’ in section 5.4.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.60-62.

<sup>287</sup> Victorian Farmers’ Federation, the Commonwealth Environmental Water Holder, Goulburn-Murray Water, the Local Government Association of Queensland.

<sup>288</sup> Goulburn-Murray Irrigators, Draft Advice Submission, March 2016, p.2.

<sup>289</sup> *ibid.*

<sup>290</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>291</sup> *ibid.*, p.4.

(LGAQ) identified that it supports amendments that seek to improve transparency and noted that the requirements under Part 4 of the WCIR have improved pricing transparency in Queensland.<sup>292</sup>

The Victorian Farmers' Federation (VFF) support rule advices 5-E and 5-F. The VFF noted that there are differences in charging arrangements between jurisdictions and infrastructure operators. The VFF submitted that rule advices 5-E and 5-F provide infrastructure operators with the flexibility to modify their Schedule of Charges to suit their charging arrangements while also providing customers with sufficient information. The VFF added that they support a template Schedule of Charges being developed as a guide to infrastructure operators.

Other stakeholders expressed concerns about the proposed amendments to the information to be included on a Schedule of Charges, particularly in relation to the compliance costs. The NIC submitted that the proposed amendments would increase regulatory burden.<sup>293</sup> The National Farmers' Federation (NFF) submitted its view that the benefits of the proposed amendments do not outweigh the costs.<sup>294</sup> The LGAQ submitted that the requirements should not unreasonably and unnecessarily increase costs for infrastructure operators, which are subsequently passed onto customers.<sup>295</sup>

Some stakeholders identified the impact of regulatory costs on smaller infrastructure operators. For example, the NFF is concerned about the compliance costs that the proposed amendments will impose on smaller IIOs who do not have business systems that would support the detail they thought would be required in the proposed rules.<sup>296</sup> Similarly, the NIC and Western Murray Irrigation (WMI) noted that smaller operators do not benefit (in terms of an offsetting reduction in regulatory costs) from the proposed repeal of the NSP.<sup>297</sup> WMI added that the review process "should not seek to trade one cost against a benefit, where the future benefits and current costs are unevenly distributed".<sup>298</sup>

The NIC also commented that the proposed amendments are "more lengthy, detailed and prescriptive".<sup>299</sup>

The Queensland Farmers' Federation (QFF) submitted that the proposed amendments are unnecessary and duplicate the information that SunWater is required to publish on its annual NSP for its irrigation schemes (the NSP is prepared as part of the Queensland Competition Authority's (QCA's) recommendation to the Queensland Minister in relation to SunWater's irrigation charges).<sup>300</sup>

SunWater suggested that there might need to be further amendments to rule advice 5-E to require infrastructure operators to provide information about Community Service Obligations (CSOs) and subsidies, and how these benefit customers in the charges that they pay.<sup>301</sup> This suggestion was provided within the context that SunWater's charging arrangements for irrigation and non-irrigation customers differs due to government policies that cap and subsidise irrigation charges at the lower-bound level of cost recovery (see section 5.6 for more detail). SunWater submitted that it recognises that it could improve the format and presentation of the information that it provides to customers

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<sup>292</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.8.

<sup>293</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.12.

<sup>294</sup> National Farmers' Federation, Draft Advice Submission, March 2016, p.2.

<sup>295</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.8.

<sup>296</sup> National Farmers' Federation, Draft Advice Submission, March 2016, p.2.

<sup>297</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.2; National Irrigators' Council, Draft Advice Submission, March 2016, p.12.

<sup>298</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>299</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.12.

<sup>300</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.4.

The Queensland Farmers' Federation added that it "has supported the preparation of the Network Service Plans for this period to provide a transparency annual reporting process on the implementation of the prices recommended by the Queensland Competition Authority (QCA). The annual plans will also provide data for and efficiencies in the conduct the next price investigation".

<sup>301</sup> SunWater, Draft Advice Submission, March 2016, p.5.

about irrigation, non-irrigation and upper-bound prices to better reflect the effect of the Queensland Government’s policy and the amount of the subsidy. SunWater suggested that this could be implemented through the additional amendment to rule advice 5-E.

### ACCC assessment

#### Responses to stakeholder feedback

The ACCC supports stakeholder feedback about the importance of pricing transparency to facilitate informed decisions and the efficient functioning of the water market. The ACCC maintains that the amendments proposed in the Draft Advice regarding the information to be included on a Schedule of Charges will significantly improve customers’ ability to understand and compare operators’ charging arrangements.

The ACCC notes stakeholder concerns that the proposed amendments to the information to be included on a Schedule of Charges will significantly increase compliance costs. However, the ACCC is of the view that many of the proposed amendments are not in excess of what operators should currently be providing on their Schedule of Charges in accordance with the current rules.<sup>302</sup> As previously discussed, the issue with the current rules is that they refer generally to a ‘Schedule of Charges’, which is a defined term phrased in terms of outcomes, rather than explicitly stating what information must be provided for the operator to comply with the rule requirements. The ACCC considers that the uncertainty associated with the high-level definition of the Schedule of Charges in the existing rules creates significant uncertainty for operators, as they must interpret what information must be included on their Schedule. The proposed amendments seek to achieve those outcomes (that is, the intent of the rule largely remains the same), but in a manner which imposes less uncertainty on the operator about what information they must provide.

Table 5.3 below compares the current WCIR requirements for what a Schedule of Charges must include (in relation to infrastructure charges only, as the WCIR do not relate to planning and management charges). Currently, the content of a Schedule of Charges is specified under rule 4. The table compares each element of rule 4 to the proposed approach.

**Table 5.3 Comparison of existing and proposed information to be included on a Schedule of Charges**

Existing WCIR requirements	Proposed requirement in the Final Advice
<i>4(a) The schedule of charges must set out all regulated charges<sup>303</sup> that the operator may levy in respect of an infrastructure service provided by the operator</i>	<b>Retained</b> via requirements in rule 12, which requires that, “for each” infrastructure charge of the operator, the Schedule of Charges must include the name of the charge and other details (described below in this table)
<i>4(b) includes details of the regulated charges sufficient to enable a customer of the infrastructure operator to determine the customer’s liability under the regulated charges in respect of a period during which the customer receives, or is entitled to receive, infrastructure services from the infrastructure operator.</i>	<b>Retained</b> via a requirement for the Schedule to provide a description of the infrastructure service to which each charge relates. <b>Added</b> a clear requirement for operators to set out the date that the Schedule of Charges takes effect (or the date that individual charges are in effect, if that period is different to the period that the Schedule of

<sup>302</sup> The ACCC is proposing further amendments to rules 7 and 11 such that the requirement to ‘not levy a charge that is not listed on the Schedule of Charges’, is separate from the requirement to ‘send / publish a Schedule of Charges’.

<sup>303</sup> Note: the term “regulated charges” in the current WCIR has been re-labelled as “infrastructure charges” in the proposed water charge rules. See rule advice 4-B.



<p>The ACCC has provided the following detailed guidance<sup>304</sup> on what would be needed to ensure this requirement is satisfied:</p> <p>“In order to enable customers to determine their liability with respect to regulated charges, a schedule of charges must specify details of the type of infrastructure services provided by the operator. Such details must include the breakdown of associated regulated charges in accordance to the pricing policy used to levy these charges.</p> <p>For each infrastructure service provided, the schedule of charges should specify:</p> <ul style="list-style-type: none"> <li>• the fixed and variable components of multi-part tariffs, including the basis of the charge—e.g. ML of entitlement, hectares, number or type of outlets</li> <li>• inclining block tariffs, if used—e.g. flat charge for entitlements up to a fixed minimum</li> <li>• casual use charges and the basis on which they are levied</li> </ul> <p>[Details on regulated charges] may be broken down by:</p> <ul style="list-style-type: none"> <li>• geographical areas (e.g. valley or district)</li> <li>• infrastructure type (gravity fed channels or piped and pumped)</li> <li>• water quality (premium or standard; stock and domestic or irrigation).</li> <li>• charges for market segments where different rates apply to: <ul style="list-style-type: none"> <li>○ different geographical regions—e.g. valley/district</li> <li>○ segmentation by type of water right—e.g. stock and</li> <li>○ domestic/irrigation; type of water—e.g. high/general security</li> </ul> </li> <li>• differentials applying to: <ul style="list-style-type: none"> <li>○ different infrastructure—e.g. pumped and piped/gravity fed channels/combination of both</li> <li>○ different time of delivery—e.g. peak/off peak usage</li> <li>○ different customer groups—e.g. with enhanced delivery or drainage service”</li> </ul> </li> </ul>	<p>Charges is in effect).</p> <p><b>Retained</b> via a requirement that the Schedule must include the amount of each charge or details of rates and all other details necessary to determine that amount.</p> <p><b>Expressly added</b> a requirement for operators to set out when the charge is payable, and if payable by instalments, the number of instalments and intervals at which the charge is payable. (Note: if all charges are payable at the same date, then only one statement needs to be included on the Schedule of Charges).</p> <p><b>Retained</b> via a requirement that the Schedule must include the circumstances in which the charge is payable, which includes as applicable:</p> <ul style="list-style-type: none"> <li>(i) the water resources, catchment or district, and the water resource plan or other plan, to which the charge relates and / or</li> <li>(ii) the class of person required to pay the charges and / or</li> <li>(iii) the class of water access right, irrigation right or water delivery right to which the charge relates.</li> </ul>
<p><i>4(c) If a discount or surcharge applies to a regulated charge, include details of the discount or surcharge and the circumstances in which it is applicable.</i></p>	<p><b>Retained</b> to apply to discounts or surcharges in relation to particular charges and in general.</p> <p><b>Made compliance easier</b> via rule advice 5-J, section 5.4.3, which provides an automatic exemption for an operator to list particular types of discounts on their Schedule of Charges.</p>
<p><i>4(d) If the schedule is issued by an irrigation infrastructure operator and sets out regulated charges</i></p>	<p><b>Extended</b> to infrastructure operators that are not irrigation infrastructure operators.</p>

<sup>304</sup>ACCC, *A guide to the water charge (infrastructure) rules: Publishing and non-discriminatory charging requirements*, June 2011, pp.19-20, viewed June 2016, [https://www.accc.gov.au/system/files/Water%20charge%20rules%20-%20infrastructure%20-%20guide%20to%20publishing%20and%20non-discriminatory%20charging%20requireme\\_0.pdf](https://www.accc.gov.au/system/files/Water%20charge%20rules%20-%20infrastructure%20-%20guide%20to%20publishing%20and%20non-discriminatory%20charging%20requireme_0.pdf).

<p><i>that include fees or charges of a kind referred to in paragraph 91(1)(a) of the Act, the schedule of charges must include a statement setting out the process for determining the amount of those regulated charges.</i></p>	<p><b>Added</b> requirement to include a statement about how:</p> <ul style="list-style-type: none"> <li>• a person can participate in that process.</li> <li>• make an enquiry or resolve a dispute with the entity in relation to a regulated water charge.</li> </ul>
<p><i>4(d) If the schedule is issued by an irrigation infrastructure operator and sets out regulated charges that include fees or charges of a kind referred to in paragraph 91(1)(a) of the Act, the schedule of charges must include a statement showing separately, as applicable, the components of those charges attributable to:</i></p> <p>(i) <i>The storage of water in connection with infrastructure services provided through the irrigation network</i></p> <p>(ii) <i>Bulk water charges imposed on the operator by another infrastructure operator</i></p> <p>(iii) ... [see below]</p> <p>(iv) <i>The holding of, or management of, a water access entitlement [WAE] by the irrigation infrastructure operator.</i></p> <p>(iii) <i>Connecting or disconnecting a customer to water service infrastructure</i></p>	<p><b>Removed</b> requirement for operators to separately list the components of the charge attributable to the storage of water.</p> <p><b>Changed</b> to a general requirement to set out how the infrastructure operator has determined / calculated the infrastructure charges it levies to recover the cost of infrastructure charges and planning and management charges it incurs, in accordance with the proposed separate rule ‘pass-through’ requirements (see section 5.13 and rule advice 5-Y)</p> <p><b>Removed</b> requirement to separately set out the components of operator charges attributable to connection / disconnection.</p> <p><b>Made compliance easier</b> for where an operator does levy a separate charge that reflects the costs of physically connecting, or physically disconnecting a customer from the operator’s water service infrastructure, the operator may include a statement that the charge will be determined at the time of the connection or disconnection, instead of the amount of the charge.</p>
<p>(N/A)</p>	<p><b>Added</b> The following information should be provided about infrastructure charges and planning and management charges that the operator collects on behalf of another person, and planning and management charges that the operator levies, as applicable:</p> <ol style="list-style-type: none"> <li>a. Who determined the charge (if it is not determined by the person adopting the Schedule of Charges)</li> <li>b. Who the charge is payable to (if it is not payable to the operator or person adopting the Schedule of Charges)</li> <li>c. The name of the agency or person for whom the charge is being collected.</li> </ol> <p>The legislative, contractual or other authority for the charge (for a planning and management charge only).</p>

Table 5.3 demonstrates that the requirements about what information an infrastructure operator must provide on a Schedule of Charges is substantially the same as the information that operators should currently be providing in order to comply with the existing requirements in the WCIR. In particular, the existing requirement to provide *‘details of the regulated charges sufficient to enable a customer of the infrastructure operator to determine the customer’s liability under the regulated charges in respect of a period during which the customer receives, or is entitled to receive, infrastructure services from the infrastructure operator’* relies on the detail set out in the guidance material about what information must be provided to comply with the requirement. The ACCC considers that the proposed amendments remove uncertainty for infrastructure operators about what information they must provide on their Schedule of Charges to meet this requirement.

The main area where additional information requirements could apply is in relation to where an operator collects infrastructure charges or planning and management charges on behalf of another person (which is distinct from a situation where an operator levies its own charges to ‘pass through’ the cost of charges it incurs). Where this occurs, an operator must provide customers with details about the person the charge is being collected for, and the legislative, contractual or other authority for the charge. However, since most infrastructure operators do not collect charges on behalf of another person, these requirements will not apply to most infrastructure operators.

In the case where an operator determines a planning and management charge (on behalf of government), there are information requirements which apply under the current WCPMIR (not included in the table above). These requirements are largely unchanged in the current rules. However, these requirements do not apply to the majority of operators.

On balance, the ACCC does not consider that the proposed Schedule of Charges requirements will significantly increase the regulatory burden incurred by an infrastructure operator beyond that associated with the current rules. The ACCC maintains that it is important for customers of all infrastructure operators to be afforded a minimum, consistent level of transparency and that this can be achieved without placing a disproportionate burden on smaller infrastructure operators.

Consistent with the existing WCIR, the ACCC proposed that the requirements about the information to be included on a Schedule of Charges should apply to all operators.<sup>305</sup> Therefore, this rule advice does not increase the number of entities required to produce a Schedule of Charges.

The ACCC acknowledges that operators are likely to incur some costs initially to update their Schedules of Charges. However, the ACCC notes that in many cases, smaller infrastructure operators have quite simple tariff structures and these operators should in general only incur modest regulatory costs (over and above the existing requirements) to modify their Schedules. As such, the ACCC expects that the regulatory cost of the proposed amendments relating to Schedule of Charge requirements will largely be in proportion to the complexity of operators’ charging arrangements. Beyond this, the ACCC notes that there is currently a high degree of variance in the information provided on a Schedule of Charges between operators, and that not all operators are currently providing all the information required under the current rules. As such, operators who have provided insufficient information in the past will be required to make a greater degree of change to their Schedules of Charges compared to those whose current Schedules provide more information.

The ACCC notes the concern raised by NFF that smaller operators will be unable to comply with the proposed amendments due to not having the needed business system capabilities. In response, the

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<sup>305</sup> Under existing rule 7, all infrastructure operators (regardless of their size or ownership status) must provide their customers with a Schedule of Charges (which meets the definition of a Schedule of Charges in rule 4).

ACCC notes all the information proposed to be included on a Schedule of Charges should be readily available to the infrastructure operator. Therefore, the ACCC maintains its position that the application of the rules relating to the information to be included on a Schedule of Charges should not distinguish between infrastructure operators based on their size (and ownership status). The ACCC also notes that several revisions to its advice (e.g. in relation to ‘pass-through’ of charges incurred by operators (section 5.13) and accounting for customer contributions in relation to termination fees (section 6.2.1)) have the effect that the proposed rules are less prescriptive than those recommended in the Draft Advice. This means that the regulatory burden will be lessened. Overall, the ACCC is confident that the proposed amendments do not require operators to provide information that is beyond their current business system capabilities.

The ACCC is of the view that the proposed amendments will improve the level of consistency in the information provided to customers, which will make it easier for customers to understand their operator’s charging arrangements and compare charges across infrastructure operators. The ACCC considers that this information can be provided to customers while still providing operators with sufficient flexibility in how they set their charges and charging arrangements.

In recognition of the importance of operator discretion, the ACCC maintains its position from the Draft Advice that the rules should not include a template Schedule of Charges that infrastructure operators must follow as a requirement of the water charge rules. However, the ACCC does agree with the VFF that the publication of an ‘example’ Schedule of Charges in ACCC guidance could assist operators in complying with the rules in relation to the:

- amount of detail required to be published on the Schedule of Charges
- changes that operators will be required to make to their existing Schedule of Charges.

### **General information**

The ACCC notes that in the Draft Advice it was proposed that the rules should retain the requirement for operators to list on their Schedule of Charges a statement setting out how charges were determined and add that an operator should also list where customers can find out more information, and how they may participate in those processes. The intention of this statement is to provide transparency about the operator’s processes for determining charges such that customers can engage in, or query, those processes. The ACCC acknowledges that the NSP and associated consultation process may be one of the processes that the operator uses to determine its charges. However, to the extent that an operator is still required to produce a NSP – because either it is a requirement within the Basin State or the ACCC’s proposed amendment to repeal Part 5 is not accepted – and produce the information statement about the process for determining its charges and how to participate in that process, the ACCC is of the view that this will still not represent significant duplication. An operator can simply list that this is one of the processes that it uses to determine its charges – it does not have to duplicate any of the information contained in the NSP or consultation process itself.

The ACCC further notes that if the Minister accepts the ACCC’s proposal to repeal Part 5 of the rules (the NSP requirements), then the proposed statement about how charges were determined and where customers can find out more about those processes represents a significant reduction in regulatory costs for existing Part 5 operators (see sections 4.7 and 5.5 for further discussion).

The ACCC agrees with SunWater’s view that operators could be more transparent about government policies, subsidies and the consequential impact on charges. The ACCC considers that the proposed general information to be included in a Schedule of Charges is likely to such details where they are material to an infrastructure operator’s decision about the structure and level of its charges.

Additionally, the ACCC is proposing further amendments in section 5.6 to more clearly take into account government policies and subsidies in the approval / determination of infrastructure charges.

### **Discounts and surcharges**

The ACCC notes that the proposed rule amendment in the Draft Advice relating to the information that must be included on a Schedule of Charges does not clearly require general discounts and surcharges to be listed (e.g. for the early / late payment of an invoice). The ACCC considers that general discounts / surcharges should be set out on a Schedule of Charges, along with the circumstances in which they would apply. This should apply to discounts / surcharges applicable to a particular charge or charges, or discounts / surcharges on the overall amount paid by the customer. However, any such requirement should not extend to discounts provided to an individual customer or customers for reasons of the customer(s) hardship or in recognition of service disruption (see section 5.4.3).

### **Interaction with rule 7 (conditions applying to infrastructure charges and planning and management charges)**

Rule 7 of the WCIR currently includes a requirement that an infrastructure charge cannot be levied unless it is set out on a Schedule of Charges *that has been provided to the customer within the specified timeframes*. In the Draft Advice, the ACCC sought to divide this into three separate (express) requirements:

- (i) that an operator's Schedule of Charges must include all the relevant information prescribed in the rules (replacing the definition of a Schedule of Charges in rule 4 of the WCIR);
- (ii) that an operator must not levy a charge unless it is on their Schedule of Charges;
- (iii) that an operator must send / publish their Schedule of Charges within specified timeframes.

The intent of these amendments was to improve the operation of the rules such that (unlike the existing rules) an operator would not be penalised for, or prevented from, levying a charge that *was* listed on their Schedule of Charges but, for one reason or another, the Schedule had not been *provided* to the customer.<sup>306</sup> The ACCC also proposed that these requirements should be extended to other persons levying planning and management charges, consistent with the ACCC's proposed advice to harmonise the requirements for infrastructure charges and planning and management charges.

The ACCC maintains the intent of these amendments in the Final Advice; however, in relation to requirement (ii), the proposed rule 7 published with the Draft Advice only required that a charge *not exceed* the amount listed on the Schedule of Charges. The ACCC's Final Advice clarifies the wording of the proposed amendment, to reflect the policy intent. That is, that an infrastructure operator (or other relevant person) can only levy an infrastructure charge or planning and management charge if:

- the charge is specified in the Schedule of Charges in effect at the time the infrastructure service is provided (and for planning and management charges- at the time the circumstances set out in the Schedule of Charges for incurring the charge are met) and
- the charge is levied in accordance with that Schedule of Charges (i.e. at the amount or rate and in the circumstances specified in the Schedule of Charges).

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<sup>306</sup>For example, the Schedule of Charges may have been sent to the customer but: the customer received it with only five business days' notice instead of the required 10 or it was lost in the mail. This complements another proposed amendment to the publication requirements to clarify that an operator is taken to have given a Schedule of Charges on the day it is sent, rather than the day it is received by the customer (see section 5.4.2).

Further, since releasing the Draft Advice and after considering stakeholder feedback, the ACCC considers that it is necessary to ensure that the rules provide scope for some charges to be levied despite not being specified in a Schedule of Charges. The ACCC proposes to allow for a degree of retrospectivity in certain circumstances where it is not practicable for the operator or person to publish those charges before providing an infrastructure service (or circumstances for incurring a charge are met). The ACCC considers that in these circumstances, an operator should not be prevented from levying a charge until it adopts a new Schedule of Charges, nor be required to incur the costs entailed in re-sending and re-publishing a Schedule of Charges within a short period of time before it can levy the charge.

The rules provide for these exemptions and retrospective application of charges in the following limited circumstances:

- Charges levied under the proposed “pass-through rule” (rule 9A) may apply retrospectively (up to the time the charges incurred by the operator commenced) (see section 5.4.2 and section 5.13)
- Charges are allowed to apply retrospectively due to a delay in the approval or determination of a person’s infrastructure charges or planning and management charges that are determined by another entity (see section 5.4.2).
- Some infrastructure charges do not need to be included on a Schedule of Charges (i) at all, or (ii) until the operator next adopts a new Schedule of Charges (see section 5.4.3).

In these circumstances, the proposed requirements in rule 7 will not preclude a person (including an infrastructure operator) from levying an infrastructure charge or planning and management charge despite the charge not being listed on the Schedule of Charges at the time the infrastructure service is provided (or, for a planning and management charge, at the time the circumstances for incurring the charge are met).

### **Interaction with rule 9A (pass-through requirements)**

In the Draft Advice, the ACCC proposed detailed rules about how certain categories of pass-through charges must be recovered to address concerns about the transparency of cost pass-throughs and to ensure that the pass-through mechanism does not distort customer decision-making (see section 5.13). Accordingly, the ACCC proposed that operators should be required to provide certain information on their Schedule of Charges about these cost pass-throughs including:

- for each planning and management charge recovered from customers in accordance with proposed rule 9A – the name of the entity levying the charge on the infrastructure operator
- for each infrastructure charge levied in accordance with proposed rule 9A – the name, amount and entity levying the charge being recovered and how the infrastructure charge levied by the infrastructure operator was determined.

In the Final Advice, the ACCC maintains the policy intent of the cost pass-through requirements but proposes to achieve this intent through simpler, less prescriptive rules (see section 5.13). Accordingly, in the information requirements for the Schedule of Charges, the ACCC is proposing that an infrastructure operator only be required to set out *in general terms* (on its Schedule of Charges) how it determined its own charges to recover the cost of infrastructure charges and planning and management charges that it incurs, rather than doing so for each such charge. The statement should be in general terms, but provide enough information to enable customers to understand the relationship between the range of infrastructure charges and planning and management charges incurred by the operator and infrastructure charges levied by the operator to recover these costs.

## Summary of ACCC assessment

In summary, the ACCC's Final Advice is to:

- provide greater clarity about the information that should be included on the Schedule of Charges by replacing the existing WCIR requirements, which are indirect and framed in terms of outcomes, with more direct requirements about what is required to achieve those outcomes.
- improve the operation of the existing WCIR provisions, which prevent an operator from levying a charge in certain circumstances.
- harmonise the Schedule of Charges requirements applying to infrastructure operators and other persons in relation to the information that must be provided about, infrastructure charges and planning and management charges, and the circumstances in which these charges can be levied.

### 5.4.2 Publication requirements

#### Rule advice 5-G

The rules should be amended to require all infrastructure operators who have a website to publish their Schedule of Charges on a page on their website that is easily and publicly accessible (not only operators servicing over >10 GL of water access entitlement).

This rule advice is implemented in rule 15 of the proposed Water Charge Rules.

#### Rule advice 5-H

The rules should be amended to remove requirements to publish a Schedule of Charges in a local newspaper or in the *Gazette*.

See also rule advice 5-L.

This rule advice is implemented in the repeal of current WCIR rule 15(1)(b) and (c).

#### Rule advice 5-I

##### *Timeframes to give / publish the Schedule of Charges*

The rules should be amended to change the current timeframes for when a Schedule of Charges that has been adopted by a person (including infrastructure operator) must be given (see below advice on the meaning of "give" in this context):

- For an infrastructure operator who levies an infrastructure charge in relation to either:
  - a bulk water service in respect of water access rights; or
  - infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State,<sup>307</sup>

the operator must give a copy of its Schedule of Charges to its customers, and publish it on its website (if it has a website), 25 business days or more before the Schedule of Charges comes into effect.

- For an infrastructure operator of any other kind who adopts a Schedule of Charges,

<sup>307</sup> This test should apply regardless of whether or not the operator's infrastructure charges are approved or determined by the ACCC under these rules or a single State Agency under a law of the State.

the operator must give a copy of the Schedule of Charges to its customers, and publish on its website (if it has a website), 10 business days or more before the Schedule of Charges comes into effect.

- A person, other than an infrastructure operator, who adopts a Schedule of Charges must:
  - publish the Schedule of Charges on its own website, or cause the Schedule of Charges to be published on the website of:
    - the person who determined the charge; or
    - the agency or person to whom the charge is payable; or
    - the agency or person on whose behalf the charge is collected; and
  - ensure that the Schedule of Charges is made available at its principal place of business, or the principal place of business of:
    - the person who determined the charge; or
    - the agency or person to whom the charge is payable; or
    - the agency or person on whose behalf the charge is collected;

25 business days or more before the Schedule of Charges takes effect for the person who levies the charges.

*Note:* As indicated above, the person who is required to publish the Schedule of Charges should be the person who adopts a Schedule of Charges.

These rules should be civil penalty provisions.

#### *Delays due to determination / approval requirements*

The rules should provide that if a person (including an infrastructure operator) is required under the rules to give / publish a Schedule of Charges which:

- includes charges that were approved or determined by another person that was either the ACCC or a State Agency; and
- the approval or determination is delayed such that the person is unable to comply with the timeframes for giving / publishing its Schedule of Charges

the operator is taken to have complied with the timing requirements if they give / publish their Schedule of Charges as soon as practicable after the charges have been approved or determined (e.g. after the regulator publishes its final decision), and the operator's charges may take effect from the date specified in the regulatory decision, including if this date is before the date the operator gives / publishes its Schedule of Charges.

#### *Changes in charges being passed through*

When the infrastructure charges and / planning and management charges incurred by an operator (and which rule advice 5-Y requires the operator to pass-through) have changed or will change, and this is the only reason an infrastructure operator needs to adopt a new Schedule of Charges, the rules should allow an infrastructure operator to adopt the new Schedule without triggering the obligation to give the Schedule to all its customers prior to the charges coming into effect. However, the infrastructure operator should still be required—in relation to the newly adopted Schedule of Charges—to:

- publish the Schedule on their website (if they have one) as soon as practicable after adoption;
- make the Schedule available on request;
- give the Schedule, or a notice regarding the details of the updates, when the



operator next invoices customers.

The rules should allow an updated charge to commence on the same date the infrastructure charge or planning and management charge incurred by the operator commences (even if this was before the new Schedule of Charges is adopted).

*Note:* rule advice 5-Y allows an operator to defer updating any infrastructure charge(s) that it levies to recover the cost of charges it incurs for up to three months after the charges it incurs are changed.

#### *Requirement to give the Schedule of Charges to new customers or on request*

The rules should be amended to change the current timeframes for an infrastructure operator to give a copy of its Schedule of Charges:

- to a new customer—to within 10 business days of the day that the operator first receives notice or otherwise becomes aware that the person is a customer.
- on request—within 10 business days of the request (reduced from 20 business days).

The rules should also require that the operator not only provide its current Schedule of Charges but also any Schedule of Charges which is not yet in effect but has been given to the operator's other customers in accordance with the rules.

These rules should be civil penalty provisions.

#### *The meaning of 'give'*

The rules should be amended such that an operator is taken to have given a Schedule of Charges to its customers on the day that it is posted or otherwise sent. That is, an infrastructure operator should not be required to ensure that a customer has *received* the Schedule of Charges within the timeframe specified in the rules.

Further, the rules should clarify that an infrastructure operator:

- does not need to send the Schedule of Charges to all customers via the same means
- may send the Schedule of Charges in electronic form including via fax, email or text message including by attaching the document to an email or referring to an Internet address where the document can be found in an email or text message.

This rule advice is implemented in rules 3, 11, 12 and 15 of the proposed Water Charge Rules.

### *Background*

Under the current Part 4 of the Water Charge (Infrastructure) Rules 2010 (WCIR), rules 11-15 require a Schedule of Charges ("Schedule") to be provided to customers. An infrastructure operator is currently required to:

- provide its Schedule to existing customers and new customers (rule 11)
- provide a revised Schedule when changes occur (subrule 12(1))
- provide its Schedule at least 10 business days before charges or changes to the Schedule come into effect (subrules 7(a) and 12(2))
- provide its Schedule when it receives a request in writing (rule 13)
- if the infrastructure operator provides infrastructure services in relation to at least 10 GL of managed water resources, publish its Schedule on their business' internet site, or in a local newspaper or in the Gazette (rule 15).

Rule 7 in Part 2 of the WCIR prevents an infrastructure operator from imposing a regulated charge<sup>308</sup> unless it has given its current Schedule of Charges to customers:

- 10 business days before the service is provided, for customers who were existing customers by three months after the rules commenced (that is, before the end of the “transitional period” for the commencement of the WCIR); or
- before the service is provided, for new customers.

The effect of this rule in most cases is that an operator must give its Schedule of Charges to customers 10 business days before the Schedule comes into effect. An operator is only taken to have ‘given’ the Schedule of Charges when it is *received* by the customer.

The intent of rule 7 and the Part 4 provisions is that an operator’s Schedule of Charges should be provided to the operator’s customers, so that customers are given all relevant information needed to determine their liabilities in respect to regulated charges. Further, this information should in general be available to customers *before* the charges actually commence. Information about an operator’s charging arrangements should also be readily available to other interested parties (for example, prospective customers). These publication requirements contribute to the Basin Water Charging Objectives and Principles (BWCOP) by making market information readily available to market participants and by promoting pricing transparency for water storage and delivery services.

### **Timing of publication**

In the Draft Advice, the ACCC sought to facilitate the timely publication of off-river infrastructure operators’ Schedules of Charges, by:

- requiring on-river infrastructure operators and persons determining planning and management charges to publish / send their Schedule of Charges 25 business days in advance, and imposing complementary timeframes for approval / determination decisions (see rule advice 5-N).
- amending the requirement to ‘sending’ a Schedule of Charges by the required number of days—the wording of the existing WCIR refers to an operator ‘giving’ the Schedule of Charges to customers which has been interpreted as ensuring that customers have *received* the Schedule of Charges 10 business days in advance. Therefore, if the Schedule of Charges is sent via the post (although as noted above the current rules do not require this), it effectively means that an operator must send the Schedule of Charges *more than* 10 business days in advance.

### **Place of publication**

A number of submissions to the Act Review and Issues Paper submitted concerns about the current wording of the publication requirements including their view that several amendments could be made to streamline the information provision requirements and decrease regulatory burden for operators, while maintaining effective pricing transparency and providing information to customers and other interested parties. In the Draft Advice, the ACCC noted that the current publication requirements in the WCIR do not explicitly require operators to mail hard copies of documents to customers. The ACCC is of the view that, while mailing of documentation may be an option used by some operators, it is not generally necessary to be compliant with the Rules.

Nonetheless, in the Draft Advice, the ACCC sought to reduce the regulatory burden associated with providing the Schedule of Charges by providing clarity for operators about what constitutes sufficient

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<sup>308</sup> Note: if an operator has gained an exemption under rule 9 from the requirement to include a particular charge on its Schedule of Charges, rule 7 does not apply in relation to that charge.

provision of information to customers. That is, the ACCC proposed that the rules should make clear that an electronic copy of the Schedule of Charges can be provided where possible.

Rule 15<sup>309</sup> currently requires that where an infrastructure operator provides infrastructure services in relation to more than 10 GL of managed water resources,<sup>310</sup> that operator must (in addition to providing their Schedule of Charges to customers) publish their Schedule, either on their website, in a local newspaper or in the *Gazette*. In the Draft Advice, the ACCC considered that this requirement should be streamlined to:

- require all infrastructure operators who have a business website to publish their Schedule on their website, at the same time they are required to provide their Schedule to their customers; and
- maintain the current requirement for all infrastructure operators to provide a copy of their Schedule upon receiving a request.

Consistent with the ACCC's rule advice in section 5.5 (to repeal Part 5 of the WCIR), the ACCC proposed in the Draft Advice that publication requirements in relation to Part 5 should be amended or repealed accordingly.

### *Stakeholder feedback*

Three submissions to the Act Review directly raised concerns about the WCIR's publication requirements.<sup>311</sup> In their view, the WCIR require physical postage of the Schedule of Charges, as well as information required by Part 5 of the WCIR (the Network Consultation Paper, Network Services Plan (NSP) and Information Statement). These submissions noted that a requirement to post hard copies of documents to customers increases the administrative burden for the operator and adds complexity for customers, and recommended that language in the relevant parts of the WCIR in relation to providing information be changed from 'provide' to 'make available'.

Nine submissions to the ACCC's Issues Paper also raised concerns with the current publication requirements.<sup>312</sup> Most of these submissions reiterated the view expressed to the Act Review that the WCIR currently requires operators to post their Schedules to customers, and contended that the WCIR should be amended to permit an operator to use electronic communication methods. Several of these submitters also pointed out the difficulties that some irrigation infrastructure operators (IIO) have in meeting the '10 day rule' (current WCIR rule 7, under which an operator may not impose a regulated charge relating to an infrastructure service unless it has given a copy of its current Schedule of Charges to existing customers 10 business days before the service is provided) in the context where that IIO is passing through charges of a Part 6 infrastructure operator whose charges are determined by the ACCC or an accredited regulator. Other views expressed in the ACCC's initial consultation period were that operators should be required to submit their Schedules of Charges to the regulator, and that publication requirements under the water charge rules are inconsistent with requirements in urban water sectors.

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<sup>309</sup> This rule applies whenever subrule 11(1) or rule 12 applies; that is, when an infrastructure operator is required to provide its Schedule of Charges to a customer, certain operators (those with more than 10 GL) are further required to make the Schedule of Charges publicly available as per rule 15. Currently, infrastructure operators with less than 10 GL are not required to publish their Schedule of Charges.

<sup>310</sup> The term 'managed water resources' is defined in rule 3 of the WCIR.

<sup>311</sup> Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, July 2014, p.12. MIL added that printing and postage costs amount to approximately \$5000 to mail-out their Schedule and information statement; National Irrigators' Council, Submission to the Independent Review of the Water Act 2007, July 2014, pp.14-15; NSW Irrigators' Council, Submission to the Independent Review of the Water Act 2007, July 2014, pp.13-14.

<sup>312</sup> See 'stakeholder feedback' in section 5.4.2 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015pp.81-83.

A number of submissions to the Draft Advice commented on the publication requirements relating to the place and timing for publishing information about fees and charges.

The CEWH, Mr Tom Loffler and Goulburn-Murray Water (GMW) commented generally on the importance of the publication of information on fees and charges, and / or other information about an infrastructure operator's policies and rules. The CEWH identified that the publication of this information is important for the efficient and effective operation of the market.<sup>313</sup> Mr Loffler noted that access to information including infrastructure operator policies is important for customers to be able to make informed decisions.<sup>314</sup>

The Queensland Farmers' Federation (QFF) submitted that it supports rule advices 5-G, 5-H and 5-I.<sup>315</sup> GMW noted that the proposed amendments are consistent with, among other things, GMW's intention to:

- ensure information is accessible
- improve its communication tools and approach.<sup>316</sup>

The Local Government Association of Queensland (LGAQ) identified that it supports amendments that seek to improve transparency and noted that the (existing) requirements under Part 4 of the WCIR have improved pricing transparency in Queensland.<sup>317</sup> However, the LGAQ also supports other stakeholders' feedback regarding to the cost of sending information to, and consulting with, customers; that is, an infrastructure operator should not incur unreasonable or unnecessary costs, which it subsequently passes onto customers.<sup>318</sup>

### **Timing of publication**

Stakeholders also commented on the requirements relating to the timeframe for publishing the Schedule of Charges.

The CEWH supports infrastructure operators being required to publish information in advance.<sup>319</sup> Similarly, the South Australian Murray Irrigators (SAMI) identified that one of the complaints they receive from their members is "the lack of transparent, accurate and timely information that contains known trigger points from which business decisions can be made and banked on".<sup>320</sup>

In comparison, WaterNSW and GMW identified some concerns about meeting the proposed amendments to the timeframes for on-river infrastructure operators to send their Schedule of Charges (from 10 business days to 25 business days, rule advice 5-I).<sup>321</sup> The basis for their concerns is that their ability to meet the required timeframes is dependent on the timing of a regulator's decision.

Subsequently, once the regulator publishes its decision, there are internal administrative processes (e.g. Board approval, scheduling the mailing house) that must be conducted before they can publish the Schedule of Charges. GMW identified that the timeframes proposed under rule advice 5-N (relating to when a regulator must publish its final decision, being 30 business days before the start of the regulatory period) and rule advice 5-I, only leaves five business days for the infrastructure operator to complete these internal administrative processes and publish its Schedule of Charges. GMW submitted that it typically requires one month to complete these processes; WaterNSW

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<sup>313</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>314</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.2.

<sup>315</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.4.

<sup>316</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>317</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.8.

<sup>318</sup> *ibid.*

<sup>319</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>320</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.4.

<sup>321</sup> WaterNSW, Draft Advice Submission, March 2016, p.6; Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3.

submitted that it would typically require two weeks. Therefore, WaterNSW and GMW made some suggestions for further amendments to rule advice 5-I.<sup>322</sup>

- A reduction of the number of days in advance that the Schedule of Charges must be sent – WaterNSW supported a reduction to 15 business days, GMW suggested 20 business days. GMW also proposed a further related amendment, which would be applicable to rule advice 5-N: the regulator’s notice of their final decision should be provided 50 business days before the charges come into effect (hence, the operator would have one month to release the Schedule of Charges).
- An exemption from the timeframe for sending the Schedule of Charges for infrastructure operators where the operator’s charges must be approved or determined by an economic regulator (WaterNSW).
- The timeframes for sending the Schedule of Charges should only be triggered when the regulator publishes their final decision. WaterNSW suggested that infrastructure operators could have 15 days to publish their Schedule of Charges from the release of the final decision.

In submissions to the ACCC’s Issues Paper and again in consultation meetings on the ACCC’s Draft Advice, some stakeholders were concerned that the ability for off-river infrastructure operators to meet the required timeframes for publication can be affected by delays outside of their control. This is relevant to charges that these infrastructure operators pass through to their customers, such as planning and management charges or on-river infrastructure charges (also known as “bulk charges”).

### **Place of publication**

Some stakeholders commented on the means by which infrastructure operators must send information to their customers.

The National Irrigators’ Council (NIC) noted that contact details for electronic communication (e.g. email) are unreliable.<sup>323</sup> The ACCC understands that the concern is that consequently infrastructure operators will still need to post the Schedule of Charges to many customers. Other stakeholders, during the consultation process on the Draft Advice, are also of the view that they would need to maintain separate databases for customers with email addresses and those without and that this would create additional costs to create and maintain. The NIC’s preferred approach, to reduce industry costs, is for the rules to be amended so that infrastructure operators are only required to publish their Schedule of Charges on a website, rather than sending a copy to each customer (via the post or electronically).

### **Drafting**

Lower Murray Water (LMW) commented on the drafting of the proposed amendments in relation to sending the Schedule of Charges to new customers (subrules 11(4)(b)), 11(5)(b)).<sup>324</sup> LMW questions how an infrastructure operator is able to know in advance whether someone will become a customer and that it is “not reasonable or feasible” for an infrastructure operator to send a Schedule of Charges on the day that they do become a customer. LMW argues that it should be the responsibility of the customer through due diligence to make informed decisions and investigate an infrastructure service before they receive it. LMW added that any person could have immediate access to LMW’s Schedule of Charges on request. LMW suggested that the ACCC should amend the proposed rule such that

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<sup>322</sup> GMW supports the rationale for the proposed amendments to the timeframe for sending the Schedule of Charges and for the regulator to finalise its decision (rule advice 5-N).

<sup>323</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.13.

<sup>324</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.5.

infrastructure operators must send the Schedule of Charges within 15 days of a person becoming a customer.<sup>325</sup>

The NIC requested a drafting amendment to subrule 3(6); the term “send” should be used for consistency with subrule 11(4)(a).

### *ACCC assessment*

#### **Timing of publication**

The ACCC acknowledges the concerns of off-river infrastructure operators about the timing of price approval / determination decisions in relation to charges they incur and pass-through to their customers, and the impact this has on:

- their ability to meet the required timeframes for sending their Schedule of Charges or
- the additional costs that they incur to meet those timeframes (i.e. through sending multiple Schedules of Charges within a short period of time).

In the Draft Advice, the ACCC proposed two key amendments to facilitate the timely publication / provision of off-river infrastructure operators’ Schedule of Charges.

First, that the publication requirements be amended to make clear that an operator need not ensure that the customer *receives* the Schedule of Charges within the specified timeframes; rather, the operator is only required to ensure that it has been *sent* within those timeframes. This amendment effectively reduces the number of days in advance that the operator must finalise and send their Schedule of Charges.<sup>326</sup>

Second, that infrastructure operators meeting the proposed criteria for the application of Part 6 (or which would meet the criteria if their charges were not approved or determined by a single State Agency) and persons, other than infrastructure operators, determining planning and management charges should be required to publish / send their Schedule of Charges earlier than other infrastructure operators (25 business days in advance, instead of 10). The ACCC also proposed complementary timeframes for approvals / determinations of infrastructure charges under Part 6 (see section 5.6.1).<sup>327</sup>

The ACCC maintains that these amendments will address some of the concerns raised by off-river infrastructure operators in relation to their ability to meet the publication requirements. However, the ACCC acknowledges the following additional issues, which the rules proposed with the Draft Advice do not address.

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<sup>325</sup> *ibid.*

<sup>326</sup> The ACCC notes that the wording of the existing and proposed rules both refer to an operator “giving” the Schedule of Charges to customers (the existing WCIR also uses ‘provide’ interchangeably with ‘give’). The ACCC proposes that the rules should explicitly clarify that if the Schedule of Charges is sent by post or electronic form, an operator should be taken to have “given” its Schedule on the date that it is sent. This is in contrast to how “give” has been interpreted under the current rules. In particular, the ACCC’s guidance on the existing rules states that: “infrastructure operators must ensure that all customers and interested parties receive the schedule of charges in accordance with the WCIR.” ACCC, A guide to the water charge (infrastructure) rules: Publishing and non-discriminatory charging requirements, June 2011, p.21, viewed July 2016, [http://acc.gov.au/system/files/Water%20charge%20rules%20-%20infrastructure%20-%20guide%20to%20publishing%20and%20non-discriminatory%20charging%20requireme\\_0.pdf](http://acc.gov.au/system/files/Water%20charge%20rules%20-%20infrastructure%20-%20guide%20to%20publishing%20and%20non-discriminatory%20charging%20requireme_0.pdf).

<sup>327</sup> Part 4 of the WCIR currently imposes the same publication timeframes on on-river, and off-river, infrastructure operators. Further, the WCPMIR impose no specific timeframes for persons, other than infrastructure operators, determining planning and management charges to publish planning and management charges (subrule 5(3)(d) only requires that the charge is published before it takes effect). Additionally, the timeframes in rule 30 that apply to the ACCC or accredited regulators for approving / determining charges do not reference the start of the regulatory period to which the approval / determination relates. Off-river infrastructure operators are likely to pass through the cost of planning and management charges, and an on-river infrastructure operators’ infrastructure charges.

- If the proposed amendments to the application of Part 6 (in rule 23, see section 5.6) are accepted, Basin State regulators will not be bound by the requirements in Part 6 regarding the timeframes for charge approvals / determinations (which will assist in facilitating the earlier publication of infrastructure operators' Schedule of Charges).
- The proposed amendments do not protect an infrastructure operator or other person whose charges are approved / determined if the timing of a regulatory decision relating to the approval / determination of those charges prevents them from being able to meet the required timeframes.<sup>328</sup>
- An infrastructure operator might face difficulties in complying with the proposed pass-through rules (see section 5.13) when there are delays or other timing issues, such that the Schedule of Charges cannot be sent / published in advance of the date from which an infrastructure operator incurs charges that it must recover through infrastructure charges it imposes on its own customers (see section 5.13 for the requirements relating to how an infrastructure operator should recover these costs).

Therefore, the ACCC proposes further, more direct amendments to the water charge rules to ensure that infrastructure operators and other persons are able to comply with the requirements in the water charge rules relating to:

- the timeframes for publishing / sending their Schedule of Charges because of a delay in an approval / determination decision relating to infrastructure charges or planning and management charges, which is outside of their control
- levying charges that are not specified in the Schedule of Charges currently in effect (in accordance with rule 7)
- the requirements relating to how charges should be levied to cover the costs of infrastructure charges and planning and management charges the operator passes-through to its customers (see section 5.13).

*Exemption due to the timing of a charge approval / determination*

The ACCC proposes that the rules should provide an exemption from the requirements to give / publish a Schedule of Charges in advance of the Schedule coming into effect where a person (including an infrastructure operator or another person who determines planning and management charges) is required to have charges contained in their Schedule approved or determined by the ACCC or State Agency, and the timing of the approval / determination decision prevents the timeframes being met. The rules should allow the person to instead give / publish a Schedule of Charges as soon as practicable after the ACCC or State Agency publishes its final decision.

In accordance with these amendments, the ACCC considers that the rules should also allow the adopted Schedule of Charges to take effect from the date specified in the regulatory decision. The ACCC notes that to the extent that the timing of the regulatory decision means that the operator cannot adopt a Schedule of Charges before the date on which the Schedule will take effect, this will mean that the charges can apply retrospectively to the extent necessary to comply with the regulatory decision.

Therefore, the ACCC has proposed complementary amendments to rule 7 (the conditions under which a person can levy an infrastructure charge or planning and management charge) to ensure that a

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<sup>328</sup> The ACCC notes that under the existing rule 7 and the ACCC's proposed amendments in Rule Advice 5-E, an infrastructure operator cannot levy a charge unless it is listed on the Schedule of Charges. A delay in a regulatory decision could mean that the on-river infrastructure operator or other person is unable to update their Schedule of Charges until after the date the determined charge is to apply from.

person will not be prevented from levying a charge from the date specified in the regulatory decision despite the charge not being listed on the Schedule of Charges at the time an infrastructure service is provided (for infrastructure charges) or the circumstances for incurring the charge (for planning and management charges) are met.

The ACCC will provide detailed guidance material to assist operators to comply with these requirements if these proposed amendments are made.

The ACCC considers that outside of issues arising from the timing of a charge approval / determination, infrastructure operators should continue to publish / send their Schedule of Charges to all customers in advance and within the timeframes specified in the Draft Advice.

In particular, the ACCC acknowledges concerns from infrastructure operators whose charges must be approved or determined by the ACCC or a State Agency about meeting the 25 business day publication requirement proposed in the Draft Advice. However, the ACCC considers it is possible for infrastructure operators to complete administrative processes for adopting a Schedule of Charges following a price approval / determination decision within a shorter timeframe than those set out in submissions.

#### *Exemption for charges levied consistently with proposed pass-through rule (rule 9A)*

The ACCC recognises that delays in the approval or determination of infrastructure charges or planning and management charges are particularly problematic for other infrastructure operators that incur these charges, and will be required under the proposed water charge rule 9A to pass through these costs to their customers (see section 5.13). More generally, the ACCC considers that an operator should not be required to *immediately* update and send their Schedule of Charges when the infrastructure charges or planning and management charges it incurs are amended.

In such cases, the ACCC considers that the rules should enable infrastructure operators to comply with the proposed 9A rules without incurring undue additional costs for sending / publishing a Schedule of Charges. The ACCC recognises that some examples of the costs an infrastructure operator might incur, which might not be fully addressed by the rules proposed in the Draft Advice:

- sending multiple Schedules of Charges within a short time period when the operator is only adopting new Schedules of Charges to update those charges that it is passing through to its customers consistently with rule 9A
- forgoing revenue by being prevented from levying the charges it is passing through consistently with rule 9A, from the same date that the operator itself incurs those charges (because the rules would require an operator to send their Schedule of Charges at least 10 business days before those charges could take effect).

The ACCC's Final Advice therefore proposes two further amendments from the Draft Advice to address these issues while still maintaining the principle that a customer should be informed in advance about changes to the charges that the infrastructure operator levies.

First, the ACCC proposes that an infrastructure operator should be able to adopt a new Schedule of Charges which differs from the previous Schedule only in relation to infrastructure charges that it levies under proposed rule 9A regarding pass-throughs without triggering the obligation to *send* the updated Schedule to customers prior to those charges coming into effect. Instead, the operator should:

- publish their updated Schedule of Charges on their website (if they have one) as soon as practicable after the update
- make the updated Schedule of Charges available on request



- send the updated Schedule of Charges, or a notice regarding the details of the update, when it next invoices customers.

Second, the ACCC considers that the rules should also allow the operator's charges that it levies consistently with proposed rule 9A to commence from the same date that the infrastructure charge or planning and management charge incurred by the operator commences. The ACCC notes proposed amendments set out in section 5.13 will allow infrastructure operators up to three months to adopt a new Schedule of Charges when there are changes to the infrastructure charges and planning and management charges it incurs and is required to pass-through to its customers.

Taken together, this will mean the operator's charges levied to comply with proposed rule 9A may commence on a date earlier than the date the new Schedule of Charges is adopted (but not earlier than the date the new charges incurred by the operator commenced).

If the proposed rule amendments are adopted, the ACCC will provide guidance to operators to assist them to comply with these requirements.

#### *Summary—timeframes for publishing / sending a Schedule of Charges*

In summary, the ACCC's Final Advice in relation to the timing of publication is to maintain the intent of the Draft Advice to reduce the regulatory costs associated with sending or updating the Schedule of Charges. However, the ACCC has updated its rules advice to address situations where the timing of a charge approval or determination by a regulator would make it difficult or impossible for an operator to meet the timeframes proposed.

The ACCC considers that these amendments strike an appropriate balance between providing greater flexibility to infrastructure operators (and therefore reducing their regulatory costs) while still ensuring that there is an adequate level of transparency for customers.

#### **Place of publication**

The ACCC continues to support the policy position that the Schedule of Charges should be given to all customers, rather than moving to publication on the operator's website only. Website only publication increases the possibility that customers will not become aware of changes to the Schedule of Charges until after those new charges come into effect and in some cases, customers may not find out that their charges have changed until they receive an invoice that reflects those changes. In particular, the ACCC is concerned that website only publication will be most likely to disadvantage customers without internet access.

### **Box 5.3: Publication requirements (timing and place of publication) in other regulated industries**

Table 5.4 below summarises the publication requirements in some other regulated industries where there are long-term contractual relationships between the business and the customer. A common theme in all publication requirements is that the Schedule of Charges must be published on the business' website and provided to customers on request. However, there are also a number of differences between the requirements in these industries, which provide a range of other protections to customers to ensure they are informed about charges and variations to charges including:

- customers must be notified of variations to the Schedule of Charges with the next bill and / or via newspaper notices.
- limitations on the frequency with which charges can be varied and the amount of notice that is required before a new Schedule of Charges can take effect.
- options for customers to choose to have the Schedule of Charges, and updated Schedule of Charges, emailed or sent via post, until further notice.

The ACCC considers that the publication requirements in the proposed water charge rules are consistent with other industries. The proposed water charge rules will require operators to publish on a website and provide the Schedule of Charges on request. To limit the likelihood that variations could occur without the customer knowing, the water charge rules also require operators to send their Schedule of Charges to each customer. The ACCC considers that this is a reasonable substitute for the customer protections in other industries, such as in energy, which limits the frequency operators can vary the charges.

The ACCC notes that proposed clarifications to the rules that operators can send their Schedule of Charges to customers via electronic communication methods e.g. email should mean that sending information to customers should not represent a significant cost to operators. Further, the ACCC has proposed amendments that will reduce the circumstances that trigger the requirements to send the Schedule of Charges (as discussed above).

The ACCC also notes that the rural water sector differs to other industries in that not all of the businesses regulated by the water charge rules have a website. Therefore, the rules would need to provide different requirements and customer protections for those operators that could publish on their website (primarily instead of sending the Schedule of Charges) as compared to operators that do not have a website. The ACCC considers that it is preferable to have a consistent set of requirements and customer protections applying across all operators.

**Table 5.4: Overview of publication requirements in other regulated industries**

Industry	Relevant legislation and section number	Publication requirements (timing and place of publication)
Energy	<p><i>National Energy Retail Law (SA) Act 2011</i></p> <p>Section 23 (in relation to standing offer prices<sup>329</sup>)</p>	<p>The retailer must:</p> <ul style="list-style-type: none"> <li>• publish their charges, and any variations to those charges, on their website.</li> <li>• publish a notification of variations to charges (and that those charges can be accessed from the website) in a newspaper circulating in jurisdictions in which the retailer has small customers.</li> <li>• inform each affected customer of the variation when the retailer sends the next bill to the customer.</li> <li>• not vary its charges more than once every six months.</li> <li>• allow 10 business days between when it publishes the variation and when it can come into effect.</li> <li>• notify the Australian Energy Regulator (AER) of the charges and any variation, as soon as practicable, in the manner and form required by the AER Retail Pricing Information Guidelines. Section 24 also requires retailers to present its charges in accordance with these Guidelines.<sup>330</sup></li> </ul> <p>The AER must, as soon as practicable after being notified by a retailer, publish the charges or variation on the AER’s website.</p>
Super-annuation	<p><i>Corporations Regulations 2001 (Commonwealth)</i></p> <p>Regulation 7.9.75BA</p> <p>Provision of fund information about a regulated superannuation fund (other than a self-managed superannuation fund)</p>	<p>The trustee (of a regulated superannuation fund, other than a self-managed superannuation fund) must make the fund information available on a website that it maintained by or on behalf of the trustee.</p> <p>For the first financial year or reporting period in which the trustee makes the fund information available on the website, the trustee must:</p> <ul style="list-style-type: none"> <li>• notify each holder that the fund information is available on the website and explain how to access the website. (This can be included in other information / materials sent to the holder).</li> <li>• notify the holder that they may elect to have a hard copy, or electronic copy (if available) of the fund information sent, free of charge.</li> </ul> <p>If a holder elects to have a hard copy or electronic copy of the fund information sent, the trustee must, for each subsequent financial year or reporting period, send the fund information for the financial year or reporting period, in that form, until the holder notifies the trustee that a hard copy is no longer required.</p> <p>If a holder does not elect to have a hard copy or electronic copy sent, the trustee must notify the holder each year that the fund information is available on the website.</p>
Urban	Customer Service	The water business must:

<sup>329</sup> According to the Australian Energy Regulator in its Retail Pricing Information Guidelines, “[s]tanding offers are available to small customers for the sale and supply of energy under a standard retail contract (National Energy Retail Law section 22(1)). Standing offers protect small customers who are able to choose their energy retailer but have not exercised that choice. Model terms and conditions for standing offer contracts are set out in the National Energy Retail Rules. In jurisdictions with full retail competition, customers can negotiate the terms and conditions of their contract with their retailer of choice. These contracts are market offers made under a market retail contract”. Australian Energy Regulator, *AER Retail Pricing Information Guidelines*, version 4.0, Canberra, August 2015, p.4.

<sup>330</sup> See: Australian Energy Regulator, *AER Retail Pricing Information Guidelines*, version 4.0, Canberra, August 2015, viewed June 2016, <https://www.aer.gov.au/system/files/AER%20Retail%20Pricing%20Information%20Guidelines%20-%20August%202015.PDF>.

water	Code (Urban Water Businesses) Made under section 4F of the <i>Water Industry Act 1994</i> (Victoria) and in accordance with the Water Industry Regulatory Order.	<ul style="list-style-type: none"> <li>• publish the Schedule of Charges on their website.</li> <li>• provide the Schedule of Charges to a customer on request.</li> <li>• notify customers of any variation in charges for services on or with the first bill after the decision to vary the charges has been made. (Note: The Code also requires that a water business' billing cycle must be at least quarterly unless otherwise approved by the Essential Services Commission of Victoria (ESCV) or more frequently if agreed with the customer).</li> </ul>
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The ACCC maintains that infrastructure charges are highly relevant to how customers operate their own business, including their short-run operating decisions (such as how much to produce in a particular year) and long-run access decisions (i.e. whether to retain, increase or decrease their access to their operator's network). The ACCC therefore considers that customers should receive a copy of their Schedule of Charges, preferably before changes come into effect, in order to make timely and efficient decisions. However, the ACCC acknowledges that the need to send the Schedule of Charges, and in advance of the charges coming into effect, must be balanced against the costs imposed on operators. Therefore, the ACCC supports amendments to the water charge rules that will reduce the costs associated with sending or updating the Schedule. For example:

- The ACCC maintains its position in the Draft Advice that operators can send their Schedule of Charges via electronic means (e.g. via email) rather than post (proposed subrule 3(6)). The ACCC considers the cost of maintaining a record of customers' preferred contact method (where an operator provides a choice to customers) would not be significant.
- The ACCC maintains the proposed amendments from the Draft Advice which effectively reduce the number of days in advance of a Schedule of Charges coming into effect that the Schedule must be given to customers. The proposed amendments to the rules mean that an operator only needs to give / send the Schedule 25 / 10 business days in advance rather than ensuring that the customer receives it within 10 business days.
- Further, the ACCC is proposing amendments to the timing of publication (as discussed above), and additional exemptions from the charges that must be included on a Schedule of Charges (see section 5.4.3), which will reduce the circumstances that trigger the need to adopt and send / publish a new Schedule of Charges. In turn, these amendments should reduce the likelihood of, and therefore costs associated with, mailing out multiple Schedules within a short period of time.

In summary, the ACCC's Final Advice is to maintain its position that infrastructure operators should be required to give its Schedule of Charges to its customers in addition to publishing the Schedule on its website (if it has a website).

### **Drafting**

The ACCC agrees that the requirements for infrastructure operators to send a Schedule of Charges to new customers should be clarified. The ACCC considers that it is reasonable for the operator to send a Schedule of Charges to a person within 10 business days of the operator becoming aware or receiving notice that the person is a customer (in situations where an operator was not aware that the person was a customer at the time it generally sent out its Schedule of Charges).

The ACCC has also proposed some minor amendments relating to the requirements to send a Schedule of Charges on request, reducing the time limit for an operator to respond to a request from

25 to 10 business days following receipt of a written request. This will align the timing requirements with those applying to sending the Schedule of Charges to new customers. The ACCC does not consider that reducing the number of days that the operator has to fulfil this request will represent a significant compliance burden, noting that the proposed rules clarify that an operator is taken to have 'given' information on the day that it is sent (see below).

In both cases, an operator should be required to send a copy of its current Schedule of Charges *and* any other Schedule of Charges which is not yet in effect but has been given to the operator's other customers in accordance with the rules. This will ensure that a person is provided with all relevant information relating to the operator's charges / charging arrangements.

The ACCC supports the NIC's suggestion to use consistent terminology in relation to the use of the words, 'give', 'send' and 'provide'. The ACCC notes that the proposed water charge rules included with this Final Advice consistently use the word 'give'. The proposed water charge rules clarify (in subrule 3(6)) that if a document is 'sent' via post or electronic means, then it is taken to have been 'given' on the day that it is posted or otherwise 'sent'. This retains the intent of the Draft Advice that operators will be taken to have complied with the timing requirements for sending documents, including the Schedule of Charges, on the day that they send and that operators should not have to allow extra time to ensure that a customer actually receives it within the prescribed timeframe.

For planning and management charges, the existing Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) and the proposed water charge rules published with the Draft Advice impose the obligation to comply with the publication requirements and rule 7 (the conditions under which a person can levy a planning and management charge) on the person determining the charge. However, in some circumstances, the person determining the charge (e.g. a minister or independent economic regulator) is not the same person who levies the charge (e.g. a Basin State Department). Therefore, in relation to planning and management charges, the ACCC proposes that the rules should be amended to reflect these different arrangements. The rules should allow any of the following persons to adopt a Schedule of Charges:

- a person who determines the charge
- a person who levies the charge
- a person who on whose behalf the charge is collected.

The proposed rules require that the person who adopts the Schedule of Charges must ensure that it is published consistently with the publication requirements. Where possible, the ACCC has retained the language from the WCPMIR such that the person who adopts the Schedule of Charges can meet their publication obligation by *causing* the Schedule of Charges to be published on another relevant person's website. The ACCC considers that the proposed amendment will provide a greater recognition of the different arrangements in Basin States regarding the determination (and levying / collecting) of planning and management charges.

The ACCC notes that, regardless of the person who adopts and publishes the Schedule of Charges, the proposed amendments to the rules will further require that the person levying the charge must comply with rule 7 (the conditions under which a person can levy a planning and management charge). This means that the person cannot levy a charge unless it is specified on the Schedule of Charges, and it is levied consistently with that specification. The ACCC therefore expects that when the person who adopts the Schedule of Charges is not the same person who levies the charge, there will need to be communication between these persons to ensure that all requirements relating to the Schedule of Charges are met.

## Basin Plan water trading rules reference to WCIR 15

The ACCC notes that subrule 12.47(5) of the Basin Plan water trading rules (BPWTRs) currently contains a cross-reference to WCIR 15 which places certain Schedule of Charge publication requirements on operators servicing in excess of 10GL of water. BPWTR 12.47(5) requires operators to whom WCIR 15 applies to also provide a copy of their water trading rules to a ‘central information point’ (which is currently the MDBA itself).

If the ACCC’s rule advice 5-G is adopted, the obligation for an operator to publish a Schedule of Charges on its website would be broadened to all operators with a website, not just those servicing water access entitlements over 10GL. This could, in turn, broaden the application of BPWTR 12.47(5). To avoid this, a minor technical amendment to BPWTR 12.47 would be needed to ensure its current scope is maintained.

### 5.4.3 Exemptions from the publication requirements

#### Rule advice 5-J

##### *Amendments to the exemption process relating to infrastructure charges specified in contracts (Rule 9)*

The rules should be amended to allow for an application for an exemption from the requirement to include infrastructure charges specified in a contract between the operator and one or more customers in the operator’s Schedule of Charges:

- in a situation where publication would have a material financial loss for, or material detriment to, the operator or the customer (as opposed to the current rules, which require that there be a ‘material and adverse effect’ on either both the operator *and* the customer, or the customer only);
- within 12 months of the rules being amended, for contracts that were entered into before the rules were amended (despite the existing rules under which an application should have already been made);
- on behalf of a group of customers subject to the same contract with the infrastructure operator (including the same infrastructure charges) where it can be shown that publication of the amount of the charge(s) would result in a material financial loss for, or material detriment to, the operator and / or each customer;
- in a situation where the contract specifies a formula by which the charge would be determined (this clarifies the existing rule, which may have the effect that an application could only be made where the amount of a charge is directly specified).

This rule advice is implemented in rules 9 and 78 of the proposed Water Charge Rules.

##### *Other exemptions from Schedule of Charges requirements for infrastructure operators*

The rules should be amended such that a Schedule of Charges need not include the following:

- for a charge in relation to which an exemption has been granted under rule 9— details of the charge other than the information specified in rule advice 5-K below.
- where a discount on an infrastructure charge is provided to an individual customer or customers for reasons of the customers’ hardship (e.g. a natural disaster), or in recognition of a service disruption they have experienced (e.g. temporary channel closure)—the amount of the discount and any other information relevant to that

discount.

- for an infrastructure charge the infrastructure operator levies in accordance with proposed rule 9A (see rule advice 5-Y) to recover the amount of any infrastructure charge or planning and management charge incurred by the operator in relation to a transaction undertaken on behalf of a customer, such as a trade application charge—all details of the charge.

The rules should also provide that if an operator levies or proposes to levy an infrastructure charge for an infrastructure service (other than a service in relation to the physical connection to, or disconnection from the operator's water service infrastructure) and:

- the nature of the service is known, but the information regarding the amount of the charge or details of rates and all other details necessary to determine that amount cannot be reasonably determined; or
- the nature of the infrastructure service is not known sufficiently in advance in order for it to be practicable to expect that the charge could be included in a Schedule of Charges;

then the operator does not need to include any details about the charge on that Schedule of Charges. However, the operator must adopt a new Schedule of Charges which includes details of that charge within 12 months of the infrastructure charge being levied.

*Note:* In practice, if the operator would ordinarily have adopted a new Schedule of Charges within 12 months (e.g. because it updates its infrastructure charges each year), the operator may include the required details on that new Schedule. However, if this were not to occur, an operator would still be required by this rule to adopt a new schedule which includes the relevant details within the required timeframe.

*Note:* this rule advice is relevant to proposed rule 7 in rule advice 5-E because it allows infrastructure charges in these circumstances to be levied despite the charges (and all other details of those charges) not being on a Schedule of Charges at the time the infrastructure service is provided.

This rule advice is implemented in rules 9 and 11 of the proposed Water Charge Rules.

### **Rule advice 5-K**

The rules should be amended to require infrastructure operators who have received an exemption under rule 9 to include:

- a notice of the exemption on their Schedule of Charges;
- the name of the customer(s);
- the time period of the contract;
- the nature of the infrastructure service to which the charge exempt from disclosure relates.

The rules should require the operator to provide this information on a Schedule of Charges within 12 months after the exemption is granted.

Rule 55 should be amended to allow the ACCC to publish the name of the parties who are the subject of the exemption, and the type of infrastructure service to which the exemption relates.

This rule advice is implemented in rules 9 and 55 of the proposed Water Charge Rules.

### *Background*

Rule 9 of the Water Charge (Infrastructure) Rules 2010 (WCIR) currently provides that where an infrastructure operator and a customer have entered or propose to enter into a written contract for the

provision of infrastructure services to the customer at agreed charges specified in the contract and believe, on reasonable grounds, that disclosure of details would have a material and adverse effect for the operator and customer or customer, the operator and the customer jointly or the customer may apply in writing to the ACCC for an exemption from requirements to include its infrastructure charges for those services in its Schedule of Charges.

In its Final Advice on the development of the WCIR, the ACCC considered this exemption provision to be adequate to ensure commercial disadvantage does not arise as a result of the publication requirement. In other circumstances, the benefits of increased transparency in water infrastructure markets outweigh the commercial sensitivity felt by parties to contracts.<sup>331</sup>

The ACCC believes that the disclosure of infrastructure charges is essential to the objective of pricing transparency. The discussion in section 5.3 noted the potential for infrastructure operators to discriminate in the charges they levy on different types of customers. Pricing transparency is essential to ensuring customers are aware not only of the charges they will incur but also the charges levied by the infrastructure operator for the same or similar infrastructure services.

In its Draft Advice, the ACCC identified that the following improvements could be made to this rule:

#### **Allowing for applications on the grounds of a material and adverse effect on the operator only**

Currently, the ability to apply for an exemption requires that there is a material and adverse effect to the customer(s) of the operator. Subrule 9(2) provides for the case where there is a material and adverse effect on *both* the operator and the customer and subrule 9(3) provides for the case where the material and adverse effect is on the customer only.

The proposed amendment provided for the additional situation where *only* the operator would incur the negative effects of publication. The ACCC considered that it may be reasonable for the operator to be afforded the protection of rule 9 even though no detriment is occurring for the customer. In this case, the ACCC considered that the operator should be able to apply in writing to the ACCC for an exemption. The ACCC therefore made draft rule advice to extend rule 9 to apply in cases where there is a material and adverse effect on the operator only (draft rule advice 5-J).

#### **An infrastructure operator should be required to provide notice that it has been granted an exemption**

Currently, subrule 9(12) requires the ACCC to publish notice of an exemption on its website; thus, information about when an exemption is granted is already in the public domain. However, the ACCC remains concerned that operators' customers should have readily available access to this information. In particular, the Draft Advice considered that the current subrule 9(12) did not necessarily facilitate the desired level of transparency for customers of an operator or water market participants more broadly.

Therefore, the ACCC considered that it was appropriate for operators to declare<sup>332</sup> on their Schedule of Charges when they have been granted an exemption under rule 9. This draft rule advice would provide improved transparency for customers of the operator, while still preserving the intent of rule 9 to protect from commercial disadvantage in the stated circumstances.

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<sup>331</sup> ACCC, *Water infrastructure charge rules – Advice to the Minister for Climate Change and Water*, Canberra, June 2009.

<sup>332</sup> The ACCC considers that, where an operator has been granted an exemption under rule 9, inclusion of a link to the ACCC's public notice as published on its website on the operator's Schedule of Charges would be sufficient to satisfy this proposed rule requirement.



## Stakeholder feedback

In the Issues Paper, the ACCC asked for stakeholder feedback on:

- the circumstances in which an infrastructure operator should be exempt from the obligation to include all their regulated charges in their Schedule of Charges.
- the procedural requirements that infrastructure operators should be required to meet when applying for an exemption.

Only two stakeholders responded to the Issues Paper on this matter. Central Irrigation Trust (CIT) commented that the existing rule is satisfactory. Murrumbidgee Irrigation Limited (MI) submitted that it did not support the publication of commercially negotiated contracts, particularly when those charges are confidential. MI considered that it is sufficient that there is agreement between the customer paying the charge and the infrastructure operator, and that the customer knows the charge with certainty and in advance.

The ACCC received four written submissions on the Draft Advice from stakeholders commenting on the need to apply for an exemption, and the ACCC's proposed amendments to that provision.

The South Australian Department of Treasury and Finance and the National Irrigators' Council (NIC) consider that the publication of commercially negotiated charges and / or uncertainty as to whether an exemption will be obtained could affect the willingness for operators and / or (potential) customers to enter into commercial arrangements.

The South Australian Department of Treasury and Finance's main concern in this respect is the need to apply for an exemption on a case-by-case basis.<sup>333</sup> The South Australian Department of Treasury and Finance has requested that the ACCC consider a class exemption for infrastructure operators who meet the following criteria:

- the infrastructure operator's charges are covered by an access arrangement or third-party access regime under Part IIIA of the *Competition and Consumer Act 2010* (CCA),<sup>334</sup> and
- there is independent regulatory oversight, including annual reporting, on the access arrangement or third-party access regime.

The NIC is of the view that commercial entities are unlikely to consent to publishing their charges; however, applying for an exemption is "unappealing" because the test would be difficult to satisfy.<sup>335</sup> In the absence of commercial arrangements, the NIC warn that the infrastructure operator will have fewer customers over which it can recover its costs, resulting in higher charges for irrigators.

Lower Murray Water (LMW) similarly submitted that it does not support the requirement to publish commercially negotiated charges and called for the removal of this requirement and the accompanying exemption process.<sup>336</sup> LMW made five main arguments:

- In relation to the exemption process and legal test under which the ACCC must assess applications, LMW noted:

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<sup>333</sup> South Australian Department of Treasury and Finance, Draft Advice Submission, March 2016, p.1.

<sup>334</sup> The *Water Industry (Third Party Access) Amendment Act 2015* (South Australia) establishes a (negotiate / arbitrate) third-party access regime for water or sewage infrastructure and infrastructure services in SA. The South Australian Government intends to apply to the National Competition Council to have the regime certified as an 'effective state or territory regime' for the purposes of Part IIIA of the *Competition and Consumer Act 2010*. Section 5.11 provides further background information about the *Water Industry (Third Party Access) Amendment Act 2015*.

<sup>335</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.13.

<sup>336</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.4.

- it would be “unlikely” that an operator would obtain an exemption.
  - it would be a potentially time-consuming process for the infrastructure operator if there were back and forth communication before the ACCC makes a decision.
  - customers can get annoyed at the time taken for government approval of applications and processes.
  - it places an administrative burden on the ACCC to monitor compliance and assess exemption applications.
- LMW is working to make its Schedule of Charges easier for customers to understand and publishing additional information about commercially negotiated charges, which will not be applicable to most customers, will create confusion.
  - If a customer had concerns about the details of a contract that LMW has with another customer then they could use the *Freedom of Information Act 1982*. Further, the customer who has entered into a commercial arrangement with LMW has a contract, which sets out the relevant information, and if a dispute arises then that customer has legislated avenues for resolving the dispute.
  - An operator would need to send a new Schedule of Charges to all customers every time it enters into a new (commercially negotiated) contract, which is unwarranted, impractical and unfeasible. LMW added that because it may need to publish a new Schedule of Charges several times per year to comply with this requirement, the process would be costly, time consuming and undesirable. LMW also noted that draft rule advice 5-K means that an operator would still need to send the Schedule of Charges, even if the operator is successful in obtaining an exemption. This is because the operator still needs to publish other information about the contract such as the name of the entity paying the charge.
  - The ACCC has not had regard to commercial confidentiality clauses and the ACCC should consider the benefit to the community of the publication of this information.

Mr Connolly alleges that the Victorian Environmental Water Holder (VEWH) “does not pay the same as irrigators for their water delivered through [Goulburn Murray Water’s] IIO delivery system”.<sup>337</sup> Mr Connolly’s view is based on his reading of GMW’s 2015-16 Schedule of Charges and GMW’s application to the Essential Services Commission of Victoria (ESCV) for the approval / determination of its charges. Mr Connolly notes that the application sets out that the VEWH’s charges are levied according to a ‘delivery share equivalent approach’ but there is no ‘delivery share equivalent’, “which can be accessed by all customers in the [2015-16] Schedule of charges”.

The VEWH<sup>338</sup> submitted that there is scope for clarifying in the Final Advice that environmental water holders do pay off-river infrastructure charges, headworks and delivery charges, and that they might receive a lower priority delivery service. The VEWH also submitted that in some cases, the infrastructure services obtained by environmental water holders can be the same or different to the service received by irrigators. The VEWH considers that these differences should be acknowledged, where they exist.

The Queensland Farmers’ Federation (QFF) submitted that it supports proposed amendments to the exemption provisions (rule advices 5-J and 5-K).<sup>339</sup>

<sup>337</sup> Patrick Connolly, Draft Advice Submission 1, February 2016, p.1.

<sup>338</sup> Victorian Environmental Water Holder, Draft Advice Submission, March 2016, p.1.

<sup>339</sup> In relation to the information to be included on a Schedule of Charges, the Queensland Farmers’ Federation submitted that the proposed requirements are unnecessary and duplicate the information that SunWater is required to publish on its annual Network Service Plan for irrigation schemes. Queensland Farmers’ Federation, Draft Advice Submission, March 2016, p.4.

## *ACCC assessment*

### **Rule 9 – Exemption relating to certain contracts**

The ACCC recognises stakeholder concerns about the willingness for customers and operators to enter into commercial contracts due to the requirement to publish commercially negotiated charges and / or uncertainty about whether an exemption will be provided. The ACCC considers that the publication of commercially negotiated contracts will remove information asymmetries, to the benefit of all customers, including those that are negotiating with the operator. However, where the customer does have a concern about the charge being published, the rules allow the customer (and / or operator) to apply for an exemption.

The ACCC notes that the exemption process in rule 9 of the water charge rules places the burden of proof on the operator and / or customer to provide evidence that publication will result in a material financial loss for, or material detriment to, the operator or customer. The ACCC maintains that the rule should require publication unless the customer / operator can provide this evidence. However, the ACCC agrees that there is scope to provide additional guidance material about what evidence would be required to prove that there would be a ‘material financial loss or detriment’. This guidance material could assist in providing greater confidence to operators and customers about the process and in reducing uncertainty about the likelihood of successfully obtaining an exemption. The ACCC’s guidance material will also be important for addressing stakeholder concerns about the timeliness of the exemption process.

Under rule 9, the ACCC must make a decision about an application for exemption within 30 business days. However, factors that will add to the amount of time required to complete this process include the time required for the operator / customer to prepare the application and the ACCC’s use of the ‘clock-stop’ provisions to request further information. The ACCC considers that updated guidance material, which clearly identifies what information is required to support an exemption application, will reduce the time required to compile the application and the likelihood of the ACCC needing to request further information (by using the ‘clock-stop’ provisions). These factors should assist in reducing stakeholder concerns about the timeliness of the exemption process.

The ACCC continues to support the amendment to the exemption process proposed in the Draft Advice, which would allow an operator *alone* to seek an exemption. This amendment will increase the circumstances in which parties to the contract can apply for an exemption. Under the existing rules, an operator cannot apply for an exemption without the customer also applying, and the operator / customer must prove that the publication would be of detriment to the customer alone, or both the operator and customer.

The ACCC considers that the following three additional amendments (in this Final Advice) to the exemption process will enhance the opportunities for operators and customers to apply for an exemption and contribute to addressing stakeholder concerns about the regulatory burden associated with the provision.

First, the current rule requires an operator / customer to apply for an exemption before entering into a contract. The ACCC proposes amending the requirement to allow operators and / or customers to apply for an exemption from publishing charges in pre-existing contracts at the time the amendments to the rules take effect (the ‘transition date’), where such charges are not currently disclosed at all, in contravention of the existing rules. The ACCC considers that it is reasonable to provide operators with 12 months from the transition date to either publish these charges or apply for an exemption. The

ACCC views this situation as preferable to operators continuing to not publish these charges because they can no longer apply for an exemption or the risk of possible enforcement action for non-compliance with the existing disclosure requirements

Second, currently, the rules refer to ‘the customer’ (or ‘the customer and the operator’) in relation to an exemption application. The rules should provide for an exemption application involving multiple customers subject to the same contract. This clarification will reduce the potential regulatory burden of needing to apply multiple times for an exemption related to a single contract / charge.

Third, the existing rules and those published with the Draft Advice specify that an exemption application can only be made when the operator and customer have entered into a contract in writing for the provision of infrastructure services at *agreed infrastructure charges specified in the contract*. Given that the application is required to be made before the contract is entered into (and therefore before the infrastructure service is provided / charge is levied), the ACCC is concerned that this could unduly prevent an application from being made where the nature of the infrastructure service or contract is such that the amount of the charge depends on variables that are not known in advance. The ACCC has therefore proposed to clarify the drafting such that an application could be made when the contract specifies *the infrastructure charges that will apply – whether directly or by specifying a formula by which they will be determined*. This amendment is consistent with the ACCC’s proposed exemptions from the information to be included on a Schedule of Charges (see below).

The ACCC notes stakeholder concerns about commercial confidentiality. The ACCC considers that the existing exemption process, and the ACCC’s proposed amendments to that process, provides operators and customers sufficient protection from the publication of commercially sensitive information when it would cause a material financial loss or detriment to the operator and / or the customer(s).

In relation to concerns about publishing commercially sensitive information, the ACCC notes one suggestion raised in a private consultation meeting was the ACCC should consider alternatives that would still enable the ACCC to monitor compliance with the non-discrimination provisions.<sup>340</sup> One suggestion was that the operator could reveal the contract / charge to the ACCC for clearance that the charge was non-discriminatory.

The ACCC agrees that one of the benefits of publishing this information about commercially negotiated charges is to monitor compliance with other requirements in the rules (such as the non-discrimination provisions). However, publication is also intended to provide transparency to customers more generally. The ACCC maintains that it is important for all customers to be able to view and compare all the charges that the infrastructure operator offers to other customers, and to understand what is driving the differences.

The ACCC considers that charges pursuant to a Part IIIA access arrangement and / or subject to regulatory oversight should be subject to the same publication and transparency requirements as other types of regulated charges (see section 5.11).

The ACCC acknowledges stakeholder feedback about the importance of commercially negotiated contracts to assist operators in recovering the costs of operating their business. The ACCC’s Final Advice on the proposed non-discrimination provisions (see section 5.3.1) allows for an operator to provide an infrastructure service at a lower, discounted charge for a particular customer where this

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<sup>340</sup> ACCC consultation meeting with National Irrigators’ Council members on the Draft Advice for the review of the water charge rules, Griffith, 12 January 2016.

represents a ‘prudent discount’.<sup>341</sup> However, even if a commercially negotiated charge could be characterised as a ‘prudent discount’, the operator should still be required to publish the charge on their Schedule of Charges unless they have been granted an exemption. The ACCC considers that where there are benefits of the commercial negotiation to the larger customer base, this should be communicated to the operator’s other customers unless the operator and / or customer can demonstrate to the ACCC that publishing the charge would cause a material financial loss or detriment.

The ACCC maintains from the Draft Advice that it is important for infrastructure operators to publish other details about commercial arrangements even when the ACCC has approved an exemption from publishing the amount of the charge to ensure that customers are informed about the existence of such arrangements. Indeed, customer awareness that a commercial arrangement exists is necessary for the customer to be able to enact the *Freedom of Information Act 1982*.<sup>342</sup>

However, the ACCC does recognise stakeholder concerns about this requirement to include additional information despite obtaining an exemption triggering the publication requirements and the potential for customer confusion with infrastructure operators frequently sending a new Schedule of Charges to customers. Therefore, the ACCC has proposed to amend the rules such that an operator will only be required to provide this information on their Schedule of Charges within 12 months after the exemption is granted.

### **Other exemptions**

The ACCC notes that the proposed amendments to rule 7 (in rule advice 5-E of section 5.4.1) would prohibit an infrastructure operator or other person from levying an infrastructure charge where this charge is not set out on the Schedule of Charges in effect at the time the infrastructure service is provided and levied consistently with how the charge is specified in that Schedule of Charges (i.e. at the rate / circumstances set out on the Schedule of Charges).

However, the ACCC acknowledges that there are a number of scenarios where it would not be feasible for an operator to set out some or all of the details of an infrastructure charge on their Schedule of Charges at the time the operator adopts a Schedule of Charges. This would apply where, for example:

- the amount of the charge is unknown until the customer requests the service - for example, a service for the connection or disconnection of a customer from the operator’s network.
- the operator could not have reasonably anticipated the nature of the infrastructure service nor the amount of the charge in advance – for example, charges for works carried out by the operator on a customer’s property.
- the infrastructure charge is set out in a new commercial agreement between the operator and a customer for an infrastructure service that the operator could not have anticipated providing .
- the operator provides a discount to an individual customer or customers for reasons of the customer(s) hardship, or in recognition of service disruption.

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<sup>341</sup> A *prudent discount* is where an infrastructure operator offers an infrastructure service at a discounted rate to a particular customer or group of customers, which will / is likely to result in charges for the infrastructure operator’s other customers being lower than they would otherwise have been. This includes where an operator credibly believes that a customer would not obtain infrastructure services at the standard charge for that infrastructure service, but would, with the provision of a discount, obtain infrastructure services and pay charges that would contribute towards the operator’s fixed costs.

<sup>342</sup> The ability to use the *Freedom of Information Act 1982* was noted by LMW as a reason to not publish commercially negotiated charges.

- the infrastructure charge passes on the cost of a ‘transaction charge’ incurred by the operator on behalf of a customer, consistently with proposed rule 9A.<sup>343</sup>

Absent any further measures, the proposed amendments to rule 7 would mean that if these situations arise after a Schedule of Charges comes into effect, then the operator would be prohibited from levying a charge for those infrastructure services until it adopted a new Schedule of Charges that set out all the details of the charge (and that Schedule had come into effect), which would also trigger the notification requirements to send / publish the new Schedule of Charges.

The ACCC recognises that this could represent a significant regulatory burden for some infrastructure operators, particularly operators who are likely to enter into a number of commercial and written contracts throughout the year. For example, the ACCC acknowledges stakeholder concerns about the compliance costs and potential for customer confusion if an operator is required to regularly adopt and send a new Schedule of Charges throughout the year to include these types of charges on its Schedule. Therefore, the ACCC considers that there should be some exemptions from rule 7, which would allow an operator to levy charges for these infrastructure services, despite the charge not being listed on the operator’s Schedule of Charges at the time the infrastructure service is provided. In these cases only, the ACCC considers that it is reasonable for the exemption from rule 7 to be automatic. This is because the case for not publishing these charges is straightforward. In particular:

- the charge is not or cannot reasonably be known at the time the operator adopts their Schedule of Charges
- the operator is responding to a personal hardship that a customer or customers are experiencing or
- it would not be practical given the range of transaction charges that many operators are likely to be required to pass through to their customers.

Therefore, the benefits of requiring an operator to apply for an exemption would not outweigh the costs.

The ACCC considers that a Schedule of Charges need not include:

- (i) for a charge in relation to which an exemption has been granted under rule 9—details of the charge (other than the information required by proposed subrule 9(13A), as discussed above).
- (ii) where a discount on an infrastructure charge is provided to an individual customer or customers for reasons of the customers’ hardship (e.g. a natural disaster), or in recognition of a service disruption experienced by the customer (e.g. a temporary channel closure)—the amount of the discount and any other information relevant to that discount.
- (iii) for a charge levied in accordance with rule 9A to recover the amount of any infrastructure charge or planning and management charge incurred (but not determined) by the operator in relation to a transaction undertaken on behalf of a customer such as a trade application charge—all details of the charge.
- (iv) for a charge that reflects the costs of physically connecting, or physically disconnecting a customer from the operator’s water service infrastructure—the operator may include a statement that the charge will be determined at the time of the connection or disconnection, instead of the amount of the charge.

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<sup>343</sup> Where an operator incurs a transaction charge on behalf of a customer (for example a trade application charge) the ACCC considers it is reasonable and desirable for the operator to recover the cost of such a transaction charge directly from the customer(s) responsible for it being incurred. Section 5.13 details proposed rule 9A, for how an operator should pass through the cost of infrastructure charges or planning and management charges it incurs—including transaction charges—onto its customers.

- (v) for an infrastructure charge relating to an infrastructure service (other than a service in relation to the physical connection to or disconnection from the operator’s water service infrastructure) where circumstances are such that the amount of the charge (or details of rates and all other details necessary to determine that amount) cannot reasonably be determined—all details of the charge.

In relation to charges described by item (ii), if an infrastructure charge relates to a discount provided for reasons of hardship or service disruption, the ACCC considers that this charge and other relevant details need not be included on the operator’s current or subsequent Schedule of Charges.<sup>344</sup> Such discounts relate to situations which may be highly sensitive or specific to the particular customer and the nature of the hardship. In these cases, the ACCC does not consider that requiring disclosure of the discount would significantly contribute to pricing transparency of a kind which is useful for customer decision-making. However, the ACCC notes that these charges should still be subject to the proposed non-discrimination provisions. This will ensure that any discounts offered on the basis of hardship or service disruption do not unreasonably favour one customer group over another.

In relation to charges described by item (iii), if the infrastructure charges are levied by the operator consistently with proposed rule 9A, in order to pass through the cost of a ‘transaction charge’ incurred on behalf of a customer, the ACCC considers that the details of the charge need not be disclosed on the operator’s current, or subsequent Schedule of Charges. This is because the automatic exemption proposed here will only apply where the operator’s infrastructure charge (passing through the transaction charge) is consistent with proposed rule 9A, which will ensure pricing transparency by requiring that the cost of transaction charges’ are passed through only on to those customers responsible for the costs being incurred.

The ACCC also notes that any transaction charges the operator incurs will, by definition, be either an infrastructure charge or planning and management charge, and the details of the transaction charge would therefore still be set out on the Schedule of Charges of the entity that determined the transaction charge. The automatic exemption would not extend to any transaction charge determined directly by (rather than incurred by) the infrastructure operator to recover its own costs.

In relation to charges described by item (iv), where an operator levies infrastructure charges for a service of physically connecting or disconnecting a customer to or from its water service infrastructure, the amount of the charge may be dependent on factors occurring at the time of the connection or disconnection (for example, a charge could be calculated based on the time and / or equipment used to perform the connection or disconnection). If the operator considers this is likely, the ACCC considers it would be sufficient for the operator to list on its Schedule of Charges that the amount of the charge will be determined upon application or at the time of the connection or disconnection (according to however the operator determines the amount of the charge). The ACCC does not consider that it is necessary that operators report on the amount of connection or disconnection fees actually charged. As these kinds of infrastructure services are highly specific but not uncommon, the ACCC considers it likely that customers would be able to informally gather sufficient general information about the likely costs involved even without a requirement for the operator to report on fees actually levied.

In relation to charges described by item (v) (where the operator either knows the infrastructure service but not the amount of the charge or does not know the infrastructure service sufficiently early for it to

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<sup>344</sup> However, as discussed in section 5.4.1, an operator should still be required to set out on its Schedule of Charges, details of any *generally available* discount or surcharge, including the circumstances in which they apply (e.g. a discount for early payment).

be included on a Schedule of Charges), the ACCC considers that these are situations where an infrastructure operator should not be required to list the charge on its current Schedule of Charges at the time an infrastructure service is provided in order to be able to levy a charge. However, unlike the circumstances discussed above for physical connection / disconnection, the operator *should* be required to include / report all relevant details of the charge on the next Schedule of Charges that the operator adopts, or within 12 months, whichever comes first.

The ACCC notes that most infrastructure operators publish a new Schedule of Charges at least annually (typically commencing in the new financial year). The ACCC therefore considers that the pricing transparency benefits associated with requiring all infrastructure charges to be disclosed on a Schedule of Charges will still be largely realised if operators are only required to publish details of infrastructure charges (such as those set out in new commercial agreements) within 12 months or when they next adopt a new Schedule of Charges.

For example, consider an operator that has adopted a new Schedule of Charges at the beginning of the financial year, but then, several months later, enters into a new commercial arrangement to provide infrastructure services to a customer at a lower charge than their standard charge for that service. In such cases, information about the nature of the service being provided and the related infrastructure charges may often be useful for other customers (e.g. because the commercial arrangement relates to a new or different infrastructure service which other customers may be interested in receiving). Therefore, the ACCC considers it appropriate that, within a reasonable timeframe, other customers are made aware of the details of the charge (assuming an exemption under rule 9 does not apply). However, the ACCC appreciates that a requirement that operators resend an updated Schedule of Charges each and every time it enters into such a contract would impose additional costs on the operator. Therefore, the ACCC's position is that, while ultimately the operator should be required to provide information on infrastructure charges in such situations (unless a rule 9 exemption applies), the infrastructure operator should not be required to adopt or update their Schedule of Charges immediately. Instead, the rules should require the operator to list the details of the infrastructure charge on its next Schedule of Charges.

In the event that an operator levies infrastructure charges associated with a particular commercial agreement only for a particular period—for example, the commercial agreement was for a 'one-off' service—the ACCC considers that the details of the charge should still be disclosed in the operator's next Schedule of Charges. This will assist with pricing transparency and ensure customers are more fully informed.

The effect of the exemptions set out above is that an infrastructure operator would not be precluded from levying the relevant infrastructure charges (under proposed rule 7). However, the ACCC notes that these charges should still be subject to the proposed non-discrimination provisions (see section 5.3).



## 5.5 Network Service Plans (Part 5)

### Rule advice 5-L

The rules should be amended to repeal the Network Service Plan (Part 5) requirements. Effective standards can be ensured through rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions.

*Note:* there is merit in repealing the Part 5 requirements in the near term to avoid operators incurring unnecessary expenditure.

This rule advice is implemented in the repeal of Part 5 of the current WCIR and related provisions referencing Part 5 operators.

### Background

Currently under the Water Charge (Infrastructure) Rules 2010 (WCIR), a Part 5 operator is defined as including member-owned operators servicing more than 125 gegalitres (GL), and other infrastructure operators (that are not member-owned) servicing between 125 and 250 GL of water held under water access entitlements (WAE). There are currently five Part 5 operators:

- SunWater;
- Coleambally Irrigation Cooperative Limited (CICL);
- Murray Irrigation Limited (MIL);
- Murrumbidgee Irrigation Limited (MI); and
- Central Irrigation Trust (CIT).

Although the WCIR do not require the charges of Part 5 operators to be approved or determined by a regulator, they do impose certain requirements in relation to network planning and customer consultation:

- At least once every five years, a Part 5 operator must develop a Network Service Plan (NSP) that provides details of the operator's plans relating to its water service infrastructure over the forthcoming five year period.
- In developing their NSP, Part 5 operators must prepare a Network Consultation Paper to facilitate consultation with their customers.<sup>345</sup>
- Part 5 operators must give, or cause to be given, a copy of the NSP to each customer, along with a summary of the consultation undertaken in preparing the NSP.<sup>346</sup>
- Part 5 operators must also submit a copy of their NSP to the ACCC who will provide it to a qualified engineer for comment and advice on the prudence and efficiency of the NSP.<sup>347</sup> The ACCC will then provide any comment or advice from the engineer to the operator. Within 20 business days after receiving the comment or advice, the operator must give a copy of the advice to each of its customers.
- A Part 5 operator must also prepare an information statement<sup>348</sup> each year and provide this to customers when providing its Schedule of Charges.

<sup>345</sup> WCIR, rule 18 sets out the specific consultation requirements.

<sup>346</sup> Part 5 operators must ensure that all customers receive the NSP in accordance with the WCIR. However, the WCIR is not prescriptive in how the operator must provide the NSP to its customers; an operator may offer customers different options for receiving the NSP e.g. via email or post. See: ACCC, *A guide to the water charge infrastructure rules: tier 2 requirements*, Canberra, June 2011, p.19, viewed July 2016, <http://www.accc.gov.au/publications/water-charge-infrastructure-rules/a-guide-to-the-water-charge-infrastructure-rules-tier-2-requirements>.

<sup>347</sup> WCIR, rule 18.

<sup>348</sup> The information statement must explain:

During the Review of the Act, some operators expressed concerns about the significant information and consultation requirements associated with NSPs, and the costs that this can entail for Part 5 operators. In its Issues Paper, the ACCC sought feedback about the advantages and disadvantages of current Part 5 requirements and whether there are alternative ways to ensure an operator's customers are aware of, and can have input into, water infrastructure investment planning and decision making.

In forming its Draft Advice, the ACCC noted stakeholders views received in response to the Issues Paper and Act Review that the compliance costs of Part 5 outweigh the benefits obtained. The ACCC considered that effective standards could be maintained, through proposed amendments to the non-discrimination provisions (see section 5.3) and pricing transparency provisions (see section 5.4), rather than the current Part 5 requirements, at significantly lower compliance costs. Accordingly, the ACCC made draft rule advice to repeal Part 5 of the WCIR, as well as rule requirements for Part 5 operators specifically that are located in other Parts of the rules (draft rule advice 5-L). This draft rule advice was contingent on the ACCC's Draft Advice relating to pricing transparency and non-discrimination also being adopted.

### *Stakeholder feedback*

Stakeholders raised significant concerns in relation to the regulatory burden of Part 5, via submissions to the Act Review, submissions to the ACCC's Issues Paper, in meetings with ACCC staff and at public forums. Many stakeholders questioned what, if any, additional benefits are being achieved through the Part 5 requirements as distinct from those activities already undertaken by member-owned operators or under state-based processes. The majority of feedback received by the ACCC in its first round of consultation supported the repeal of Part 5 requirements of the WCIR.<sup>349</sup>

Member-owned infrastructure operators identified that the Network Consultation Paper process duplicates consultation processes that they already use to engage with their customers

In response to the Draft Advice, the National Farmers' Federation (NFF) submitted that the costs of producing the NSP outweigh the benefits.<sup>350</sup>

Three other submissions *conditionally* support the repeal of the requirement to produce a NSP. The National Irrigators' Council (NIC) submitted that they support the repeal as a standalone reform, arguing that it is the only proposed amendment, which appropriately responds to the terms of reference for the water charge rules review.<sup>351</sup> However, the NIC do not support the repeal being conditional on the introduction of the ACCC's proposed amendments regarding pricing transparency and non-discrimination. The NIC's view is that the proposed amendments that would replace the NSP "would be more burdensome and costly" than producing a NSP. The NIC argues that the NSP addresses issues such as works, expenditure estimates, financing plans, details about grants or subsidies and estimated regulated charges, which is different to the issues that the other proposed amendments attempt to address.<sup>352</sup>

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- any changes to the regulated charges contained in the NSP
  - the operator's actual and anticipated revenue from regulated charges
  - details of and reasons for any adjustments made in respect of the charges set out in the NSP for that year
  - an explanation of the reasons for differences in regulated charges imposed on irrigation right holders versus other customers.

<sup>349</sup> See 'stakeholder feedback' in section 5.5 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.88-92.

<sup>350</sup> National Farmers' Federation, Draft Advice Submission, March 2016, p.1.

<sup>351</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.6.

<sup>352</sup> *ibid*, p.8.

The NIC and Western Murray Irrigation (WMI) further commented that smaller operators may face increased regulatory costs from the proposed amendments to rules (such as non-discrimination provisions), but they do not benefit, by way of offsetting regulatory costs, from the repeal of the NSP.<sup>353</sup>

By comparison, the Local Government Association of Queensland (LGAQ) suggested that if the information is not required to be published then it should be made available on request or included in other publications. The LGA Q noted that the NSP requirements (in addition to the requirements relating to Schedules of Charges) in the WCIR have increased transparency of water charges in Queensland, and this transparency will be maintained even with the repeal of the NSP.<sup>354</sup>

SunWater already produces an annual NSP as part of the process for the Queensland Competition Authority (QCA) recommending SunWater's irrigation charges to the Queensland Minister. The Queensland Farmers' Federation (QFF) noted that it supports the annual NSP (under the Queensland process) because it is a transparent process reporting on the implementation of the charges recommended by the QCA; QFF is of the view that the annual NSP will provide data and efficiencies for SunWater's next price review.<sup>355</sup>

Only one submission, from Mr Tom Loffler, supports retaining the requirement to produce and publish a NSP.<sup>356</sup>

#### *ACCC assessment*

The ACCC maintains its view from the Draft Advice that, on balance, requirements in relation to NSP should be removed from the rules. Repealing Part 5 would significantly reduce the regulatory requirements and associated compliance costs of the current Part 5 operators. However, a key consideration is to balance the reduction in compliance burden obtained via the repeal of Part 5 against the maintenance of effective standards.<sup>357</sup>

The ACCC continues to hold the view from its Draft Advice that some of the proposed amendments to other parts of the rules will contribute to achieving the underlying intent of the current Part 5 requirements, while also addressing other important issues directly.

The ACCC noted in its Draft Advice that the policy intent of Part 5 was to provide increased transparency around infrastructure investment and price-setting processes and allow for customer participation in these processes, while taking into account ownership arrangements and the size of the operator.<sup>358</sup> Pricing transparency and customer participation in decision making remain important for customers' own decision-making and for promoting the economically efficient and sustainable use of water resources and water service infrastructure. The ACCC considers that this original policy intent of Part 5 remains relevant.

As such, while the simple removal of the NSP requirements (without any other amendments to the rules) would provide a reduction in the compliance burden, the ACCC does not consider this change alone would ensure that effective standards are maintained.

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<sup>353</sup> *ibid*, p.9; Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>354</sup> Local Government Association of Queensland, Draft Advice Submission, March 2016, p.8.

<sup>355</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.4.

<sup>356</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.2.

<sup>357</sup> Item 3, water charge rules review terms of reference.

<sup>358</sup> ACCC, *Water infrastructure charge rules – Advice to the Minister for Climate Change and Water*, Canberra, June 2009, pp.26,29.

The ACCC maintains that customers should be able to understand the process by which infrastructure charges imposed by their operator are decided. Accordingly, the ACCC made draft rule advice that all infrastructure operators should provide a statement setting out the process for determining their charges when providing their Schedule of Charges to customers (see rule advice 5-E). This ensures that customers are informed, at a high level, about the process that the operator has undertaken for determining charges, without providing the level of prescriptive detail that was required in the Network Consultation Paper or NSP.

The ACCC further considers that its proposed enhanced non-discrimination provisions (see section 5.3) will provide additional protections for customers, and thereby mitigate against the possibility of adverse effects caused by repeal of the Part 5 (NSP) provisions. To the extent that customers are protected from certain forms of discriminatory pricing through enhanced non-discrimination requirements, the need for customers to participate in decision-making processes in order to avoid such outcomes is alleviated.

The ACCC acknowledges stakeholder concerns that some smaller infrastructure operators may incur additional regulatory costs as a result of the proposals elsewhere in this Final Advice, but not enjoy the cost reduction associated with the proposed repeal of the NSP requirements.

The ACCC's proposal to apply a consistent set of requirements on all infrastructure operators was and remains based on the need to ensure a consistent level of protection for all infrastructure operator customers, balanced against the estimated regulatory costs. While the ACCC estimates a small increase in regulatory costs for smaller infrastructure operators (see chapter 9), it considers that it is adequately balanced against the increased level of protection that will be afforded to customers of these operators.

### **Regulatory cost and the timing of amendments**

As noted in chapter 9, the development and dissemination of an NSP involves substantial estimated regulatory costs.

The ACCC notes that the current round of NSPs are due to expire in mid-2017. While there is no statutory timeframe for when an infrastructure operator should commence the development of the next round of NSPs, the level of detail and consultation required by the rules mean that infrastructure operators are likely to have commenced development of these before the end of 2016. In the absence of a new NSP, the current rules could preclude an infrastructure operator from levying charges for their infrastructure services,<sup>359</sup> or at least updating and publishing a new Schedule of Charges.<sup>360</sup>

### **Conclusion**

The ACCC considers that effective standards can be ensured through rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions. However, in recognition of the regulatory cost and timing considerations set out above, the ACCC considers that the proposed amendments to repeal Part 5 (NSP) requirements should not be conditional on the simultaneous acceptance of these rule advices, and has adjusted its rule advice to reflect this.

Furthermore, to the extent that the Minister is inclined to accept the ACCC's rule advice 5-L (to repeal the Part 5 (NSP) requirements), there is merit in doing so in the near term to avoid operators

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<sup>359</sup> See subrule 8(1) in the WCIR.

<sup>360</sup> See rule 17 in the WCIR.

incurring unnecessary expenditure. In particular, the Minister may wish to consider an interim response to the ACCC's advice in relation to the possible repeal of the Part 5 (NSP) requirements.

## 5.6 Approval or determination of regulated charges (Part 6)

### Rule advice 5-M

#### *Application of Part 6*

The rules should be amended such that Part 6 applies based on the following criteria.

Where an infrastructure operator levies an infrastructure charge in relation to either:

- (a) a bulk water service in respect of water access rights; or
  - (b) infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State;
- and:
- (c) the infrastructure operator is not required to have all its infrastructure charges approved or determined by a single State Agency under a law of the State in a way that is consistent with proposed subrule 29(2)(b);

that infrastructure operator is a *Part 6 operator*.

The rules should be amended to allow for the ACCC to provide an exemption to the requirement on a Part 6 operator to have its infrastructure charges approved or determined under Part 6 of the rules.

The ACCC should only give such an exemption if it is satisfied that the application of those requirements would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles, taking into account:

- (a) the total volume of water access rights in relation to which bulk water services are provided by the operator, if applicable;
- (b) the total volume of water subject to water sharing arrangements in relation to which the operator provides infrastructure services, if applicable;
- (c) the infrastructure services provided by the operator;
- (d) any preferences expressed by the operator's customers to the ACCC;
- (e) any views expressed by a State Agency to the ACCC;
- (f) whether the relevant law of the State is being transitioned so that the operator's infrastructure charges will at a future date be approved or determined by a single State Agency in a way that is consistent with the regulatory test for Part 6 operators (set out in subrule 29(2)(b) of the proposed water charge rules);
- (g) the proportion of the infrastructure operator's revenue to be recovered from infrastructure charges; and
- (h) any other matters that the ACCC considers relevant.

The exemption should be granted for a specific period, or for an unspecified period if the decision to exempt is subject to review at a specific time.

In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.

#### *Transitional arrangements for existing Part 6 operators*

The rules should include transitional provisions to provide that, when the amended rules commence (referred to in the proposed water charge rules as the 'transition date'), Part 6 of the proposed rules continues to apply to an existing Part 6 operators (even if it would not meet the proposed new criteria) until the conclusion of any regulatory period in effect on the transition date.

If, however, a Part 6 operator had made an application under Part 6 before the transition date, but the regulator had not yet approved or determined the charges, the approval or determination should be made according to the current Part 6 criteria. However, Part 6 as amended should then apply to the operator until the end of the 'regulatory period' for which the application was made.

After the transition date, the ACCC will consider whether existing Part 6 operators meet the proposed new criteria for the application of Part 6 and, if they do or will, whether an exemption from the requirements of Part 6 as amended should be given for after the transition period.

*Note:* If rule advice 5-M is adopted, rule advices 5-A to 5-E, relating to enhancing the non-discrimination and pricing transparency provisions, should also be adopted to ensure effective standards are maintained.

*Note:* If rule advice 5-M is adopted, rule advice 5-W (winding back accreditation requirements) should also be adopted.

### *Regulator for Part 6*

Due to the proposed amendments to the criteria for Part 6, the regulator for Part 6 after the transition period should be the ACCC (rather than an accredited state regulator or the ACCC, as under the current rules).

*See also rule advice 5-W.*

This rule advice is implemented in rules 23 to 23D and Part 11 of the proposed Water Charge Rules.

## *Background*

Part 6 of the Water Charge (Infrastructure) Rules 2010 (WCIR) provides for the ongoing determination or approval of regulated charges of Part 6 operators by an independent regulator. The regulator is the ACCC by default, unless an eligible state regulator applies for, and is granted, accreditation under Part 9 of the WCIR. For the relevant operators, Part 6 addresses the potential misuse of market power that can occur by natural monopoly infrastructure operators (see section 5.1).

Under the WCIR, a Part 6 operator is defined as an infrastructure operator that is not member-owned and that services greater than 250 gigalitres (GL) of water held under water access entitlements (WAEs).<sup>361</sup> After an initial transition period, a Part 6 operator is required to have its regulated charges approved or determined by the ACCC or an accredited Basin State regulator.

The current Part 6 operators are:

- Lower Murray Water (LMW)—regulated by the Essential Services Commission of Victoria (ESCV)
- Goulburn-Murray Water (GMW)—regulated by ESCV
- WaterNSW (formerly State Water)—regulated by the IPART.

In its Draft Advice, the ACCC considered a number of arguments regarding the best approach to charge approvals / determinations made under the water charge rules:

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<sup>361</sup> Rule 23 in the WCIR.

- Monopoly power is most significant for infrastructure operators who provide on-river infrastructure services for the storage and / or delivery of water on-river (in contrast to the delivery of water ‘off-river’ through pipes and / or channels, where irrigators and other customers are likely to have more options such as moving to another operator or becoming a private diverter). Given this rationale, it is important that direct regulation be applied to operators providing monopoly on-river infrastructure services regardless of their ownership structure.
- There is a strong view from stakeholders that the water charge rules need to provide for the approval or determination by an independent regulator of charges imposed by the Murray-Darling Basin Authority (MDBA), should the MDBA impose charges (see section 5.12).<sup>362</sup> It is not clear that the rules in their current form would necessarily result in Part 6 applying to MDBA. A similar concern is also warranted in relation to the Border Rivers Commission (BRC).
- The current accreditation arrangements of the WCIR reflect the continued role of Basin States in regulating other water charges; in particular, those outside of the Murray-Darling Basin (MDB), or in relation to urban water supply activities. The ACCC noted that there are currently no indications that Basin State are likely to further transfer the regulation of rural water charges or other water-related functions to the Commonwealth, and that Basin States maintain considerable expertise which is highly valuable for the management of the MDB and the rural water sector more broadly.<sup>363</sup>
- Moreover, the provision for Basin State regulators to be accredited under Part 9 of the WCIR affords considerable discretion to accredited regulators, meaning that the potential consistency gains accruing from directly determining operators’ charges under Commonwealth rules are limited. Although the requirement for accredited regulators to act consistently with the ACCC’s Pricing Principles promotes a degree of consistency, the ACCC considered that there is sufficient discretion for regulators under the rules and Pricing Principles that this requirement will not necessarily result in a markedly greater level of consistency than would be achieved in a context where regulators voluntarily worked to develop a nationally coherent approach.

The ACCC reconsidered whether the current application of Part 6 and accreditation arrangements constituted the best mechanism for integrating the functions of State and Commonwealth regulators. The ACCC’s Draft Advice considered that it is appropriate that the focus of the Commonwealth’s role be redirected away from determining an operator’s overall revenue requirement (since this role can be performed effectively under state water management law), and towards providing consistent protections and promoting pricing transparency for customers of infrastructure operators throughout the Basin. Accordingly, the ACCC’s Draft Advice recommended that the application of Part 6 be recrafted as both:

- a framework for the regulation of infrastructure operators that would allow Basin States to voluntarily transfer regulatory functions to the Commonwealth at a later date; and
- a regulatory ‘fall-back’ where state water management law does not provide for the State regulator to directly approve or determine the infrastructure charges of infrastructure operators providing on-river infrastructure services. This could occur where:
  - (a) a Basin State does not have in place a mechanism for direct approval or determination of a particular operator’s infrastructure charges; or

<sup>362</sup> The MDBA does not currently impose charges, and as such is not currently subject to the water charge rules.

<sup>363</sup> The *Water Act 2007* already provides for Basin States to ‘opt-in’ the non-MDB parts of their states to the coverage of the water charge rules (and the Water Market Rules 2009). No Basin State has expressed an interest in this option to date.

- (b) a Basin State does not have adequate jurisdiction over an infrastructure operator because that operator provides services across multiple jurisdictions (e.g. MDBA, BRC).

This approach recognised that customers of providers of on-river infrastructure services have less opportunity and ability to change service providers than do customers of other infrastructure operators, and that on-river infrastructure services for the storage and delivery of water generally remain ‘bundled’ with water access rights. To implement this approach, the ACCC made draft rule advice (5-M) that the application of Part 6 be amended to apply based on the following:

Where:

- holders of a class of water access rights must obtain infrastructure services from an infrastructure operator in order to have water relating to that water access right stored or delivered; or
- a person must obtain infrastructure services from an infrastructure operator in relation to the storage or delivery of water to give effect to an arrangement for the sharing of water between more than one Basin State; and
- the infrastructure operator is not required to have all its infrastructure charges approved or determined by a single State agency under State water management law;

that infrastructure operator should be a Part 6 operator.<sup>364</sup>

The ACCC further made draft rule advice that the rules should provide for the ACCC to exempt an operator from the requirements of Part 6 (requiring an operator to have its infrastructure charges approved or determined) where applying the requirements would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles (BWCOP), having regard to certain matters (draft rule advice 5-M).

Furthermore, the ACCC made draft rule advice to repeal Part 9 of the WCIR relating to the accreditation of state regulators (draft rule advice 5-W, considered in section 5.9).

### *Stakeholder feedback*

During its consultation for the Issues Paper, the ACCC received feedback from stakeholders<sup>365</sup> about the significant regulatory burden imposed by having multiple regulators, particularly in the context of the perceived current lack of consistency in relation to pricing outcomes for Part 6 operators (see also section 5.10.3). The ACCC also received a number of submissions which pointed out that most Basin States already provide for the direct price regulation of certain infrastructure operators (including all current Part 6 operators) under state water management law and which argued that direct determination of these operators’ charges under the WCIR adds little value beyond that already achieved under state-based frameworks. However, one submitter advocated expanding the reach of

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<sup>364</sup> In its Draft Advice, the ACCC recognised that this approach will require guidance on terms such as “class of water access rights”. The ACCC generally considers a ‘class of water access right’ to be defined by reference to the following characteristics:

- (a) the water resource to which the right relates
- (b) the SDL resource unit
- (c) its priority or reliability
- (d) the form of take

*Note:* ‘form of take’ is defined in section 1.07 of the Basin Plan.

- (e) access to carryover arrangements (where applicable)
- (f) tradeability.

<sup>365</sup> For a summary of relevant submissions, see discussion in section 5.6 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.94.



the water charge rules to apply nationally, with a view to promoting a nationally consistent framework for regulating water charging arrangements.<sup>366</sup>

In response to the Draft Advice, five stakeholders supported the intent of the proposed amendment to hand-back responsibility for price approvals / determinations to Basin States under their own regulatory regimes:

- WaterNSW argued that the pricing principles in the IPART Act 1992 are broadly similar to the BWCOP.<sup>367</sup> WaterNSW therefore considers it will achieve broadly similar outcomes as those envisaged under the *Water Act 2007* (the Act) and the WCIR.
- LMW, WaterNSW and IPART noted that a single price determination can be carried out for the one operator and / or the timing of water charge reviews can be aligned across the state.<sup>368</sup> WaterNSW and IPART further submitted that this would result in:
  - lower costs for the regulated entity (WaterNSW) and its customers
  - a consistent approach to price setting in valleys inside and outside the MDB (IPART).
  - GMW agrees that the ESCV is “better placed” to make a price approval / determination of GMW’s charges under the Water Industry Regulation Order.<sup>369</sup>

WaterNSW added that the proposed amendments to “permit state based economic regulation in the Murray Darling Basin, is a common-sense approach to reduce cost burden and maximise the benefits of economic regulation for the customers”.<sup>370</sup> IPART also agrees that the proposed amendments will reduce regulatory burden on infrastructure operators. IPART added that it would provide a simpler process for all stakeholders to engage with.<sup>371</sup>

The Victorian Farmers’ Federation (VFF) argued that it is important that the charges of large, Victorian infrastructure operators such as GMW and LMW be subject to regulatory approval/determination. The VFF noted that while it supports the existing approach to Part 6, it is willing to support, in principles, the amendments on the condition that there is “proper and appropriate” regulatory oversight and the quality is not diminished.<sup>372</sup> The VFF is of the view that this is ensured through having Part 6 as a fall back in the absence of state regulation and via the proposed non-discrimination provisions.

By comparison, the NSWIC submitted that NSW stakeholders have deployed significant resources to familiarise themselves with different regulatory processes to come “full circle” and have “no real regulatory change”. That is, under the proposed amendments IPART will again determine WaterNSW charges under NSW legislation (as was the case before the rules were developed)—yet, in the meantime, WaterNSW charges will have also been determined by the ACCC and then IPART separately under the water charge rules.<sup>373</sup>

### **Coverage of certain infrastructure operators**

Some stakeholders sought clarification on the infrastructure operators that the proposed amendments to the application of Part 6 will capture.<sup>374</sup> In particular, there is a view that the current drafting could

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<sup>366</sup> Waterfind, Issues Paper Submission, July 2015, p.2.

<sup>367</sup> WaterNSW, Draft Advice Submission, March 2016, p.7.

<sup>368</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.1; WaterNSW, Draft Advice Submission, March 2016, p.7; IPART, Draft Advice Submission, March 2016, p.1.

<sup>369</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>370</sup> WaterNSW, Draft Advice Submission, March 2016, p.1.

<sup>371</sup> IPART, Draft Advice Submission, March 2016, p.1.

<sup>372</sup> Victorian Farmers’ Federation, Draft Advice Submission, March 2016, pp.6-7.

<sup>373</sup> NSW Irrigators’ Council, Draft Advice Submission, March 2016, p.1.

<sup>374</sup> NIC, LMW and QTDEWS.

be interpreted as capturing irrigation infrastructure operators (IIOs). Many of these stakeholders have noted that this is not the ACCC's intent, and provided feedback that there is scope to improve the clarity of the drafting to better reflect this.

- The National Irrigators' Council's (NIC) concerns relate to the drafting of subrule 23(b)(i). The NIC argues that the rule "taken literally" in its current form would capture any infrastructure operator where at least one of its customers has transformed and retained water delivery rights.<sup>375</sup>
- Lower Murray Water (LMW) commented on subrule 23(b); LMW noted there was scope to further clarify that the rule only captures on-river infrastructure operators.<sup>376</sup>
- The Queensland Treasury and Department of Energy and Water Supply (QTDEWS) noted that channel irrigation schemes currently owned and operated by SunWater are being transferred to private, local ownership and management.<sup>377</sup> The QTDEWS sought clarification as to whether the proposed amendments would apply to the St George Distribution Scheme, the only distribution scheme where relevant charges may fall within the scope of the water charge rules, both now and once it has transferred to local management.

Queensland stakeholders were particularly concerned that price regulation for Queensland operators such as SunWater and Queensland Department of Natural Resources and Mines (DNRM) could be captured by Part 6 under the rule 23 in the Draft Advice (and discrimination provisions) because:

- SunWater's irrigation charges are recommended by the Queensland Competition Authority (QCA) to the Minister, rather than being determined by 'a single State agency'
- Non-irrigation charges are subject to negotiation, not necessarily under 'State water management law'
- DNRM levies infrastructure charges in relation to the Border Rivers Water Supply Scheme, without a regulatory process.

They are concerned that price determination by the ACCC would involve a new type of 'heavy-handed' regulation and duplication with existing Queensland processes, for little benefit. The Queensland Farmers' Federation (QFF) was also concerned that ACCC could be the default regulator for the Queensland MDB schemes, resulting in additional cost and regulation.

The Local Government Association of Queensland (LGAQ) also did not support ACCC regulation that is "already clearly established for the states", although it saw a role for the ACCC in providing guidance in relation to a water charging framework based on clear principles. It had particular concerns about the effect of the QCA's cost allocation methodology on high priority licence holders, which are typically councils and non-irrigation customers.

### **References to State water management law**

IPART commented on the drafting of rule 23 in relation to the reference to 'State water management law'.<sup>378</sup> IPART recommended that the ACCC ensure that the drafting captures the relevant legislative framework in NSW including:

- section 11 of the *Independent Pricing and Tribunal Act 1992*, which relates to the determination of maximum prices by IPART (under a standing reference)

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<sup>375</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.16.

<sup>376</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.2.

<sup>377</sup> QTDEWS, Draft Advice Submission, March 2016, pp.9-10.

<sup>378</sup> IPART, Draft Advice Submission, March 2016, p.2.

- section 39 of the *Water NSW Act 2014*, which relates to the imposition of fees and charges by WaterNSW.

### **Transitional arrangements**

WaterNSW stated that it supports the transitional provisions for rule 23. In particular, it supports IPART being able to approve / determine WaterNSW's charges under NSW legislation from the start of the next regulatory period (1 July 2017).<sup>379</sup> WaterNSW noted its preference to “work closely” with the ACCC and IPART to ensure that its application in relation to this regulatory period is not only consistent with proposed amendments to other relevant sections of the water charge rules, but also with IPART's framework for approving / determining charges.<sup>380</sup>

SunWater also commented on the transitional provisions for rule 23, submitting that Part 6 should not apply to charges that are already set under pre-existing contracts (i.e. commercially negotiated contracts). In SunWater's view, the rules should “honour and preserve” charges under pre-existing contracts.<sup>381</sup>

### *ACCC assessment*

The ACCC maintains its view from the Draft Advice that the criteria for the application of charge approvals / determinations should be revised.

The ACCC agrees with the VFF that there should be appropriate regulatory oversight of the current Part 6 operators and considers this can be achieved where Basin State regulatory approaches ensure that relevant infrastructure operators' costs are prudent and efficient and infrastructure charges are set at levels that would not allow the operator to earn monopoly returns.<sup>382</sup> The ACCC believes this standard is consistent with the regulatory test set out in subrule 29(2)(b), which is discussed in section 5.6.3. The ACCC also notes the need for clarity about the form / level of regulation that is required by a State Agency to exclude an infrastructure operator from the application of Part 6. As such, the ACCC considers the application criteria in proposed subrule 23(a) should only be satisfied if the operator is not required to have all its infrastructure charges approved or determined consistently with the regulatory test set out in (proposed) subrule 29(2)(b) which would apply to a Part 6 operator.

The ACCC considers this will provide an essential level of protection for customers in aggregate—ensuring that revenue from infrastructure charges meets, but does not materially exceed, the prudent and efficient costs of providing the infrastructure services, taking into account government contributions through Community Service Obligations (CSOs) or forgone returns and any other revenue derived from the operator's water service infrastructure (see section 5.6.3).

The ACCC considers that while the criteria used by the alternative State-based regulators (IPART, ESCV, QCA and Essential Services Commission of SA (ESCOSA)) are not identical to the BWCOP and current Part 6, they are likely to be consistent with the proposed requirements above.

Under the proposed arrangements for the application of Part 6, Basin States would be responsible for the approval or determination of the infrastructure charges of current Part 6 operators in the first instance. This would have the effect that LMW, GMW and WaterNSW could have their infrastructure charges approved or determined under Basin State regulatory processes rather than under Part 6 of the

<sup>379</sup> WaterNSW, Draft Advice Submission, March 2016, p.11.

<sup>380</sup> WaterNSW lodged its application for that regulatory period in June 2016.

<sup>381</sup> SunWater, Draft Advice Submission, March 2016, p.10.

<sup>382</sup> ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.96.

water charge rules. The infrastructure charges (and any water planning and management charges) of these operators should still be required to comply with the other rule requirements—in particular, the non-discrimination rules and the pricing transparency requirements.

This is similar to current arrangements in relation to the Basin Plan water trading rules. Basin States are primarily responsible for trading arrangements within their jurisdiction, but they must ensure their arrangements are consistent with the Basin Plan water trading rules. This allows for the ongoing role for Basin States, capitalising on their significant local expertise, while ensuring a Basin-wide level of protection for water users which facilitates the development of efficient water markets

The ACCC considers that the proposed arrangements set out in this section will allow:

- the water charge rules to regulate any future infrastructure charges imposed by inter-jurisdictional infrastructure operators such as the MDBA;
- the water charge rules to provide a regulatory ‘fall back’ should a Basin State withdraw from the regulation of an operator who otherwise meets the new Part 6 application provisions.

### **ACCC Pricing Principles**

The proposed changes to the application of Part 6 mean there would no longer be any need for the accreditation of Basin State regulators under Part 9 of the WCIR (see section 5.9). Because Basin State regulators would no longer be accredited under the WCIR, they would not be bound by the ACCC Pricing Principles as a condition of accreditation. The ACCC considers that the gain in terms of decreased regulatory burden of these proposals would outweigh potential small increases in inconsistency of regulators’ approaches to approvals and determinations. Although accredited regulators are required to apply the ACCC’s Pricing Principles when approving or determining charges (as a condition of accreditation), in practice the regulator (whether the ACCC or an accredited State regulator) has considerable discretion and substantially different pricing outcomes can occur.

The ACCC Pricing Principles would be retained to provide a clear guide for circumstances where the ACCC did have an approval role (e.g. for regulation of charges of the MDBA if imposed in the future). The ongoing revision of the Pricing Principles can also serve as a useful platform for the development of nationally consistent approaches to regulatory issues in the rural water sector (see recommendation 4-B in section 4.4). Further, in approving or determining charges, they (and the operator) would need to ensure that the operator’s charges were consistent with the other requirements of the water charge rules (see section 5.6.3).

### **Exemptions**

Recognising there may be a number of reasons why a Basin State may choose not to require an operator’s infrastructure charges to be approved or determined, and that the benefits of this form of regulation will vary across operators, there may be circumstances where the application of Part 6 is not the best regulatory outcome. For this reason, the ACCC also advises that the rules contain a process allowing the ACCC to exempt an infrastructure operator from the requirement for the ACCC to approve or determine their infrastructure charges. The rules should only allow the ACCC to give such an exemption where the application of Part 6 would not materially contribute to the achievement of the BWCOP, taking certain matters into account. This was proposed in draft rule advice 5-M, and given effect in proposed rule 23C in the Draft Advice.

The ACCC proposes adding two further matters that may be taken into account under proposed rule 23C when considering whether to exempt an operator from the requirements of Part 6 (these are in addition to those proposed in the Draft Advice):

- whether a Basin State is transitioning its regulatory regime in a way that would satisfy the criteria set out in proposed subrule 23(a)—that is, so that all the infrastructure charges of the relevant operator(s) will be approved or determined by a single State Agency under a law of the State, consistent with the regulatory test in proposed subrule 29(2)(b)—see ‘Application to Queensland operators’ below for more information.
- the proportion of the infrastructure operator’s revenue to be recovered from infrastructure charges—this will help ensure that Part 6 is not applied where doing so would not materially contribute to the achievement of the BWCOP (e.g. where infrastructure charges are levied in relation to infrastructure services offered incidentally to an operator’s business).

### **Coverage of certain infrastructure operators**

#### *Application to IIOs*

A number of stakeholders expressed concern that the proposed revisions to rule 23 in the Draft Advice (which included removing volume and ownership criteria) could result in off-river infrastructure operators, in particular, (member-owned) IIOs, meeting the definition of a Part 6 operator, and therefore potentially requiring their infrastructure charges to be approved or determined by the ACCC.

The ACCC notes that it was the intent of the Draft Advice to include all infrastructure operators as *potentially* qualifying for Part 6 if they had sufficient degree of monopoly power. However, the Draft Advice also noted that the proposed criteria for Part 6 would generally not apply to off-river infrastructure operators as they would not satisfy the condition:

*‘holders of a class of water access rights must obtain infrastructure services from the operator in order to have water relating to that water access right stored or delivered.’*

Customers of off-river infrastructure operators in NSW or SA generally hold water in the form of irrigation right, which is not a water access right.<sup>383</sup> Even in the event that they, or a customer of an off-river infrastructure operator elsewhere in the Basin, hold a water access right, the proposed criterion is only intended to apply if the infrastructure operator has a monopoly on the provision of infrastructure services for the storage or delivery of water directly relating to that class of water access right (rather than any secondary delivery service provided by an off-river infrastructure operator).

The ACCC accepts that there may still be some uncertainty for IIOs (and off-river infrastructure operators more generally) as to whether they would meet the criteria proposed in the Draft Advice, and that the proposed wording of rule 23 needs to be clarified.

The ACCC further notes that the term ‘bulk water service’ is defined in the Water Regulations 2008 as:

***bulk water service*** means one or more of the following:

- (a) a service that is provided for the storage of water that is primarily stored on-river;*
- (b) a service that is provided for the delivery of water that is primarily delivered on-river.*

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<sup>383</sup> See section 4 of the *Water Act 2007* (Cth).

Accordingly, the ACCC considers that the wording of the criteria in subrule 23(b)(i)<sup>384</sup> should be clarified to make it clear that the criteria is only met if an operator levies an infrastructure charge (including infrastructure charges that are not bulk water charges) in relation to a bulk water service in respect of water access rights. The ACCC considers that this amendment aligns with the reasoning set out in the Draft Advice, summarised in the ‘Background’ section above, relating to the high degree of market power possessed by such operators, and the lack of competitive pressure applied to them.

The proposed criteria clarifies that off-river infrastructure operators—who do not provide services for either the storage of water that is primarily stored on-river, or the delivery of water that is primarily delivered on-river—will not be considered Part 6 operators.

In the event that an off-river infrastructure operator’s network incorporates a natural watercourse, the ACCC is of the view that the criteria would only be met if the operator provides a bulk water service *in respect of water access rights*. That is, the delivery of water must be not only primarily on-river, but also to the location where the water under the water access right is able to be taken. The ACCC considers this would not extend to situations where an off-river infrastructure operator takes water under the water access right that they hold, before delivering the water to a customer holding an irrigation right against it.

For example, if an operator holds a NSW Murrumbidgee Regulated River water access licence and extracts water through the associated works from that water source, it is at this point that the water access right has been taken and any subsequent delivery of the physical water to a customer would not be a bulk water service *in respect of water access rights*, even if the subsequent delivery was primarily on-river within the operator’s network.

Even in the unlikely event that an off-river infrastructure operator levies an infrastructure charge in relation to a bulk water service in respect of water access rights, the ACCC may still exempt the operator from the requirements of Part 6 if applying these requirements would not materially contribute to the achievement of the BWCOP (see ‘Exemptions’ above).

#### *Application to Queensland operators*

The ACCC agrees with Queensland stakeholders that some Queensland operators could qualify for Part 6 under the proposed rule 23, given that:

- SunWater levies infrastructure charges in relation to bulk water services it provides in respect of water access rights
- SunWater’s irrigation charges are currently subject to QCA investigation and recommendation, but are determined by the Minister on the basis of that recommendation – they are therefore not strictly determined by ‘a single State agency’. However, the QCA’s recommendations are based on transparent cost-recovery and efficiency criteria, and the responsible Minister implemented the charges as recommended in the last review for 2012-17.
- SunWater currently sets / negotiates its non-irrigation prices in a non-transparent way, but can be subject to a QCA investigation at the Minister’s discretion. Currently it is not clear that, for example, revenue from non-irrigation customers is not materially exceeding the associated prudent and efficient costs of providing infrastructure services
- DNRM could also qualify as a Part 6 operator insofar as it is a joint owner of the Border River Water Supply Scheme (BRWSS) infrastructure, and levies infrastructure charges. Although

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<sup>384</sup> The proposed wording for subrule 23(b)(ii), relating to water sharing arrangements between States, is considered below.

DNRM states that the charges are unlikely to constitute monopoly rents, they are set under a non-transparent process with no independent assessment of costs.

The ACCC considers that the approval / determination of SunWater or DNRM's infrastructure charges in the MDB under Part 6 and by the ACCC is not the preferred outcome, particularly in light of the small scale of operations in MDB areas. However, the ACCC also considers that the rules should set a basic standard for the regulatory oversight of infrastructure charges of operators with such significant market power in their respective area of operations. To this end, the ACCC considers the rules should expressly allow for Basin States to transition their regulatory arrangements in order to meet the basic standard for regulatory oversight proposed in subrule 23(a). The ACCC has proposed an additional ground for (temporary) exemption from the requirements of Part 6, as set out above. This would allow lighter-handed regulation than under Part 6, as sought by the Queensland Government.

This approach would be consistent with the submissions by several Queensland stakeholders indicating an interest in reforms to the regulatory system—in particular, the LGAQ's recommendation for a more transparent approach to pricing, DNRM's suggestions on reform of BRWSS arrangements, QTDEWS seeking an improved regulatory environment, and SunWater on establishing upper bound prices.

As achieving the new approach will take some time, if the rules are amended as proposed, the ACCC considers that SunWater and DNRM should be exempted from Part 6 under rule 23C to enable this to occur. Any such exemption would be for a discrete period and require a clear indication that the necessary adjustments to State regulatory processes were going to be undertaken within a set timeline.

#### *Infrastructure services relating to water sharing arrangements between Basin States*

The ACCC's Draft Advice was intended to allow multi-State infrastructure operators such as MDBA to be regulated by the ACCC under Part 6 if they begin levying infrastructure charges.<sup>385</sup>

Submissions on the topic supported the regulation of MDBA charges, and the ACCC's Final Advice maintains this general approach in the Draft Advice. However, the ACCC's Final Advice also seeks to clarify that the criteria should only be met by an infrastructure operator if it levies (or proposes to levy) infrastructure charges for infrastructure services giving effect to an arrangement for the sharing of water between more than one Basin State. If the operator does not levy infrastructure charges for those services, but does for other infrastructure services it provides, it should not meet this criteria.<sup>386</sup>

This amended criteria would still extend to the MDBA, if it were to impose infrastructure charges that are not required to be approved or determined, but also limit the trigger to those infrastructure services that are directly related to giving effect to such an arrangement.

The ACCC also notes that where such an operator levies charges in more than one Basin State, the proposed rule would require that *all* the operator's infrastructure charges would need to be approved / determined by a *single* State Agency in order for Part 6 not apply. This would require the relevant Basin States to agree to such charges being approved / determined by the State Agency of one of those Basin States.

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<sup>385</sup> At present neither the MDBA nor the Border Rivers Commission levy regulated charges, as both are funded by lump-sum contributions by member States. However, in NSW, WaterNSW levies the charges to recover part of the MDBA contributions, and these charges are considered 'regulated charges', regulated under Part 6.

<sup>386</sup> The operator may still meet the criteria for being a Part 6 operator if the infrastructure charges it levies are in relation to a bulk water service in respect of water access rights (see the 'Application to irrigation infrastructure operators' section above).

Further stakeholder views regarding the regulation of MDBA or Border River Commission charges are considered in section 5.12.

### **References to State water management law**

IPART asked the ACCC to ensure that the reference to ‘State water management law’ captures the relevant NSW legislative framework.

The ACCC accepts that the reference to ‘State water management law’ in rule 23 as proposed in the Draft Advice could be unnecessarily restrictive as it would not reflect the legislative bases on which NSW (and other States) provide for the approval / determination of their infrastructure operators’ charges. This is because of the specific focus of the definition of ‘State water management law’ in section 4 of the Commonwealth *Water Act 2007*.

The ACCC’s Final Advice is therefore to amend rule 23 to refer more broadly to ‘a law of a State’, rather than ‘State water management law’.

### **Transitional arrangements**

#### *Existing Part 6 operators*

Proposed rule 80 under the Draft Advice provided transitional arrangements where a current Part 6 operator would continue to be considered a Part 6 operator for the remainder of the regulatory period underway at the time the rules were amended. The intention was that determinations for current regulatory periods would continue as if under Part 6, while determinations for future regulatory periods could revert to state-based regulation outside Part 6.

Some uncertainty remained over situations where a pricing review under Part 6 is in progress at the time any amendments to Part 6 commenced. This is likely to occur with IPART’s review of WaterNSW’s charges for the four-year period beginning 1 July 2017. IPART has begun this review as an accredited regulator under the WCIR. WaterNSW is currently a Part 6 operator but could cease to qualify if the proposed amendment to rule 23 is implemented (assuming the necessary Basin State regulatory processes were in place).

The ACCC supports a transition to the proposed Part 6 in a way that is administratively feasible and ensures procedural fairness for stakeholders is maintained.

The proposed water charge rules refer to the date that amendments to the rules commence as the ‘transition date’. The ACCC has recommended (in section 4.7) that the transition date be no earlier than 1 July 2017, meaning that:

- As WaterNSW would still meet the current criteria for a Part 6 operator on the transition date, it would be considered a Part 6 operator until the end of the regulatory period that was in effect on that date (that is, until 30 June 2021).
- IPART would be considered the ‘regulator’ (in place of the ACCC) for the purposes of Part 6.

However, two significant issues may arise in the event that the proposed amendments to the rules relating to Part 6 commence *before* 1 July 2017, given the transitional provisions proposed in the Draft Advice:



- it would potentially lead to a change in the underlying regulatory framework (from Part 6 to the NSW framework)<sup>387</sup> towards the conclusion of IPART’s review of WaterNSW’s 2017-21 charges—the ACCC believes this would induce significant confusion and uncertainty for customers and other relevant stakeholders
- WaterNSW’s next regulatory period may be three years, rather than the four year regulatory period for which their application was made, due to the proposed new definition of ‘regulatory period’ (set out in section 5.6.2)—the ACCC considers that such a change in the length of the upcoming regulatory period occurring immediately before the commencement of that period is also undesirable.

As such, the ACCC’s Final Advice proposes that the transitional provisions in Part 11 provide that Part 6 of the proposed rules should also apply until the conclusion of any regulatory period for which an application had been made, but no approval or determination had been made by the transition date.

Further, in relation to applications current at the transition date, the *existing* rules should apply in relation to the approvals or determinations relating to such applications. This will ensure the current WaterNSW application to IPART continues to be assessed in accordance with Part 6 as unamended in the case where it submits its application prior to the transition date, but IPART has not yet approved or determined the infrastructure charges contained in the application.

The ACCC considers that it is appropriate that the regulator’s approval / determination in relation to an application be made under the same framework (i.e. the existing framework). The ACCC considers that changing the framework for assessing an application which has already been made under the existing rules would not give effect to the principle of procedural fairness, as it is unlikely that all stakeholders would have sufficient opportunity to understand the impacts of the proposed new regulatory framework.

The ACCC notes that the approach proposed in this Final Advice will also be relevant to Lower Murray Water, given its next regulatory period is due to commence on 1 July 2018. The timing of Lower Murray Water’s application for approval or determination of its infrastructure charges for this period will determine whether that approval / determination is undertaken under the existing Part 6 provisions, or—assuming that Lower Murray Water would not be considered a Part 6 operator under the proposed amendments—the Victorian regime. If the application is made before the transition date (which the ACCC recommends as being no earlier than 1 July 2017—see section 4.7) the proposed approach would mean that this application is assessed under the existing Part 6 provisions, and that Part 6 as amended applies until the end of Lower Murray Water’s regulatory period beginning on 1 July 2018. If the application is made after the transition date, and assuming Lower Murray Water would not meet the proposed new criteria for the application of Part 6, Part 6 would cease to apply to Lower Murray Water at the end of its current regulatory period (on 30 June 2018).

The rules should also make clear that existing Part 6 operators that will not meet the new criteria for the application of Part 6 after the transition date would not be subject to the requirements of Part 6 beyond the transition period. The rules should also make clear that such an operator is not required to apply to have their charges approved or determined if they will not be a Part 6 operator beyond the transition period.

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<sup>387</sup> The ACCC expects that regulatory arrangements under NSW legislation in relation to WaterNSW will not trigger the criteria in proposed subrule 23(a) (meaning that WaterNSW would no longer meet the definition of a Part 6 operator).

To avoid doubt, the ACCC's Final Advice also confirms that an existing Part 6 operator's infrastructure charges that were approved or determined under Part 6 before the transition date are taken to have been approved or determined under Part 6 as amended (to ensure the operator can comply with rule 8).

#### *Existing contracts*

SunWater submitted that there should be transitional provisions so that a price approval / determination should not apply to charges set under pre-existing contracts, until those contracts expire. Alternatively it submitted that, as a minimum, there should be a long transition time to allow adjustment to a new pricing regime. SunWater noted that some of these contracts may be very long-term. (SunWater was also concerned about the application of the proposed non-discrimination provisions to existing contracts, which is discussed further in section 5.3.1.)

The ACCC agrees that any new rules should not cause disruption to stakeholders with existing contracts that were negotiated in good faith. Under the ACCC's Final Advice, SunWater's charges could be regulated by the QCA, subject to a total revenue constraint through rule 23 as amended (section 5.6 above). This need not require short-term changes to individual contract prices as long as total revenue does not exceed prudent and efficient costs of providing infrastructure services. If adjustments to negotiated prices are required to meet longer term cost recovery goals or other valid regulatory objectives, it should be possible to allow a sufficient transition time to avoid undue disruption. This includes any transition necessary to ensure that differences in charges (for the same infrastructure service) are not unreasonable.

The ACCC's proposed rule amendments in relation to non-discrimination (rule advice 5-B in section 5.3.1) specifically acknowledge the potential for a regulator (either the ACCC under Part 6, or a Basin State Agency) to establish a transition path to full cost recovery or upper bound pricing charge levels for particular customers / classes of customers. Residual charge differences can be considered reasonable while such a transition is underway.

The ACCC considers that no further amendments are required to Part 6 in relation to SunWater's concerns regarding existing contracts.

## 5.6.1 Procedural requirements

### Rule advice 5-N

The rules should be amended such that timeframes that apply to Part 6 processes are as per Table 5.5.

**Table 5.5: Proposed Regulatory Timelines for Part 6 operators**

	Original approval / determination	Annual review approval / determination
Application for approval / determination lodged	15 months before the start of the regulatory period to which the approval / determination relates.	4 months before the start of the year of the regulatory period to which the approval / determination relates.
Regulator provides notice of its final decision	30 business days before the start of regulatory period to which the approval / determination relates.	30 business days before the start of the year of the regulatory period to which the approval / determination relates.

*Note:* Rule advice 5-I sets out Schedule of Charge publication requirements (see section 5.4.2).

This rule advice is implemented in Part 6, Divisions 2 and 3 of the proposed Water Charge Rules.

### Background

Under the Water Charge (Infrastructure) Rules 2010 (WCIR), the regulator has 13 months from the time an application is received from a Part 6 operator to make a decision as to the approval or determination of a Part 6 operator's charges. However, there is no statutory deadline for the operator to lodge their application.<sup>388</sup> Further specific procedural requirements for the approval and determination of Part 6 operators' charges are set out in Part 6 and schedules 1 and 2 of the WCIR.<sup>389</sup> The ACCC has also produced guidelines in relation to applications under Part 6.<sup>390</sup>

In its Draft Advice, the ACCC considered both the timelines involved in making a decision under Part 6 and the consultation requirements of Part 6. These issues are addressed in turn below.

### Timeliness of regulatory decisions

Currently under WCIR rule 7, an infrastructure operator must give a copy of its Schedule of Charges to a customer at least 10 business days before the service is provided. This requirement applies to all infrastructure operators. Some infrastructure operators provide on-river infrastructure services to customers that are also infrastructure operators (for example, operators who only provide off-river infrastructure service). For example, WaterNSW imposes charges for storage and delivery services on Western Murray Irrigation (WMI), who in turn recovers these charges from its customers.

Infrastructure operators who receive on-river infrastructure services provided by a Part 6 operator have raised concerns, both during the WaterNSW 2014-15 price determination and during the consultation process for the water charge rules review, that the regulator's decisions on regulated

<sup>388</sup> Rule 30 in the WCIR.

<sup>389</sup> WCIR, Schedule 1, in particular, sets out requirements for applications by a Part 6 operator, covering: consultation; regulatory and legislative obligations; infrastructure service standards; revenue; regulatory asset base; rate of return; renewals annuity (if relevant); capital expenditure; operating expenditure; tax; demand or consumption; and current and proposed regulated charges.

<sup>390</sup> ACCC, *A guide to the water charge infrastructure rules: pricing application for part 6 operators*, Canberra, October 2011, viewed July 2016, <http://www.accc.gov.au/publications/water-charge-infrastructure-rules/a-guide-to-the-water-charge-infrastructure-rules-pricing-application-for-part-6-operators>.

charges of those Part 6 operators who supply on-river infrastructure services to other operators have been too late to allow those other operators enough time to prepare and send their own Schedules of Charges before the start of the new water year.

Enabling more timely decisions for Part 6 operators would assist operators to provide their Schedules of Charges in a timelier manner, but requires consideration of all the stages in a charge determination process, from the application through to the notifications to customers.

The rules currently do not prescribe that the regulator’s decision must be notified by any particular time before the start of the year to which the charges relate. Also, although rule 30 requires that the regulator’s decision must be made within 13 months after receiving the operator’s application under Part 6, Division 1, the WCIR do not prescribe any time within which the application must be submitted. Similarly, for the annual review of charges under Division 3 of Part 6, there is no deadline for the application to be submitted, but the regulator’s decision must be made within 3 months of receiving the application (rule 37). Therefore, if the application is submitted late, it may be difficult for the regulator to complete its decision in good time before the start of the new water year.

In the case of the ACCC’s determination of State Water’s charges for 2014-17, State Water submitted its formal application on 30 July 2013, although it had submitted a draft application on 30 May 2013. The ACCC released its final decision on 28 June 2014. This was within the 13 months allowed (from both the draft and formal lodgement dates), but too late to allow irrigation infrastructure operators (IIOs) to give their customers 10 days’ notice prior to 1 July.

In recognition of these issues, the ACCC made draft rule advice that the rules should be amended such that timeframes that apply to Part 6 processes are as per Table 5.5.

**Table 5.5: Proposed Regulatory Timelines for Part 6 Operators**

	Original approval / determination	Annual review approval / determination
Application for approval / determination lodged	15 months before the start of the regulatory period to which the approval / determination relates.	4 months before the start of the year of the regulatory period to which the approval / determination relates.
Regulator provides notice of its final decision	30 business days before the start of regulatory period to which the approval / determination relates.	30 business days before the start of the year of the regulatory period to which the approval / determination relates.
Part 6 operator to notify customers of its Schedule of Charges <sup>†</sup>	25 business days before the regulated charges in its Schedule of Charges is due to commence	25 business days before the regulated charges in its Schedule of Charges is due to commence
Other infrastructure operators <sup>‡</sup>	10 business days before the regulated charges are due to commence.	10 business days before the regulated charges are due to commence.

<sup>†</sup> This should apply to all infrastructure operators who provide on-river infrastructure services, not just Part 6 operators. This requirement should apply via Schedule of Charge requirements.

<sup>‡</sup> i.e. other than Part 6 operators / operators who provide on-river infrastructure services) to notify its customers. This requirement should also apply via Schedule of Charge requirements.

## Consultation requirements under Part 6

Although the existing WCIR do not prescribe that operators undertake their own consultation, the ACCC's Pricing Principles set out the expectation that operators will consult with customers on issues of significance to them. Such consultation is likely to cover the trade-offs between pricing and service outcomes, major investment decisions, significant maintenance works and proposed tariffs.

The Pricing Principles also state that:

*...the regulator must have regard to the consultation that has been undertaken by the operator. For instance, where a regulator deems consultation to be insufficient or unsatisfactory it may influence the regulator's views on whether proposed expenditure is prudent or efficient.*<sup>391</sup>

Also, WCIR rule 28 and 29 require the regulator to invite submissions on the Part 6 operator's application from interested parties and have regard to any submissions it receives before publishing its draft approval or determination of a Part 6 operator's regulated charges, and rule 36 provides a similar requirement for the annual review process.

Consultation between a Part 6 operator and its customers is likely to facilitate a better application from the operator. Further, if customers' views and knowledge are taken account of at an early stage, this is likely to lead to a better regulatory decision. Customers are particularly well-placed to provide information, for example, on whether proposed upgrades in services would be worth the additional cost.

The need for consultation is greater for a major price approval or determination under Division 2 of Part 6 (which occurs at the beginning of a regulatory period) than for an annual review under Division 3 (annual reviews occur in subsequent years of the regulatory period). Changes in charges through the annual review are likely to be smaller and the process is more mechanistic. Further, the time frame for a decision is shorter in the annual review. Therefore, the regulatory burden of earlier consultation is less likely to be justified for an annual review.

The ACCC did not consider it appropriate to mandate the specific form of consultation that should be undertaken by a Part 6 operator. There may be many different ways that successful consultation may be undertaken, and the ACCC notes that there is little evidence that the detailed consultation requirements currently forming part of Part 5 of the water charge rules has been valued by customers.<sup>392</sup>

In its Draft Advice, the ACCC considered that the current provisions requiring both the operator and the regulator to *undertake* consultation during Part 6 processes should be retained. Also, the ACCC made draft rule advice that all infrastructure operators, including Part 6 operators, must include on their Schedules of Charges a statement setting out (among other things) how a person may seek to participate in the operator's process(es) for determining its charges (see section 5.4.1).

### *Stakeholder feedback*

#### **Timeliness of regulatory decisions**

In submissions to recent pricing reviews, the Act Review and the ACCC's Issues Paper, infrastructure operators and their representative bodies expressed concern about regulatory timelines for the

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<sup>391</sup> ACCC, *Pricing Principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010*, Canberra, July 2010, p.55.

<sup>392</sup> For this and other reasons the ACCC has recommended the repeal of Part 5 in its entirety (see section 5.5).

approval or determination of charges for Part 6 operators.<sup>393</sup> The key issue of concern to these stakeholders was that the timing of the release of the final decision for price approvals or determinations does not leave other infrastructure operators, who use the charges of a Part 6 operator as an input into their own pricing decisions, sufficient time to set their own charges and provide their Schedules of Charges to customers before the start of the new water year (and to comply with rule 7 of the WCIR).

Only two stakeholders provided feedback on the Draft Advice in relation to the timeliness of regulatory decisions.

WaterNSW and GMW identified some concerns about meeting the proposed amendments to the timeframes for off-river infrastructure operators to send their Schedule of Charges (from 10 business days to 25 business days, rule advice 5-I).<sup>394</sup> These concerns relate to the fact that these operators are reliant on a regulator's final decision about their fees and charges, and then subsequent internal administrative processes (e.g. Board approval, scheduling the mailing house), before they can publish their Schedule of Charges.

GMW identified that the timeframes proposed under rule advice 5-N (relating to when a regulator must publish its final decision, being 30 business days before the start of the regulatory period) and rule advice 5-I, if implemented, only leaves five business days to complete these internal administration processes and publish its Schedule of Charges. GMW submitted that it typically requires one month to complete these processes; WaterNSW submitted that it would typically require two weeks.

GMW supported a further amendment to rule advice 5-N to require that regulators make their final decision 50 business days before the charges come into effect. This is in addition to a supporting amendment to rule advice 5-I to reduce the number of days in advance that an off-river infrastructure operator must send their Schedule of Charges, from 25 business days to 20. Under GMW's proposed amendments, the infrastructure operator would have one month to release the Schedule of Charges before the charges come into effect.

WaterNSW made some suggestions for amendments to rule advice 5-I to address its concerns about the impact of regulators decision on their ability to meet the timeframes for sending the Schedule of Charges but did not make any suggested amendments to rule advice 5-N.<sup>395</sup> See the stakeholder summary in section 5.4.2.

#### *Consultation requirements under Part 6*

Submissions to the Issues Paper from individual irrigators and the Victorian Farmers' Federation (VFF), as well as feedback from irrigators attending public forums, supported more clarity being provided to Part 6 operators about what constitutes effective customer consultation.<sup>396</sup> These stakeholders raised several key issues relating to Part 6 consultation requirements, such as:

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<sup>393</sup> See 'stakeholder feedback' in section 5.6.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.100-101.

<sup>394</sup> WaterNSW, Draft Advice Submission, March 2016, p.6; Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3.

<sup>395</sup> WaterNSW made the following suggestions:

- reduce the number of days in advance that the Schedule of Charges must be sent from 25 business days to 15.
- exemption for infrastructure operators to meet the timeframes when their charges are approved or determined by an economic regulator.
- timeframes only triggered when the regulator publishes their final decision; at such time, the operator has 15 business days to send the Schedule of Charges.

<sup>396</sup> Victorian Farmers' Federation, Issues Paper Submission, July 2015, p.4.

- insufficient information being provided by operators when consulting on major pricing decisions (e.g. lack of customer access to planning documents)
- lack of direct consultation between the regulator and customers (irrigators) and
- operators allegedly misrepresenting customers' views received during consultation processes.<sup>397</sup>

In response to the Draft Advice, GMW supported the ACCC's position to not specify the form of consultation that infrastructure operators should undertake in making their application to the regulator.<sup>398</sup> GMW noted that:

- it is beneficial for the infrastructure operator to have flexibility in how they consult with their customers.
- different consultation methods are required to reach different customers.
- successful consultation is difficult to prescribe.

### *ACCC assessment*

The ACCC recognises the advantages of an earlier date for publishing regulatory decisions—allowing the infrastructure operator adequate time to complete internal administration processes before publishing / sending its Schedule of Charges by the time required in rule 15 (this was rule 11 in the Draft Advice version of the proposed water charge rules). However, earlier dates for the final decision involve trade-offs against other objectives—in particular, to use the most up-to-date information possible to make the decision, and to allow the regulator sufficient time to conduct an adequate review and consultation.

The proposed rule amendments in the Draft Advice relating to timeframes should make it easier for off-river infrastructure operators to publish their charges on time (at least 10 business days before the charges commence) than in the past. These include rule advice 5-I regarding notification requirements for Schedule of Charges (see section 5.4.2), as well as rule advice 5-N regarding publication of decisions.

The proposed requirement for the ACCC to publish its decision at least 30 business days before the regulatory period commences should allow more time for operators than available in practice with past decisions.<sup>399</sup>

Under proposed rule 15 in rule advice 5-I, 'upstream' infrastructure operators would have to send / publish their Schedule of Charges 15 business days earlier than the off-river infrastructure operators who are their customers.<sup>400</sup> By contrast, under the current rules there is no set time gap because all operators have to publish / provide their Schedule of Charges at least 10 business days before the charges take effect.

<sup>397</sup> See 'stakeholder feedback' in section 5.6.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.101-102.

<sup>398</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3.

<sup>399</sup> Publication dates in recent decisions were:

- ACCC annual review of WaterNSW's 2015-16 charges – 5 June 2015;
- ACCC 2014 determination of State Water's 2014-17 charges - 26 June 2014,
- ESCV 2013 determination of GMW's 2013-16 charges - 21 June 2013,
- IPART 2010 determination of State Water's charges - 18 June 2010.

<sup>400</sup> This is because under proposed rule 15, infrastructure operators levying infrastructure charges in relation to either:

- bulk water service; or
- infrastructure services in relation to the storage or delivery of water that is necessary to give effect to an arrangement for the sharing of water between more than one Basin State ;

have to publish their Schedule of Charges at least 25 business days before the Schedule takes effect (rule 15(3)), while other infrastructure operators have to publish at least 10 business days before the charges take effect (rule 15(4)).

Other proposed amendments to the publication requirements (set out in section 5.4.2) should reduce the administrative time and cost for operators to prepare and distribute their Schedule of Charges. In particular:

- changing infrastructure operators' obligation by making clear that a Schedule of Charges is taken to have been *given* to a customer on the date the operator *sends* it to the customer—infrastructure operators will no longer have to factor in an allowance for the time taken for postal deliveries when meeting this requirement.
- making it clearer that operators do not have to give their Schedule of Charges to all customers using the same method—for example, an operator can give copies by email to some customers, by post to other customer, by fax to yet other customers.
- providing a degree of protection to infrastructure operators where their inability to meet the proposed timing requirements is due to the timing of a regulatory decision.

The ACCC considers that publishing the decision 30 business days before a regulatory period as proposed in the Draft Advice would provide a reasonable balance between objectives. It would allow more up-to-date data—in particular, on water usage and the CPI—to be used, compared with 40-50 business days as recommended by some operators.

For the above reasons, the ACCC's Final Advice maintains the Draft Advice to publish regulatory decisions at least 30 business days before the regulatory period commences (rules 30, 37), in conjunction with changes in advice on notification requirements in rule advice 5-I.

Note that the rules governing the time of the application and determination will not be relevant to operators such as GMW and WaterNSW which are expected to cease to qualify for Part 6 under proposed rule 23. State-based frameworks are not prescriptive on such times for the review. However, the rules on publication times under Part 4 will remain for all operators, so that Basin State regulators should be encouraged to schedule their processes so that stakeholders can meet the publication requirements in the water charge rules.

No submissions provided feedback directly on the draft rule advice to require a Part 6 operator to submit its application at least 15 months before the start of the period (or 4 months for an annual review.) This, combined with the proposed requirement on the regulator to publish its decision 30 business days before the period commences, means that the regulator effectively has about 13½ months to conduct the review, which replaces the 13 months currently required in rule 30. The proposed rules relate the due times to the commencement of the regulatory period, and put responsibility on the operator to submit its application by the due date, thereby allowing sufficient time for the regulator to conduct an adequate review.

The ACCC notes stakeholder concerns with the level and nature of stakeholder consultation by Part 6 operators. As noted in the Draft Advice, the ACCC recognises the benefits of detailed consultation to regulatory processes. However, the ACCC maintains its view that the rules should not mandate the specific form of consultation that should be undertaken by a Part 6 operator. This retains the current provisions requiring both the operator and the regulator to *undertake* consultation during Part 6 processes, without mandating the form of consultation.

The ACCC Final Advice maintains its Draft Advice on application times but replaces the bottom two rows of the table with a cross reference to the proposed timing requirements in rule advice 5-I (see section 5.4.2).



## 5.6.2 Length of the regulatory period

### Rule advice 5-0

The rules should be amended to alter the definition of “regulatory period” (rule 3 in Part 1) to provide for a default regulatory period of three years (instead of four years) for Part 6 operators.

Rule 24 should be amended to allow the ACCC to lengthen a regulatory period from the proposed default period of three years to up to five years upon the request of an operator in order to align the regulatory period with:

- a regulatory period that applies to the Part 6 operator in relation to urban water services (as is currently provided for); or
- a regulatory period that applies to the Part 6 operator in relation to non-Murray-Darling Basin (MDB) (rural) water services.

The rules should also be amended to provide the ACCC with a general discretion to lengthen a regulatory period up to a maximum of 5 years (including for reasons other than aligning regulatory periods). The ACCC should obtain, and have regard to, the views of the Part 6 operator prior to making a decision to lengthen a regulatory period.

The rules should not allow the ACCC to decide to change a regulatory period after the date the ACCC publishes its draft approval or determination in relation to the regulatory period (under rule 28).

This rule advice is implemented in rules 3 and 24 of the proposed Water Charge Rules.

### Background

Subsection 92(4) of the Act allows the Water Charge (Infrastructure) Rules 2010 (WCIR) to specify the duration of a determination, which the WCIR implements via rule 3 – definition of **regulatory period**. Rule 24 provides the regulator limited discretion to vary the regulatory period from the period as defined by rule 3. Rule 3 currently specifies a standard regulatory period of four years (after an initial period of 3 years).

The ACCC notes that the WCIR already contain a provision for the temporary continuation of existing charges for a specified period in the event that charges have not been approved or determined.<sup>401</sup> This discussion is only concerned with a variation to the duration of a *future* regulatory period.

The ACCC’s submission to the Act Review recommended that subsection 92(4) of the Act be redrafted to provide that the water charge rules may also provide for the duration of the regulatory period to be determined by the ACCC or relevant accredited regulator. The Independent Expert Panel (the Panel) reviewing the Act considered that there should be further consultation on amending subsection 92(4), but recommended that regulators’ discretion be limited to *extending* the period.<sup>402</sup>

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<sup>401</sup> See rule 33 in the WCIR.

<sup>402</sup> The Panel stated:

*“The ACCC suggested amendments to the Act to enable regulators to set the duration of a pricing determination or approval of charges, in order to be more responsive to wider economic conditions, or other factors that may influence the efficiency and operation of existing or future determinations. The ACCC proposes that section 92(4) be redrafted to provide that the water charge rules may also provide for the duration to be determined by the ACCC or relevant accredited regulator.  
...The Panel considers that consultation should be undertaken on amending section 92(4) to allow the ACCC or an ACCC accredited regulator to determine the regulatory period applying to a price determination or charge approval. The Panel recommends that regulators’ discretion to amend the regulatory period be limited to extending the period relative to the periods*

There are trade-offs to consider in setting the length of the regulatory period. On the one hand, a longer period reduces the regulatory burden and cost of frequent reviews, and provides greater certainty about the price path. It provides more incentive for providers to reduce costs through efficiency, as they will have longer to benefit from reduced costs before charges are reduced to take account of the new observed cost level. However, too long a period could result in the level of charges diverging from the underlying level of costs as conditions change. Longer regulator periods may also mean a slower adoption of improved regulatory approaches.

Shorter periods allow for more timely responses to changes in conditions. For example, reductions in operating cost could be more quickly passed on to customers. Also, a shorter regulatory period could be one option for the regulator to maintain clear oversight when it is not satisfied with an operator's pricing proposal, or during a period of structural adjustment or unusually high uncertainty. On the other hand, too short a period makes reviews too frequent, with higher consequential regulatory costs. It leaves less incentive for providers to reduce costs through efficiency, as their charges will more quickly be reduced to take account of the new observed cost level.

Another important dimension of the regulator's discretion in choosing the regulatory period is whether the regulatory period may be altered to align with regulatory periods for an operator's services, which are not regulated under the water charge rules. Part 6 operators such as WaterNSW and Lower Murray Water (LMW) have significant operations outside the scope of the water charge rules (so that these operations are not subject to price determination under Part 6), and allowing more flexibility in the rules for different regulatory periods will reduce the regulatory burden associated with non-alignment of these different determination processes. Allowing the regulator to align regulatory periods would avoid the regulatory burden resulting from an operator having to engage in separate determination processes for its different services. By comparison, differences in the length of regulatory periods between different operators or jurisdictions are unlikely to have significant adverse economic consequences.

The rules currently provide for an alignment of regulatory periods in the case where an operator has urban services, for which charges are not regulated under the water charge rules. However, operators may also provide rural water infrastructure services outside the Murray-Darling Basin (MDB), and charges for these services may be regulated under other law than the water charge rules (for example, the law of a State). Where this is the case, the water charge rules currently do not allow the regulator to vary the length of the regulatory period in order to align with regulatory periods pertaining to non-MDB rural services.

Given the ACCC's draft rule advice in relation to the application of Part 6 and the consequential limited role for accreditation, there will be less need to adjust regulatory periods to align with other regulatory periods faced by operators if the ACCC's rule advice is accepted. Nevertheless, there may still be a need for a regulator to alter the regulatory period for reasons other than alignment.

In its Draft Advice, the ACCC considered that it would be preferable for the rules to allow for the regulator to generally have discretion over the length of the regulatory period, for shorter as well as longer periods than the default. While a limited discretion could be given to allow the aligning of regulatory periods for operators, a wider discretion would be preferable, in that:

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*specified in the rules, to provide flexibility for regulators without reducing certainty or increasing costs for regulated entities and their customers.” (Report of the Independent Review of the Water Act 2007, pp.65-66).*

- longer periods may be suitable when costs are stable, so that regulatory costs are reduced, there is more certainty about the future price path, and more incentive for the operator to reduce costs; and
- shorter periods may be suitable when a major change is expected—e.g. a change in governance or costs—such that it would be preferable to review the situation when there is greater clarity.<sup>403</sup>

However, the Draft Advice noted that allowing such a general discretion may require an amendment to s.92 of the Act. The ACCC notes that the Panel recommended that the Act be amended to allow the regulator to have discretion to determine the regulatory period.

In light of these considerations, the ACCC made caveated draft rule advice that the regulator should have discretion to vary the regulatory period (draft rule advice 5-O), as follows:

- If the relevant amendments to the Act are *not* made, the water charge rules should be amended to allow discretion for the regulator to vary the regulatory period for the purpose of aligning the regulatory period with another regulatory period pertaining to the operator's non-MDB services. This should operate similarly to the current WCIR rule 24.
- If the relevant amendments to the Act *are* made, the water charge rules should be amended to allow discretion for the regulator to generally be able to vary the length of the regulatory period to between 3 and 5 years.

This rule advice encompassed the possibility of the need to align regulatory periods, but more broadly was concerned with the regulator having the ability to respond to individual circumstances as the need arises, such as are outlined above.

### *Stakeholder feedback*

All submissions to the ACCC's Issues Paper that commented on the regulatory period supported the regulator having flexibility. In particular, both accredited Basin State regulators with Part 6 responsibilities, IPART<sup>404</sup> and ESCV, recommended discretion for the regulator. They commented that their past experience has indicated that a shorter period can be appropriate when a major change in conditions or investment is expected but uncertain. In such a situation, a new determination can be made after there is greater clarity on the new conditions. A longer period may also be justifiable in certain circumstances.<sup>405</sup>

In response to the Draft Advice, three submissions (from Goulburn-Murray Water (GMW), QFF and IPART) supported regulator discretion in setting the length of the regulatory period.<sup>406</sup> GMW submitted that it was an opportunity to reduce regulatory burden. IPART reiterated its position from its submission to the Issues Paper. In this submission, IPART supports flexibility within rules for the regulator to set the length of the regulatory period at between three and five years.<sup>407</sup>

<sup>403</sup> The ACCC notes that a shorter period could also be desirable where there is uncertainty about the information provided by the regulated entity, although this was not raised in the Draft Advice.

<sup>404</sup> On 23<sup>rd</sup> September 2015, the ACCC approved IPART's application for accreditation.

<sup>405</sup> See 'stakeholder feedback' in section 5.6.2 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.106-107.

<sup>406</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3; Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.5; IPART, Draft Advice Submission, March 2016, p.2.

<sup>407</sup> IPART, Issues Paper Submission, June 2015, pp.5-7.

WaterNSW does not support the other aspect of rule advice 5-O to reduce the default regulatory period from four to three years.<sup>408</sup> The reasons provided by WaterNSW for this view include:

- the costs and administrative burden would outweigh any benefits
- there is already enough flexibility within the rules for the regulator to respond in a timely way to changes in the regulatory environment (through for example, the annual review process, proposed cost-pass through provisions, ex-post and ex-ante measures that can be implemented during the review). WaterNSW considers that there was no evidence in the Draft Advice that these processes are not working.

WaterNSW also noted that IPART's standard regulatory period is four years and in the gas and electricity sector, regulatory periods are typically four or five years.

### *ACCC assessment*

Amendments to the Act in May 2016 now allow water charge rules to be made to give the ACCC a general discretion to extend (but not shorten) a regulatory period from the default period stated in the rules. The ACCC noted in the Draft Advice that if these amendments were made, the rules should be amended to give a general discretion to the ACCC to vary a regulatory period (which would include varying a regulatory period in order to align with a regulatory period under a Basin State process).

All submissions on the topic supported the concept of flexibility in the length of the regulatory period, but one submission, from WaterNSW, opposed a reduction of the default period from four to three years.

Given the Act amendment, the rules cannot give the ACCC a general discretion to reduce a default four year regulatory period to three years. The ACCC considers that a default regulatory period of three years (with flexibility to extend this period) is appropriate, even though a period of four (or five) years may be preferable in many circumstances. In response to WaterNSW's concerns, the ACCC can take into account the relative merits of extending the length of a regulatory period, including the likely change in regulatory costs to the operator.

WaterNSW also suggested that there was already sufficient flexibility for a regulator to respond in a timely way to changes in the regulatory environment. The ACCC notes that the annual review process (discussed in section 5.6.4) is relatively limited in scope under both the current and proposed rules and it would be unsuitable for responding to most of the matters set out in the 'Background' section above. The proposed variation provisions (discussed in section 5.6.5) offer greater flexibility but only in adjusting an existing determination. The ACCC maintains that the preferable approach is to have a shorter default regulatory period, but with the ability to lengthen this period if circumstances warrant.

The ACCC maintains its view from the Draft Advice that an infrastructure operator should be able to apply to the ACCC to change the length of a regulatory period to align it with a State-based regulatory period. However, in order to ensure regulatory periods are able to be set in response to wider circumstances, including in order to pass on cost savings to customers sooner, the proposed general discretion for the ACCC to lengthen a regulatory period should not be contingent on an application by the infrastructure operator. However, the ACCC should be required to consult with the operator before making such a decision.

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<sup>408</sup> WaterNSW, Draft Advice Submission, March 2016, pp.8-9.

The ACCC notes that the timing of a decision to extend a regulatory period is important. Lengthening a regulatory period after that period has commenced could create significant uncertainty and cost for the Part 6 operator and its customers. Similarly, an extension of an upcoming regulatory period part-way through a charge approval / determination process may also increase regulatory costs and uncertainty, but the magnitude of this would depend on how far into the process the decision to extend the regulatory period occurs.

Proposed rule 24 (in the Draft Advice) was silent on when a Part 6 operator could apply to the ACCC to change a regulatory period. The ACCC could take the timing of this request into account in deciding whether to approve the application or not. This would necessarily focus on the potential impact on the Part 6 operator's customers (as the Part 6 operator would consider the impact on its own business in deciding whether or not to apply).

However, as noted above, the ACCC's Final Advice is for the rules to provide the ACCC with discretion to lengthen a regulatory period absent an application by the Part 6 operator. Proposed rules 24A and 25 require a Part 6 operator to lodge its application for approval or determination of its infrastructure charges 15 months before the commencement of the relevant regulatory period.

Any decision to lengthen the duration of the next regulatory period would preferably be made in advance of the operator's application relating to charges for that period. However, if the ACCC decides to lengthen the upcoming regulatory period after the Part 6 operator has lodged its application, the ACCC will need to request further information from the Part 6 operator under rule 26, which would involve an additional cost to the operator. The ACCC would need to balance the advantages of extending the upcoming regulatory period with this additional cost to the operator.

Rule 27 requires the regulator to publish the Part 6 operator's application as well as further information received under rule 26, and invite interested parties to make submissions on this material. The ACCC notes that the advantages of lengthening the upcoming regulatory period are less likely to outweigh the disadvantages if the decision to lengthen the regulatory period is made after this formal consultation had begun. However, the ACCC also sees benefit in the rules expressly precluding a decision by the ACCC (to lengthen an upcoming regulatory period) being made after the ACCC has published its draft approval or determination (under rule 28).

### **5.6.3 Basis for approving or determining regulated charges**

#### **Rule advice 5-P**

- Subrule 29(2) should be amended to more clearly take into account government subsidies and Community Service Obligations (CSOs), as well as revenue from sources other than infrastructure charges that is derived from the water service infrastructure used to deliver infrastructure services.
- In particular, subrule 29(2) should require the regulator to be satisfied that the forecast revenue from infrastructure charges is reasonably likely to meet, and will not materially exceed the prudent and efficient costs of providing infrastructure services, less:
  - any amount to be contributed by governments in relation to providing the infrastructure services; and
  - any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and
  - any revenue (other than from infrastructure charges) derived from the water

service infrastructure used to provide infrastructure services.

- Rule 29 should be amended to also require the ACCC not to approve the infrastructure charges set out in an application unless it is satisfied that the infrastructure charges contained in the application are also consistent with the requirements of other provisions of the water charge rules.
- Rule 37 should be amended to allow a regulator to amend the infrastructure charges in the initial determination to the extent that it is reasonably necessary to make variations, having regard to the consistency of the infrastructure charges with the requirements of other provisions of the water charge rules.
- Schedule 1 of the rules (information to be provided in an application under Part 6) should be amended to:
  - require an operator to set out details of differences between its actual / forecast capex for the current period and the capex approved by the regulator for that period (in terms of both the amount of capex and the selection / scope of projects undertaken).
  - require an operator to include the actual and forecast revenue from sources other than infrastructure charges
  - include a provision to make clear that where actual figures are unavailable, an operator must provide forecast figures.
- Schedule 2 of the rules (calculation of the regulatory asset base) should be amended to provide that *actual* capex in relation to:
  - a major project not previously approved; or
  - a project whose scope as undertaken materially differed from what was approved; or
  - a project on which expenditure materially exceeded the amount previously approved;

may not be rolled into the RAB if the ACCC is not satisfied that the capex was prudent and efficient.

*See also section 5.6.4.*

This rule advice is implemented in rules 29 and 37, and Schedules 1 and 2, of the proposed Water Charge Rules.

## *Background*

Rule 29 of the Water Charge (Infrastructure) Rules 2010 (WCIR) sets out the decision rule for charge approvals and determinations.

Subrule 29(1) provides that the regulator must either approve or determine the charges.

Under subrule 29(2) of the WCIR, the regulator must not approve the regulated charges set out in an application by a Part 6 operator unless it is satisfied:

- that the determination of the Part 6 operator's regulatory asset base (RAB) used to calculate the charges is in accordance with Schedule 2 of the rules; and
- that:
  - the Part 6 operator's total forecast revenue (from all sources) for the regulatory period is reasonably likely to meet the prudent and efficient costs of providing infrastructure services in that regulatory period; and

- the forecast revenue from regulated charges is reasonably likely to meet that part of the prudent and efficient costs of providing infrastructure services that is not met from other revenue.

These tests were designed, in part, to ensure that a Part 6 operator's revenue from sources such as government grants or contributions, or from charges that are not regulated charges, can be taken into account.

Subrule 29(3) specifies that if the regulator is not satisfied that the tests in subrule 29(2) are met it must determine the charges. The regulator is also required by subrule 29(4) to have regard to whether the regulated charges would contribute to achieving the Basin Water Charging Objectives and Principles (BWCOP) set out in Schedule 2 of the Act (and reproduced in appendix B to this paper).<sup>409</sup>

An accredited regulator (as a condition of their accreditation) must also take account of the ACCC's pricing principles<sup>410</sup> when approving or determining charges (see section 5.9 for further discussion of accreditation arrangements).<sup>411</sup>

In its Draft Advice the ACCC, considered (based on its experience in implementing this rule) that there is scope to improve the clarity of rule 29 in several ways.

#### **Estimated revenue versus costs—subrule 29(2)(b)**

The current drafting of subrule 29(2)(b) is potentially ambiguous in relation to how a regulator is to account for revenue from sources other than the infrastructure charges to be approved or determined.

On one interpretation, the requirements under subrule 29(2)(b)(i) and (ii) are logically identical. On an alternative interpretation, the requirement under subrule 29(2)(b)(i) would have the effect that revenue from sources unrelated to the provision of infrastructure services would be fully offset by reductions in the amount that could be recovered through the infrastructure charges being approved or determined.

To avoid such ambiguity, the ACCC proposed re-drafting this subsection to provide regulators and infrastructure operators with greater clarity.

Revenue from sources other than infrastructure charges clearly encompasses where there is a government contribution to the cost of specified activities. It could also include other revenue which derives from the same infrastructure services as customers are charged for and helps to defray the cost. For example, fees charged to hydro-electricity operators could conceivably form part of 'other revenue', although neither IPART nor the ACCC has assessed them in revenue in price determinations to date.

Revenue from other sources could also include all revenue derived by the operator from activities not directly related to its infrastructure services—for example, WaterNSW's revenue from providing construction services to the Murray-Darling Basin Authority (MDBA). The ACCC considers that this was not the intent of rule 29 and it was not interpreted in that way by the ACCC during the ACCC's 2014 of WaterNSW's (then State Water) charges. Construction services provided by WaterNSW are

<sup>409</sup> A number of submissions to the Review of the *Water Act 2007* noted issues associated with the interpretation of the BWCOP by different regulators and the relative importance given to them by regulators. The interaction between the BWCOP and the water charge rules generally is discussed in section 4.2.

<sup>410</sup> ACCC, *Pricing principles for price approvals and determinations under the Water Charge Infrastructure Rules 2010*, Canberra, July 2011.

<sup>411</sup> See: the ACCC's website for the final decision on the accreditation of the Essential Services Commission of Victoria, viewed June 2016, <http://www.accc.gov.au/regulated-infrastructure/water/water-charge-infrastructure-rules-accreditation-arrangements/accreditation-escv>.

unlikely to meet the definition of ‘infrastructure services’ under the rules, and have a different cost base to that for infrastructure services. Therefore it would not be appropriate to include revenue from such services when the related costs are excluded.

In its Draft Advice, the ACCC considered that the interpretation of subrule 29(b) would be clarified by removing the reference revenue from sources other than infrastructure charges. Instead, the rule should simply require the regulator to consider whether the forecast revenue from infrastructure charges is reasonably likely to meet:

- the prudent and efficient costs of providing infrastructure services, less
- any government contributions related to the provision of those infrastructure services.

### **Consistency with other parts of the water charge rules**

The ACCC noted in its Draft Advice that Part 6 does not currently explicitly require the regulator to ensure that infrastructure charges it approves or determines are consistent with other parts of the water charge rules (outside of Part 6).<sup>412</sup> The ACCC considers that it is incumbent on the regulator not to approve or determine charges that are inconsistent with other requirements in the water charge rules despite the fact that the prohibitions in the rules are generally directed at the operator rather than the regulator.

This is particularly the case given the proposed changes to expand the application of Part 3 of the rules (non-discrimination requirements) to all infrastructure operators, including Part 6 operators. While Part 6 operators should not include infrastructure charges that are inconsistent with the rules in their applications to the regulator, the regulator should also be satisfied that the charges it approves or determines are consistent with other provisions of the rules.

As such, the ACCC considered the decision criteria in rule 29 (for an initial determination or review) and rule 37 (for annual reviews of infrastructure charges) should be amended to expressly require the regulator to consider the consistency of the infrastructure charges being approved or determined with the other requirements of the water charge rules.

### *Stakeholder feedback*

Stakeholder feedback to the Issues Paper relating to defining terms in the BWCOP and the possibility of ordering the BWCOP into a hierarchy are discussed in section 4.2. Stakeholders did not provide specific comments on the tests set out in rule 29.

### **Estimated revenue versus costs—subrule 29(2)(b)**

SunWater submitted that it might be necessary to make an additional amendment to rule advice 5-P “to require the regulator to be satisfied that revenue would not exceed, rather than be likely to meet, prudent and efficient costs...”. SunWater added that this amendment would recognise that “...it may be the [infrastructure operator’s] intention (or the [infrastructure operator] may be directed) to not recover all its costs, including a full return on assets, from customers”. SunWater also suggested a

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<sup>412</sup> This is partially because under the current rule, the non-discrimination provisions in Part 3 (which address discrimination against customers based on whether the customer holds an irrigation right) only applies to member-owned operators, and under the current rules, member-owned operators cannot be Part 6 operators. Also, other requirements in the rules are placed on infrastructure operators rather than on the regulator directly.



further amendment “to explicitly take account of any revenue that the [infrastructure operator] intends to forgo, along with government CSO contributions”.<sup>413</sup>

### **Determination of the regulatory asset base (Schedule 2) for SunWater**

SunWater commented on Schedule 2, section 1 in relation to the determination of the regulatory asset base (RAB) in relation to Part 6 operators.<sup>414</sup> SunWater is concerned about the value of the RAB it could be assigned in an initial regulatory period (if its charges are approved / determined under Part 6), if it meets the criteria under subsection 1(a) of Schedule 2. This subsection requires that where an infrastructure operator’s charges were previously determined by an agency of the State in the preceding regulatory period, the value of the operator’s assets in the preceding period should be carried forward into the initial regulatory period.

The QCA, under the Minister’s direction, did not determine a RAB for SunWater in recommending its irrigation charges to the Minister.<sup>415</sup> Therefore, SunWater is concerned that the requirement to set the RAB according to the value of assets in the preceding period might mean that SunWater’s RAB is set at \$0. In response to this concern, SunWater submitted that:

- its RAB should be determined under subsection 1(b) of Schedule 2 (by applying a recognised valuation methodology) and
- there should be an amendment to the criteria for subsection 1(a) of Schedule 2 such that it would only apply when the operator’s RAB was determined by an agency of a State in the preceding period, rather than its fees and charges.

SunWater argued that this amendment would reflect the intent of the provision to maintain the value of the RAB where the RAB itself has previously been determined, rather than when charges have previously been determined.

### **Prudence and efficiency of past capital expenditure**

IPART submitted to the Draft Advice that it reiterates its position from its submission to the Issues Paper in relation to amending the rules to include an ex-post review of capital expenditure.<sup>416</sup> In its submission to the Issues Paper, IPART argued that the rules should allow the regulator to assess actual capital expenditure during the current regulatory period for its “prudence and efficiency” before rolling forward the RAB to the next regulatory period.<sup>417</sup> IPART noted that this is a feature of its own regulatory framework. The benefits that IPART identified of this review are:

- it may prevent inefficient investments, or overinvestments, being passed through to customers. Therefore not only does it provide a safeguard against such investments it also provides operators with an incentive to make prudent and efficient investments. Hence, an ex-post review “can ensure business apply rigorous processes to investment evaluation and decision-making”.<sup>418</sup>
- it better promotes the Basin Water Charging Objectives and Principles (BWCOP), particularly objective (a)(ii) and (iii) and (e) [as reproduced in appendix B of this Final Advice].

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<sup>413</sup> SunWater, Draft Advice Submission, March 2016, p.6.

<sup>414</sup> *ibid.*, p.11.

<sup>415</sup> *ibid.*, p.11; Local Government Association of Queensland, Draft Advice Submission, March 2016, p.5.

<sup>416</sup> IPART, Draft Advice Submission, March 2016, p.2.

<sup>417</sup> *ibid.*, p.3.

<sup>418</sup> *ibid.*

## Consistency with other parts of the water charge rules

In response to the Draft Advice, Goulburn-Murray Water (GMW) identified concerns about proposed amendments to rule 37 that would allow a regulator to vary infrastructure charges from those made by an initial determination to the extent reasonably necessary to improve consistency of the infrastructure charges with other requirements in the water charge rules.<sup>419</sup> GMW's concerns are:

- the proposed amendment could be interpreted as leading to annual adjustments for factors other than for demand or price stability.<sup>420</sup> In turn, this could increase the complexity, and amount of time required, to complete the annual review and consequently, the timeframe for publishing the Schedule of Charges.
- there were no stakeholder comments [identified in the Draft Advice] to support the change and therefore further discussion is required about the potential costs and benefits.

### *ACCC assessment*

The ACCC notes that its first recommendation – primarily relating to government contributions in subrule 29(2) – was not opposed by any stakeholders, and maintains this recommendation in its Final Advice. However, several other issues were raised in submissions, as follows:

- estimated revenue versus costs (subrule 29(2)(b))
- determination of the RAB
- prudence and efficiency of past capital expenditure.
- consistency with requirements in other parts of the water charge rules.

The ACCC has considered these below.

### **Estimated revenue versus costs—subrule 29(2)(b)**

The ACCC's view is that rule 29 is intended to lead to charges that are neither materially above nor below the level of prudent and efficient costs. Charging above cost imposes a burden on consumers and the economy, while charging below cost requires cross-subsidisation by non-users of the infrastructure.

As there may be some ambiguity about the term “meet”, the ACCC considers that rule 29 should be amended to clarify that the regulator should be satisfied that forecast revenue from infrastructure charges is reasonably likely to meet, *and will not materially exceed*, the prudent and efficient costs of providing infrastructure services.

The ACCC considers that this proposed minor amendment to rule 29 will assist in ensuring that Part 6 operators do not earn monopoly profits.

While the current rule 29 requires revenue to meet prudent and efficient costs, the BWCOP recognise that, if full cost recovery is unlikely to be achieved and a CSO is deemed necessary, the size of the subsidy should be reported publicly and, where practicable, a subsidy or CSO is to be reduced or eliminated.

Rule 29 as proposed in the Draft Advice recognises that government contributions may be deducted from costs, effectively to derive ‘net costs’ to the operator. Government contributions may be given

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<sup>419</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3.

<sup>420</sup> GMW cited one possible adjustment: “charges could be adjusted annually to account for the prior year’s actual capex rather than being based on forecast capex until updates are made at the end of the regulatory period”. Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3.

by way of explicit subsidies or CSOs. A government may also decide to forgo a return on its share of capital in an infrastructure operator, for example, by way of forgone dividends or return on debt. In SunWater's case this is done by an explicit direction from the Queensland Government.

The ACCC agrees with SunWater that rule 29 should allow the regulator to take government directives into account. The ACCC considers that any government contribution should be viewed as effectively reducing the net amount that the operator must recover through infrastructure charges. The Final Advice accordingly provides that, when approving or determining infrastructure charges, such contributions should be deducted from the 'prudent and efficient' costs of providing the infrastructure services.

As noted in the 'Background' section above, the ACCC's Draft Advice proposed amending rule 29 so that revenue from government contributions was clearly deducted from the prudent and efficient costs of providing infrastructure services in calculating infrastructure charges. Under this approach, revenue from other sources (besides government contributions or infrastructure charges) would not be taken into account for the purposes of determining infrastructure charges. Examples of revenue from other sources could include a related business of the operator providing consultancy, or construction services using different resources and assets from those providing the water infrastructure services. This approach could also disregard revenue derived from the operator's water service infrastructure, such as from generating hydroelectricity. The ACCC considers that such revenue should be deducted from the prudent and efficient costs of providing infrastructure services when determining infrastructure charges, and this is reflected in proposed amendments to rule 29 (factors that the ACCC must take into account when approving or determining charges) and Schedule 1 (information to be included on an application).

#### **Determination of the regulatory asset base (Schedule 2) for SunWater**

SunWater was concerned about the valuation that could be applied to its RAB in the event that it became a Part 6 operator, given that its current regulator has not set a value on its RAB.

The ACCC considers that the current rules provide a reasonable solution to this issue. Schedule 2 of the WCIR provides two alternatives for the derivation of the initial RAB of an operator for its first period under Part 6, depending on its situation. Subsection 1(a) of Schedule 2 provides that:

*[I]n the case of an operator whose fees and charges were determined by an agency of a State under a law of the State" in the preceding period, its initial RAB would be based on the formula in which:*

*A is the value of the operator's assets that were used for the preceding period...*

Note that the ACCC interprets the phrase "that were used for the preceding period" as applying to 'the operator's assets' – not to 'the value'. This situation could apply to SunWater insofar as its irrigation charges have been previously determined by the QCA. Normally, where the previous regulator had determined a RAB, this same RAB should be used for A. However, in SunWater's case, under the Minister's direction, a RAB has not been previously determined and the "value of the operator's assets" would still need to be determined. Such a determination would necessarily be made by the regulator by applying a recognised valuation method, as in subsection 1(b) of Schedule 2:

*[I]n the case of any other Part 6 operator, [its initial RAB] is to be determined by applying a recognised valuation methodology.*

In either case, SunWater's opening RAB would not be zero but would be determined by applying a recognised valuation methodology.<sup>421</sup> Therefore, the ACCC considers that the current rules provide a satisfactory approach to the valuation and there is no need to amend them.

### **Prudence and efficiency of past capital expenditure**

Subrule 29(2)(a) states that the RAB used to calculate an operator's charges should be determined in accordance with Schedule 2, which refers to "actual capital expenditure on assets used by the operator... in respect of each year of the preceding period". This appears to preclude the regulator from excluding from the RAB any part of actual historic capex that it considered not prudent and efficient.

Ex-post reviews of capex for this purpose are conducted by IPART under its NSW regulatory framework, and by the Australian Energy Regulator (AER) in energy price regulation.

The ACCC considers that such ex-post reviews may prevent inefficient investments, or overinvestments, being passed through to customers. Without review it is possible that the operator may over-spend by incurring capex that would not have been approved as efficient if considered by the regulator at the initial determination, and that this capex would automatically roll into the RAB at the start of the next regulatory period. Users will then pay charges that incorporate the capital costs for inefficient investments for the remainder of the asset's life.

An ex-post review would be in accordance with the basic National Water Initiative (NWI) pricing principle that charges should reflect efficient costs. It would allow inefficient capex to be excluded from the RAB and hence not inflate future charges. This would apply the same principle to historic capex as the regulator applies when assessing the efficiency of forecast capex.

Schedule 1 of the WCIR already requires the operator, when making an application for an approval / determination under Part 6, to provide information on capex in the last period. This includes the outcomes of the projects, their justification, and evidence that they were prudent and efficient (paragraph 8(a)). Currently this information is used to assist in assessing future capex needs by showing details of actual base level capex and indicating the operator's past record in implementing approved capex projects. However, the information could also be used to assess the efficiency of the past capex without needing additional information.

Any review of past capex should not require a detailed reconsideration of all capex items, as actual capex on projects that had been previously approved would automatically be accepted (up to the amount approved). Rather, the regulator should be given the discretion to review past capex.

Therefore, the ACCC's Final Advice is that Schedule 2 of the rules should be amended to provide that *actual* capex in relation to:

- a major project not previously approved; or
- a project whose scope as undertaken materially differed from what was approved; or
- a project on which expenditure materially exceeded the amount previously approved

may not be rolled into the RAB if the ACCC is not satisfied that the capex was prudent and efficient.

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<sup>421</sup> There are a range of different approaches to asset valuation that might be proposed by the operator, but the ACCC would have regard to the BWCOP and its Pricing Principles in deciding an acceptable approach.

A capital expenditure project should be taken to have been approved to the extent that the scope of, and expenditure on, a project proposed by the operator was accepted by the regulator in forecasting an amount of capital expenditure to be used in the approval or determination of infrastructure charges.

Further, to assist the ACCC in assessing the prudence and efficiency of past capex, Schedule 1 should also be augmented to require a Part 6 operator to set out details of any differences between their actual / forecast capex for the current period and the capex approved by the regulator for that period (in terms of both the amount of capex and the selection / scope of projects undertaken). The ACCC notes, however, that the current wording of Schedule 1 refers to actual expenditures and revenue. However, a Part 6 operator's application for an upcoming regulatory period is likely to be made a considerable amount of time before the end of the current regulatory period, and actual figures will not be available for the latter part of the period. The ACCC proposes Schedule 1 include a provision to make it clear that where actual figures are unavailable, an operator must provide forecast figures.

### **Consistency with other parts of the water charge rules**

The ACCC maintains its view that the principle of consistency with the broader requirements in the water charge rules is a logical one which should be applied to charges for any Part 6 operator, whether in price approvals / determinations in Division 2 (rule 29) or annual reviews in Division 3 (rule 37).

The ACCC acknowledged in its Draft Advice that Part 6 does not currently explicitly require the regulator to ensure that infrastructure charges it approves or determines are consistent with the other provisions of the water charge rules. This is partially because under the current rule Part 3 (non-discrimination against customers based on whether they hold an irrigation right) only applies to member-owned operators, which under the current rules cannot be Part 6 operators. Also, other requirements in the rules are placed on infrastructure operators rather than on the regulator directly.

The ACCC considers that it is incumbent on the regulator not to approve or determine charges that are inconsistent with other provisions of the rules, despite the fact that the prohibitions in the rules are generally directed at the operator rather than the regulator. This is particularly the case given the proposed changes to apply Part 3 of the rules to all infrastructure operators (including Part 6 operators). While Part 6 operators should not include infrastructure charges that are inconsistent with the rules in their applications to the regulator, the regulator should also be satisfied that the charges it approves or determines are consistent with other provisions of the rules.

As such, the ACCC maintains its view from the Draft Advice that the decision criteria in rule 29 (for an initial determination or review) and rule 37 (for annual reviews of infrastructure charges) should be amended to expressly require the regulator to consider the consistency of the infrastructure charges being approved or determined with the other requirements of the water charge rules.

The ACCC notes that—in relation to rule 37 (for annual reviews of infrastructure charges)—any variations to the charges of the original decision will also need to be made taking into account price stability and the relatively short period available for such reviews. As such, full consistency between the infrastructure charges and the other water charge rules may not occur until after the end of the regulatory period underway at the time any such amendments to the water charge rules commence. Nevertheless, there would be an expectation that any variation of charges under rule 37 should, at a minimum, not result in the operator's infrastructure charges being any less consistent with the other requirements of the water charge rules.

Under the proposed amendments, a regulator would be permitted to vary charges in the light of consistency with other requirements of water charge rules. However, the regulator only has to have regard to consistency and may vary the charges to the extent that it is reasonably necessary, but is not required to ensure full compliance with other water charge rules provisions immediately. Note also that operators themselves may propose variations to their charges on the grounds of consistency with the rules, for consideration as part of an annual review.

The ACCC recognises that, if the proposed amendments to the rules are made, the situation may arise where it is not possible for charges previously determined by the regulator to be fully consistent with amended rule requirements outside of Part 6. In these cases, the regulator should seek to ensure that charges it approves or determines—including through the annual review process—are consistent as far as possible with other provisions of the amended water charge rules.

The ACCC notes GMW's concerns about the potential for the annual review process to vary charges to account for actual capex figures. The ACCC considers that this will not occur as there is no provision in either the current or proposed water charge rules for the annual review process to adjust revenue requirements to account for actual capex figures. The Final Advice on amendments to rules 29 and 37 to promote consistency with the water charge rules as a whole remains the same as in the Draft Advice.

#### **5.6.4 Annual review of regulated charges**

##### *Background*

Under Part 6 of the Water Charge (Infrastructure) Rules 2010 (WCIR), the ACCC, or an accredited regulator, sets the regulated charges for Part 6 operators for the first year of the regulatory period and regulated charges (or a methodology for setting regulated charges) for the remaining years of the regulatory period.

The Part 6 operator must apply to the regulator for approval or determination of its infrastructure charges in each year subsequent to the initial year of the regulatory period (an 'annual review'). In its application, the operator must include an estimate of demand for, or consumption of, infrastructure charges during the current year, as well as its forecast of demand for, or consumption of, infrastructure charges for the forthcoming regulatory year. The operator must also include its proposed infrastructure charges for the forthcoming year.

At that review, the regulator must decide whether to vary the regulated charges in (or set according to the methodology in) the original approval / determination. It may vary these charges if it is reasonably necessary to do so having regard to changes in the demand or consumption forecasts (from those used in the original approval / determination) and price stability.

The regulator must complete this review within three months of receiving the application, although if necessary, it may extend this period by one month at a time. This three month period does not include any time that an information request from the regulator to the Part 6 operator is outstanding.

In its Draft Advice, the ACCC considered that the current provisions relating to the annual review are adequate, except in relation to the following matters:

- the timelines for the annual review should be adapted as per Table 5.5 in draft rule advice 5-N.

- in undertaking the annual review, the regulator should also be able to vary charges having regard to the consistency of the infrastructure charges with other provisions of the water charge rules (this is considered in section 5.6.3).

In the Draft Advice, the ACCC did not support allowing a Part 6 operator to have the discretion to decide whether or not the annual review would take place. Similarly, the ACCC did not support additional requirements, suggested by some submitters to the Issues Paper, being placed on Part 6 operators during the annual review.<sup>422</sup>

### *Stakeholder feedback*

The NSW Irrigators' Council (NSWIC) submitted to the Act Review that the annual review process "creates greater risk and uncertainty about future bulk water charges as any 'over' or 'under' recovery by [State Water, now WaterNSW] could trigger significant adjustments and volatility in bulk water charges from one year to the next".<sup>423</sup> The NSWIC also noted that there was no annual review process under price determinations carried out by IPART under State water management law.

In submissions to the Issues Paper, the ACCC received several conflicting views about the annual review process, with some stakeholders advocating for a more flexible process, and others calling for a more prescriptive process.

The main deregulatory proposal with regard to the annual review process came from WaterNSW (formerly State Water).<sup>424</sup> WaterNSW proposed that the Part 6 operator should have the discretion as to whether the annual review is held. Under this proposal, the regulated charges in the years subsequent to the first year of the regulatory period would be the indicative prices outlined in the original approval/determination, or the indicative prices for future regulatory years calculated during a review process if and when a review occurs. WaterNSW further proposed that, in deciding whether to vary the regulated charges at an annual review, the regulator should be required to achieve the BWCOP.

In contrast, several stakeholders expressed concerns that the rules do not sufficiently incentivise the operator to find other remedies than increases in charges to address negative impacts arising from demand or consumption fluctuations. These stakeholders proposed that the annual review mechanism be amended to increase the amount of information an operator is required to provide and / or increase the scope of matters the regulator could consider during the annual review process.<sup>425</sup>

In response to the Draft Advice, Goulburn-Murray Water (GMW) submitted that it supports the annual review process, noting its importance to ensuring that there is an ongoing relevance between charges and costs.<sup>426</sup>

WaterNSW on the other hand submitted that the ACCC should consider other alternatives with lower costs.<sup>427</sup> WaterNSW suggested the following as alternatives to the annual review process:

- the approach in the energy sector – annual, mechanistic updates to charges

<sup>422</sup> See 'stakeholder feedback' and 'discussion' in section 5.6.4 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.113-116.

<sup>423</sup> NSW Irrigators' Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.9. NSWIC also noted that there was no annual review process when IPART determined WaterNSW's charges under State water management law and that IPART determined the prices for the entire regulatory period with CPI adjustments.

<sup>424</sup> WaterNSW, Issues Paper Submission, July 2015, pp.8-9.

<sup>425</sup> See 'stakeholder feedback' in section 5.6.5 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.113-114.

<sup>426</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.3.

<sup>427</sup> WaterNSW, Draft Advice Submission, March 2016, p.9.

- regulator flexibility to take an alternative approach such as the regulator sets a price adjustment formula, which the regulated entity could update for demand forecasts and price stability issues.

### *ACCC assessment*

The ACCC considers that the complexity of annual reviews depends primarily on the nature of the original determination for a regulatory period.

Recent decisions under Part 6 have varied as follows:

- In Victoria the Essential Services Commission of Victoria (ESCV) set revenue caps for GMW and Lower Murray Water (LMW), with revenue to come mostly from fixed rather than variable charges – this requires a relatively small adjustment each year in light of under or over-recovery of revenue as usage changes. However, the operator may also propose some restructuring of charges under a revenue cap at the annual review stage, and this may involve more complexity.
- For WaterNSW the ACCC set price caps, with an 60:40 ratio of revenue from variable charges to revenue from fixed charges, and established an unders and overs mechanism to take account of demand changes each year. This tends to result in more volatility in charges from year to year, hence a need for greater scrutiny as part of the annual review process.

The ACCC notes WaterNSW's suggested alternatives to annual reviews, including a mechanistic approach where indicative charges and the approach for adjusting them for each period of a regulatory period, are set out in the original approval / determination for that period. The ACCC believes that such an approach would not necessarily remove the need for annual reviews under Division 3 of Part 6, however.

It is possible and desirable for the original charge approval / determination decision to set out indicative charges and a mechanism for adjusting charges to account for *actual* demand / consumption being lower or higher than forecast. However, the ACCC still considers it appropriate for regulatory oversight of any proposed charges resulting from the application of the mechanism, to consider if it is necessary to further vary them for reasons of price stability, taking into account any customer views.

An operator may also update its demand or consumption forecasts (from those provided during the original approval / determination) to take account of better data or changed circumstances. Material changes in the forecasts for demand / consumption can lead to significant changes in the level of infrastructure charges. The ACCC considers it would be unlikely that an approval / determination decision could fully anticipate and provide for the range of scenarios that may eventuate throughout the regulatory period. Annual reviews provide this safeguard.<sup>428</sup>

The ACCC maintains its view from the Draft Advice that the current provisions for annual reviews allow reasonable discretion for regulators to take a range of approaches to the review, ranging from simple mechanistic adjustments to more complex adjustments that allow for changes in demand forecasts.

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<sup>428</sup> For example, the ACCC's annual review of WaterNSW's charges for 2015-16 noted that the demand forecasts used to calculate the indicative charges in the original decision did not include volumes of water allocation traded out of NSW (upon which WaterNSW applied its variable charge). The ACCC was able to vary charges (downwards) during the annual review process, having regard to this update in the demand / consumption forecasts. See: ACCC, *WaterNSW: Annual review of regulated charges: Final Decision 2015-16*, Canberra, June 2015, viewed June 2016, <http://accg.gov.au/regulated-infrastructure/water/water-projects/water-nsw-formerly-state-water-annual-price-review-2015-16/final-decision>.



In relation to GMW's preference to ensure an ongoing relevance between charges and costs, the ACCC notes that under current rules the annual review does not allow the regulator to adjust charges to take account of changed costs.

A similar issue was raised in consultation on the Draft Advice (by NSWIC), suggesting that the regulator should be able to update capex figures during the determination period so that the determination is based on actual rather than estimated capex. The ACCC considers that general adjustments to expenditure during the period at annual reviews would discourage operational efficiency. The ACCC considers that the annual review is not an appropriate time to revisit costs.

Nevertheless, the ACCC considers the rules should allow for some variations to an approval / determination during a regulatory period—see section 5.6.5 for a discussion of variations and contingent projects.

The ACCC's Final Advice therefore maintains the approach of the Draft Advice regarding annual reviews. The ACCC notes rule advice 5-P in section 5.6.3, that the regulator should be required to consider the consistency of the infrastructure charges being approved or determined with the other requirements of the water charge rules, in annual reviews as well as the initial review, for a regulatory period.

### **5.6.5 Variations of determinations**

#### **Rule advice 5-Q**

The rules should be amended to provide the regulator with the discretion to specify a capital expenditure project as a 'contingent project' in an initial approval / determination if:

- the infrastructure operator submits a project to the regulator in its application for the initial approval / determination, and
- the regulator is sufficiently uncertain about the cost, timing, necessity, likelihood or feasibility of the project, and
- the inclusion of the project in a Part 6 operator's revenue requirement would have a material impact on the infrastructure charges to be approved or determined.

Infrastructure charges for the operator should be determined in the initial approval / determination on the basis that funding such a project would not be a prudent and efficient cost of providing infrastructure services.

However, the regulator may specify the criteria (or 'trigger event') that—if met—would enable the infrastructure operator to apply for a variation of the approved / determined charges based on the inclusion of the cost of a contingent project in the revenue requirement for the remainder of the regulatory period.

The inclusion of the prudent and efficient cost of a contingent project in the revenue requirement for the remainder of the regulatory period should be subject to regulatory scrutiny to ensure:

- the trigger event has been met
- the contingent project is prudent and efficient
- the regulator is satisfied of the matters set out in subparagraphs 29(2)(b) and (c) of the proposed rules.

If the regulator varies an approval or determination, it must decide what infrastructure charges should be varied and the amount of the variation, as well as when the varied

charges should commence, but this should be no earlier than the beginning of the next year of the regulatory period.

This rule advice is implemented in rules 29 and 31, and Part 6, Division 4 of the proposed Water Charge Rules.

### **Rule advice 5-R**

The rules should be amended to provide for the following in relation to variations of approvals or determinations for certain events:

- The regulator should be allowed to vary an approval / determination where it is satisfied that a taxation or regulatory event provides a benefit to an infrastructure operator of more than 1 per cent of the operator's aggregate revenue requirement for the regulatory period.
- For a taxation or regulatory event, the current materiality threshold should be changed to 1 per cent of the aggregate revenue requirement for the regulatory period, and the current requirement for the event to have been 'unforeseen' should be removed.
- For other events, the current materiality threshold should be changed to 3 per cent of the aggregate revenue requirement for the regulatory period.
- The term 'aggregate revenue requirement' should be defined to be the sum of revenue from infrastructure charges and government contributions that was forecast for the regulatory period at the time that the ACCC made the initial approval or determination of the charges under rule 29.
- The requirement for an operator to demonstrate that it is not able to reduce its expenditure to meet the cost of an event should be amended to be a requirement to demonstrate that reductions are not able to be done without materially and adversely affecting the reliability or safety (instead of reliability and safety) of its water service infrastructure.

This rule advice is implemented in Rule 3 and Part 6, Division 4 of the proposed Water Charge Rules.

### *Background*

Currently under the rules, a Part 6 operator may request a variation of a determination if:

- an event occurs during the regulatory period that materially and adversely affects the operator's water service infrastructure or otherwise materially and adversely affects the operator's business
- the operator could not reasonably have foreseen the event.

The operator must provide the regulator with certain details of the event and the attempts it made to rectify the material and adverse circumstances. The regulator must not vary a prior approval or determination unless it is satisfied of the above points, and:

- that the amount required during the remainder of the regulatory period to rectify the material and adverse effects of the unforeseen event exceeds \$15 million (absolute materiality threshold) or five per cent of the value of the operator's regulatory asset base (RAB) as at the beginning of the regulatory period (RAB materiality threshold), whichever is the lesser
- that the total expenditure during the remaining part of the regulatory period will exceed the total forecast expenditure for that remaining part

- the operator has demonstrated that it is not able to reduce its expenditure without materially and adversely affecting the reliability and safety of its water service infrastructure or its ability to comply with relevant regulatory or legislative obligations.

In its Draft Advice, the ACCC identified that there were three key areas where the rules for variations of determinations could be improved:

- creating a new ‘contingent project’ mechanism whereby the operator may seek a variation to allow the operator to recover specific capital expenditure that was designated as a ‘contingent project’ during the initial determination
- allowing the regulator as well as the operator, to initiate a variation under certain circumstances
- adjusting the materiality thresholds that must be met before an operator may seek a variation.

### **Pass-throughs and contingent projects**

Currently, a regulator must approve or determine infrastructure charges based on the forecast prudent and efficient cost of providing infrastructure services. This requires the regulator to form a view about whether the expenditure proposed by the infrastructure operator is prudent and efficient. For some ‘business as usual’ costs, there will be a high degree of certainty that the infrastructure operator will incur the costs. However, for other projects (such as certain capex items), there will be a degree of uncertainty about:

- whether the infrastructure operator will go ahead with the project
- whether the scope of the project will differ from that proposed
- the timing of the expenditure of the project, and / or
- whether the cost of the project has been forecast accurately.

Where the regulator factors the forecast expenditure into the infrastructure operator’s revenue requirement (and therefore into approved or determined charges), but the expenditure does not occur, customers will face higher than necessary charges. However, where the regulator does not factor this forecast expenditure into the revenue requirement and the expenditure proves necessary; this means that the infrastructure operator will be undercompensated for its provision of water infrastructure services. This may lead to reduced quality of services for customers and underinvestment in the infrastructure operator’s infrastructure.

The ACCC recommended in its Draft Advice that the rules allow the regulator to specify a specific project or particular portion of capital expenditure related to a specific project as a ‘contingent project’ during the initial determination process, along with the criteria that must be met before the infrastructure operator can apply for the cost of the project to be factored into the calculation of the infrastructure operator’s charges for the remainder of the regulatory period (draft rule advice 5-Q). The advice stated these projects should be limited to capital expenditure projects only.

The ACCC considered that rules allowing the regulator to specify a project as a contingent project in a determination should have the following elements:

- the regulator should have the discretion to specify a project as a ‘contingent project’ (either in response to a Part 6 operator’s request, or on the regulator’s initiative), taking into account:
  - the cost of the project
  - the likelihood the project will occur
  - the timing of the project
  - the necessity of the project
  - the feasibility of the project.

- the regulator may specify the criteria (or ‘trigger event’) that must be met before the infrastructure operator can apply for the contingent project to be included in the revenue requirement for the remainder of the regulatory period; the criteria set would depend upon the circumstances.
- where the regulator is satisfied that the contingent project meets the criteria, the regulator can review whether the contingent project is included in the revenue requirement for the remainder of the regulatory period, taking into account information that was not available at the time of the original determination.
- as a result of including the contingent project in the revenue requirement for the remainder of the regulatory period, the regulator can decide which infrastructure charges should be varied, by how much and when, subject to the decision rules discussed in section 5.6.3.

### **Allowing the regulator to initiate a variation in certain circumstances**

Currently, only a Part 6 operator may seek a variation of an approval / determination. This means that where an unforeseen event occurs that materially and adversely affects a Part 6 operator, the operator can seek to vary the original approval / determination to remedy the effects of the unforeseen event. However, where the unforeseen event confers on the Part 6 operator a material benefit, there is no opportunity for the regulator to vary the approval / determination in order to share these material benefits with the operator’s customers via reduced infrastructure charges.

In its Draft Advice, the ACCC considered that both the regulator and the Part 6 operator should be allowed to initiate a variation for regulatory and taxation events but only the Part 6 operator should be permitted to initiate a variation for other events. The reasons for this are set out below.

### **Taxation / regulatory events**

The ACCC made draft rule advice to allow *both* the regulator and the Part 6 operator to seek a variation of the original approval / determination on the grounds of taxation events<sup>429</sup> or regulatory events<sup>430</sup> (draft rule advice 5-R). This would include the situation where a Part 6 operator imposes regulated charges on other Part 6 operators (for example, if either the BRC or Murray-Darling Basin Authority (MDBA) directly imposed charges for infrastructure services on other Part 6 operators). Notwithstanding the costs of the variation process, and the fact that, to some extent, the regulator can deal with this change in tax or regulatory events at the next approval / determination process, the ACCC considers that there are compelling reasons for allowing the regulator to initiate a variation in this context:

<sup>429</sup> A **taxation event** occurs if:

- (a) any of the following occurs during the course of a regulatory period for a Part 6 operator:
  - (i) a change in a relevant tax, in the application or official interpretation of a relevant tax, in the rate of a relevant tax, or in the way a relevant tax is calculated;
  - (ii) the removal of a relevant tax;
  - (iii) the imposition of a relevant tax; and
- (b) in consequence, the costs to the Part 6 operator of providing regulated infrastructure services meet the materiality threshold for taxation and regulatory events.

A **relevant tax** is any tax payable by a Part 6 operator other than:

- (a) income tax and capital gains tax;
- (b) stamp duty, financial institutions duty and bank accounts debits tax;
- (c) penalties, charges, fees and interest on late payments, or deficiencies in payments, relating to any tax; or
- (d) any tax that replaces or is the equivalent of or similar to any of the taxes referred to in paragraphs (a) to (b) (including any State equivalent tax).

<sup>430</sup> In this context, the ACCC considers a **regulatory event**:

- includes a change to regulatory requirements on the Part 6 operator that relates to the provision of infrastructure services
- includes the approval or determination of regulated water charges incurred by the infrastructure operator, by the ACCC or State Agency under State water management law. This includes where an infrastructure operator imposes regulated charges on other Part 6 operators, for example Murray-Darling Basin Authority / Border River Commission charges.
- does not include an obligation to pay a fine, a penalty or compensation in response to any breach of law.

- in many cases the intention of the government in making taxation and regulatory changes is that the benefits of these changes should be passed onto customers. Where such a policy intent is clearly evident, the regulator should not frustrate this clear intention.
- extra revenue or lower costs from a taxation or regulatory change is a windfall gain. It is not apparent why Part 6 operators should solely benefit from this windfall gain rather than passing it (at least in part) on to customers.
- the costs for undertaking the variation review are unlikely to be high because the main question to be decided is the monetary cost of the taxation and regulatory events. These should be measurable.
- it is consistent with other regulatory frameworks, such as the National Electricity Rules. Under the National Electricity Rules, the regulator is allowed to seek the variation of the original approval / determination in certain circumstances.

The ACCC acknowledged that to allow for the regulator to initiate a variation of the original approval / determination due to changes in taxation or regulatory arrangements would not be in the interests of Part 6 operators. Previously, if the Part 6 operator was affected by an unforeseen and material taxation or regulatory event that caused it to gain additional revenue or face significantly reduced costs, it could keep this gain (although it may need to later give it back through other mechanisms). However, if the regulator were allowed to seek the variation of an approval / determination due to taxation or regulatory changes, then a Part 6 operator may need to immediately give back all or part of the ‘upside’ from this unforeseen event in the form of reduced infrastructure charges in future years of the regulatory period. Moreover, the operator will be subject to the costs of involvement in a variation process, although these costs are unlikely to be high due to the restricted subject matter of such a review.

The ACCC also noted that the current variation process would not allow for the amendment of the original approval / determination in many circumstances to account for taxation and regulatory events. Where the event is foreseeable (but the monetary impact of the event is uncertain), the current variation process does not permit the regulator to vary the original approval or determination to account for this regulatory or taxation event. Given the difficulty for a Part 6 operator in avoiding or mitigating these costs when they occur, the ACCC considered it appropriate to remove this foreseeability requirement from the rules with regard to taxation and regulatory events.

### **Other Events**

The ACCC considers that while Part 6 operators should be able to initiate a variation review for other events, regulators should *not* be able to do so. There are several reasons, which suggest that regulators should be able to initiate such reviews, including symmetry with variations for taxation and regulatory events; fairness in allowing customers to share in unforeseen gains made by Part 6 operators; and consistency with other regulatory frameworks such as the National Electricity Rules (NER). However, on balance the ACCC considers that there are compelling reasons for *not* allowing regulators to initiate such variation review processes including:

- providing an incentive for Part 6 operators to seek efficiencies—the regulator is only likely to initiate a variation process where the Part 6 operator has achieved a large reduction in costs. In these circumstances, the regulator is likely to seek to return the gains from this reduction in costs to the customer. This will mean that the Part 6 operator will have little incentive to seek cost efficiencies. Encouraging Part 6 operators to seek efficiencies will benefit customers

because at the next approval / determination, the regulator can take this into account when setting the operator's revenue requirement.<sup>431</sup>

- other avenues for passing on the cost reductions for non-taxation and non-regulatory events to customers over the longer term. For example, at the 2014 Determination of Regulated Charges for State Water (now WaterNSW), the ACCC determined that State Water underspent its capex in the 2010-14 regulatory period. The ACCC reduced the opening RAB for the next regulatory period by the amount of the unspent capex from the previous regulatory period and the depreciation relating to that unspent capex. This resulted in a lower revenue requirement for the operator in the following regulatory period than would have been the case had the ACCC not done so.
- the variation process for other events will be costly for the regulated business
- a reduction in regulatory certainty for businesses.

### **Materiality thresholds**

The current materiality threshold that must be reached for an operator to be able to seek a variation is that the amount required to rectify the material and adverse effects of an event must exceed 5 per cent of the operator's RAB, or \$15 million, whichever is the lesser.<sup>432</sup> In its Draft Advice, the ACCC considered that there are grounds to lower this threshold.<sup>433</sup> In forming this view, the ACCC considered that lower thresholds are more consistent with the purpose of an approval / determination process. Such a process is meant to give the Part 6 operator the ability to recover revenue sufficient to cover the prudent and efficient costs of their operations for the regulatory period.<sup>434</sup> It therefore appeared logical that where there is a material unforeseen event (and/or for taxation and regulatory events, a foreseen event which has an uncertain monetary impact) that prevents them from doing so (and the operator is unable to mitigate the loss), that it should be allowed to recover this revenue to make up for the shortfall. However, even though the materiality threshold currently may be too high, any amended threshold needs to balance the desirability of possibly more frequent variations occurring due to these lower thresholds against the factors which favour the limitation of such reviews (mentioned at the start of this section).

#### *Taxation / regulatory events*

In its Draft Advice, the ACCC considered that it is appropriate that the materiality thresholds for the variation process differ between taxation and regulatory events and other events. Taxation and regulatory events are legal obligations from the perspective of the Part 6 operator; the Part 6 operator has no choice in whether to pay the amounts incurred under these obligations. Further, these expenses are unlikely to be able to be insured against or mitigated against. In its Draft Advice, the ACCC recommended (at draft rule advice 5-R) that, for taxation and regulatory events, the materiality threshold should be 1 per cent of the aggregate revenue requirement to be recovered from infrastructure charges for the current and remaining years of the regulatory period<sup>435</sup> (the one per cent remainder materiality threshold).

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<sup>431</sup> In contrast, providing an incentive for the Part 6 operator to seek efficiencies is only a limited consideration for taxation and regulatory changes because the gains from such unforeseen events are likely to be windfall in nature and are beyond the operator's control. Therefore, there is no reason to restrict a regulator's ability to initiate a variation review on these grounds of taxation and regulatory changes.

<sup>432</sup> WCIR, subrule 40(2)(c)(ii).

<sup>433</sup> For a full discussion of the ACCC's reasoning in the Draft Advice regarding materiality thresholds, see section 5.6.5 in ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.123-126.

<sup>434</sup> See for example, WCIR, subrule 29(2)(b).

<sup>435</sup> As opposed to the current threshold which is set, in part, at five per cent of the opening regulatory asset base for the operator.

However, even though the taxation or regulatory event arises from a legal obligation that is unavoidable for the Part 6 operators, the ACCC does not consider that where the event occurs and meets the required threshold that the entire additional amount should automatically be included in the Part 6 operator's regulated revenue for the remainder of the regulatory period. That is, the Part 6 operator would still need to satisfy the regulator that it cannot reduce its expenditure to avoid the consequences of the event. Further, consistent with the current variation process, the monetary impact of the event would need to remain above the one per cent materiality threshold after these matters have been considered.

Further, the purpose of the taxation or regulatory changes imposed may be intended to make the Part 6 operator change its behaviour, so if the regulator allows the operator to include in its revenue requirement enough revenue to continue its 'business as usual' practices, this may frustrate the intended purpose of the change.

#### *Other Events*

For other events, the ACCC did not consider a one per cent remainder materiality threshold to be appropriate. The ACCC made draft rule advice that the materiality threshold for other events should be five per cent of the aggregate revenue requirement (draft rule advice 5-R). This threshold would still be subject to the requirement that the regulator be satisfied that the Part 6 operator is not able to reduce its expenditure without materially and adversely affecting the reliability or safety of its business or its ability to comply with its legislative or regulatory obligations.

However, even if this five per cent remainder materiality threshold is satisfied, the ACCC considered it was not appropriate that this amount is automatically added to the Part 6 operator's revenue requirement for the remainder of the regulatory period. Currently, even where the threshold for seeking a variation is met, Part 6 operators must satisfy the regulator that:

- it is reasonably likely that the total expenditure expected to be undertaken during the remaining part of the regulatory period is likely to exceed the total forecast expenditure for that remaining part<sup>436</sup>
- that the applicant has demonstrated that it is not able to reduce its expenditure to avoid exceeding the total forecast expenditure for the remainder of the regulatory period without materially and adversely affecting the reliability *and* safety of the applicant's water service infrastructure or the applicant's ability to comply with any relevant regulatory or legislative obligations<sup>437</sup> (where the 'total forecast expenditure' is that forecast in the initial determination or approval).

The ACCC considered it appropriate that, with regard to other events, these conditions on granting a Part 6 operator a variation of the original approval / determination remain (with one minor exception, see 'Other proposed amendments relating to the variation process' immediately below). Although the events that meet this threshold may be unforeseen, there appears to be no reason to require customers to pay higher charges when the Part 6 operator can mitigate the loss from the unforeseen event or will otherwise gain its revenue requirement. The materiality threshold would therefore act as a threshold for the Part 6 operator to pass to gain the regulator's consideration as to whether the operator is allowed to recover costs related to an unforeseen non-taxation and non-regulatory event. The amount

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<sup>436</sup> WCIR, subrule 43(5)(b)(ii).

<sup>437</sup> WCIR, subrule 43(5)(c).

actually added to the revenue requirement and passed through to customers (if the variation is approved) may be less than the amount in the application.<sup>438</sup>

The ACCC considers that, in relation to other events, the requirement for the event to be unforeseen before the Part 6 operator can apply for a variation to the original approval / determination should be maintained. Given that *foreseen* other expenditure is likely to be capital expenditure:

- if the monetary impact of the event is known before the start of the regulatory period, it can be assessed by the regulator at the time of the original approval / determination; and
- if the monetary impact of the event is unknown at the start of the regulatory period, the regulator can use other processes (e.g. the proposed new contingent project provisions set out above) for assessing whether expenditure relating to the event should be included in the revenue requirement.

### **Other proposed amendments relating to the variation process**

The ACCC noted in its Draft Advice that under the current rules, before allowing the variation the regulator must be satisfied that the Part 6 operator cannot reduce its expenditure without it ‘materially adversely affecting the reliability *and* safety of the applicant’s water service infrastructure’. The ACCC considered it was sufficient that the regulator is satisfied that the materially adverse effect be on the reliability *or* safety of the applicant’s water service infrastructure. A materially adverse effect on either could be highly detrimental to a regulated business and its customers and therefore allowing a variation in either circumstance is warranted. Therefore in its Draft Advice, the ACCC recommended this change to the water charge rules (draft rule advice 5-R).

### *Stakeholder feedback*

#### **General comments on rule advices 5-Q and 5-R**

The QFF commented generally in relation to rule advice 5-Q and 5-R that the proposed amendments “will raise significant issues for maintaining a consistent state-wide process for pricing regulation”.<sup>439</sup>

#### **Pass-throughs and contingent projects**

State Water (now WaterNSW) noted in its submission to the Act Review that the “reopening provisions do not include a specific pass through mechanism for a regulatory change event”.<sup>440</sup>

In its Issues Paper submission, Goulburn-Murray Water (GMW) noted that pass-through events are sometimes defined in a price determination: “for example, the AER determines pass through events where there is some likelihood of an event occurring but the timing and cost impact is unknown at the time of the determination”.<sup>441</sup>

In response to the Draft Advice, WaterNSW noted generally that it supports amendments to improve the existing price setting arrangements in the Water Charge (Infrastructure) Rules 2010 (WCIR).<sup>442</sup> WaterNSW submitted that the proposed amendments ‘reflect an appropriate trade-off between regulatory flexibility and regulatory certainty’.<sup>443</sup> WaterNSW also noted that the specific proposed

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<sup>438</sup> WCIR, subrule 43(5)(b)(i).

<sup>439</sup> Queensland Farmers’ Federation, Draft Advice Submission, March 2016, p.5.

<sup>440</sup> State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.35.

<sup>441</sup> Goulburn Murray Water, Issues Paper Submission, July 2015, p.2.

<sup>442</sup> WaterNSW, Draft Advice Submission, March 2016, p.1.

<sup>443</sup> *ibid.*



amendments to pass-throughs and contingent projects would better allow an operator to respond to customer needs during the regulatory period.

### **Reducing the current absolute and RAB materiality thresholds**

GMW noted that the ACCC's Draft Advice had responded to GMW's feedback in relation to lowering the thresholds for a variation of a determination (as implemented through rule advice 5-R).<sup>444</sup> However, GMW submitted its concern about the "practical impact" that the proposed amendment to change the threshold to '5 per cent of the aggregate revenue requirement for the year to which the review relates and the remaining years of the regulatory period'. GMW expressed concern that this could actually increase the threshold for GMW in the early years of the regulatory period, for events other than taxation and regulatory events.<sup>445</sup> GMW argued that the proposed amendments to the threshold are 'unacceptably high' and that '[a]t the proposed threshold for the first year of the regulatory period, GMW could foreseeably be moved to a position where its financial viability is threatened, with adverse implications for service delivery'.<sup>446</sup> GMW added that the impact would be greatest when there is district-based pricing 'because unforeseen costs below the threshold would be borne by individual business segments or districts rather than absorbed by GMW at a global level'.<sup>447</sup>

GMW concluded that where the threshold is related to the total annual revenue or the RAB, consideration should be given to 'the practical impacts of a disaggregated business and user pays reflective based pricing'.<sup>448</sup> GMW added that [t]his highlights the complexity of the trade-off between cost reflectivity and simplicity and the importance of providing sufficient flexibility to allow operators to develop efficient pricing that avoids perverse outcomes and price shocks'.<sup>449</sup>

IPART argued that the rules should maintain the existing materiality thresholds – hence, '[d]eterminations should be varied only where prices would materially change as a result of the trigger event'.<sup>450</sup> IPART added that this would minimise the cost of regulation on the regulated entity, the regulator and stakeholders.

### **Allowing the regulator to initiate a variation of the original determination**

Only IPART made a submission on this issue. IPART reiterated its views from its submission to the Issues Paper that regulators should be able to initiate variation reviews. This would allow the regulator to initiate a variation review where there are cost decreases as well as cost increases.<sup>451</sup>

### **Narrowing the circumstances under which a Part 6 operator may seek the variation of a determination**

IPART's submission to the Draft Advice reiterated its position from its Issues Paper submission in favour of limiting the scope for variation of a determination.<sup>452</sup> In its Issues Paper submission, IPART argued that the circumstances under which there could be a variation of an approval or determination

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<sup>444</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.4. GMW had called for a lower materiality threshold in its Issues Paper submission, arguing that the current threshold imposes a significant risk on the operator. Goulburn Murray Water, Issues Paper Submission, July 2015, p.4.

<sup>445</sup> For example, GMW argued that the threshold would increase in the first year of their current regulatory period from \$11.7 million to \$18.6 million. GMW added that this issue is "exacerbated" because it has a "very low RAB to annual revenue ratio" due to the "RAB being substantially below book asset value".

<sup>446</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.4.

<sup>447</sup> *ibid.*

<sup>448</sup> *ibid.*

<sup>449</sup> *ibid.*

<sup>450</sup> IPART, Issues Paper Submission, June 2015, p.5.

<sup>451</sup> *ibid.*; IPART, Draft Advice Submission, March 2016, p. 2.

<sup>452</sup> IPART, Draft Advice Submission, March 2016, p.2.

should be limited to unforeseen regulatory and taxation change events (because these events are outside the regulated entity's control).<sup>453</sup>

## *ACCC assessment*

### **Overview**

The ACCC remains of the view that its draft rule advice on contingent projects (rule advice 5-Q) in the Draft Advice largely remains appropriate, for the reasons set out in that document (summarised in 'Background' section above).

However, in this Final Advice, the ACCC has added a materiality criterion that the regulator must consider before a capital expenditure project can be specified as a contingent project. The reasons for this and some further clarification of the contingent projects mechanism is set out below.

As noted above, in its submission IPART continued to support its previous view, submitted in response to the Issues Paper, that the ability of Part 6 operators and regulators to seek a variation be limited to taxation and regulatory events only. In its Draft Advice, the ACCC stated that it supported the ability of both the regulator and operator to seek a variation for regulatory and taxation events, but in relation to other events it supported only the operator's ability to seek a variation. For the reasons outlined in the Draft Advice (and summarised in the background to this section), the ACCC remains of this view.

However, in response to stakeholder feedback, the ACCC supports amending draft rule advice 5-R (which relates to the materiality thresholds for parties to seek variations of an original approval / determination). The ACCC recommends that the materiality thresholds now be defined as:

- one per cent of the aggregate revenue requirement for regulatory and taxation events, and
- three per cent of the aggregate revenue requirement for other events.

To apply for a variation, the particular event must meet the threshold. The event cannot be a series of events, an aggregation of related events, or an overrun of business as usual costs.

The ACCC has also amended the proposed definition of the 'aggregate revenue requirement' to be the sum of revenue from infrastructure charges *and government contributions* that was forecast for the *regulatory period* at the time that the ACCC made the initial approval or determination of the charges under rule 29. In the Draft Advice, the definition of the aggregate revenue requirement covered only infrastructure charges and was limited to revenue for the current and remaining years of the regulatory period (that is, the amount declined over the regulatory period).

The ACCC's reasons for its positions and its response to stakeholder concerns are set out below.

### **Contingent Projects—materiality thresholds and other matters**

The Draft Advice proposed that the rules give the ACCC the discretion on whether to include an individual capital expenditure proposed by a Part 6 operator as a contingent project when approving or determining an operator's infrastructure charges. In making this decision, the ACCC would be required to consider the cost, timing, necessity, likelihood and feasibility of the capital expenditure project occurring.

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<sup>453</sup> IPART, Issues Paper Submission, July 2015, p.5.

The ACCC continues to believe that these criteria are appropriate for the reasons set out in the Draft Advice. However, on further consideration, the ACCC believes that a further criterion is necessary. The ACCC is concerned that the proposed rule may encourage operators to submit to the ACCC a large number of small projects. This may prove costly for the operator as it will face regulatory costs at the time of the approval or determination and at the time it makes any subsequent variation applications.

Therefore, in this Final Advice, the ACCC has decided to include a materiality criterion the ACCC must consider before it can specify a particular capital expenditure project as a contingent project. Specifically, the ACCC must be satisfied that the inclusion of the proposed capital expenditure project would have a material impact on the operator's infrastructure charges to be approved or determined. The ACCC considers that the inclusion of this criterion will promote regulatory certainty and make the operation of variations relating to contingent projects simpler and less costly.

The ACCC notes that if the inclusion of a particular project as a contingent project in the operator's approval or determination has the possibility of materially affecting certain infrastructure charges in a particular valley or district, this would be sufficient to satisfy this criterion.

The ACCC also notes that the threshold proposed above does not preclude the ACCC from excluding other proposed capital expenditure from an approval or determination if it considers that the associated costs would not be prudent or efficient.

In general, the ACCC wishes to clarify certain other matters relating to the operation of the contingent project mechanism, set out below.

Where the Part 6 operator submits a variation application relating to a contingent project, the Draft Advice did not expressly set out the process to be undertaken by the regulator when considering the application and how this translated to the aggregate revenue requirement and infrastructure charges. In the proposed water charge rules included in the Draft Advice (subrule 43(6)), before approving a change to the approval or determination, the ACCC would be required to be satisfied that:

- the trigger conditions relating to the application had been fulfilled
- the forecast revenue from infrastructure charges covered by the application met the prudent and efficient costs of providing the related infrastructure services
- the infrastructure charges proposed in the application were consistent with the Rules.

The ACCC believes that these criteria are still appropriate for the ACCC to consider when deciding on the variation application. However, in this Final Advice, the ACCC adds an additional criterion; the proposed project itself must be prudent and efficient. If the project itself is not a prudent and efficient capital expenditure, then the associated costs of funding the project would not be included in the operator's revenue requirement.

The decision on the prudence and efficiency of a contingent project will be based on the latest available information. This means, where a variation application relating to a contingent project is made, this information will include information that was not available at the time of the initial approval or determination.

Where the ACCC approves the variation of an approval or determination in relation to a contingent project, this will be incorporated into the calculation of the operator's revenue requirement in the same way that other approved capital expenditure projects are. That is, the capital expenditure in each year will be added to the operator's regulatory asset base, with the forecast depreciation and return on

capital relating to the contingent project added to the revenue requirement in each of the remaining years of the regulatory period. The intention of the contingent project mechanism is not to allow an operator to recover the entirety of a capital expenditure over one year or over the remainder of the regulatory period.

### **Variations for taxation or regulatory events, and other events—materiality thresholds**

The ACCC made draft rule advice that, for taxation and regulatory events, the materiality threshold should be one per cent of the combined amount of the *revenue requirement* for the current and remaining years of the regulatory period (i.e. one per cent of the ‘aggregate revenue requirement’) (draft rule advice 5-R). The draft rule advice also proposed that a regulatory or taxation event need not be foreseeable for an operator to seek a variation.<sup>454</sup> For ‘other events’ (i.e. events other than regulatory or taxation events), the Draft Advice proposed a materiality threshold of five per cent of the aggregate revenue requirement (and the event needed to be unforeseeable).

The ACCC maintains its view from the Draft Advice of the need to balance the interests of an operator with those of its customers, while also not imposing unnecessary regulatory costs. If materiality thresholds are set too low, operators will have a greater degree of revenue certainty, but greater regulatory costs will be incurred in making and assessing applications for variations more frequently, and less certainty for customers about the level of infrastructure charges throughout a regulatory period. More fundamentally, allowing for variations transfers the risk of unforeseen events from the operator to its customers.

The ACCC acknowledges that where there is district-based pricing (or otherwise where pricing is segmented by customer group), an unforeseen other event may impact disproportionately on a particular business segment of the Part 6 operator that it covers. This could occur even though the impact of such an event, when considered in relation to the entire regulated business of the Part 6 operator, is less than the proposed relevant materiality threshold. Nevertheless, the ACCC considers it remains appropriate to consider the materiality of an event in relation to the infrastructure operator more generally. This is because the purpose of allowing a Part 6 operator to seek a variation of an original approval / determination is to mitigate the effect of the unforeseen event, in aggregate, on the operator.

#### *Definition of ‘aggregate revenue requirement’*

The ‘aggregate revenue requirement’ was defined in the proposed water charge rules provided with the Draft Advice as: ‘the sum of the forecast revenue from infrastructure charges that is reasonably likely to meet the prudent and efficient costs of providing the infrastructure services for the current and remaining years of the regulatory period.’<sup>455</sup> After further consideration, the ACCC proposes to refine this definition in three areas.

First, the current proposed definition only accounts for revenue from infrastructure charges, but not revenue from government contributions. This definition, by not including revenue from government contributions, is problematic for three reasons:

- where user *and* government contributions pay for the costs of providing infrastructure services, infrastructure charges may provide only a small proportion of the revenue required. Therefore,

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<sup>454</sup> In contrast, the current threshold is set at five per cent of the opening RAB for the operator, or \$15 million, whichever is the lesser, and an operator may only apply for a variation of an approval or determination if the relevant event could not have been reasonably foreseen.

<sup>455</sup> ACCC, *Draft Water Charge Rules*, November 2015, subrule 40(5).

a test which references only the portion of revenue raised via infrastructure charges could result in materiality thresholds being very low.

- if the government decreases its contribution from one regulatory period to the next, then user contributions must increase. This will increase the dollar amount of the materiality thresholds. The ACCC does not consider this is appropriate because the thresholds should reflect the effect of the event on the viability of the business, not the contribution of one group of stakeholders to the business.
- it is inconsistent with other parts of the water charge rules, in particular, subrule 29(2)(b). In that subrule, the prudent and efficient costs of providing infrastructure services to be recovered through infrastructure charges must take into account government contributions.

Including forecast revenue from government contributions will effectively increase the materiality thresholds to the extent that an operator has such revenue.

Second, the ACCC also considers that the definition of aggregate revenue requirement in the Draft Advice may result in inappropriately low thresholds in the latter years of a regulatory period. This is because the definition set out in the Draft Advice refers to the forecast revenue for only the remaining part of a regulatory period rather than the period as a whole. As noted above, materiality thresholds set too low can increase overall regulatory costs and can inappropriately transfer risk from the operator to its customers.

Finally, it was unclear in the Draft Advice the point in time the aggregate revenue requirement should be calculated. Were the aggregate revenue requirement to be recalculated every time a variation occurred during the regulatory period, then the materiality thresholds relevant to variations could rise and fall over that time. The ACCC considers that such a scenario would not improve the variations process in terms of maintaining the financial viability of the regulated business. Further, it would add an unnecessary layer of complexity to the variations process.

In view of these issues, the ACCC considers that ‘aggregate revenue requirement’ should instead be defined as the sum of revenue from infrastructure charges *and* government contributions that was forecast *for the regulatory period at the time that the ACCC made the initial approval or determination of the charges under rule 29.*

The ACCC appreciates that this changed definition of the aggregate revenue requirement has the effect that the materiality thresholds (in dollar terms) may be significantly higher than those which would apply under the proposed water charge rules provided with the Draft Advice, particularly in the latter years of the regulatory period. Also, for ‘other events’, the materiality thresholds for some operators could increase when compared with the current thresholds. Thus this change in the proposed definition, other things being equal, would exacerbate the issue which GMW had already identified as being a concern with the Draft Advice materiality threshold proposals.

Therefore, having changed the definition for the aggregate revenue requirement, the ACCC has re-examined the materiality threshold for both regulatory and taxation events, and other events to ensure they remain appropriate for the proposed water charge rules.

#### *Taxation and Regulatory Events*

The ACCC considers that a materiality threshold for regulatory and taxation events of one per cent of the (revised) aggregate revenue requirement is appropriate.

The ACCC notes that, due to:

- the inclusion of government contributions in the definition of aggregate revenue requirement (relevant to where the customer contribution to the cost of regulated water infrastructure services share is less than 100 per cent); and
- the changing of the aggregate revenue requirement to be a constant amount (rather than a declining amount) throughout a regulatory period, as it relates to the revenue requirement for the *entire* regulatory period ,

there will typically be higher materiality thresholds for operators when compared with the thresholds proposed in the Draft Advice.

The following example demonstrates the effect of this proposed threshold based on assumptions drawn from the most recent WaterNSW determination.

**Example One: WaterNSW (regulatory and taxation events)**

In its final determination for State Water (now WaterNSW) for the three year regulatory period 2014-15 to 2016-17:

- the ACCC set the opening RAB for the regulatory period at \$657.3 million.<sup>456</sup> This meant the relevant materiality threshold under the current WCIR is \$15 million (as this figure was lower than 5 per cent of the RAB).
- the ACCC set regulated revenue at \$84.3 million for 2014-15, \$88.3 million for 2015-16 and \$91.5 million for 2016-17.<sup>457</sup>
- based on customer share percentages recommended by IPART and agreed to by the NSW Government for those years, the customer share of this revenue requirement was \$52.6 million for 2014-15, \$54.4 million for 2015-16 and \$56.2 million for 2016-17.

A comparison of materiality thresholds under the current WCIR, the proposed materiality thresholds in the Draft Advice and the proposed materiality thresholds in the Final Advice are set out in Table 5.6 below.

**Table 5.6 – Comparison of materiality thresholds (WaterNSW, regulatory and taxation events)**

	2014-15 (\$ million)	2015-16 (\$ million)	2016-17 (\$ million)
Current WCIR Materiality Threshold	15	15	15
Proposed Materiality Threshold (Draft Advice)	1.6	1.1	0.6
Proposed Materiality Threshold (Final Advice)	2.6	2.6	2.6

The aggregate revenue requirement for WaterNSW for regulatory period = \$264.1 million over three years. All of the figures in this example are reported in \$2014-15. That is, they are not increased by the relevant CPI figure in each year. This maintains the simplicity of the example without undermining any conclusions that can be drawn from it.

Based on this example, for WaterNSW the revised materiality threshold for regulatory and taxation events is \$2.6 million. This is significantly below the threshold in the current rules. An examination of other Part 6 operators’ materiality thresholds for taxation and regulatory events reveals a similar result.

The ACCC considers that the revised threshold is appropriate because:

- although it will mean that the event that allows the operator to seek a variation must be of a greater impact than that included in the Draft Advice, the level of that greater impact is not high

<sup>456</sup> ACCC, *ACCC Final Decision on State Water Pricing Application: 2014-15 to 2016-17*, Canberra, June 2014, p.34.

<sup>457</sup> ACCC, *ACCC Final Decision on State Water Pricing Application: 2014-15 to 2016-17*, Canberra, June 2014, p.184.

and it is still significantly below the current materiality threshold in the WCIR for taxation and regulatory events.

- the change from declining to constant thresholds over the regulatory period simplifies the operation of the variation process.
- it still meets the ACCC objective of balancing the ability of operators to more easily seek a variation for regulatory / taxation obligations (as opposed to other events) and the desirability to avoid variation applications due to their cost and creation of uncertainty for operators and customers.
- it is consistent with the methodology used to determine the materiality threshold for other events.

#### *Other Events*

The ACCC considers that Part 6 operators should be able to apply for a variation to an approval or determination in response to other events where they are unforeseen.

However, the ACCC considers that the five per cent materiality threshold outlined in the Draft Advice for these ‘other events’ should be adjusted downwards to three per cent, given the revisions to the definition of ‘aggregate revenue requirement’ set out above.

This revised threshold would still allow an operator to recover their prudent and efficient costs for other events likely to have a serious effect on the operator while limiting the potential for frequent variation applications which entail increased regulatory costs for the operator, the regulator and customers involved.

The impact of other events that do not meet the materiality threshold (and therefore cannot result in a variation) can nevertheless be assessed as part of the more thorough approval or determination process for the next regulatory period, rather than the more ad hoc nature of a variation review.

The ACCC has produced the following examples to aid stakeholders to understand the difference between the materiality thresholds calculated using the approach set out in the current WCIR, the ACCC’s Draft Advice and this Final Advice.

The ACCC observes that the proposed thresholds for other events:

- result in a much lower materiality threshold for WaterNSW when compared with that in the current rules
- result in only slightly higher thresholds for GMW and LMW when compared with those under the current rules.
- resolve the problem raised by GMW in the Draft Advice regarding the thresholds for the first year of the regulatory period

### Example Two: WaterNSW (other events)

**Table 5.7: Comparison of materiality thresholds (WaterNSW, other events)**

	2014-15 (\$ million)	2015-16 (\$ million)	2016-17 (\$ million)
Current WCIR Materiality Threshold	15	15	15
Proposed Materiality Threshold (Draft Advice)	8.2	5.5	2.8
Proposed Materiality Threshold (Final Advice)	7.9	7.9	7.9

The aggregate revenue requirement for WaterNSW was \$264.1 million over three years.

All of the figures in this example are reported in \$2014-15.

While the thresholds proposed in this Final Advice will be higher in the latter years of a regulatory period than those proposed in the Draft Advice, they will still be significantly lower compared to the current WCIR materiality thresholds.

For WaterNSW, the effect of including government contributions in the definition of 'aggregate revenue requirement' is effectively cancelled out by a reduction in the rate from five to three per cent.

### Example Three: GMW (other events)

In its final determination for GMW, the Essential Services Commission Victoria (ESCV) for the regulatory period 2013-14 to 2015-16:

- set GMW's opening RAB at \$210.2 million for 2013-14.<sup>458</sup> This means the relevant materiality threshold under the current WCIR is \$10.5 million (i.e. five per cent of the opening RAB).
- set the regulated revenue requirement at \$119.0 million for 2013-14, \$118.6 million for 2014-15 and \$118.8 million for 2015-16.<sup>459</sup>

The customer share of the revenue requirement was 100 per cent.

**Table 5.8: Comparison of materiality thresholds (GMW, other events)**

	2014-15 (\$ million)	2015-16 (\$ million)	2016-17 (\$ million)
Current WCIR Materiality Threshold	10.5	10.5	10.5
Proposed Materiality Threshold (Draft Advice)	17.8	11.9	5.9
Proposed Materiality Threshold (Final Advice)	10.7	10.7	10.7

The aggregate revenue requirement for GMW was \$356.1 million over three years.

All the figures in this example are in \$2013-14.

This example supports GMW's contention that the materiality thresholds for 'other events' proposed in the Draft Advice could result in much higher materiality thresholds for the early years of a regulatory period than is currently the case. However, this result is likely to occur in very specific circumstances: that is, where the regulated revenue for the remainder of the regulatory period is high (and does not contain government contributions), or the opening RAB is low (or a combination of both). The ACCC considers for the reasons set out earlier in this section that such a high materiality threshold is undesirable.

The ACCC considers that the proposed approach in the Final Advice provides an appropriate balance between allowing the Part 6 operator to seek a variation review from the regulator where an unforeseen event occurs

<sup>458</sup> Essential Services Commission of Victoria, *2013 Water Price Review- Goulburn-Murray Water Determination 1 July 2013 - 30 June 2016*, June 2013, p. 32.

<sup>459</sup> Essential Services Commission of Victoria, *2013 Water Price Review- Goulburn-Murray Water Determination 1 July 2013 - 30 June 2016*, June 2013, p. 25.



that may have a material and adverse effect on an operator and discouraging the operator from regularly seeking a variation review.

#### Example Four: LMW (Other Events)

In its final determination for LMW, the Essential Services Commission Victoria (ESCV) for the regulatory period 2013-14 to 2017-18:

- set LMW's opening RAB at \$73.4 million for 2013-14.<sup>460</sup> This means the relevant materiality threshold under the current WCIR is \$3.7 million (i.e. 5 per cent of the opening RAB).
- set the regulated revenue requirement at \$26.8 million for 2013-14, \$27.1 million for 2014-15, \$27.5 million for 2015-16, \$28 million for 2016-17 and \$28.5 million for 2017-18.<sup>461</sup>

The customer share of the revenue requirement was 100 per cent.

**Table 5.9: Comparison of materiality thresholds (LMW, other events)**

	2013-14 (\$ million)	2014-15 (\$ million)	2015-16 (\$ million)	2016-17 (\$ million)	2017-18 (\$ million)
Current WCIR Materiality Threshold	3.7	3.7	3.7	3.7	3.7
Proposed Materiality Threshold (Draft Advice)	4.1	3.3	2.5	1.7	0.9
Proposed Materiality Threshold (Final Advice)	4.1	4.1	4.1	4.1	4.1

The aggregate revenue requirement for LMW was \$137.9 million over five years.

All the figures in this example are in \$2013-14.

This example shows the proposed thresholds for LMW are slightly higher than under the current WCIR thresholds. However, the ACCC considers that the thresholds resulting from the approach proposed in the Draft Advice would be set too low in the later years of a regulatory period (for reasons set out above) and the methodology set out in this Final Advice is more appropriate.

#### How a variation is to be given effect

The Draft Advice was unclear as to how a variation of an approval or determination made by the ACCC would be given effect, particularly in terms of how this would translate into varied infrastructure charges. The ACCC considers that this is best left to the discretion of the regulator as part of its assessment of the variation.

While different criteria must be met for a variation due to a taxation or regulatory event, an 'other event', or in relation to a contingent project, the ACCC considers that such variations should all be given effect subject to:

- the requirement that any varied charges not commence before the beginning of the next year of the regulatory period, and
- the ACCC being satisfied, in relation to the varied charges, of the regulatory test for approvals and determinations set out in paragraphs in subrules 29(2)(b) and (c) of the proposed water charge rules.

<sup>460</sup> Essential Services Commission of Victoria, *2013 Water Price Review- Goulburn-Murray Water Determination 1 July 2013 - 30 June 2016*, June 2013, p. 32.

<sup>461</sup> Essential Services Commission of Victoria, *2013 Water Price Review- Goulburn-Murray Water Determination 1 July 2013 - 30 June 2016*, June 2013, p. 25.

The proposed water charge rules provided with the Draft Advice only stated this expressly in relation to variations for contingent projects. The ACCC has adjusted its rule advice, and the proposed water charge rules, to expressly provide for these requirements in relation to all variations.

### **Maintaining a consistent state-wide process for pricing regulation**

As mentioned above, the QFF considered that the proposed recommendations in relation to variations of an approval / determination included in the Draft Advice ‘raised significant issues for maintaining a consistent state-wide process for pricing regulation’.

The ACCC notes that pricing regulation in the Murray-Darling Basin (MDB) is regulated under the Act and the related water charge rules. Areas outside the MDB are regulated under the relevant state law. In these circumstances, the ACCC considers that having more than one system for pricing regulation in any particular Basin State may be inevitable to the extent that one or more operators from that Basin State continue to be subject to Part 6 (see section 5.6 for proposed amendments to the criteria for Part 6 operators).

The ACCC considers that the Final Advice allows the ACCC to maintain a consistent Basin-wide system for water charge regulation, consistent with the scope of the Act, in relation to approvals / determinations under the water charge rules.

## **5.7 Distributions (Part 7)**

### **Rule advice 5-S**

#### *Application of Part 7*

Part 7 should be amended to adapt the “triggering” provisions (Part 7, Division 1) to apply to all distributions by an infrastructure operator, other than **standard distributions**.

The test for the application of Part 7 should refer to “infrastructure operators” (rather than only to member-owned infrastructure operators as in the existing rules). (see section 5.2 for further discussion).

*See also rule advice 5-U* in relation to when an operator should be taken to have made a distribution.

**Standard distributions** are those:

- made or offered in proportion to the volume of all the operator’s customers’ rights of access (typically represented by their water delivery right);
- made or offered in proportion to each customer’s contribution to the total revenue from all customers from charges levied per unit of water delivery right held;
- made to customers that had previously contributed to a fund for the replacement / upgrade of infrastructure when this money is no longer required because the replacement / upgrade of the infrastructure is no longer required, or has been undertaken at a lower cost than forecast, in proportion to the contributions made by each customer;
- made in the form of reasonable honorariums;
- made in the form of a trade or allocation of water that was offered to all customers on the same terms, whether or not the offer was in return for consideration;
- made or offered to all customers in a specific part of the area serviced by the

infrastructure operator in relation to water savings achieved by the operator in that part, in proportion to each customer's right of access to that part or in proportion to each customer's contribution to the total revenue from all customers in that part from charges levied per unit of water delivery right held; or

- made by an infrastructure operator to its owners but only if the infrastructure operators' infrastructure charges are approved or determined under Part 6 or by a State Agency under a law of the State.

The rules should also provide that, where an infrastructure operator withholds a distribution up to the amount of any arrears owed by a customer (where that amount would otherwise have formed part of a distribution), that amount is taken to have been made as a distribution, or part of a distribution, as appropriate.

*Note:* This would have the effect that the assessment of whether a distribution would be considered a standard distribution is not affected by an operator withholding a distribution (or part of a distribution) for the purpose of paying off arrears owed.

This rule advice is implemented in Part 7, Division 1 of the proposed Water Charge Rules.

### *Regulator for Part 7*

Consistently with the rule advice for amending the application of Part 6 and the consequent removal of the need for accreditation, the regulator for Part 7 following the transition period will be the ACCC.

*See also rule advices 5-M and 5-W.*

This rule advice is implemented in Part 7 of the proposed Water Charge Rules.

### **Rule advice 5-T**

The rules should require that an infrastructure operator must notify the ACCC as soon as practicable if:

- it becomes aware that it is a Part 7 operator; or
- it becomes aware of a distribution it will make that may result in the operator becoming a Part 7 operator.

The rules should be amended to allow for the ACCC to grant an exemption to the requirement for a Part 7 operator to have its infrastructure charges approved or determined.

The rules should allow the ACCC to make the exemption in relation to a specific distribution or a distribution to be made in the future that meets particular conditions specified by the ACCC.

The ACCC should only give such an exemption if it is satisfied that providing the exemption is unlikely to have a negative impact on the achievement of the Basin Water Charging Objectives and Principles, taking into account:

- the nature of the operator's infrastructure services;
- the nature of the distribution made by the operator to its customers;
- the preferences of the operator's customers; and
- any action taken by the operator in response to the ACCC's concerns about distributions that the operator has made or intends to make; and
- any terms, conditions, or obligations associated with the distribution.

In making this decision the rules should allow the ACCC to undertake public consultation or request further information from the operator.

### *Approvals or determinations under Part 7*

The rules should also be amended to allow the ACCC, in approving or determining infrastructure charges set out in an application under Part 7, to also:

- have regard to any distributions previously made and / or proposed by the infrastructure operator.
- specify terms and conditions in relation to particular charges.

This rule advice is implemented in Part 7 of the proposed Water Charge Rules.

### **Rule advice 5-U**

The water charge rules should be amended to provide that an infrastructure operator should be taken to have made a **distribution** to a customer if it has:

- declared a dividend for a customer; or
- distributed profits, or any part of its profits, whether in the form of dividends or otherwise to a customer; or
- distributed its reserves, or any part of its reserves to a customer; or
- issued bonus shares to a customer.

However, the rules should clarify that an infrastructure operator is not taken to have made a distribution where it makes a payment to a customer as an incentive for the customer to agree to the reconfiguration or decommissioning of relevant water service infrastructure.

The rules should provide that an infrastructure operator is also taken to have made a distribution where it trades or allocates water to a customer in the form of a 'water allocation' or an allocation of water to an irrigation right other than:

- the allocation of water from an irrigation infrastructure operator to the holder of an irrigation right to fulfil its contractual obligations in relation to irrigation rights held by its customers;
- those necessary to give effect to a trade of water access right or irrigation right by a customer.

However, even where the trade or allocation of water to a customer is considered a distribution, it should not trigger the potential application of Part 7 if it also meets the definition of a **standard distribution** as proposed in rule advice 5-S.

This rule advice is implemented in Part 7, Division 1 of the proposed Water Charge Rules.

### **Rule advice 5-V**

The water charge rules should be amended such that an infrastructure operator ceases to be a Part 7 operator three years after:

- the day the operator last made a distribution (other than standard distribution); or
- the start of the regulatory period for the operator;

whichever occurs later.

(The current rules state that an operator is no longer a Part 7 operator five years after it last made a distribution, or when it ceases to be a member-owned operator.)

This rule advice is implemented in Part 7, Division 1 of the proposed Water Charge Rules.

## Background

Currently Part 7 of the Water Charge (Infrastructure) Rules 2010 (WCIR) is triggered by a member-owned operator (servicing more than 10 gegalitres (GL)<sup>462</sup>) making a distribution to all its ‘related customers’.<sup>463</sup> When Part 7 is triggered, the operator is a “Part 7 operator”,<sup>464</sup> and the regulator is required to undertake a limited (in comparison to Part 6 requirements) price determination / approval role.

For the purposes of the existing rules, there is a distribution if an operator has:

- declared a dividend for all its related customers
- distributed profits, or any part of its profits, whether in the form of dividends or otherwise, to all its related customers
- distributed its reserves, or any part of its reserves, to all its related customers
- issued bonus shares to all its related customers.

A Part 7 operator must have its regulated charges approved or determined by the ACCC or an accredited regulator. Specific procedural requirements are set out in Schedule 3 of the WCIR. Since the WCIR came into effect, the ACCC has not identified any infrastructure operators that have met the definition of a Part 7 operator.

Currently, only member-owned operators can meet the definition of Part 7 operator. However, an infrastructure operator that is not member-owned may nevertheless still have a minority of customers that are ‘related customers’. Distributions by such an infrastructure operator to its related customers would not currently trigger the application of Part 7 of the WCIR.

Part 7 was developed to ensure that member-owned operators would not be able to circumvent the non-discrimination rule 10 by increasing charges to all customers and returning profits to related customers through distributions. Part 7 does not *prevent* an operator from making such distributions, but rather provides a strong incentive not to because the consequence of triggering Part 7 is that the operator’s regulated charges will be approved/determined by an independent regulator for a five year period.

Although Part 7 provides some deterrence for member-owned operators to discriminate between related customers and other customers, the current drafting is also only likely to be effective in very limited circumstances. An operator need only leave out a single related customer when making a distribution to related customers (but not other customers) to avoid triggering Part 7. This means that it is very unlikely that Part 7 would ever be triggered in practice.

Further, under the current rules non-financial distributions are not explicitly covered. However, unused conveyance water or “surplus water” (sometimes called “enhancements”) may also be returned to related customers only. Such water is easily convertible into money through the temporary

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<sup>462</sup> Part 7 of the WCIR applies to a member-owned infrastructure operator servicing more than 10 GL of water held under water access entitlements.

<sup>463</sup> WCIR rule 6 states that: In these Rules, a customer of an infrastructure operator is a related customer if:

- (a) The customer is a beneficiary of a trust of which the infrastructure operator is a trustee; or
- (b) Where the infrastructure operator is a company within the meaning of the *Corporations Act 2001*, the customer is—
  - i. a related body corporate within the meaning of that Act in relation to the infrastructure operator; or
  - ii. a member of the company; or
- (c) where the infrastructure operator is a body corporate incorporated under a law of a State or of the Commonwealth (other than the *Corporations Act 2001*), the customer is a member of the body corporate; or
- (d) the customer has any other legal or equitable interest in the infrastructure operator.

<sup>464</sup> Note that this definition does not extend to where distributions are made without distinction between related customers and other customers or only to some of an operator’s related customers but not others.

water market. ACCC staff have investigated a number of complaints relating to surplus water distributions.

Finally, Part 7 does not currently restrict or provide a disincentive for operators to make distributions on discriminatory bases other than between related customers and other customers—for example, based on the purpose for which water has, or will be, used, or the volume of tradeable water right held or used by a customer.

The ACCC made draft rule advice to alter the application and mechanisms of Part 7 as follows:<sup>465</sup>

- (Draft rule advice 5-S) Distributions made by all infrastructure operators should be covered, not only those made by member-owned infrastructure operators.
- (Draft rule advice 5-U) Distributions of water should be explicitly covered.
- (Draft rule advice 5-S) Part 7 should allow for ‘standard distributions’ that cannot trigger the application of Part 7, where ‘standard distributions’ are to be defined as those made:
  - on the basis of all the operator’s customers’ rights of access (typically represented by their water delivery right);
  - to customers that had previously contributed to a fund for the replacement of infrastructure when this money is no longer required because the replacement of the infrastructure is no longer required, in proportion to the contributions made by each customer;
  - in the form of reasonable honorariums;
  - to all customers in a specific part of the area serviced by the infrastructure operator in relation to water savings achieved by the operator in that part, in proportion to each customer’s right of access to that part; or
  - made by an infrastructure operator to its owners but only if the infrastructure operators’ infrastructure charges are approved or determined under Part 6 or by a State Agency under the water management law of a Basin State.
- (Draft rule advice 5-T) The ACCC should have the discretion to exempt an operator who has made a non-standard distribution from the application of Part 7 in certain circumstances.
- (Draft rule advice 5-V) Part 7 should be amended such that an infrastructure operator ceases to be a Part 7 operator after three years, rather than five years, as is currently the case.

### *Stakeholder feedback*

The ACCC only received three submissions to the Draft Advice in relation to distributions. Two stakeholders argued Part 7 should not extend to an operator that makes a distribution to some (but not all) of its members.<sup>466</sup> Another submitter was of the view that if a customer “does not seek to be a member of an IIO [irrigation infrastructure operator], they should not be eligible for member benefits”.<sup>467</sup>

Waterfind supported the Draft Advice relating to Part 7 (rule advices 5-S and 5-U), but sought clarification on whether ‘allocation enhancements’ would be considered standard distributions.<sup>468</sup> In particular, Waterfind asked whether ‘allocation enhancements’ would be allowed if they were given

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<sup>465</sup> A full discussion of the ACCC’s reasoning for this draft rule advice is provided in section 5.7 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.129-131.

<sup>466</sup> Murrumbidgee Irrigation Limited, Issues Paper Submission, July 2015, p.7; Western Murray Irrigation, Issues Paper Submission, July 2015, p.5.

<sup>467</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, pp.7-8.

<sup>468</sup> Waterfind, Draft Advice Submission, March 2016, p.6.

only to customers with a particular class of water delivery right, or whether the rules require that they must be given to all customers who hold water delivery rights.

The National Irrigators' Council (NIC) and Western Murray Irrigation (WMI) raised a number of concerns in relation to the proposed amendments to Part 7. The NIC and WMI submitted that the ACCC provided no stakeholder feedback or "proper economic/regulatory argument" in the Draft Advice that supports the need for the proposed amendments to Part 7.<sup>469</sup> The NIC noted that the only submissions the ACCC cited in the Draft Advice argued "against increased regulation".<sup>470</sup> WMI submitted that it rejects the proposed amendments "for not only adding regulatory complexity for no reason, but for stifling both innovation and efforts to minimise costs to customers of the services provided by IIOs".<sup>471</sup> NIC agreed with these arguments and added that the ACCC's distribution proposals (among others) would reduce pricing flexibility.<sup>472</sup>

The NIC also contended that all member-owned operators who currently make distributions will become Part 7 operators.<sup>473</sup> The NIC noted that under the existing rules an operator can, and does, avoid becoming a Part 7 operator by ensuring that "at least one member misses out on the distribution".<sup>474</sup> The NIC stated that a "significant number" of operators make such distributions. The NIC noted that there is no threshold for the operator's size or consideration of ownership arrangements in the application of Part 7. The NIC argued that the cost to each infrastructure operator of having its charges approved or determined by the ACCC under Part 7 would be similar to the amount estimated by WaterNSW in the Draft Advice (\$200 000).

Similarly, WMI submitted that 'based on WMI's current practices, it would become a Part 7 operator (as none of the proposed exceptions would apply)'. WMI did not state what kind of distributions it currently makes that would trigger the application of the proposed new Part 7. The ACCC notes that WMI has previously stated to the ACCC that its Constitution prevents WMI from paying dividends.<sup>475</sup> Further, WMI's 2014-15 Annual Report clearly states that "[t]he Company is a not for profit organisation and no operating surplus may be paid or transferred by way of a distribution to the members."<sup>476</sup> The ACCC is unaware of whether WMI currently makes distributions in the form of allocating surplus water to customers, and, if so, whether such a distribution would meet the proposed definition of 'standard distribution'. As such, the ACCC considers that it is not clear that WMI would in fact meet the definition of a Part 7 operator as described in the Draft Advice.

The NIC noted that many member-owned operators would need to "change their business models" or become Part 7 operators.<sup>477</sup> The NIC considered that most infrastructure operators would be unable to make a 'standard distribution', because they offer different types of rights of access to their customers, which can vary according to the customer's circumstances. As such, in the NIC's view, these operators cannot compare rights of access and it would therefore be "impossible" for such operators to make distributions in proportion with customers' right of access.<sup>478</sup>

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<sup>469</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.14; Western Murray Irrigation, Draft Advice Submission, March 2016, p.3.

<sup>470</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.14.

<sup>471</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.3.

<sup>472</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.8.

<sup>473</sup> WMI also noted its view that it would become a Part 7 operator because it would not meet any of the exemption criteria.

<sup>474</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.14.

<sup>475</sup> Western Murray Irrigation, Submission to the water charge rules Issues Paper, July 2008, p.12, viewed June 2016, <https://www.accc.gov.au/system/files/Western%20Murray%20Irrigation.doc>.

<sup>476</sup> Western Murray Irrigation, *Annual Report 2014-15*, p.12, viewed June 2016, <http://www.westernmurray.com.au/>.

<sup>477</sup> National Irrigators' Council, Draft Advice Submission, March 2016, pp.14-15.

<sup>478</sup> The NIC provided three examples of different types of rights of access that an operator might issue to customers:

1. the right to the delivery of a certain volume of water within one year

The NIC also provided examples of types of distributions or circumstances in which an infrastructure operator may or may not offer a distribution, which might be inadvertently captured by the proposed amendments to Part 7:<sup>479</sup>

- Distributions of additional water allocations would not be considered standard distributions if the following customers/entities did not also receive the distribution:
  - customers with outstanding charges
  - “sophisticated counterparties” who have individual arrangements with the operator, and those arrangements do not entitle the entity to a distribution
- Distributions from an operator’s reserves and part of its reserves. Such a distribution may be provided to a customer as an incentive to close a section of a channel.
- Various distributions of supplementary water or off-allocation supply. These distributions sometimes “reflect long-standing and binding agreements” but are not made in accordance with the operator’s water access entitlement (WAE) and therefore the exemption in proposed subrule 45(3)(e)(i) does not apply.

In relation to the exemption in the proposed subrule 45(3)(e)(i), which refers to “a water access entitlement held by the operator on behalf of the holder of an irrigation right”, the NIC submitted that the drafting does not reflect practical realities of member-owned operators’ arrangements, and as such will not achieve the policy intent of this provision. The NIC contended that “no member-owned operator holds its water access entitlement ‘on behalf of the holder’” and that “water access entitlements are not, and never have been, held in trust”.<sup>480</sup> The NIC argued that there is no requirement for operators to hold a water access entitlement and that “operators do not always promise that their irrigation rights will reflect the allocation of any particular water access entitlement”;<sup>481</sup> operators can manage their entitlement and allocation as they see fit, as long as they meet their contractual obligation to credit customers with their entitled volume of water allocation. The NIC stated that the drafting does not reflect this situation and therefore the exemption “will be of no assistance” to member-owned operators.<sup>482</sup>

One stakeholder argued that infrastructure operators should be able to give distributions to members but not non-members without any regulatory consequences. They stated that no other membership-based organisation was required to give distributions to members and non-members equally, a scenario which it argued the proposed Part 7 of the rules appeared to encourage.

### *ACCC assessment*

Part 7 was primarily developed to ensure that member-owned operators would not be able to circumvent the rule in the WCIR relating to non-discrimination (rule 10) by increasing charges to all customers and returning profits to related customers through distributions. Part 7 sought to discourage this practice by requiring that the regulated charges of an infrastructure operator making such distributions be subject to approval / determination by an independent regulator for five years after such a distribution was made.

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2. the right to have delivered or to take an unlimited volume of water when a channel or body reaches a certain trigger point and remains above that point.

3. a right defined by reference to a share of the available capacity (e.g. a flow rate share) in a constrained part of the operator’s network.

<sup>479</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, pp.14-15.

<sup>480</sup> *ibid.*, p.15.

<sup>481</sup> The NIC noted for example, that an operator could source all of its water by purchasing water allocations from the market.

<sup>482</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.15.



However, the ACCC considers the current rule in relation to distributions has been ineffective. Infrastructure operators can easily avoid the application of the Part 7 provisions when making distributions to related customers (and not their other customers) so long as one or more related customers do not receive the distribution. The ACCC considers that such practices would clearly be inconsistent with the intent of this Part, which is to promote equitable treatment of customers and ensure that operators do not circumvent the non-discrimination requirements of Part 3 by using distributions, rather than differences in charges, to favour members or customers who hold irrigation rights over others.<sup>483</sup>

While the ACCC continues to support the broad principles in relation to distributions outlined in the Draft Advice, it acknowledges stakeholder concerns about the implementation of the proposed rules, as set out below.

### **Application**

The Draft Advice proposed amendments to the application of Part 7 to discourage operators from providing distributions to ‘almost all’ members but not to non-members. Beyond this, the Draft Advice sought to promote equity in distributions more generally, by applying Part 7 to operators that did not allocate distributions proportionally among all its customers. The ACCC considers the position in the Draft Advice is appropriate as those customers that contribute to the costs of running an infrastructure operator should benefit from its distributions, not only members.

This may result in individual distributions being smaller than they otherwise would be; however, the ACCC considers they will be fairly allotted. Therefore the ACCC has maintained this position in its Final Advice.

The NIC expressed the view that the revised Part 7 would result in all member-owned operators who currently make distributions becoming Part 7 operators. The ACCC does not consider this likely for three reasons.

First, a key purpose of the revised Part 7 is to discourage operators from making non-standard distributions to customers. The ACCC considers that non-standard distributions have the potential to unreasonably favour some customers at the expense of others. The ACCC expects that the proposed Part 7, if implemented, will discourage infrastructure operators from making such distributions and therefore will limit the number of operators that will be deemed as Part 7 operators. The ACCC accepts that this may incentivise some operators to make changes to how they administer distributions, but does not share the NIC’s view that such a change amounts to a requirement for operators to “change their business model”.

Second, the proposed rules set out clear and ‘straight-forward’ standard distributions, which will enable infrastructure operators to make a variety of distributions without becoming Part 7 operators.

Third, the ACCC’s proposals allow it to exempt operators meeting the criteria of a Part 7 operator from the requirement to have their infrastructure charges approved or determined by the ACCC if doing so is unlikely to have a negative impact on the achievement of the Basin Water Charging Objectives and Principles. In making the decision, the ACCC would have regard to certain matters

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<sup>483</sup> Note: the current non-discrimination rule (Part 3) relates to different charges being levied on customers who hold irrigation rights versus those who do not. In contrast, the current application of Part 7 refers to ‘related customers’ (which operators generally refer to as ‘members’). The ACCC understands that there is a large degree of overlap between membership and customers who hold irrigation right for most operators, and as such, that there is a high degree of linkage between the types of discriminatory activity that Parts 3 and 7 seek to deter.

including the magnitude and the impact of any distribution as well as the likelihood of other operators adopting that practice. The rules should also provide a non-exhaustive list of factors the ACCC should take into account when considering an exemption, as follows:

- the nature of the operator’s infrastructure services—this will enable the ACCC to consider more broadly the context in which the distribution was made, and the likely impacts on customers;
- the nature of the distribution made by the operator to its customers—this will enable consideration of whether the distribution would have the effect that charges (net of the distribution) paid by customers are inconsistent with Part 3;
- the preferences of the operator’s customers (in particular those customers that did not receive the distribution)—this will enable the ACCC to better determine whether, and how, the distribution might negatively impact customers;
- any action taken by the operator in response to the ACCC’s concerns—this will enable consideration of, for example, whether an operator inadvertently made a non-standard distribution and whether an operator is willing to take steps to address any instance of non-compliance;
- any terms, conditions, or obligations associated with distributions made by the operator—this will enable the ACCC to take into account the reasonableness (or otherwise) of the particular circumstances associated with an operator’s non-standard distribution as well as previous and future distributions when considering whether to provide an exemption in relation to the distribution or any future distribution. This is an additional criterion added since the Draft Advice.

In making this decision, the rules should allow the ACCC to undertake public consultation or request further information from the operator to inform its decision. The ACCC considers such an exemption system allows appropriate flexibility.

The ACCC considers this exemption process means that there is little justification for maintaining the current restriction of these provisions to member-owned operators providing infrastructure services in relation to at least 10 GL. Broadening the scope of the rules to non-standard distributions of all infrastructure operators means that customers of all infrastructure operators would be protected from being unfairly treated by their operator’s distribution practices.

In relation to the appropriate length of time that a Part 7 operator should be required to have its charges approved or determined, the ACCC did not receive any feedback on the amendments proposed in the Draft Advice. Therefore the ACCC confirms that this period should be three years. The ACCC considers this will align this regulatory period with that used under Part 6 but still provide a sufficient regulatory deterrent to infrastructure operators making distributions other than standard distributions.

The ACCC considers that an infrastructure operator should become a Part 7 operator if it makes a distribution, other than a ‘standard distribution’ to any customer (unless exempted). Therefore, the distinction between standard distributions and other distributions is very important to the operation of the proposed Part 7. The ACCC has considered the various scenarios submitted by stakeholders and where necessary has adjusted its definition of ‘distribution’ and ‘standard distribution’ that was included in the Draft Advice. These are discussed below.

## **Distributions of water**

Most stakeholders' specific feedback on the definition of distributions related to the treatment of 'enhancements' or allocation of 'surplus' water (the sale of water, for consideration, from operators to customers is considered further below).

In response to Waterfind's query of whether 'enhancements' could be given only to holders of a particular class of water delivery right, the ACCC considers that in general additional or 'surplus' water should be:

- made or offered to all customers of the operator in proportion to their:
  - right of access or
  - contribution to total revenue from all customers from infrastructure charges levied per unit of water delivery right held; or
- where the surplus results from water savings in a specific part of the area serviced by the operator—made or offered:
  - to all customers in that part, in proportion to their right of access—which may be represented through a water delivery right of a particular class; or
  - to all customers in that part, in proportion to each customer's contribution to the total revenue from all customers in that part from charges levied per unit of water delivery right held.

The ACCC's advice and the proposed rule amendments reflect this position and make clear that such a distribution would be deemed a 'standard distribution'.

However, the ACCC acknowledges that in some cases, operators may have other "longstanding and binding agreements"<sup>484</sup> regarding the allocation of supplementary, off-allocation or 'surplus' water to customers. The ACCC's view is that where a customer has a right to receive water in those circumstances (including water which may only be actually available from time to time) this would constitute a form of irrigation right, even if it was effectively still bundled with a customer's water delivery right.<sup>485</sup> The ACCC's Final Advice clarifies that an allocation of water by an irrigation infrastructure operator to irrigation right holders to enable the operator to fulfil its contractual obligations in relation to irrigation rights held by its customers would not be considered a distribution.

## **Linkages between the operator's water access rights and customers' irrigation rights**

The ACCC acknowledges NIC's comment with regard to subrule 45(3)(e)(i) (published with the Draft Advice) that WAEs may not be held by the IIO 'on behalf' of customers in a formal sense. For example, operators do not necessarily hold WAEs 'in trust' for irrigators / customers, and operators may not have explicit and formal rules which link specific irrigation rights with specific WAEs (or parts thereof) held by the operator. The ACCC does not propose to limit the definition of distribution to only those cases where such formal linkages exist. Moreover, the ACCC does not wish to include in the definition of distribution a situation where an operator purchases WAEs or water allocation in the course of fulfilling its irrigation right holders' right to receive water. Accordingly, the ACCC's rule advice has proposed amended wording for subrule 45(3) to reflect this (see rule advice 5-U).

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<sup>484</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.15.

<sup>485</sup> The ACCC notes that Basin Plan water trading rule 12.34 requires irrigation infrastructure operators to clearly specify irrigation rights of their customers.

The ACCC also notes that in its definition of distribution in the Draft Advice, it is unclear in subrule 45(3)(e) that the trade or allocation of water by the operator must actually be to a customer. The ACCC's advice and proposed subrule 45(3)(e) have been revised to reflect this.

### **Distributions to customers in arrears**

The ACCC notes the merits of the NIC's suggestion that customers who have failed to pay outstanding charges should not reap the benefits of a distribution. The ACCC considers that where the proposed distribution is a distribution that otherwise meets the criteria for being a 'standard distribution', the infrastructure operator should be able to withhold the distribution from a customer who is in arrears, up to the amount of any arrears, and still have that distribution be considered a 'standard distribution'. In relation to a non-financial distribution (e.g. a distribution of water), an operator should use a reasonable valuation methodology for determining the amount of the distribution that is to be withheld in order to 'pay off' any outstanding amounts payable by customers. For example, an operator could use the prevailing market price of water allocation at the time the distribution is made to determine the value of a distribution of water for the purposes of such a deduction.

### **Distributions to 'sophisticated customers'**

The ACCC considers it appropriate that the criteria for a Part 7 operator includes where an operator makes a distribution but excludes certain 'sophisticated customers'. To the extent that these customers are required to contribute to the cost of running the operator's water service infrastructure, the ACCC considers that they too should receive the distribution in order for it to be considered a 'standard distribution' under the rules. However, this would not extend to where a customer did not have an ongoing right of access to the operator's water service infrastructure (in particular, where a customer was a casual user without any volume of water delivery right). A distribution could exclude such customers and still be a standard distribution.

### **Customer contributions for the replacement / upgrade of infrastructure**

The ACCC notes that in the Draft Advice a standard distribution included the scenario where the infrastructure operator gives back to the customer their contribution for the replacement of infrastructure, where this funding is no longer required because the replacement is no longer required. The ACCC continues to support the inclusion of this scenario as a standard distribution, but considers that it should also extend to situations where the customer contributes to the forecast cost of infrastructure upgrades and the replacement / upgrade was undertaken at a lower cost than forecast. In these cases, the infrastructure operator would only be returning to the customer their own money. The ACCC has adjusted its advice so that such refunds are considered standard distributions.

### **Network reconfiguration or decommissioning**

The ACCC agrees that Part 7 should not be applicable to an operator that makes a payment (from reserves or otherwise) to facilitate network reconfiguration or decommissioning (such as the closure of an irrigator's channel or part thereof). The ACCC considers that such a transaction represents payment to a customer for consideration, the consideration being an agreement to participate in network reconfiguration / decommissioning. The ACCC also notes that an operator may provide similar rationalisation incentives in the form of reducing or waiving termination fees. Accordingly, the ACCC has amended its advice to make clear that payments made to provide an incentive to a customer for their participation in network reconfiguration or decommissioning undertaken by the operator should not be considered a distribution.

### **Where customers' rights of access are defined differently**

The NIC further stated that it would be 'impossible for many operators' to make standard distributions based on customers' relative rights of access, as the rights of access of each customer are not defined in the same way. The ACCC acknowledges this issue exists for some operators. Accordingly, the proposed distributions rule has been amended to additionally allow operators to make or offer distributions in proportion to each customer's contribution to the total revenue from all customers from charges levied per unit of water delivery right held (i.e. in proportion to 'fixed charges' levied on customers' water delivery rights).<sup>486</sup>

### **Distributions offered but not taken**

During consultations, one stakeholder queried whether an infrastructure operator is taken to have made a non-standard distribution if a distribution of water is offered to the customer, but the customer refuses to take it. The ACCC agrees that this should not preclude a distribution from being considered a non-standard distribution. Accordingly, the ACCC has amended the proposed subrules 45(5)(a) and 45(5)(e) to include distributions that are made or *offered*.

### **Operators selling water to customers**

A number of submissions queried whether the selling of water to customers at a subsidised rate constituted a non-standard distribution. The ACCC's Draft Advice considered that the selling of water to customers should be considered a distribution except where this was necessary to give effect to a trade of water access right or irrigation right by a customer, but would be a 'standard distribution' if the water was offered to all customers in proportion to their right of access.

On further consideration, this appears unnecessarily restrictive. The ACCC considers that if an infrastructure operator offers to trade or allocate water to all of its customers on the same terms (whether or not the offer was in return for consideration), then this is not an exercise of monopoly power because all customers have the opportunity to participate equally. Therefore, the ACCC considers that the proposed rules should allow that the trade or allocation of water from an operator to a customer in such circumstances be considered a 'standard distribution'. The ACCC has amended its rule advice accordingly.

For example, an operator trading water to customers would be making a 'standard distribution' if they traded water to customers which they had offered for sale to all customers:

- on a 'first-come-first-served' basis
- subject to a bidding process (where the water is traded to the highest bidders)
- with a cap on the amount that could be purchased that was the same for all customers; or
- with a cap on the amount that could be purchased set in proportion to a customer's right of access

### **The nature of an approval or determination under Part 7**

In its Draft Advice, the ACCC set out the rules for the operation of an approval or determination process under Part 7. These did not differ substantially from the operation of this process under the current rules.

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<sup>486</sup> The operator can also choose to make or offer a distribution in proportion to each customer's right of access. See subrule 45(5)(a) in the proposed Water Charge Rules.

Under the Draft Advice proposals, Part 7 operators would be required to submit an application for an approval and / or determination of their infrastructure charges to the ACCC. The ACCC then would be required to consider the application but could not approve these charges unless it was satisfied that the return on investment on these charges were commensurate with the commercial risks involved. If the ACCC was not satisfied of this, it would be required to determine the infrastructure charges at a level that would satisfy this criterion.

In approving or determining the charges, the Draft Advice proposed that the ACCC may have regard to whether or not the infrastructure charges would contribute to achieving the Basin water charging objectives and principles set out in Schedule 2 of the Act.

In this Final Advice, the ACCC has amended this Part 7 approval / determination process to allow the ACCC to also have regard to previous distributions made and / or proposed to be made by the operator and to allow the ACCC to specify terms and conditions in relation to particular charges. These provisions would allow, for example, the ACCC to require the operator to discount or waive an infrastructure charge for customers that it considers were / will be unreasonably excluded from a distribution. The ACCC considers that such an amendment is appropriate because it more closely connects the non-standard distribution an operator makes with the consequence of making that non-standard distribution—that the operator may have its charges regulated by the ACCC and allows it to redress the impacts of a non-standard distribution on those customers that were excluded.

### **Estimated regulatory costs**

Both WMI and the NIC contended in their submissions that the implementation of the proposed new rules in relation to distributions will cause many infrastructure operators to become Part 7 operators and therefore these rules will be costly. The NIC stated that it expected the cost per operator of becoming a Part 7 operator would be around \$200 000, based on WaterNSW's estimate of certain costs relating to the determination of its charges under Part 6 of the rules.<sup>487</sup> The ACCC considers that the actual effect of the proposed amendments on the estimated regulatory costs faced by operators will be minor (see also chapter 9). This is because:

- the definition of 'standard distribution' has been broadened in response to stakeholder feedback (see above)
- operators will likely adapt how they make distributions to avoid potential charge regulation under Part 7 and will therefore avoid becoming Part 7 operators.
- the proposed exemptions process would allow the ACCC to ensure that Part 7 regulation of charges is applied only on an 'as needed' basis.
- price regulation under Part 7 is less onerous than that under Part 6. Accordingly, the costs of regulation under Part 6 are not a good indicator of the costs of regulation under Part 7.

### **Effect on the ability of operators to give benefits to members only**

The ACCC notes that the proposed Part 7 does not prevent infrastructure operators from providing distributions to members only, although it discourages them from doing so unless there are extenuating circumstances. The ACCC also notes the proposed exemption process under which the ACCC can exempt an operator that has made or proposes to make a distribution (other than a 'standard distribution') from the requirement for its charges to be determined or approved under Part 7.

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<sup>487</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.14.

The ACCC acknowledges that this approach is different to other regulated sectors. However, it considers this approach is appropriate for three reasons.

First, infrastructure operators that are not subject to Part 6 or equivalent Basin State regulation are monopolies that are generally not subject to direct regulation to prevent monopoly profits. In this situation, the ACCC considers the distributions that are made to members only or to some members and not other customers need to be more closely examined to ensure that the distribution does not reflect this monopoly power.

Second, the ACCC also notes that non-member customers are generally required to pay ongoing access charges set by the operator and/or otherwise pay a termination fee. The ACCC considers that those customers that contribute to the costs of running an infrastructure operator should benefit from its distributions, not only those customers that are members.

Finally, the ACCC also notes that non-member customers may not be eligible to become a member of the infrastructure operator. In these circumstances, it seems particularly unreasonable that non-members are excluded from distributions.

### **Effect on operators' pricing flexibility / ability to innovate**

The ACCC considers that the proposed rule amendments on distributions will, if implemented, have minimal effect on an infrastructure operator's pricing flexibility. The ACCC accepts that it would prevent an infrastructure operator from increasing its charges and returning profits to only preferred members / customers through distributions. However, this is precisely the intention of the current, and revised, Part 7.

The ACCC does not share WMI and NIC's view that the proposed rules on distributions will add undue complexity and stifle innovation 'for no reason'. While the revised Part 7 may involve some additional complexity, the ACCC considers the proposed rules will produce a fairer outcome for customers as they more comprehensively discourage operators from favouring some customers over others through distributions. Further, the proposed rules set out a range of 'standard distributions' that operators can make to customers without the risk of triggering Part 7. The ACCC considers that the proposed rules will not stifle innovation in the infrastructure services that operators offer to customers, or how they operate their infrastructure.

## **5.8 Appeal mechanisms under the WCIR and lessons learnt from other sectors**

### *Background*

The terms of reference for the water charge rules review specifically require the ACCC to consider the lessons learned from other sectors in relation to appeal mechanisms.

Under the Water Charge (Infrastructure) Rules 2010 (WCIR), decisions made by the ACCC, including on price approvals or determinations of regulated charges in Part 6 and 7, are subject to judicial review under the *Administrative Decisions Judicial Review Act 1977* (Cth) (ADJR Act).

A person who is aggrieved by a decision made under the water charge rules may apply to the Federal Court for an order of review in respect of the decision on any one or more of the grounds of judicial review specified in the ADJR Act. Judicial review (as opposed to 'merits review', which looks at the substance of the decision) may be generally described as a review of the legal processes and

lawfulness for the making of the decision. Judicial review focusses on errors in the application of the law. It relates to matters such as whether the decision maker had the power to make the decision and whether the decision maker applied 'procedural fairness'.

In order to seek judicial review, it is necessary to establish a specific ground of review. Of most relevance are the grounds for review provided for in section 5 of the ADJR Act. Common circumstances giving grounds for review include:

- not giving a stakeholder an appropriate opportunity to present their views
- incorrectly interpreting relevant legislation
- not taking into account something the law requires to be considered.

If the court finds that there are grounds for review and that the decision was not a lawful one, it may set aside that decision. Normally, the court will then ask the original decision-maker to make the decision again.

The rules of procedural fairness require a decision maker to give a person a proper hearing before making any decision that affects a person's interests. For example, if the ACCC failed to consult with interested parties in making a decision to approve or determine regulated charges under Part 6 of the WCIR this would be a ground for judicial review under the ADJR Act.

Another example of a ground of review under the ADJR Act would be if the ACCC failed to take into account a relevant consideration when making its decision under the rules. A relevant consideration would include a consideration, which the ACCC must take into account as required by the rules. For example, if the ACCC in making an accreditation decision under Part 9 of the WCIR failed to take into account a relevant consideration such as the requirements set out in Schedule 5 of the WCIR, this would be a ground for judicial review under the ADJR Act.

To date, no person has applied for judicial review of a decision under the WCIR.

In its Draft Advice, the ACCC considered that the current provisions of judicial review for the water charge rules are sufficient. The ACCC did not support introduction of a merits review process, noting the considerable costs and uncertainties such a process would introduce, and the limited likely benefits. The ACCC also did not support proposals from stakeholders that state jurisdictional appeal mechanisms be accessible under the water charge rules. The ACCC's reasoning in support of this conclusion is set out in section 5.8 of the Draft Advice.<sup>488</sup>

The ACCC also noted in its Draft Advice that some stakeholders are concerned about appeal mechanisms in the rural water sector more broadly. Some stakeholders suggested that a water ombudsman could be an appropriate entity to deal with issues relating to decisions made under Part 6, or for the rural water sector more broadly.<sup>489</sup> While the ACCC did not consider an ombudsman to be an appropriate avenue for reviewing a regulatory determination made under Part 6 (or Part 7) of the WCIR, the ACCC was supportive of the proposal to have a water ombudsman adjudicate individual rural water disputes more generally. This proposal is discussed in section 8.3.

### *Stakeholder feedback*

In submissions to the Act Review and the Issues Paper, stakeholders expressed a range of views regarding the benefits of incorporating additional appeal mechanisms beyond judicial review into the

<sup>488</sup> See 'Discussion' in section 5.8 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.136-138.

<sup>489</sup> See 'stakeholder feedback' in section 5.8 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.135-136.



WCIR. On balance, there was a mixed response in relation to including a merits review mechanism in the water charge rules: two stakeholders supported such a mechanism<sup>490</sup> three stakeholders did not.<sup>491</sup>

WaterNSW argued that the applicability of the ADJR Act to the regulatory framework in water is uncertain and that the right to judicial review should be set out explicitly in the *Water Act 2007* (the Act).<sup>492</sup> Goulburn-Murray Water (GMW) supported a Basin State's regulatory review processes applying where the State regulator has been accredited.<sup>493</sup>

Several stakeholders<sup>494</sup> and individual irrigators attending public forums expressed a preference for having a water ombudsman for the rural water sector. The National Irrigators' Council (NIC) and Central Irrigation Trust (CIT) supported having an Ombudsman on the condition that it covered all aspects of the Act, the Murray-Darling Basin (MDB) Plan and associated State and Federal legislation.

Only two stakeholders made written submissions to the Draft Advice which addressed appeal mechanisms. Both these stakeholders, WaterNSW and GMW, submitted that they continue to support a merits review process in the WCIR.

While WaterNSW acknowledged that the judicial review mechanism was an appropriate mechanism for review of decisions the regulator makes under the WCIR, it was concerned that this mechanism was limited in scope.

While acknowledging the ACCC's view that it was unclear the benefits of merits review outweighed the costs, WaterNSW noted that the ACCC's assessment was based on qualitative, rather than detailed, cost information.

WaterNSW continued to support merits review for price determinations in the MDB for the reasons set out in its previous submissions, including its submission in relation to the ACCC's Issues Paper.<sup>495</sup> These reasons were that a merits review process:

- facilitates robust and consistent economic outcomes
- ensures the regulator exercises power lawfully and within its mandate
- prevents outside influences creeping into the regulatory process in the form of regulatory capture, regulatory inertia or regulatory timidity
- ensures outcomes are free of regulatory error
- facilitates greater investments as operators would have greater confidence that the regulatory decisions would allow an adequate return.<sup>496</sup>

GMW submitted that the introduction of a merits review process would make the WCIR consistent with "standard regulatory practice and provide the opportunity for manifestly incorrect decisions to be challenged".<sup>497</sup>

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<sup>490</sup> WaterNSW, Issues Paper Submission, July 2015, pp.6,7,10; State Water, Submission to the Independent Review of the Water Act 2007, July 2014; Goulburn-Murray Water, Issues Paper Submission, July 2015, p.4.

<sup>491</sup> IPART, Issues Paper Submission, July 2015, pp.7-8; National Irrigators' Council, Issues Paper Submission, July 2015, p.12; Central Irrigation Trust, Issues Paper Submission, July 2015, p.6.

<sup>492</sup> WaterNSW, Issues Paper Submission, July 2015, p.7. State Water (now WaterNSW) also expressed this position in its submission to the Act Review. State Water also noted that the right to judicial review is explicitly set out in the energy sector. State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.30-32.

<sup>493</sup> GMW noted for example that it would reduce the need for interstate travel and excessive legal costs.

<sup>494</sup> National Irrigators' Council, Issues Paper Submission, July 2015, p.12; Central Irrigation Trust, Issues Paper Submission, July 2015, p.6; Waterfind, Issues Paper Submission, July 2015, p.2; Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.6.

<sup>495</sup> WaterNSW, Draft Advice Submission, March 2016, p.10.

<sup>496</sup> WaterNSW, Issues Paper Submission, July 2015, pp.6-7.

### *ACCC assessment*

The ACCC notes and agrees with stakeholders' general support for the use of judicial review of administrative decisions of regulators under the rules.

The ACCC also notes that some stakeholders support the introduction of a merits review process for approvals or determinations made by the regulator, in addition to judicial review. However, the ACCC does not support the introduction of merits review, for the following reasons:

- in many scenarios the ACCC considers judicial review as sufficient to address problems that may be present in regulatory decisions.
- stakeholders have not demonstrated how a merits review system would improve regulatory decision-making.
- it is not apparent that the benefits of an appeals process would outweigh the costs.

Merits review can take a number of forms. It can consist of a 'full' merits review, where the appeals body may make a decision on any issue the stakeholder raises as new, that is, without regard to the regulator's original decision. Alternatively, merits review can be a 'limited' review in which a stakeholder may appeal only on certain grounds (such as is used in the energy sector). The appeals body may be an administrative body with specialist expertise or a quasi-judicial body, such as the Australian Competition Tribunal.

In making regulatory decisions, the ACCC and other regulators weigh up various complex objectives. There is often a range of reasonable decisions that the regulator may make, rather than one 'correct' decision.

Where the decision made does not fall within this reasonable range of outcomes, the decision is likely to be contrary to or involve an error of law, not be authorised by the rules, and / or be an improper exercise of power under the rules. In these circumstances, judicial review should be sufficient to examine these regulatory decisions and ensure that 'manifestly incorrect' decisions are overturned and power is exercised lawfully.

The ACCC acknowledges that various appeals processes are used in several other regulated industries. However, it is unclear that the benefits of implementing an appeals process for the regulatory approval / determination process for Part 6 (and Part 7) operators outweigh the costs.

The benefits of an additional appeals process are likely to be relatively small in aggregate. Although stakeholders cited the energy industry as an example of a successful appeals process, the ACCC notes that the size of the regulated energy industry is far greater than the regulated MDB rural water sector. For example, the electricity distribution industry in NSW and Victoria has annual regulated revenues of more than \$5 billion. By contrast, GMW, Lower Murray Water (LMW) and WaterNSW combined have regulated revenues of just over \$250 million per year.<sup>498</sup> The possible gains of an appeals process are likely to be much lower in the regulated water sector than in the regulated energy sector. The ACCC acknowledges that, despite potential benefits likely being small in aggregate, they could nonetheless be material to a particular operator.

Potential benefits from an operator's perspective include:

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<sup>497</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.4.

<sup>498</sup> ACCC, *ACCC Final Decision on State Water Pricing application: 2014-15 to 2016-17*, Canberra, June 2014, p.18. Essential Services Commission of Victoria, *Price Review 2013: Rural Water Businesses Final Decision*, June 2013, p.18.

- greater accountability—the existence of a merits review mechanism may incentivise the regulator to undertake a more exhaustive decision-making process in order to reduce the risk of an appeal (e.g. by considering more alternatives, undertaking more research, consulting more widely)
- allowing a ‘more appropriate’ balance between the Schedule 2 objectives in the Act than the original determination<sup>499</sup>
- allowing a ‘more appropriate’ balance between the interests of the operator and consumers
- providing an authoritative guide on how the regulator should undertake its particular responsibilities
- correcting elements of the regulator’s decision that were based on factual errors.

In practice, several of these potential benefits may depend on a stakeholder’s point of view. For example, stakeholders’ views on the ‘appropriate’ or ‘correct’ balance between competing interests are likely to differ, and it is not clear that a decision by the appeals body on such matters will necessarily be better than the regulator’s original decision.

However, any potential benefits need to be weighed against potential costs.

Although the total cost of an appeals process ultimately depends on how often stakeholders use it, the costs to set up and maintain an appeals process are likely to be substantial. While there is limited evidence on the total cost of appeal mechanisms operating in other sectors, partial data on costs of the appeals process in the energy sector (a sector that has a limited merits review process) give some indication. The Regulation Impact Statement for the review of the limited merits review mechanism in the energy sector assessed the annual operating costs of an appeals body to be up to \$5-\$10 million. Also, the final report completed on the pre-2013 limited merits review process in the electricity and gas networks sectors completed for the Council of Australian Governments Standing Council on Energy and Resources noted that: “[t]he [Limited Merits Review] LMR regime has been costlier to operate and cases have taken longer than was anticipated”.<sup>500</sup>

Beyond the set-up and ongoing costs relating to the appeals body, the regulator will also incur costs, such as:

- undertaking or commissioning more detailed analysis on matters that could be the subject of an appeal
- legal costs incurred in anticipation and during appeals (including the cost of legal counsel, expert witnesses etc.)
- legal costs in anticipation of forthcoming appeals
- curtailing of the regulator’s discretion when making future decisions
- costs of additional staff to deal with the appeals process.

Appeals processes introduce a significant burden on stakeholders who participate in them. Costs incurred by stakeholders include:

- cost of legal counsel
- cost of consultants / staff time to analyse issues that are to be appealed
- time costs

<sup>499</sup> Note, however, that the ‘correct’ balance between these objectives may be a matter of opinion and may differ across stakeholders.

<sup>500</sup> Standing Council on Energy and Resources, *Regulation Impact Statement: Limited Merits Review of Decision-Making in the Electricity and Gas Regulatory Frameworks – Decision Paper*, June 2013, p.34. Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn, *Review of the Limited Merits Review Regime – Stage Two Report*, 30 September 2012, p.15.

- cost of uncertainty / delay of final decision.<sup>501</sup>

Given that regulated entities are able to include their costs of participating in appeals when estimating their required revenues, inevitably, it is customers who bear these costs.

The ACCC does not consider that having a merits review appeal mechanism will facilitate greater investment, as submitted by WaterNSW. The system of regulatory approvals / determinations works to ensure that capital expenditure proposed by operators is prudent and efficient—greater investment is not beneficial per se. The ACCC considers that the current mechanisms in the rules provide sufficient certainty of investment for operators.

The ACCC's view is that a merits review appeals mechanism is unlikely to promote greater consistency of regulatory decision-making in the rural MDB. Given the high-level nature of many of the matters the regulator must have regard to when approving / determining charges of Part 6 (or Part 7) operators, there is considerable scope for discretion when weighing up various criteria. It is not apparent that having two decision-making bodies (the regulator and the appeals tribunal) will make more consistent decisions than just one decision-making body, the regulator.

It is also unclear whether a merits review appeals system will provide extra protections for customers. Although such a process would allow customers to appeal approvals or determinations, it also allows operators to do so. Customer participation in appeals processes relating to regulatory determinations is rare in Australia and has to date largely not been successful. For example, in the Council of Australian Governments Standing Council on Energy and Resources report mentioned above, the report noted:

*There had been only limited participation of network users and consumers in the appeals process to date, suggesting there were issues and potential problems with the practicalities and abilities of network users and consumers to participate in the [Limited Merits Review] regime.*<sup>502</sup>

Given the above considerations, the ACCC maintains its position that the current mechanism for the judicial review of administrative decisions in relation to Part 6 is the most appropriate appeal mechanism for the water charge rules. As such, the ACCC does not recommend any amendments to the rules in relation to appeal mechanisms.

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<sup>501</sup> This is particularly relevant in the context of three regulatory periods under the WCIR: in the energy sector, appeals processes generally take up to two years, compared to a five year regulatory period.

<sup>502</sup> Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn, *Review of the Limited Merits Review Regime – Stage Two Report*, 30 September 2012, p.13.

## 5.9 Accreditation of Basin State regulators (Part 9)

### Rule advice 5-W

The rules should be amended so that the current Part 9 continues only as far as is necessary to transition from the current application of Part 6 (and no further).

In particular, accreditation arrangements under the existing Part 9 should cease to apply in relation to approvals and determinations for:

- infrastructure operators not currently subject to Part 6 or Part 7: when the amendments (including the repeal of existing Part 9) commence;
- infrastructure operators subject to existing Part 6: at the end of the regulatory period underway on the transition date (when amendments to the rules take effect) or, if the operator has lodged an application for an upcoming regulatory period, at the end of that regulatory period;
- infrastructure operators subject to existing Part 7: when those operators cease to be Part 7 operators;  
unless the accreditation is revoked, withdrawn by a Basin State or expires earlier.

This rule advice is implemented in the repeal of Part 9 of the current WCIR, and through Part 11 of the proposed Water Charge Rules.

### Background

Part 9 of the Water Charge (Infrastructure) Rules 2010 (WCIR) allows the ACCC to accredit a State Agency<sup>503</sup> upon application, to approve or determine regulated charges for Part 6 and Part 7 operators within that Basin State. Unless the ACCC applies qualifications, accreditation applies for 10 years.

Schedule 5 requires that certain provisions of the WCIR (called the ‘applied provisions’, which allow for regulation of Part 6 and Part 7 operators) must apply and be in force in the relevant state before lodging the formal accreditation application. This requires the commitment of the relevant State Government (and State Parliament) to pass the necessary legislation to allow the relevant State Agency’s application to proceed.

To date, two accredited regulators approve or determine charges for three infrastructure operators, as follows:

- The Essential Services Commission of Victoria (ESCV) was accredited under the WCIR in February 2012.<sup>504</sup> ESCV approves / determines charges for Lower Murray Water (LMW) and Goulburn-Murray Water (GMW).
  - The current regulatory period for LMW is 2013–18.
  - The current regulatory period for GMW is 2016–20.
- The IPART (NSW) achieved accreditation under the WCIR in September 2015, taking effect on 1 June 2016.<sup>505</sup> IPART will approve / determine of charges for WaterNSW (formerly State Water Corporation) beginning from the next regulatory period (2017-21).

<sup>503</sup> A State Agency is a body established or appointed for a public purpose by or under a law of the State, such as a Basin State regulator.

<sup>504</sup> See: the ACCC’s website for the final decision on the accreditation of the Essential Services Commission of Victoria, viewed June 2016, <http://www.accc.gov.au/regulated-infrastructure/water/water-charge-infrastructure-rules-accreditation-arrangements/accreditation-escv>.

<sup>505</sup> ACCC, *IPART application for accreditation under the water charge (infrastructure) rules*, September 2015, viewed June 2016, <http://www.accc.gov.au/regulated-infrastructure/water/water-projects/ipart-application-for-accreditation-under-the-water-charge-infrastructure-rules>.

The ACCC noted in its Draft Advice that the accreditation process under Part 9 of the WCIR is a straightforward process that is largely administrative in nature and which does not require a complex application to be submitted to the ACCC.<sup>506</sup>

The ACCC's draft rule advice on amendments to the application of Part 6 (as set out in section 5.6) will, if adopted, mean that accreditation will no longer be necessary for the purposes of Part 6 of the WCIR. Further, the ACCC noted in its Draft Advice that accreditation arrangements were included in the rules primarily due to considerations relating to Part 6, rather than Part 7, and that there is no strong rationale for a state regulator to be the regulator for Part 7 in the context where it is not also the regulator for Part 6. As such, the ACCC considered that Part 9 should no longer provide for Basin State regulators to apply for accreditation, and made draft rule advice to repeal Part 9 (draft rule advice 5-W).

However, to provide certainty to currently accredited Basin State regulators, infrastructure operators and customers, the ACCC considered that existing accreditation arrangements should continue to apply in relation to Part 6 on an operator-by-operator basis until the end of the regulatory periods underway at the time amendments to Division 1 of Part 6 commence.

Further, the ACCC considered that accreditation arrangements should cease to apply in relation to any operators subject to approvals or determinations under Part 7 when these operators cease to be Part 7 operators under the rules. To date, there have been no Part 7 operators.

The ACCC noted in its Draft Advice that having multiple regulators across the Basin could result in inconsistency in regulatory decisions. While this may be the case, it is not always an undesirable outcome. In the absence of a single regulator model, different regulators will exercise their discretion differently. Consistency in relation to some aspects of a regulator's decision will be desirable or necessary in some circumstances whereas in other situations, different pricing decisions will be expected, for example, to reflect that costs vary in different parts of the Basin (see also section 5.10).

### *Stakeholder feedback*

Stakeholders provided feedback on the accreditation provisions in Part 9 of the WCIR in both the *Water Act 2007* (the Act) Review and as part of the water charge rules review process.

The Act Review raised two key stakeholder concerns relating to accreditation under Part 9 of the WCIR. First, submitters to the Act Review stated that the existence of multiple regulators across Basin States has not achieved consistency in regulatory decisions (under Part 6 of the WCIR) and led to inefficiencies in the regulation of water charges.

Second, some stakeholders suggested that accreditation requirements are 'overly prescriptive', making accreditation difficult to obtain, and that such difficulties may have deterred a regulator (IPART) from seeking accreditation under the WCIR.<sup>507</sup> The ACCC does not believe that accreditation arrangements are difficult or onerous, and noted in its Draft Advice that IPART has since applied and successfully had its application for accreditation arrangements approved. Its accreditation commenced on 1 June 2016.<sup>508</sup>

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<sup>506</sup> The ACCC's assessment of an application is limited to the consideration of whether the requirements of Schedule 5 of the WCIR are met (WCIR subrule 63(2)), and whether the applicant must also satisfy certain information requirements as set out in Schedule 4.

<sup>507</sup> *Report of the Independent Review of the Water Act 2007*, p.63

<sup>508</sup> See section 5.9 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.139.

Responses to the Issues Paper, while generally supportive of the accreditation mechanism in that it reduced duplication for regulated operators, raised several issues. One stakeholder submitted that accredited state regulators should have increased flexibility and discretion. In contrast, other stakeholders submitted that accreditation has led to a lack of consistency in approach to charge determinations and approvals across different regulators, which should be addressed. One submitter also identified that Basin State regulators potentially face a conflict of interest in regulating state-owned operators, and recommended that ACCC oversight of Basin State regulators continue.<sup>509</sup>

In response to the Draft Advice, the Queensland Farmers' Federation (QFF) was the only stakeholder to comment on rule advice 5-W, stating that it cannot support this rule advice because it is conditional on rule advices 5-A to 5-E.<sup>510</sup>

### *ACCC assessment*

Under the proposed amendments to rule 23, the ACCC expects few, if any, operators, to meet the criteria of a Part 6 operator. The only circumstances in which an operator meeting the criteria set out in proposed subrule 23(b) could be a Part 6 operator is in the event that the relevant Basin State was unable or unwilling to ensure that the infrastructure charges of the operator are regulated in a manner broadly consistent with the requirements of Part 6. In such cases, the ACCC contends, accreditation of a State Agency would not be feasible in any case.

The ACCC therefore considers that, if the Minister accepts rule advice 5-M on the application of Part 6, Part 9 as well as Schedules 4 and 5 of the rules can be repealed, subject to transitional arrangements for existing accreditation arrangements for Part 6 and Part 7 operators.<sup>511</sup>

The current accreditation arrangements should continue after the transition date (when amendments to the rules take effect) as follows:

- in relation to Part 6 operators, until the end of the latest regulatory period for which its infrastructure charges had been approved or determined before the transition date; or if the operator had lodged an application but its charges had not yet been approved or determined by the transition date, until the end of the upcoming regulatory period that the application related to.
- in relation to Part 7 operators, until those operators cease to be Part 7 operators.

Section 5.6 contains further detail regarding transitional arrangements for Part 6 operators.

If the ACCC's rule advice is adopted and the accreditation arrangements cease to have effect (after a transition period), the ACCC Pricing Principles will no longer apply to accredited Basin State regulators.<sup>512</sup> This issue is considered further in section 4.4.

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<sup>509</sup> See 'Stakeholder feedback' in section 5.9 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp139-140.

<sup>510</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.5.

<sup>511</sup> In response to the Queensland Farmers' Federation's submission, the rule advice set out in this section is not directly conditional on the adoption of rule advices 5-A to 5-E. Rather, the ACCC (in section 5.6) advises that rule advice 5-M (regarding changes to the application criteria for Part 6) should only be adopted if rule advices 5-A to 5-E are adopted. However, in any case, if rule advice 5-M is adopted then rule advice 5-W should also be adopted.

<sup>512</sup> Currently, IPART and the ESCV must apply the ACCC Pricing Principles as a condition of their accreditation.

## 5.10 Differences in charging arrangements and their impacts

### *Background*

Under subsection 92(1)(c) of the *Water Act 2007* (the Act), the water charge rules should contribute to achieving the Basin Water Charging Objectives and Principles (BWCOP). This includes the facilitation of consistency in pricing policies across sectors and jurisdictions where entitlements are able to be traded.<sup>513</sup> The BWCOP are based on the Intergovernmental Agreement on the National Water Initiative (NWI).<sup>514</sup> Under the NWI, States and Territories agreed to implement consistent pricing policies, compatible institutional and regulatory arrangements and to remove barriers to trade that would facilitate the operation of efficient water markets and opportunities for intrastate and interstate trade.<sup>515</sup>

The terms of reference for the Act Review required the Independent Expert Panel (the Panel) to consider the level of Basin-wide consistency in water charging regimes and the contribution made by those charging regimes to the water charging objectives.<sup>516</sup> The Panel considered that the intention of the Act was to ensure that water charges are set on a consistent basis, rather than a requirement that charges be consistent *per se*.<sup>517</sup> Consistency in charging practices was seen as necessary in order to address pricing distortions and facilitate the efficient functioning of water markets.

The ACCC is required by its terms of reference for the water charge rules review, based on the Panel's recommendation, to consider a range of issues related to the consistency of water charging regimes. This includes the continuing appropriateness of tiered regulation (see section 5.2), the consistent application of the BWCOP (see section 4.2), the form and content of charge determinations and the number of regulatory authorities (see section 5.6).

This section focuses on the extent to which the water charge rules contribute to one of the outcomes of consistent pricing policies—to facilitate the efficient functioning of water markets.

The water charge rules seek to preclude water charging arrangements that could impose a barrier to trade or distort trade-related decision making. As noted in section 5.2, the Water Charge (Infrastructure) Rules 2010 (WCIR) currently take a tiered approach, with the form of regulation and the specific requirements applying to an operator determined by the ownership and size of an infrastructure operator. The vast majority of infrastructure operators in the Murray-Darling Basin (MDB) are free to design their tariff structures and charging arrangements as they see fit. Charging arrangements therefore reflect differences in operators' technology, scale, levels of service, infrastructure age, business models, input cost, and owners' requirements.

For 'Tier 1' and 'Tier 2' operators,<sup>518</sup> the only current limitations on charging arrangements are the minimal and limited non-discrimination requirements in the WCIR. There is no general requirement for these infrastructure operators' charging arrangements to be consistent with (or to give effect to) the BWCOP (see section 4.2).

'Tier 3' operators are required to have their charges approved or determined under Part 6 (or Part 7) of the WCIR. In these cases, the rules for the approval or determination of charges will be applied by

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<sup>513</sup> Schedule 2, Part 3, Clause 3(7) of the Act.

<sup>514</sup> *Report of the Independent Review of the Water Act 2007*, p.43.

<sup>515</sup> See clauses 58-63 and 64-77 in the Intergovernmental Agreement on a National Water Initiative, 2004, p.10-11, 13.

<sup>516</sup> *Report of the Independent Review of the Water Act 2007*, p.58.

<sup>517</sup> *Report of the Independent Review of the Water Act 2007*, p.6.

<sup>518</sup> Operators not subject to Part 6 or Part 7 of the current WCIR. See section 5.2 for further information.



accredited Basin State regulators as well as by the ACCC. Where the WCIR allow a degree of discretion for a regulator, regulators can and do exercise that discretion in different ways.

As such, charging arrangements in the Basin vary considerably between operators and between Basin States. Also, due to the fact that all current Part 6 charges operators provide on-river infrastructure services, while those who only provide off-river infrastructure services are not Part 6 operators, there also exist differences in charging approaches for on-river and off-river services.

Particular aspects of charging arrangements which differ widely across the MDB are:

- The cost-reflectiveness of tariff structures, in terms of the proportion of costs recovered via fixed versus variable charges;<sup>519</sup>
- The overall level of cost recovery (including whether charges are set to achieve lower or upper bound costs (or something else), the approach to recovering future capital costs
- The way in which government water planning and management charges and on-river infrastructure charges are passed on to irrigators
- The use of non-volumetric and transaction-based charges.

These differences are likely to influence irrigators' decisions to use, carry over and trade their water and may affect the efficiency of water use across the MDB. However, there can be reasonable grounds for differences in infrastructure operators' charging arrangements.

In its Draft Advice the ACCC clarified its position on a number of matters relating to differences in charging arrangements and their impacts. In particular, the ACCC:

- noted that it supports the interpretation that the intention of the Act is to ensure that water charges are set on a consistent basis, rather than a requirement that charges be consistent *per se*.
- noted the difficulties in eliminating all possible distortions on trade but highlighted the need for ongoing monitoring.
- did not support proposals to mandate 'postage-stamp pricing' for rural water.
- did not support mandating a particular split between fixed and variable charges.

The remainder of this section considers four specific aspects of consistency, as follows:

- Consistency as an objective—section 5.10.1
- Consistency of charges across valleys ("postage stamp pricing") — section 5.10.2
- Consistency in charge approvals / determinations under Part 6 of the WCIR— section 5.10.3
- Water charging arrangements and barriers to trade—section 5.10.4

### **5.10.1 Consistency as an objective**

#### *Stakeholder feedback*

#### **Consistency at the level of the infrastructure operator**

A number of irrigation infrastructure operators (IIOs) and the National Irrigators' Council (NIC) raised concerns about pursuing consistency as an objective because they wished to maintain IIO

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<sup>519</sup> In Victoria, charges for on-river infrastructure services (often called 'bulk water charges') are 100 per cent fixed (that is, they do not vary with the volume of water delivered), while such charges in NSW and Queensland are both fixed and variable. Charges for on-river infrastructure services are not levied in SA.

Nearly all irrigation infrastructure operators (IIOs) who provide off-river infrastructure services employ fixed charges levied on the volume of water delivery right held and variable charges on the amount of water used. Some IIOs also impose account or connection fees, casual water usage charges and / or a tiered tariff structure. The relative weighting between these charges varies across operators and over time.

discretion in determining their own charges.<sup>520</sup> The Queensland Farmers' Federation (QFF) similarly submitted that discretion in designing tariff structures is important and necessary to allow for differences between schemes and operators.<sup>521</sup> Submissions stated that each infrastructure operator is different for a variety of reasons, including areas of operation, customers and service levels.<sup>522</sup> Consistency was described as being "aspirational" and "impossible" to achieve,<sup>523</sup> and moreover that "differences in charging arrangements are to be expected in a competitive and innovative industry".<sup>524</sup> Coleambally Irrigation Cooperative Limited (CICL) considered that attempts to "compare charges across IIOs have been 'fraught' because no two IIO's customers, area of operations or service levels are the same".<sup>525</sup> CICL added that pricing and service levels within an IIO over time "is of much more relevance than what is happening elsewhere".<sup>526</sup>

However, many submissions acknowledged that there should be some limits on operators having full discretion (although stakeholders differed on what the appropriate limits should be). The NIC stated that infrastructure operators should not have "free reign" but should be able to "construct their prices according to their particular circumstances in full knowledge that their customers have recourse to the ACCC if they consider the prices unreasonable".<sup>527</sup> Western Murray Irrigation (WMI) submitted that it supported regulation that would allow for full cost recovery and local-level decision making, noting that NSW was the only Basin State that is "aiming for full cost recovery from its water users".<sup>528</sup>

WaterNSW's (formerly State Water) called for *increased* regulation of Part 5 and Part 7 infrastructure operators (by way of "incentive based outcomes observed under Part 6 pricing regulation"), to "ensure consistent and efficient pricing outcomes are obtained for customers" and to promote Basin wide consistency and the achievement of the BWCOP. WaterNSW commented that current Part 5 and Part 7 operators "still [have] an opportunity to extort monopoly rents from customers or levy charges beyond prudent and efficient costs".<sup>529</sup>

Daniel Mongan, an irrigator in Goulburn Murray Water (GMW)'s area submitted that "there should be consistency amongst all of the infrastructure operators in the Murray-Darling Basin (MDB). This would remove the differences between approaches along the Murray river operators and allow water to flow to its highest value."<sup>530</sup> The Victorian Farmers' Federation (VFF) also "believes that the pricing of Victorian rural water corporations need to be benchmarked against each other", despite there being some local differences that need to be taken into account.<sup>531</sup>

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<sup>520</sup> Western Murray Irrigation, Issues Paper Submission, July 2015, p.4. WMI submitted that each infrastructure operator is unique and there should be no expectation that its charging regime will be consistent with another;

National Irrigators' Council, Issues Paper Submission, July 2015, pp.3,12; Central Irrigation Trust, Issues Paper Submission, July 2015, p.2.

<sup>521</sup> Queensland Farmers' Federation, Issues Paper Submission, July 2015, p.5.

<sup>522</sup> National Irrigators' Council, Issues Paper Submission, July 2015, p.3; Central Irrigation Trust, Issues Paper Submission, July 2015, p.2. Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.6.

<sup>523</sup> Central Irrigation Trust, Issues Paper Submission, July 2015, p.2. CIT labelled "consistent pricing" an "aspirational target" that is impossible to achieve; National Irrigators' Council, Issues Paper Submission, July 2015, p.3. NIC submitted that the BWCOP, to ensure consistency in pricing policies, is "aspirational rather than achievable"; Western Murray Irrigation, Issues Paper Submission, July 2015, p.4; WMI submitted their view that as an objective, consistency is impossible to achieve.

<sup>524</sup> Murrumbidgee Irrigation Limited, Issues Paper Submission, July 2015, p.7.

<sup>525</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.7. CICL acknowledged, however, that this does not mean the ACCC's comparisons between IIOs should be avoided, but rather that the limitations should be clearly stated and the "extent of the effort that the ACCC might devote to this exercise should be limited."

<sup>526</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.7.

<sup>527</sup> National Irrigators' Council, Issues Paper Submission, July 2015, p.3.

<sup>528</sup> Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4.

<sup>529</sup> State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.36,38-39.

<sup>530</sup> Daniel Mongan, Issues Paper Submission, July 2015, p.5.

<sup>531</sup> Victorian Farmers' Federation, Issues Paper Submission, July 2015, p.7.

## Consistency at the ‘macro’ level

While infrastructure operators and peak bodies such as the NIC supported maintaining infrastructure operators’ discretion in setting their own charges, these stakeholders, as well as others, appear to desire greater consistency at the ‘macro’ level – that is, between regulators, and within and between Basin States. For example, the NIC<sup>532</sup> saw that the main benefit of accreditation under the Water Charge (Infrastructure) Rules 2010 (WCIR) was that it would allow one agency to be “responsible for determining all water charges across the State”. NIC contrasted the situation in NSW where WaterNSW was subject to direct regulation by both the ACCC and IPART unfavourably with the situation in Victoria where the Essential Services Commission of Victoria (ESCV) has received accreditation under the WCIR and therefore is the sole regulator to conduct price determinations for Lower Murray Water (LMW), GMW, and other infrastructure operators.

The QFF and VFF likewise emphasised the importance of consistency between the Commonwealth water charge rules and the state-based regime. The VFF supported consistency in the principles underpinning the regimes at the Commonwealth and State level, which currently both apply in Victoria. The VFF stated that two principles should be included in the criteria used to assess different pricing approaches: “encouraging effective engagement with customers and stakeholders”, and “considering the future operating environment”.<sup>533</sup> The VFF added that it wants to “ensure that the principles underpinning both regulatory regimes will create value for customers and enhance transparency” whilst also allowing “flexibility to adapt regulatory response to the impacts” of changes in the rural water market.<sup>534</sup>

QFF submitted that despite the limited scope of the water charge rules, it was recognised in Queensland that there was a need for a consistent approach and that the water charge rules “have been and continue to be very effective in providing guidance for the implementation of water infrastructure charges and terminations fees across Queensland”.<sup>535</sup> QFF added that the Queensland Competition Authority (QCA) was guided by the water charge rules in its recommendation on price paths for SunWater and SEQWater. IPART similarly submitted that they consider the “WCIR provide[s] a good framework for regulation of bulk water in the Basin.”<sup>536</sup>

Murray Irrigation Limited (MIL) submitted that although “rules relating to the determination of bulk water prices are sound [...] in practice the rules have not achieved the intended goal of consistency across the Basin.”<sup>537</sup> In its submission to the Act Review, MIL suggested that Basin State regulators should be able to approve infrastructure charges and apply their own pricing principles, as long as the intent of those principles is consistent with the WCIR or the BWCOP.<sup>538</sup> See section 5.6 for the ACCC’s rule advice in relation to the regulatory approval or determination of infrastructure charges.

WaterNSW submitted that after almost five years of the WCIR, “a common approach to pricing has still not been achieved and there still remains no consistent application of economic principles within the basin.”<sup>539</sup> WaterNSW further noted that this was evident with the recent different regulatory

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<sup>532</sup> National Irrigators’ Council, Issues Paper Submission, July 2015, p.13.

<sup>533</sup> Victorian Farmers’ Federation, Issues Paper Submission, July 2015, p.7.

<sup>534</sup> *ibid*, pp.6-7. The Victorian Farmers’ Federation also stated its support for using price benchmarking between Victorian rural water corporations.

<sup>535</sup> Queensland Farmers’ Federation, Issues Paper Submission, July 2015, p.2.

<sup>536</sup> IPART, Issues Paper Submission, July 2015, p.1.

<sup>537</sup> Murray Irrigation Limited, Issues Paper Submission, July 2015, p.7. MIL also noted this in its Submission to the Independent Review of the Water Act 2007.

<sup>538</sup> Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, July 2014, p.8; Murray Irrigation Limited, Issues Paper Submission, July 2015, pp.7-8.

<sup>539</sup> WaterNSW, Issues Paper Submission, July 2015, p.5.

decisions of GMW and WaterNSW.<sup>540</sup> WMI submitted that there has been “little improvement in consistency of water charging regimes in terms of bulk water charges.”<sup>541</sup>

The Murray-Darling Basin Authority (MDBA) submitted to the Act Review that “transparency of pricing decisions is low” and there are inconsistencies between jurisdictions in the approach to cost recovery and consumption based pricing.<sup>542</sup> MDBA further submitted that there are “consequential distortions” in the water market, which “undermine the objective of achieving efficient use of water”.<sup>543</sup> The MDBA added that “[t]here is also a risk that over time inconsistent approaches to price recovery could result in problems with infrastructure operation and maintenance”. WMI, MIL and NSWIC also compared NSW to other states by identifying NSW’s focus on ‘beneficiary pays principles’ and its focus on identifiable government / user cost shares compared to Victoria and SA, where it is difficult to determine the extent infrastructure charges are subsidised.<sup>544</sup>

WMI also noted that SA “still does not on charge its irrigators and general use customers for bulk water charges”.<sup>545</sup> The MDBA also submitted to the ACCC that differences between state governments in the level of cost recovery for River Murray Operations (RMO) contributions, which are ultimately paid by irrigators, “appear at odds with the National Water Initiative in achieving a level playing field for water users”.<sup>546</sup>

Murray Valley Private Diverters submitted that water charging arrangements must “adequately factor in how to improve Government inefficiencies” and “must take into account the differences that occur throughout the [MDB]”.<sup>547</sup> Murray Valley Private Diverters stated that differences might exist because of “how water is managed, how water charges are determined, the specific organisational and infrastructure arrangements for water delivery, historical regional differences and the ability of individual users to pay”. Murray Valley Private Diverters stated that they “reject the concept that uniform rules and charges can apply to the entire [MDB]” and called for a review of the appropriateness of the BWCOP in relation to MDB-wide consistent water charging arrangements. Murray Valley Private Diverters also noted that the Act’s “attempts” at uniform water charging arrangements “has resulted in more complex arrangements and further costs to water managers and water users”.

The South Australian Government submitted its view to the Act Review that the water charge rules and Water Market Rules 2009 (WMR) “are assisting to promote the efficient use of, and investment in, water infrastructure, improve consistency and transparency of charging and facilitate the efficient operation of water markets”.<sup>548</sup>

Many submissions to both the Act Review and to the ACCC’s Issues Paper suggested that a key inconsistency is the current absence of the application of the water charge rules, particularly Part 6, to the MDBA. These issues are discussed in section 5.12.

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<sup>540</sup> WaterNSW, Issues Paper Submission, July 2015, p.5.

<sup>541</sup> Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4.

<sup>542</sup> The MDBA also noted that the absence of a “level playing field” has resulted in “different charges for similar products, and implications for competitive neutrality”.

<sup>543</sup> Murray-Darling Basin Authority, Submission to the Independent Review of the Water Act 2007, June 2014, p.8.

<sup>544</sup> Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4; Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, July 2014, p.7; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, July 2014, p.6.

<sup>545</sup> Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4.

<sup>546</sup> Murray-Darling Basin Authority, Submission to the Independent Review of the Water Act 2007, June 2014.

<sup>547</sup> Murray Valley Private Diverters, Submission to the Independent Review of the Water Act 2007, June 2014, pp.4-5.

<sup>548</sup> South Australian Government, Submission to the Independent Review of the Water Act 2007, June 2014, p.16.

Stakeholders, apart from Waterfind, who responded to an option (raised in the ACCC's Issues Paper) to impose a general requirement for all infrastructure operators' charging arrangements to be consistent with the BW COP generally were not supportive.<sup>549</sup>

### *ACCC assessment*

One of the main themes of the ACCC's Draft and Final Advice is to move from an approach to regulation that applies differently to different groups of regulated entities (and therefore creates greater protection for some irrigators compared to others), to a more streamlined approach providing a consistent framework for regulated water charges that applies as widely as possible, but which allows a degree of discretion to both regulated entities and the regulator. This approach will better contribute to consistency in water charging arrangements while still ensuring that there is a measured approach to regulation in terms of the level of regulatory costs infrastructure operators face.

Under subsection 91(2) of the Act, the water charge rules are limited to apply to regulated water charges in the MDB, excluding charges for urban water supply activities. Additionally, the characteristics of infrastructure operators in the Basin differ due to among other factors, size, ownership, infrastructure assets, infrastructure services and costs and the approach to determining charges. Moreover, Basin States have shown a clear preference for continuing to be involved in regulation of infrastructure charges. The ACCC's proposed approach throughout its Final Advice takes into account these factors, yet aims to create a consistent set of regulatory requirements under the water charge rules. The ACCC has proposed requirements to be applied to all infrastructure operators, rather than seeking to regulate to produce an outcome where all charging arrangements are as similar as possible. Under these proposed amendments, infrastructure operators can generally determine charges and consult with their customers in a way that best meets the individual needs of their business and customers, subject to some basic customer protections and transparency requirements.

However, the ACCC considers that it is important that the regulator should still maintain the ability to take into account individual circumstances when undertaking its roles, whether this is under the various exemption mechanisms provided under the proposed rules, or in undertaking approvals and determinations. Allowing such guided discretion precludes the need for the regulations to either attempt to deal exhaustively or prescribe a 'one size fits all' approach to differing circumstances.

### **5.10.2 Valley-based and 'postage stamp pricing'**

#### *Stakeholder feedback*

Several submissions raised the issue of consistency in water charging arrangements in relation to the merits of valley-based pricing arrangements versus 'postage stamp pricing'.<sup>550</sup>

Goulburn-Murray Water (GMW) noted that it has proposed to move towards uniform pricing in its application to the ESCV for the approval / determination of its charges to apply from July 2016. GMW commented on the rationale for valley-based, versus uniform, pricing.<sup>551</sup> It also responded to its customers' submissions to the ACCC's Issues Paper regarding this proposal. GMW's submission on these issues is summarised in section 4.2. In summary, GMW considered that the case for valley-

<sup>549</sup> For a summary of submissions on this option, see ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.147.

<sup>550</sup> 'Postage stamp pricing' refers to where all users are charged the same charge, especially in the situation where there are likely to be underlying differences in the cost of supply to different user groups – for example, because of differences across geographical areas.

<sup>551</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, pp.1-2,4.

based pricing is diminishing because of the increasing standardisation of assets, service levels and outcomes, largely due to modernisation and low customer growth. Additionally, it considered that district level prices are based on “historically sunk asset allocations and institutional boundaries” rather than reflecting the underlying differences in the cost of supply. GMW further noted that there are administrative cost savings that it can realise from having an administratively simpler tariff structure.

By contrast, some stakeholders submitted concerns about postage stamp pricing for valleys in GMW’s area. Peter Beex stated that GMW’s approach to impose a single water charge is contradictory with the Act. Peter Beex noted that the Independent Expert Panel (reviewing the Act) had interpreted the water charging objectives in the Act—to ensure charges are set on a consistent basis (rather than produce consistent charges per se) and to reflect the costs of providing the service (with no cross subsidisation between valleys).<sup>552</sup> Peter Beex added that the single charge could distort irrigators’ decisions to invest in the Murray Valley if, in order to achieve the single price, water usage charges and infrastructure access fees increase in the Murray Valley and decrease in the Shepparton Valley.<sup>553</sup> Daniel Mongan and the Victorian Farmers’ Federation (VFF) also commented on GMW’s water charging arrangements and corresponding consultation process in relation to potential changes outlined in the GMW Blueprint document.<sup>554</sup>

### **Feedback relating to charging outcomes in the Peel Valley**

The Peel Valley Water Users Association (PVWUA) submitted concerns about the differences in the level of charges between NSW valleys in submissions both to the Issues Paper and Act Review.

The PVWUA’s view is that if the water charge rules produce inequitable charges, then the rules should be amended “to produce a more equitable pricing outcome”.<sup>555</sup> In the PVWUA’s view, the cause of the ‘inequitable water charges’ is that there is no definition of what constitutes a ‘perverse outcome’ under the BWCOP.<sup>556</sup> The PVWUA further stated that there is a need for a definition of ‘perverse or unintended pricing outcomes’.<sup>557</sup> In its view, the current pricing outcomes in Peel are both ‘*intended*’ and ‘perverse’.<sup>558</sup>

The PVWUA advocated postage stamp pricing as a mechanism for addressing its concerns.<sup>559</sup> The PVWUA reasoned that the Murray-Darling Basin (MDB) is a single ‘entity’ and that therefore there should be a standard charge applying across the entire Basin (rather than valley-based charges). The PVWUA recommended that a weighted average usage charge would be the “fairest system to all users” and not result in reduced revenue for State Water (now WaterNSW).<sup>560</sup>

In their Draft Advice submissions, the Tamworth Regional Council and PVWUA remained concerned about the relatively high charges in the Peel Valley resulting from the application of the water charge rules. Tamworth Regional Council noted that the ACCC had not made any proposed amendments to

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<sup>552</sup> Peter Beex, Issues Paper Submission, July 2015, pp.1, 6.

<sup>553</sup> *ibid*, p.3. Mr Beex also noted that over the last financial year, the infrastructure usage fee has increased by 11 per cent in the Murray Valley, and decreased by 16 per cent in Shepparton.

<sup>554</sup> Daniel Mongan, Issues Paper Submission, July 2015; Victorian Farmers’ Federation, Issues Paper Submission, July 2015.

<sup>555</sup> Peel Valley Water Users Association, Issues Paper Submission, July 2015, p.5.

<sup>556</sup> Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.2.

<sup>557</sup> Peel Valley Water Users Association, Issues Paper Submission, July 2015, p.4; Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.2.

<sup>558</sup> Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, p.2; Peel Valley Water Users Association, Issues Paper Submission, July 2015, p.4. *Emphasis added.*

<sup>559</sup> Peel Valley Water Users Association, Submission to the Independent Review of the Water Act 2007, June 2014, pp.1,3.

<sup>560</sup> *ibid*, p.3. The PVWUA also noted that it releases 95 per cent of its water to other downstream valleys. See section 4.2 for further discussion on this issue.

the water charge rules which would positively affect the level of charges within the Peel Valley.<sup>561</sup> The PVWUA echoed this feedback.

The PVWUA submitted that the ACCC's role is to "prevent inequitable charges" and "promote competition and fair trading and regulated national infrastructure to make markets work for everyone".<sup>562</sup> The PVWUA was dissatisfied with the ACCC's advice in relation to the Peel Valley charges; it considered that the ACCC has not fulfilled its role. The PVWUA's view was that "the ACCC is more concerned with finding reasons to justify the status quo with water charge rules, rather than focusing on identifying solutions to what is an obvious problem...".

The PVWUA, and to some extent the Tamworth Regional Council, considered that it is the application of the water charge rules (i.e. via the interpretation of the BWCOP) which is producing the differences in charges, and that their concerns can be addressed via amendments to the water charge rules.<sup>563</sup> Accordingly, the PVWUA provided suggestions about possible amendments, which they consider would address their concerns about the level of charges in the Peel Valley.<sup>564</sup> Additionally, Tamworth Regional Council continued to advocate for postage stamp pricing, and for the water charge rules to not preclude uniform pricing from being applied now or in the future.<sup>565</sup>

One of the PVWUA's key concerns in relation to the application of the water charge rules continues to be the interpretation of the principle 'to avoid perverse or unintended pricing outcomes'.<sup>566</sup> The PVWUA submitted that it cannot see how the current charges in the Peel Valley, relative to other NSW valleys, could not be 'perverse' and therefore in violation of this principle. The PVWUA therefore questioned why the regulator continues to approve charges 'in breach' of the Act. The PVWUA considered that part of the issue is that there is no definition, or transparent criteria, that demonstrate how the regulator is, or should be, evaluating this principle. The PVWUA noted the ACCC's recommendation (4-A) to develop guidance material on the interpretation of, and the interactions between, the BWCOP. However, the PVWUA considered that the recommendation "is too vague to be helpful".

One of the PVWUA's criticisms about valley-based pricing is that, in its view, it does not reflect the principle of user-pays. The PVWUA<sup>567</sup> provided three arguments about how the water charge rules could be applied, or charging arrangements modified, to produce lower charges in the Peel Valley:

- the user share of costs in the Peel Valley is the same as other parts of NSW; however, the charges are higher because there are fewer irrigators over which to spread the costs. Consequently, if the user share of costs is the same, so too should the charges be the same.
- under the Peel Valley Water Sharing Plan, Peel Valley water users (irrigators and Tamworth Regional Council) can only access an amount of water equal to five per cent of the average end of stream flow. Therefore, to reflect the principle of user-pays, Peel Valley water users should not be charged 100 per cent of the user share of costs.
- charges do not reflect the "environmental footprint" of consumptive water use. This is because the valleys with the highest volume of water for consumptive use, and therefore the largest environmental footprint, have the lowest charges (i.e. Murray and Murrumbidgee);

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<sup>561</sup> Tamworth Regional Council, Draft Advice Submission, March 2016, p.5.

<sup>562</sup> Peel Valley Water Users Association, Draft Advice Submission, March 2016, p.1.

<sup>563</sup> *ibid.*, p.2.

<sup>564</sup> The PVWUA also noted that the differential between charges in the Peel Valley and other NSW valleys will continue to increase as Peel Valley charges further progress along the transition path to their cost-reflective level while the charges in other valleys will only increase at the rate of the Consumer Price Index. Peel Valley Water Users Association, Draft Advice Submission, March 2016, p.3.

<sup>565</sup> Tamworth Regional Council, Draft Advice Submission, March 2016, p.5.

<sup>566</sup> Peel Valley Water Users Association, Draft Advice Submission, March 2016, pp.3-4.

<sup>567</sup> *ibid.*, pp.3-5.

whereas, the Peel Valley with the lowest volume of water use, and therefore the smallest environmental footprint, have the highest charges. The PVWUA considers this a “perverse outcome for the environment”.

Tamworth Regional Council (TRC)<sup>568</sup> supported postage stamp pricing. TRC submitted that its main point is that even if the ACCC does not support postage stamp pricing now, the water charge rules should not be drafted to preclude it from being introduced at another time, should the ACCC or other relevant government agencies’ position change.

TRC provided two main arguments about the benefits of postage stamp pricing (other than reducing the level of charges in the Peel Valley):

- Postage stamp pricing precludes difficulties associated with deciding which valley-based charges should apply in the cases of supplementary / off-allocation flows between valleys, and in the case of water shepherding for environmental flows.
- Postage stamp pricing recognises and fairly accounts for legacy issues. For example, the higher cost of supplying water to some valleys such as the Peel is due to decisions made by governments “before the notion of user-pays was conceived” and in a time where present day users were not consulted about, or even able to consider, the infrastructure investment decisions.

TRC argued that in combination with postage stamp pricing, there could be a requirement to provide a transparent break-down of the costs to supply each valley to identify “inefficiency’s[sic] or unnecessary waste”. TRC concluded by questioning how the ACCC can allow the NSW Department of Primary Industries—Water (DPI Water) to apply postage stamp pricing in respect of meter reading charges in the west of the Great Dividing Range, yet not allow postage stamp pricing with respect to on-river infrastructure charges.<sup>569</sup>

### *ACCC assessment*

The ACCC supports the BWCOP and the commitments made under the National Water Initiative (NWI) to promote the efficient functioning of water markets and to reduce barriers to trade through consistent water charging arrangements.<sup>570</sup> The ACCC also supports the interpretation of the Independent Expert Panel reviewing the Act (the Panel) that the intention of Part 4 of the Act, under which the water charge rules are made, is to “ensure that water charges are set on a consistent basis; it is not intended to produce consistent charges per se”.<sup>571</sup> In line with this interpretation, the ACCC does not support postage stamp pricing in the rural water sector. The ACCC agrees with the Panel’s position that mandating postage stamp pricing would not give effect to the objectives of the Act related to user-pays and price transparency, and that it would result in cross subsidisation and inefficient use of infrastructure services and water.<sup>572</sup>

The ACCC considers that there is no need to change the main principles referred to in the rules (BWCOP), which emphasise cost recovery, user pays and efficiency. The ACCC accepts that these principles incline pricing decisions towards valley or district-based pricing in cases in which differential prices reflect different costs. Uniform pricing in that situation would result in groups with higher costs being subsidised by other groups, which itself could be considered a perverse outcome.

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<sup>568</sup> Tamworth Regional Council, Draft Advice Submission, March 2016, p.5.

<sup>569</sup> Tamworth Regional Council, Draft Advice Submission, March 2016, pp.5-6.

<sup>570</sup> See clauses 58-60 in the Intergovernmental Agreement on a National Water Initiative, 2004, p.10-11, 13, viewed July 2016, [http://www.nwc.gov.au/\\_data/assets/pdf\\_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf](http://www.nwc.gov.au/_data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf).

<sup>571</sup> Report of the Independent Review of the Water Act 2007, p.60.

<sup>572</sup> Report of the Independent Review of the Water Act 2007, p.60.



However, the rules do not *preclude* standardising or ‘broad-banding’ charges where appropriate. The ACCC accepts that in some cases it may be more efficient to combine some groups of users where their costs are similar or they share use of the same infrastructure, and where attempting to differentiate their costs and charges would involve excessive administrative cost. The ESCV, as an accredited regulator under the Water Charge (Infrastructure) Rules 2010 (WCIR), has partially implemented this approach in its recent determination of GMW charges for the period 2016-2020. The ESCV accepted that several districts could be combined with the same charges, but charges for certain other districts should be kept separate as the services are too distinct and the costs too different for broad-banding to be efficient.<sup>573</sup>

In relation to specific concerns raised by Peel Valley stakeholders, the ACCC acknowledges the relatively high charges faced by Peel users. However, the ACCC reiterates its view that the relatively high charges in the Peel Valley are a necessary consequence of the requirement in the water charge rules for the ACCC to have regard to the BWCOP set out in the Act, in particular the principles of efficiency, user pays and cost recovery principles.

The ACCC emphasises that infrastructure charges relate to the provision of infrastructure access and services, rather than for the water directly. Water service infrastructure is largely specific to valleys and user charges reflect the costs of servicing each valley. Peel Valley costs largely relate to the relatively small Chaffey dam (62 GL capacity before the recent augmentation to 100 GL). As with all dams, costs to maintain Chaffey Dam tend to be relatively fixed regardless of capacity. The ACCC notes that the user share of costs in absolute terms is smaller for Peel Valley than for any other valley. Also, most of the costs paid for by Peel Valley users are for current operations and maintenance, as most of the capital costs, including the Chaffey dam, have been provided by the NSW or Australian Governments. Nevertheless, Peel Valley charges are relatively high because there is a relatively small volume of entitlements / water use over which to spread these costs compared to other valleys.

The user pays approach requires that the cost of the infrastructure is spread over those benefiting from it. This means that, where usage charges are imposed, they are imposed on usage in the Peel Regulated River water resource only, as this is the area where usage is dependent upon the operation of WaterNSW’s water service infrastructure (i.e. Chaffey Dam). The water flowing out the end of the Peel is not primarily due to operations by the Chaffey Dam—rather it is inflows from other tributaries and environmental requirements.

In relation to the PVWUA’s argument that Peel Valley water users should be charged lower infrastructure charges because they have a ‘lower environmental footprint’ compared to other valleys where consumptive use is higher, the ACCC observes that charges for water service infrastructure aim to recover the direct costs of provision – they do not include any component for environmental externalities. Environmental issues are addressed through separate more direct measures, in particular the sustainable diversion limits set out in water sharing plans and (effective from 2019) the Murray-Darling Basin Plan.

In summary, the ACCC does not accept that the solution to charging outcomes in the Peel Valley is to mandate uniform, or ‘postage stamp’ pricing instead of valley based pricing. The ACCC considers that any future consideration of these matters should take into account:

- the amount of annual forfeiture of water allocation in the Peel Valley and the impacts of such forfeiture on the level of charges

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<sup>573</sup> Essential Services Commission of Victoria, *Goulburn-Murray Water Price Review 2016 — final decision*, June 2016, viewed June 2016, <http://www.esc.vic.gov.au/wp-content/uploads/2016/06/Water-Price-Review-2016-20-G-MW-Final-Decision.pdf>.

- whether inter-valley trading (e.g. between the Peel and Namoi) has the potential to assist in broadening the customer base on which Peel Valley charges are levied (e.g. because water is traded and used rather than being forfeited)
- whether there is a more appropriate split between fixed and variable charges
- the impacts on charges of the Chaffey Dam upgrade
- the impacts on charges of any future changes to rules for allocation of water to different entitlement types under the Peel Regulated River water sharing plan
- long-term growth in the demand for water to service Tamworth
- the demarcation of geographical areas such as valleys for charging purposes
- the merits of funding a Community Service Obligation (CSO) to alleviate upward pressure on infrastructure charges in the Peel.

However, the ACCC acknowledges that these matters are beyond the scope of the rules to address.

See also section 4.2 (in particular Box 4.1) for further discussion of matters relevant to the Peel Valley.

### 5.10.3 Consistency in price approvals / determinations

#### *Stakeholder feedback*

Several stakeholders commented on consistency in pricing outcomes under Part 6 of the Water Charge (Infrastructure) Rules 2010 (WCIR). Current Part 6 operators are Goulburn-Murray Water (GMW), Lower Murray Water (LMW) and WaterNSW (formerly State Water).

WaterNSW noted in its submission to the Act Review that recent Murray-Darling Basin (MDB) water charging arrangements “neither achieve Basin-wide consistency nor contribute to the [BWCOP] to the degree intended by the Act”.<sup>574</sup> WaterNSW noted that in recent decisions, the ACCC and the ESCV had different interpretations and applications of the BWCOP and imposed different tariff structures and price control mechanisms. To achieve greater consistency in water charging arrangements, WaterNSW called for a guided discretion model and greater prescription in charging arrangements, incorporating the following elements:<sup>575</sup>

- “[P]rovide clear objectives in relation to regulatory decisions”, which could be facilitated by:
  - weighting the BWCOP or ordering the BWCOP into a hierarchy
  - excluding consideration of irrelevant matters, which might influence the outcome of the pricing decision
  - removing unclear or ambiguous objectives, or providing greater guidance on how to interpret (particularly in relation to the phrase, ‘perverse and unintended pricing outcomes’).
- “[A]dopt high level mechanisms prescribed in the energy sector, which provide a greater degree of guidance for the decisions to be made by the regulator”.
- “[A]dopt the high level mechanisms prescribed in the energy sector, which provide improved procedural and information requirements for the pricing process”.

<sup>574</sup> State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.1.

<sup>575</sup> *ibid.*, pp.12-24.

WaterNSW called for the introduction of a merits review mechanism, because, in its view, in the absence of such a mechanism, there is less incentive for administrative bodies to be accountable for the decisions that they make.<sup>576</sup> Appeal mechanisms are considered separately in section 5.8.

In its Issues Paper submission,<sup>577</sup> WaterNSW contended that the WCIR has not achieved a common approach to pricing or application of economic principles within the Basin. WaterNSW stated that the key reason for inconsistent charging arrangements under the WCIR is that regulators must consider “conflicting efficiency and social objectives, with no guidance on how to trade them off”. WaterNSW held up the national electricity market as a model in that it provides substantial guidance “to achieve conflicting policy objectives” and that this has provided consistent charging arrangements across interconnected systems and a robust market.

WaterNSW submitted that subrule 29(4) of the WCIR should be amended such that a regulator’s primary objective is to promote economic efficiency and support infrastructure development, without resulting in pricing outcomes that distort market activity”.<sup>578</sup> WaterNSW additionally recommended that the BWCOP should be ordered into a hierarchy, and the WCIR used to define the terms used in the BWCOP to “foster consistent charging arrangements, promote investment and trade”.<sup>579</sup> The ACCC sought stakeholder views on the issue of ranking the BWCOP; these are summarised in section 4.2.

The NSWIC submitted that the “involvement of the ACCC in bulk water charging determinations” [i.e. through price determinations under Part 6] has not achieved consistency because on-river infrastructure charges are still regulated by the ESCV in Victoria and the ACCC in NSW.<sup>580</sup> Murray Irrigation Limited (MIL) provided a similar view in its Issues Paper submission.<sup>581</sup>

Some stakeholders identified implications for state-based consistency in price approvals / determinations in relation to the ACCC’s draft amendments to the application of Part 6. These matters are addressed in section 5.6.

### *ACCC assessment*

The ACCC has acknowledged that there continues to be a clear preference from Basin State governments for State regulators to be able to undertake price approval or determination roles, rather than the ACCC. This preference resulted in the current accreditation arrangements under Part 9 of the WCIR.

Under the ACCC’s proposed amendments to Part 6, this role would revert to being undertaken by regulators under Basin State regulatory regimes rather than under the WCIR (i.e. without accreditation), where State regulatory processes can be shown to be broadly consistent with those under (the amended) Part 6. As detailed in section 5.6, the ACCC considers that while the criteria used by the alternative State-based regulators (IPART, ESCV, Queensland Competition Authority (QCA) and Essential Services Commission of SA (ESCOSA)) are not identical to the BWCOP and

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<sup>576</sup> State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.26. WaterNSW reiterated this in its Issues Paper Submission, July 2015. State Water further submitted that the merits review process could improve the quality of regulatory decisions and the achievement of the BWCOP, and that over time, a body of precedent would develop and that would also improve consistency in water charging arrangements (pp.26-27).

<sup>577</sup> WaterNSW, Issues Paper Submission, July 2015, p.3-5.

<sup>578</sup> *ibid*, p.9.

<sup>579</sup> WaterNSW, Issues Paper Submission, July 2015, p.9; NSWIC also submitted its view that the “plans and rules made under Part 1, section 10(1) [of the Act] have not improved the Basin-wide consistency of water charges but, to the contrary, have added additional complexity and costs ...”, NSW Irrigators’ Council, submission to the Water Act Review, June 2014, p.7.

<sup>580</sup> NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, p.8.

<sup>581</sup> Murray Irrigation Limited, Issues Paper Submission, July 2015, p.7.

the current Part 6, they are broadly consistent with the requirements the ACCC has proposed to apply under the amended Part 6.

The ACCC acknowledges that, due to operators being regulated by different regulators in different Basin States, there is always the possibility that regulators will, in exercising their discretion, arrive at different outcomes. Nevertheless, the proposed rules will still require fundamental similarity in approach—this is the essence of the ‘test’ in Part 6 which requires that approval processes are broadly equivalent before an operator can be regulated under a State regime instead of the water charge rules. Therefore, this approach will enable an amelioration of current inconsistencies *within* Basin States (by allowing the same framework to be applied to MDB and urban / non-MDB areas), without sacrificing all consistency *across* Basin States by setting in effect a minimum standard which State based regimes need in order for Part 6 of the water charge rules not to apply.

Further discussion on the appropriate application of Part 6 of the WCIR, including questions of consistency in regulatory approach and about the ACCC’s involvement in direct price regulation, are addressed in section 5.6.

#### **5.10.4 Water charging arrangements that create barriers to trade**

##### *Stakeholder feedback*

##### **Impacts of water charging arrangements on trade**

Many stakeholders pointed out the link between inconsistent charging arrangements and water markets. In particular, stakeholders identified the following perceived distortions:<sup>582</sup>

- The fact that South Australian water users do not pay ‘bulk’ (on-river) infrastructure charges distorts water markets and / or creates the potential for arbitrage between different trading zones.<sup>583</sup>
- On-river infrastructure charges are ‘heavily subsidised’ and / or non-transparent in SA and Victoria, which distorts water markets.<sup>584</sup>
- The existence of casual usage arrangements can distort trading decisions by affecting the level of charges on customers’ rights of access.<sup>585</sup>
- NSW irrigators have an advantage over Victorian irrigators in interstate water markets because they pay lower charges for water access entitlements.<sup>586</sup>
- At a general level, difference in tariff structures distort trading decisions, for example because customers facing a higher level of variable charges have more incentive to trade than those who face lower variable charges, or because charging arrangements discriminated in favour of certain water users.<sup>587</sup>

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<sup>582</sup> For a full summary of these submissions, see ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.151-153.

<sup>583</sup> Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, July 2014, p.3; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, p.6; Western Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.4; Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.7; Murray Irrigation, Submission to the Independent Review of the Water Act 2007, June 2014, p.7; Peter Beex, Issues Paper Submission, July 2015, pp.6-7. Mr Beex contended that one reason that there is a significant volume of trade out of zone 6 (in Victoria) to SA is because water users in SA can avoid the Victorian on-river infrastructure charge (“bulk water charge”) of \$11.80 ML by transferring it into SA.

<sup>584</sup> National Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, p.6 ; Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, June 2014, p.7; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, June 2014, pp.6-7. NSWIC also noted that there is a “sophisticated bulk water charging regime” in NSW and that other states do not pay comparable water charges.

<sup>585</sup> Peter Beex, Issues Paper Submission, July 2015, p.3.

<sup>586</sup> John Girdwood, Issues Paper Submission, July 2015, p.1

<sup>587</sup> Frontier Economics, Submission to the Independent Review of the Water Act 2007, June 2014, p.3; MDBA, Issues Paper Submission, July 2015, p.6.

- Inconsistency in the price approval / determination decisions made under Part 6 of the Water Charge (Infrastructure) Rules 2010 (WCIR) for State Water, as compared to Goulburn-Murray Water (GMW) and Lower Murray Water (LMW), affect the efficient functioning of water markets.<sup>588</sup>
- “Gaps” in state water planning are one factor that could affect trade decisions.<sup>589</sup>

In contrast to these views, other stakeholders submitted that charges did *not* have distorting impacts on water markets:

- Central Irrigation Trust (CIT) and National Irrigators’ Council (NIC) submitted that water trade data (in particular the significant volume of interstate trade of water allocations and entitlements) indicates that trade across the Murray-Darling Basin (MDB), and the efficient use and migration of water, is uninhibited by existing water charging arrangements.<sup>590</sup>
- NIC submitted that the member-owned structure of many infrastructure operators provides incentives for these operators *not* to impose unreasonable or price-distorting charges, and that industry innovation and competition for investment act as a deterrent to these practices.<sup>591</sup>
- Coleambally Irrigation Cooperative Limited (CICL) submitted that it does not apply conditions on the trade of water within or beyond its area of operations, other than to meet its groundwater and salinity levels under its operating licence, and it is not aware of “any differences” in other irrigation infrastructure operators (IIOs) that would constitute a barrier to trade.<sup>592</sup>

The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) survey of irrigators commissioned by the ACCC identified that, for most irrigators in the Goulburn-Broken and Murray systems, the level of fixed and variable charges is very important or somewhat important to their trading decisions. Charges were somewhat less important for trading decisions for irrigators in the Murrumbidgee system and the Northern Basin.<sup>593</sup>

The Marsden Jacob Associates Report commissioned by the ACCC identified that there are substantial variations in the structure and level of IIO charges across the MDB, but those differences do not have a material influence on trade decisions. Marsden Jacob Associates further also found that while there are differences in the nominal value of fixed and variable charges (due to differences in capital cost recovery models), these differences are unlikely currently to be materially influencing trade decisions.

Marsden Jacob Associates recommended that in light of these findings, the ACCC should continue to monitor whether differences in IIO charges are affecting water markets. Marsden Jacob Associates suggested that the ACCC could monitor “long-term seasonally corrected water usage across IIOs” in relation to differences in capital recovery frameworks, compliance requirements and fixed to variable charge splits. Marsden Jacobs Associates stated that this would be to ensure that such charge

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<sup>588</sup> State Water, Submission to the Independent Review of the Water Act 2007, July 2014, p.46. State Water (now WaterNSW) submitted that because of the relatively higher proportion of variable to fixed charges set for State Water’s charges by the ACCC’s 2014 price determination, it faces financial risk in being unable to recover its usage charge when water allocations are traded interstate. State Water submitted that it cannot levy its usage charge on customers in interstate jurisdictions because “there is no specific agreement or mechanism for recovery of revenue” and customers in other jurisdictions are accustomed to paying fixed charges. State Water added that it is difficult to assess “usage of water on the opposite border” and debit it from the NSW water accounts to “access meters and/or readings to accurately measure the amount of water taken at the respective location” in relation to tagged water access entitlements.

<sup>589</sup> Queensland Farmers’ Federation, Issues Paper Submission, July 2015, p.5.

<sup>590</sup> Central Irrigation Trust, Issues Paper Submission, July 2015, pp.3,6; National Irrigators’ Council, Issues Paper Submission, July 2015, p.6.

<sup>591</sup> National Irrigators’ Council, Issues Paper Submission, July 2015, p.13.

<sup>592</sup> CICL, Issues Paper Submission, July 2015, pp.8-9.

<sup>593</sup> D Ashton, *Water trading and water charge rules: a survey of irrigators in the Murray-Darling Basin*, ABARES report to client prepared for the Australian Competition and Consumer Commission, Canberra, June 2015, Table 1.

characteristics do not result in perverse incentives, encouraging irrigators to trade out of higher cost IIOs towards lower cost IIOs.

### **Transaction fees and charges applied when a person trades**

Waterfind<sup>594</sup> called for greater regulation of transaction fees (trade application fees and trade out fees) to “reduce trade barriers” and “ensure consistency across the Murray-Darling Basin”. Waterfind submitted its view that “significant water market trade barriers stem from the fact that at present, member owned infrastructure operators can freely set their transaction fee arrangements”, rather than those charges being subject to regulatory approval or determination (i.e. under Part 6 of the rules). Waterfind called for the regulatory approval of transaction fees and other water planning and management charges.

In relation to transaction fees levied by or on behalf of Basin State governments, Waterfind argued that bringing these charges under WCIR regulation would “improve transparency and efficiency of water markets” and enhance the “comparability of water market transactions”. Waterfind identified that such trade transaction fees are currently regulated under the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) (since they relate to water planning and management activities and are determined by or on behalf of governments) which focuses on publishing information related to these charges rather than the determination or approval of the charges.

Additionally, Waterfind identified that ‘transaction fees’, in particular in the form of infrastructure charges imposed on water allocations traded out of member-owned private irrigation districts create barriers to trade. Waterfind called for these charges to be prohibited or capped.

The Murray-Darling Basin Authority (MDBA) submitted that additional or higher charges should not apply to water that is traded into a state or district than would be payable for water associated with “local entitlements”, except where the difference relates to the marginal cost of administering the trade. The MDBA further noted that the marginal cost of administering a trade may be different for each trade authority approval because there is wide variation in the number of trades in each state.<sup>595</sup>

National Water Brokers submitted to the Act Review its concerns about the differences in transaction costs between state jurisdictions and that such differences have the effect of creating a barrier to efficient trade, to or from states or IIOs where the fees are higher, particularly for small volume transactions. National Water Brokers called for a more consistent charging regime “to enable more efficient water trading”.<sup>596</sup>

Marsden Jacobs Associates provided a range of evidence about the impact of WaterNSW’s current infrastructure charging arrangements on water markets (see section 5.3.2).

Section 5.3 summarises specific stakeholder feedback on the draft rule advice to prohibit infrastructure charges imposed as a condition of trade, and on the proposal to prohibit price discrimination on the ground that someone has traded their water.

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<sup>594</sup> Waterfind, Issues Paper Submission, July 2015, pp.3-4.

<sup>595</sup> Murray-Darling Basin Authority, Issues Paper Submission, July 2015, p.7.

<sup>596</sup> The National Water Brokers further submitted that one way to reduce costs would be to have a National Standard of Water Registers. The National Water Brokers, Submission to Independent Review of the Water Act 2007, June 2014, p.5.

## *ACCC assessment*

In its Draft Advice, the ACCC expressed concern about the unnecessary impediment to trade that can arise as a result of infrastructure charges that are imposed on, or as a condition of, trade, where such charges are unrelated to trade or do not reflect the reasonable and efficient costs of processing a trade. The water charge rules currently do not prevent charges being imposed on a customer as a condition or a result of trade, nor do the rules currently directly address the imposition of infrastructure charges to prevent people from trading water out of a particular irrigation area or jurisdiction (effectively acting as an export tax on water trade). These charges have the potential to unduly inhibit water trade, and preclude, at the margin, the use of water resources and infrastructure assets by their highest value use.

The ACCC acknowledged that current charging arrangements have not precluded trade decisions entirely. However, charges that are imposed on, or as a condition of trade, where there is no fundamental reason for the charge to be linked to trade, could prevent or distort trade decisions at the margin, even though they do not prevent trade entirely.

The ACCC considers that stakeholders' concerns about the impact of tariff structures on trade, and the effect of charges being levied on or because of trade which do not appropriately reflect administration costs, provide further support for its rule advice on the proposed non-discrimination rules. In particular, rule advice 5-D advises that an infrastructure operator should not be able impose an infrastructure charge when a person applies to trade, as a condition of trade, or because a person has traded, other than a charge which reflects the reasonable and efficient administrative costs incurred to process a trade or to recover the costs of an infrastructure service provided in relation to a trade.<sup>597</sup> This proposed amendment will directly address concerns about the potential for infrastructure charges to be levied in distortionary ways. Rule advice 5-B (the proposed non-discrimination rule) will also limit an infrastructure operator's ability to *unreasonably* levy a different charges for the same infrastructure service, which could include whether the charge has been levied differently based on whether a person has participated in water markets.

As detailed elsewhere, the ACCC recognises that, as a default approach, variable and fixed infrastructure charges should reflect underlying variable and fixed costs. Such an approach would be consistent with the principles of achieving full cost recovery and user pays. However, the ACCC does not recommend amending the rules to mandate the fixed / variable split of charges to reflect the underlying fixed / variable composition of costs. There are a range of considerations that an operator must take into account when setting its charges, such as:

- the time periods over which costs are to be recovered
- complexities such as economies of scale and the costs of supplying different services or different customer groups
- risk sharing between the operator and its customers (or other equity concerns)
- the difficulties inherent in setting charges based on demand forecasts in an environment of considerable uncertainty.

The ACCC is of the view that operators should, consistently with the BWCOP, continue to move towards cost-reflective and upper bound pricing where practicable, but that operators should generally

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<sup>597</sup> More specifically on this last point, rule advice 5-D proposes that an operator should not be prevented from imposing an infrastructure charge in relation to an infrastructure service for the: (i) harvesting or storage of water before a trade; (ii) storage or delivery of water in the course of giving effect to the trade; or (iii) storage or delivery of water in relation to the traded water access right after a trade but is not able to levy a charge on the customer after the trade occurs.

retain the discretion to set fixed and variable charges in a manner which best reflects their individual circumstances (see, however, the ACCC's rule advice relating to pass through of infrastructure charges incurred by an operator, at section 5.13). The ACCC also recognises that enforcing a rule which required revenues recovered via fixed and variable charges to exactly match underlying fixed and variable costs would require exact and detailed data on an operator's fixed versus variable costs, which would impose a significant regulatory burden.

The ACCC notes that the primary rationale behind stakeholder support of cost-reflective charging is the possible impacts on water markets of tariff regimes that differ in their 'fixed vs variable split'. The ACCC considers that it is more important to address aspects of charging arrangements that directly distort trading decisions, such as infrastructure charges levied directly on trade,<sup>598</sup> rather than attempting to partially address the indirect effects of differing tariff structures by mandating cost-reflective charging via the rules.

The ACCC recognises that underlying differences in charging arrangements will continue to persist, and are likely to continue to affect prices in water markets. Whether these effects amount to distortions on trade will depend on the reasons for the differences in charging arrangements. The ACCC acknowledges the limited ability of the rules to fully prevent all distortionary effects of tariff structures. This is due to the prohibitive costs in obtaining the information required to fully understand underlying cost structures and implement fully cost-reflective charges for all infrastructure operators. In addition, the rules are limited in their ability to fully prevent distortionary effects because infrastructure services provided by some entities are partly or wholly subsidised by governments, thereby distorting relative prices.

The ACCC agrees with Marsden Jacobs Associates that there is a need for ongoing monitoring of the impact of operator charges on market outcomes. The ACCC believes this will be possible given the proposed non-discrimination provisions, the information collected via infrastructure operators' and other entities' Schedules of Charges, and the annual 'Requests For Information' the ACCC makes to inform its Water Monitoring Reports.

### **5.10.5 Charging arrangements during periods of low or restricted water availability**

#### *Stakeholder feedback*

Several stakeholders also commented on, or questioned, the imposition of infrastructure charges during periods of low, or restricted, water availability.

SMK Consultants submitted on behalf of Mr John Seery, an irrigator in the Macintyre and Gwydir valleys. SMK Consultants, in noting the different proportions of fixed and variable charges between states, submitted that the water charge rules should "mandate" the way in which infrastructure operators' set this proportion, with a preference towards increasing the proportion of variable charges.<sup>599</sup> The rationale that SMK Consultants submitted to support this view relate to the concern about paying "significant" charges when there are low volumes of available water allocations. SMK Consultants consider that the current pricing approach is "damaging enterprises" and "hurting the agriculture industry and will continue to do so until a point where many activities are untenable". SMK Consultants argue that a higher proportion of variable charges would be a more sustainable, and 'user-pays', approach to pricing.

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<sup>598</sup> See section 5.3 and rule advice 5-B and rule advice 5-D.

<sup>599</sup> SMK Consultants on behalf of Mr John Seery, Draft Advice Submission, March 2016, pp.1-2.



WJ and A Seery Partnerships separately submitted their view that all annual water charges should not be imposed when the government and/or infrastructure operator imposes embargoes on water extraction.<sup>600</sup> WJ and A Seery provided that an example of such an embargo in the Border Rivers system whereby the DPI Water and WaterNSW have at times limited extraction in the Border Rivers System, despite the flow being above 10 000ML, the minimum flow rate at which supplementary licence holders can extract water. WJ and A Seery note that the reasons for the embargo include water quality issues (blue green algae) and to allow water to flow to Menindee Lakes and Broken Hill. WJ and A Seery were concerned about having to pay water charges under these circumstances and that irrigators are unable to “get back water which they have lost as a consequence of these restrictions” (e.g. to extract water below the 10 000 ML threshold after the embargo has been removed). WJ and A Seery noted that “the financial loss suffered by irrigators when Government agencies deny them access to extract water which they are normally entitlement[sic] to, is far in excess of annual water charges”. WJ and A Seery considered that “[t]he environment is taking priority and yet the burden of maintaining the system is falling on irrigators”.

### *ACCC assessment*

The ACCC recognises stakeholder concerns about paying for infrastructure charges in periods of low water availability. However, the ACCC reiterates that infrastructure charges are not ‘resource rents’ for water itself, but are rather set to recover costs of providing infrastructure services. Many of an infrastructure operator’s costs are incurred regardless of the level of water availability—even in cases where water users are unable to access water allocations because of low water availability generally, or specific event-based restrictions (such as the restrictions related to blue-green algae identified by stakeholders). The ACCC considers that the rules cannot mandate that operators should forego recovery of fixed costs in times of low water availability, as to do so would be inconsistent with the BWCOP.

However, the rules do allow for the sharing of financial risks between operators and customers, and for operators to alter the timing of when infrastructure charges are imposed, both generally and in relation to customer preferences. In particular, the ACCC has proposed (see section 5.3) that the rules explicitly acknowledge that operators may choose to offer a ‘hardship discount’, and / or may give effect to Community Service Obligations given by Basin States via discounting (or waiving) infrastructure charges.

Also, the rules do not mandate the proportion of costs that can be recovered through fixed versus variable charges. Operators (and regulators who approve or determine operator’s charges) have the discretion to choose a higher proportion of variable charges, which has the effect that, all else equal, irrigators will pay fewer charges in a period of low water availability relative to a period of high water availability. In deciding on the proportion of fixed and variable charges, an appropriate balance should be struck between:

- maintaining the viability of the infrastructure operator
- providing incentives and signals for efficient investments and
- customers’ willingness to pay.

The ACCC maintains that these decisions are best considered on a case-by-case basis to enable an operator (and regulator) to take into account individual circumstances. Therefore, the ACCC does not recommend that the rules should mandate the proportion of fixed and variable charges.

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<sup>600</sup> WJ and A Seery Partnership, Draft Advice Submission, February 2016, pp.1-2.

## 5.11 Commercially negotiated charges and third party access regimes

### Rule advice 5-X

The rules should be amended to provide an exemption such that proposed rule 10 does not apply in relation to charges, or restrictions on the availability of infrastructure services, that are negotiated, offered, arbitrated or otherwise specified under the following arrangements (or arrived at under a dispute resolution process undertaken consistently with such an arrangement) under Part IIIA of the *Competition and Consumer Act 2010*:

- (a) an access undertaking or access code;
- (b) a declared service;
- (c) an effective access regime;
- (d) a competitive tender process.

There should not be any general exemption for other 'commercially negotiated' infrastructure charges.

See rule advice 5-B (in section 5.3.1) for the proposed non-discrimination requirements.

This rule advice is implemented in rule 10(7) of the proposed Water Charge Rules.

### Background

The Water Charge (Infrastructure) Rules 2010 (WCIR) regulates charges for access to, and services provided in relation to, water service infrastructure. Commonly, an infrastructure service is provided to customers by levying a standard infrastructure charge as specified on the infrastructure operator's Schedule of Charges. However, an operator may also enter into a contract for the provision of infrastructure services to new or existing customers at a different charge. These contracts may arise in relation to access to infrastructure services under any of the available mechanisms pursuant to Part IIIA of the *Competition and Consumer Act 2010* (CCA),<sup>601</sup> or they may also arise independently (i.e. outside of Part IIIA). For the purposes of this discussion, it is useful to distinguish between charges specified in a contract developed under Part IIIA (which will be referred to as a "Part IIIA charges"),<sup>602</sup> and those that arise out of independent contracts (which will be referred to as a "commercially negotiated charges").

Generally, Part IIIA charges and commercially negotiated charges for infrastructure services would be considered 'infrastructure charges' as per the ACCC's proposed approach (see rule advice 4-B), and would therefore be subject to the water charge rules. If an infrastructure operator levies a commercially negotiated charge or a Part IIIA charge, then the operator must ensure that those charges comply with the current non-discrimination provisions under rule 10, which prohibits certain infrastructure operators from engaging in price discrimination between irrigation right holders and other customers. The ACCC has proposed additional non-discrimination prohibitions for rule 10 (see section 5.3), which would also apply to commercially negotiated charges and Part IIIA charges (in the absence of further amendments proposed below).

<sup>601</sup> This includes where access to the infrastructure is subject to an arbitration or other dispute resolution process.

<sup>602</sup> This includes where the charge is arbitrated, determined, negotiated or otherwise arising as the outcome of a dispute resolution process.

Further, an infrastructure operator is also required to publish details of its charges, including commercially negotiated charges and Part IIIA charges, in its Schedule of Charges. The WCIR currently provide some limited protections in relation to the publication of commercial-in-confidence information where there is a contract between the infrastructure operator and a customer for an agreed charge. Currently under rule 9, an infrastructure operator and customer, or a customer, may apply to the ACCC for an exemption from the requirement that the operator must include the charge on its Schedule of Charges.<sup>603</sup> The test for granting the exemption is that disclosure of the details of the charge would have a material and adverse effect for the infrastructure operator and the customer (or just the customer, when only the customer has applied for an exemption). The ACCC must publish a notice on its website when an exemption has been granted. Currently under rule 55, where an exemption under rule 9 has effect, the ACCC may publish the names of the parties and the date on which the exemption has been granted, but may not publish any other information to which the exemption relates.

**Box 5.4: Access to Services under Part IIIA of the *Competition and Consumer Act 2010***

The objects of Part IIIA of the CCA 2010 are to:

- promote the economically efficient operation of, use of, and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.<sup>604</sup>

There are a number of mechanisms through which access to infrastructure services can be provided under Part IIIA. This includes declaration and negotiation/arbitration, an access undertaking, an ‘effective’ State or Territory access regime and a competitive tender process for government-owned facilities.

**Declaration and negotiation/ arbitration**

Any person may apply to the National Competition Council seeking a recommendation that a service<sup>605</sup> be declared. Once the designated Minister declares a service, an access seeker can enter into negotiations with the service provider. In the event that there is a dispute, an application can be made to the ACCC to have the dispute resolved via arbitration.

**Access undertaking or access code**

The owner or operator of a facility can lodge an access undertaking with the ACCC. If accepted, the access undertaking sets out the terms and conditions upon which the owner or operator of a facility that provides a service would be willing to provide third party access. A service cannot be declared if there is an access undertaking in place. Similarly, an industry body can lodge an access code with the ACCC. If accepted, the access code sets out the rules for access to a service.

**Effective State or Territory access regime**

A State or Territory can establish its own third party access regime and apply to the National Competition Council seeking a recommendation that the regime should be certified as ‘effective’. A service may not be declared once the Commonwealth Minister certifies a State or Territory access regime as ‘effective’.

**Competitive tender processes for government-owned facilities**

This relates to applications made to the ACCC to approve a tender process for the construction or operation of a facility owned by the Commonwealth, or a State or Territory.

<sup>603</sup> The ACCC has also made rule advice to allow an operator to seek an exemption in the case where publication requirements relating to the infrastructure charge would cause a materially adverse impact on the operator, but not the customer. Where an operator receives an exemption from publication requirements under rule 9, the ACCC’s proposed amendments to Schedule of Charge requirements will require the operator to include notice of the exemption on its Schedule of Charges. See rule advice 5-J and rule advice 5-K.

<sup>604</sup> Section 44AA of the *Competition and Consumer Act 2010*.

<sup>605</sup> As defined under section 44B, Part IIIA, *Competition and Consumer Act 2010*.

Some state jurisdictions have developed legislation to establish or regulate a third party access regime in relation to water infrastructure services provided within that jurisdiction.<sup>606</sup> The water charge rules are not intended to exclude or limit the operation of any law of a State, including any Basin State third party access regime.<sup>607</sup> In its Issues Paper, the ACCC sought stakeholders' views on how the rules should deal with the interaction between the rules and third party access regimes, and with commercially negotiated charges more generally. In particular, the ACCC identified a need to consider:

- whether, and how, an exemption from the proposed non-discrimination provisions should apply to commercially negotiated charges, including commercially negotiated charges under a third party access regime.
- what information must be provided on an infrastructure operator's Schedule of Charges in relation to commercially negotiated charges.
- how commercially negotiated charges should be taken into account by a regulator during the course of approvals and determinations under Parts 6 and 7 of the WCIR.

The WCIR do not specify separate requirements for Part IIIA charges that arise through the provision of infrastructure access and related services under the available mechanisms set out in Part IIIA of the CCA.

The ACCC made draft rule advice that the rules should be amended to provide an exemption from the non-discrimination provisions (i.e. proposed rule 10) for Part IIIA charges (draft rule advice 5-X). Part IIIA charges would still be subject to the pricing transparency requirements, unless an exemption was granted under rule 9 (as amended). The ACCC did not support any exemption being made in relation to other commercially negotiated charges. Also, the ACCC did not consider a blanket exemption for Part IIIA charges (as proposed by some stakeholders) as necessary or appropriate.

The ACCC considered that this approach struck an appropriate balance between recognising the benefits that commercially negotiated and Part IIIA charges can provide, while ensuring that the interests of customers generally are protected by preventing commercially negotiated charges which discriminate against certain customers on particular grounds (as per the proposed enhanced non-discrimination provisions). This approach also recognised the protections that already form part of the Part IIIA framework.<sup>608</sup>

The ACCC also identified in its Draft Advice that another issue in relation to the interaction between commercially negotiated / Part IIIA charges and the water charge rules is how the regulator should treat such charges during an approval or determination of infrastructure charges under Parts 6 and 7 of the water charge rules. The ACCC considers that under the current rules, a regulator would be required to take account of revenue received from such charges when undertaking such approvals or determinations; however the ACCC's pricing principles do not currently deal with this issue directly. The ACCC will be conducting a review of these pricing principles following the provision of this Final Advice. This review can consider the development of principles that relate to the way in which a regulator should take account of commercially negotiated and Part IIIA charges during an approval or determination of infrastructure charges.

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<sup>606</sup> For example, NSW established an access regime under Part 3 of the Water Industry Competition Act 2006 (NSW) in relation to Sydney Water Corporation and Hunter Water Corporation; SA established a third-party access regime in the *Water Industry (Third Party Access) Amendment Act 2015*.

<sup>607</sup> Section 250B of the *Water Act 2007* (Cth). Note other sections in Part 11A deal with the interaction between Commonwealth water legislation and State laws.

<sup>608</sup> For a full discussion of the ACCC's reasoning underpinning its rule advice in relation to commercially negotiated charges and Part IIIA charges, see 'discussion' in section 5.11 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.159-161.

## Stakeholder feedback

Submissions to the Issues Paper generally did not make substantive comments on how the WCIR should accommodate commercially negotiated charges and Part IIIA charges. However, generally speaking, there was support for operators to be able to enter into commercially negotiated arrangements, particularly under third party access regimes,<sup>609</sup> and for there to be transparency in providing for commercially negotiated charges and third party access.<sup>610</sup>

Since the ACCC published its Draft Advice, the South Australian parliament passed the *Water Industry (Third Party Access) Amendment Act 2015* (South Australia)<sup>611</sup> (‘the SA Third Party Access Act’) to establish a third party access regime for water infrastructure in SA. The South Australian Government intends to apply to the National Competition Council to have the regime certified as an ‘effective access regime’ for the purposes of Part IIIA of the CCA.<sup>612</sup>

In the course of its consultation process on the development of the SA Third Party Access Act, the South Australian Department of Treasury and Finance raised concerns regarding uncertainty in the scope of the application of the water charges rules.<sup>613</sup> To the extent of any overlap between the infrastructure services covered by the SA third party access Act and the water charge rules, the South Australian Department of Treasury and Finance also noted concerns about potential legal inconsistency, which could have the effect of invalidating the state legislation.<sup>614</sup> A further concern related to the complexity of the overlapping regimes, whereby “some infrastructure services of SA Water (and potentially other water industry entities) would be subject to Commonwealth water charge rules, some would be subject to the state-based access regime, and some would be subject to both”.<sup>615</sup>

To address these concerns, the SA Third Party Access Act includes a displacement provision for the purposes of section 250D of the *Water Act 2007* (the Act). Under this displacement provision, the state legislation will prevail to the extent that there are any direct inconsistencies between the SA third party access regime and the water charge rules. To the extent that there are no such inconsistencies, then both the state legislation and the water charge rules can operate concurrently.<sup>616</sup>

In response to the Draft Advice, the South Australian Department of Treasury and Finance submitted that the draft amendments to the water charge rules “would substantially address inconsistency between the water charge rules and the operation of an access arrangement or third party access

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<sup>609</sup> Central Irrigation Trust, Issues Paper Submission, July 2015, p.7; Murrumbidgee Irrigation Limited, Issues Paper Submission, July 2015, p.6.

<sup>610</sup> Queensland Farmers’ Federation, Issues Paper Submission, July 2015, p.6.

<sup>611</sup> The *Water Industry (Third Party Access) Amendment Act 2015* passed both houses of the South Australian Parliament on 14 October 2015, viewed June 2016,

[https://www.legislation.sa.gov.au/LZ/V/A/2015/WATER%20INDUSTRY%20\(THIRD%20PARTY%20ACCESS\)%20AMENDMENT%20ACT%202015\\_28.aspx](https://www.legislation.sa.gov.au/LZ/V/A/2015/WATER%20INDUSTRY%20(THIRD%20PARTY%20ACCESS)%20AMENDMENT%20ACT%202015_28.aspx).

<sup>612</sup> South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, Explanatory Memorandum, September 2013, p.4.

<sup>613</sup> South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, February 2013, pp.10-11. The *Water Industry (Third Party Access) Amendment Act 2015* does not apply to infrastructure operated by irrigation infrastructure operators (IIOs) in SA. South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, Explanatory Memorandum, September 2013, pp.21-22.

<sup>614</sup> South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, February 2013, pp.10-11.

The areas where the South Australian Department of Treasury and Finance raised particular concerns about potential inconsistencies was in relation to an activity prohibited under state legislation that is not prohibited under the water charge rules - the Department cited non-discrimination as an example. Additionally, regulatory requirements may be more ‘onerous’ under the state legislation than the water charge rules - the Department cited the approval or determination of charges by an independent regulator as an example. South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, Explanatory Memorandum, September 2013, pp.21-22.

<sup>615</sup> South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, February 2013, pp.10-11.

<sup>616</sup> South Australian Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, Explanatory Memorandum, September 2013, pp.21-22.

regime under Part IIIA of the *Competition and Consumer Act 2010*”.<sup>617</sup> However, the South Australian Department of Treasury and Finance remains concerned about the requirements relating to the exemption process from the publication of a Schedule of Charges, where those charges arise under a third-party access regime (see section 5.4.3).

SunWater commented on transitional provisions for the non-discrimination provisions in relation to charges set under existing contracts (see section 5.3.1).

### *ACCC assessment*

#### **Non-discrimination provisions and charges pursuant to a Part IIIA access arrangement**

The ACCC maintains its position from the Draft Advice that there should be an exemption from the proposed non-discrimination rule (i.e. proposed rule 10) for charges pursuant to a Part IIIA access arrangement. The ACCC considers that the Part IIIA framework provides an additional protection for customers against certain customers receiving favourable treatment by way of lower charges or access to particular infrastructure services. This is because an infrastructure operator, whose infrastructure is subject to a Part IIIA access arrangement, is required to offer third party access in accordance with the access undertaking or via negotiations. Further, there is a formal dispute resolution process if the parties cannot reach an agreement.<sup>618</sup> The ACCC also notes that there are significant barriers to gaining access under a Part IIIA access regime. Therefore, the carve-out is unlikely to affect a significant number of infrastructure charges that fall within the scope of the water charge rules.

It should be clarified that, in making this advice, the ACCC does not consider that there is a rationale for exempting Part IIIA charges from proposed rule 10A. Proposed water charge rule 10A is intended to prohibit certain charges from being levied in relation to trade and termination, on the basis that such charges would directly and inappropriately distort customers’ termination and trade decisions (see section 5.3.2). The ACCC considers that, whereas the protections afforded by Part IIIA arrangements can be considered a sufficient alternative to those afforded by proposed rule 10, this is not the case in relation to proposed rule 10A. In particular, an operator levying infrastructure charges under a Part IIIA arrangement could seek to impose (for example) inappropriately high transactions costs on processing all terminations or trades, or other charges which would be inconsistent with rule 10A. The ACCC considers that customers are likely to have little recourse under Part IIIA mechanisms to challenge such charges, particularly if the operator characterises such charges as being generally applicable to all customers (in the relevant circumstances) as opposed to being charges which can be individually negotiated by different customers. Accordingly, the ACCC considers it appropriate that all infrastructure charges, including charges pursuant to a Part IIIA access arrangement, be subject to rule 10A.

Draft rule advice 5-X proposed that Part IIIA charges be “permitted despite the non-discrimination requirements of Part 3 of the WCIR”.<sup>619</sup> Under the current WCIR, the only rule in Part 3 is rule 10. In making this draft rule advice, the ACCC intended to provide an exemption from proposed Rule 10 only (consistent with the approach described above). This intent was given effect in the proposed rules accompanying the Draft Advice—i.e. an exemption for Part IIIA charges was provided in relation to draft rule 10 but not draft rule 10A. The South Australian Department of Treasury and Finance was the only stakeholder to comment on this issue in response to the Draft Advice, and it

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<sup>617</sup> South Australian Department of Treasury and Finance, Draft Advice Submission, March 2016, p.1.

<sup>618</sup> The dispute resolution processes will only typically apply where the dispute is not regarding a trivial matter or an unreasonable request from one of the parties to the negotiation.

<sup>619</sup> ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.161.

submitted that the draft amendments to the water charge rules presented with the Draft Advice would substantially address its concerns regarding inconsistency between the rules and the operation of a Part IIIA arrangement.<sup>620</sup>

Nevertheless, the ACCC acknowledges that some ambiguity may have arisen from the fact that proposed rule 10A is contained under the general heading of “non-discrimination”, both in the advice and in Part 3 of the proposed rules. The ACCC has made clear in (final) rule advice 5-X that the exemption should only apply in relation to rule 10.

### **Non-discrimination provisions and other commercially negotiated charges**

The ACCC maintains its position from the Draft Advice that there should be no carve-out from the non-discrimination provisions for charges that are commercially negotiated outside the Part IIIA framework. As set out in the Draft Advice, the ACCC considers that in the absence of the *requirement* for infrastructure operators to offer third-party access (e.g. to negotiate) or to fall back on a formal dispute resolution process, there are inadequate protections for customers against the unfavourable exercise of market power by infrastructure operators. Therefore, these charges should be subject to the proposed non-discrimination provisions in Part 3 of the water charge rules.

### **Disclosure of Part IIIA charges and other commercially negotiated charges**

Crucially, the ACCC’s support for a carve-out from the non-discrimination provisions for charges pursuant to Part IIIA of the CCA is subject to there being an adequate level of transparency about these charges. Therefore, the ACCC supports the requirements to disclose all infrastructure charges in Parts 2 and 4 of the water charge rules unless:

- there is evidence that disclosing the charge will cause a material financial loss or detriment (that is, an exemption is granted by the ACCC under rule 9) or
- the charge otherwise qualifies for an exemption under one of the proposed grounds in rule advice 5-J.<sup>621</sup>

In particular, the ACCC proposes that the disclosure (on a Schedule of Charges) of an infrastructure charge set out in a new commercial agreement between an infrastructure operator and customer (including any of the proposed details required when an exemption under rule 9 has been granted),<sup>622</sup> may be deferred until the operator next adopts a Schedule of Charges but within the next 12 months (see section 5.4.3 for further discussion about the exemptions from the publication requirements).

### **Accounting for Part IIIA charges and other commercially negotiated charges in price determinations**

The ACCC maintains its view from the Draft Advice that it is important for the revenue from commercially negotiated charges to be taken into consideration in price approvals / determinations and for this to be dealt with under the ACCC’s guidance material. Future ACCC reviews of guidance material for the water charge rules are discussed in section 4.4.

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<sup>620</sup> South Australian Department of Treasury and Finance, Draft Advice Submission, March 2016, p.1.

<sup>621</sup> Note: rule advice 5-J proposes grounds under which an operator can levy an infrastructure charge without contravening proposed rule 7 despite the charge not being listed on a Schedule of Charges at the time the infrastructure service is provided (rule advice 5-E, section 5.4.1 sets out the proposed amendments to rule 7). Under rule advice 5-J, depending on the infrastructure charge being levied, an operator is either exempt from ever listing the charge on the Schedule of Charges, or must include the charge on the next Schedule of Charges it adopts but within the next 12 months. See section 5.4.3 for further discussion about the intent and operation of rule advice 5-J.

<sup>622</sup> Rule advice 5-K proposes that an infrastructure operator should be required to provide the following information on a Schedule of Charges when the ACCC has granted an exemption under rule 9: (i) a notice of the exemption; (ii) the name of the customer or customers; (iii) the time period of the contract; and (iv) the infrastructure service to which the charge exempt from disclosure relates.

## 5.12 Regulation of MDBA or Border Rivers Commission charges

### *Background*

Much of the water service infrastructure in the River Murray System is operated by, and funded through, the Murray-Darling Basin Authority (MDBA), pursuant to the Murray-Darling Basin Agreement (MDB Agreement).

During the *Water Act 2007* (the Act) Review, several stakeholders expressed concerns that the activities of the MDBA were not subject to the same scrutiny as those of operators subject to price approvals / determinations under Part 6.<sup>623</sup>

While there is scope in the Act for the MDBA to impose infrastructure and / or planning and management charges to recover its costs, the MDBA does not currently impose such charges and is therefore not currently subject to the water charge rules.<sup>624</sup> Rather, the MDBA's infrastructure (and water planning and management (WPM)) costs are funded through contributions from the Commonwealth and Basin State governments (see Box 5.5). These contributions are recovered from water users by Basin States in different ways and to different extents.

Similarly, the Border Rivers Commission (BRC) is responsible for the operation of infrastructure servicing NSW and Queensland, and is jointly funded by those States, rather than through user charges levied by the BRC. As such, the BRC is also not currently subject to the water charge rules.

If the MDBA or BRC were to impose charges, they would likely be considered an 'infrastructure operator' and the charges (as they relate to infrastructure services) would be 'infrastructure charges'.

Similarly, if the MDBA or BRC were to determine a charge by or on behalf of government to recover the costs of WPM activities, these charges would likely meet the definition of 'planning and management' charges.

Should the MDBA or BRC elect to impose infrastructure charges and / or planning and management charges directly, those charges would likely be subject to the water charge rules. The specific regulatory requirements that would apply would be determined by the same criteria currently applied to other infrastructure operators under the proposed water charge rules.

### **Box 5.5: Legislative framework for MDBA and BRC funding**

#### **Murray-Darling Basin Authority**

The funding of the MDBA's joint activities is set out in the MDB Agreement.<sup>625</sup> The MDBA is also an independent statutory authority and receives an appropriation from the Commonwealth for agency costs and the Commonwealth's contribution to joint activities.

Subsection 212(1) of the *Water Act 2007* allows the MDBA to impose fees and charges in performing its functions. Under subsection 212(2) the MDBA cannot impose a fee specified in regulations<sup>626</sup> unless:

- the ACCC has advised that the fee is reasonable, and
- the MDBA has published the (ACCC) advice on its website.

In giving advice the ACCC must take into account (1) the Basin Water Charging Objectives and Principles, and (2) any additional matters specified in regulations.

<sup>623</sup> Note that the MDBA has recently published the results of an efficiency review of its River Murray Operations, available at: <http://www.mdba.gov.au/media-pubs/research-reports/reviewing-the-efficiency-of-river-murray-operations>, viewed June 2016.

<sup>624</sup> Section 212 of the *Water Act 2007* (Cth).

<sup>625</sup> See: Murray-Darling Basin Agreement, Schedule 1 to the *Water Act 2007* (Cth)

<sup>626</sup> As at June 2016, no such fees have been specified in the regulations.



In the event that the MDBA decided to levy an infrastructure charge or a planning and management charge, that charge would be subject to the water charge rules.

#### **Dumareseq-Barwon Border Rivers Commission**

The NSW-Queensland Border Rivers Agreement sets up the arrangements for the construction and management of the shared water infrastructure between the two states as well as the agreed water sharing agreements.

This agreement also set up the BRC as a separate statutory agency. The NSW and Queensland governments each have legislation that sets out the BRC functions, ownership of assets, management structure and allocation of costs of the BRC as well as some additional arrangements to deal with BRC functions relating to the implementation of the National Water Initiative (NWI). The costs of these functions are split equally between NSW and Queensland.

Although the BRC administers the Border Rivers scheme and SunWater provides operational services, the infrastructure assets are jointly owned by the NSW and Queensland Governments, and the BRC does not itself levy charges:

- On the NSW side, WaterNSW levies charges to recover a lump-sum amount it must pay the NSW Government to help recover the Government's contributions to the BRC. IPART regulates the charges WaterNSW can impose to recover their costs (including this revenue requirement for the BRC).
- On the Queensland side, the Government sets user charges to help fund the BRC infrastructure. The charges are set under Water Regulations 2002 (Queensland) and are based on indexation of charges initially set in about 2000.<sup>627</sup>

In its Draft Advice, the ACCC recognised the concerns raised by the MDBA in relation to Basin State contributions, regarding the significant variations in how MDBA contributions are paid for across Basin States. However, such matters are beyond the scope of the water charge rules, and remain the responsibility of Basin States and the Commonwealth.

It is clear that unless the MDBA or BRC imposed infrastructure charges or planning and management charges, their activities will remain beyond the scope of the water charge rules. However, the ACCC considered it was important that the MDBA and BRC should be captured by the rules, if either were to impose charges that meet the definition of 'infrastructure charge' or 'planning and management charge' in the future. The majority of stakeholders supported this outcome, and the ACCC also considers that this would be important for the achievement of the Basin Water Charging Objectives and Principles (BWCOP). The ACCC accordingly made draft rule advice to amend the application of Part 6 such that it would apply in the event that a person must obtain infrastructure services from the operator in relation to the storage or delivery of water to give effect to an arrangement for the sharing of water between more than one Basin State (draft rule advice 5-M).

The ACCC did not support the option raised by the MDBA for the ACCC to conduct efficiency reviews of the MDBA.<sup>628</sup> The ACCC noted that Basin States, in conjunction with the Commonwealth, being the parties who directly fund MDBA and BRC activities, are best-placed at present to progress reforms to improve transparency of MDBA and BRC costs and funding arrangements.

### *Stakeholder feedback*

<sup>627</sup> Queensland Department of Natural Resources and Mines, Submission to the ACCC water charge rules review, Draft Advice, March 2016, p.1.

<sup>628</sup> The ACCC / AER conduct several types of reviews in other sectors. These include:

- prudency reviews of capital expenditure programs in electricity and gas network resets
- monitoring reviews of airports and container ports in terms of price, costs and quality of service
- a review of Australia Post's reserved services and the degree to which these services might cross-subsidise other functions and
- annual reviews of some access regimes.

In each case, these reviews are either part of a regulated determination required in legislation, the product of a Ministerial direction under the *Competition and Consumer Act 2010* (CCA) to monitor, or are part of an access determination under the CCA.

A number of submissions to the Act Review raised concerns over the transparency of ‘government charges’ and expressed particular concern about cost recovery in relation to the MDBA’s River Murray Operations (RMO).<sup>629</sup> Many submissions to the ACCC’s Issues Paper raised similar concerns.<sup>630</sup>

The MDBA’s own submission to the ACCC’s Issues Paper discussed costs-sharing arrangements between the Commonwealth and the Basin States, which provide a significant proportion of MDBA funding. The MDBA detailed the funding arrangements of its joint activities of RMO and how these are approved by Basin States. The MDBA noted the arrangements by which some Basin states recover some of their RMO contributions through indirect water charges, commenting that:

*“These different arrangements appear to be at odds with the intent of the National Water Initiative in achieving a level playing field for water users. In this context, it may be useful for the ACCC to provide explicit guidance to the joint governments on a more consistent and transparent approach to meeting their RMO costs.”*<sup>631</sup>

In response to the Draft Advice, both WaterNSW and Goulburn-Murray Water (GMW) submitted that they continue to support greater regulation of the MDBA and / or BRC. WaterNSW considered that such regulation would “drive efficiencies and bring costs down for the benefit of customers”.<sup>632</sup> GMW identified some of the benefits that could be derived from economic regulation of the MDBA contributions including greater transparency, certainty, reduced price volatility (potentially), prudence and efficiency.<sup>633</sup>

The MDBA was similarly of the view that the RMO (which are managed by the MDBA) should be subject to the same level of regulation as other infrastructure operators under the water charge rules.<sup>634</sup> The MDBA called for the ACCC’s views on an independent review (by the ACCC for example) of the RMO. The MDBA considered that this review could provide either advice to the Commonwealth, NSW, Victorian and South Australian governments, or a regulatory decision, in relation to the efficient costs of the RMO. The MDBA considered that the outcome from this review would be greater transparency to water users about costs, and cost recovery approaches.

The MDBA’s position is based on its concerns about the level and uncertainty in state government contributions to the RMO for construction, operation and maintenance activities. The MDBA noted that there have been shortfalls in funding over a number of years, which has been managed by deferring asset renewal and maintenance expenditure. However, the MDBA considers that this increases the risk profile of assets and, if deferral occurs over an extended period of time, it could affect water users through higher costs or risks to public safety.

The Queensland Department of Natural Resources and Mines (DNRM) opposed the regulation of BRC-related charges by the ACCC. DNRM argued that the charges do not constitute a monopoly rent and the total volume of water managed in the BRC area is insignificant in the MDB context.

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<sup>629</sup> Murray Irrigation, Submission to the Independent Review of the Water Act 2007, July 2014, p.8; NSW Government, Submission to the Independent Review of the Water Act 2007, 2014, p.2; NSW Irrigators’ Council, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9; Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, pp.2-3; State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41.

The National Farmers’ Federation submitted its view that the recovery of MDBA costs is the “greatest area of inconsistency in water charging”. National Farmers’ Federation, Submission to the Independent Review of the Water Act 2007, 2014, pp.3, 9, 16.

<sup>630</sup> See ‘stakeholder feedback’ in section 5.12 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.163-165.

<sup>631</sup> Murray-Darling Basin Authority, Issues Paper Submission, August 2015, p.5.

<sup>632</sup> WaterNSW, Draft Advice Submission, March 2016, p.10.

<sup>633</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.5.

<sup>634</sup> In the Murray-Darling Basin Authority’s view, this was the intention of the Australian Government when the rules were made. Murray-Darling Basin Authority, Draft Advice Submission, March 2016, p.1.

## *ACCC assessment*

The ACCC maintains its Draft Advice that, if the MDBA or BRC begin to levy regulated infrastructure charges, they should be regulated through Part 6 by the ACCC. The ACCC considers that this would be important for the achievement of the BWCOP, and it is consistent with the views expressed in submissions. The proposed wording of rule 23 is intended to bring the MDBA / BRC within the ambit of Part 6 in the event that these bodies levy infrastructure charges in relation to the relevant infrastructure services. The Final Advice clarifies that Part 6 should only apply to the extent that an operator levies an infrastructure charge in relation to either:

- the storage or delivery of water that is necessary to give effect to the sharing of water between more than one Basin State; or
- a bulk water service in respect of water access rights;

*and* the operator is not required to have all its infrastructure charges approved or determined by a single State Agency under a law of the State in a way that is consistent with relevant aspects of Part 6. See section 5.6 for further detail.

The ACCC notes that Part 6 would *not* apply if all the infrastructure charges of an operator meeting this requirement were regulated by a *single* State Agency. However, if regulation by a single State Agency was not possible, it is appropriate for the ACCC to approve / determine these charges under Part 6 of the rules (see sections 5.6 and 5.10 in relation to the difficulties that can arise with multiple regulators).

In the absence of the MDBA and BRC directly imposing infrastructure charges (and therefore being subject to Part 6 regulation), Basin State governments, in conjunction with the Commonwealth, are best-placed to progress reforms to improve transparency of MDBA and BRC costs and funding arrangements, including any arrangements for direct charges.

In relation to the MDBA in particular, the ACCC's view is consistent with the Australian Government's response to the Independent Review of the Act, which noted that section 212 of the Act already makes it clear that the water charge rules would govern the charging of fees by the MDBA, should regulated water charges be introduced in the future.<sup>635</sup>

The ACCC also maintains its view in its Draft Advice that it is not its preferred approach for the ACCC to conduct efficiency reviews of the MDBA, as the water charge rules cannot provide for the scrutiny of costs in the absence of charges. Reviews of MDBA's costs and efficiency have been done and can be done further by private consultants.<sup>636</sup> The ACCC considers that, although these reviews were primarily aimed at improving transparency and funding decisions, they provide an information base for assessment of any future charges.

As discussed in section 5.6, the ACCC considers that charges levied by the Queensland Government DNRM to fund the BRC could potentially be regulated under Part 6 by virtue of the proposed rule 23 (the application of Part 6). However, as noted in section 5.6, the ACCC's preferred outcome is for Queensland to adjust its regulatory framework so it can regulate all water charges within the State under its own framework rather than have the ACCC regulate these charges under Part 6.

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<sup>635</sup> *Australian Government Response to Report of the Independent Review of the Water Act 2007*, December 2015, p.14.

<sup>636</sup> The most recent reviews of River Murray Operations (RMO) were completed in 2014 by Synergies Economic Consulting in conjunction with Cardno and Economic Insights, concluding that RMO's costs were generally efficient, except for a minor adjustment to a contingency allowance. High-level economic benchmarking performed by Economic Insights suggested RMO costs compared well to their peer group, though this should only be considered indicative and preliminary given the data constraints. See: Synergies Economic Consulting, *Building Blocks Model, River Murray Operations*, Final Report for Commonwealth Department of the Environment, November 2014, p.6.

The ACCC's Final Advice, as in its Draft Advice, does not involve any specific rule advice regarding the MDBA and BRC, other than that regarding the application of Part 6 in rule advice 5-M, as discussed in section 5.6.

### 5.13 Transparency of cost pass-throughs

#### Rule advice 5-Y

The rules should be amended to regulate the manner in which an infrastructure operator can recover amounts incurred by the operator through infrastructure charges or planning and management charges levied on the operator, through infrastructure charges that the operator imposes on its own customers.

#### *Definitions*

The rules should define **network operation charges** to mean infrastructure charges and planning and management charges levied on an infrastructure operator on the basis of:

- water access rights held or used by an infrastructure operator specifically for the purpose of meeting distribution losses; or
- infrastructure used by the operator to extract water from a watercourse or discharge water to a watercourse in the course of providing a service to their customers (for example: charges levied on off-take works used by the operator to extract water from or deliver water to a natural watercourse)

All other infrastructure charges and planning and management charges incurred by an infrastructure operator should be deemed **ancillary charges**.

#### *Rule for passing through the cost of network operation charges*

The rules should be amended so that:

- An operator may (but is not required to) levy a separate charge(s) to recover the amount of any network operation charges it incurs from its customer.
- If the operator chooses to levy separate charges to recover network operation charge, these charges must not recover in total more than the total amount of the network operation charges.

This rule should be a civil penalty provision.

*Note:* These rules should have the effect that an operator may choose the basis on which it levies such charges, including through charges per unit of water delivery / drainage right held (in which case these charges are able to be included in termination fees).

#### *Rule for passing through the cost of ancillary charges*

The rules should be amended so that:

- An operator must levy one or more separate charges on its customers to recover the costs of ancillary charges it incurs.
- These charges the operator levies must be *separate* from its other infrastructure charges, but can recover the cost of more than one 'ancillary charge' as long as, as far as practicable, those charges recover the same total amount as the ancillary charges.
- The operator must not levy these separate charge(s) on the basis of the number of units of water delivery right or water drainage right held.

*Note:* this has the effect that such charges cannot form part of the basis for calculation of the

maximum termination fee payable.

- An operator must as far as practicable levy charges on the same basis on which the operator incurred the ancillary charges, or otherwise must levy charges on a basis that is reasonably similar to the basis on which the operator incurred the ancillary charges.

Example: a volumetric charge incurred by an operator in relation to the water access entitlement held by the operator should be recovered through similar charges on customers' irrigation rights.

- Where an infrastructure operator incurs a charge as a direct result of the actions of a particular customer or customers, the infrastructure operator should levy its charge, as far as practicable, only on that customer or those customers.

Example: if an operator incurs a transaction charge determined by or on behalf of government (a type of planning and management charge) when facilitating a trade or transformation for a customer, the cost of the charge should be passed through directly to that customer. See also section 5.4.3.

This rule should be a civil penalty provision.

### *General rules for the pass-through of network operation charges and ancillary charges*

- The amounts of any charges levied by an infrastructure operator to recover the cost of network operation charges or ancillary charges should take into account any discounts received by the operator.
- An operator may continue to levy, in accordance with the current Schedule of Charges, any (separate) infrastructure charge(s) that recover network operation charges or ancillary charges for up to three months after the charge(s) it incurs (or the circumstances in which it incurs the charge) are changed.<sup>637</sup>

See also:

- *Rule advice 5-E* (section 5.4.1) for Schedule of Charges information requirements
- *Rule advice 5-I* (section 5.4.2) in relation to timing requirements.
- *Rule advice 5-J* (section 5.4.3) for an exemption from publication requirements for charges in relation to certain 'ancillary charges'.

This rule advice is implemented in rule 9A of the proposed Water Charge Rules.

### *Background*

Infrastructure operators often provide infrastructure services not only to irrigators or other water users, but also to other infrastructure operators. Generally this occurs in the context of one operator providing on-river infrastructure services to another operator, who in turn provides off-river infrastructure services to individual customers such as irrigators. Where this occurs, that second operator (the off-river infrastructure operator) incurs infrastructure charges payable to the on-river infrastructure operator. Also, infrastructure operators may incur planning and management charges payable either to another operator or to a Basin State water department or authority. The vast majority of these charges (by value) are levied against water access rights.

Where an infrastructure operator incurs an infrastructure charge or a planning and management charge in the course of their operations, they face a choice as to how to recover these costs from their own

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<sup>637</sup> That is, an operator *must* determine infrastructure charges to recover the cost of pass-through charges it incurs in accordance with rule 9A *within three months* of the effective date of any pass-through charges it incurs. The operator *is not taken to have breached rule 9A in the intervening period* if it continues to levy infrastructure charges according to a prior Schedule of Charges that was previously consistent with rule 9A.

customers. Some operators choose to “pass through” these charges to their customers, meaning that they levy a separate charge (or charges) to recover revenues to pay the charges they themselves incur, in addition to their general infrastructure charges which recover other costs. Other operators may roll the costs of infrastructure and planning and management charges they incur into their general cost base, and so recover the costs of these charges indirectly via the general infrastructure charges they levy on their customers.

The Water Charge (Infrastructure) Rules 2010 (WCIR) currently require irrigation infrastructure operators (IIOs) to separately show the components of their charges attributable to on-river infrastructure charges or to the holding of, or management of, water access entitlements (WAEs) by the operator.<sup>638</sup> This provides partial transparency by requiring IIOs to show the general extent to which revenues from the IIO’s own charges are used to pay on-river infrastructure charges or for the costs of holding or managing WAE. However, there is no clear requirement that infrastructure operators generally must pass through on-river infrastructure charges and planning and management charges that it incurs on behalf of its customers in a transparent and accountable manner. As such, IIOs and other infrastructure operators vary considerably in how the cost of these charges is passed through to their own customers.

In some instances, an operator specifies a single, separate fixed or variable ‘government fee’. In other instances, fixed on-river infrastructure charges and planning and management charges are presented separately whilst variable on-river infrastructure charges and planning and management charges are included in an infrastructure operator’s ‘usage’ charge.

Further complicating the way these charges are passed through to customers is the rebate some IIOs in NSW receive from WaterNSW.<sup>639</sup> This rebate is generally used in one of two ways:

- to pay for all or a portion of on-river infrastructure charges and / or planning and management charges imposed on conveyance water; or
- to pay for a portion of the total fixed on-river infrastructure charges incurred by the IIO.

Other infrastructure operators incorporate on-river infrastructure charges and planning and management charges into their tiered tariff structures for infrastructure charges.

In all of these cases, the charges payable to the operator are not easily comparable to the on-river infrastructure and planning and management charges that are actually incurred by the infrastructure operator. These charging practices reduce price transparency and make it difficult for customers to compare the charges *imposed on* an infrastructure operator with any infrastructure charges *imposed by* infrastructure operators to recover these costs. Similarly, such practices make it difficult for customers to distinguish the extent to which the charges they face represent the specific costs of operating their network. This is particularly relevant when a customer is considering the merits of transformation or termination.

The ACCC acknowledges that operators wish to maintain flexibility over their charging arrangements as much as possible. However, the ACCC’s view is that allowing an operator total discretion over how it passes through such charges works directly against achieving pricing transparency and can

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<sup>638</sup> Subrule 4(d) in the WCIR. This rule requirement only applies to irrigation infrastructure operators.

<sup>639</sup> NSW infrastructure operators receive an ‘irrigation corporation and district (ICD) rebate’ on on-river infrastructure charges levied by WaterNSW. The rebate is based on the assumption that WaterNSW avoids incurring certain costs because ICD customers are not their own customers.

result in an operator's charges distorting decisions on trade, transformation and termination.<sup>640</sup> The ACCC considers that where the cost of planning and management charges or infrastructure charges are passed through to customers by an infrastructure operator, charging arrangements must provide sufficient traceability to ensure that the customer ultimately paying the charges can clearly understand the origin of these charges and how they were determined.

Moreover, the ACCC is concerned about infrastructure operators specifying their own charges in a way that could potentially mislead customers about what the charges relate to. For example, the ACCC is aware of instances of operators combining several charges it is required to pay to different entities (for example, an infrastructure charge payable to an infrastructure operator for on-river infrastructure services, and a planning and management charge payable to a Basin State department) into a single 'government charge' payable by customers. In these instances, the operator is under no obligation to show customers how the amount payable under the 'government charge' relates to the actual charges incurred by the operator. Furthermore, the operator may impose its 'government charge' on a different basis, for example by applying a tiered tariff structure, which would result in these costs being recovered disproportionately from some customers. Such practices may distort customers' understanding of the relative costs of services they (or their operator on their behalf) are receiving, which may distort their decision-making.

The ACCC's Draft Advice proposed that the water charge rules should:

- regulate through new 'pass through rules' how certain infrastructure charges and planning and management charges should be passed through to customers, in a way that balances operators' discretion with customers' needs (draft rule advice 5-Y)
- require infrastructure operators who pass through those charges or collect charges on behalf of another entity, to publish certain information relating to pass through charges on their Schedule of Charges (draft rule advice 5-E(g))
- recognize and account for the relationship between the proposed pass through rules and calculation of termination fees (draft rule advice 5-Z).<sup>641</sup>

### *Stakeholder feedback*

A number of submissions to the *Water Act 2007* (the Act) Review raised concerns over pricing, cost recovery and transparency for 'government charges', both generally and specifically in relation to open and transparent determination of Murray-Darling Basin Authority (MDBA) River Murray Operations (RMO) charges.<sup>642</sup> Both the NSW Department of Primary Industries—Water (DPI Water, formerly NSW Office of Water) and WaterNSW (formerly State Water) recover a portion of the NSW Government's contributions to the MDBA through charges on water users. Other Basin States recover the cost of contributions to the MDBA through other, less direct methods.

Further, submissions to the Act Review argued that MDBA costs are not subject to the same level of scrutiny as the other costs of Part 6 operators, and recommended that the MDBA undergo an open and transparent price determination process to ensure Governments, and through them irrigators, are only paying prudent and efficient costs. The scrutiny of MDBA costs is considered further in section 5.12.

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<sup>640</sup> Where the ACCC and proposed water charge rules refer to a trade of a tradeable water right, this includes a transfer. This is consistent with the definition of 'trade' in the Basin Plan water trading rules (see rule 1.07(2)-(3)).

<sup>641</sup> For a full discussion of the ACCC's reasoning underpinning its rule advice in relation to pass through of charges, see 'discussion' in section 5.13 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.170-174.

<sup>642</sup> See 'stakeholder feedback' in section 5.13 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.168-170.

Submissions to the ACCC's Issues Paper from several infrastructure operators did not support additional regulation relating to how they pass-through charges and expressed a clear preference for maintaining their discretion as to how they choose to pass through charges.<sup>643</sup>

In contrast, other stakeholders raised concerns about the lack of transparency of "government charges" and planning and management charges. Moreover, several stakeholders showed confusion on what certain charges related to or considered pricing arrangements to be far more complicated than necessary, which is indicative of a lack of clear and transparent information about charging arrangements. For example, stakeholders attending the Deniliquin public forum questioned Murrumbidgee Irrigation Limited (MI) about its charging structure and MI discussed how it incorporates government charges into its declining block tariff tiered pricing structure.<sup>644</sup> Under this charging arrangement, customers are not able to clearly see how the 'government charges' are reflected in charges they pay. Irrigators at the Shepparton public forum raised concerns about the complexity and transparency of Goulburn-Murray Water's (GMW's) pricing system as a whole, and supported having a greater degree of pricing transparency in relation to GMW's charging structure.<sup>645</sup>

The ACCC received substantial feedback on the amendments related to the transparency of cost pass-throughs proposed in the Draft Advice.

Two stakeholders explicitly supported the proposed amendments. GMW submitted that it supports the ACCC's proposed amendments and the intent to improve pricing transparency.<sup>646</sup> The Commonwealth Environmental Water Holder (CEWH) stated that 'the schedule of charges should clearly identify whether tariffs include a pass-through charge component to fund state or Commonwealth activities such as the MDBA RMO, or the Dumaresq-Barwon Border Rivers Commission'.<sup>647</sup>

The Queensland Farmers' Federation (QFF) noted that in response to the proposed amendments it was concerned about maintaining a consistent state-wide regulatory process in Queensland (given that the proposed rules would only apply in the Queensland Murray-Darling Basin (MDB)).<sup>648</sup>

The National Irrigators' Council (NIC), Western Murray Irrigation (WMI) and Lower Murray Water (LMW) did not support the proposed amendments. The feedback from these stakeholders relates to three main areas, discussed in turn below:

- rationale for proposed pass-through rules
- application and regulatory burden
- penalty for non-compliance.

### **Rationale for proposed pass-through rules**

The NIC questioned the need for the proposed changes.<sup>649</sup> In particular, the NIC noted:

- the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) survey of irrigators, where 80 per cent of customers responded that their current Schedule of Charges clearly set out the difference between charges payable for access to the operator's infrastructure, and charges incurred by the operator and passed on to the customer.

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<sup>643</sup> Murrumbidgee Irrigation Limited, Issues Paper Submission, July 2015, p.7; Central Irrigation Trust, Issues Paper Submission, July 2015, p.7; Western Murray Irrigation, Issues Paper Submission, July 2015, p.6; National Irrigators' Council, Issues Paper Submission, July 2015, p.13; Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.10.

<sup>644</sup> ACCC public forum on the review of the water charge rules, Deniliquin, 3 August 2015.

<sup>645</sup> ACCC public forum on the review of the water charge rules, Shepparton, 3 August 2015.

<sup>646</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.5.

<sup>647</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.2.

<sup>648</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.5.

<sup>649</sup> National Irrigators' Council, Draft Advice Submission, March 2016, pp.12-13.



- feedback from irrigators on page 75 of the Draft Advice that charging regimes are too complex.

WMI commented generally that, in its view “[t]he only feedback received by the ACCC was against increased regulation” and therefore it was “absurd” for the ACCC to propose increased regulation “in the name of ‘competition’”.<sup>650</sup>

### **Application and regulatory burden**

The NIC and WMI submitted that the proposed amendments would increase the complexity of the Schedule of Charges and represent a “considerable undertaking”.<sup>651</sup> The NIC noted in particular that the separate charges proposed in the Draft Advice would make it “more complicated for a customer to determine their liability in respect of any particular period” and would increase regulatory burden.<sup>652</sup>

LMW and the NIC commented on the extent to which the water charge rules should specify the way in which operators design their tariff structures. LMW argued that the rules should not specify charging structures and that the structure “should reflect what the infrastructure operator and customer consider appropriate”.<sup>653</sup> LMW noted that the rules, as proposed, would be inconsistent with a current stakeholder direction and that the detail on their Schedule of Charges reflects consultation with customer committees. The NIC noted that the proposed amendments would “stifle pricing innovation” and reduce the ability for infrastructure operators to differentiate themselves based on their charges.<sup>654</sup>

The NIC laid out in detail its view on what each operator will need to do to comply with the requirements:

*The new rule 9A will require every operator of any size to:*

- (a) *first, review every charge that the operator pays to another operator or to a State Agency, and consider whether that charge is an “infrastructure charge” or a “planning and management charge”, or neither;*
- (b) *second, classify every infrastructure charge and planning and management charge as either a “directly attributable charge”, “distribution loss shared charge” or “shared charge”, all of which are newly-defined terms in rule 9A, for a total of up to six categories of charge;*
- (c) *third, restructure its charging arrangements so that each of the six categories of charge is passed through to customers in the way mandated by rule 9A, which, in some cases, may involve amending the operator’s contract with its customers and going through the applicable contractual processes for doing so; and*
- (d) *finally, changing its schedule of charges to reflect the updated charging structure and comply with the regulatory processes for changing the schedule of charges.*<sup>655</sup>

Both the NIC and WMI submitted that the proposed amendments are “confusing, ambiguous and difficult to apply in practice”.<sup>656</sup> The NIC furnished some examples of where it considers this to be the case:

- In relation to the definition of ‘directly attributable charge’, the NIC questioned how an infrastructure operator can incur a charge “as a direct consequence of a customer holding an irrigation right” because:

<sup>650</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>651</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.12; Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>652</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.13.

<sup>653</sup> Lower Murray Water, Draft Advice Submission, March 2016, pp.4-5.

<sup>654</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.13.

<sup>655</sup> *ibid*, p.12.

<sup>656</sup> *ibid*, p.13; Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

- the charge is levied on the operator’s water access right and the operator would incur the charge regardless of whether a customer holds an irrigation right.
- there are many irrigation rights and there is often no relationship between an irrigation right and a particular category of water access right held by the operator.
- In relation to the definition of a ‘distribution loss shared charge’, the NIC noted that the definition depends on the operator being able to prove that water was actually lost during distribution whereas actual losses vary significantly as circumstances change during the water year. The NIC added that the proposed amendments would complicate periodic invoicing.

On the application of the proposed amendments, WMI noted that some costs (e.g. electricity) are unknown until they are incurred, which is also a problem that is unaddressed in other sections of the water charge rules (although WMI did not indicate which other sections this concern related to).<sup>657</sup>

Both LMW and NIC questioned the need to separately list ‘distribution loss shared charges’. NIC stated that there was “no convincing explanation” of why this should be the case.<sup>658</sup> LMW argued that the proposed rule amendment (subrule 9A(3)) is impractical and does not provide benefits to customers.<sup>659</sup> LMW added that it already tells its customers about cost pass-throughs where LMW considers this is appropriate and meaningful. LMW considered that it is unwarranted to detail “many varied small charge tariffs” and there is no benefit to doing so for “small inconsequential infrastructure charge[s]” such as ‘distribution loss shared charges’. LMW noted that distribution losses for Red Cliffs represented less than one per cent (approximately \$3.80 per delivery share) of a customer’s bill.

### **Penalty for non-compliance**

The NIC and LMW commented on the proposed penalties for non-compliance with the proposed pass-through rules, which were two-fold:

- As per draft rule advice 5-Y, a failure to comply with the pass through rules could attract a civil penalty; and
- as per draft rule advice 5-Z, an operator who did not comply with the pass-through rules would be required to calculate termination fees using a termination fee multiple of 1x instead of 10x.

The NIC labelled the civil penalties as “excessive”,<sup>660</sup> and that the penalty that caps the termination fee at a multiple of one is “extreme” and “bears no relationship to the nature or gravity of non-compliance, particularly given the potential complexity of achieving compliance”. The NIC added that it would affect “blameless” customers who do not terminate because they will incur increased fixed costs.

LMW similarly argued that the penalty relating to the termination fee is potentially a “major issue” for LMW, reiterating its views regarding the rationale for the requirement to separately list ‘distribution loss shared charges’.<sup>661</sup> In particular, LMW questioned why the charge needed to be listed separately to be included in the termination fee because:

- when a customer terminates all of their water delivery rights, LMW still incurs the same distribution losses until or unless it changes its distribution system

<sup>657</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.2.

<sup>658</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.13.

<sup>659</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.6.

<sup>660</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.13.

<sup>661</sup> Lower Murray Water, Draft Advice Submission, March 2016, p.6.

- when a customer does not terminate all of their water delivery rights, LMW is still delivering water.

### *ACCC assessment*

#### **Rationale for proposed pass-through rules**

The proposals in the Draft Advice sought to address stakeholder concerns about the transparency of ‘government charges’ or other regulated charges incurred by off-river infrastructure operators and passed onto their customers. In particular, the proposals recognised that a failure to pass through the cost of these charges on the same basis as they are incurred by an infrastructure operator (or as close as possible) could lead to various distortions on customer decision-making. Examples of such distortions are:

- If charges are passed through onto customers’ water delivery rights, customers who transform could face the possibility of paying these charges twice (once via the water delivery right they hold against the off-river infrastructure operator, and again directly to the on-river operator or Basin State via their transformed WAE).
- If charges are passed through as fixed charges levied on a customer’s water delivery right, a customer (and the ACCC) could not be certain that they weren’t included in the basis for calculating termination fees (as it would be difficult to determine whether a requirement to ‘net out’ such charges from fixed water delivery right charges was complied with).
- If charges are passed through by including them together with charges recovering the operator’s own infrastructure costs (i.e. no charges are separated out), customers do not face clear price signals about on-river versus off-river infrastructure services, and there is the potential that customers may be misled about the reason for changes in charge levels.
- If the operator aggregates charges levied by different entities together (e.g. planning and management charges levied by a Basin State are aggregated with on-river infrastructure charges) and passes them through to customers without explaining how this is done, customers will not face accurate price signals about the costs of various services and planning and management (WPM) activities.
- If the operator does specify separate charges (e.g. ‘government charges’), but the amounts of these charges are higher than those incurred by the operator, there is the potential for customers to be misled about the relative costs of different infrastructure services and WPM activities.
- In some cases, charges incurred by an operator are directly attributable to a particular customer, but if an off-river infrastructure operator chooses to ‘socialise’ these charges across all customers rather than passing them through to the relevant customer, then price signals will be muted and there may be material cross-subsidies between customers.

An analysis of operators’ 2015-16 Schedules of Charges indicates that many operators currently pass through charges in a way that gives rise to the possibility of one or more of the negative impacts described above. However, there are several operators who clearly separate out both planning and management charges and on-river infrastructure charges (both fixed and variable) from their own charges—it is expected that these operators would already comply with the proposed pass-through rules.<sup>662</sup> Table 5.9 provides a summary.

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<sup>662</sup> Note, however, that since the proposed pass through rule will also apply to non-volumetric charges incurred by operators, there may be instances where operators are currently incurring non-volumetric charges that are not *network operation charges* which the pass through rules will require an operator to separate out. The ACCC is not aware of any instances where this will be the case, but will work with operators and provide guidance to assist operators to comply if the rule is amended.

**Table 5.9: Off-river operators: current methodologies for passing through fixed and variable volumetric on-river infrastructure charges (ICs) and planning and management charges**

Operator	Fixed on-river ICs / planning & management charges separated out from operator's own charges?	Variable on-river ICs / planning & management charges separated out from operator's own charges?	Schedule of charges distinguishes between charges levied to recover on-river ICs versus planning & management charges? <sup>663</sup>
<i>Off-river IO, member owned, &lt;10 GL<sup>†</sup></i>			
Bringan Irrigation Trust	x	x	✓
Bullatale	✓	✓	x
Bungunyah-Koraleigh Irrigation Trust	✓	✓	x
Glenview Irrigation Trust	x	x	✓
Goodnight Irrigation Trust	x	x	x**
Pomona Water	✓	✓	x
West Cadell Irrigation Trust	x	x	x*
<i>Off-river IO, member owned, 10 GL – 125 GL</i>			
Buddah Lake Irrigators' Association	✓	✓	x
Eagle Creek Pumping Syndicate	x	x	x**
Hay Private Irrigation District	x	✓	✓ (for fixed charges only)
Jemalong Irrigation Limited	x	x	x**
Marthaguy Irrigation Scheme	x	✓	✓ (for fixed charges only)
Moira Private Irrigation District	✓	x	x***
Narromine Irrigation Board of Management	x	x	✓***664
Renmark Irrigation Trust	x	n/a	✓
Tenandra Irrigation Scheme	✓	✓	x
Trangie-Nevertire Irrigation Scheme	x	x	x*
West Corugan Private Irrigation District	x	✓	x***
Western Murray Irrigation Limited	x	x	x*665

<sup>663</sup> Note: the proposed pass through rules will allow operators to aggregate charges levied to recover *ancillary charges*, as long as the operator provides information on its methodology for passing through charges. As such, separately listing charges levied to recover planning and management charges and those levied to recover on-river infrastructure charges (where the per ML amounts of these charges are the same as those incurred by the operator) would be compliant with the pass-through rules, but is not the only way an operator could comply.

<sup>664</sup> Narromine Irrigation Board of Management (NIBM) specifies separately a 'State Water Corporation Usage Charge' (reflecting the variable on-river infrastructure charge levied by WaterNSW) and a 'NSW Water Usage Charge' (reflecting the variable planning and management charge levied by DPI Water); however the per ML amounts of these charges do not reflect the amounts incurred by NIBM. Rather, the amounts are higher, which NIBM states is to 'include estimated 20% losses'.

<sup>665</sup> WMI's fixed 'government charge' – general security and variable usage are the sum of the relevant WaterNSW and DPI Water charges for general security users, but the fixed 'government charge' – for "high security" and "S&G" [stock and garden] is less than the sum of the corresponding WaterNSW and DPI Water charges.

<i>Off-river IO, member owned, &gt; 125 GL</i>			
Central Irrigation Trust	x	n/a	✓
Coleambally Irrigation Co-Operative Limited (CICL)	x	x	x*
Murray Irrigation Limited	x	x	x <sup>666</sup>
Murrumbidgee Irrigation	x	x	x <sup>*** 667</sup>
<i>On-river &amp; off-river IO, non-member owned</i>			
SunWater	x	x	✓
Lower Murray Water	x	x	✓
Goulburn Murray Water	x	x	✓
WaterNSW	n/a	n/a	n/a

Notes: † 2014-15 Schedule of Charges used for analysis.

\* Combined 'government' charge *equals* the sum of corresponding WaterNSW on-river infrastructure charges and DPI Water's planning and management charges (on a per ML basis).

\*\* Combined 'government' charge is *less* than the sum of corresponding WaterNSW and NSW DPI charges (on a per ML basis), likely reflecting WaterNSW ICD rebate.

\*\*\* Combined 'government' charge is *greater* than the sum of corresponding WaterNSW and DPI Water charges (on a per ML basis).

Given this assessment, the ACCC considers that the rationales for the proposed pass-through rules—to improve pricing transparency and to reduce the scope for passing through charges in a distortionary manner—remain sound.

At the same time, the Draft Advice acknowledged that some pass-through charges incurred by an operator related to water held / used by the operator for distributions losses, and that such charges *should* be able to be reflected in the calculation of termination fees (whereas other pass-through charges should not). Therefore, the Draft Advice proposed detailed rules about how the cost of certain categories of charges (directly attributable charges, distribution loss shared charges, other shared charges) must be recovered.

Although member-owned infrastructure operators and LMW have stated that they do not believe customers value the transparency that the proposed pass-through rules would produce, the ACCC considers that evidence from other stakeholders suggests otherwise:

- A number of submissions to the Act Review, including submissions from the NIC and Murray Irrigation Limited (MIL), raised concerns over pricing, cost recovery and transparency for 'government charges', both generally and specifically in relation to MDBA's RMO.<sup>668</sup>

<sup>666</sup> MIL levies a highly tiered combined 'government charge' and offers no information on how these charges relate to on-river and planning and management charges incurred by MIL.

<sup>667</sup> MI's fixed 'government charges' equal the sum of the corresponding WaterNSW and DPI Water charges, rounded up to the nearest 10 cents. MI's variable 'government charges' are substantially higher than the sum of the corresponding WaterNSW and DPI Water charges.

<sup>668</sup> Murray Valley Private Diverters submitted that it was concerned that "[w]ater users are not receiving transparent information on government charges, particularly in relation to the MDBA and other Federal actions arising from the [Act]". Murray Valley Private Diverters, Submission to the Independent Review of the Water Act 2007, June 2014, p.4. Southern Riverina Irrigators, Submission to the Independent Review of the Water Act 2007, 2014, pp.2-3; NSW Irrigators' Council, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9; Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, July 2014, p.8; National Farmers' Federation, Submission to the Independent Review of the Water Act 2007, 2014, pp.3,9,16; NSW Government, Submission to the Independent Review of the Water Act 2007, June 2014, p.2; State Water, Submission to the Independent Review of the Water Act 2007, July 2014, pp.39-41.

- Irrigators attending the ACCC’s public forums expressed confusion over what their operator’s charges related to, and questioned how ‘government’ charges were incorporated into tariffs<sup>669</sup>
- GMW’s and the CEWH’s submission to the Draft Advice explicitly supported the draft rule advice.
- Results from the ABARES irrigator survey were that:
  - on average, an estimated 44 per cent of irrigators across the MDB believe that “[c]harges that are incurred by the operator and passed on to customers (e.g. bulk water charges, government planning and management charges)” are “important to show on a schedule of charges”; and
  - while on average across the MDB 82 per cent of irrigators considered that their operator’s Schedule of Charges “clearly set out the difference between charges payable for access to [their] operator’s infrastructure and charges incurred by [their] operator and passed onto [the irrigator]”, this proportion varied significantly across MDB regions. Also, this question only considered whether operators broadly distinguish between their own charges and other charges, and gives no indication of whether (i) operators distinguish between different types of charges they pass through (e.g. planning and management charges versus infrastructure charges), or the degree to which the amounts of charges levied by the operator actually reflect the charges they themselves incur.
- Results from the University of Adelaide irrigator survey for irrigators in the southern MDB were that:
  - an estimated 90% of irrigators believe it is very (61%) or somewhat (29%) important for an operator to separate out bulk water charges for access and use of their own network.
  - an estimated 79% of irrigators believe it is very (48%) or somewhat (31%) important that water charges incurred by an operator on behalf of one of its customers are passed on directly to that customer, rather than recovered from all customers.

As such, the ACCC’s advice is that the rules should be amended to improve transparency and reduce distortions in relation to pass-through of charges incurred by infrastructure operators. However, the ACCC also considers that the policy intent can be achieved via simpler, less prescriptive rules than those proposed in the Draft Advice.

The ACCC accepts stakeholders concerns that the level of detail in the proposed rules could have the potential to introduce significant compliance costs for some operators. Also, the ACCC accepts that, due to the variety of arrangements operators have for specifying irrigation rights, it might not always be clear exactly how a particular charge would be required to be passed through. A key example of this issue, identified by the NIC, is the case where an operator holds a portfolio of WAEs but specifies irrigation rights (IR) in such a way that there is not a clear one-to-one relationship between WAE held and IR held by customers. For example, a hypothetical operator could hold a small volume of high security WAE and a larger volume of general security WAE, but then issue three ‘priority classes’ of IR to customers (e.g. high, medium and low). In this case, there is no single ‘best’ method for how an operator should pass on the charges it incurs relating to its high security WAE versus its general security WAE. The appropriate attribution of these costs would depend on how the operator uses its entitlements to service irrigation right holders.

In recognition of this issue and operators’ feedback about the regulatory burden of the pass-through rules proposed in the Draft Advice, the ACCC has modified its advice. The ACCC proposes that

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<sup>669</sup> For details, see stakeholder feedback in section 5.13 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015.

rather than attempting to classify each charge an operator incurs and mandating how it may be recovered, the broad policy intent can be achieved by:

- permitting operators full discretion as to how they recover ‘network operation charges’ (see below);
- a general prohibition on passing through ‘ancillary charges’ (i.e. infrastructure charges and planning and management charges incurred by the operator, other than ‘network operation charges’) onto customers’ water delivery rights and a requirement that charges levied by the operator to recover ‘ancillary charges’ be separated from charges levied to recover costs of operating the operator’s infrastructure;
- a general requirement that operators recover these costs on the same basis as they are incurred (or otherwise on a reasonably similar basis);
- a requirement that an operator include information on its Schedule of Charges detailing its methodology for recovering the cost of infrastructure charges and planning and management charges that it incurs (see also section 5.4.1).

These elements are discussed in turn below.

### **Recovery of ‘network operation charges’**

As acknowledged in its Draft Advice, some charges incurred by infrastructure operators should properly be viewed as costs associated with operating the infrastructure operator’s network. The Draft Advice proposed a category of charges; ‘distribution loss shared charges’ being shared charges (i.e. not directly attributable to particular customers) incurred by the operator relating to water under a water access right that is lost during distribution of water to customers.

In its Draft Advice, the ACCC proposed that the only requirement the rules should place on infrastructure charges levied to recover distribution loss shared charges was that they be separate from the operator’s other charges.

The ACCC acknowledges that there may be other types of infrastructure charges and / or planning and management charges incurred by the operator that are associated with the operation of its network, in particular charges levied in relation to the operator’s off-take or discharge works.

These charges are incurred by operators regardless of whether their customers choose to trade, transform or terminate. As such, these charges should be able to form part of the operator’s general cost base, and should be reflected in the calculation of termination fees.

Therefore, the ACCC’s Final Advice proposes that such charges, together with those relating to distribution losses, be categorised as ‘network operation charges’. Operators should be free to recover the cost of these charges however they wish, including through charges per unit of water delivery / drainage right held—which would have the effect that these charges are able to be included in the termination fee base. The only requirement on infrastructure operators in relation to network operation charges is that any separate charges that the operator levies must not recover more than the total amount of the network operation charges.

### **Recovery of charges other than ‘network operation charges’**

The ACCC advises that charges incurred by an operator that do not meet the definition of ‘network operation charges’ should be considered ‘ancillary charges’. This incorporates the categories of ‘shared charges’ and ‘directly attributable charges’ used in the Draft Advice.

Examples of such ‘ancillary charges’ are:

- charges incurred by the operator in relation to water access rights held by the operator for the purpose of allocating water to irrigation right holders<sup>670</sup>
- trade-related charges incurred by the operator on behalf of a customer trading a water access right.<sup>671</sup>

The rules should require an operator to recover the cost of ancillary charges by levying one or more separate charges and prohibit an operator from levying such a charge on customers’ water delivery rights (or water drainage rights). This would preclude the operator’s charges from forming part of the basis for calculating termination fees. It also precludes the possibility of transformed customers paying twice in relation to these charges (once via water delivery / drainage right charges and again via direct payment of charges levied on the customers’ transformed WAE). The rules should also require an operator, as far as practicable, to recover the same total amount as the ancillary charges.

The ACCC further advises that when passing through the cost of ancillary charges, an operator should seek to preserve as closely as possible the original basis of the ancillary charge. Some examples are provided below.

Example: an operator holds a general security WAE in order to allocate water to holders of general security irrigation right (IR):

- If the operator incurs fixed on-river infrastructure charges in relation to this WAE, levied per ML of that WAE, it should pass this on to all IR holders in the form of a charge levied per ML of IR held by each customer. The per ML amount of the charge should reflect the per ML amount of the original charge.
- If the operator incurs variable on-river infrastructure charges in relation to this WAE, levied per ML of water allocation from that WAE that is delivered to the operator’s offtake point, it should pass this charge on to IR holders in the form of a charge levied per ML of water used by each IR holders. The per ML amount of the charge should reflect the per ML amount of the original charge.
- If an operator incurs a transaction charge in the course of facilitating trade on behalf of a customer, it should be recovered from that customer (see next section).
- If an operator has access to carryover, and incurs carryover charges, it should recover the cost of these carryover charges from irrigation right holders who participate in carryover arrangements.<sup>672</sup>

The guiding principle for the recovery of ‘ancillary charges’ from customers should be that:

- *if possible*, the charge levied by the operator should be levied on the same basis as the charge incurred by the operator;
- *or otherwise*, on as similar a basis as possible.

In its Draft Advice, the ACCC restricted the application of the rule to regulating pass through of only those charges incurred by the operator that were levied on the basis of water access rights. This

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<sup>670</sup> For example, on-river fixed and variable infrastructure charges levied by an on-river infrastructure operator; planning and management charges levied by a Basin State Department or water authority, where such charges are levied on water access rights held by the operator for the purpose of allocating water to irrigation right holders.

<sup>671</sup> For example, where an irrigation right holder wishes to conduct an external allocation trade, an operator might incur a trade application charge as this trade is facilitated by the operator trading water from its water allocation account to that of the external buyer.

<sup>672</sup> Note, the rules relating to termination fees preclude an operator from imposing a termination fee at all if a charge for the storage of water is included in the charges in respect of the right of access (which would include a charge levied on a water delivery right or water drainage right).



restricted application was necessary due to the prescriptive nature of the rules proposed in the Draft Advice.

The ACCC considers that, given the simpler rule requirements now proposed, the rules should relate to *all* planning and management charges and infrastructure charges an operator incurs. Noting that the majority of charges incurred by operators are currently levied on the basis of water access rights, the ACCC does not anticipate that this broadening of coverage will significantly increase the regulatory burden. However, it allows for a more comprehensive approach, which will be robust to future developments in the water rights framework.<sup>673</sup> This broadening of coverage still does not capture charges incurred by an operator which are not infrastructure charges or planning and management charges. This is relevant to WMI's concern that this rule would apply to electricity charges incurred by operators; since electricity charges are not planning and management charge or infrastructure charges, the proposed rules would not regulate how an operator passes through such charges.

### **Transaction charges**

The ACCC notes that 'ancillary charges' incurred by an infrastructure operator may include a 'transaction charge', incurred on behalf of a customer in relation to trade or other dealings undertaken on their behalf. These charges are only incurred (by the operator) in relation to a specific transaction such as:

- trade of a water access right (or registration of a trade)
- amalgamation / division / cancelling / issuing of a water access right
- association of a water access right.<sup>674</sup>

A key attribute of such transaction charges is that the operator only incurs them from time to time, and may not be able to reasonably foresee when it might incur a particular charge. This is in contrast to other infrastructure charges or planning and management charges incurred by the operator, which tend to be ongoing, such as:

- planning and management charges levied on the volume of water access right(s) held or used by the operator
- infrastructure charges levied in respect of infrastructure services received by the operator or its customers, such as the storage, delivery or drainage of water, or in relation to the taking or water.

As an example of a 'transaction charge', consider a customer of an off-river infrastructure operator, that holds an irrigation right. This customer would generally require the operator to facilitate a 'temporary trade' into or out of the operator's irrigation network. This is because the water allocation is either held by the operator (for trades out), or will be held by the operator (for trades in) rather than the customer. In such cases, the operator is likely to incur a trade application charge levied by a trade approval authority.

The ACCC considers it is reasonable and desirable for the operator to recover the cost of such a transaction charge directly from the customer responsible for it being incurred. Where an infrastructure operator passes through a transaction charge to the customer without modification, the ACCC considers the proposed pass-through rule will have been satisfied.

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<sup>673</sup> For example, should rights, which are currently bundled in with water access rights be individually specified in future, charges levied on the basis of those unbundled rights would still be captured. Potential examples include rights to storage (such as capacity shares) and on-river water delivery rights.

<sup>674</sup> Note: in some cases associations with location-related rights such as works approvals or use approvals are made or changed during the process of trading or transferring a water access right, but this may not always be the case.

However, the ACCC also recognises that there may be a large number of different transaction charges that could be incurred by an infrastructure operator on behalf of their customers, depending upon the trade / dealing decisions of their customers. The proposed pass through rules would require an infrastructure operator to pass on the cost of each of these different transaction charges directly to the customer(s) responsible for them being incurred, through a corresponding infrastructure charge. Section 5.4.3 discusses the proposed exemption for infrastructure operators from the obligation include details of infrastructure charges passing through the cost of a *transaction charge* in their Schedule of Charges. Importantly, the proposed exemption set out in section 5.4.3 would not generally extend to any administration fee or charge that the infrastructure operator itself determines.

### **Information to be provided on methodology for passing through charges**

The ACCC advises that, in lieu of prescriptive requirements detailing exactly how an operator must pass through charges it incurs, an operator should notify customers of its general methodology for such pass throughs. In particular, an operator should describe its methodology using an “in-out” approach, such that a customer has sufficient information to ascertain:

- what infrastructure charges and / or planning and management charges an operator incurs (including the amounts of such charges and the bases on which they are levied).
- what infrastructure charges an operator levies to recover the costs of the charges it incurs.
- what the relationship is between the charges incurred by, and levied by, the operator.

The ACCC considers that this information forms a crucial component of achieving pricing transparency for the pass-through of charges. This statement should be included on the operator’s Schedule of Charges. For further information (including the rule advice that gives effect to this intent) see also section 5.4.1, (rule advice 5-E).

### **Timing requirements**

The ACCC recognises that operators have little control over the timing of when they incur infrastructure charges and / or planning and management charges levied by other entities. As such, the ACCC has provided appropriate flexibility in its proposed amendments to the Schedule of Charge rules. These matters are discussed in section 5.4.2 (rule advice 5-I).

As a complement to the flexibility provided in the Schedule of Charge requirements, the ACCC also advises that an operator should be allowed a ‘grace period’ for compliance with the proposed pass-through rule. This will enable the operator to be better able to align when it updates charges levied in accordance with this rule with more general changes to its Schedule of Charges.

The ACCC’s advice is that an operator *may* (but is not required to) defer updating any infrastructure charge(s) that it levies to recover the cost of *network operation charges* or *ancillary charges* (i.e. charges levied under proposed rule 9A) for up to three months after the charge(s) it incurs are changed. An operator will not be taken to have breached the proposed pass-through rule if it simply continues to levy charges according to its current Schedule of Charges in the interim (assuming that the current Schedule is consistent with the rules).

### **Penalty for non-compliance**

The ACCC acknowledges stakeholder concerns about its draft rule advice that sought to connect an operator’s ability to levy termination fees using a 10x multiple with compliance with the proposed pass-through rule. The intent of this draft proposal was to recognise that inappropriate inflation of termination fees is one of the key consequences of a failure to appropriately separate out charges that

do not relate to the costs of maintaining the operator's network when calculating termination fees. However, upon consideration, the ACCC considers that this approach may be overly onerous given that the pass-through rule would be a civil penalty provision in its own right (see also section 6.2.1). Accordingly, the ACCC has removed draft rule advice 5-Z (and proposed subrule 72(2)(a)(ii) which gave effect to the draft rule advice—see also section 6.2.1).

The ACCC maintains its advice that non-compliance with the proposed pass-through rules should attract a civil penalty provision. In response to the NIC's view that the amount of the civil penalty is "excessive", the ACCC notes that the amount is set by the Act and is not the only enforcement response available to the ACCC (see also section 4.5 regarding the ACCC's approach to compliance and enforcement, and the ACCC's response to similar NIC concerns detailed in section 5.3.1).

## 6 Water Charge (Termination Fees) Rules 2009

The current Water Charge (Termination Fees) Rules 2009 (WCTFR) provide for two different types of *termination fee*:

- a general termination fee—the WCTFR caps the maximum applicable termination fee by applying a termination fee multiple (currently 10x) to the ‘total network access charge’ (TNAC) (referred to throughout this chapter and the proposed water charge rules as a *general termination fee*);
- an additional termination fee—the WCTFR also allow operators to impose a fee in addition to any general termination fee where this is set out under a contract between an operator and the terminating customer, and the ACCC has approved the fee (referred to throughout this chapter and the proposed water charge rules as an *additional termination fee*).

Section 6.1 considers which infrastructure operators should be subject to the application of the WCTFR.

Section 6.2 relates to the method of calculating the maximum *general termination fee*.

Section 6.3 relates to the circumstances where termination fees (both general termination fees and additional termination fees) can be levied.

Section 6.4 relates to how the rules regulate *additional termination fees*.

Section 6.5 provides a summary drawing together the ACCC’s advice in relation to termination fees.

### 6.1 Application of the WCTFR

#### Rule advice 6-A

The rules should be amended to regulate termination fees levied by all infrastructure operators, not only irrigation infrastructure operators.

This rule advice is implemented in Part 10 of the proposed Water Charge Rules.

#### Background

‘Termination fees’ are fees payable to an infrastructure operator by an irrigator who terminates or surrenders the whole or part of a right of access to the operator’s water service infrastructure. The Water Charge (Termination Fees) Rules 2009 (WCTFR) regulate the circumstances in which irrigation infrastructure operators (IIOs) can charge termination fees and cap the maximum termination fee payable. The WCTFR do not *require* the imposition of a termination fee, and currently only apply to termination fees imposed by IIOs.

The WCTFR acknowledge that there are several sometimes competing interests to account for when considering issues relating to termination fees, such as those of the operator, terminating irrigators, prospective new customers to the operator’s network, and remaining or other customers. If termination fees are set too high, irrigators would remain connected to the network even if it was otherwise more efficient for them to trade water and terminate access.

On the other hand, prohibiting termination fees altogether or setting maximum termination fees too low risks leaving IIOs with insufficient revenue to provide services to remaining customers, undermining investment in water infrastructure. IIOs have made significant investments in their networks and face ongoing costs to maintain the infrastructure, many of which costs are fixed and are incurred by the operator whether or not an irrigator chooses to terminate access. Allowing operators to impose termination fees permits them to recover these unavoidable fixed costs.

In forming its Draft Advice, the ACCC had regard to the specific context of considerable change that has occurred across the Murray-Darling Basin (MDB) in recent years. In particular, the ACCC noted that there has been a period of significant structural adjustment across the MDB, often involving network rationalisation. These changes have affected many operators, irrigators and other water users, many of whom have faced significant costs and challenges to adapt.

One important aspect of these developments is that an operator which currently meets the definition of ‘IIO’ as defined in the *Water Act 2007* (the Act)<sup>675</sup> may cease to meet that definition at some time in the future. This could occur, for example, for an operator who provides a significant level of services to customers other than irrigators, such as urban and environmental water users. Further, there may be operators who may not meet the definition of ‘IIO’ but who nevertheless may be entitled (now or in the future) to charge a termination fee.<sup>676</sup> In view of this issue, the ACCC’s Draft Advice argued that the rules should regulate termination fees of by *all* infrastructure operators who are entitled to charge them, rather than the subset of infrastructure operators who meet the definition of ‘IIO’ (draft rule advice 6-A). This will ensure that customers (both the terminating customer and the remaining customers) of all operators are afforded the same protections when terminations occur, and will help ensure a ‘level playing field’ between different types of operators.

The remainder of this section discusses stakeholder feedback on draft rule advice 6-A and other matters relating to the general operation of the water charge rules in relation to termination fees. Specific aspects of the rules are considered in later sections, as follows: the method of calculating termination fees (section 6.2), circumstances when a termination fee may be imposed (section 6.3), and approval of additional termination fees (section 6.4).

### *Stakeholder feedback*

Submissions to the ACCC’s Issues Paper were generally supportive of the provisions currently forming the WCTFR.<sup>677</sup> Three stakeholders noted that there does not appear to be evidence that the current WCTFR are impeding the operation of markets.<sup>678</sup> Also, several submissions noted the

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<sup>675</sup> Subsection 7(4) of the Act states:

- (4) If water service infrastructure is operated for the purposes of delivering water for the primary purpose of being used for irrigation:
  - (a) each infrastructure operator for the water service infrastructure is an *irrigation infrastructure operator*; and
  - (b) the water service infrastructure is the *irrigation network* of each of those irrigation infrastructure operators.

This ‘primary purpose’ test means, in effect, that an operator’s status as an irrigation infrastructure operator depends on the purpose(s) for which water delivered by the operator is used.

<sup>676</sup> The ACCC recognises that “termination fee” is not currently a defined term, and has made rule advice that this term be defined – see rule advice 4-B. In this advice, ‘termination fee’ is used to refer to fees payable for the termination of a right of access to an infrastructure operator’s water service infrastructure. At present, the WCTFR only regulate such fees for rights held against an irrigation infrastructure operators, rather than against infrastructure operators generally.

<sup>677</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.10; Murray Irrigation Limited, Issues Paper Submission, July 2015, p.9; Murrumbidgee Irrigation Limited, Issues Paper Submission, July 2015, p.7; Lower Murray Water also noted its support for the current approach to termination fees at the Mildura public forum.

<sup>678</sup> National Irrigators’ Council, Issues Paper Submission, July 2015, p.13; Western Murray Irrigation, Issues Paper Submission, July 2015, p.6; Central Irrigation Trust, Issues Paper Submission, July 2015, p.7.

benefits of the WCTFR to the IIO and other irrigators who remain connected to the irrigation network.<sup>679</sup>

However, some stakeholders who made submissions to the Issues Paper cited certain instances where, in their view, the WCTFR fail to provide appropriate protections for the customers of IIOs.<sup>680</sup> On the one hand, some stakeholders were concerned with the interests of irrigators who wish to terminate. On the other hand, some stakeholders were concerned more with the interests of remaining irrigators after another customer has terminated, or with the interests of other customers generally in circumstances where an operator has entered into a contract with a specific prospective customer that involves a discounted or waived termination fee clause.<sup>681</sup>

Further, some stakeholders appear to consider that the WCTFR do not adequately insulate operators from the effects of termination. In particular, three submissions to the Issues Paper noted that the possibility of ‘stranded assets’ continues to be an ongoing risk for IIOs.<sup>682</sup>

Two submissions to the Issues Paper also noted that termination is not the only option available to an irrigator who seeks to discontinue access to their irrigation networks; in particular, an irrigator may be able to trade rights of access such as water delivery rights to existing or new customers of the IIO.<sup>683</sup>

The ACCC also heard during several of its public forums about cases where irrigators were facing difficulties with paying termination fees after having participated in government buyback programs or otherwise sold their water access entitlement. These issues are discussed in section 8.2.2.

The ACCC received varied feedback on its Draft Advice in relation to the WCTFR. Stakeholder feedback on draft rule advice 6-A and general comments on the rules as a whole are summarised below; comments on specific matters are addressed in the following sections.

The Victorian Farmers’ Federation (VFF)<sup>684</sup> supported rule advice 6-A. The VFF further identified that there are both advantages and disadvantages of allowing infrastructure operators to charge termination fees. In terms of advantages, the VFF noted that termination fees remove the revenue risk for an infrastructure operator that is associated with termination. However, the VFF also noted that while termination fees encourage irrigators to retain their water within the district, they also inhibit irrigator and water mobility. The VFF concluded that the overall impact of termination fees depends on various factors such as whether modernisation is occurring and the specific situation of the operator. For example, in relation to the Goulburn-Murray Water (GMW) Connections Project, the VFF argued that termination fees have acted as a barrier to network rationalisation by deterring exits which may have benefited the progression of the project.

Lower Murray Water (LMW) submitted its support for the current WCTFR and the continuing need for termination fees.<sup>685</sup> LMW noted that the termination fee is a “fair mechanism” for terminating customers, remaining customers and the infrastructure operator. LMW also noted the continuing risk

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<sup>679</sup> Murray Irrigation Limited, Issues Paper Submission, July 2015, p.9; National Irrigators’ Council, Issues Paper Submission, July 2015, p.4; Central Irrigation Trust, Issues Paper Submission, July 2015, p.2; Central Irrigation Trust, Issues Paper Submission, July 2015, p.2; Daniel Mongan, Issues Paper Submission, July 2015, p.6.

<sup>680</sup> See ‘stakeholder feedback’ and ‘discussion’ in section 6.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.176-178.

<sup>681</sup> See ‘stakeholder feedback’ in section 6.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.177-178.

<sup>682</sup> National Irrigators’ Council, Issues Paper Submission, July 2015, p.4; Central Irrigation Trust, Issues Paper Submission, July 2015, p.2; Western Murray Irrigation, Issues Paper Submission, July 2015, p.1.

<sup>683</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.9; Murray Irrigation Limited, Issues Paper Submission, July 2015, p.9.

<sup>684</sup> Victorian Farmers’ Federation, Draft Advice Submission, March 2016, p.7.

<sup>685</sup> Lower Murray Water, Draft Advice Submission, March 2016, pp.5-6.

of stranded assets and operators' need for time to adjust to terminations to ensure remaining customers do not bear additional costs.

The National Irrigators' Council (NIC) did not comment specifically on the draft rule advice (6-A) to extend the operation of the WCTFR to apply to all infrastructure operators, but generally opposed amendments to the WCTFR on grounds of increased burden to member-owned operators. Additional NIC views related to termination fees are summarised in subsequent sections.

### *ACCC assessment*

The ACCC notes that the VFF explicitly supported, and no stakeholder opposed, its draft rule advice to extend the application of the WCFTR to apply to all infrastructure operators, not only to IIOs. The ACCC therefore maintains its advice, together with its position that this rule amendment is required so that the application of the rules regulating termination fees:

- does not depend on factors such as an infrastructure operator's customer base or demand profile which can change over time or
- extend to other infrastructure operators which may not meet the definition of an IIO, but which may nevertheless seek to levy terminations fees (now or in the future).

## **6.2 Method of calculating general termination fees**

### *Background*

As noted at the beginning of section 6.1, the WCTFR Water Charge (Termination Fees) Rules 2009 (WCTFR) cap the amount an operator may levy for a general termination fee with reference to the 'total network access charge' (TNAC). The existing WCTFR define TNAC as follows:<sup>686</sup>

***Total network access charge**, for the purposes of the calculation of a fee under rule 7 in respect of the termination or surrender of a right of access to an irrigation infrastructure operator's (IIO's) irrigation network, means the total amount that would have been payable to the operator in respect of a full financial year by a terminating irrigator, if termination or surrender had not occurred, including amounts payable in respect of the recovery of expenditure on capital works, but does not include:*

- a) Any amount calculated by reference to the number of units or volume of water actually delivered to the terminating irrigator; or*
- b) If a service for the storage of water is provided in addition to the service for the delivery of water, any amount in respect of the service for the storage of water; or*
- c) Any amount imposed as a fee in respect of the costs of connecting, or disconnecting, the terminating irrigator to the operator's irrigation network; or*
- d) Any amount 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 the right of access or services provided in relation to that right; or*
- e) If a fee payable under a contract is approved under rule 8, any amount payable under the contract in respect of the recovery of expenditure on capital works relating to the operator's irrigation network carried out, or to be carried out, within 5 years after the contract was entered into; or*

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<sup>686</sup> TNAC is defined under current rule 3 of the WCTFR.

f) *Any amount of GST.*

The WCTFR currently cap the level of general termination fees at 10 times the relevant TNAC unless a lesser sum is provided for in a contract or arrangement between the IIO and the irrigator (in which case, the lesser fee applies).

Where the irrigator terminates only part of their right of access, the general termination fee payable is calculated by reference to the proportion of the access right that is terminated.

### **6.2.1 Total network access charge and calculation of the termination fee**

#### **Recommendation 6-A**

Infrastructure operators should provide information to their customers on how they have used and intend to use revenue from termination fees.

*See also rule advice 5-E.*

#### **Rule advice 6-B**

The rules should be amended such that the calculation of the maximum general termination fee should only include fixed volumetric infrastructure charges imposed:

- (a) per unit of water delivery right; or
- (b) per unit water drainage right (where this is separate from the water delivery right);

to the extent that these aspects of a customer's right of access are being terminated.

However, the maximum general termination fee may also include an amount to account for charges dealt with under rule advice 6-C.

*Note:* an infrastructure operator may impose a termination fee that is less than the maximum amount, or waive a termination fee.

*See also rule advices 6-C, 6-D and 6-E.*

This rule advice is implemented in rule 72 of the proposed Water Charge Rules.

#### **Rule advice 6-C**

*Separate charges for infrastructure that is dedicated for the exclusive use of the terminating customer*

The rules should be amended to provide that, if a separate charge is imposed in respect of infrastructure that is dedicated to the exclusive use of the terminating customer, the maximum general termination fee that the infrastructure operator may impose can include an amount, which is the lesser of:

- (a) a reasonable estimate of the cost of the dedicated infrastructure, net of a reasonable estimate of any contribution towards that cost made by the terminating customer, whether via direct contribution (e.g. lump sum payment) or via the payment of the separate infrastructure charge; or
- (b) 10x the amount of the annual relevant infrastructure charge (i.e. the separate charge that relates to the specific infrastructure).

This rule advice is implemented in rule 72 of the proposed Water Charge Rules.



## **Rule advice 6-D**

The rules should be amended to provide more clarity about which infrastructure charges an operator should use when calculating the maximum general termination fee.

### *General rule*

Where a customer has provided notice of their intention to terminate or otherwise made an information request, the infrastructure operator must use:

- (a) the infrastructure charges specified in the Schedule of Charges currently in effect at the time the customer provides notice or makes their request; or
- (b) if the infrastructure operator has adopted a new Schedule of Charges within the previous 25 business days—the infrastructure charges specified in the earlier Schedule of Charges;

whichever produces the lower maximum general termination fee.

### *Specific rule for when customer specifies future date for termination / surrender*

Where a customer terminates / surrenders their right of access by submitting written notice to the operator, but specifies in that notice a future date on which the termination / surrender is to take effect which is more than 6 months after the date of the notice, the infrastructure operator must use the infrastructure charges specified in the Schedule of Charges in effect at the time of the termination / surrender.

### *Specific rule for when operator terminates due to breach of contract*

Where an operator terminates a customer's right of access due to a customer's breach of contract, the infrastructure operator must use the infrastructure charges specified in the Schedule of Charges in effect at the time the operator provides notice of the termination to the customer.

*See also rule advice 6-F.*

This rule advice is implemented in rule 72 of the proposed Water Charge Rules.

## *Background*

### **Capping maximum termination fees: the 10 times multiple**

The 10 times multiple for the termination fee base (currently referred to as the 'total network access charge' ('TNAC')) was chosen as a balance between the interests of terminating and remaining irrigators, and the operator. The ACCC noted in its Draft Advice that the 10 times multiple is not intended to equate to ten years' worth of actual fixed costs incurred by the operator, but rather that this multiple provides an appropriate level of protection for the operator and remaining customers in the medium-term after the termination occurs. It is not appropriate that termination fees afford such protections in perpetuity, as this would preclude the operator from receiving signals about efficient network rationalisations and work against the objective of promoting the efficient and sustainable use of water resources and water infrastructure assets.<sup>687</sup> The ACCC also noted that the 10 times multiple is not a required or default setting for actual termination fees levied—it rather sets a regulatory cap which the termination fees cannot ordinarily exceed.<sup>688</sup>

<sup>687</sup> Schedule 2, Part 2, subsection 2(a) of the *Water Act 2007*.

<sup>688</sup> The WCTFR currently allow the termination fee to exceed 10x TNAC in the limited circumstances where the ACCC has approved an additional termination fee relating to contracts negotiated between the operator and a customer for certain capital works. See rule 8 of the WCTFR.

The ACCC considered in its Draft Advice that there is no strong reason to change the multiple at this time. However, the ACCC will continue to monitor termination fees through its monitoring role, and notes that there may be cause to re-visit the multiple in the future.

### **Composition of the total network access charge (TNAC) / termination fee base**

As described above, currently the calculation of the maximum allowable termination fee under rule 7 of the Water Charge (Termination Fees) Rules 2009 (WCTFR) references the concept of the “total network access charge” (TNAC). This definition takes the approach of initially considering all charges payable to the operator, and then excluding certain types of charges or amounts. Particular elements of this definition are discussed in detail below.

In its Draft Advice, the ACCC considered that the rules for determining the maximum termination fee can be made more clear by taking an approach that has as its basis only the fixed infrastructure charges that are levied with respect to the volume or unit share of the terminating customer’s right of access to the infrastructure; typically their water delivery right, but also a right to drainage where applicable (draft rule advice 6-B).<sup>689</sup> This means that non-volumetric charges (e.g. flat rate charges levied per customer, per outlet, per farm etc.), variable volumetric charges and charges levied on rights other than rights of access to infrastructure (e.g. charges levied per volume of water access entitlement (WAE) held or per volume of irrigation right held) would not form part of the termination fee base.

The ACCC also argued that termination fee calculations should also continue to exclude (consistently with current rules):

- a) any amount in respect of a service for the storage of water; and
- b) any amount of GST; and
- c) a charge that reflects the costs of physically connecting, or physically disconnecting, the customer from the operator’s water services infrastructure; and
- d) if a fee payable under a contract is approved (under proposed rule 73)<sup>690</sup>—any amount payable under the contract in respect of the recovery of expenditure on capital works relating to the operator’s water services.

The maximum termination fee may, however, include an amount to account for charges levied in relation to infrastructure used exclusively by the terminating customer (see below).

### **Treatment of cost pass-throughs in calculation of termination fees**

The ACCC’s Draft Advice proposed rules to regulate how operators passed through certain charges they incurred through their own infrastructure charges.<sup>691</sup> In the Draft Advice, the ACCC proposed that only certain charges relating to ‘distribution losses’ should be able to be passed through on the basis of water delivery right (or other right of access to the operator’s infrastructure such as a right to drainage) held by a customer. This would have the effect that only such ‘distribution loss shared charges’ could be included in the calculation of the termination fee, as they would be:

- a) fixed volumetric infrastructure charges; and

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<sup>689</sup> For a full discussion of the ACCC’s position on rules relating to calculation of termination fees, see ‘Discussion’ and rule advice 6-B in section 6.2.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.181-189. See also rule 72 of the proposed Water Charge Rules.

<sup>690</sup> Note: proposed rule 73 of the proposed Water Charge Rules replicates current rule 8 of the WCTFR, with minor changes as a consequence of the rules being amended and combined into a single instrument.

<sup>691</sup> See section 5.13 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.170-175. See also rule 9A of the proposed Water Charge Rules.

- b) levied on the basis of water delivery right (or water drainage right) held.

### **Accounting for direct contributions from irrigators**

The ACCC's Draft Advice also considered situations where there is a separate infrastructure charge levied in relation to infrastructure such as meters or outlets that are used exclusively by the terminating customer. The ACCC proposed that the calculation of the termination fee payable should be required to take account of customer contributions to the operator's costs, whether those contributions are lump sum / 'up front', or are paid via the separate infrastructure charge (draft rule advice 6-C).<sup>692</sup> The intent of this approach was to improve clarity and ensure that the amount paid by the terminating customer more closely reflects the unavoidable fixed costs faced by the operator.

The ACCC also noted in its Draft Advice that nothing in the water charge rules *precludes* an operator from taking direct customer contributions into account more generally when calculating the amount of the termination fee. However, the ACCC did not consider it appropriate to generally regulate how the operator should take into account direct customer contributions, as the circumstances in which direct contributions occur may vary widely.

### **Shadow access fees**

In the Draft Advice the ACCC set out its reasons for maintaining its view, formed when giving its advice on the creation of the WCTFR, that 'shadow access fees' should not be used when calculating termination fees.<sup>693</sup> A shadow access fee is the fixed access fee that would be charged if fixed access fees were set to recover all fixed costs and no variable costs (i.e. if variable access fees were set at a level to recover all variable costs and no fixed costs) of the operator.

### **Discounting of termination fees and use of termination fee revenue**

In its Draft Advice the ACCC considered that infrastructure operators should be free to waive or discount the termination fees payable by customers at any time, including to facilitate or to encourage appropriate network modernisation and rationalisation. Operators can and do use termination fee discounts / waivers as a strategy to encourage new customers to join the network or, conversely, to encourage disconnection and network rationalisation. The rules do not require operators to give the same offer to waive / discount termination fees to all customers.

Where termination is swiftly followed by "re-issue" and/or issuing of "new" water delivery rights, the ACCC considers it preferable that the water delivery right be traded from the customer who wishes to terminate to the person who wishes to obtain additional water delivery right. The ACCC made draft rule advices 6-E and 6-F to encourage the development of water delivery right trade.

Further, the ACCC considered that it is not appropriate for the water charge rules to mandate how an operator uses its termination fees revenues, including whether termination fees can or should be used to fund discounts to new customers. However, the ACCC considered it appropriate and beneficial for the operator to be transparent about how it uses termination fees revenues, and made draft rule advice and recommendations to encourage such transparency. In particular, the ACCC has made rule advice 5-E, which requires that an infrastructure operator must advise its customers (on its Schedule of Charges) how they can make an enquiry or resolve a dispute with the operator in relation to regulated

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<sup>692</sup> For a full discussion of the ACCC's position on this matter, see 'Separate charges for dedicated infrastructure' and rule advice 6-C in section 6.2.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.185-186,189. See also rule 72 of the proposed Water Charge Rules.

<sup>693</sup> For a full discussion of the ACCC's position on shadow access fees, see 'Shadow access fees' in section 6.2.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.183-184.

water charges. In the ACCC's view, this would include an inquiry about how termination fee revenues are used. The ACCC also made a draft recommendation that operators should provide information to their customers on how they have used and intend to use revenue from termination fees (draft recommendation 6-A).

### **Which Schedule of Charges should apply when calculating termination fees?**

Given the proposed change to the publication requirements for Schedules of Charges (see section 5.4.2), it is possible that some customers will not receive their Schedule of Charges until after the new charges come into effect. Under the current arrangements for calculating termination fees, such customers would be unable to terminate (or provide notice of termination) prior to becoming aware of any significant increases in fixed infrastructure charges (and therefore maximum termination fees). To avoid this outcome, the ACCC made draft rule advice that the operator should calculate termination fees based on the infrastructure charges in effect at the time the customer gives their notice of their intention to terminate (or requests information about the termination fee payable), or 30 days before this time, whichever produces the lower maximum termination fee (draft rule advice 6-D).

### *Stakeholder feedback*

#### **Feedback on the Issues Paper<sup>694</sup>**

Several stakeholders submitted to the Issues Paper that the current definition of TNAC is clear and appropriate and that the need for the rules (e.g. providing a 'buffer' for operators when customers leave) has not changed or diminished.<sup>695</sup>

However, the ACCC received feedback from irrigators across several areas of the Basin that operators have incentives to determine their charges in a way that maximises termination fees payable. In the view of customers, operators are not sufficiently taking into account contributions made by customers via methods other than paying infrastructure charges—for example, via lump-sum contributions.<sup>696</sup> Also, several irrigators expressed concern about selective discounting of infrastructure charges and termination fees by certain operators.<sup>697</sup>

A number of stakeholder submissions to the Draft Advice provided feedback on the proposed amendments to the calculation of termination fees (draft recommendation 6-A, draft rule advices 6-B, 6-C and 6-D), and this is set out below.

#### **Draft recommendation 6-A**

Three stakeholders, Goulburn-Murray Water (GMW), the Victorian Farmers' Federation (VFF) and the Queensland Farmers' Federation (QFF), supported draft recommendation 6-A for infrastructure operators to provide their customers with information about how they have used, or intend to use, revenue from termination fees.<sup>698</sup> GMW and the VFF supported transparency about the use of termination fee revenue. The VFF submitted that this is an "appropriate tool" for customers to make an enquiry about the use of termination fee revenue. However, the VFF added that it is not an

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<sup>694</sup> For a full summary of stakeholder feedback received prior to the release of the Draft Advice, see 'stakeholder feedback' in section 6.1 and 'stakeholder feedback' and 'discussion' in 6.2.1 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.179-178, 180-188.

<sup>695</sup> National Irrigators' Council, Issues Paper Submission, July 2015, p.13; Central Irrigation Trust, Issues Paper Submission, July 2015, p.7; Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, pp.9-10.

<sup>696</sup> ACCC public forum on the review of the water charge rules, Mildura, 27 July 2015.

<sup>697</sup> ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015.

<sup>698</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.6; Victorian Farmers' Federation, Draft Advice Submission, March 2016, p.8; Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.6.

appropriate safeguard for the calculation of the termination fee because of the “complexity of the Water Charge Rules”. The VFF submitted therefore, that there should be an additional requirement for infrastructure operators to explain the basis of the calculation of the termination fee, including aspects that are customer specific, when the customer is charged a termination fee. In support of this suggestion, the VFF argued that termination fees are a “considerable cost” to customers and a “significant source of revenue for infrastructure operators” and therefore “transaction specific termination fee break downs are a reasonable expectation”.<sup>699</sup>

### **Draft rule advice 6-B**

Irrigator / farmer representative groups (VFF and QFF) supported draft rule advice 6-B which would limit the termination fee base to fixed volumetric water delivery right / water drainage right charges. QFF commented that the principle of this advice “was applied by [the Queensland Competition Authority] QCA for the current price paths for distribution schemes managed by SunWater and SEQWater”.<sup>700</sup>

In contrast, member-owned infrastructure operators generally opposed draft rule advice 6-B. During meetings held with National Irrigators’ Council (NIC) members in Griffith, stakeholders commented that, whereas previously the concept of TNAC encompassed virtually all fixed charges levied by operators, the proposed amendments focussed on fixed *volumetric* charges levied on customers’ water delivery rights and water drainage rights (apart from non-volumetric charges levied in respect of dedicated infrastructure used solely by a terminating customer). Operators noted that non-volumetric fixed charges, such as meter, outlet or landholding charges, are often used to recover a variety of costs such as overheads which are not strictly related to a particular piece of infrastructure. For example, an outlet charge may recover both the costs associated with the outlet and also overheads such as staffing costs. Operators argued that, since in some cases non-volumetric charges can currently be used to recover unavoidable ongoing fixed costs, they should be able to be incorporated into termination fees.<sup>701</sup>

The NIC submitted its view that many of the proposed amendments relating to termination fees “seem calculated to reduce termination fees”, which will affect remaining customers through higher charges to recover the fixed, ongoing costs left behind by terminating irrigators. The NIC also noted that the Draft Advice stated that submissions to the Issues Paper were generally supportive of the current WCTFR requirements, and argued that the ACCC’s Draft Advice does not provide evidence of stakeholder support for “increased regulation” in relation to the WCTFR.<sup>702</sup> Similarly, in commenting generally on proposed amendments to termination fee rules, Western Murray Irrigation (WMI) submitted that there is “no compelling justification for such a significant change, particularly given the extensive arguments offered at the time the rules were first made, both for and against various models”.<sup>703</sup>

Submissions made by non-member owned infrastructure operators (WaterNSW, GMW, Lower Murray Water (LMW) and SunWater) did not address matters relating to draft rule advice 6-B.

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<sup>699</sup> Victorian Farmers’ Federation, Draft Advice Submission, March 2016, p.8.

<sup>700</sup> Queensland Farmers’ Federation, Draft Advice Submission, March 2016, p.6.

<sup>701</sup> ACCC consultation meeting with National Irrigators’ Council members on the Draft Advice for the review of the water charge rules, Griffith, 12 January 2016.

<sup>702</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.15.

<sup>703</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.3.

Results from the University of Adelaide irrigator survey indicate that, on average, for irrigators in the southern Murray-Darling Basin (MDB):<sup>704</sup>

- 48 per cent of irrigators who *have ever* terminated or surrendered water delivery right do not support the inclusion of non-volumetric ('flat rate') charges in termination fees, 15 per cent are unsure, and 37 per cent *do* support their inclusion;
- 35 per cent of irrigators who *have never* terminated or surrendered water delivery right do not support the inclusion of non-volumetric ('flat rate') charges in termination fees, 20 per cent are unsure, and 45 per cent *do* support their inclusion.

These results show that irrigators as a group are ambivalent about the benefits of including flat rate charges in termination fees.

Further, the results show that the lowest level of support for inclusion of non-volumetric charges occurs in Murrumbidgee Irrigation Limited (MI), where 43 per cent of irrigators (regardless of prior termination activity) do not support inclusion of non-volumetric charges in termination fees (23 per cent unsure; 35 per cent support). The ACCC's analysis shows that the contribution of flat rate charges to hypothetical bills and to termination fees is highest for customers of MI.<sup>705</sup> This data suggests that as the impact of flat rate charges on termination fees increases, irrigators are less likely to support the inclusion of these charges in the calculation of termination fees.

### **Draft rule advice 6-C**

The VFF supported draft rule advice 6-C, regarding how termination fees can be adjusted where a separate infrastructure charge is levied on infrastructure used exclusively by the terminating customer. The VFF supported this draft rule advice to ensure capital contributions by customers, governments or other parties are not included in the termination fee.<sup>706</sup> The QFF noted this draft rule advice, and commented that "this case has not been an issue raised in Queensland distribution schemes".<sup>707</sup>

In contrast, the NIC, WMI and LMW identified concerns with this draft rule advice.

The NIC submitted that the proposed amendments to the calculation of termination fees will increase complexity.<sup>708</sup> The NIC identified in particular that the proposed amendments in relation to dedicated infrastructure would create an "enormously complicated exercise", potentially requiring separate calculations for "every single outlet in every single operator's irrigation network". WMI echoed the NIC's concerns, noting that, in its view, WMI would need to create a separate cost centre in its accounts for each of its 500 outlets to meet the new requirements.<sup>709</sup> WMI added that the proposed amendments require "unique costing" that is unprecedented in other regulatory environments – for example, in gas and electricity, distributors are not required to "manage their costs to the scale required by the ACCC" under the proposed water charge rules.

Similarly, LMW submitted that the proposed rule amendments in rule advice 6-C would create "unnecessary complications".<sup>710</sup> LMW put forward a number of arguments to support this position.

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<sup>704</sup> A Zuo, S Wheeler and A Loch, *Short survey of southern Murray-Darling Basin irrigators' views on the review of the water charge rules – Final Report*, University of Adelaide report to client prepared for the ACCC, Adelaide, May 2016, p. 14.

<sup>705</sup> ACCC, *Water Monitoring Report 2014-15*, Canberra, May 2016, pp. 82-86, 125-127, viewed June 2016, <https://www.accc.gov.au/publications/accc-water-monitoring-report>.

<sup>706</sup> Victorian Farmers' Federation, Draft Advice Submission, March 2016, p.8.

<sup>707</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.6.

<sup>708</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.15.

<sup>709</sup> Western Murray Irrigation, Draft Advice Submission, March 2016, p.3.

<sup>710</sup> Lower Murray Water, Draft Advice Submission, March 2016, pp.6-7.

First, LMW noted that as a result of the proposed amendments, the termination could be different for each customer. This means that each termination fee could not be calculated from the Schedule of Charges and “in practice”, LMW could only provide on its Schedule of Charges the method for calculating, but not the amount of, the termination fee. LMW submitted that a customer would need to make an enquiry with LMW to obtain the information necessary to calculate the termination fee, however this information is also not “readily available” to LMW itself.

Second, LMW submitted that it supports being able to set separate infrastructure charges that recover the sunk costs of dedicated infrastructure, however these charges would generally be set under an individual, legal contracts and therefore, LMW has concerns about how these proposed amendments interact with the requirements to publish a Schedule of Charges. LMW submitted that it does not support having to publish each of these charges on its Schedule of Charges and reiterates its concerns in relation to obtaining an exemption from this requirement (see section 5.4.3 regarding these concerns).

### **Draft rule advice 6-D**

Again, farmer / irrigator groups (VFF and QFF) supported draft rule advice 6-D regarding which Schedule of Charges should be used when calculating termination fees. The QFF commented that the “ruling” in draft rule advice 6-D had also already been used by the QCA.

Operators attending the ACCC’s meeting with NIC in Mildura commented that the timing requirements associated with draft rule advice 6-D (and corresponding proposed rules 72(5) and 74) would increase regulatory burden on operators.<sup>711</sup> Further, operators commented that given that the rules as a whole (together with the Water Market Rules 2009) impose several different timing requirements, operators faced increased probability of inadvertent non-compliance through mistakenly applying the wrong timing requirement for a particular situation.

The NIC submitted that the drafting of subrule 72(5)(a) (which gives effect to draft rule advice 6-D) “reopens the loophole” that would allow customers to notify the infrastructure operator of their intention to terminate some considerable time in advance (e.g. years) and lock-in a termination fee based on current charges.

### **Feedback on the relationships between termination fee rules and decisions about charging arrangements**

Mr Don Low, reiterating the Wah Wah Stock and Domestic Water Users’ Association submission to the Issues Paper, submitted his concerns that the introduction of the WCTFR has provided his infrastructure operator with an incentive to increase the proportion and level of fixed charges.<sup>712</sup> Mr Low noted that prior to the introduction of the WCTFR, charges in the Wah Wah Stock and Domestic area were mainly usage charges but now they are “95 per cent fixed”, with MI proposing to increase charges by 40 per cent in the next season. Mr Low noted that as a consequence of a higher proportion of fixed charges, there is no incentive to save water.

Mr Low also identified concerns about the basis on which fixed charges are levied in one area of the Wah Wah Stock and Domestic area. Mr Low noted that there are two types of areas – rated and non-rated. These areas differ based on how allocations are determined and whether or not there is a holding reference number. The holding reference number is only used in the rated area to distinguish

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<sup>711</sup> ACCC consultation meeting with National Irrigators’ Council members on the Draft Advice for the review of the water charge rules, Mildura, 14 January 2016.

<sup>712</sup> Mr Don Low, Draft Advice Submission, March 2016, pp.1-2,4.

between farms. Mr Low explained how it is possible for a customer to acquire a number of holding reference numbers (e.g. a separate holding reference number is provided to a husband and wife if they hold the land in two titles). Mr Low expressed concern that, because the holding reference numbers are used as basis for levying fixed charges, customers face a situation where, in his view, charges do not reflect or have any correlation with:

- the number of connections or outlets at the property (e.g. two landholders might share an outlet but both pay the landholding charge)
- the size of each individual property
- the volume of water supplied and for how long it has been supplied.

Mr Low also noted that for the same volume of water delivered, a customer on a rated area can pay more if it has multiple holding reference numbers, than someone with only one holding reference number, and identified that a customer in the rated area will generally pay more than someone in the non-rated area (see also stakeholder feedback in section 5.3.1 for feedback on charging arrangements relating to use of landholdings as a unit for levying charges).

### **Ability to discount termination fees**

Two stakeholders submitted that they support infrastructure operator discretion to waive or discount termination fees. The VFF commented that this discretion is “an important, and appropriate tool”, particularly for modernisation / rationalisation projects.<sup>713</sup> The VFF submitted that it continues to support the water charge rules setting a cap on termination fees from which infrastructure operators can decide to waive or apply a discount. P and B Tomlinson supported operators having discretion to waive termination fees, in the absence of more direct mechanisms to improve the tradeability of water delivery rights<sup>714</sup> (see also section 6.2.2).

### *ACCC assessment*

#### **Capping maximum termination fees: the 10 times multiple**

The ACCC notes that no submissions to the Draft Advice advocated a change to the current ten times multiple, and continues to be of the view that it is reasonable to maintain the multiple at 10 times. The ACCC reiterates, however, that there may be cause to re-visit this parameter in the future, depending on developments in this sector over time.

#### **Composition of the total network access charge (TNAC) / termination fee base**

The Draft Advice proposed that the basis for calculating termination fees should be changed from the TNAC approach in the current rules to allowing only volumetric fixed charges levied with respect to customers’ water delivery rights and water drainage rights to form the termination fee base. The termination fee multiple (10x) would be applied to this base. An extra amount would also be included in the termination fee where there is a separate charge for dedicated infrastructure (such as an outlet or meter) used exclusively by the terminating customer, but an infrastructure operator would be required to take into account prior contributions towards the cost of this dedicated infrastructure (this is considered below).

The ACCC considers that overall this advice is appropriate, but that there are a number of matters raised during consultation for the Draft Advice that warrant further consideration.

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<sup>713</sup> Victorian Farmers’ Federation, Draft Advice Submission, March 2016, pp.8-9.

<sup>714</sup> Peter and Barbara Tomlinson, Draft Advice Submission, March 2016, p.1.



The ACCC does not share the NIC's view that the intent of the proposed amendments is to reduce termination fees. The intent is to ensure the calculation of maximum termination fees is brought back into alignment with the original intent, which was that termination fees should recoup an amount related to the unavoidable ongoing fixed costs that the operator would incur after a customer terminates.<sup>715</sup>

In relation to this intent, the ACCC notes in particular that the current definition of TNAC (subrule (d) in TNAC definition) contemplates operators 'netting out' amounts that exceed those associated with cost recovery when calculating termination fees. However, the particular wording of this current rule requirement<sup>716</sup> means that it is difficult in practice for the regulator to ascertain whether this requirement is complied with. Based on data reported to the ACCC via annual requests for information, operators generally use a simple 10x fixed charges approach to levying termination fees. The extent to which this is fully consistent with the TNAC definition depends on the degree of cost-reflectiveness of charging arrangements, and as such is inherently difficult to assess in the absence of more detailed cost data.

In cases where operators levy fixed charges that recover *more* than is needed to cover fixed costs, the current definition requires such 'netting out', but where fixed charges cover less than (or equal to) fixed costs, this is not required. The ACCC notes that in practice most operators rely heavily on variable charges, meaning that netting out is unlikely to be required in most cases. However, subrule (d) remains relevant to operators who rely predominantly on fixed charges. The impracticality of this current requirement to assess the degree to which a charge (or part of a charge) exceeds an amount that could be considered cost-reflective is a key rationale for the ACCC's recommended changes.

The ACCC has also identified that item (a) of the current TNAC definition may not be robust to future developments in charging arrangements. Item (a) provides that amounts calculated by reference to the number of units or volume of water actually delivered may not be included in termination fees. The ACCC's broad intent in recommending this provision be included in the original WCTFR was to exclude charges levied to recover variable costs from inclusion in termination fees.<sup>717</sup> However, the ACCC now considers that 'variable' infrastructure charges may not always reference the actual amount of water *delivered* to a customer. For example, if a variable infrastructure charge were to be set with reference to the volume of water *allocated* to a customer's account (i.e. allocated against a customer's water access right or irrigation right for use, trade, carryover, etc.), rather than the volume *actually used* by the customer, this charge may not fall within item (a) of the current definition, and as such may not be excluded for the purposes of calculating the termination fee. This concern provides additional motivation for the recommended change in approach.

Beyond these issues with the current TNAC definition, the ACCC has identified that the current practice of including relatively large non-volumetric charges in termination fees can result in perverse incentives for customers to retain a very small portion of their right of access.<sup>718</sup> Further, as identified by Mr Low, and as acknowledged by operators during consultation meetings, in some cases

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<sup>715</sup> ACCC, *Water Charge Termination Fee Rules Final Advice*, Canberra, December 2008, p.46: "Termination fees are imposed to ensure departing irrigators make some level of contribution *only* to an operator's ongoing unavoidable costs." [emphasis added]

<sup>716</sup> See 'background' section above, which sets out the full definition of TNAC in the current WCTFR. Item (d) specifies that operators must not include "any amount 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 the right of access or services provided in relation to that right".

<sup>717</sup> ACCC, *Water Charge Termination Fee Rules Final Advice*, Canberra, December 2008, p.51: "The recommended rules provide that only those fees and charges that are fixed charges should be included in the total network access charge. Fixed charges are those that do not vary with the quantity of water delivered or drained. Since termination fees are only required to cover unavoidable costs, they should not compensate operators for variable costs."

<sup>718</sup> ACCC, *Water Monitoring Report 2013-14*, Canberra, April 2015, p.69.

non-volumetric charges are not clearly linked to service provision or underlying physical realities, with the result that some customers incur significantly higher non-volumetric charges, despite receiving similar levels of service.

The ACCC accepts that operators currently use non-volumetric charges to recover a range of costs, and agrees that, where these costs are fixed, ongoing and unavoidable after a customer terminates, they should be able to be recovered via termination fees. However, the ACCC challenges the notion that these costs necessarily need to be recovered via non-volumetric charges. The ACCC has made allowance for non-volumetric charges for dedicated infrastructure (e.g. meters and outlets) to be included in termination fees (see below). Beyond this, the ACCC notes that a reliance on non-volumetric charges for the recovery of general costs such as overheads has a consequence that charges are not proportional to the size of a customer's right of access. This can distort decision making regarding the level of access and use of water service infrastructure as well as irrigator trading and termination decisions.<sup>719</sup> This concern provides motivation for incentivising operators to move away from such charges, and towards volumetric charges levied on customers' water delivery rights and water drainage rights. The ACCC notes that several operators (see Table 6.1 below) who currently levy non-volumetric charges already voluntarily do not include these charges in termination fees, and also that operators are free to move away from a reliance on non-volumetric charges.

**Table 6.1: Non-volumetric charges and termination fees**

Reporting IIOs	Impose non-volumetric fixed charges?	Non-volumetric fixed charges included in termination fee?
Buddah Lake Irrigators' Association (Buddah Lake)	x	x
Central Irrigation Trust (CIT)	x <sup>†</sup>	x
Coleambally Irrigation Cooperative Limited (CICL)	✓	✓
Eagle Creek Pumping Syndicate (Eagle Creek)	✓	x
Goulburn-Murray Water (GMW)	✓	x
Hay Private Irrigation District (Hay)	✓	✓
Jemalong Irrigation Limited (Jemalong)	x	x
Lower Murray Water (LMW)	✓	x
Marthaguy Irrigation Scheme (Marthaguy)	x	x
Moira Private Irrigation District (MPID)	x <sup>†</sup>	x
Murray Irrigation Limited (MIL)	✓	✓
Murrumbidgee Irrigation Limited (MI)	✓	✓
Narromine Irrigation Board of Management (NIBM)	✓	✓
Renmark Irrigation Trust (RIT)	✓*	✓*
SunWater	✓	n/a**
Tenandra Irrigation Scheme (Tenandra)	x	x

<sup>719</sup> ACCC, *Water Monitoring Report 2014-15*, May 2016, section 6.2.2 (regarding the effect on termination fees) and 5.3.4 (regarding the impact on irrigator bills), viewed June 2016, <https://www.accc.gov.au/publications/accc-water-monitoring-report>.

Trangie-Nevertire Irrigation Scheme (Trangie-Nevertire)	✘	✘
West Corurgan Private Irrigation District (West Corurgan)	✓	✘
Western Murray Irrigation (WMI)	✘	✘

Source: ACCC analysis from data provided by reporting operators, 2014-15

Notes: <sup>†</sup>These operators listed several non-volumetric connection charges on their 2014-15 Schedules of Charges, but these do not appear to be ongoing charges that a customer would pay each year (e.g. they are imposed when a new connection is created).

<sup>‡</sup>RIT imposes an 'irrigation access charge' per 'rated hectare'. This is a non-volumetric charge in that it is not related to a volume of water access right, irrigation right or water delivery right. However, based on information provided by RIT, the ACCC understands that RIT uses a conversion factor of 9.28 hectares per ML in order to convert this charge to a per ML (volumetric) charge.

<sup>\*\*</sup>SunWater has not reported any terminations, or indicated that it would levy termination fees in the event a termination occurred (other than in the context of trade out of an off-river system).

The ACCC acknowledges that its proposed amendments to general termination fee calculations will likely incentivise some operators to move towards a greater use of volumetric infrastructure charges levied on the basis of customers' water delivery rights to recover fixed costs (although the proposed amendments will not *require* this outcome). The ACCC considers that this would be an appropriate outcome.

### **Treatment of cost pass-throughs in calculation of general termination fees**

The ACCC has also identified that there is a need to ensure termination fees are not inflated by the inclusion of on-river infrastructure charges and planning and management charges which the operator incurs, other than certain charges relating to distribution losses. The ACCC considers that its proposed amendments relating to cost pass-throughs (see section 5.13), together with rule advice 6-B, will achieve this outcome.

Based on the above considerations, the ACCC maintains its advice that general termination fees should generally be based on a multiple of fixed charges levied per unit of the terminating customer's water delivery right and / or water drainage right. This advice, together with the proposed pass-through rules which prohibit operators from passing through certain charges on the basis of customers' water delivery rights, will help ensure that termination fees only reflect ongoing unavoidable fixed costs faced by the infrastructure operator. It will also help address the disproportionate incentives for customers to retain small portions of their right of access, which will improve rationalisation efforts and help preclude a situation occurring where a customer has sold all of their water but has retained a small part of their right of access in order to avoid termination fees associated with non-volumetric charges.

In recognition of operators' concerns about the ACCC's proposal to link the level of the termination fee multiple to compliance with the proposed pass-through rules, the ACCC has rescinded draft rule advice 5-Z and the relevant proposed rule. See section 5.13 for a full discussion.

### **Accounting for direct contributions from irrigators—separate charges for dedicated infrastructure**

Draft rule advice 5-C sought to balance irrigator feedback that terminating customer contributions should be taken into account when calculating termination fees with the impacts on operators and remaining customers such a requirement would produce. This draft advice recognised that requiring operators to fully account for *all* terminating customer contributions (including in relation to shared infrastructure) was not advisable for several reasons, including that:

- a terminating customer's past level of use of shared infrastructure (and corresponding payments of infrastructure charges) should not necessarily be directly linked to their responsibility for the future costs they impose on others when they terminate, as represented by the termination fee;
- significant additional regulatory burden may be created for the operator in terms of the record keeping required to give effect to such accounting requirements; and
- the water charge rules regulate the *maximum* termination fee which can be imposed, and the ACCC notes that the operator may take into account past capital contributions.

With these considerations in mind, the ACCC made draft rule advice 5-C that operators should be required to take into account terminating customer contributions in the limited circumstance of where an operator imposes either a separate fixed volumetric or non-volumetric infrastructure charge specifically in relation to infrastructure dedicated to the exclusive use of the terminating customer, such as a charge per meter or per outlet.

The ACCC proposed that the termination fee that the infrastructure operator can impose should be able to include an amount which is the lesser of:

- any capital cost the infrastructure operator can demonstrate it has incurred (i.e. excluding any capital contribution by the customer, government or other party) in relation to the dedicated infrastructure, minus the cumulative amount paid under the relevant infrastructure charge (or other infrastructure charge previously imposed specifically in relation to the dedicated infrastructure); and
- 10x the amount of the relevant infrastructure charge (i.e. the separate charge that relates to the specific infrastructure).

The ACCC's rule advice also set out how an operator should calculate the relevant termination fee in a situation where an infrastructure operator levies a separate infrastructure charge in relation to infrastructure used exclusively by the terminating customer, but has not imposed that charge in each year since the cost was initially incurred.

The ACCC maintains that this overall approach appropriately reflects stakeholders' calls for past contributions to be directly taken into account, for the case where there is infrastructure that is exclusively used by the terminating customer. In this case, termination of the customer's access to that exclusively used infrastructure is likely to have a much lower (or zero) cost for remaining irrigators and the operator. For example, in the case of a water meter, the operator will not be required to maintain the meter at the terminating irrigator's property, and may even be able to relocate or resell the metre for use elsewhere.

However, the ACCC accepts concerns from operators that the proposed water charge rule drafting included in the Draft Advice could impose significant regulatory burden on operators in the form of requiring detailed record-keeping if the operator wanted to augment the general termination fee to include charges for the dedicated infrastructure. The ACCC also acknowledges that in some cases, government contributions to new infrastructure such as meters may have previously been given as part of a broader package which involved the transfer of water savings from the operator to the government. The ACCC has adapted its rule advice in this respect to:

- provide that only previous contributions made by the terminating customer (rather than all previous contributions, including government contributions) need to be taken into account;
- provide that an operator may use a 'reasonable estimate' of the cost of the dedicated infrastructure, rather than a more onerous requirement to record exact costs; and

- remove requirements specifying precisely how an operator must calculate the relevant portion of the general termination fee in the situation where the operator currently imposes a separate charge for dedicated infrastructure, but did not previously levy that charge for the entire period since costs relating to that infrastructure were first incurred.

In relation to the final point above, on balance the ACCC considers this level of detail is more suitable for guidance material, rather than a detailed rule requirement. The ACCC intends that the guidance will specify that, where an operator seeks to include an amount based on a separate charge for dedicated infrastructure in the general termination fee, but has not levied that charge for the full duration since the relevant costs were incurred, an estimate of the terminating customer's contribution to the dedicated infrastructure that was based on a calculation which assumed the *current* charge had been levied each year since the costs were incurred would be seen as reasonable under this rule. This approach acknowledges that, prior to the introduction of the separate charge, the costs would have necessarily been recovered via other more general charges (e.g. charges levied on the customer's water delivery rights).

Box 6.1 provides an example of how to calculate a general termination fee in respect of dedicated infrastructure, under the revised rule advice.

**Box 6.1 Case study—how to calculate a general termination fee relating to a separate charge for dedicated infrastructure**

Maddie Blake is a customer of ClearWaters Irrigation (CWI). She has 40 ML of water delivery right and two outlets and decides to terminate part of her right of access, by terminating 30 ML of her water delivery right and one of her two outlets. CWI has a separate charge levied per outlet (from CWI's channel to the Maddie's property) set at \$100 per outlet (per annum) which has been imposed for 8 years. The full cost of the outlet was \$2000 (of which CWI incurred \$1500 of capital cost due to an upfront capital contribution of \$500 paid by Maddie).

CWI also has a fixed charge set at \$20 per ML of water delivery right held.

The termination fee base in relation to the fixed charges levied per ML of Maddie's right of access would be equal to 30 ML x \$20 = \$600 and the maximum general termination fee in relation to the water delivery right terminated would be \$6000 (=10 x \$600).

This termination fee base could then be increased to account for the termination of the outlet (as there is a separate charge payable for this dedicated infrastructure). The amount of the increase is calculated as the lesser of:

- a reasonable estimate of the cost of the dedicated infrastructure, net of any contribution towards that cost made by the terminating customer (= \$2000 minus Maddie's upfront contribution minus the cumulative amount paid under the relevant infrastructure charge (8 years x \$100 per year = \$800)) = \$2000 – \$500 – \$800 = \$700; and
- 10x the amount of the relevant infrastructure charge (\$100) = \$1000.

The total maximum general termination fee would therefore equal \$6700 (\$6000 in relation to the water delivery right plus \$700 in relation to the outlet).

The ACCC considers that these revisions maintain the broad intent of the Draft Advice—to provide for terminating customers' prior contributions to be taken into account in limited circumstances—while addressing concerns regarding regulatory costs. Finally, the ACCC notes that nothing in this rule *requires* operators to levy a termination fee in relation to where a separate charge is levied for dedicated infrastructure—operators (e.g. GMW) who currently elect not to include non-volumetric charges in termination fees at all may continue to do so.

### **Shadow access fees and effect of WCTFR on incentives to levy fixed charges**

The ACCC acknowledges that the restriction of general termination fees to being based on actual fixed charges only (and not a ‘shadow access fee’) may, other things equal, increase incentives for operators to increase the proportion of revenue generated from fixed charges. However, as explained in the Draft Advice, most operators have historically set fixed charges at a level that is considerably *lower* than fixed costs, and as such an increased reliance on fixed charges may be consistent with moving towards cost-reflective charging and full cost recovery.<sup>720</sup>

### **Discounting of termination fees and use of termination fees revenue**

The ACCC recognises stakeholder views that operators should be prevented from discounting termination fees in a range of circumstances, but also contrasting views held by other stakeholders that operators *should* be able to discount termination fees. The ACCC considers that discounting / waiving termination fees is a matter best left to for individual operators to decide in consultation with their customers and in light of their particular circumstances.

The ACCC’s monitoring of termination fees show that many operators do currently discount or waive termination fees. The most common reason cited is that termination fees are discounted / waived in situations where termination occurs as part of network rationalisation. The ACCC supports discounting in such circumstances, as this is consistent with the principle that termination fees should only provide for ongoing unavoidable costs incurred by the operator for a finite period after termination occurs. Where rationalisation reduces such costs, it is entirely appropriate that termination fees be discounted / waived.

The ACCC reiterates that the rules relate to calculation of a *maximum* termination fee only, and that operators are free to discount / waive termination fees as they see fit.

### **Which Schedule of Charges should apply when calculating general termination fees?**

The ACCC’s draft rule advice 6-D was aimed at:

- providing clarity about which Schedule of Charges applies when calculating termination fees; and
- allowing a customer to be able to respond to a new Schedule of Charges by terminating their right of access, without being forced to pay a termination fee based on that new Schedule (noting that such an avenue would be most desirable in a situation where the new Schedule increased or introduced new fixed charges).

The ACCC received no submissions challenging its rationale for this draft rule advice, while the VFF and QFF supported it.

However, the ACCC acknowledges concerns raised by operators during consultation meetings about the implementation of the proposed rules. In particular, the ACCC acknowledges concerns that the proposed rules may introduce scope for inadvertent non-compliance because of the several different timing requirements applying to infrastructure operators. Accordingly, the ACCC has amended its rule advice to provide that, other than the “10 day requirement” for certain operators to provide their Schedule of Charges (see section 5.4.2), specific time requirements applying to infrastructure operators outside of Part 6 of the rules (regulatory approvals / determinations) will be harmonised to 25 business days.

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<sup>720</sup> See discussion of ‘shadow access fees’ in chapter 6 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.183-184.

Also, as discussed in section 6.3, the ACCC considers there is merit in providing for a customer to request information on termination fees independently of a decision to actually terminate. In providing for this, the rules must clearly specify how an operator must calculate the maximum termination fee when this situation occurs. The ACCC has adapted rule advice 6-D and the relevant proposed rules to ensure these matters are dealt with.

In particular, the ACCC advises that, in general, the operator should calculate the maximum general termination fee using the Schedule of Charges in effect at the time the customer gives notice terminating or surrendering their right of access, or otherwise requests information about what termination fees would be payable; unless a different Schedule of Charges was in effect 25 business days previously and using the infrastructure charges set out in that earlier Schedule of Charges would produce a lower general termination fee. This approach is necessary given operators will no longer be required to ensure customers have *received* a new Schedule of Charges before those charges can be levied (see section 5.4.2) and customers may therefore only become aware of significant increases in infrastructure charges relevant to a termination fee after they take effect. Beyond this general scenario, the ACCC considers that two ‘special cases’ need to be provided for, as follows.

The first case is where the customer terminates / surrenders their right of access by submitting a written notice to the operator, and the notice specifies a date for the termination / surrender to take effect which is more than 6 months<sup>721</sup> after the date they gave the notice to the operator. The ACCC notes that in this context, in making a decision to terminate on a future date, the customer has inherently already accepted the possibility of a change in the Schedule of Charges. Accordingly, the rationale (described above) for the general requirement for an operator to use a previous recent Schedule of Charges should not apply. Therefore, in this case the operator should simply calculate the general termination fee using the Schedule of Charges in effect at the time of the termination / surrender.<sup>722</sup>

Second, in the case where the *operator*, rather than the customer, instigates a termination due to a customer’s breach of contract, the operator should calculate the maximum termination fee using the Schedule of Charges in effect at the time when the operator notifies the customer of the termination. In this case, the customer’s consent to the termination is not required, meaning that there is no customer decision which could be affected by the level of infrastructure charges and the resulting maximum termination fee. Also, the ACCC considers it appropriate given the circumstances that the operator not be required to use a previous Schedule of Charges (even if that would have produced a lower general termination fee).

It is important to note that the maximum termination fee calculated is only valid if a termination goes ahead in the subsequent six months (see the subsection titled ‘Timeframe over which information given to a customer is valid’ in section 6.3 for more detail). This addresses the NIC’s concern that the drafting of subrule 72(5)(a) (which gave effect to draft rule advice 6-D) “reopens the loophole” would allow customers to “lock-in” a termination fee based on current charges years in advance of actual termination.

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<sup>721</sup> See rule advice 6-F and subsection titled “Timeframe over which information given to a customer is valid” in section 6.3 regarding the advice that the termination fee information given by the operator should be valid for a period of 6 months.

<sup>722</sup> Note that the operator would still need to respond to the customer’s notice by providing a ‘termination information statement’ to the customer (see Rule Advice 6-F and section 6.3), and could only levy a termination fee if, after receiving this information, the customer confirms they wish to proceed with the termination or surrender.

## 6.2.2 Effect of the WCTFR on operation of markets for tradeable water rights

### Rule advice 6-E

The rules should be amended to provide that, when calculating the maximum general termination fee applicable to a termination / surrender of a right of access, if an infrastructure operator does not allow for the trade of water delivery right (of a kind relevant to the termination) separately from the trade of a water access right or irrigation right, the multiple applied to the fixed volumetric charge levied per unit of water delivery right or unit of water drainage right should be 1x rather than 10x.<sup>723</sup>

*Note:* an operator 'allows for the trade of water delivery right' if water delivery right of a kind relevant to the termination is generally permitted to be traded, rather than whether any particular proposed trade of a water delivery right is approved or not.

*See also rule advice 6-F.*

This rule advice is implemented in rule 72 of the proposed Water Charge Rules.

### *Background*

The ACCC noted in its Draft Advice that termination fees affect supply and demand for tradeable water rights in different ways depending on the right in question.

#### *Trade of water access rights*

The ACCC considered that, while the relationship between termination fees and trade of water access rights (including water access entitlements (WAEs) and water allocations) is complex, termination fees currently do not amount to a distortion on trade of these rights.<sup>724</sup> Given this assessment, the ACCC maintained its view that the current level of the termination fee multiple should not be altered based on an argument that it produces termination fees which are trade-distorting. However, this assessment should not preclude a re-assessment of the level of the termination fee multiple at a future date. The ACCC maintains that this assessment is appropriate in its Final Advice.

#### *Trade of water delivery rights*

The Draft Advice also described in detail the relationship between termination fees and trade of water delivery rights.<sup>725</sup> In particular, the ACCC noted that the ability for a customer to trade water delivery right to another irrigator within an operator's network (or to a new entrant) provides a much less costly alternative to termination for customers wishing to reduce their water delivery right holdings.

However, currently markets for water delivery rights are in general not well-developed. The ACCC strongly endorses the development of robust water delivery right markets (within an operator's network) to facilitate flexible management of the network, enhance the ability of customers to deal flexibly with their tradeable water rights.

The ACCC further noted that the existence of willing buyers and sellers is not necessarily sufficient to ensure that robust water delivery right markets emerge. In particular, an operator has incentive to prevent such trades (or even disallow trade altogether) in order to benefit from payment of termination

<sup>723</sup> This should not otherwise limit the calculation of a maximum termination fee in relation to a right to drainage, or charging of termination fees in relation to infrastructure dedicated to the exclusive use of the terminating irrigator (where an infrastructure operator has a separate, specific charge in relation to that infrastructure).

<sup>724</sup> For a detailed discussion of the impacts of termination fees on trade of water access rights, see section 6.2.2 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.191.

<sup>725</sup> For a detailed discussion of the relationships between termination fees and trade of water delivery rights, see section 6.2.2 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.191-193.



fees by the terminating customer, and then issue “new” water delivery right to those wishing to acquire these rights. The ACCC considered that actions by operators to unreasonably restrict, or disallow altogether, trade of water delivery rights cause detriment to the operator’s customers and should be prohibited.<sup>726</sup>

Accordingly, the ACCC made draft rule advice 6-E that operators who do not provide for the trade of water delivery right within their networks should have their maximum termination fee multiple capped at 1 times (instead of 10 times). Further, in draft rule advice 6-F (discussed in section 6.3), the ACCC advised that operators should be required to inform a customer of their policies and opportunities for trade of water delivery right upon receiving notification of an intention to terminate, or request for information about the termination fee payable.

The ACCC noted that trade of a water delivery right requires that the water delivery right is able to be separated from the water access right or irrigation right. Thus, draft rule advice 6-E would not apply to a right of access to water service infrastructure which is implied into a water access right (for example, WAEs generally have an implied right to delivery on-river which cannot currently be separated from the right to water).

### *Stakeholder feedback*

Some submissions to the Issues Paper stated that there was no evidence that the current approach to termination fees is impeding water markets, and therefore there is no need to change the existing approach.<sup>727</sup> One submission to the Issues Paper noted that the intent of termination fees is not to facilitate water trade, but rather to reduce the burden on the operator and remaining customers.<sup>728</sup>

One stakeholder noted that termination fees are facilitating the efficient functioning of water markets but called for greater consistency in the units used to define water delivery rights to improve the comparability of termination fees across operators.<sup>729</sup>

Two submissions also noted that termination is not the only option available to an irrigator who seeks to discontinue its access to their irrigation networks.<sup>730</sup> One submission to the *Water Act 2007* (the Act) Review commented that “it is not in the interest of irrigation infrastructure operators (IIOs) to limit trade [of water delivery rights] where possible as ongoing income through both delivery rights and water use is preferable to termination”.<sup>731</sup>

The Wah Wah Stock and Domestic Water Users Association submitted that termination fees should not be permitted where a customer’s water access rights are not tradeable under state water management law.<sup>732</sup> The ACCC heard similar feedback during consultation meetings for the Draft Advice.

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<sup>726</sup> The Draft Advice noted that the Basin Plan water trading rules require irrigation infrastructure operators to not unreasonably restrict the trade of a water delivery right (rule 12.28). The ACCC considers that reasonable restriction of water delivery right trade should be determined with reference to the factors explicitly listed under rule 12.29 of the Basin Plan water trading rules.

<sup>727</sup> Central Irrigation Trust, Issues Paper Submission, July 2015, p.7; National Irrigators’ Council, Issues Paper Submission, July 2015, p.13; Western Murray Irrigation, Issues Paper Submission, July 2015, p.6.

<sup>728</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.10.

<sup>729</sup> Waterfind, Issues Paper Submission, July 2015, pp.4-5.

<sup>730</sup> Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.9; Murray Irrigation, Issues Paper Submission, July 2015, p.9.

<sup>731</sup> Murray Irrigation Limited, Submission to the Independent Review of the Water Act 2007, July 2014, p.6.

<sup>732</sup> Wah Wah Stock and Domestic Water Users Association, Issues Paper Submission, July 2015, p59.

Waterfind<sup>733</sup> submitted that it “fully supports” rule advice 6-E (limiting the termination fee multiple to 1x where an operator does not provide for the trade of water delivery right). Waterfind added that infrastructure operators could more provide information to customers or new entrants about the tradeability of their water delivery rights. To support this suggestion, Waterfind submitted that it has received feedback from clients that “they are often not aware of how delivery rights can be traded, let alone the value of the right (be it a positive or a negative price, depending on the situation)”.

Waterfind reiterated its positions from its submission to the Issues Paper that in order to facilitate water delivery right trade, the ACCC should additionally consider actions to unify the units that are used to define water delivery rights across states. Waterfind compared Victoria to NSW; in Victoria, water delivery rights are defined in terms of ML/day units whereas in NSW, water delivery rights are typically defined in terms of one delivery right equivalent to the right to have one ML of water delivered. Waterfind put forward its view that the unit used in Victoria is “often hard to interpret and makes comparison and trading of the delivery rights difficult”. Waterfind added that standardising the units used to define water delivery rights would make it easier to compare termination fees across infrastructure operators, which would be beneficial to new entrants to the water market, who are considering purchasing water delivery rights.

Some stakeholders commented on rule advice 6-E in relation to state-specific issues. The Queensland Farmers’ Federation (QFF) noted that it is a “complex issue” to consider whether termination fees are adversely affecting the operation of water markets.<sup>734</sup> The QFF considered that it is an issue that should be examined on a case-by-case basis for schemes within the Queensland portion of the Murray-Darling Basin (MDB). The QFF concluded with its view that the trade of water delivery rights is not an issue that is currently relevant to these schemes.<sup>735</sup>

Mr Connolly and P and B Tomlinson submitted their views on factors within Goulburn-Murray Water’s (GMW’s) networks that affect the tradability of their water delivery rights.

Mr Patrick Connolly submitted that the intent of rule advice 6-E, to cap termination fees at a multiple of 1x for infrastructure operators who do not provide for water delivery right trade, is undermined by allowing casual use of infrastructure.<sup>736</sup>

‘Casual use’ is a general term used to describe a person obtaining infrastructure services from an operator in excess of the volume provided for in that person’s ongoing right of access. This typically involves the delivery of water to a customer in excess of the volume provided for in their water delivery right, or delivery of water to a customer that does not hold any water delivery right.

Mr Connolly argued that encouraging casual use in preference to, or with greater flexibility than, trading water delivery rights contradicts the market and has the consequence that the “1x rule will have little consequence in encouraging the trade of delivery shares on the trading platform”.<sup>737</sup> This is because customers can choose to pay the casual use charges rather than buying additional water delivery rights (particularly when they have used more water than their own right of access allows), and that as such generous casual usage policies undermine demand for water delivery rights. Mr Connolly noted that in many of GMW’s districts there is a multiple of delivery shares over the volume of water delivered (in 2013-14). Outside of the specific relevance to termination fees, in relation to

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<sup>733</sup> Waterfind, Draft Advice Submission, March 2016, p.6.

<sup>734</sup> Queensland Farmers’ Federation, Draft Advice Submission, March 2016, p.6.

<sup>735</sup> The Queensland Farmers’ Federation also noted its view that the Queensland Competition Authority is compliant with the water charge rules in its price recommendation process.

<sup>736</sup> Patrick Connolly, Draft Advice Submission 1, February 2016, pp.2-4.

<sup>737</sup> Patrick Connolly, Draft Advice Submission 1, February 2016, pp.2-3.

casual use charges, Mr Connolly argued that these charges are not consistent with the Basin Water Charging Objectives and Principles (BWCOP) to promote the efficient functioning of water markets. Mr Connolly's other comments on casual use charges and the proposed non-discrimination provisions are discussed in section 5.3.

P and B Tomlinson<sup>738</sup> also commented extensively on factors within GMW's irrigation networks which have affected the value and tradeability (at a positive price) of water delivery rights and therefore work to "lock" irrigators into paying either the termination fee, or large amounts to have someone take over their delivery shares. P and B Tomlinson identified that the key factor that has affected the tradeability and value of water delivery rights is GMW's decision to re-value its water delivery rights from 100 ML per delivery right to 270ML, stating:

*Delivery shares [i.e. water delivery rights] were now to be the main source of GMW revenue, it was also suggested that they would have a value, be tradable, and they may well have been, had it not been for an act of rare folly committed by GMW when it was decided that each [delivery share] would allow holders access to 270 [ML] of water. This one decision killed any extra demand or revenue coming to GMW, also any value [delivery share] may have held...it also mean a termination fee had to be introduced to lock farmers in as they now had the capacity to cancel over half their [delivery shares]...*

P and B Tomlinson added that an "equally damaging, and perhaps overlooked consequence" is the impact this decision has had on land values.

P and B Tomlinson submitted that land buyers know that they can find other irrigators with unwanted delivery shares who are willing to pay large amounts for other irrigators to take them on (i.e. a negative price) or they have "ample" delivery shares themselves. Therefore, land buyers, of which there are many, are unwilling to buy properties with delivery shares attached; they demand that either the delivery shares are removed or otherwise the sale price of the farm reduces by the amount of the termination fee associated with each water delivery right. Consequently, the termination fee is a "death tax" for older, retiring farmers.<sup>739</sup> P and B Tomlinson put forward their suggestions, that for GMW's water delivery rights to be viably tradeable, the following should occur:

- decrease the volume of water attached to each water delivery right to 150ML<sup>740</sup>
- decrease the annual charge levied on water delivery rights
- GMW to levy a new charge when it issues new water delivery rights (e.g. the equivalent of one year of annual fees)

In the absence of these reforms, P and B Tomlinson consider that GMW should use some of the "rationalisation funds", to waive the termination fee, or grant an exemption, for circumstances where the farmer is exiting the industry due to health or age and the buyer will be taking over.

P and B Tomlinson interpreted from the ACCC's Draft Advice that the ACCC believes that a "robust market in delivery shares would be desirable, which in turn would largely remove the need for the levying of a termination fee". P and B Tomlinson note that this is a view they have "long held" and that it "fills [them] with hope".

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<sup>738</sup> Peter and Barbara Tomlinson, Draft Advice Submission, March 2016, p.1.

<sup>739</sup> P and B Tomlinson stated that in their case, the termination fees would be "half the value of [their] farm".

<sup>740</sup> P and B Tomlinson noted that there was a push during the 2013 price review from some farmer representative bodies and from within GMW itself, to reduce the right to water under each water delivery right back to 150 ML. However, this did not go ahead because many farmers had already reduced their water right holdings before unbundling, and therefore being issued with 270 ML for each water delivery right was "attractive" and GMW already made a number of its business decisions based on the 270 ML ratio.

Feedback from the University of Adelaide irrigator survey indicates that on average (for irrigators in the southern MDB), 45 per cent of irrigators consider that they do not have the correct amount of water delivery right for their needs; this proportion ranges from 32 per cent in the South Australian Murray to 63 per cent for Victorian private diverters.

### *ACCC assessment*

The ACCC considers that it is important to encourage operators to facilitate water delivery right trade, both as an alternative to termination and to facilitate more efficient use of water service infrastructure generally. The Draft Advice proposed to incentivise operators by limiting the multiple that applies to termination fee calculations to a lower amount if an operator does not provide for the trade of water delivery rights separately from the trade of a water access right or irrigation right.

The ACCC welcomes the feedback from a variety of stakeholders who consider that promotion of water delivery right trade is desirable, and reaffirms the need to promote trade of water delivery right as an alternative to termination. However, the ACCC acknowledges that trade is not always a possibility in every case, as it depends on a variety of factors, and in particular on there being demand for water delivery rights from existing or new customers.

The ACCC also welcomes suggestions made by operators to improve the operation of the proposed rule.

In particular, the ACCC has amended its rule advice and proposed rules to make clear that the intent is that the termination fee multiple should be restricted to 1x in cases where the operator does not *allow* for trade of water delivery rights of the kind related to the right of access the customer is considering terminating. This means that, on the one hand, an operator should not be able to impose a general termination fee using the 10x multiple where it restricts the trade of water delivery right of the kind the customer wishes to terminate. On the other hand, the multiple should not be restricted to 1x because the operator has not approved a particular application to trade a water delivery right. Basin Plan water trading rule 12.28 provides that there may be cases where an operator can reasonably restrict the trade of a water delivery right, and the ACCC intends the proposed water charge rule provision to complement Basin Plan water trading rule 12.28. As such, the ACCC considers that its revised advice in this matter provides an appropriate level of generality which will promote water delivery right trade in general while still allowing operators the flexibility to consider water delivery right trades on a case-by-case basis.

The ACCC has also adopted the suggestion that the rule be specified in terms of whether the operator “allows for” rather than “provides for” the trade of relevant water delivery rights, in order to avoid the misconception that the rules require operators to actively facilitate trade via such activities as maintaining an online water delivery right exchange, or providing for specific types of trade, such as leases or temporary trade. The ACCC encourages development of such arrangements where appropriate, but acknowledges that water delivery right markets are still nascent in many operators’ networks and therefore that it is not appropriate for the rules to mandate what specific types of trading arrangements or trading platforms an operator should have.

The ACCC considers that the submissions of Mr Connolly and P and B Tomlinson together provide a detailed explanation of the inter-relationships between specification of water delivery rights, termination fees, casual usage arrangements and trade of water delivery rights. In particular, these submissions demonstrate the impacts that decisions about casual usage policies and specification of water delivery rights can have on supply and demand for water delivery rights.

While sympathising with Mr Connolly’s concerns about the impacts of casual use arrangements on demand for water delivery rights, the ACCC does not consider that the water charge rules should mandate the level at which casual usage charges should apply across all operators, or restrict operators’ ability to offer access to its infrastructure on a casual basis. Casual use is a legitimate service that an operator may choose to provide to customers. The appropriate amount of casual use and the circumstances in which it is offered must be determined on a case-by-case basis, according to the circumstances unique to each operator. Nevertheless, the ACCC recognises the negative impacts overly generous casual usage arrangements (particularly in the context of relatively low casual usage charges) can have on the value of and demand for water delivery rights and robust water delivery right markets.

The ACCC similarly considers that the water charge rules are not the appropriate vehicle for making rules governing how an operator should specify its water delivery rights. In the case of GMW’s decision to ‘rebase’ its water delivery rights to allow channel customers to have delivered 270 ML per unit of water delivery right held, the ACCC notes that this decision essentially means that users can use a greater amount of water relative to the amount of water delivery right held before casual usage charges apply. Thus, decisions about water delivery right are fundamentally linked to casual use arrangements. The ACCC stresses that while the rules can and should promote non-discriminatory pricing outcomes, part of which is achieved by requiring operators not to unreasonably restrict access to services, the rules should not mandate which types of services an infrastructure operator chooses to offer.

The ACCC notes requests by stakeholders that the rules prohibit an operator from levying a termination fee when a customer’s water access rights are not tradeable under state water management law. While these stakeholders raise a legitimate concern that the inability to trade a water access right, in addition to termination fees, creates the potential for customers to be ‘locked in’ to current arrangements, the water charge rules cannot require a Basin State to allow a particular type of water access right to be tradeable.<sup>741</sup> Also, the rules should not preclude an operator from the legitimate recovery of its costs (in accordance with the rules for calculating termination fees) merely because of a state restriction over which the operator has no control. While sympathising with the situation faced by such users, the ACCC is of the view that these concerns cannot be adequately addressed under the water charge rules.

### **6.3 Circumstances in which a termination fee can be imposed**

#### **Rule advice 6-F**

The rules should be amended as set out below to clarify when an operator can levy a termination fee and improve the availability of information to customers considering terminating.

#### *Operator to provide information in response to customer seeking to terminate*

The rules should continue to allow for a customer to terminate some or all of their right of access by submitting a written notice to their infrastructure operator.

Upon receiving such a notice, the infrastructure operator must, within 25 business days,

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<sup>741</sup> The ACCC also notes that the Basin Plan water trading rules do not require Basin States to allow all kinds of water access rights to be tradeable, and that rule 12.02 exempts non-tradeable water rights from the protections of the water trading rules. Further rule 12.08(2) exempts the application of that rule to tradeable stock and domestic water access rights. As such, the current Basin Plan water trading rules also do not appear to be able to address this stakeholder concern.

provide the customer with a written statement (referred to in the proposed water charge rules as a '**termination information statement**')

- (a) setting out the value of the maximum **general termination fee** that would be payable upon termination (binding on the operator and the customer for 6 months—see below), and how that fee was calculated;
- (b) notifying the customer if they are able to trade water delivery right of the kind relevant to the customer's right of access, and any rules governing such trade;
- (c) if applicable—setting out the amount of any disconnection fee that would apply under Rule 76, or providing information on how a disconnection fee would be calculated;
- (d) if applicable—setting out the amount of any **additional termination fee** relating to capital works, approved by the ACCC under rule 73.

*Operator to confirm that customer wishes to proceed with termination after providing termination information statement*

After providing the termination information statement containing the information in (a)–(d) above, the rules should require the operator to confirm that the customer wishes to proceed with the termination in order to be able to levy a termination fee.

In the case where the operator had provided the statement to the customer in response to an information request (see below) within the period beginning 6 months before the operator received the customer's written notice to terminate, the customer's written notice should be taken as confirmation that they wish to proceed with the termination (and the maximum general termination fee would be that previously provided to the customer in the statement).

*Operator to provide information in response to customer information request*

An infrastructure operator should also be required to provide a termination information statement to a customer upon receiving a request from a customer for information on the termination fee that would be payable if the customer were to terminate some or all of their right of access (an 'information request').

An operator *may* require an information request to be submitted in writing, but if it does so *must* advise any customer who submits a non-written information request of this requirement as soon as is practicable. Where an operator has such a policy, the rule requirement for the operator to provide a termination information statement should apply only in relation to written information requests received by that operator.

*Operator only permitted to levy a termination fee when customer terminates if information has been provided within required timeframe*

The rules should provide that, where the customer instigates a termination by submitting written notice to the operator, the operator may not levy a termination fee unless it has already provided the customer with a termination information statement setting out the information in items (a)–(d) above within the previous 6 months. However, in the case where the customer specifies a future date on which the termination is to take effect, the termination information statement must have been given within the period beginning 6 months before that future date.

If the operator had not previously provided the termination information statement within the relevant time, they must do so after receiving the notice from the customer, and may only levy a termination fee if a customer, having been given the termination information statement, confirms that they wish to proceed with the termination.

The maximum *general* termination fee the operator can levy is that set out in the termination information statement. If applicable, the maximum *additional* termination

fee is the relevant fee approved by the ACCC under rule 73.

*Note:* If an operator instigates a termination due to a customer's breach of contract (as is provided for in subrule 71(3), an operator should not be required to provide a termination information statement.

These rules should be a civil penalty provision.

*See also rule advice 6-E.*

This rule advice is implemented in rules 71 and 74 of the proposed Water Charge Rules.

### **Rule advice 6-G**

The rules should be amended to make clear that the operation of proposed subrule 71(9)(b) (current rule WCTFR 6(2)(b)) should be confined to where an operator provides a service for the storage of water using its own water service infrastructure.

This rule advice is implemented in subrule 71(9)(b) of the proposed Water Charge Rules.

### *Background*

The Water Charge (Termination Fees) Rules 2009 (WCTFR) prohibit an operator from charging a termination fee except in circumstances authorised by the WCTFR. Where an operator is able to charge a termination fee, the WCTFR regulated the maximum amount that can be imposed.

### **Specific circumstances in which an operator may not impose a termination fee**

Currently, an irrigator may elect to terminate or surrender their right of access to the irrigation infrastructure operator's (IIO's) irrigation network by giving written notice to the operator. An operator may impose a termination fee without written notice from the irrigator only where the operator terminates the irrigator's right of access due to the irrigator breaching their obligations under their contractual right of access. However, an operator is not permitted to impose a termination fee on an irrigator if:

- the customer is not liable to pay ongoing access fees and is not liable to pay a termination fee under any contract with the operator;<sup>742</sup> or
- the operator does not separate out fees for a service for the storage of water that it provides, from the charges in respect of the customer's right of access.<sup>743</sup>

The ACCC considered in its Draft Advice that in these circumstances it remains appropriate that operators be prohibited from imposing termination fees. As such, the ACCC did not propose amendments to these current rule requirements.

Specific additional instances where the WCTFR currently do permit, but, in the view of certain stakeholders, should *not* permit a termination fee to be imposed (or where an operator should be required to discount termination fees), were discussed in previous sections (see 6.2.1 and 6.2.2).

### **Operation of proposed rule 77 (current WCTFR rule 11)**

The current WCTFR contains a provision (rule 11) that, where an infrastructure operator has a right to terminate a right of access (e.g. in an existing contract or arrangement), the WCTFR do not remove that right or preclude the operator from exercising this right. This rule notes, however, that an operator

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<sup>742</sup> Subrule 6(2)(a) of the WCTFR.

<sup>743</sup> Subrule 6(2)(b) of the WCTFR.

who exercises such a right may only charge a fee, charge or payment in respect of such a termination if it is expressly authorised by the WCTFR.

### **Operator’s responsibilities upon receiving notice of intention to terminate**

Although not raised directly by stakeholders, the ACCC considers that the processes for terminations, and in particular the operator’s responsibilities during that process, form an important aspect of an operator’s ability to charge a termination fee.

The ACCC’s Draft Advice noted that under the current WCTFR, there is no process by which a customer may inquire, and receive notice from the operator, about what termination fee would apply prior to submitting a notice of intention to terminate. This means that an irrigator will not necessarily know the amount of the termination fee that would be payable until they provide notice that they are in fact terminating their right of access. The rules also do not require the infrastructure operator to set out how they have calculated, or intend to calculate, the termination fee.

- The ACCC noted that a similar mechanism does already exist under the Water Market Rules 2009 (WMR) in relation to transformations,<sup>744</sup> and considered that there would be benefit in providing such a mechanism in relation to termination fees. Draft rule advice 6-F was made to that effect. The draft rule advice recommended that the amount of the termination fee specified in a notice provided to a customer should be binding on the operator for 30 business days.
- The ACCC further considered that, when providing notice of what the termination fee would be, an operator should also be required to:
  - set out how that termination fee was calculated; and
  - notify the customer if they are able to trade their water delivery right (as an alternative to termination).

### *Stakeholder feedback*

#### **Specific circumstances in which an operator may not impose a termination fee**

Generally, feedback received in response to the Issues Paper from operators was that the circumstances specified in the rules under which a termination fee may be imposed are set appropriately, and that termination fees are not inhibiting operators from making efficient network rationalisations.<sup>745</sup>

However, the ACCC heard feedback from irrigators via submissions and during public forums that they consider the circumstances in which termination fees may be imposed to be too permissive in some cases. Stakeholder views on when an operator should be required to discount, or not levy, termination fees due to previous customer contributions or alternative means of recovering future

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<sup>744</sup> See: ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November, pp.194-195.

<sup>745</sup> Western Murray Irrigation, Issues Paper Submission, July 2015, p.7; National Irrigators’ Council, Issues Paper Submission, July 2015, p.14; Central Irrigation Trust, Issues Paper Submission, July 2015, p.7; Murray Irrigation Limited, Issues Paper Submission, July 2015, p.9; Coleambally Irrigation Cooperative Limited, Issues Paper Submission, July 2015, p.10.

Coleambally Irrigation Cooperative Limited noted that “[r]ationalisation of group schemes is easily said but much harder to achieve because it inevitably comes down to some customers being pressed to accept relocation, reduced service levels and/or higher charges. That said, where an IIO is intent on rationalisation, access to a pool of termination fees that might be used [to] fund rationalisation is far more likely to assist [than] inhibit the process”.

Queensland Farmers’ Federation made a comment on the termination fee set by the Queensland Competition Authority, which falls outside the jurisdiction of the WCTFR. The Queensland Farmers’ Federation noted that the “[Queensland Competition Authority] imposed termination fees in some high cost schemes that would restrict opportunities for irrigators to take options to trade out of a scheme if they were wanting to address financial problems on farm and within the scheme. These changes may restrict an operator from rationalising sections of a scheme by allowing customers to trade out of the problem section of the scheme”. Queensland Farmers’ Federation, Issues Paper Submission, July 2015, p.6.



capital costs are discussed in section 6.2.1. Views on whether / how trade of different kinds of water rights should impact on ability to impose a termination fee are discussed in section 6.2.2.

In its submission on the Draft Advice, the National Irrigators' Council (NIC) commented on the draft rule 71(2)(b) (subrule 71(9)(b) in the proposed water charge rules accompanying the Final Advice) which restricts an operator from levying a termination fee if it provides a service of the storage of water (in addition to a service for the delivery / drainage of water) and the charges for the storage service are included in the charges in respect of the right of access.<sup>746</sup> The NIC questioned whether the drafting of the rule captures infrastructure operators who offer carryover services but do not have a separate storage charge; therefore, they would be unable to levy a termination fee. The NIC noted that "[t]his is an important point as the consequences could be catastrophic". The ACCC notes that proposed subrule replicates the current WCTFR rule 6(2)(b). Therefore, NIC's submission on this point contrasts with NIC's earlier submission on the Issues Paper, in which the NIC stated that "the current limits on when a termination fee can be imposed under WCTFR, are appropriate and that the WCTFR do not inhibit IIOs from efficient network augmentation or rationalisation decisions."<sup>747</sup>

### **Operation of proposed rule 77 (current WCTFR rule 11)**

The NIC claimed that proposed rule 77—limiting a fee, charge or payment in respect of a termination by the operator under a contract or arrangement, to those expressly authorised by the WCTFR—"tak[es] away an operator's common law right to claim damages for a breach".<sup>748</sup> The NIC further commented that "no justification for this has been offered".

### **Operators' responsibilities upon receiving notice of intention to terminate**

Two stakeholders commented specifically on rule advice 6-F. The Queensland Farmers' Federation (QFF) submitted that it supports this rule advice.<sup>749</sup>

Operators attending a discussion in Griffith identified that the drafting of proposed rule 74 uses several different forms of wording, which creates potential for confusion. In particular, subrules (a) and (b) contemplate a customer being able to submit a "written notice...of their intention to terminate" or "request information on the termination fee that would apply", while the latter part of the rule refers to an operator "...receiving the application..." from the customer.<sup>750</sup>

Operators attending a discussion Mildura expressed concern that the rules impose too many different compliance time periods, which would inevitably lead to unintentional non-compliance because operators would be confused about which time periods apply in which cases.<sup>751</sup>

### *ACCC assessment*

### **Specific circumstances in which an operator may not impose a termination fee**

This discussion focusses on rules governing an operator's general ability to impose a termination fee—that is, proposed rules 70, 71 and 77 (current WCTFR 5, 6 and 11). Stakeholder feedback relating to discounting or waiving termination fees, given that the operator is able to impose a fee at

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<sup>746</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.15.

<sup>747</sup> National Irrigators' Council, Issues Paper Submission, May 2015, p.15.

<sup>748</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.16.

<sup>749</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.6.

<sup>750</sup> ACCC consultation meeting with National Irrigators' Council members on the Draft Advice for the review of the water charge rules, Griffith, 12 January 2016.

<sup>751</sup> ACCC consultation meeting with National Irrigators' Council members on the Draft Advice for the review of the water charge rules, Mildura, 14 January 2016.

all, is addressed above at section 6.2.1. Discussion of whether an operator should be precluded from levying a termination fee where trade is restricted or not allowed is at section 6.2.2. Changes to rule 71 relating to requirements to provide information to a terminating customer are discussed below in this section.

After considering stakeholder feedback on the rules governing termination fees, the ACCC considers there is no need to alter its advice in relation to proposed rules 70 and 77. These proposed rules replicate the existing WCTFR rules with only minor wording changes to reflect the amalgamation of rules and the broadening of the rules governing termination fees to apply to all infrastructure operators (as per rule advice 6-A). Generally stakeholders were either comfortable with these provisions, or submitted concerns that more properly relate to circumstances in which an operator should discount termination fees or the inter-relationships between termination fees and trade, which are addressed elsewhere.

In relation to the NIC's concern regarding subrule 71(2)(b) (now subrule 71(9)(b)), the ACCC considers that given that this subrule replicates the current WCTFR rule 6(2)(b), and that no stakeholders, including the NIC, have raised concerns about this provision in the six years that the WCTFR have been in operation, it does not appear that this provision would have "catastrophic" consequences for operators.

The ACCC notes that off-river operators generally do not provide carryover services themselves (because they generally do not operate on-river storages), but rather facilitate access to another entity providing carryover services. Also, the ACCC is not aware of any examples of off-river infrastructure operators levying separate charges in relation to carryover, or at all.

The ACCC considers that the intent has always been to apply this rule in relation to where an operator provides a service for the storage of water via the use of *its own* water service infrastructure. In particular, the ACCC's guidance material on the existing provision (current WCTFR subrule 6(2)(b)) concentrated on where an operator provides 'bulk' (or 'on-river') services through 'bulk storage infrastructure' in addition to providing delivery and drainage services through their off-river network.<sup>752</sup> The ACCC supports the rules continuing to require operators to specify infrastructure charges for such storage services separately from charges levied on customers' rights of access.

However, the ACCC appreciates that it is not clear that the current wording of the rule, 'a service for the storage of water', necessarily excludes a service whereby an operator facilitates customers' access to storage services offered by another entity (e.g. an on-river infrastructure operator who provides 'bulk' storage services). Therefore, to avoid all doubt and to address the NIC's concern, the ACCC's recommends that rule 71 be amended to refer to 'a service for the storage of water using the operator's water service infrastructure'. The ACCC has made rule advice 6-G to this effect.

### **Operation of proposed rule 77 (current WCTFR rule 11)**

In response to the NIC's view that rule 77 removes an operator's common law right to seek damages, the ACCC notes that rule 77 replicates existing rule 11 of the WCTFR (with only minor consequential changes required due to the rules being combined into a single instrument). Nothing in the modification affects the operation of this rule. The general effect of the WCTFR (via Part 2 of the existing rules) is to prevent termination fees except as expressly authorised under Part 3. Thus, current rule 11 provides that an operator may have an existing right to terminate a customer's right of access

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<sup>752</sup> ACCC, *A guide to the water charge (termination fees) rules*, Canberra, December 2011, section 4.2.1, viewed June 2016, [https://www.accc.gov.au/system/files/A%20guide%20to%20water%20charge%20termination%20fees%20rules\\_0.pdf](https://www.accc.gov.au/system/files/A%20guide%20to%20water%20charge%20termination%20fees%20rules_0.pdf).

in certain circumstances (which is not affected by the rules), but reiterates that an operator may only levy a fee, charge or payment in respect of that termination if it is expressly authorised by the rules.

This rule was made in the existing WCTFR to ensure that unreasonable grounds for terminating a customer which may exist in such contracts cannot result in a termination fee being payable. For example, pre-existing contracts may require a customer to not trade a water access right, or may enable an operator to terminate a customer's right of access if they do. This rule precludes an operator from demanding a fee, charge or payment from a customer whose right of access was terminated in such circumstances.

The ACCC does not therefore consider that this rule removes an operator's common law ability to pursue damages, for example, for unpaid charges or damage to the operator's property, as these are not charges in respect of the termination directly. Reflecting that this rule is the 'status quo', and that no argument has been presented to support allowing the imposition of fees, charges or payments in such circumstances, the ACCC does not propose any modification to this provision.

### **Operator's responsibilities upon receiving notice of intention to terminate**

The Draft Advice sought to:

- provide customers with greater certainty about the termination fee payable in the customer's own circumstances and
- ensure, where possible, that a customer has all relevant information about the options and associated costs to reduce their right of access, and sufficient time to consider this information before making a decision.

The Draft Advice therefore proposed that customers should be able to notify their operator of their intention to terminate or request information about the termination fee that would apply, and that the operator should be required to provide a response which sets out the applicable termination fee together with all information relevant to the customer's decision. In order to ensure that the operator responds to such requests in a timely manner, the draft rule advice recommended that an operator be required to respond within 20 business days of receiving the notice of intention to terminate / request for information. The irrigator should then have 30 business days to consider this information, before making a decision; that is, the termination fee 'quote' provided by the operator should be binding for 30 business days from the time the operator provides the notice.

This mechanism would provide greater certainty to customers about the termination fee payable in their circumstances. It would also ensure that wherever possible, a customer has all relevant information about the costs of termination and about alternative options (in particular, options to trade water delivery right), and sufficient time to consider this information before making a decision. The Draft Advice also noted that such a mechanism would also support the Basin Plan water trading rule 12.28, which requires that an IIO must not unreasonably restrict the trade of water delivery right. Further, the ACCC noted that the inclusion of a similar approach in relation to transformation in the WMR has not appeared to create problems for operators.

The ACCC maintains that this rule advice is generally appropriate. However, the ACCC acknowledges that several changes can be made to improve the operation of this proposed mechanism. These changes are discussed in turn below.

#### *Information to be provided*

Draft rule advice 6-F proposed that an operator should be required to provide information on:

- the value of the termination fee that would be payable upon termination, and how that fee was calculated; and
- whether the customer is able to trade their water delivery right, and any rules governing such trade.

Upon further consideration, the ACCC advises that operators should also be required to include in the information provided to the customer, if applicable:

- the amount of any disconnection fee levied under Rule 76 (or an estimate if the amount of the fee needs to be calculated when the termination actually occurs), and how that fee is calculated; and
- the amount of any *additional termination fee* related to capital works which has been approved by the ACCC under Rule 73 (see section 6.4); if the operator has applied to the ACCC but the fee has not yet been approved, the operator should provide an indicative amount.

These additions more completely give effect to the policy intent of draft rule advice 6-F, which was that the rules should ensure customers are provided with complete information before making a decision to terminate.

The proposed water charge rules clarify that this information should be provided in writing, and refers to the statement containing the requirement information as a ‘termination information statement’.

#### *Timeframe for an operator to give the information*

The ACCC acknowledges that the water charge rules and the WMR together place several timing requirements on operators. Elsewhere in this Final Advice, the ACCC has proposed several amendments which will harmonise and reduce<sup>753</sup> the number of such requirements on operators. Consistent with this intent and the proposed additional information to be required in a termination information statement, the ACCC considers that the timeframe for an operator to provide the statement should be adjusted to 25 business days (from 20 business days). The ACCC considers that it is important that there rules require timely response, and that timing requirements are an essential tool to ensure such compliance. The ACCC proposes to include in its guidance material a comprehensive explanation of which timing requirements apply when, to assist operators to understand the rules and achieve full compliance (see also section 4.4).

#### *Timeframe over which information given to a customer is valid*

After further consideration, the ACCC advises that the period for which a general termination fee ‘quote’ is valid should be 6 months. This period had previously been proposed to be 30 business days in the Draft Advice. This change has been made to recognise that, particularly in the case where termination occurs together with sale of water access entitlements (including entitlements resulting from transformation) the sale of irrigation rights, customers may seek information on termination fees prior to participation in water markets or seek information during an irrigation season with an intent to terminate at the end of that season. The ACCC believes the amended 6 month timeframe is necessary to ensure customers can proceed with water market transactions with sufficient certainty about the amount of a termination fee they are liable to pay and will avoid the need for operators to respond to multiple requests for such information over a short period.

The proposed rules make clear that, although a customer is able to request information on the amount of a termination fee at any time, the ‘quoted’ general termination fee in the termination information

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<sup>753</sup> This is particularly the case for Part 5 operators via the proposed repeal of Part 5.

statement given by the operator is only binding on the operator if the customer terminates within 6 months. Therefore, in the case where a customer has been provided with a termination information statement, but does not proceed with termination / surrender within 6 months, the termination information statement is taken to have lapsed.

However, the ACCC recognises that in some cases customers terminate / surrender their right of access by providing notice to their operator, but specify in that notice a *future date* for the termination / surrender to take effect. In this circumstance, the ACCC considers that the operator should give to the customer a termination information statement, which should include the amount of termination fee that the customer would pay if they were to terminate within six months. However, if the future date the customer has specified for the termination to take effect is *beyond* this six month period, the termination information statement should also make clear that—if the customer confirms that they wish to proceed with the termination at that future date—the maximum general termination fee that will be levied will be calculated using the relevant infrastructure charges from the Schedule of Charges in effect at that future date, and may therefore be higher than the dollar amount ‘quoted’ in the statement (i.e. because the statement is only binding for six months).

The ACCC considers that this outcome provides an appropriate balance between customers’ information needs and not ‘locking in’ operators to charging a particular termination fee for an inappropriate length of time. Giving the customer a 6-month maximum general termination fee ‘quote’ in response to their request will give the customer some idea of the likely termination fee that would apply, but the operator would also be able to make clear that termination fees for terminations occurring after the 6-month period are not bound by the ‘quote’.

#### *Effect of giving a termination information statement to a customer*

The ACCC has ensured that proposed subrule 71(5) states that where an operator gives a customer a termination information statement setting out the amount of a general termination fee that would apply to a particular termination (whether in response to a request for such information or because a customer provides a written notice terminating their right of access), and the customer terminates within 6 months of the operator giving that information, the operator must not charge a general termination fee for the termination that is *higher* than that specified in the statement. However, the operator is free to levy a *lower* termination fee if it wishes to do so.

Further, the ACCC considers that the amount of a general termination fee in a termination information statement given to a customer should also be binding on the *customer* for 6 months. This means that an operator need not provide a revised ‘quote’ during the 6-month period, even if the operator adopts a new Schedule of Charges during that time. Similarly, if the customer proceeds to terminate within that 6 month period, the maximum general termination fee the operator is able to levy should be the general termination fee set out in the termination information statement, even if re-calculating the general termination fee using the newly adopted Schedule of Charges would result in a lower general termination fee. The revised rule advice and drafting give effect to this intent.

In some cases, a customer may, after receiving the termination information statement provided by the operator, change their mind about the amount and / or aspect of their right that they wish to terminate. This could occur, for example, if the termination fee per unit terminated is substantially higher or lower than the customer expected, or if there was a significant difference in the termination fee for “fully” versus “partially” terminating. In these cases, if the information provided by the operator is easily adaptable to the revised amount to be terminated, the operator should not be required to prepare and send a new termination information statement to the customer within 6 months of the date it first

provided a statement to the customer. An example of this would be where a termination information statement set out an amount of termination fee per unit terminated (e.g. \$ per ML of WDR terminated), and the customer decided to change the number of units terminated.

However, if the information previously given is not adaptable to the revised amount, the operator should provide a revised 'quote' in a new termination information statement. A key example of where an operator might need to provide new information is where a customer initially sought to only partially terminate (that is, reduce the volume of their right of access but retain access), but subsequently decides to fully terminate their right of access. In this case, the operator may need to include additional amounts relating to fully terminating that were not relevant to the initial 'quote' provided in the first termination information statement. This would be particularly relevant where an operator has separate infrastructure charges for infrastructure used exclusively by the terminating customer, such as meters or outlets. The ACCC does not consider that this level of details needs to be specified in the rules but should be included in future guidelines.

The ACCC notes that under the proposed approach, an operator would be required to set out how it calculated the general termination fee (and, if applicable, any additional termination fee) it provided to a customer in the termination information statement. In the event that an operator introduces a new Schedule of Charges within the 6 months period, a customer should be able to determine whether a lower termination fee could apply under that Schedule. That is, a customer should be able to see whether individual charges on which the termination fee 'quote' was based have changed in the new Schedule of Charges, and if so, how the termination fee calculation would be affected. Given that subrule 71(5) only prevents an operator levying a fee that is *higher* than the amount specified in the termination information given (where termination occurs within the 6 month period), if a new Schedule of Charges is introduced which would have a correspondingly lower termination fee, a customer could negotiate with the operator for the lower termination fee (according to the new Schedule) to apply. In the event that an operator refused to lower the termination fee, the customer may decide not to terminate until a later date (i.e. after the 6 month period has lapsed).

#### *Clarifying circumstances in which an operator is required to provide information*

The ACCC considers that the amendments proposed in the Draft Advice did not clearly provide that an operator should be *required* to provide information about the amount of the (maximum) termination fee and opportunities to trade water delivery right *prior to* a customer terminating their right of access. The ACCC considers that such a requirement is important to ensure that all customers who wish to terminate are provided with the information they need before making a decision.

The ACCC has therefore revised its advice and the corresponding proposed rule to make clear that, in the case where a *customer* instigates termination, the operator must always provide the relevant information and confirm the customer's decision to terminate after the information has been provided. This intent is given effect to by proposed subrule 71(2) which requires that, in the case where the customer instigates the termination, in order to be able to levy a termination fee an operator must either:

- (a) have already provided the relevant information within the period beginning 6 months<sup>754</sup> before receiving the customer's notice to terminate; or
- (b) otherwise, provide the required information to the customer in response to receiving the customer's notice, and then confirm that the customer wishes to proceed.

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<sup>754</sup> See the subsection titled 'Timeframe over which information given to a customer is valid' below.

The ACCC agrees with stakeholders that the wording in proposed rule 74 could be improved by consistently referring to the operator receiving an ‘information request’, which could entail either:

- a) a request from a customer for information on the termination fee that would apply if the customer were to terminate the whole or part of a right of access; or
- b) a notice submitted by a customer to terminate the whole or part of their right of access.

The revised proposed rule 74 implements this improvement.

The revised drafting also clarifies that an operator *may* require that an information request be submitted in writing, but must advise customers that this is the case. Where an operator has such a policy, the rule requirement should apply only to information requests received in writing.

In the case where the *operator* instigates a termination due to a customer’s breaching their contractual obligations (provided for under subrule 71(3)), the ACCC does not consider that the rules should require an operator to provide specific information. Given that the customer’s consent to the termination is not required in this case, the rationale that the operator should be required to provide information because that information is necessary to the customer’s decision-making does not apply. However, the ACCC notes that in practice an operator will still need to inform the customer of the amount of the termination fee being levied (so that the customer is able to pay that amount), and may also wish to provide the customer with details of how that fee was calculated for the purpose of demonstrating that the rules for calculating the fee have been complied with.

## **6.4 Approval of additional termination fees**

### *Background*

Rule 8 of the Water Charge (Termination Fees) Rules 2009 (WCTFR) provides for the allowance of termination fees that are in excess of the amount otherwise permitted under the rules in certain circumstances. Specifically, rule 8 allows such a termination fee where the fee is specified in an existing or new contract between an operator and a customer and relates to the recovery of capital expenditure that could not be recovered under the termination fee calculated under rule 7 of the WCTFR. The ability of operators and customers to negotiate such a clause reflects the possibility that some efficient investments may only be viable with cost recovery periods longer than those implied by the maximum termination fees allowed by the rules.

Rule 8 requires the parties to the contract to obtain approval from the ACCC for this termination fee. Before the ACCC decides whether to approve the additional termination fee, a party to the contract must submit to the ACCC:

- a copy of the contract;
- the contact details of the parties;
- details of contracts/arrangements made for the carrying out of capital works which relate to the termination fee; and
- any further information the ACCC requests.

The ACCC must approve the additional termination fee if:

- it is satisfied that the fee is clearly stated within the contract;
- the fee relates to capital works entered into within the first five years of the contract; and

- the fee is reasonably related to the recovery of the estimated or actual cost and it was agreed by the parties to the contract in a fair and reasonable negotiation. Further, before approving the fee, the ACCC must have regard to the Basin Water Charging Objectives and Principles (BWCOP).<sup>755</sup>

In the more than six years since the introduction of the WCTFR, the ACCC has received only one application from an irrigation infrastructure operator (IIO) for assessment, and this was assessed to be invalid.<sup>756</sup> Further, the ACCC has only received two customer inquiries relating to additional termination fees and both of those were in 2009.

In the Draft Advice, the ACCC considered that the reasons for regulatory overview of the additional termination fee process are still valid. Any amended approach that by-passes ACCC scrutiny requires the customer:

- to be able to assess whether the trade-off between a higher termination fee and the building of new infrastructure is in their self-interest;
- to have enough knowledge of the rules and sufficient negotiation skills to participate in a fair and reasonable negotiation;
- to know of their ability to, and the circumstances in which, they can refer a matter to the regulator (the ACCC).

Whereas some customers would be able to assess such matters, many irrigators may not have the necessary commercial expertise in such contract negotiations, often have limited or no knowledge of the various water charge rules, or have limited resources and may not be able to make this assessment. Customers may also be in a relatively weak bargaining position in relation to an operator for a variety of reasons.

Accordingly, in the Draft Advice, the ACCC considered that it is appropriate to maintain this rule in its current form.

### *Stakeholder feedback*

The ACCC has received no evidence of support to change to rule 8. Stakeholders have not made any submissions on the issue of additional termination fees in response to the Issues Paper, the Draft Advice or otherwise.

### *ACCC assessment*

The ACCC maintains that the rationale set out in the Draft Advice continues to apply, and given the absence of any stakeholder feedback on this position, considers that rule 8 should be incorporated into the combined water charge rules in its current form.

## **6.5 Summary of Final Advice on termination fees**

The ACCC's advice on changes to rules for termination fees, set out in the sections above, together provide for a new process when a customer is considering terminating or surrendering their right of

<sup>755</sup> The ACCC must decide whether or not to approve the additional termination fee within 30 business days, excepting any days on which an ACCC request for information to stakeholders is outstanding. The ACCC may extend its decision-making period by 30 business days.

<sup>756</sup> The ACCC found the application invalid, in part because the relevant capital works had commenced some years before the contract was entered into. The infrastructure operator declined to re-submit the application.



access. A central principle in this advice is that a customer should be able to access information relevant to a decision to terminate, *before* making that decision. This includes information about the amount of any termination fee or disconnection fee that the customer would be liable to pay, how those amounts were calculated, and whether alternatives (such as water delivery right trade) are available. This information should be provided in writing and is referred to in the proposed water charge rules as a 'termination information statement' (TIS).

The ACCC's advice also makes changes to the manner in which termination fees are calculated, in order to better promote the efficient use of water service infrastructure. These changes:

- reduce the potential for termination fees to be levied in a manner which provides an incentive for customers to retain a small portion of their right of access, and
- provide incentives for operators to allow for trade of water delivery rights within their networks.

In order to aid stakeholders to understand these rule advices, the following flow charts set out the steps for providing information to customers and levying termination fees (Figure 6.1) and the process for calculating termination fees (Figure 6.2) which would apply if all of the ACCC's rule advice in this Chapter was implemented.

Figure 6.1: Process for providing termination information statements and levying termination fees – applicable to all infrastructure operators

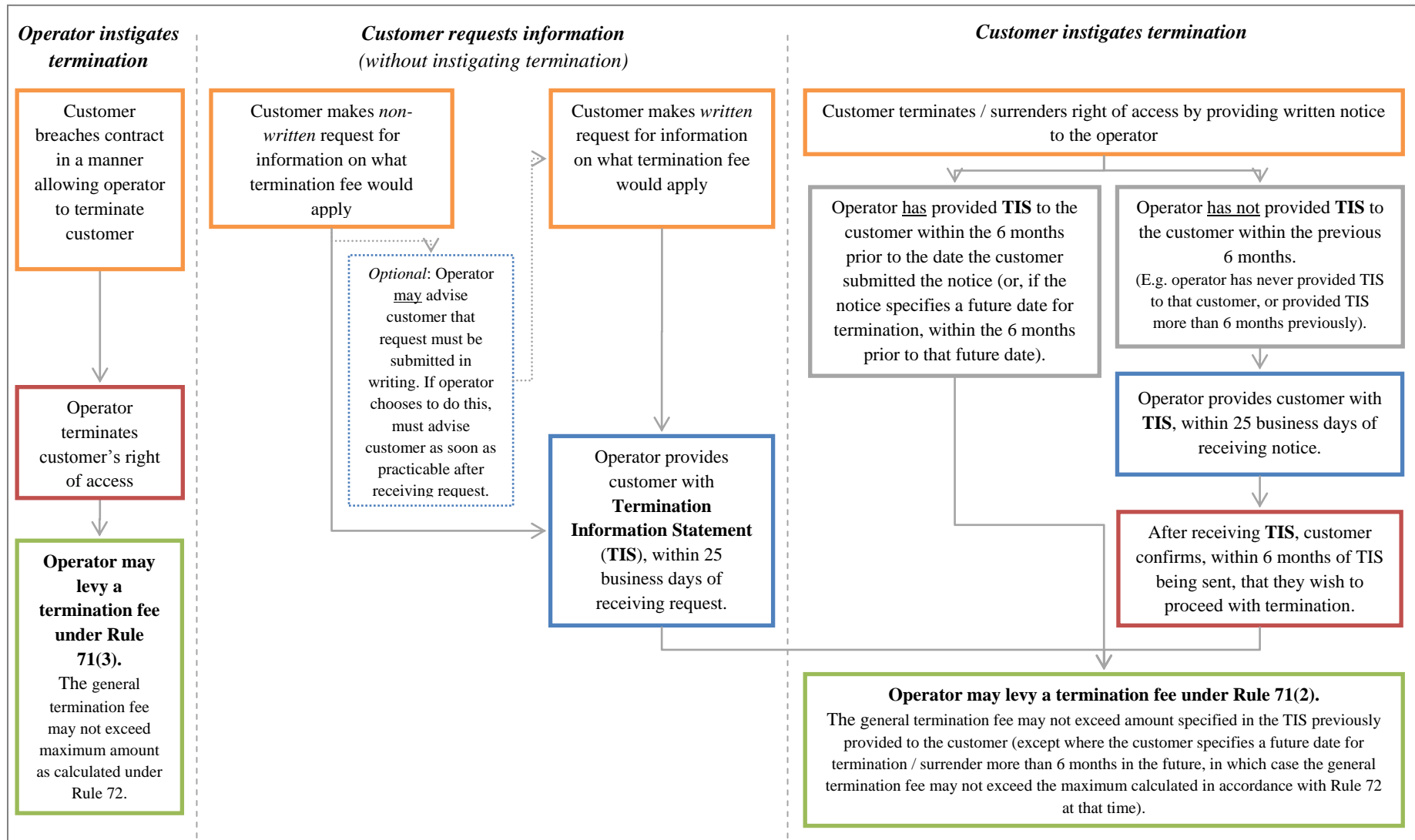
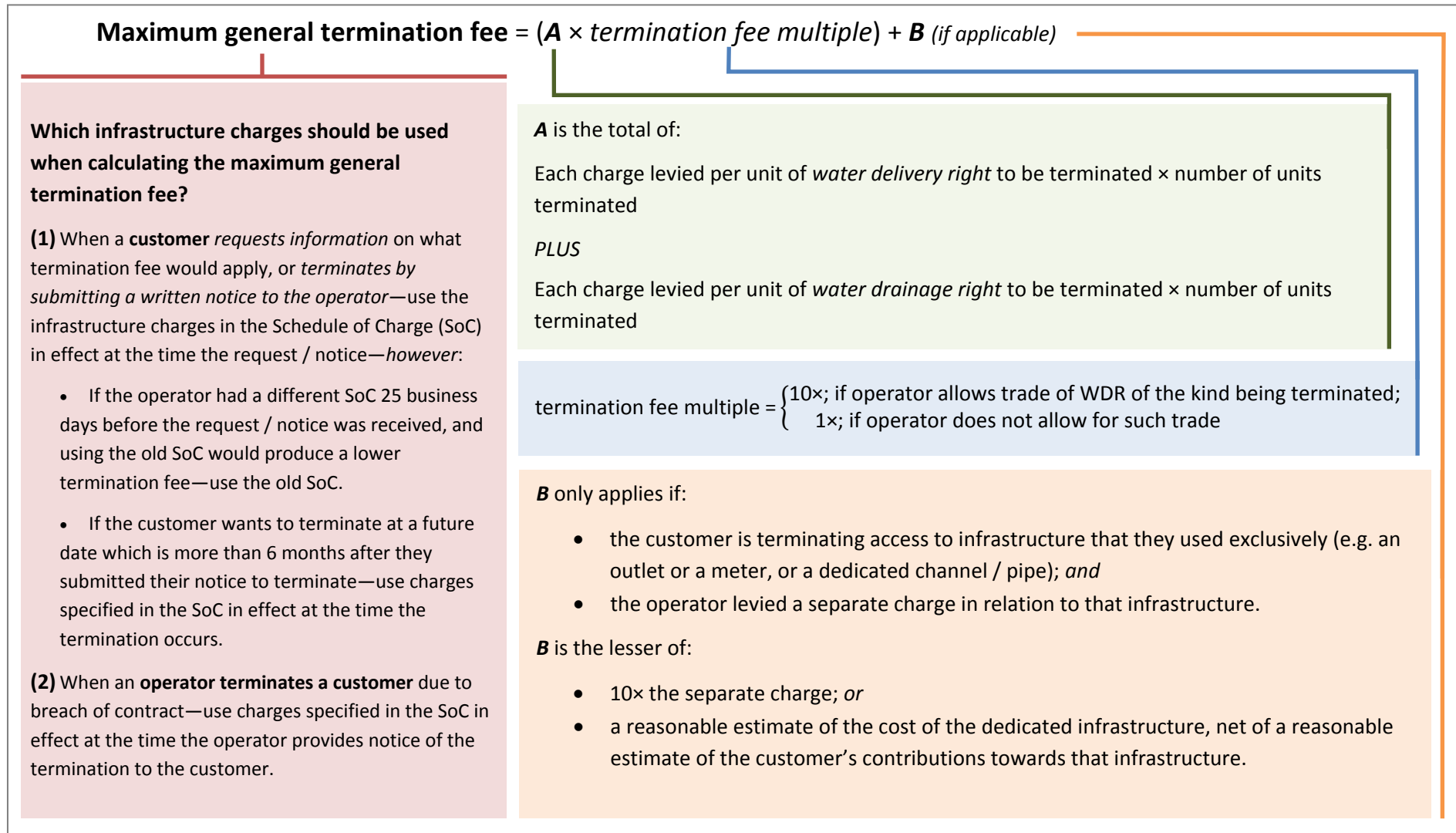


Figure 6.2: Calculating maximum general termination fees



## 7 Water Charge (Planning and Management Information) Rules 2010

### 7.1 Background

The Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) seek to advance the objective of pricing transparency by requiring persons determining charges for water planning and water management (WPM) activities<sup>757</sup> to publish information about the charges.<sup>758</sup>

Pricing transparency was one of a number of objectives and principles for water planning and management charges (hereafter, referred to simply as planning and management charges) that States and Territories committed to implementing under the National Water Initiative (NWI). These NWI commitments were incorporated into the Basin Water Charging Objectives and Principles (BWCOP) in Schedule 2 of the *Water Act 2007* (which the water charge rules are required to contribute to achieving). Other BWCOP relevant to cost recovery for planning and management included giving effect to the principles of user pays, identifying and publishing information on the costs of WPM activities and linking charges to the costs of WPM activities or products.

Planning and management charges generally represent a small proportion of an irrigators' total regulated water bill—less than five per cent for most irrigators.<sup>759</sup>

### 7.2 The scope of the WCPMIR and the utility of published information

#### Recommendation 7-A

The ACCC supports the ongoing commitment made by governments to greater cost recovery for water planning and management activities, as part of the National Water Initiative, but recommends that the water charge rules are not an effective policy tool to ensure these commitments are met.

#### Background

The Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) aim to improve the consistency, scope and availability of information about planning and management charges across Basin States.

Different approaches by Basin State governments to cost recovery for water planning and management (WPM) activities may, if significant, distort water markets. This can result in inefficient

<sup>757</sup> WPM activities cover a broad range of activities, delivered by or on behalf of government, to plan for and manage water resources, to support sustainable water use and to maintain the health of natural ecosystems: for example, administering water entitlement registers, developing water sharing plans, monitoring and evaluating water quality and river health levels, building environmental works to mitigate the impacts of consumptive water use (e.g. fish ladders). The *Water Act 2007* (the Act) does not define planning and management charges or WPM activities. The Act and the WCPMIR therefore currently rely upon the ordinary meaning of these terms; further guidance on defining and identifying WPM activities and planning and management charges can be found in the ACCC, *A guide to the water charge planning & management information rules 2010*, Canberra, July 2010, viewed July 2016, <http://acc.gov.au/publications/a-guide-to-the-water-charge-planning-management-information-rules-2010>. The guide adopts the definition and method for classifying water planning and water management activities set out in the 'National Water Initiative Pricing Principles: Principles for cost recovery of water planning and management activities'. These pricing principles, developed jointly by the Australian, State and territory governments, were endorsed by the Natural Resource Management Ministerial Council in April 2010.

<sup>758</sup> Explanatory Statement, Water Charge (Planning and Management Information) Rules 2010.

<sup>759</sup> The ACCC calculates hypothetical irrigator bills to show changes in absolute amounts paid by irrigators and to track the relative proportions of the bill that relate to planning and management charges, bulk charges and irrigation infrastructure operator charges. Planning and management charges paid by irrigators differ across the Basin and the hypothetical bills assume only planning and management charges regularly applied rather than irregular transaction charges. In most Basin States, this means planning and management charges represent around five per cent of total hypothetical irrigator bills. See: ACCC, *Water Monitoring Report 2013-14*, 2015, pp.65-67, viewed July 2016, <http://acc.gov.au/regulated-infrastructure/water/water-monitoring-reporting>.

decisions regarding the use of water, water infrastructure and government resources allocated to managing water. This is because water users in some Basin States would not face the full cost of their water-related decisions. The WCPMIR were intended to assist Basin States to adopt more consistent approaches to cost recovery for WPM activities.

At the time the WCPMIR were made, Basin States took different approaches to funding their WPM activities. Sometimes, these activities were funded out of general revenue and at other times by charges recovering costs from water users. Where planning and management charges were applied these took the form of charges ranging from broad-based levies to specific transaction fees. Some charges were subject to formal regulatory price-setting processes but the basis on which other charges were set was often unclear, especially the link between charges and the costs of WPM activities. In other cases, Basin States did not directly charge water users for WPM activities.

During the policy development stage for the WCPMIR, some stakeholders proposed that the Minister make rules to allow the Commonwealth to set the planning and management charges imposed by Basin States. In its advice to the Minister, the ACCC noted there were policy and legal issues relating to the Australian Government's ability to direct state governments as to costs they should recover from water users through charges. Further, WPM activities were often undertaken by a range of departments and agencies or delegated to government-owned corporations, and the activities could be state-wide, not clearly related or limited to areas within the Murray-Darling Basin (MDB), or relate to urban water supply activities.

For these reasons, the Minister made the WCPMIR that sought to build the consistency and scope of information available to water users about new and existing planning and management charges imposed by Basin States and the extent to which those charges recovered the costs of WPM activities.

### **Basin State compliance with the WCPMIR**

Basin States have generally complied with the requirements to disclose information about planning and management charges. By contrast, compliance with the requirement to disclose WPM activities and the cost of those activities has been more variable. Where there is non-compliance with the WCPMIR by Basin States, the ACCC has previously adopted an approach of working with Basin States to improve compliance over time. ACCC staff have spent considerable resources assisting Basin States to comply with the rules, although in some cases, this has had limited effect.

Queensland, in particular, has advised that it does not intend to comply due to the significant resource burden involved in producing the information required by the WCPMIR.<sup>760</sup> The ACT has also refused to disclose the activities and costs associated with its key planning and management charge.

### **NWI and the BWCOP commitments to disclose the cost of planning and management activities**

The ACCC noted in its Draft Advice that all State and Territory Governments, and the Australian Government, committed to 'bring into effect consistent approaches to pricing and attributing costs of water planning and management' through the NWI. They also committed to annual public reporting on cost recovery for WPM activities.<sup>761</sup> These Governments also followed up the commitments of the NWI by developing a set of pricing principles for the cost recovery of WPM activities in 2010.

The water charge rules must contribute to the achievement of the BWCOP. The BWCOP are based on the commitments made in the NWI for planning and management pricing transparency, disclosure and

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<sup>760</sup> Queensland Department of Natural Resources and Mines, Issues Paper Submission, July 2015, p.2.

<sup>761</sup> See clauses 67 of the Intergovernmental Agreement on a National Water Initiative, 2004.

reporting of the cost recovery for WPM activities. However, the drafting of the *Water Act 2007* (the Act) limits the ability of the WCPMIR to achieve the BWCOP:

- the rules can only require the provision of information about planning and management charges (and related activities) in relation to the MDB, excluding charges in relation to urban water supply activities and
- cannot compel information about the cost of WPM activities for which no charge is levied.

### **The value of planning and management charge and cost disclosure**

The Draft Advice noted that disclosure of planning and management *charge* information is useful to water users, as it informs users of their quantum relative to other water charges. Also, since planning and management charges are usually *unavoidable* (e.g. in order to gain a license or trade a water allocation you must pay a charge), it is appropriate that there is disclosure. Noting that one of the objectives of the water charge rules is to improve pricing transparency, it is appropriate that all regulated water charges imposed on water users, including planning and management charges, be disclosed using a consistent framework across the MDB.

The value regarding disclosure of planning and management *activities* and associated costs appears mixed. Such disclosure allows users to understand what activities a charge pays for, what those activities cost and the degree to which planning and management charges imposed recover the costs incurred. As discussed above, the WCPMIR does not oblige Basin States to disclose information about WPM activities for which no charge is levied.

Basin States have struggled to practically achieve the requirements of the WCPMIR. Planning and management charge disclosure is generally *objective* – a specific charge amount is imposed and the charge is imposed on a type of customer in a certain area etc. In collecting and presenting WPM *activity cost* information, persons determining a charge have to make assessments on:

- the degree to which the costs identified relate to WPM activities *carried out in the MDB* and
- the degree to which the WPM costs *can be separated from other costs*.

The majority of compliance issues related to the WCPMIR involve the presentation of cost information.

The ACCC has previously noted the significant inconsistency in the approach to planning and management charges is unlikely to be sufficiently material to significantly distort water markets.<sup>762</sup> However, the ACCC also notes that this view is based on limited research, disclosed in the 2010-11 and 2013-14 water monitoring reports that show planning and management charges are small relative to charges imposed by infrastructure operators.<sup>763</sup>

### **Summary of Draft Advice**

The ACCC's Draft Advice considered that there was value in continuing to require persons who determine planning and management charges to publish information on these charges. While seeing value in the disclosure of WPM activities and costs, the ACCC noted that the limited coverage of the Act makes it difficult for Basin States to meet the requirements for disclosure of WPM cost recovery through the WCPMIR alone. Noting the existing NWI framework for identifying and presenting

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<sup>762</sup> ACCC, Submission to the Independent Review of the Water Act 2007, July 2014, p.6.

<sup>763</sup> ACCC, *Water Monitoring Report 2010-11*, Canberra, April 2012, pp.64-66; ACCC, *Water Monitoring Report 2013-14*, Canberra. May 2015, p.50.

information on cost recovery of WPM activities, the ACCC proposed that this might be a more effective means to achieve the BWCOP on this issue (recommendation 7-A).

### *Stakeholder feedback*

A number of submissions to the Issues Paper<sup>764</sup> supported the intent of the WCPMIR and the transparency requirement for Basin States to disclose information about their planning and management charges.<sup>765</sup> However, some stakeholders questioned both the benefits of publishing information about WPM costs, particularly when charges do not reflect full-cost recovery, and the extent to which the information publication requirements contribute to the BWCOP.<sup>766</sup>

Submissions to the Issues Paper provided mixed feedback in relation to the usefulness of planning and management charge information,<sup>767</sup> and the compliance costs associated with the current WCPMIR, and associated monitoring requests.<sup>768</sup>

In response to the Draft Advice, Goulburn-Murray Water (GMW) submitted that generally it supports the ACCC's proposed amendments in relation to the WCPMIR and the "intention to improve price transparency".<sup>769</sup>

The Queensland Department of Natural Resources and Mines (DNRM) supported the ACCC's proposed amendments to repeal the reporting requirements to disclose the costs related to WPM activities for which a planning and management charge is levied. DNRM submitted that although it was supportive of the National Water Initiative (NWI) pricing principles, it is DNRM's view that the current cost information publication requirements under the rules do not assist in promoting the economically efficient and sustainable use of water resources.<sup>770</sup>

The Commonwealth Environmental Water Holder (CEWH) commented that there is a need to recognise the efficiency gains in WPM costs that have occurred because of water being managed for environmental outcomes, rather than consumptive use.<sup>771</sup> The CEWH believes that the BWCOP "inherently" provides for the recognition of such gains. The CEWH concluded that, "providing water for environmental outcomes supports the WPM activities of promoting sustainability and long term river health".

The South Australian Murray Irrigators (SAMI) raised a number of specific concerns about the level of, and planning process for, planning and management charges in SA. The SAMI submitted:

*Paying for open ended and unspecified Water Planning and Management charges is unfair and at times causing detrimental effects on the irrigation business. Over the last 10 years we have seen these fees skyrocket and effect unnecessary planning and little solid resource definitions or trigger point flow values with which to base business decisions and manage the farms assets efficiently.*

In particular, the SAMI identified concerns in relation to the following two charges:

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<sup>764</sup> See: ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.198-200.

<sup>765</sup> IPART, Issues Paper Submission, July 2015, p.9; Victorian Farmers' Federation, Issues Paper Submission, July 2015, p.9; Waterfind, Issues Paper Submission, July 2015, p.5; Murray Irrigation Limited, Issues Paper Submission, July 2015, p.9.

<sup>766</sup> Queensland Department of Natural Resources and Mines, Issues Paper Submission, July 2015, p.2; Queensland Farmers' Federation, Issues Paper Submission, July 2015, pp.2,7.

<sup>767</sup> Waterfind, Issues Paper Submission, July 2015, p.5; Mr Mongan, Issues Paper Submission, July 2015.

<sup>768</sup> IPART, Issues Paper Submission, July 2015, p.9; Goulburn-Murray Water, Issues Paper Submission, July 2015, p.5; Coliban Water, Issues Paper Submission, July 2015, p.1.

<sup>769</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.6.

<sup>770</sup> Queensland Department of Natural Resources and Mines, Draft Advice Submission, March 2016, p.2.

<sup>771</sup> In particular, the CEWH argues that there have been efficiency gains from the consolidation of many small water access entitlements used for consumptive purposes into a small number of large water access rights to now be used for environmental purposes.

- The South Australian Government’s processing and transfer fee. The SAMI labelled this fee as being the “most burdensome” and “unjustifiably inflated” fee.<sup>772</sup>
- The Natural Resources Management (NRM) Board Levy. The SAMI accompanied its submission to the Draft Advice with a submission that it made to the Natural Resources Management Board on 15 January 2016 in relation to the Board’s Draft Business Plan. In this submission, the SAMI outline a number of concerns about the Board and Levy.

### *ACCC assessment*

The ACCC’s Draft Advice considered that the water charge rules are not an effective policy tool to ensure the objectives of the NWI relating to planning and management cost recovery are met. Stakeholders either supported or did not oppose this view.

The ACCC accepts that there are potential problems with a lack of transparency about the cost basis for certain WPM charges and their allocation between different stakeholders, as indicated in SAMI’s submission. However, there are inherent difficulties in identifying and allocating the costs for relevant activities given the current legislative framework limiting the scope of the rules to where certain charges are actually imposed. The current WCPMIR publication requirements in relation to the cost of planning and management activities have therefore been unable to effectively facilitate greater cost recovery in this area.

The ACCC’s Final Advice maintains the position from the Draft Advice that the water charge rules are not an effective policy tool to ensure governments’ water planning and management commitments under the NWI are met. The corresponding advice to remove certain publication requirements is provided in section 7.3.

## **7.3 Requirements about information to be published**

### **Rule advice 7-A**

The requirement to disclose the nature and cost of water planning and management activities related to planning and management charges (rules 5(2)(d) and 5(2)(j) of the WCPMIR) should be repealed.

This rule advice is implemented in the proposed repeal of the WCPMIR.

### **Rule advice 7-B**

The rules should be amended such that remaining requirements in the WCPMIR to disclose information about planning and management charges are retained and harmonised with the general pricing transparency requirements for infrastructure charges. These requirements are set out in rules advices 5-E and 5-F.

This rule advice is implemented in rule 11, 12 and 13 of the proposed Water Charge Rules.

<sup>772</sup> The South Australian Murray Irrigators noted that irrigators with permanent plantings and water in other catchments “are ‘price takers’ when it comes to these fees as their business is dependent on the water arriving at their property”. Additionally, for irrigators making small trades, “the fixed trade costs are burdensome”.



## *Background*

The Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) currently require a person who determines a planning and management charge (usually a Minister or another government executive or a delegate of that person) to publish certain information on that charge.<sup>773</sup>

Planning and management charges may be imposed directly on users or incorporated into other (infrastructure) charges imposed by infrastructure operators as a pass-through charge (see section 5.13).

In its Issues Paper, the ACCC sought stakeholder feedback on whether the level of detail of information required to be published under the WCPMIR about planning and management charges was appropriate, and whether there are specific requirements to publish information in the WCPMIR that are unnecessary, onerous, unreasonable or unduly costly.

In its Draft Advice, the ACCC noted that the introduction of the WCPMIR has led to an increase in disclosure of information relating to planning and management charges, resulting in a clearer understanding that many planning and management charges are imposed by infrastructure operators along with their infrastructure charges.

Consistent with the recommendation in section 7.2, the ACCC proposed that the rules should be amended to remove the requirement to publish information on activities that relate to a planning and management charge and the costs associated with those activities.<sup>774</sup>

Rule advice 4-A in section 4.3.1 proposed the consolidation of the three current water charge rules into a single instrument. The combined instrument would apply to regulated water charges and a charge captured under the term 'regulated charge' in the WCPMIR would be considered a planning and management charge under the combined water charge rules.

The Water Charge (Infrastructure) Rules 2010 (WCIR) and WCPMIR currently require the publication of different types of information about charges, at different times, depending on whether the charges are infrastructure charges or planning and management charges; and on whether they are imposed by an infrastructure operator or some other entity. All these charges are ultimately payable by irrigators and other water users. The ACCC proposed in the Draft Advice that the water charge rules should, as much as possible, streamline these information requirements to ensure pricing transparency and better informed decisions.

Accordingly, the ACCC made draft rule advice to increase consistency of disclosure requirements for infrastructure charges and planning and management charges, based on the approach currently taken in subrule 5(2) of the WCPMIR.

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<sup>773</sup> For example, the following information must be provided under rule 5 of the WCPMIR:

- the name and amount of the charge (or information necessary to determine the amount)
- who must pay the charge and to whom
- the details of the activities to which the charge relates including when the activities are being carried out, the costs of the activities and the relationship between the costs of the activities and the calculation of the charge
- information about the process for determining the charge, including cost allocation principles and whether the charge was the subject of consultation, review or audit, and
- other information, if applicable, such as the water resource or class of water access right to which the charge applies.

The above summarises the requirements of the WCPMIR. The full WCPMIR requirements are available at: <http://www.comlaw.gov.au/Details/F2010L02133>, viewed June 2016.

<sup>774</sup> The current requirements in the WCPMIR relating to these matters are at subrules 5(2)(d)(i) and 5(2)(j).

### *Stakeholder feedback*

In response to the Issues Paper, Waterfind submitted that it valued planning and management charge information provided under the WCPMIR.<sup>775</sup>

The NSW Government stressed the importance of consistency of information provided. The NSW Government prepares planning and management information to meet both Commonwealth and its own reporting requirements, however called for the rule requirements to be consistent with NSW requirements.<sup>776</sup> The Victorian Farmers' Federation (VFF) submission noted a recommendation from a Victorian Auditor General Office report on the Environmental Contribution Levy that the Department of Environment and Primary Industries enhances public reporting to ... clearly describe the purpose, benefits and achievements of the Environmental Contribution Levy and its funded projects and/or initiatives".<sup>777</sup>

In response to the Draft Advice, the Queensland Farmers' Federation (QFF) and the Queensland Department of Natural Resources and Mines (DNRM) submitted that they supported draft rule advice 7-A to remove the requirements for Basin State governments to publish information about the costs of WPM activities.<sup>778</sup>

The QFF and Lower Murray Water support rule advice 7-B to harmonise the publication requirements for infrastructure, and planning and management charges.<sup>779</sup>

Goulburn-Murray Water (GMW) supported the ACCC's proposed amendments in relation to the WCPMIR and the "intention to improve price transparency".<sup>780</sup>

The Commonwealth Environmental Water Holder's (CEWH's) submission called for an acknowledgment within the water charge rules that infrastructure operators "are obliged to plan and manage their resource for multiple purposes and multiple users"; therefore WPM costs are incurred by, and apply to, all classes of entitlements, regardless of the purpose of water use.<sup>781</sup> Similarly, the NSW Office of Environment and Heritage (OEH) commented on the benefits of the contribution that it makes to the NSW WPM costs via the charges that it pays as a licence holder.

### *ACCC assessment*

Submissions on this issue generally supported the proposals in the Draft Advice.

The ACCC's Final Advice maintains rule advices 7-A and 7-B, that is:

- The requirement to disclose the nature and cost of WPM activities related to planning and management charges (subrules 5(2)(d) and 5(2)(j) of the WCPMIR) should be repealed.
- The rules should be amended such that remaining requirements in the WCPMIR to disclose information about planning and management charges are retained and harmonised with the general pricing transparency requirements for infrastructure charges.

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<sup>775</sup> Waterfind, Issues Paper Submission, July 2015, pp.5-6.

<sup>776</sup> NSW Government, Issues Paper Submission, August 2015, pp.1-2.

<sup>777</sup> Victorian Auditor-General as cited in Victorian Farmers' Federation, Issues Paper Submission, July 2015, p.9.

<sup>778</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.6; Queensland Department of Natural Resources and Mines, Draft Advice Submission, March 2016, p.2.

<sup>779</sup> Lower Murray Water's support was conditional on the repeal of the WCPMIR. Lower Murray Water, Draft Advice Submission, March 2016, p.5; Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.6.

<sup>780</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.6.

<sup>781</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.3.

This will implement the ACCC's general advice on the suitability of the rules in relation to reporting on WPM costs, set out in section 7.2.

The ACCC notes the comments of the CEWH and NSW OEH on the benefits for planning and management from using water for environmental outcomes, including through the revenue from infrastructure charges relating to such water. However, the ACCC does not consider that an express recognition of this is required in the rules. Similarly, the ACCC considers it is not necessary for there to be an acknowledgment within the water charge rules that infrastructure operators "are obliged to plan and manage their resource for multiple purposes and multiple users". The ACCC considers that the range of uses and users of water is already widely understood throughout the MDB.

#### **7.4 Requirements as to timing and place of publication**

##### *Background*

The introduction of a new planning and management charge or amendment of a material characteristic of an existing planning and management charge currently triggers under the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) the requirement to publish the information, either on the internet or in the Australian Government Gazette, and to place a notice advising of information being available in a newspaper circulating generally in the area in which persons liable to pay the planning and management charge reside or carry on business. The information must be available before the planning and management charge or the amendment comes into effect and must be provided to any person on request.

The ACCC noted in its Draft Advice that currently under the WCPMIR and Water Charge (Infrastructure) Rules 2010 (WCIR), infrastructure operators and individuals who determine planning and management charges are subject to different requirements relating as to the timing and place of publication of information about regulated charges. The ACCC made draft rule advice 5-I to simplify and, where appropriate, streamline publication requirements.<sup>782</sup> In relation to publication requirements for planning and management charges, rule advice 5-I in section 5.4.2 of the Draft Advice proposed:

- removing the requirement to publish a notice in a local newspaper or in the *Australian Government Gazette* when a charge is imposed or changed (draft rule advice 5-H); amending the timeframe for when charge information must be published.<sup>783</sup> The ACCC proposed that:
  - a Schedule of Charges should be published / sent 25 business days in advance of that Schedule coming into effect by infrastructure operators (whose charges must be approved or determined by the ACCC or a State Agency) and persons, other than infrastructure operators, who determine planning and management charges.
  - a Schedule of Charges should be published / sent 10 business days in advance of that Schedule coming into effect by all other infrastructure operators.<sup>784</sup>

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<sup>782</sup> See 'discussion' and draft rule advices 5-H and 5-I in section 5.4.2 and 'discussion' in section 7.4 of ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.83-84, 205-206.

<sup>783</sup> Under the existing WCPMIR, a person determining planning and management charges does not need to adopt a Schedule of Charges per se; the person must publish the required information in the manner specified in the rules. In the Draft Advice, consistent with the objective to streamline the publication requirements relating to infrastructure charges and planning and management charges, the ACCC proposed that persons determining planning and management charges should be required to publish a 'Schedule of Charges' that contains all the relevant information set out in the rules and is published in the manner required.

<sup>784</sup> For more detail on these positions see ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, pp.205-206.

### *Stakeholder feedback*

Only one submission to the Issues Paper directly addressed the issue of timing and location for publishing information on planning and management charges. The NSW Government suggested that water planning and management (WPM) information could instead be provided to the ACCC at the same time that it is provided to IPART (in October).<sup>785</sup> The NSW Government further noted that charges imposed by the Department of Primary Industries—Water (DPI Water) are subject to IPART’s public consultation process when IPART sets price paths for their charges and the charges are available on the DPI Water’s website.

In response to the Draft Advice, Goulburn-Murray Water (GMW) submitted generally that it supports the ACCC’s proposed amendments in relation to the WCPMIR and the “intention to improve price transparency”.<sup>786</sup>

No other submissions commented specifically on this section of the Draft Advice.

### *ACCC assessment*

The ACCC maintains its advice that the information requirements for infrastructure charges should be harmonised with those for planning and management charges as much as possible. The ACCC has generally retained draft rule advice 5-I but has proposed further amendments that will make it easier for persons to comply with the publication requirements relating to planning and management charges, see section 5.4.2 for further discussion. .

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<sup>785</sup> NSW Government, Issues Paper Submission, August 2015, p.2.

<sup>786</sup> Goulburn-Murray Water, Draft Advice Submission, March 2016, p.6.

## 8 Other issues of concern

This chapter briefly discusses several issues which were raised by stakeholders but which cannot be addressed through the water charge rules. Although they are outside the direct scope of this review, the ACCC has considered these concerns and made several recommendations in response.

### 8.1 Water market concerns

#### 8.1.1 Transparency in water markets

##### **Recommendation 8-A**

The ACCC recommends that the Australian Government work with Basin States to improve the accuracy and consistency of water trade reporting. In particular, water trading price data should be collected on a consistent basis in a way that can allow for the separation of market-based trades from other types of trades.

##### **Effect of water market intermediaries on market transparency**

During the ACCC's consultation process for the water charge rules review, several stakeholders raised the potential for water market intermediary misconduct and the impacts intermediaries' actions could potentially have on prices for water access rights. For example, one stakeholder in the Shepparton public forum stated that where water markets are fragmented, intermediaries may (deliberately or otherwise) cause price inflation when providing information to potential market participants. The example given was that of a broker providing advice to a buyer seeking to purchase a large volume of water allocation. In the stakeholder's view, the broker provided information about prevailing market prices with reference to the price as listed on an exchange where only a very small volume of water allocation was traded. The view was that it was likely that prices in this small market would be higher than for a market where there was a larger number of traders and a greater volume of water allocation being traded. Therefore, in this stakeholder's view, use of price information obtained from a 'small' market as a basis for the formation of willingness-to-pay estimates in other contexts has the effect of putting upward pressure on water allocation prices outside of that reference market.

Further, some stakeholders were of the view that brokers deliberately avoided conducting trades through public exchanges in order to conceal information about the identity of particular buyers and / or sellers, or the volume of water allocation traded. The view was that such behaviour amounts to misconduct because the brokers are deliberately obstructing pricing transparency in water markets and encouraging collusion and 'insider trading'.

Two submissions to the Draft Advice provided differing views on the preferred level of regulation that should apply to water market intermediaries. Waterfind supported greater regulation of water market intermediaries, managed by the Australian Government through a licensing system.<sup>787</sup> The Australian Water Brokers Association (AWBA), on the other hand, did not support more regulation of water market intermediaries.<sup>788</sup> The AWBA considered that "[p]rofessional water brokers...are eminently qualified to identify issues as they arise, provide feedback and offer solutions". The AWBA submitted that the recommendation of the Independent Expert Panel (the Panel) reviewing the *Water*

<sup>787</sup> Waterfind identified a list of areas that should be covered by such regulations (e.g. performance standards and some form of quality endorsed certification) and requirements that should be imposed on water market intermediaries (e.g. operate an independently audited trust account and hold professional indemnity insurance). Waterfind, Draft Advice Submission, March 2016, p.8.

<sup>788</sup> Australian Water Brokers Association Inc., Draft Advice Submission, March 2016, pp.5-6.

Act 2007 (the Act) for an industry-led scheme of regulation already exists in the form of its Association.

The ACCC notes that the Australian Government released for consultation in 2013 a COAG draft Regulation Impact Statement for the potential regulation of water market intermediaries, but that to date no further action has been taken.<sup>789</sup> Following on from this, the Panel recommended that:

*...industry develop, in consultation with the Australian Government, an industry-led scheme of regulation for water market intermediaries. The scheme could include voluntary accreditation, a code of conduct and a defalcation fund. If a scheme is not developed, the Australian Government should regulate water market intermediaries. State referrals would be necessary to give effect to Basin-wide or national regulation.*<sup>790</sup>

Since the Draft Advice was published, the Australian Government addressed the issue of water market regulation in its response to the Panel's report, released in December 2015. The Government accepted the Panel's recommendation to encourage a scheme of industry-led self-regulation of water market intermediaries. The response noted that:

*...A scheme of industry-led self-regulation is consistent with the Government's regulatory reform agenda. The Government will also explore options that may improve transparency in the water market. Commonwealth regulation will be considered if evidence emerges that this would alleviate or remove risks in the water market and hence provide an overall net benefit to business, individuals and community organisations.*<sup>791</sup>

Further, as noted in the Draft Advice, although water market intermediaries (including water brokers) are not currently subject to any industry specific legislation, they must still comply with the provisions in the *Competition and Consumer Act 2010* (CCA) including the Australian Consumer Law (ACL). The ACL prohibits, among other matters, misleading and deceptive conduct, and false or misleading representations of various kinds. The ACCC enforces the CCA and, together with state and territory fair trading agencies, enforces the ACL. In the event that voluntary regulation is introduced, this legislation will remain an important foundation on which the industry-led scheme can be built.

The ACCC reiterates its encouragement for any stakeholder with specific concerns or evidence of water market intermediary misconduct to report the issue to the ACCC. This evidence will be important to support any industry-led self-regulation to ensure that the regime is well-designed and able to address the issues that are causing concern or detriment.

### **Availability of market data**

A number of stakeholders raised concerns via submissions to the Issues Paper, the Draft Advice and in public forums about the lack of reliable information about water holdings and trades, particularly price information.

The ACCC observes that concerns about water market data reliability and availability have the potential to lead to a lack of confidence in the market in some areas. Irrigators seek readily accessible information as to the volume and price of water trades, and some also seek the identity of sellers and

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<sup>789</sup> Department of Sustainability, Environment, Water, Population and Communities, *Regulation of Water Market Intermediaries*, Draft Council of Australian Governments regulation impact statement for consultation, April 2013, viewed June 2016, <https://www.environment.gov.au/water/australian-government-water-leadership/coag/consultation-ris-2013>.

<sup>790</sup> *Report of the Independent Review of the Water Act 2007*, Recommendation 9.

<sup>791</sup> *Australian Government Response to the Report of the Independent Review of the Water Act 2007*, December 2015, p.7.

purchasers. These concerns were particularly evident in the Shepparton public forum, and in submissions from irrigators in that area. The ACCC recognises that a well-functioning market requires confidence from its participants and transparency.

Some stakeholders provided further commentary on these issues in their submissions to the Draft Advice. The Commonwealth Environmental Water Holder (CEWH) supported improvements to state register reporting mechanisms and the provision of clear and concise information to water rights holders regarding water trading. The CEWH considered that these reforms will assist in addressing the potential for the asymmetric availability of information to market participants.<sup>792</sup>

Additionally, Waterfind supported steps to improve the accuracy and consistency of water trade reporting. In particular, it suggested that the authorities approving or registering a trade should be obliged to publicly disclose the trade price, given that the seller is required to report the agreed price to the authority.<sup>793</sup> Waterfind noted that most authorities are already reporting this information to the Bureau of Meteorology (BOM) and that therefore it would not represent a significant regulatory burden to report it publicly.

Waterfind also commented on the National Water Market System (NWMS) project, which was discontinued in 2014, Waterfind also submitted that the Government should make immediate decisions regarding the legacy of this project. Waterfind noted its understanding that infrastructure operators are using the NWMS information systems to report information to the BOM and called for “someone [to] take ownership of the NWMS data, and either improve the existing portal or develop a new one as soon as is practicable in order to provide more efficient water trade information services for market participants.” Waterfind supported Federal and State Governments working with the industry to find a sustainable solution.<sup>794</sup>

The ACCC has previously called for improvements in how water trade prices are reported.<sup>795</sup> In particular, it appears that prices reported for trades are often skewed by other transactions occurring at the same time (for example, the trade of water with land or water delivery right). Furthermore, trade data does not generally distinguish market-based arms-length transactions from related-party transactions (for example, where an irrigator trades water from one property to another) or transactions where only the location (and not the ownership) of a water access right is changed. Such distinctions are particularly important in the context of very large trades by environmental water holders. If such trades are not reported separately from ‘arms-length’ transactions, reported trade figures give a misleading impression. For example, an environmental water holder may trade water allocation from one location to another in order to facilitate the delivery of water to a wetland, or trade (gift) a volume of water allocation to a delivery partner such as a catchment management authority; currently, both these trades will be recorded alongside market-based transactions.

At present information about water trading is held on individual Basin State water registers, and the accessibility and level of detail of each register varies. In examining the timeliness and accuracy of water market information, the Report of the Panel concluded that:

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<sup>792</sup> Commonwealth Environmental Water Holder, Draft Advice Submission, March 2016, p.4.

<sup>793</sup> The requirement on the seller is under section 12.48 of the Murray-Darling Basin Plan. Waterfind, Draft Advice Submission, March 2016, pp.6-7.

<sup>794</sup> Waterfind, Draft Advice Submission, March 2016, p.7.

<sup>795</sup> See: ACCC, Submission to the Independent Review of the Water Act 2007, July 2014, p.4; ACCC, *Water Monitoring Report 2012-13*, April 2015, chapter 2.

*Basin State governments should take opportunities to enhance the interoperability of registers, building on the work that has been undertaken through the National Water Markets System program to create more efficient services for users.*<sup>796</sup>

In the Draft Advice, the ACCC agreed with the Panel's conclusion, and recommended (via recommendation 8-A) that to address these issues the Australian Government should work with the Basin States to improve the accuracy and consistency of water trade reporting across the Basin. A number of stakeholders commented on this recommendation in their submissions to the Draft Advice. The Murray-Darling Basin Authority (MDBA) supported changes to water charge rules that facilitate water markets, and to that end supported the ACCC's Recommendation 8-A in relation to improving the information about water prices.<sup>797</sup> The Queensland Farmers' Federation (QFF) also supported Recommendation 8-A, but considered that "the focus should be on facilitating market based opportunities to achieve this outcome".<sup>798</sup>

The ACCC notes that submissions to the Draft Advice broadly supported improved information on water trades, and maintains its position stated in Recommendation 8-A in the Draft Advice.

Since the release of the ACCC's Draft Advice, the Australian Government has provided its response to the Panel's Review. The Australian Government acknowledged that access to timely, high quality water trading data is essential to the functioning of Australian water markets. The Government noted several initiatives being undertaken by Commonwealth agencies to improve the quality and dissemination of water market information, including:

- the MDBA's Water Markets Product Information website, which sets out information about different types of water access rights across the Basin.
- the Bureau of Meteorology's weekly water market reports, which report on volumes and prices for trades of water allocations and entitlements on issue across Australia.
- the CEWH's commitment to making trading information publicly available both prior to and after each trading action.<sup>799</sup>

The Australian Government stated that it "encourages Basin States to look for opportunities to build on the work that has already been undertaken through the NWMS programme".<sup>800</sup> The ACCC notes that approach is consistent with Recommendation 8-A, and aligns with the recommendations submitted by Waterfind.

Some stakeholders also raised concerns about the lack of transparency of water access right holdings, particularly by non-irrigators. The ACCC notes that Basin State water registers are generally searchable, although a fee is typically charged for title searches for specific water access entitlements. Also, there does not appear to be any readily available summary of the extent of WAE holdings by non-irrigators, aside from information published by environmental water holders directly.<sup>801</sup> Concerns about the participation in the market by non-irrigators are discussed in more detail in section 8.1.3.

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<sup>796</sup> *Report of the Independent Review of the Water Act 2007*, Conclusion 4.3.

<sup>797</sup> Murray-Darling Basin Authority, Draft Advice Submission, March 2016, p.2.

<sup>798</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.7.

<sup>799</sup> *Australian Government Response to the Report of the Independent Review of the Water Act 2007*, December 2015, pp.9-10, 24.

<sup>800</sup> *ibid.*, p. 23.

<sup>801</sup> For example, see the material published on the water held by the Commonwealth Environmental Water Holder (CEWH) at: <http://www.environment.gov.au/water/cewo/about/water-holdings>.



## 8.1.2 Unbundling of water rights

### Recommendation 8-B

Basin States, infrastructure operators, the MDBA and the ACCC should make it a priority to better inform rights holders of the benefits and obligations on right holders conferred by each type of tradeable water right, particularly in relation to charges payable and trading options.

‘Unbundling’ of water rights can refer to:

- separating a right to water from a right to land
- further unbundling a water right to create separate rights to:
  - a share of available water resources
  - inflows
  - storage capacity (including access to carryover)
  - delivery of water (on-river / off-river)
  - use water on land
  - operate water-related infrastructure (such as a pump).

Significant unbundling occurred in most Basin States between 2003 and 2007 as required under the National Water Initiative (NWI), to which all Basin States have subscribed. This unbundling typically involved the creation of water access entitlements (WAEs), separate from land, as well as location-related rights such as rights to use water on land (‘water use approvals’) and rights to operate water-related works (‘works approvals’). Infrastructure operators providing off-river infrastructure services have also generally created separate water delivery rights, which relate to access and use of the operator’s infrastructure.

In its Final Advice on the Basin Plan water trading rules, the ACCC noted that unbundling could increase trading opportunities and thus provide water users with greater flexibility to manage their water access, use, delivery and land-holding needs.<sup>802</sup>

Unbundling has several impacts on the value of water rights, particularly in conjunction with the ability to trade these rights:

- The total net value of a person’s water right holdings, which previously related to a single right, is separated across several rights.
- Water access rights (including WAEs and water allocation) have positive value because they give the holder certain rights to take and hold water, which has intrinsic value.
- Generally, where a separate water delivery right is created, this takes on a ‘negative’ value because it forms the basis on which ongoing fixed infrastructure charges (and possibly termination fees) are imposed for off-river infrastructure services (primarily the delivery of water through pipes and channels), which were previously levied on the combined water right.
- The positive value of a water access right increases when it is made tradeable because more alternative uses are now possible (e.g. use for irrigation in a different valley, environmental use, etc.), and therefore demand for the right increases.
- The negative value of a water delivery right decreases when it is made tradeable because water delivery rights can more effectively be used to ration network capacity and an irrigator may be able to avoid paying termination fees via water delivery right trade.

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<sup>802</sup> See: ACCC, *Water Trading Rules: Final Advice*, Canberra, March 2010, p.19.

Therefore, the net effect of unbundling and trade facilitation is to increase the value of a person's holdings of tradeable water rights (their WAEs, water allocations, water delivery rights and irrigation rights), and to allow them to deal more flexibly with the rights they hold.

However, many stakeholders at the ACCC's public forums indicated strong concerns about unbundling and, in particular, the creation of separate water delivery rights, which they regard as a liability. In some cases, irrigators had sold their WAE (often to the Government) separately from their water delivery right, and were now facing increased fixed infrastructure charges (levied on the water delivery right which they retained) and could not afford the termination fees payable to terminate their water delivery right. In other cases, there were reports that irrigators had been advised to sell their WAE in order to retire debt, but to retain their water delivery right, and rely on water allocation trade ('temporary trade') in order to meet their water needs. These users were now facing high water prices which stakeholders stated made their farms unsustainable. Concerns about high water allocation prices are considered in section 8.1.3.

The ACCC acknowledges that there were significant and complex changes for irrigators during the unbundling process (primarily between 2003 and 2007), and that many irrigators during that time faced significant financial pressure given the severe drought conditions. Some irrigators may have made decisions to trade their WAEs, or their water delivery rights, without a complete understanding of the long-term impact of these decisions. It became apparent in the course of this review that some irrigators continue to have concerns about the complexity of water trading markets, and may not fully understand the nature of the unbundled water rights and, in particular, what water charge obligations relate to the unbundled rights.

Similarly, charges for on-river infrastructure services are usually levied on the basis of water access right held or used (in the absence of any separate right to storage or on-river delivery). This can lead to an understanding that these infrastructure charges are for the water or water access right itself (rather than for the infrastructure services relating to the water access right), and there are corresponding concerns about paying these charges in periods of low water availability (this issue is also considered in section 5.10.5). The ACCC notes that the obligation to pay ongoing infrastructure charges and, where relevant, termination fees, was not created by unbundling.

While the ACCC remains of the view that unbundling water rights will ultimately be beneficial for most irrigators as it increases the value of their holdings and increases flexibility, it recognises that some individual irrigators have been significantly impacted to their detriment by the transition. Some stakeholders have suggested that an Ombudsman or other mediation service would be of assistance to individual irrigators when negotiating with monopoly infrastructure operators as to charges, fees and water access in their particular circumstances. The ACCC considers this suggestion further in section 8.3 below.

The ACCC also recommended in its Draft Advice that it is incumbent upon regulators and Government agencies working in this area to more clearly explain and improve water users' understanding of the nature of the water rights that they hold, the options to trade those rights and the regulated water charges applicable to them. This may go some way towards addressing these issues and assist irrigators and other water users to make better informed trading decisions.

The Murray-Darling Basin Authority (MDBA) was the only stakeholder to provide feedback on this section of the Draft Advice. The MDBA supported Recommendation 8-B.<sup>803</sup>

The ACCC's Final Advice maintains Recommendation 8-B as in the Draft Advice.

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<sup>803</sup> Murray-Darling Basin Authority, Draft Advice Submission, March 2016, p.2.

### 8.1.3 Trade by non-water users and concerns about speculators

Unbundling and the removal of certain trading restrictions has enabled non-water users to obtain water access rights. For the purpose of this discussion, a non-water user is a person that does not use water for irrigation, environmental purposes or any other consumptive use, but instead primarily holds water access rights for investment purposes.

The ACCC has heard concerns from several stakeholders, chiefly via its public forums, about ownership and trade of water access rights by non-water users. In these stakeholders' views, non-water users who hold water access rights are engaging in 'speculative' activity in water markets, and deliberately attempting to drive up water allocation prices in order to maximise their investment returns.<sup>804</sup> These stakeholders were of the view that non-water users should be banned or limited in some way from holding water access rights.

Given the limitations on available information as to the entities involved in water trading (see the discussions at section 8.1.1 above), most of the submissions received by the ACCC on this issue have been necessarily anecdotal. The ACCC also has not found any firm evidence of water market speculation driving up water prices. Furthermore, the available data appears to indicate an ongoing strong inverse correlation between water allocation prices and general water availability. That is, water allocation prices in water markets generally increase during periods of dry seasonal conditions (and low storage inflows) because less water is available to be allocated for use and / or trade and water demands of crops increase. Conversely, water allocation prices generally decrease during wetter periods when more water is available and demand is lower. Although individuals' marginal water use and trading actions affect the supply of and demand for water allocation in the market at a particular point in time, fundamentally prices reflect the total amount of water available to be allocated.<sup>805</sup>

Having said that, the ACCC acknowledges that the current high water allocation trading prices are a concern for many irrigators. The ACCC also accepts that non-water users will seek to maximise their return on water assets. However, water trading is also of benefit to irrigators. While irrigators will ordinarily seek to maximise their return on their water access rights by using their water to produce agricultural output, in some circumstances it may be more beneficial to carryover water, or sell water allocation on the market. The availability of flexible water markets provides irrigators this additional financial option.

The ACCC further notes that, in aggregate, despite any trading by non-users the volume of water access entitlements (WAEs) is not altered, and the holdings of non-users are unlikely to reduce the volume of water available in the system. In addition, trading activity by non-users may result in a 'smoothing' of supply and demand for water access rights over time. In particular, non-users may buy WAEs or water allocations in periods of high water availability, when prices are low, offering irrigators a better return from selling their water than using it on-farm. Then, these non-users are likely to sell the allocations at times of high demand, providing additional supply when most needed. The ACCC notes that in order to obtain an ongoing income from their investment, non-users ultimately need to sell water allocation.

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<sup>804</sup> In contrast, Waterfind quoted the definition of 'speculation' in the Oxford Dictionary as "Investment in stocks, property, etc. in the hope of gain but with the risk of loss", and submitted to the Draft Advice that:

*"...most of Australian water right holders would be considered, in one form or another, speculators, and as Australian farming enterprises are continuing to be aggregated, Australia has over the last 10 years undergone an actual decline in the number of individuals speculating in holding water"* (Waterfind, Draft Advice Submission, March 2016, p.8).

<sup>805</sup> See, for example, Victorian Department of Environment, Land, Water and Planning, Water Market Trends, *Trends in Northern Victorian Water Trade 2001-2015*, 24 February 2016, section 4.4, <https://waterregister.vic.gov.au/about/news/194-new-water-market-trends-report-available>.

The ACCC reiterated in its Draft Advice the view that there should not be any limitations on which entities can buy and sell water in the Basin. Waterfind supported this view.<sup>806</sup> Waterfind submitted that any rules that attempted to decrease market participation would cause temporary disruption to, and increase the volatility of, the market and, “encourage innovative rules work arounds”. Waterfind added, “[i]ncreased volatility would then only serve as additional lure to profit-maximising investors seeking to make profit out of this precious resource”.

Waterfind stated that the Commonwealth should encourage increased participation in the water market, thereby providing irrigation communities with increased opportunities to grow their irrigated agricultural businesses. Waterfind considered that the amount of water held in the market for non-food / fibre production or industrial use may have increased over the last 10 years, but the eventual application of this water is still for food and fibre production or environmental purposes. It considered that, regardless of who owns the water, no single entity (apart from the Commonwealth Environmental Water Holder (CEWH)) has the capacity to have a dramatic impact on the performance of the market.

Despite the ACCC’s view that there should be no limitations on who buys and sells water, the ACCC also recognises that due to information asymmetries there may be conduct by market participants that may distort or manipulate the market to unfairly benefit some entities. It would be cause for concern if any market participant were seeking to manipulate markets through misleading and deceptive conduct or anticompetitive practices. If specific concerns are identified raising such issues, the ACCC can and will investigate them. These issues may also benefit from a broader market study or formal inquiry by the ACCC or another body.

While not raised by stakeholders, the ACCC notes that tariff structures (in particular for on-river infrastructure services) featuring lower fixed charges (and higher variable charges) arguably reduce the WAE holding costs for those water market participants seeking to trade (rather than use) the consequential water allocation. Similarly, the lack of any separate charge for those who store water for most or all of a season, or who carryover water into the next season is also beneficial to such traders. Operators, state regulators and entities determining the bases for planning and management charges should carefully consider market impacts of future decisions about such aspects of charging arrangements.

#### **8.1.4 Non-charge barriers to water trade**

Stakeholders identified concerns and provided feedback to the ACCC in relation to several existing arrangements which may (inadvertently) act as barriers to trade, including:

- differences in season closing dates for temporary trade
- payment of charges when water trades are not completed and
- the inability to deliver water at the right time for administrative reasons.

Waterfind submitted that it is concerned about the barrier to trade, and an inequity in the ability for irrigators to manage their water assets, because of earlier season closing dates for intra-and-interstate temporary trade in the NSW Murray and Murrumbidgee relative to SA and Victoria.<sup>807</sup> Waterfind questioned the reason for earlier season closing dates in NSW and called for the ACCC to standardise trade-closing dates across the southern (connected) Murray-Darling Basin (MDB).

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<sup>806</sup> Waterfind, Draft Advice Submission, March 2016, pp.8-9.

<sup>807</sup> Waterfind submitted (ibid, p.9) that in the NSW Murray and Murrumbidgee, interstate temporary trading closes at the end of April; intrastate temporary trading closes at the end of May. This is compared to Victoria and SA whereby intra-and-interstate trading does not close until 30 June.

Waterfind also stated that the Basin Plan water trading rules and the ACCC's proposed amendments to the non-discrimination provisions do not prevent all trade barriers that can arise within the MDB.<sup>808</sup> In particular, Waterfind was concerned about irrigators not having "any avenues to appeal" against IIOs prohibiting trade out of their irrigation districts. However, Waterfind considered that a water ombudsman, as suggested by Recommendation 8-C, could deal with these issues (see section 8.3).

The South Australian Murray Irrigators (SAMI) commented on what it considers to be inequitable management of trade caps.<sup>809</sup> The SAMI alleges that in some areas where trade caps were reached, "[l]arger bulk trades were given priority within the cap limit". The SAMI added that where a trade cap was implemented in an "upstream jurisdiction", buyers who were unable to complete the trade and have the water delivered, were still required to pay the charges in the "upstream jurisdiction".

The SAMI also provided comment on what it considers to be 'market anomalies', which should be minimised:

*The distinction between permanent entitlement traded and temporary water trades has brought with it a suite of inconsistencies that will differ depending on the business water portfolio mix and exposure to temporary water. Trade is forced when permanent crops will die without water and the fees are compulsory. Crop yields and quality are compromised when the right amount of water cannot be delivered at the right time due to an administrative reason rather than a system constraint. This type of market anomaly should be minimised.*<sup>810</sup>

The ACCC is concerned about trade barriers that may hinder the efficient functioning of the water market. The ACCC's Final Advice proposes changes to the water charge rules that seek to limit or preclude such barriers (to the extent that they can be addressed by the rules). In particular, the ACCC has proposed amendments that seek to preclude distortions to water markets and promote the efficient functioning of the water market by, for example, ensuring that:

- an operator cannot, by levying unreasonably different charges on different customers, provide an advantage / disadvantage to certain customers groups that subsequently affect their incentives to participate in water markets (see section 5.3.1)
- an operator does not unnecessarily levy charges when water is traded (see section 5.3.2)
- there is sufficient pricing transparency, including that customers are provided with all relevant information about their operator's charging arrangements and that this information is provided in a timely manner (see section 5.4).

The ACCC recognises that there are other factors which have the potential to distort or hamper trade such as the conditions surrounding trade approvals or caps, but which are outside the scope of this review. The ACCC supports continuing reforms outside the water charge rules to address trade barriers to ensure that water is able to move to its most productive use.

Stakeholders also expressed concern about the hampering of trade resulting from what they regarded as excessive processing times and fees imposed by some Basin State governments, in particular in SA.<sup>811</sup> Government charges for processing water trades are likely to meet the definition of planning and management charges, which are subject to the publication requirements of the water charge rules and have been included in the ACCC's annual monitoring reports. The ACCC's 2013-14 and 2014-15 Water Monitoring Reports drew attention to the wide disparities in trade application charges and

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<sup>808</sup> *ibid*, p.5.

<sup>809</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.4.

<sup>810</sup> *ibid*, p.3.

<sup>811</sup> *ibid*, p.2.

processing times between Basin States. For instance, during these years, the charges for an application for water allocation trade in SA were over five times the amount for an online application in Victoria.<sup>812</sup>

The ACCC notes that Basin States still have significantly different processes in place to process trade applications. The ACCC encourages Basin States to pursue efficiencies in processing trade applications, to reduce transaction costs (including the trade application fee and the time required to process a trade) and ensure that these processes do not hinder water from moving to its highest value use. The ACCC considers that Basin States are best placed to implement these reforms in consultation with relevant stakeholders including infrastructure operators and their customers. The ACCC's continuing role to monitor and report on the level and trends of planning and management charges, including making cross-state comparisons, will complement reforms at the Basin State level.

### **8.1.5 Market impacts of water allocation decisions**

Several stakeholders raised concerns relating to the potential for decisions taken under established water allocation frameworks to impact on water allocation markets.

Patrick Connolly submitted that Recommendation 8-A is not worded strongly enough, as it would not deter what he argued is unlawful conduct in which authorities have borrowed environmental water from the Barmah Forest Account to 'kickstart' allocations for irrigators in the 2015-16 season.<sup>813</sup> Mr Connolly's concern relates to the impact that the need to repay this water is having on the opening allocation announcements for the 2016-17 season and the consequent effect on the market price of water allocations.

In response, the ACCC notes that arrangements for the 'borrowing' from the Barmah-Millewa Forest Account are governed by the *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2016* (NSW)<sup>814</sup> and the *Bulk Entitlement (River Murray—Goulburn-Murray Water) Conversion Order 1999* (Vic).<sup>815</sup> These accounting arrangements should properly be viewed as rules relating to the allocation of available inflows to water users (including environmental accounts and water access entitlement holders), rather than as trade of water access rights.

Mr Tom Loffler submitted similar concerns about the management of South Australian entitlements:

*The ACCC should also have the authority to ensure an even application of measures such as the availability of carryover water uniform to all states as well as ensuring that in South Australia there are designated trigger points for percentage quantities of water irrigators may access at the varying percentages of water made available to South Australia under the Murray-Darling Basin Agreements when South Australian entitlement is less than 100 per cent.*<sup>816</sup>

The ACCC does not consider that it would be necessary or desirable to give the ACCC authority over water allocation frameworks. Assessment of the appropriateness of these arrangements is a matter for Basin States and is beyond the scope of the current review.

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<sup>812</sup> ACCC, *Water Monitoring Report 2013-14*, Canberra, April 2015, p.30; ACCC, *Water Monitoring Report 2014-15*, Canberra, May 2016, pp.121-122.

<sup>813</sup> Patrick Connolly, Draft Advice Submission 2, February 2016, p.2.

<sup>814</sup> See clauses 27(3) and (16) in *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2016* (NSW), viewed June 2016, <http://www.legislation.nsw.gov.au/regulations/2016-366.pdf>.

<sup>815</sup> See clauses 10.5-10.7 in *Bulk Entitlement (River Murray—Goulburn-Murray Water) Conversion Order 1999* (Vic), viewed June 2016, <http://waterregister.vic.gov.au/water-entitlements/bulk-entitlements>.

<sup>816</sup> Mr Tom Loffler, Draft Advice Submission, March 2016, p.2.

## 8.2 Concerns about the Murray-Darling Basin Plan and water recovery

### Sustainable Diversion Limits

The Basin Plan sets long-term average Sustainable Diversion Limits (SDLs) that are considered to ‘reflect an environmentally sustainable level of water use (or ‘take’).’<sup>817</sup> An environmentally sustainable level of take is the amount of water that can be taken for different human or ‘consumptive’ uses including town water supplies, industry and agriculture, while ensuring there is enough water to achieve healthy river and groundwater systems.

A number of stakeholders (in submissions to the Issues Paper or in public forums) have either implicitly or explicitly questioned the SDL limits, arguing that water set aside for non-consumptive or environmental purposes is water that cannot be used for irrigation. For example, irrigator Ruth Angel stated that “environmental flows are prioritised. They get water when we don’t”.<sup>818</sup> A number of stakeholders at the regional public forums commented that there was too great a priority placed on environmental (non-consumptive) water versus water for irrigation. Some stakeholders also questioned the process for adjusting the SDL as being uncertain in regard to the likely outcome of the process.

Stakeholders also commented on water recovery methods (for environmental purposes) and their impacts. These issues are discussed below.

### Water recovery methods and their impacts

There are a number of methods that Basin States and the Australian Government can use to recover water for environmental purposes. The two primary methods are:

- buybacks of water from irrigators and
- infrastructure projects to increase water efficiency, with a portion of the water savings used for environmental outcomes.

The overwhelming majority of stakeholders who expressed a view on water recovery methods during the ACCC’s public forums had strong reservations about buybacks. The ACCC notes the Australian Government has (in October 2015) moved to cap the volume of water that can be recovered through buybacks at 1500 GL and instead prioritise water recovery through infrastructure investment.<sup>819</sup>

However, stakeholders also raised concerns in relation to infrastructure projects. In particular, there were concerns from some irrigators about the potential for further efficiency improvements (and government funding) where irrigators had previously self-funded other efficiency measures. Also, although water efficiency projects are often built at no capital cost to infrastructure operators and individual irrigators, this infrastructure can have higher ongoing (“opex”) costs than the infrastructure it replaced; a cost that must ultimately be borne by irrigators. Other stakeholders felt that the volume of water they were required to transfer to the Government in return for infrastructure funding was too high.<sup>820</sup> One submission to the Draft Advice noted specific concerns about tender processes in relation

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<sup>817</sup> Further information about Sustainable Diversion Limits is available from the Murray-Darling Basin Authority’s website, see for example: <http://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits>, viewed June 2016.

<sup>818</sup> Ruth Angel, Issues Paper Submission, July 2015, p.1. In response to this submission, the Victorian Environmental Water Holder (VEWH) commented that this statement is incorrect, and further stated: “Water delivered for environmental water holders sometimes receives lower priority than other water users, and environmental water holders do pay headworks and delivery charges.” Victorian Environmental Water Holder, Draft Advice Submission, March 2016, p.1.

<sup>819</sup> The *Water (Amendment) Act 2015* received Royal Assent on 13 October 2015.

<sup>820</sup> Michael Renehan, Murray Irrigation Limited, ACCC public forum on the review of the water charge rules, Deniliquin, 3 August 2015.

to the Goulburn-Murray Water (GMW) Connections Project, labelling the process “obscure and unfair”.<sup>821</sup>

WJ and A Seery Partnership submitted to the Draft Advice that they are concerned about the impact the Water Sharing Plans are having on communities in the upper section of the Barwon, in particular due to the water being taken from this region.<sup>822</sup> WJ and A Seery stated that communities are suffering and are bearing the brunt of the economic impacts, noting that many people had left the towns, leaving many vacant and unsellable houses and lots. They submitted that when deciding on how to share costs, there should be a consideration of who will be economically advantaged and disadvantaged.

The ACCC notes these issues and the concerns of irrigators. However, these matters are outside the scope of the ACCC’s review and of the water charge rules and have been discussed in a number of other forums. Accordingly, as in its Draft Advice, the ACCC does not propose to comment further on these issues.

### 8.3 Concerns about dispute resolution mechanisms in the rural water sector

#### Recommendation 8-C

The ACCC recommends that governments consider the merits of:

- expanding the jurisdiction of existing ombudsmen schemes or small business commissioners to resolve disputes between infrastructure operators and their customers; or
- the creation of a new scheme to perform these roles.

Several stakeholders advocated for an Ombudsman or an enhanced dispute resolution mechanism to resolve disputes in the rural water sector.<sup>823</sup> In particular, stakeholders attending the public forum in Griffith called for a water ombudsman, as in their view irrigators are currently left with a ‘massive’ burden of proof and legal fees when in a negotiation with Murrumbidgee Irrigation Limited (MI).<sup>824</sup> Also, Waterfind noted that smaller irrigation trusts often set “unjust restrictions to water trading” on their members.<sup>825</sup> Waterfind also stated that the trustees “in some cases even benefit monetarily or in other ways due to imposed restrictions and their position”. Waterfind stated that it “believes that the opening for an ombudsman or tribunal type oversight would provide an option for individual trust members to claim their rights to manage their own water assets in problematic situations, as well as provide some pressure to trusts or schemes practicing unjust policies”.

The National Irrigators’ Council (NIC)<sup>826</sup> and Central Irrigation Trust (CIT)<sup>827</sup> provided qualified support, stating that they would “support an Ombudsman review process only if [it] covered all aspects of the Water Act, the MDBA Plan [*sic*] and associated Federal and State government rules,

<sup>821</sup> Andrew Goldman Excavations submitted that GMW is requiring businesses to put in tenders for “complete packages” (requiring specialised work to be subcontracted out), as compared to the previous approach where the project was split into smaller jobs. Andrew Goldman Excavations’ concern about the new approach is:

- previously local businesses could undertake the smaller jobs rather than those jobs being sub contracted out to non-local businesses
- the time lost preparing a tender under the new process (up to two weeks) for work that may not go ahead.

Andrew Goldman Excavations, Draft Advice Submission, February 2016, p.1.

<sup>822</sup> WJ and A Seery Partnership, Draft Advice Submission, February 2016, p.1-2.

<sup>823</sup> The ACCC raised the idea of an ombudsman in the context of appeals against regulatory decisions (ACCC, *Water Charge Rules Review Issues Paper*, Canberra, May 2015, p.26).

<sup>824</sup> ACCC public forum on the review of the water charge rules, Griffith, 4 August 2015.

<sup>825</sup> Waterfind, Issues Paper Submission, July 2015, p.2.

<sup>826</sup> National Irrigators’ Council, Issues Paper Submission, July 2015, p.13.

<sup>827</sup> Central Irrigation Trust, Issues Paper Submission, July 2015, p.6.



regulations and operations”. Both stakeholders stated that they “would not support such a review process if it was only limited to the 3 [water charge rules] being reviewed”.

As stated in its Draft Advice, the ACCC considers broadly that disputes arising between an infrastructure operator and its customer relating to a requirement of the water charge rules, or the *Competition and Consumer Act 2010* (CCA) more generally, can and should be raised directly with the ACCC. While the ACCC does not provide a dispute resolution service in relation to the rules, it does investigate allegations of a contravention. Where an alleged contravention has had a detrimental impact on a customer, the ACCC will take this into account in deciding how to resolve the matter. Further details on the ACCC’s enforcement and compliance approach are discussed in section 4.5.

However, the ACCC is also aware that disputes between infrastructure operators and their customers often involve a range of inter-related issues, potentially including water charge rules issues, matters governed by State (water management) law such as water quality issues, and other matters that may form part of an infrastructure operator’s licence conditions. Therefore, the ACCC considers that an ombudsman scheme with jurisdiction over such disputes could be a valuable service for infrastructure operators’ customers.

A dedicated new national or Basin-wide scheme would be needed to deal with cross-jurisdictional issues and matters that concern both Commonwealth and State issues. This would be consistent with the proposals by NIC and CIT for a comprehensive process covering Commonwealth and State legislation.

The Independent Expert Panel reviewing the *Water Act 2007* (the Act) considered a similar proposal but found that adding an ombudsman system to the existing regime may result in duplication by providing a second layer of regulation. Further, it would be difficult and complex to achieve a single appeal mechanism given the number of regulators and the different Basin State arrangements.<sup>828</sup>

The ACCC also notes that a new body would involve additional costs, which could ultimately be passed onto water users, and considerable adjustment as existing powers would have to be transferred to the new body.

Alternatively, it may be possible (and preferable) to use or modify existing agencies with similar purposes. One option would be for the current jurisdiction of state-based ombudsmen to be expanded to include disputes on matters governed by State (water management) law and possibly other types of disputes between infrastructure operators and customers.

For example, there is an existing energy and water ombudsman in all Basin States (except the ACT), however their coverage of infrastructure operators and irrigators is limited.

- The Energy and Water Ombudsman of Queensland (EWOQ) covers only residential and some small business customers in the south-eastern corner of Queensland. The small business customers covered are those consuming less than 100 kilolitres (0.1 ML) per year. Therefore, irrigators are not covered by the EWOQ scheme.<sup>829</sup>
- The Energy and Water Ombudsman of NSW (EWON) covers only small retail customers. Small retail customers are defined as customers consuming a maximum of 15 ML per year.<sup>830</sup>

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<sup>828</sup> *Report of the Independent Review of the Water Act 2007*, p.64.

<sup>829</sup> That is, EWOQ covers residential customers and small business customers with a consumption of less than 100 kilolitres (KL) in the Gold Coast Council, Logan City Council, Redland City Council, Queensland Urban Utilities and Unity water area (i.e. Moreton Bay, Sunshine Coast and Noosa local authority area). See: Electricity and Water Ombudsman of Queensland website, viewed June 2016, <http://www.ewoq.com.au/types-of-complaints>.

<sup>830</sup> *Water Industry Competition Act 2006*, section 49; and *Water Competition (General) Regulation 2008*, Regulation 5.

This level of consumption means that small businesses, including irrigators are not covered by the scheme.

- The Energy and Water Ombudsman of SA (EWOOSA) covers retail customers only and not small businesses such as irrigators.<sup>831</sup>

These ombudsmen have varying powers to deal with rural irrigation matters, however only the Energy and Water Ombudsman of Victoria (EWOV) has jurisdiction over rural water matters at a general level (although whether there is jurisdiction in relation to a particular matter will depend on the circumstances). There are two conditions on EWOV's jurisdiction of disputes between irrigators and infrastructure operators:

- the infrastructure operator must be a member of EWOV.<sup>832</sup>
- binding determinations are limited to \$20 000 or \$50 000 if both parties agree.<sup>833</sup>

An alternative option could be to expand the scope of the jurisdiction of small business commissioners in each Basin State to allow them to mediate disputes between irrigators and their operators. While Queensland and the ACT do not have a Small Business Commissioner, other bodies may be able to handle this mediation function such as Dispute Resolution Centres in Queensland or the Conflict Resolution Service in the ACT.

In its Draft Advice, the ACCC noted that all the options would involve additional costs which may be recovered in part or in full from the industry (and therefore from water users). The relative costs and benefits of expanding existing schemes or creating a new scheme should be considered by governments at the Basin State and Commonwealth level.<sup>834</sup>

The ACCC's draft recommendation 8-C was supported by stakeholder feedback that the ACCC received throughout the consultation process on the review of the water charge rules.<sup>835</sup> In terms of specific feedback on draft recommendation 8-C in submissions to the Draft Advice:

- The South Australian Murray Irrigators (SAMI) noted generally in their submission to the Draft Advice that there is a need for "a complaints and mediation process" for dealing with "grievances".<sup>836</sup> The SAMI noted that the "pathway should have real powers that allow clear justice and fairness to result".
- Waterfind considers that a dispute resolution mechanism would "provide an option for individual private irrigation trusts or joint water supply scheme members to claim their rights to manage their own water assets in problematic situations (within and beyond the scope of the water charge rules)". This is related to Waterfind's view that the Basin Plan water trading rules and the ACCC's proposed amendments to the non-discrimination provisions do not prevent all trade barriers that can arise within the Murray-Darling Basin (MDB).<sup>837</sup> In particular, Waterfind was concerned about irrigators not having "any avenues to appeal" against IIOs prohibiting trade out of their irrigation districts. However, Waterfind considered that a water ombudsman, as suggested by recommendation 8-C, could deal with these issues.

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<sup>831</sup> Discussion with Pia Bentick (Company Secretary of EWOOSA), 14 September 2015.

<sup>832</sup> Current members of EWOV may be found at: Electricity and Water Ombudsman of Victoria website, viewed June 2016, <https://www.ewov.com.au/providers/water-companies>.

<sup>833</sup> Energy and Water Ombudsman Charter, rule 6.1.

<sup>834</sup> ACCC, *Water Charge Rules Review Draft Advice*, Canberra, November 2015, p.215.

<sup>835</sup> Waterfind, Draft Advice Submission, March 2016, p.7; Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.7.

<sup>836</sup> South Australian Murray Irrigators, Draft Advice Submission, March 2016, p.3.

<sup>837</sup> Waterfind, Draft Advice Submission, March 2016, p.5.

The ACCC agrees with Waterfind that there may be some types of trade barriers that are not clearly prohibited under the Basin Plan water trading rules or the proposed amendments to the water charge rules. An ombudsman may be of some assistance in clarifying the issues for the parties but would not have a strong legal basis for helping the irrigator wishing to trade in situations where the rules are not clear. More generally, the ACCC considers that an ombudsman role for the rural MDB water sector, whether a new body or developed from existing bodies, could potentially help address a range of stakeholder concerns identified throughout this chapter.

The ACCC maintains recommendation 8-C from the Draft Advice, which, as detailed above, was broadly supported by stakeholders.

#### **8.4 Water quality concerns**

Throughout the ACCC's consultation process on the review of the water charge rules, some stakeholders raised concerns about the quality of water delivered by infrastructure operators. For example, Wah Wah Stock and Domestic Water Users Association noted that, "[w]ater currently delivered in the open channel system often has high levels of blue green algae and is not suitable for Stock [and] Domestic use".<sup>838</sup> Sally Jones, an irrigator in Murrumbidgee, also expressed concerns about "serious ongoing water problems" in the Murrumbidgee Irrigation Limited (MI) Area, in particular, the management of siltation and salinity.<sup>839</sup> Ms Jones stated that the, "gross lack of transparency and auditing means that the water quality deficiencies are not being highlighted and appropriately managed".

While water quality may be a characteristic of an infrastructure service (for example, where water is treated to a particular quality), the water charge rules cannot directly regulate water quality. This is typically the responsibility of Basin States and done, if at all, under State (water management) law and through licence conditions placed on infrastructure operators. As such, the ACCC's recommendation 8-C (in section 8.3) in relation to dispute resolution mechanisms is relevant.

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<sup>838</sup> Wah Wah Stock and Domestic Water Users Association, Issues Paper Submission, July 2015, p.2.

<sup>839</sup> Sally Jones, Issues Paper Submission, July 2015, p.1.

## 9 Assessment of change in regulatory cost

### 9.1 Overview of estimated change in regulatory costs

The Australian Competition and Consumer Commission (ACCC) has recommended a range of proposed amendments to the water charge rules. Further details of the specific amendments are set out in chapters 4 to 7. This chapter sets out the estimated change in regulatory costs associated with the proposed amendments.

The terms of reference for the review of the water charge rules requires the ACCC to consider consistency with the Australian Government's deregulation agenda to reduce the regulatory burden for individuals, business and community organisations (see section 1.1). The Terms of Reference also required the ACCC to consider opportunities to improve regulatory clarity or efficiency, or to reduce regulatory burdens while maintaining effective standards. The ACCC considers that its Final Advice achieves this balance. Under the Australian Government's Regulatory Burden Framework, all new regulations or changes to existing regulations need to have the regulatory costs imposed on businesses, community organisations and individuals quantified.<sup>840</sup> The ACCC has estimated that its recommended amendments to the water charge rules are likely to result in a reduction in regulatory costs of just under \$72 000 per annum.

In its Draft Advice, the ACCC set out a range of proposed amendments to the water charge rules, together with the estimated change in the regulatory costs associated with these proposals compared to current rule requirements.

In its Final Advice, the ACCC, after considering stakeholder feedback, has made adjustments to its rule advice and in some cases reconsidered the assumptions underpinning its assessment of the regulatory costs of its proposed changes to the rules. These adjustments have resulted in changes to the estimated regulatory costs compared to the estimates set out in the Draft Advice. Some changes in the ACCC's proposals and reassessment of the costs of these proposals have resulted in decreases to the estimated regulatory cost, while others have involved slight increases. Overall, the effect of the proposed changes to the water charge rules remains a reduction in the estimated regulatory cost compared to current rules.

Table 9.1 below summarises the estimated annualised change in regulatory costs for each category of proposed changes in the Final Advice. The effect of the ACCC's change in proposals since the Draft Advice is also shown in Table 9.1.

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<sup>840</sup> Office of Best Practice Regulation, *Regulatory Burden Measurement Framework*, February 2016, p. 1, viewed June 2016, <https://ris.govspace.gov.au/files/2016/02/Regulatory-Burden-Measurement-framework-guidance-note.pdf>.

**Table 9.1—Net annualised change in regulatory cost\***

<b>Category of proposed amendment</b>	<b>Group 1:</b> IIO, member-owned holding <10 GL of WAE	<b>Group 2:</b> IIO, member-owned holding 10-125GL of WAE	<b>Group 3:</b> IIO, current Part 5 operator**	<b>Group 4:</b> Part 6 operators and other non-member owned IOs**	<b>Total net annualised change in regulatory cost (\$/yr)—Final Advice</b>	<i>Total net annualised change in regulatory cost (\$/yr)—Draft Advice</i>
<b>No. entities</b>	8	12	5	6	<b>31</b>	31
<b>Non-discrimination provisions</b>	\$3 000	\$5 000	\$5 000	\$4 000	<b>\$17 000</b>	\$14 000
<b>Schedule of Charges</b>	-\$1 000	-\$4 000	-\$8 000	-\$24 000	<b>-\$38 000</b>	-\$43 000
<b>Network Service Plans</b>	\$ 0	\$ 0	-\$51 000	\$ 0	<b>-\$51 000</b>	-\$78 000
<b>Approvals and determinations</b>	\$ 0	\$ 0	\$ 0	-\$55 000	<b>-\$55 000</b>	-\$78 000
<b>Distributions</b>	\$2 000	\$4 000	\$3 000	\$ 0	<b>\$9 000</b>	\$4 000
<b>Termination fees (calculation method)</b>	\$1 000	\$5 000	\$7 000	\$5 000	<b>\$18 000</b>	\$8 000
<b>Termination fee (other)</b>	\$1 000	\$2 000	\$1 000	\$ 0	<b>\$4 000</b>	\$4 000
<b>Planning and management charges (information)</b>	\$ 0	\$ 0	\$ 0	-\$3 000	<b>-\$3 000</b>	-\$3 000
<b>Planning and management charges (publication requirements)</b>	\$ 0	\$ 0	\$ 0	-\$4 000	<b>-\$4 000</b>	-\$4 000
<b>One-off and start-up costs n.e.i.†</b>	\$1 000	\$2 000	\$12 000	\$15 000	<b>\$30 000</b>	\$4 000
<b>Net annualised change in regulatory cost (\$/yr per group)</b>	<b>\$6 000</b>	<b>\$14 000</b>	<b>-\$31 000</b>	<b>-\$62 000</b>	<b>-\$72 000</b>	<b>-\$172 000</b>
<b>Net annualised change in regulatory cost (\$/yr per operator)</b>	\$1 000	\$1 000	-\$6 000	-\$10 000	<b>-\$2 000</b>	-\$6 000

\* Estimates are total annualised cost per group, rounded to the nearest \$1000. Due to rounding, some totals may not correspond with the sum of the separate figures. \*\* See Table 9.2 for full group definitions. † n.e.i. = not elsewhere included.

The majority of the decreases in regulatory costs are associated with the proposed changes to charge determinations, Network Service Plans (NSPs) and the Schedule of Charges. However, the regulatory savings are not evenly distributed across all groups of infrastructure operators. There is a negligible impact on Group 1 and Group 2 (small and medium size member-owned operators) and a large change in regulatory cost for Group 3 and Group 4 (large member-owned and non-member-owned operators).

The change in regulatory cost under the Final Advice proposals compared to the Draft Advice proposals is mainly due to increases in regulatory costs (or decreases in regulatory savings) due to:

- a revised approach to the non-discrimination provisions, and an increase in the estimated costs associated with ongoing staff hours for operators to assess whether new infrastructure charges and service offerings comply with these provisions—see section 9.3.1.
- a lower estimate of the reduction in regulatory cost from the proposed abolition of Part 5 (NSP requirements), due to transitional issues—see section 9.3.3.
- a decrease in the regulatory savings associated with the recommended amendments to Part 6 (approval or determination), due to transitional issues—see section 9.3.4.
- an increase in the estimated costs for operators to understand and comply with the amended Part 7 (distributions)—see section 9.3.5.
- an increase in the estimated ongoing costs of accounting for customer contributions to dedicated infrastructure when calculating termination fees—see section 9.4.1.
- the inclusion of additional one-off start-up costs (legal and consulting) for operators to assist them to understand the revised rules and potentially revise their charging methodology—see section 9.6.

In some cases, these changes reflect changes to the ACCC's rule advice; in others the ACCC has revised its estimates in response to specific stakeholder feedback or due to timing changes which are expected to have cost consequences.

Estimated regulatory costs for other sections of the Final Advice have not changed substantially since the Draft Advice.

## 9.2 Methodology

The Office of Best Practice Regulation (OBPR) costing framework requires the ACCC to estimate the change in 'regulatory cost' associated with its recommended amendments. The ACCC consulted the OBPR and their guidance material on the methodology to estimate the change in the regulatory cost.

The notion of 'regulatory cost' does not extend to all possible types of costs associated with regulations (see below). Also, it does not capture any benefits associated with the regulations, other than a 'benefit' in the form of a decrease in regulatory cost. Matters that *can* be considered when determining the regulatory cost of proposed changes are:

- **Compliance costs:** This includes administrative costs, such as record keeping and reporting costs. It also includes substantive compliance costs, that is, the costs incurred to deliver the regulated outcomes being sought (usually purchase and maintenance costs).
- **Delay costs:** These are the expenses and loss of income incurred by a regulated entity through needing to wait for an administrative application process to be completed or the regulator to

communicate a decision which prevents the regulated entity beginning its intended operations.<sup>841</sup>

Matters that *cannot* be considered when determining the cost of proposed regulatory changes are:

- **Opportunity costs:** The value of opportunities that cannot be realised because of the regulatory intervention. This is because quantifying such costs is complex and it is difficult to accurately predict what a business may do in response to the removal or lessening of a regulation.
- **Business-as-usual costs:** The measurement of regulatory cost only includes the regulatory cost over and above what a normally efficient business would pay in the absence of the regulation. If the regulated business would do more than is required, in response to a change in regulation, this more than needed effort cannot be included in the measure of regulatory cost.
- **Non-compliance and enforcement costs:** Costs that regulated businesses incur from failing to comply with the new regulation (including legal fees) and processes related to government enforcement of regulations are not included.
- **Government-to-government regulation:** The cost of the regulation on other parts of government. For example, any increased regulatory cost on the ACCC from administering the changed water charge rules.
- **Indirect costs:** Costs that arise indirectly from regulatory changes. This includes changes to market structure and competition impacts.
- **Direct financial costs:** This includes changes to taxation or license and permit fees.
- Regulatory impacts related to the administration of courts and tribunals.<sup>842</sup>

The ACCC acknowledges that the regulatory costings estimated form only a partial picture of the overall total costs and benefits (whether direct or indirect) that would be associated with the proposed amendments.

Consistent with OBPR guidelines and the cost categories which are included in the OBPR definition of ‘regulatory costs’:

- The ACCC formed its estimates by assessing the direct costs on businesses (including government owned corporations) which are subject to the water charge rules. Regulatory costs imposed on Basin State and Commonwealth departments are not included.
- Benefits to customers of the regulated business of the proposed changes (such as increased information) are not included in the assessment of regulatory cost of the proposed changes.

Accordingly, the ACCC has assessed the change in regulatory cost in relation to 31 infrastructure operators that it currently monitors for compliance with the water charge rules. The water charge rules currently impose different requirements on these infrastructure operators depending on their size and ownership (although this distinction will be much reduced if the proposals in this Final Advice are adopted). As such, the regulatory costs are not uniform across all operators, or even within each group. To account for this variation in calculating the cost of the regulatory cost, the ACCC has grouped the 31 operators based on the following characteristics:

- Nature of activities: whether the infrastructure operator is also an irrigation infrastructure operator (IIO)<sup>843</sup>
- Ownership: whether an infrastructure operator is ‘member-owned’ or not<sup>844</sup>

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<sup>841</sup> Office of Best Practice Regulation, *Regulatory Burden Measurement Framework*, February 2016, pp. 2-3.

<sup>842</sup> Office of Best Practice Regulation, *Regulatory Burden Measurement Framework*, February 2016, pp. 4-5

<sup>843</sup> Irrigation infrastructure operator is defined in section 7 of the *Water Act 2007*.

<sup>844</sup> ‘Member-owned operator’ is defined in rule 5 of the Water Charge (Infrastructure) Rules 2010 (WCIR).

- Size: measured by the volume of water held under water access entitlement (WAE) that the operator services.

Table 9.2 below sets out four groups of infrastructure operators and identifies the characteristics and number of operators within each group.

**Table 9.2—Operator groups**

Group	No. of operators	Characteristics
1	8	IIO, member-owned holding less than 10 gegalitres (GL) of WAE
2	12	IIO, member-owned, holding between 10-125 GL of WAE
3	5	IIO, member-owned operator holding more than 125 GL of WAE and non-member-owned operators holding 125 GL – 250 GL of WAE
4	6	Infrastructure Operator (that may or may not also be an IIO), non-member-owned, holding 10 GL – 125 GL of WAE or more than 250 GL of WAE

For most proposed changes, the change in regulatory cost is calculated as the total number of operators affected by the proposed change multiplied by the estimated change in staff hours required to comply, multiplied by the OBPR default standard hourly wage rate of \$37.40, multiplied by a labour on-cost multiplier of 1.75.<sup>845</sup> Unless otherwise stated, estimates for each group are based on assumptions about the *average* costs to an entity within a particular group. The ACCC acknowledges that costs will vary across individual entities and has generally not attempted to estimate costs for each individual operator.

Consistent with the OBPR methodology, where a change in the cost only occurs in the first year, the estimated change in the cost has been annualised over a 10 year period.

The estimated change in regulatory cost has been calculated for nine categories of proposed amendments as well as for the initial ‘start up costs’ associated with operators gaining a general understanding of the proposed changes.<sup>846</sup> Table 9.3 below presents these categories and indicates which operator groups are assumed to be affected by the proposed rule amendments in each category.

<sup>845</sup> Office of Best Practice Regulation, *Regulatory Burden Measurement Framework*, February 2015, viewed June 2016, [https://www.dpmc.gov.au/sites/default/files/publications/005\\_Regulatory\\_Burden\\_Measurement\\_Framework\\_1.pdf](https://www.dpmc.gov.au/sites/default/files/publications/005_Regulatory_Burden_Measurement_Framework_1.pdf).

<sup>846</sup> Note: Individual cost categories include start-up costs that are specific to particular amendments. This final category includes general start-up costs not elsewhere included. A number of proposed relatively minor amendments will not result in any measurable change in regulatory burden. For example, those that increase clarity or align rule drafting with the practical enforcement of the rule rather than any substantial change to the intent or requirements under the current rules. The ACCC has nonetheless included some ‘start up’ costs relating to operators’ familiarising themselves with these changes.



**Table 9.3—Categories of proposed amendments and affected operator groups**

Category of proposed amendment	Relevant operator groups (see table 9.1)	Relevant water charge rules <sup>847</sup>	What the proposed amendments relate to
Non-discrimination provisions	1, 2, 3, 4	WCIR (Part 3)	Enhanced non-discrimination provisions in relation to infrastructure charges
Schedule of Charges	1, 2, 3, 4	WCIR (Part 4)	The information an infrastructure operator is required to provide on its Schedule of Charges and publication requirements
Network Service Plans	3	WCIR (Part 5)	The repeal of Network Service Plans and associated requirements
Approvals and determinations	4	WCIR (Part 6)	The application of Part 6 including procedural arrangements, length of regulatory period, basis for approving or determining charges, annual reviews and variations of determinations
Distributions	1, 2, 3	WCIR (Part 7)	The application of Part 7 when certain distributions are made to customers by infrastructure operators
Termination fees (calculation method)	1, 2, 3, 4	WCTFR	The method used to calculate termination fees
Termination fees (other provisions including information requirements)	1, 2, 3, 4	WCTFR	The circumstances where a termination fee can be imposed and the limitations on imposing termination fees
Planning and management charges (information disclosure)	4	WCPMIR	The removal of requirements for the disclosure of information in relation to water planning and management activities
Planning and management charges (publication requirements)	4	WCPMIR	The publication requirements for Basin State departments and water authorities that levy a planning and management charge
One-off and start-up costs not elsewhere included	1,2,3,4	WCIR, WCTFR, WCPMIR	The consolidation of the water charge rules into a single instrument and the one-off costs to understand proposed amendments

The ACCC notes the submission of the Queensland Farmers' Federation (QFF), which stated that the ACCC needed to consider the 'cost implications of these regulations on a state-wide basis in the interests of establishing a consistent approach', not only the cost implications of the revised rules in the Murray-Darling Basin (MDB).<sup>848</sup> However, as the water charge rules do not apply outside the MDB, the ACCC is only able to consider the cost implications of the rule changes on infrastructure operators in the MDB when estimating regulatory costs under the OBPR framework.<sup>849</sup> Nevertheless,

<sup>847</sup> As discussed in section 4.3.1, the ACCC's advice is that the Water Charge (Infrastructure) Rules 2010 (WCIR), the Water Charge (Termination Fees) Rules 2009 (WCTFR) and the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR) be combined into a single instrument.

<sup>848</sup> Queensland Farmers' Federation, Draft Advice Submission, March 2016, p.7.

<sup>849</sup> Also, subsection 91(3) of the *Water Act 2007* exempts from the application of the rules charges in respect of urban water supply activities beyond the point at which the water has been removed from a Basin water resource.

several of the ACCC's proposed amendments (for example, changes to the application of Part 6), have taken into consideration opportunities to decrease regulatory burden by improving consistency at a whole-of-state level.

In February 2016, the OBPR released guidance permitting government agencies to 'self-assess' the impact of changed regulations where the OBPR agrees that the proposal is likely to involve average costs of less than \$2 million per annum.<sup>850</sup>

The OBPR has agreed with the ACCC that, based on the regulatory costings estimated for the Draft Advice, the regulatory cost of the ACCC's proposals under the water charge rules is likely to be less than \$2 million. Therefore the ACCC has self-assessed the likely regulatory cost of its proposed changes to the water charge rules.

### **9.3 Proposed amendments regarding infrastructure charges**

The following sections present the calculation of the estimated change in regulatory cost for each category of proposed rule amendments.

#### **9.3.1 Non-discrimination provisions**

Under the current Part 3 provisions of the Water Charge (Infrastructure) Rules 2010 (WCIR), a member-owned operator (of any size) is prevented from charging a different charge for an infrastructure service of the same class to a customer based on whether or not that customer holds an irrigation right against the operator. However, this rule does not prevent different charges where the difference reflects actual cost differences.

In the Draft Advice, the ACCC stated that these provisions should be extended to prohibit all infrastructure operators (regardless of ownership) from discriminating in relation to:

- the purpose for which water has been or will be used; or
- whether a tradeable water right has been traded or transformed; or
- the volume, holdings or use of a tradeable water right or separate location related right
- whether there is an association between a separate location-related right and a water access right;
- the area of land owned, occupied or irrigated.

The proposed amendments preserved the operator's ability to differentiate charges based on underlying costs or levels of service. They would also prohibit the imposition of most infrastructure charges as a condition of approval, at the time of, or as a result of a trade of tradeable water right.

As noted in section 5.3 and for the reasons set out in that section, the ACCC has revised its approach in this Final Advice. The proposed non-discrimination rule (rule 10) has been amended to:

- require that where an infrastructure operator levies or specifies charges, rates or discounts in relation to an infrastructure service that are different for different customers, or for customers in different circumstances, the differences in the charges, rates or discounts must be reasonable.
- require that where an infrastructure operator restricts the availability of an infrastructure service that it offers, the restriction must be reasonable.

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<sup>850</sup> Office of Best Practice Regulation, *Regulatory Burden Measurement Framework*, February 2016, pp.1-2.

This advice includes a non-exhaustive list of factors that the ACCC can take into account when considering whether any differences in charges or restrictions on the availability of infrastructure services are reasonable. The advice also provides that a difference in charges arising from the operator offering a prudent discount<sup>851</sup> to a particular customer or a group of customers is taken to be reasonable.

The Final Advice also broadens the circumstances where an operator should not be taken to have contravened the proposed rule on levying infrastructure charges in relation to termination or trade (rule 10A).

As part of this Final Advice on non-discrimination, the ACCC recommended the removal of a private right of action with regard to breaches of the water charge rules, thereby limiting the right to take legal action against an operator arising from a contravention of the rules to the ACCC (as the appropriate enforcement agency under the Act).

The ACCC has assessed the likely change in regulatory cost arising from the change in the non-discrimination framework proposed under the Final Advice to that proposed under the Draft Advice.

In its submission to the Draft Advice, WaterNSW stated that its compliance costs relating to non-discrimination provisions would be likely to ‘greatly exceed’ those presented in the Draft Advice. This would be due to ‘overlapping regulatory burdens’ of non-discrimination provisions in the revised water charge rules and the general ‘protection of consumers from abuses of monopoly power’ in section 15 of the *IPART Act 1992*.<sup>852</sup>

The ACCC does not consider that the presence of any similar requirements in NSW state law (such as that mentioned by WaterNSW) are likely to increase costs for WaterNSW to comply with the proposed non-discrimination provisions. Section 15 of the *IPART Act 1992* is very general in nature, so the ACCC does not see any direct conflict between this and the specific non-discrimination provisions in the proposed Part 3 of the water charge rules. Further, the ACCC considers it unlikely that the NSW regulatory regime would be changed to directly conflict with the proposed Part 3 non-discrimination requirements because it is this that would create an overlapping regulatory requirement and be costly for regulated businesses in NSW. However, of relevance to WaterNSW’s concern, the ACCC has generally adjusted its assumptions to include ongoing costs associated with the non-discrimination provisions, as described below.

In the Draft Advice, the form of the proposed rule 10 was limited to 5 proscribed grounds. Estimates of the regulatory cost associated with that Draft Advice were based on an analysis of operators’ current Schedules of Charges and websites in light of the proposed expanded provisions. This analysis suggested 21 operators would either need to adjust their charging approach or provide the ACCC with further information demonstrating that certain differences in charges for infrastructure services of the same class reflect actual differences in underlying costs. Therefore, the ACCC based its Draft Advice estimates of the change in regulatory cost on the assumption that 21 operators could require change.

In its Final Advice, the ACCC has altered this assumption to include all 31 operators that it monitors, due to the more general nature of the proposed non-discrimination provisions in both rule 10 and 10A.

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<sup>851</sup> A prudent discount is where an infrastructure operator offers an infrastructure service at a discounted rate to a particular customer or a group of customers which can reasonably be expected to result in charges for the infrastructure operator’s other customers being lower than they otherwise would have been. See section 5.3.1 for full details.

<sup>852</sup> WaterNSW, Draft Advice Submission, March 2016, pp.1-2.

However, in some cases the ACCC has also adjusted down the assumed number of hours required for operators to comply, since the revised approach contains more flexible rules.

The ACCC considers that the start-up costs for implementing the non-discrimination provisions under the Final Advice will be the same as or lower than under the Draft Advice. While the form of the non-discrimination provisions has changed substantially since the Draft Advice, the ACCC considers that the non-discrimination provisions in the Final Advice are not more complex than in the Draft Advice. Additionally, the ACCC has recommended that the proposed rule 10 should only begin to apply one year later than the rest of the amended rules. This will provide additional time for the ACCC to provide guidance to operators on this proposed rule, which should lessen the compliance burden. In particular, the ACCC notes that the charging arrangements of many smaller operators (Group 1 and Group 2) are fairly simple and are not likely to require significant change (see section 5.3.1 for further information). On this basis, the ACCC has maintained the assumptions relating to start-up hours for Groups 3 and 4 operators, but has decreased average start up hours per operator for Groups 1 and 2.

However, the ACCC considers that there are likely to be some ongoing costs relating to the proposed non-discrimination provisions. For each new charge an operator proposes, it will need to assess whether it complies with the non-discrimination requirements. This cost is likely to be lower for smaller operators, as they have fewer types of charges and higher for larger operators who are more likely to introduce new charges. This ongoing cost will be partially offset by the removal of the private right of action as operators will need to devote fewer resources to deal with potential challenges.

Overall, the ACCC considers that the revised non-discrimination provisions in the Final Advice will result in an annualised increase in regulatory cost of \$16 690 when compared with the current non-discrimination provisions in the Rules. This compares with an annualised increase of \$13 515 estimated for the proposals in the Draft Advice.

**Table 9.4—Change in regulatory cost due to proposed changes to the non-discrimination provisions—Final Advice compared with current WCIR requirements**

	Group 1	Group 2	Group 3	Group 4	Total
<b>No. of affected operators</b>	8	12	5	6	<b>31</b>
<b>Review current policies and provide additional information and / or change charging approach</b>					
Average start-up hours per operator	30	30	120	65	
Annualised change in regulatory cost	\$1 571	\$2 356	\$3 927	\$2 533	<b>\$10 407</b>
<b>Ongoing costs – Assessment of new regulated charges against non-discrimination requirements</b>					
Average annual hours per operator	2	3	4	4	
Annualised change in regulatory cost	\$1 047	\$ 2 356	\$1 309	\$1 571	<b>\$6 283</b>
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>\$2 618</b>	<b>\$4 712</b>	<b>\$5 236</b>	<b>\$4 123</b>	<b>\$16 690</b>

### 9.3.2 Schedule of Charges

Under the current Part 1 and Part 4 provisions of the Water Charge (Infrastructure) Rules 2010 (WCIR), infrastructure operators are required to produce a Schedule of Charges (“Schedule”). They are further prohibited from imposing infrastructure charges relating to an infrastructure service unless that charge is listed in their Schedule and a copy of the Schedule has been provided to customers.

In the Draft Advice, the ACCC proposed a number of changes to WCIR provisions relating to the Schedule of Charges, including:

- Information requirements: Infrastructure operators would need to publish more extensive information about their infrastructure charges. The Schedule was also required to set out a general statement on how charges included in the Schedule were calculated and specific information on how the charges recovering the cost of any distribution loss shared charges or other shared charges were calculated.
- Publication requirements—these included:
  - requiring all operators who have a website to publish their Schedule of Charges on that site (not only operators servicing over 10 GL of water access entitlement (WAE))
  - removing the requirement of operators to publish a Schedule of Charges in their local newspaper or Gazette;
  - requiring operators that are have their charges regulated by the ACCC or a single State Agency to publish and send their Schedule of Charges 25 business days or more before they come into effect
  - requiring other operators to publish and send their Schedule of Charges 10 business days or more before it comes into effect.

The National Irrigators’ Council (NIC) noted that in its Draft Advice, the ACCC stated that operator compliance with existing rules did not require operators to mail Schedules of Charges to customers. In that case, the NIC asked why the ACCC ‘factor[ed] in a reduction in printing, posting and associated staff time in connection with the Schedule of Charges. The NIC stated that given that ‘a number of operators cannot reliably contact their customers by email... mailing is a practical necessity.’<sup>853</sup> In response, the ACCC notes that, although current rules do not *require* operators to post their Schedules of Charges to customers, they do require operators to “send” customers the Schedule. The rules allow operators to choose the mode via which they “send” their Schedule – e.g. post, email, fax, etc.

The costings in the Draft Advice acknowledged that currently many operators do choose to send their Schedules of Charges via post and the ACCC’s compliance activities with operators have demonstrated that operators continue to interpret the rules as requiring this approach to compliance, as operators do not generally have electronic contact details for *all* their customers. As such, the costings presented in the Draft Advice included the assumption that on average, Schedules of Charges are currently mailed to 60 per cent of customers. However, in clarifying in the Draft Advice (see draft rule advice 5-I) that Schedules could be sent electronically and need not be sent to all customers in the same format, the ACCC estimated printing and postage costs on the assumption that operator would only need to post schedules to (on average) 20 per cent of customers.

The Final Advice and proposed water charge rules now make it even clearer that operators are only required to “give” customers a Schedule of Charges, and that the method of “giving” may be chosen by the operator. Furthermore, the proposed water charge rules expressly provide that the form in which a Schedule of Charges is given does not need to be the same for each customer (see proposed

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<sup>853</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.17.

water charge rule 3(6) and the note under rule 15). On that basis, the ACCC maintains the view that, going forward, the proportion of customers that are given a Schedule of Charges by post will reduce (on average). However, in response to stakeholder feedback, the ACCC considers that a figure of 30 per cent may be more appropriate than the 20 per cent used in the Draft Advice estimates. As such, the ACCC has adjusted its estimated change in annual printing and postage costs from a reduction of \$22 568 (in the Draft Advice) to a reduction of \$16 926.

As noted in section 5.4 above, in its Final Advice, the ACCC has proposed a number of other changes to the above proposals, as follows:

- Information requirements—these include:
  - requiring that an infrastructure operator must set out in its Schedule of Charges any generally available discount (e.g. early payment, hardship etc.) and / or surcharge, including the circumstances in which they apply.
  - removing the requirement for the operator to set out in their Schedule of Charges how each infrastructure charge or planning and management charge incurred is passed through, and replaced this with a general statement on these matters.
- Publication requirements—these include:
  - exempting an infrastructure operator from the timing requirements where this delay is caused by the failure of the ACCC or a State Agency to approve / determine planning and management charges in sufficient time. The operator can apply the relevant charges from the date set out in the regulatory decision. The operator must then send a Schedule of Charges as soon as practicable to customers after that decision.
  - allowing an operator to update its Schedule of Charges to amend charges it levies to pass through the cost of infrastructure charges or planning and management charges that it incurs, without triggering an obligation to immediately send the updated Schedule to customers. The operator must instead update their website for these changes as soon as practicable after the update and can send this update to their customers with their next invoice.
- Exemptions from the publication requirements—this includes:
  - allowing the ACCC to exempt publication of infrastructure charges in *pre-existing* commercially negotiated contracts where publication would cause a material financial loss or material financial detriment to the operator or the customer for a 12 month period after the rules are amended.
  - allowing for an application to be made in relation to infrastructure charges applicable to multiple customers.
  - exempting operators from including details of the following types of charges in their Schedule of Charges:
    - hardship discounts;
    - charges where the operator cannot reasonably determine the nature of the service or the amount of the charge in advance (although if the operator levies such a charge, they would be required to disclose this on future Schedules); where the operator is directly passing through the cost of a transaction charge it has incurred on behalf of a customer.

Overall, the ACCC considers that these proposed changes to the Final Advice will result in a lower regulatory cost in this area when compared with the Draft Advice. Specifically:

- Information requirements: Information that must be included on the Schedule of Charges will decrease if the Final Advice proposals are adopted (when compared with both the current rules and Draft Advice proposals) due to the number of additional exemptions in the Final Advice. Therefore, the ACCC considers that the implementation and ongoing costs relating to gathering this information for the Schedule of Charges will decrease and has decreased the estimated regulatory cost accordingly.
- Printing and postage requirements: The lowering of publication requirements and level of exemptions should result in lower postage and printing charges (aside from those outlined above) as operators will need to send updated Schedules of Charges on fewer occasions. However, the level of this reduction depends on how many operators send their customers multiple Schedules of Charges each year. Data the ACCC has collected from operators indicates that the sending of multiple Schedules of Charges by operators is minimal (for 2014/15, only 3 out of 31 operators sent their customers more than one Schedule of Charges). The reduction in costs from this measure is likely to be small and therefore the ACCC considers it prudent to not make any further adjustment to the estimated reduction in postage and printing costs explained above.
- The start-up costs of implementing the proposed rule 9A are the same in the Draft Advice and Final Advice.

Overall, the ACCC considers that the reduction in regulatory cost in this area for the Final Advice proposals when compared with the current water charge rules will be \$37 756 per annum (see Table 9.5 below). This compares with an annualised decrease of \$43 270 estimated in the Draft Advice.

**Table 9.5—Change in regulatory cost due to proposed changes in the Schedule of Charges provisions—Final Advice compared with current WCIR requirements**

	Group 1	Group 2	Group 3	Group 4	Total
<b>No. of affected operators</b>	8	12	5	6	<b>31</b>
<b>Publication of Schedule of Charges Information</b>					
Average annual hours per operator	4	7	7	4	-
Annualised change in regulatory cost — staff hours	-\$2 094	-\$5 498	-\$2 291	-\$1 571	<b>-\$11 454</b>
Annualised change in printing & postage costs	-\$53	-\$757	-\$3 435	-\$12 681	<b>-\$16 926</b>
Annualised change due to publication in newspaper / Gazette	\$0	-\$700	-\$3500	-\$10 500	<b>-\$14 700</b>
<b>Start-up costs—Pass-through requirements (rule 9A)</b>					
Average start-up hours per operator	12	17	16	7	
Annualised change in regulatory costs	\$628	\$1 335	\$524	\$275	<b>\$2 762</b>
<b>Information provisions—Start-up costs</b>					
Average start-up hours per operator	11	15	11.5	11	
Annualised change in regulatory costs	\$576	\$1 178	\$376	\$432	<b>\$2 562</b>
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>-\$ 943</b>	<b>-\$4 441</b>	<b>-\$8 326</b>	<b>-\$24 045</b>	<b>-\$37 756</b>

### 9.3.3 Network Service Plans

Under the current Part 5 of the Water Charge (Infrastructure) Rules 2010 (WCIR), member-owned operators servicing more than 125 gegalitres (GL) of water access entitlement (WAE), and other infrastructure operators (that are not member-owned) servicing between 125 and 250 GL of WAE are Part 5 operators and must develop a Network Service Plan (NSP) that provides details of the operator's plans relating to its water service infrastructure over the forthcoming five year period.

In the Draft Advice, the ACCC recommended reducing the regulatory cost of the water charge rules by repealing the NSP and other requirements of Part 5.

As noted in section 5.5, the ACCC has maintained this advice. However, it was anticipated at the time of the Draft Advice that the removal of the NSP requirements could occur *before* the commencement of preparation of NSPs for the next five year period (commencing 1 July 2017). Due to the extensions to the timeframe for the ACCC to provide its Final Advice granted by the Minister,<sup>854</sup> it is now uncertain whether this is still the case.

If a Part 5 operator has not prepared a new NSP the current rules could preclude an infrastructure operator from levying charges for their infrastructure services,<sup>855</sup> or at least updating and publishing a new Schedule of Charges.<sup>856</sup> The ACCC has emphasised the need for possible amendments to be considered in a timely manner in order to avoid an outcome where operators incur costs in relation to NSP requirements that are ultimately repealed (see section 5.5). Nevertheless, operators may find it prudent to start preparing their NSPs, in case Part 5 is not removed from the WCIR. Therefore the ACCC has allowed for some operators' expenditure on NSPs in calculating the regulatory cost for this Final Advice.

In calculating the regulatory cost for this Final Advice, the ACCC has assumed that operators will take 900 hours of staff time to complete the NSP (over a period of about two years). The ACCC anticipates that the most likely outcome is that Part 5 will be removed from the WCIR by 1 July 2017, that is, one year after preparation of the NSP is due to commence. The ACCC assumes that most but not all of the work to complete the NSP will have been completed by that time. Therefore, the ACCC has anticipated that operators will have undertaken 700 hours of work on their NSPs before the requirement to undertake NSPs is abolished. The ACCC has also assumed that postage and printing costs incurred in the year prior to the (assumed) repeal of Part 5 will amount to 40 per cent of the total postage and printing costs that would have been incurred over a 10 year period (comprising 2 NSP periods).<sup>857</sup> Printing and postage costs will be necessarily incurred during that first planning year, for example to satisfy the operators' legal requirement to send a consultation paper to their customers outlining certain information relevant to the proposed NSP.

For similar reasons to its comments on Schedules of Charges, the NIC asked why the ACCC was factoring in a reduction in printing, posting and associated staff time in connection with the NSP.<sup>858</sup> In response, the ACCC notes that in the context of NSP requirements, the estimated savings in printing and postage costs are based on an acknowledgement that currently some operators have elected to fulfil the requirements to "send" or "provide" information relating to NSPs by sending information

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<sup>854</sup> See section 1.2, 'Consultation process and timeline'.

<sup>855</sup> See subrule 8(1) of the WCIR.

<sup>856</sup> See rule 17 of the WCIR.

<sup>857</sup> This reflects the assumption that:

- on average 80 per cent of the postage and printing costs of a full NSP cycle would be borne in the first year of planning, with the remainder occurring in the 2<sup>nd</sup> year of planning and during the period for which the NSP is in effect and
- over a 10 year period, two such NSP planning cycles would occur.

<sup>858</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.17.



via post, but that, due to the proposed repeal of NSPs, this information will no longer be required to be produced or sent.

Having accounted for costs of commencing the 2017-22 NSP process prior to the recommended repeal of Part 5, the ACCC anticipates a decrease in annualised costs of costs of \$50 994 when compared with current water charge rules requirements (see Table 9.6 below). This compares with an annualised decrease of \$77 558 estimated for the proposals in the Draft Advice.

**Table 9.6—Net change in regulatory cost due to proposed change to NSP requirements—Final Advice compared with current WCIR requirements**

<b>No. of affected operators (Group 3 only)</b>	<b>5</b>
<b>NSP planning process – Information and analysis</b>	
Reduction in hours per operator associated with NSP planning process (total over 10 year period) <sup>859</sup>	-1 100
Annualised change in regulatory cost—reduction in staff hours associated with NSP planning process	<b>-\$35 998</b>
<b>NSP publication costs</b>	
Reduction in hours per operator associated with NSP with postage and printing (total over 10 year period) <sup>860</sup>	-56
Annualised change due to reduction in staff hours associated with postage and printing	<b>-\$1 833</b>
Annualised change due to reduction in postage costs	<b>-\$8 156</b>
Annualised change due to reduction in printing costs	<b>-\$5 008</b>
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>-\$50 994</b>

#### 9.3.4 Approvals and Determinations

Under the current Part 6 provisions of the Water Charge (Infrastructure) Rules 2010 (WCIR), an infrastructure operator that is not member-owned and services more than 250 GL of water held under water access entitlements (WAEs) is required to apply for approval or determination of regulated charges by the ACCC or an accredited regulator under Part 9 of the WCIR.<sup>861</sup>

Furthermore, when determining or approving regulated charges, the regulator must apply or consider the following:

- procedural requirements for application for a determination or approval
- the length of the regulatory period
- the basis for approving or determining regulated charges
- annual reviews of regulated charges, and
- variation of approvals / determinations.

<sup>859</sup> Hours shown is per operator *reduction* in NSP planning hours over a 10 year period, based on an assumption of 900 hours per operator per NSP (=1800 hours per operator over a 10 year period), and that 39 per cent of the total amount of hours (i.e.700 hours) will still be incurred due to an assumed need to incur some NSP planning costs prior to the assumed repeal of Part 5.

<sup>860</sup> Hours shown is per operator *reduction* in NSP planning hours over a 10 year period, based on an assumption of 35 hours per operator per NSP (=70 hours per operator over a 10 year period), and that 40 per cent of the total amount of hours (i.e. 28 hours) will still be incurred due to an assumed need to incur some NSP planning costs prior to the assumed repeal of Part 5.

<sup>861</sup> WCIR, rule 23.

In its Draft Advice, the ACCC proposed significant amendments to this Part. This included:

- generally moving the regulation of operator's charges from the ACCC to Basin States in line with their own regulatory processes (via alteration of the criteria for Part 6)
- retaining Part 6 as a 'back-up' mechanism where certain operators are not required to have their charges approved or determined by a single State Agency; or for cross-jurisdictional operators
- allowing the ACCC to exempt an operator that would otherwise be deemed a Part 6 operator under the WCIR in certain circumstances.

In its Final Advice, the ACCC made a number of changes to clarify the operation of this Part and to reduce the regulatory cost on operators. These included:

- more clearly defining the type of Basin State mechanism that would be a satisfactory alternative to Part 6, by also referencing it to the criteria it uses for the determination or approval.
- clarifying that Part 6 is not generally intended to capture off-river infrastructure operators, and modifying the relevant criterion (23(b)(i)) accordingly.
- ensuring subrule 23(b) is only triggered where the infrastructure operator levies an infrastructure charge in relation to the relevant services (rather than being based on the customer's obtaining such services, but for which no infrastructure charges apply).
- expanding the matters the ACCC can take into account when considering whether to exempt a Part 6 operator from the Part 6 requirements.
- clarifying the transition arrangements for existing Part 6 operators.

In this Final Advice, regulatory costings have been revised:

- to include a decrease in regulatory costings savings relating to the regulation of the current Part 6 operators, WaterNSW, Goulburn-Murray Water and Lower Murray Water (LMW) due to updated assumptions regarding likely amendment timeframes.
- to include regulatory costs relating to SunWater (see below).

As explained in section 9.1.4 of the Draft Advice, the ACCC assessed the net reduction in regulatory costs for current Part 6 operators based on the assumption that these operators will move from a situation of being partially regulated under the WCIR by an accredited state regulator (in relation to Murray-Darling Basin (MDB) rural charges), and partially under state law (in relation to non-MDB / urban charges) to a situation of being wholly regulated by a state regulator under state law. The ACCC estimated the decrease in regulatory costs of moving to this more streamlined framework as \$100,000 per operator per regulatory period (assuming an average of 2.6 regulatory periods per 10 years).

The ACCC continues to expect that the current Part 6 operators (WaterNSW, Goulburn-Murray Water (GMW) and Lower Murray Water (LMW)) will cease to be Part 6 operators if these Final Advice proposals are implemented.

However, in revising estimates for the Final Advice, the ACCC now considers that it is unlikely that the proposed rule amendments would (or should) be in place in time to allow for the determination of WaterNSW's charges for the 2017-21 regulatory period to occur under NSW law rather than the water charge rules. The ACCC therefore considers that, for the ten years from 2017 over which regulatory costs are assessed, the following arrangements will apply to current Part 6 operators:

- GMW: complete current regulatory period 2016-2020 under the WCIR (Essential Services Commission of Victoria (ESCV) accredited regulator), and regulated by ESCV under Victorian law thereafter.
- LMW: complete current regulatory period 2013-2018 under the WCIR (ESCV accredited regulator), and regulated by ESCV under Victorian law thereafter.
- WaterNSW: complete current regulatory period 2017-2021 under the WCIR (IPART accredited regulator), and regulated by IPART under NSW law thereafter.

Based on this assessment, the decrease in regulatory costs associated with the move to regulation occurring under state law is estimated to apply to current Part 6 operators for an average of 1.83 regulatory periods (compared to a previous estimate of 2.6 in the Draft Advice).

The regulatory costings for the Final Advice have also been revised to include an increase in regulatory cost in relation to the application of Part 6 to SunWater. Under the proposed water charge rules, the ACCC considers that it is likely that SunWater will become a Part 6 operator unless it is exempted under the new rule 23C, as the current regulatory framework in Queensland in relation to SunWater’s regulatory charges is unlikely to satisfy the test under subrule 23(a) of the proposed rules (i.e. if this test was satisfied, SunWater would not be a Part 6 operator). However, based on the assumption that regulatory processes in Queensland are likely to be adapted to be sufficient to preclude the application of Part 6, SunWater would cease to be a Part 6 operator at a future date. On this basis, the ACCC considers that the most likely outcome is that the ACCC would grant SunWater a temporary exemption from the application of Part 6, for the period needed for Queensland processes to be adapted. Therefore, the ACCC has not included in these regulatory costings the full burden of being a Part 6 operator, but rather has assessed the costs of SunWater applying for an exemption. The ACCC has estimated the number of hours that SunWater will need for this exemption application process as 60 hours.

The ACCC continues to be of the view that the amended proposals are unlikely to capture any other current infrastructure operators as Part 6 operators.

The ACCC therefore has adapted its estimate of the reduction in regulatory cost in the Final Advice proposals when compared with current Part 6 requirements to take into account the new likely amendment date as well as the additional regulatory costs related to the exemption of SunWater. This estimated change in regulatory costs is a reduction of \$54 607 per annum. This compares with an annualised decrease of \$78 000 estimated for the proposals in the Draft Advice. Table 9.7 presents these estimates.

**Table 9.7—Net change in regulatory cost due to proposed changes to determinations and approvals—Final Advice compared with current WCIR requirements**

	Group 3	Group 4	Total
<b>No. of affected operators</b>	1	3	<b>4</b>
<b>Proposed changes to application of Part 6 provisions</b>			
Average cost per operator (over 10 year assessment period)	\$3 927	-\$165 000	
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>\$393</b>	<b>-\$55 000</b>	<b>-\$54 607</b>

### 9.3.5 Distributions

Under Part 7 of the Water Charge (Infrastructure) Rules 2010 (WCIR), a member-owned operator which provides water infrastructure services in relation to more than 10 GL of water access entitlements (WAE) is required to have its infrastructure charges approved or determined by the ACCC or an accredited regulator for five years if they make financial distributions to all ‘related customers’ but not to other customers. This was intended to prevent operators from avoiding the non-discrimination provisions of the WCIR (rule 10), by requiring the regulated charges of operators that made such distributions to have their regulated charges approved by the ACCC or an accredited State Agency.

As noted in section 5.7 above, the ACCC considers this rule has been ineffective as operators are easily able to circumvent it by making distributions to all but one of its related customers.

In its Draft Advice, the ACCC proposed a number of changes to Part 7. These included:

- applying Part 7 to all infrastructure operators
- clarifying that distributions of water were also covered
- providing a ‘safe harbour’ for certain types of distributions (‘standard distributions’). These included distributions made in proportion to the customer’s right of access; in proportion to the customer’s contribution to the replacement of infrastructure if the entirety of that money was unspent; and to customers in a specific area in the form of water, reflecting water savings in that area (in proportion to the customer’s right of access).
- allowing the ACCC to exempt an operator who has made a non-standard distribution from becoming a Part 7 operator in certain circumstances.
- infrastructure operators ceasing to be a Part 7 operator three years after it made the non-standard distribution (instead of five years).

In its Final Advice, the ACCC made a number of changes to the proposed Part 7. These changes:

- limit the scope of ‘distributions’ by excluding money paid by an operator to a customer to incentivise network rationalisation
- provide that a distribution can be considered a ‘standard distribution’ where it is:
  - made or offered in proportion to either each customer’s right of access, or their contributions to the operator’s total revenue from charges levied per unit of water delivery right held;
  - made in the form of a trade or allocation of water provided the water was offered to each customer on the same terms.
- allow operators to ‘net off’ the value of distributions to be made to a customer against the money owed to the operator by the customer
- expand the scope of the exemptions mechanism to allow the ACCC to consider any terms, conditions, or obligations associated with the distribution.
- expressly allow the ACCC to have regard to distributions previously made and / or proposed to be made by the operator when approving or determining its charges under Part 7.

The changes in the Final Advice affect 25 operators across Groups 1, 2 and 3. The ACCC considers that its revised advice makes the revised Part 7 slightly more detailed, and therefore operators will take slightly more time to time to understand it (compared to the Draft Advice). In its regulatory costings, the ACCC has allowed for four extra ‘start-up’ hours for each Group 1 operator to understand the revised Part 7 and two extra ‘start-up’ hours for each Group 2 and Group 3 operator.

Additionally, the ACCC acknowledges some ongoing costs will be incurred due to the proposed changes to the operation of Part 7. Before an operator makes a distribution, it will need to ensure that the distribution does not result in the operator becoming a Part 7 operator. This ongoing cost was not considered in the Draft Advice but has been included in the assessment of regulatory cost for the Final Advice.

The ACCC considers that the types of distributions large operators may wish to make are likely to be more complex than ones that smaller operators may wish to make, and has allocated the ongoing costs of the revised Part 7 accordingly. The ACCC has also assumed that larger operators are more likely to make distributions than smaller operators. The ACCC has calculated the annualised ongoing costs of the revised Part 7 provisions at \$4 555 per year.

Note that, where operators make similar kinds of distributions each year, in practice it will not be necessary for them to reassess the distributions each year. Thus, the number of assessments operators need to make (and the associated costs) could be expected to decline over time. However, this effect has not been taken into account in estimating the regulatory costings presented in Table 9.8. These estimates have been based on an assumed constant average number of distributions made by an operator each year during the 10 year assessment period. Therefore, to the extent that in practice operators need to make fewer assessments in later years, the estimates presented may over-estimate the additional ongoing regulatory costs associated with the proposed changes to Part 7.

The NIC considered that under the current Part 7 proposals that all infrastructure operators that make distributions will be Part 7 operators, so the costs of a regulatory approval / determination should be accounted for in regulatory costings. The NIC stated that this cost was \$200 000 per operator. This was based on the regulatory costs reported by WaterNSW in relation to its most recent approval/determination process.<sup>862</sup>

The ACCC has not included in its regulatory cost calculations the cost of approvals / determination of infrastructure charges, as suggested by the NIC. For the reasons set out in section 5.7, the ACCC considers it is unlikely that any operators will become Part 7 operators. Further, for the reasons set out in that section, even if they did so, it is unlikely the costings will be anywhere near those experienced by WaterNSW at its previous approval / determination because price determination is much less onerous under Part 7 of the rules than under Part 6.

The Final Advice proposals for distributions anticipate an increase in annualised costs of \$9 202 when compared with current water charge rules requirements (see Table 9.8 below). This compares with an annualised increase of \$4215 estimated for the proposals in the Draft Advice.

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<sup>862</sup> National Irrigators' Council, Draft Advice Submission, March 2016, p.14.

**Table 9.8—Net change in regulatory cost due to proposed changes to the Part 7 provisions—  
Final Advice compared with current WCIR requirements**

	Group 1	Group 2	Group 3	Total
<b>No. of affected operators</b>	8	12	5	25
<b>Initial review of current policies and understanding ‘trigger’ and ‘safe harbour’ distributions</b>				
Average start-up hours per operator	25	30	30	
Annualised change in regulatory cost	\$1 309	\$2 356	\$982	<b>\$4 647</b>
<b>Ongoing Costs</b>				
Average annual hours per operator	4	5	6	
Average annual no. distributions made	0.3	0.5	1	
Annualised change in regulatory cost	\$628	\$1 964	\$1 964	<b>\$4 555</b>
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>\$1 937</b>	<b>\$4 320</b>	<b>\$2 945</b>	<b>\$9 202</b>

#### **9.4 Proposed amendments regarding termination fees**

The existing Water Charge (Termination Fees) Rules 2009 (WCTFR) only apply to irrigation infrastructure operators (IIOs). The Draft Advice sought to expand these provisions from IIOs to infrastructure operators more generally. This would result in four more operators being subject to the termination fee rules.

However, currently, operators that are an infrastructure operator but not an IIO generally do not impose a termination fee as the right to delivery is still bundled with the right to water in the most of the Murray-Darling Basin (MDB) (see section 6.1). As such, because further unbundling is unlikely in the foreseeable future, the change in regulatory cost for these four operators now subject to the termination fee provisions is estimated to be zero.

##### **9.4.1 Method of Calculating Termination Fees**

Under the Water Charge (Termination Fees) Rules 2009 (WCTFR), the maximum applicable termination fee is, in most cases, 10 times the total network access charge (TNAC). TNAC refers to all fixed charges payable by an irrigator to an operator in the financial year in which notice is given or in which termination takes effect. However, TNAC excludes charges levied by reference to the amount of water actually delivered, bulk water storage fees, connection and disconnection fees, and fees that exceed recurrent and capital cost recovery by the operator related to the right of access

In the Draft Advice, the ACCC proposed that the method for calculating the maximum applicable termination fee be changed to allowing only volumetric fixed charges levied with respect to customer’s water delivery rights (or water drainage rights) to form the termination fee base.

Additionally, where the operator charges the customer separately for dedicated infrastructure (such as an outlet or a meter) used exclusively by the customer, the operator must take into account the customer’s prior contributions when calculating this termination fee. The maximum termination fee for the dedicated infrastructure would be the lesser of:

- 10 times the infrastructure charge that relates to that specific infrastructure, or

- the capital cost of the infrastructure, less capital contributions from the customer, government or any other party, and less any infrastructure charges previously imposed related to the infrastructure.

Further, when the operator calculates the maximum termination fee, the operator would be required to:

- use the infrastructure charges in effect at the time the customer provided the operator with a notice to request the termination or information on what the termination fee or the infrastructure charges would be, or
- the infrastructure charges in effect 30 days before the notice was provided;

whichever produces the lower termination fee.

In its Final Advice, the ACCC revised the maximum termination fee to be the lesser of ten times the separate infrastructure charge or a reasonable estimate of the capital cost of the infrastructure, less any contributions made by the terminating customer. Finally, when the operator calculated the termination fee, it would be required to:

- use the infrastructure charges in effect at the time the customer provided the operator with a notice of termination or requested information on what the termination fee would be or
- if the notice is given, or the request is made, on a date up to 25 business days after the infrastructure operator adopts the Schedule of Charges currently in effect—use the infrastructure charges set out in the Schedule of Charges in effect immediately before the current Schedule was adopted (see section 6.2.1 and rule advice 6-D);

whichever produces the lower maximum termination fee.

The ACCC analysed operators' Schedules of Charges and websites in light of the proposed changes to the method for calculating termination fees. The ACCC considers that there are 27 irrigation infrastructure operators (IIOs) (who currently levy termination fees) that will need to assess and possibly change their approach to calculating these fees.

The ACCC does not consider the Final Advice proposals in this area to be any more complex than those proposed in the Draft Advice. Therefore, the ACCC considers the regulatory cost of its Final Advice proposals to be the same as its proposals in the Draft Advice.

However, the ACCC notes that there is one additional cost of the proposals in this area which it did not consider in the estimated costs included in the Draft Advice. The new requirement regarding how to calculate a separate termination fee for customers with dedicated infrastructure is likely to impose some additional costs for operators. If an operator wishes to levy a termination fee in relation to dedicated infrastructure in the circumstance where they levy a separate charge for that infrastructure, the operator will need to form a reasonable estimate of any prior customer contributions to the infrastructure (e.g. by examining records of any infrastructure charges or other contributions the customer has already paid for that infrastructure) before calculating the termination fee in relation to such infrastructure. This adds additional costs to the process for calculating termination fees.

This additional cost for terminations relating to dedicated infrastructure has been calculated on the following basis:

- that it will take operators on average one hour to find the information relevant to dedicated infrastructure and calculate the termination fees

- that the number of terminations relating to dedicated infrastructure is 50 per cent of all terminations in each group for a particular financial year.
- that terminations for a financial year for each group are the yearly average of terminations per operator in each group over the years 2009-10 to 2013-14.

The Final Advice proposals for the method of calculating termination fees anticipate an increase in annualised costs of \$18 488 when compared with current WCTFR requirements (see Table 9.9 below). This compares with an annualised increase of \$10 136 estimated for the proposals in the Draft Advice.

**Table 9.9—Net change in regulatory cost due to proposed changes to the method of calculating termination fees—Final Advice compared with current WCTFR requirements**

	Group 1	Group 2	Group 3	Group 4	Total
<b>No. of affected operators</b>	8	12	5	2	<b>27</b>
<b>Review current policies and method of calculating termination fees, and if required changing approach</b>					
Average start-up hours per operator	6	10	20	8	
Annualised change in regulatory cost	\$314	\$785	\$655	\$105	<b>\$1 859</b>
<b>Estimating contributions made by irrigators for additional termination fee</b>					
Average annual hours per operator	2	4	4	3	
Annualised change in regulatory cost	\$1 047	\$3 142	\$1 309	\$393	<b>\$5 891</b>
<b>Processing costs for termination fees for dedicated infrastructure</b>					
Average annual staff hours per termination	1	1	1	1	
Average no. terminations (involving dedicated infrastructure) per operator per year <sup>863</sup>	0	1.81	15.18	33.25	<b>50.2</b>
Annualised change in regulatory cost	\$0	\$1 420	\$4 966	\$4 352	<b>\$10 739</b>
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>\$1 361</b>	<b>\$5 347</b>	<b>\$6 930</b>	<b>\$4 850</b>	<b>\$18 488</b>

#### 9.4.2 Other Termination Fee Provisions including information provisions

The Water Charge (Termination Fees) Rules 2009 (WCTFR) prohibit an operator from charging a termination fee except in circumstances authorised by the WCTFR. Currently under the WCTFR, a person can terminate their right of access to the IIO's network by giving written notice to the IIO. A person does not terminate their right of access to a network by merely trading their right of access (in whole or in part) to another person.

An IIO may decide to terminate the irrigator's right of access where the irrigator breaches a condition of their contractual right of access with the IIO. The operator cannot charge the irrigator a termination fee where the customer is not liable to pay ongoing access fees or a termination fee under the contract or the operator does not separate out fees for the storage of water it provides to the irrigator from any fees related to a right of access.

IIOs are free to waive or discount the termination fees payable by irrigators at any time, including to facilitate or to encourage appropriate network modernisation and rationalisation.

<sup>863</sup> Assumes 50 per cent of terminations include termination of rights of access relating to dedicated infrastructure (e.g. termination of outlets / meters). Assumption based on data reported by operators to the ACCC for 2009-10 to 2013-14.



In its Draft Advice, the ACCC sought to:

- provide customers with greater certainty about the termination fee payable in the customer’s own circumstances
- ensure where possible, that a customer has all relevant information about the options and associated costs to reduce their right of access, and sufficient time to consider this information before making a decision.

The Draft Advice therefore proposed that when customers provide notice to their operator of an intention to terminate (or a request for information on the termination fee payable), the operator must provide in response all information relevant to the customer’s decision. This included the maximum termination fee that would be payable upon termination (binding on the operator for 30 business days), how that fee was calculated and notification to the customer that they are able to trade their water delivery right and the rules governing such trade.

Furthermore, the ACCC proposed that the water charge rules reduce the termination fee multiple in relation to water delivery right charges from 10x to 1x the fixed volumetric charge levied per unit of right of access if an operator does not provide for the trade of water delivery rights, or where an operator fails to comply with the pass-through rules proposed in section 5.13.

In its Final Advice, the ACCC made two key changes in this area. The Final Advice proposes that the maximum termination fee provided to the customer would be binding on both the infrastructure operator *and* the customer for a period of six months. Also, the ACCC removed the termination fee multiple ‘consequence’ of failure to comply with the proposed pass-through rules.

The ACCC does not anticipate that these changes will result in any change to the regulatory costs of the rules in this area. Although the ACCC acknowledges that making the termination fee binding on the operator for six months (rather than 30 days) may increase the regulatory costs on some operators, the ACCC does not consider this increase is likely to be large. This increase is likely to be offset by the removal of the multiple ‘consequences’ of a failure to comply with the proposed pass-through rules. Therefore, the ACCC has maintained the same estimate of regulatory costs for the Final Advice that was estimated for the Draft Advice, an increase of \$3587 per annum (see Table 9.10 below).

**Table 9.10—Net change in regulatory cost due to changes in other termination fee provisions—Final Advice compared with the current WCTFR requirements**

	Group 1	Group 2	Group 3	Group 4	Total
<b>No. of affected operators</b>	8	12	5	2	27
<b>Initial review of current policies relating to termination fees</b>					
Average start-up hours per operator	4	4	4	4	
Annualised change in regulatory cost	\$209	\$314	\$131	\$52	<b>\$707</b>
<b>Annual provision of information to terminating customers</b>					
Average annual hours per operator	1	2	2	1	
Annualised change in regulatory cost	\$524	\$1 571	\$655	\$131	<b>\$2 880</b>
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>\$733</b>	<b>\$1 885</b>	<b>\$785</b>	<b>\$183</b>	<b>\$3 587</b>

## 9.5 Proposed amendments regarding planning and management charges

Planning and management charges are currently regulated under the Water Charge (Planning and Management Information) Rules 2010 (WCPMIR), which apply to Basin State government departments and water authorities. Under the Office of Best Practice Regulation (OBPR) guidelines all regulatory burdens imposed on state and commonwealth government departments are not included in regulatory costs. As such, any estimated change in regulatory cost only includes the four water authorities in Victoria<sup>864</sup> and not the five Basin State departments that also have requirements under the WCPMIR.

### 9.5.1 Disclosure of planning and management charge information

Under the current WCPMIR provisions, persons who determine charges to recover the costs of water planning and management activities (WPM) are required to disclose details of the:

- planning and management charge and charge amount
- processes for determining the charge amount
- WPM activities the charge relates to
- associated costs of WPM activities.

In its Draft Advice, the ACCC proposed that the WCPMIR be repealed, but that requirements for disclosure of particular information relating to planning and management charges be incorporated into the existing Schedule of Charge requirements under the Water Charge (Infrastructure) Rules 2010 (WCIR).

As such, persons who determine planning and management charges will continue to be required to disclose information related to planning and management *charges* but they will no longer be required to provide and disclose *cost* information on WPM activities.

In this Final Advice, the ACCC maintains this position. Therefore, the expected change in regulatory burden from these proposed amendments is the same as in the Draft Advice: a reduction of \$2618 per annum.

**Table 9.11—Net change in regulatory cost due to proposed repeal of the WCPMIR and incorporation into the water charge rules**

<b>No. of affected operators (Group 4 only)</b>	<b>4</b>
<b>Removal of requirement to disclose planning and management cost information annually</b>	
Average annual hours per operator	10
Annualised change in regulatory cost—staff hours	-\$2 618
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>-\$2 618</b>

<sup>864</sup> These four water authorities (Goulburn-Murray Water, Lower Murray Water, Coliban Water and Goulburn Wimmera Mallee Water) are more widely considered to be infrastructure operators that determine planning and management charges.

### 9.5.2 Planning and management charge publication requirements

The WCPMIR require a person who determines a planning and management charge (usually a Minister or another government executive or a delegate of that person) to publish information on that charge including (among other details):<sup>865</sup>

- the name and amount of the charge (or information necessary to determine the amount)
- who must pay the charge and to whom
- the details of the activities to which the charge relates including when the activities are being carried out, the costs of the activities and the relationship between the costs of the activities and the calculation of the charge
- information about the process for determining the charge, including cost allocation principles and whether the charge was the subject of consultation, review or audit, and
- other information, if applicable, such as the water resource or class of water access right to which the charge applies.

In its Draft Advice, the ACCC sought to remove requirements to publish information on the nature and cost of WPM activities and to harmonise publication requirements for planning and management charges with those applying to infrastructure charges. Specifically the ACCC's Draft Advice stated that:

- persons who determine planning and management charges would no longer be required to publish information in the Australian Government Gazette or publish notices in local newspapers. This charge information, while current, would need to be published on the relevant person's website and be available at their principal place of business.
- requiring persons (including infrastructure operators) determining planning and management charges to publish a Schedule of Charges containing any amended / new planning and management charges, 25 business days before the charges take effect.

The ACCC expected this would reduce costs for these persons (the four water authorities subject to these rules in Victoria).

In its Final Advice, the ACCC has also clarified that:

- a Schedule of Charges may also be adopted by a person who levies planning and management charges or on whose behalf the charges are collected (even if that person did not determine the charges).
- the person who adopts a Schedule of Charges must publish the Schedule of Charges on its website and make it available at its principal place of business, or cause this to be done by another person who either determined the charge, will levy the charge or on whose behalf the charges are to be collected.

The ACCC considers the Final Advice in this area reduces costs related to publication when compared with current requirements, and provides greater clarity on whom must publish planning and management charges when compared with the Draft Advice. However, as these relate primarily to persons other than infrastructure operators who are excluded from the OBPR regulatory costings framework, the ACCC has maintained its estimate of expected reductions in regulatory costs relating to this area, a reduction of \$4371 per annum.

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<sup>865</sup> The information set out here summarises the requirements of the WCPMIR. You can obtain a full version of the WCPMIR at: <http://www.comlaw.gov.au/Details/F2010L02133>.

**Table 9.12—Net change in regulatory cost due to proposed repeal of the WCPMIR and reduction of publication requirements**

<b>No. of affected operators (Group 4 only)</b>	<b>4</b>
<b>Annual publication requirements<sup>866</sup></b>	
Average annual hours per operator	7
Annualised change in regulatory cost—staff hours	–\$1 571
Annual publication of WPM information in the Australian Government Gazette and notice in a newspaper	–\$2 800
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>–\$4 371</b>

## 9.6 One-off and start-up costs

In many cases, estimates in the previous sections have included one-off or ‘start-up’ costs relating to particular rule requirements. For example, in response to stakeholder feedback,<sup>867</sup> the ACCC has revised its costings to include a substantial number of staff hours for the larger operators (Groups 3 and 4) to examine the impacts of the proposed non-discrimination requirements and pass-through obligations on their charging methodology (see tables 9.4 and 9.5). The ACCC considers these costs will be one-off and any that ongoing costs of these changes have been incorporated elsewhere in the regulatory costings—as such, they are not included in the estimates in table 9.13 below.

Beyond these costs, there will also be a one-off start up regulatory cost for operators to familiarise themselves with how the rules have changed in a general sense. This cost will be incurred simply because the rules have changed, and would be incurred even if the rules did not introduce new substantive obligations. This change in regulatory costs is additional to the change presented in sections 9.1-9.6, and has been estimated as the cost for 31 operators to assess and understand the overall changes to the water charge rules as well as how their obligations will change under the proposed amendments. This includes the proposed amendment to combine the three sets of water charge rules into a single instrument.

The ACCC estimates that the change in (non-legal / consulting) regulatory costs for these 31 operators will be between 15 and 30 additional staff hours per operator (depending on operator group). These additional staff hours relate to operators assessing the proposed changes. Actual hours will likely vary across operators, and even within each group. Accordingly, all estimates are an average for the group. For example, the estimated average additional staff hours is assumed to be 15 hours for Group 1 operators and 30 hours for Group 4 operators. The difference in hours allocated to each group reflects the more complicated operations of the larger businesses.

The ACCC has adjusted upwards its estimates of start-up operator hours required to understand the rule changes to reflect stakeholder concern that larger operators, who can have quite complex

<sup>866</sup> This only accounts for change in regulatory burden for planning and management charges. Publication costs for other infrastructure charges are included in section 9.1.2.

<sup>867</sup> For example, the National Irrigators’ Council (NIC) considered that the new rules would necessitate each operator substantially restructuring their charging arrangements to comply with the new rules. The NIC’s view was that this would “in many cases... involve changing the bases on which charges are levied or calculated. Reviews of an operator’s charging methodology are significant exercises, which can take months of work at the highest levels in an operator’s organisation, together with external professional advice”. The NIC considered that the ACCC was “seriously underestimating the initial and ongoing compliance burden”. As an example, the NIC stated that Central Irrigation Trust had spent \$60 000 in assessing the ACCC’s Draft Advice in its attempt to understand the impact on CIT if proposals were implemented. The NIC stated, “[t]his [estimate] does not include any of the actual implementation costs that would be incurred if the ACCC’s proposals were to become law”. National Irrigators’ Council, Draft Advice Submission, March 2016, p.14.

charging arrangements and / or offer a range of infrastructure services, will need more time than previously assumed to understand how their obligations have changed.

The ACCC has also revised its costings to include an allowance for the legal advice and consultancy assistance that operators may request to assist them to understand their obligations under the proposed water charge rules. This revision in particular responds to the concern raised by the NIC that the Draft Advice made “no allowance for operators’ legal costs”.

With respect to legal costs, the NIC submitted that the number of legal hours required would be “in the order of 50% of the number of hours for the operator on each item in the ACCC’s assessment in chapter 9 of its Draft Advice at an approximate blended hourly rate of \$500 plus GST”.<sup>868</sup>

The ACCC considers that the number of hours of required legal advice suggested by the NIC is likely to be an overestimate for the following reasons:

- operators’ staff should not require legal advice to understand the majority of the revised water charge rules. The ACCC considers that operators at most will only potentially require legal advice on the new Part 3 (Non-discrimination) and Part 7 (Distributions) requirements.
- the right of private action has been removed. This reduces the potential cost of litigation against the operator and therefore removes the need to seek legal advice on every facet of the revised rules.
- the ACCC has committed to working closely with operators to assist them in understanding any new requirements under the rules, and to producing guidance material for operators (see sections 4.4 and 4.5).

The ACCC has therefor allowed for 20 hours of legal advice for each Group 3 and Group 4 operator in calculating the regulatory start-up costs. This is in recognition of the more complex operations, including charging regimes, of these larger operators. Smaller operators generally have relatively simple Schedules of Charges and are likely to make simpler distributions, if any. Therefore, the ACCC has not included any legal costs in its calculation for regulatory burden for the start-up costs of Group 1 and Group 2 operators.

The ACCC considers that the \$500 per hour + GST cost of legal services proposed by the NIC is high; however, erring on the side of regulatory caution, it has accepted this estimate.

For the same reasons as with legal advice, the ACCC has only allowed consulting costs for Group Three and Group Four operators. The ACCC has allocated 40 consultant hours at \$300 per hour per operator for each of these operator groups.

These changes in regulatory costs are assumed to only occur in the first year after the proposed changes outlined in chapters 4-7 take effect.

The total estimated increase associated with start-up costs (not elsewhere included) is \$30 209 per annum. This compares with an annualised increase of \$3993 estimated for the proposals in the Draft Advice.

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<sup>868</sup> National Irrigators’ Council, Draft Advice Submission, March 2016, p.16.

**Table 9.13—Net change in regulatory cost due to one-off and start-up costs not elsewhere included**

	Group 1	Group 2	Group 3	Group 4	Total
<b>No. of affected operators</b>	8	12	5	6	31
<b>Initial review of proposed amendments and understanding new/changed obligations</b>					
Average staff hours per operator	15	25	30	30	
Annualised change in regulatory cost—staff hours	\$785	\$1 964	\$982	\$1 178	\$4 909
<b>Legal costs relating to operators understanding obligations under the proposed changes</b>					
Average legal hours commissioned per operator	n/a	n/a	20	20	
Average cost of legal advice per hour	n/a	n/a	\$550	\$550	
Annualised change in regulatory cost—legal services	n/a	n/a	\$5 500	\$6 600	\$12 100
<b>Consultant costs relating to revision of charging methodology under the proposed changes</b>					
Average consulting hours commissioned per operator	n/a	n/a	40	40	
Average cost of consulting advice per hour	n/a	n/a	\$300	\$300	
Annualised change in regulatory cost—consultancy services	n/a	n/a	\$6 000	\$7 200	\$13 200
<b>Total net annualised change in regulatory cost (\$/yr)</b>	<b>\$ 785</b>	<b>\$1 964</b>	<b>\$12 482</b>	<b>\$14 978</b>	<b>\$30 209</b>

## Appendix A—Request for advice and terms of reference

### Review of Commonwealth water charge rules

#### Context

The government engaged an independent panel of experts to review the Commonwealth Water Act. The Independent Review of the *Water Act 2007* (the Review) found that significant progress has been made in improving Australia's water management since the Act commenced in 2008, but that further work was required to assess and address stakeholder concerns about the reporting burden imposed under the Act.

The government accepts recommendation 11 of the Review regarding a review of the Water Charge (Infrastructure) Rules, the Water Charge (Termination Fees) Rules and the Water Charge (Planning and Management Information) Rules. The review is to be undertaken by the Australian Competition and Consumer Commission in consultation with the industry and Basin State governments.

#### Terms of Reference

- 1) The Australian Competition and Consumer Commission (ACCC) is requested to provide advice on possible amendments to the Water Charge (Infrastructure) Rules 2010, Water Charge (Planning and Management Information) Rules 2010 and Water Charge (Termination Fees) Rules 2009, in accordance with section 93 and section 98 of the Water Act 2007.
- 2) The advice should address the merits of amending the rules in response to matters raised in the Report of the Independent Review of the Water 2007, as tabled on 19 December 2014; specifically, recommendation 11 in the report, proposing that the rules be reviewed to assess opportunities to reduce cost to industry and governments. Matters to consider include:
  - a. the continuing appropriateness of tiered regulation of infrastructure operators and the potential for streamlining or eliminating regulation, including whether to remove the current requirements for member owned operators under Part 5 of the Water Charge (Infrastructure) Rules
  - b. the current process for accreditation of Basin States' regulators, the effectiveness in applying water charging regimes by different regulators, and the form and content of charge determinations by all regulators
  - c. opportunities for advancing the consistent application of the water charging objectives and principles, including options to rank objectives and define terms
  - d. lessons learned from other sectors in relation to appeal mechanisms
  - e. opportunities to combine the water charge rules and Water Market Rules in one instrument
  - f. consistency with the Australian Government's deregulation objectives
  - g. the effectiveness of the Water Charge (Planning and Management Information) Rules, the extent to which their effectiveness could be enhanced and the likely impacts if they were to be repealed.
- 3) The ACCC's advice is also requested on other opportunities for amending the rules to improve regulatory clarity or efficiency, or to reduce regulatory burdens while maintaining effective standards.

- 4) The ACCC should undertake the relevant consultation required by s93 and s98 of the Act and Water Regulations 2008.
- 5) In preparing advice and draft amendments in response to this request, the ACCC should take into account the views of the Water Act Review Panel, as expressed in their report, the submissions made to the Water Act Review and any further matters raised during the ACCC's consultations.
- 6) The ACCC should provide this advice, including draft rule amendments, by the end of December 2015.

Where appropriate throughout the Final Advice, the relevant item(s) of the terms of reference are noted. See, in particular, section 1.1.



## Appendix B—Basin water charging objectives and principles

### Part 1—Preliminary

#### 1 Objectives and principles

This Schedule sets out:

- (a) the Basin water charging objectives; and
- (b) the Basin water charging principles.

Note 1: These objectives and principles are relevant to the formulation of water charge rules under section 92 of this Act.

Note 2: These objectives and principles are based on those set out in clauses 64 to 77 of the National Water Initiative when Part 2 of this Act commences.

### Part 2—Water charging objectives

#### 2 Water charging objectives

The *water charging objectives* are:

- (a) to promote the economically efficient and sustainable use of:
  - (i) water resources; and
  - (ii) water infrastructure assets; and
  - (iii) government resources devoted to the management of water resources; and
- (b) to ensure sufficient revenue streams to allow efficient delivery of the required services; and
- (c) to facilitate the efficient functioning of water markets (including inter-jurisdictional water markets, and in both rural and urban settings); and
- (d) to give effect to the principles of user-pays and achieve pricing transparency in respect of water storage and delivery in irrigation systems and cost recovery for water planning and management; and
- (e) to avoid perverse or unintended pricing outcomes.

## Part 3—Water charging principles

### 3 Water storage and delivery

- (1) Pricing policies for water storage and delivery in rural systems are to be developed to facilitate efficient water use and trade in water entitlements.
- (2) Water charges are to include a consumption-based component.
- (3) Water charges are to be based on full cost recovery for water services to ensure business viability and avoid monopoly rents, including recovery of environmental externalities where feasible and practical.
- (4) Water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.
- (5) In subclause (4):  
***upper bound pricing*** means the level at which, to avoid monopoly rents, a water business should not recover more than:
  - (a) the operational, maintenance and administrative costs, externalities, taxes or tax equivalent regimes; and
  - (b) provision for the cost of asset consumption; and
  - (c) provision for the cost of capital (calculated using a weighted average cost of capital).
- (6) If full cost recovery is unlikely to be achieved and a Community Service Obligation is deemed necessary:
  - (a) the size of the subsidy is to be reported publicly; and
  - (b) where practicable, subsidies or Community Service Obligations are to be reduced or eliminated
- (7) Pricing policies should ensure consistency across sectors and jurisdictions where entitlements are able to be traded.

### 4 Cost recovery for planning and management

- (1) All costs associated with water planning and management must be identified, including the costs of underpinning water markets (such as the provision of registers, accounting and measurement frameworks and performance monitoring and benchmarking).
- (2) The proportion of costs that can be attributed to water access entitlement holders is to be identified consistently with the principles set out in subclauses (3) and (4).
- (3) Water planning and management charges are to be linked as closely as possible to the costs of activities or products.
- (4) Water planning and management charges are to exclude activities undertaken for the Government (such as policy development and Ministerial or Parliamentary services).
- (5) States and Territories are to report publicly on cost recovery for water planning and management annually. The reports are to include:
  - (a) the total cost of water planning and management; and
  - (b) the proportion of the total cost of water planning and management attributed to water access entitlement holders, and the basis upon which this proportion is determined.

## **5 Environmental externalities**

- (1) Market-based mechanisms (such as pricing to account for positive and negative environmental externalities associated with water use) are to be pursued where feasible.
- (2) The cost of environmental externalities is to be included in water charges where found to be feasible.

## **6 Benchmarking and efficiency reviews**

- (1) Independent and public benchmarking or efficiency reviews of pricing and service quality relevant to regulated water charges is or are to be undertaken based on a nationally consistent framework.
- (2) The costs of operating these benchmarking and efficiency review systems are to be met through recovery of regulated water charges.