



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Compliance and enforcement guide for infrastructure operators

Water Market and Water Charge Rules

September 2022

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
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ACCC 08/22_22-41

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1. Introduction

This guide has been produced to assist operators of water infrastructure in the Murray-Darling Basin understand:

- the ACCC's water roles in the Murray-Darling Basin
- the ACCC's approach to enforcing the [Water Market Rules 2009](#) and [Water Charge Rules 2010](#) (collectively the Rules), made under the *Water Act 2007* (Cth) (The Water Act)
- how the ACCC will respond to possible contraventions of the Rules and the *Competition and Consumer Act 2010* (CCA).

This guide should be read with the Water Act, the Rules and the ACCC's [Compliance and enforcement policy](#), which outlines the ACCC's approach to compliance and enforcement of the CCA.

The ACCC will publish information and provide guidance to help infrastructure operators achieve compliance. The ACCC's approach to enforcement action will depend on a range of factors, including:

- the relevant objectives and principles of the Water Act and the Rules
- the nature of the conduct and whether it demonstrates a blatant disregard for the law
- whether the conduct has caused, or is likely to cause detriment to another party, and the level of that detriment.

2. Role of the ACCC under the Competition and Consumer Act

The ACCC is Australia's peak consumer protection and competition agency. The ACCC is an independent statutory government authority serving the public interest. Most of our compliance and enforcement work is conducted under the provisions of the *Competition and Consumer Act 2010* (the CCA). The purpose of the CCA is to enhance the welfare of Australians by:

- promoting competition among business
- promoting fair trading by business
- protecting consumers in their dealings with business.

The CCA prohibits behaviours including:

- misleading or deceptive conduct
- unconscionable conduct
- false or misleading representations about goods and services.

These prohibitions may apply to water stakeholders.

The ACCC uses a range of tools to encourage compliance and prevent breaches of the CCA, including education, and working closely with stakeholders and other agencies. The CCA also provides the ACCC with a range of enforcement remedies to address contraventions, including court-based outcomes and court enforceable undertakings.

More information about the principles we adopt to achieve compliance with the CCA, and our compliance and enforcement functions, strategies and tools under the CCA is in our [Compliance and enforcement policy](#).

The ACCC does not:

- act on behalf of particular interests
- provide professional, legal or commercial advice
- provide mediation or conciliation services
- enforce the terms and conditions of contracts between private parties, such as supply contracts between irrigation infrastructure operators and irrigators.

Our role is to ensure compliance with the laws we administer and to offer guidance. Guidance sets out the ACCC's understanding of the law and is prepared as general guidance for legal practitioners and business advisers. Guidance is not a substitute for legal advice.

3. ACCC functions under the Water Act

Under the [Water Act](#), the ACCC monitors and enforces compliance with the Rules.



Monitoring

Publishes an annual Water Monitoring Report on regulated water charges, compliance with the Water Market Rules 2009 and Water Change Rules 2010, and transformation arrangements in the Murray-Darling Basin.



Compliance & Enforcement

Enforces compliance with the Water Market Rules 2009, Water Charge Rules 2010, and the *Competition and Consumer Act 2010*, including the Australian Consumer Law.

Compliance

Carries out compliance activities including preparing guidance and engaging with stakeholders to educate them on their obligations, encourage voluntary compliance and resolve breaches administratively.

Enforcement

Enforces obligations under the Water Market Rules 2009, Water Change Rules 2010, and the *Competition and Consumer Act 2010*, through the use of enforceable undertakings, infringement notices, declarations and court action.



Advice

Provides advice to the:

- Minister under the *Water Act 2007* on the Water Market Rules 2009 and Water Charge Rules 2010.
- Murray-Darling Basin Authority on the Basin Plan Water Trading Rules.

The Australian Treasurer can ask the ACCC to conduct price inquiries under Part VIIA of the *Competition and Consumer Act 2010*.

The Rules are statutory instruments made by the relevant Minister.

The Water Market Rules 2009

The Water Market Rules help irrigators permanently transform their irrigation right into or onto a statutory water access entitlement which they can trade or hold in their own name, free of any trade restrictions imposed by the irrigation infrastructure operator.

The Water Charge Rules 2010

The Water Charge Rules provide charging transparency for customers of water infrastructure operators in the Murray-Darling Basin. Water infrastructure operators are required to include most charges in their schedule of charges. The Water Charge Rules also set limits on termination fees that may apply where a customer chooses to terminate their access to the operator's water service infrastructure.

Behaviour prohibited by the Rules may also breach the CCA. Sometimes, behaviour that is not prohibited under the Rules may still breach the CCA. More information about the ACCC's role under the Water Act is on our [website](#).

4. Water charging, market and trading objectives and principles

When the ACCC monitors and enforces the Rules, we consider the water charging objectives and principles, and water market and trading objectives and principles in the Water Act. These objectives and principles include:

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

The Rules require infrastructure operators to help achieve these objectives and principles, for example, by removing unreasonable restrictions on trade. The Rules prevent irrigation infrastructure operators taking advantage of being a natural monopoly to manipulate the market for tradeable water rights.

5. Compliance monitoring and information gathering

Under the Water Act, the ACCC monitors regulated water charges and compliance with the Rules and provides a monitoring report to the Minister. One of the purposes of monitoring is to assess compliance with the Rules.

Our monitoring approach relies on:

- observing behaviour and activities in the market
- information received from complaints and enquiries
- information collected from infrastructure operators.

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

To perform our functions under the Water Act, we sometimes need to get information or documents from:

- irrigators
- infrastructure operators
- third parties and other interested groups.

While we will generally request information on a voluntary basis, we have the option of issuing a statutory notice to compel a party to provide information, documents, or to appear and provide evidence in person. The ACCC's powers under section 155 of the CCA are also available to us under the Water Act.

Failure to comply or knowingly giving false or misleading information in response to a notice are criminal offences.

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

6. Compliance and enforcement

Education, advice and persuasion

Our approach to achieving compliance with the Rules focuses initially on working cooperatively with stakeholders. Preventing contraventions of the Rules is preferable to taking enforcement action after a contravention has occurred.

We take this initial approach by:

- publishing guidance
- responding to inquiries and generally liaising with infrastructure operators, irrigators, government agencies and other stakeholders about the Rules.

ACCC approach to enforcement

Where the ACCC is investigating and considers that there has been a contravention of the Rules, the Water Act provides us with a range of enforcement remedies.

In deciding which compliance or enforcement tools to use, our priority is always to achieve the best possible outcome for the community and to manage risk proportionally. Decisions are made on a case-by-case basis, taking a range of factors and circumstances into consideration.

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

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

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

7. Enforcement options

The enforcement responses available to the ACCC fall into 2 categories: administrative resolution and enforcement action.

Administrative resolution

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

An administrative resolution could involve the ACCC:

- warning infrastructure operators that particular conduct may be non-compliant
- warning infrastructure operators that the ACCC is concerned with the actions they are taking
- notifying infrastructure operators that they have committed a possible contravention that needs to be remedied
- reaching agreement with the infrastructure operator that it will remedy a contravention and notify the ACCC once it has been remedied
- educating non-compliant infrastructure operators on their compliance obligations
- reminding infrastructure operators of their obligations under the Rules.

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

Enforcement

The Water Act contains several statutory remedies to address contraventions of the Rules. These include stronger administrative action and court proceedings. The available responses are:

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

Enforceable undertakings

The ACCC may resolve potential contraventions of the Rules by accepting court enforceable undertakings under section 163 of the Water Act. In these undertakings, the party offering the undertaking will generally agree with the ACCC that they will:

- take specified action to follow the Rules
- refrain from specified action that would be in breach of the Rules
- take specified action to ensure that it does not, or is unlikely to, commit a contravention in the future.

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

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

Enforceable undertakings accepted by the ACCC under section 163 of the Water Act are available on the [ACCC website](#).

If a person who has given an enforceable undertaking fails to follow its terms, we may apply to court for any of the following orders:

- that the person comply with the enforceable undertakings
- that the person pay an amount to the ACCC up to the amount of any financial benefit they have received for not following the enforceable undertaking
- any order that the court considers appropriate to compensate any person that has suffered loss because of the contravention
- any other orders the court considers appropriate.

Infringement notices

The ACCC may resolve contraventions of the civil penalty provisions of the Rules by issuing an infringement notice under section 156 of the Water Act. Infringement notices are designed to provide a timely, cost-efficient enforcement outcome for relatively minor contraventions.

Payment of a penalty under an infringement notice:

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

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

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

Litigation

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

We are more likely to proceed to litigation when the behaviour is particularly harmful and:

- there is reason to be concerned about the future behaviour of the infrastructure operator
- the infrastructure operator is unwilling to provide an alternative satisfactory resolution.

In determining whether to start legal proceedings, the ACCC will consider the factors listed above at section 6.

Under the Water Act, the Federal Court may:

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

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

8. Private legal proceedings

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

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

9. Further information

More information about the ACCC's functions in water are available on the [ACCC website](#).

Contacts

Infocentre: 1300 302 502

Website: www.accc.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the [National Relay Service](#)

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



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