

EXPLANATORY STATEMENT

Issued by Authority Minister for Agriculture and Water Resources

Water Act 2007

Water Charge Amendment Rules 2019

Legislative Authority

The *Water Act 2007* (Water Act) provides for the management of the water resources of the Murray-Darling Basin and other matters of national interest, including providing the Australian Competition and Consumer Commission (ACCC) with a key role in developing and enforcing water charge and water market rules consistent with the National Water Initiative.

Section 92 of the Water Act provides that the Minister may make rules (to be called ‘water charge rules’), applying in Basin states that are referring States and in the Australian Capital Territory that relevantly relate to regulated water charges, and contribute to achieving the Basin water charging objectives and principles set out in Schedule 2 to the Water Act.

Subsection 93(1) provides that the Minister must ask for the advice of the ACCC about water charge rules the Minister proposes to make, or about proposed amendments or revocations of rules. Subsection 93(4) provides that the Minister must have regard to the ACCC’s advice in making, amending or revoking the water charge rules. The *Water Regulations 2008* prescribe the rule making process.

Section 2 of Schedule 2 to the Water Act provides that the ‘water charging objectives’ are: to promote the economically efficient and sustainable use of water resources, water infrastructure assets, and government resources devoted to the management of water resources; to ensure sufficient revenue streams to allow efficient delivery of the required services; to facilitate the efficient functioning of water markets (including inter-jurisdictional water markets, and in both rural and urban settings); 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.

Section 3 of Schedule 2 to the Water Act provides that the ‘water charging principles’ are: that pricing policies for water storage and delivery in rural systems are to be developed to facilitate efficient water use and trade in water entitlements; that water charges are to include a consumption-based component; that 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; and that water charges in the rural water sector are to continue to move towards upper bound pricing where practicable.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose

The purpose of the *Water Charge Amendment Rules 2019* (Amendment Rules) is to amend the *Water Charge (Infrastructure) Rules 2010* to implement certain rule advices from the *ACCC's Review of the Water Charge Rules: Final Advice* (Final Advice) and to repeal the *Water Charge (Planning and Management Information) Rules 2010* and the *Water Charge (Termination Fees) Rules 2009*. The 'rule advices' are amendments proposed by the ACCC and grouped by topic. ACCC rule advice 5-L to repeal Network Service Plans was implemented through the *Water Charge (Infrastructure) Amendment Rules 2017*.

All of the remaining ACCC rule advices are being implemented through the Amendment Rules except for the ACCC's proposed new rules for non-discrimination and distributions (rule advices 5-A, 5-B, 5-D, 5-S, 5-T, 5-U, 5-X) and the repeal of the private right of action for infrastructure charges (rule advice 4-C).

For non-discrimination and distributions, the existing regulatory frameworks and protections will remain in place. Part 7 relating to distributions was originally developed to ensure that member-owned operators would not be able to circumvent the non-discrimination rule by increasing charges to all customers and then returning profits to related customers through distributions. As the existing non-discrimination and distribution rules are strongly related from a policy standpoint, it makes good regulatory sense to retain both of these aspects of the rules at this stage so that the rules retain their coherence. These aspects of the rules can be revisited together in the future if needed (noting the ACCC's ongoing statutory water monitoring role). Also, customers will benefit from increased pricing transparency regarding what charges they have to pay and why, through the implementation in the Amendment Rules of the ACCC's new schedule of charge requirements for operators. Customers are able to compare their charges with the charges of other customers within and outside their networks and to engage directly with operators in charge determination and dispute resolution processes.

Background

Recommendation 11 of the *Report of the Independent Review of the Water Act 2007* (the Water Act Review) recommended the ACCC conduct a review of the *Water Charge (Infrastructure) Rules 2010*, the *Water Charge (Planning and Management Information) Rules 2010* and the *Water Charge (Termination Fees) Rules 2009*. The Australian Government response to the Water Act Review agreed to this recommendation.

As stated above, section 93 of the Water Act provides that the Minister must ask the ACCC for advice about water charge rules the Minister proposes to make, or proposed amendments or revocations of rules.

On 17 December 2014, in accordance with the Government Response to recommendation 11 of the Water Act Review and section 93 of the Water Act, the then Parliamentary Secretary to the Minister for the Environment wrote to the ACCC requesting 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 2015-16, the ACCC undertook its review of the *Water Charge (Infrastructure) Rules 2010*, the *Water Charge (Termination Fees) Rules 2009* and the *Water Charge (Planning and Management Information) Rules 2010*.

The ACCC provided its final advice, draft amendment rules and a draft compilation to the then Minister for Agriculture and Water Resources, the Hon. Barnaby Joyce MP, on 21 September 2016. The ACCC advice is available at <https://www.accc.gov.au/regulated-infrastructure/water/water-projects/review-of-the-water-charge-rules-advice-development/final-advice>.

On 31 January 2017, the then Minister repealed Part 5 of the *Water Charge (Infrastructure) Rules 2010*, as per rule advice 5-L of the ACCC's advice. The Part 5 repeal amendment was made by the *Water Charge (Infrastructure) Amendment Rules 2017* which commenced on 1 July 2017.

The Amendment Rules implement all of the remaining ACCC rule advices except for the ACCC's proposed new rules for non-discrimination and distributions (rule advices 5-A, 5-B, 5-D, 5-S, 5-T, 5-U, 5-X), and the repeal of the private right of action in relation to infrastructure charges (rule advice 4-C). For these aspects of the rules, the existing regulatory frameworks and protections will remain in place.

As required under subsection 93(7) of the Act, the respects in which the Amendment Rules do not reflect the ACCC's advice, and the Minister's reasons for departing from the ACCC's advice in those respects, are set out in the document tabled in Parliament with the Amendment Rules by the Minister for Agriculture and Water Resources, David Littleproud, MP.

Impact and Effect

The Amendment Rules have the effect of:

- combining three sets of water charge rules into a single instrument by incorporating relevant provisions of the *Water Charge (Planning and Management Information) Rules 2010* and the *Water Charge (Termination Fees) Rules 2009* (and then repealing those instruments), and amending existing provisions in the *Water Charge (Infrastructure) Rules 2010* and renaming it the *Water Charge Rules 2010*. In terms of impact, infrastructure operators benefit from more streamlined regulatory requirements. Operators no longer have to familiarise themselves with three separate sets of rules. All of the requirements are in one place, and the requirements themselves are standardised and consolidated;
- ensuring that terms are defined consistently across rules, for example, to implement the drafting principle of 'one expression, one meaning', so that the term 'regulated charge' is not defined differently in different sets of rules;
- increasing transparency and customer protections by enhancing schedule of charge requirements;
- regulating the manner in which an infrastructure operator may recover amounts incurred by the operator through infrastructure charges or planning and management charges levied on the operator by another entity.
- handing back most regulatory responsibility for Part 6 infrastructure operators to Basin states under Basin state laws, provided Basin state regulatory approaches ensure that operators' costs are prudent and efficient, and charges are set at levels that would not allow monopoly returns. In terms of impact, regulatory oversight of Part 6 operators under the *Water Charge (Infrastructure) Rules 2010* (that was, non-member operators that provide services in relation to at least 250 gegalitres of water access

entitlement) is handed back to Basin states 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;

- improving the method for, and transparency of, calculating termination fees; and
- incorporating planning and management charges in schedule of charge requirements.

Consultation

Section 17 of the *Legislation Act 2003* requires that the rule-maker must be satisfied that any consultation that the rule-maker considers to be appropriate and reasonably practicable to undertake has been undertaken.

During the process of developing its final advice, the ACCC engaged in extensive consultation with persons likely to be affected by the Amendment Rules and with persons having expertise in fields relevant to the Amendment Rules. This included public consultation on an issues paper, public forums and targeted industry consultation, which informed the ACCC's Draft and Final Advice and subsequently the development of the Amendment Rules. Those consulted included the Basin States, infrastructure operators and their customers within the Murray-Darling Basin, the public, the Murray-Darling Basin Authority, the Bureau of Meteorology, and representatives from industries, including agriculture and irrigation.

In accordance with the requirements under regulation 4.04 of the *Water Regulations 2008*, the Amendment Rules were made available for not less than four weeks prior to the Amendment Rules being made. Following the public notice period, the commencement date for the *Water Charge Amendment Rules 2019* was changed from 2019 to 2020 to allow regulators, operators and customers more time to transition to the new arrangements.

The Office of Best Practice Regulation (OBPR) was consulted by the ACCC regarding the amendments made by the Amendment Rules. The ACCC certified that the Final Advice meets the OBPR's requirements for a process and analysis equivalent to a Regulation Impact Statement (RIS). The estimated change in regulatory costs to business, community and organisations were agreed by the OBPR (ID: 19056).

Details/Operation

Details of the instrument are set out in [Attachment A](#).

Other

The instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in [Attachment B](#).

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Rules commence on 1 July 2020.

Details of the *Water Charge Amendment Rules 2019*

Section 1 – Name

This section provides that the name of the instrument is the *Water Charge Amendment Rules 2019* (Amendment Rules).

Section 2 – Commencement

This section provides that the Amendment Rules commence on 1 July 2020.

Section 3 – Authority

This section provides that the Amendment Rules are made under section 92 of the *Water Act 2007*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1 – Main amendments

Amendments to the *Water Charge (Infrastructure) Rules 2010*

Item 1 amends the name of the *Water Charge (Infrastructure) Rules 2010* by omitting the adjective ‘infrastructure’ so that the name of the rules is the *Water Charge Rules 2010*. This is because the Amendment Rules combines three sets of water charge rules into a single instrument applying to all three types of charges by incorporating relevant provisions of the *Water Charge (Planning and Management Information) Rules 2010* and the *Water Charge (Termination Fees) Rules 2009* (and then repealing those instruments), and amending existing provisions in the *Water Charge (Infrastructure) Rules 2010* and renaming it the *Water Charge Rules 2010*.

The ACCC noted in its Final Advice that the *Water Act 2007* refers simply to ‘water charge rules’ and does not require separate sets of rules for different types of regulated water charges. The ACCC considered that its review of the water charge rules provided 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.

Item 2 repeals the definitions of ‘accredited agency’ and ‘accredited arrangements’ in subrule 3(1). Basin state agencies are no longer required to be accredited under the water charge rules.

Under previous Part 6 of the *Water Charge (Infrastructure) Rules 2010* non-member operators that provided services in relation to at least 250 gigalitres of water access entitlement were regulated by State regulators who were accredited under Part 9 of the *Water Charge (Infrastructure) Rules 2010*. Under the Amendment Rules, regulation of the large non-member-owned operators (Part 6 operators under the *Water Charge (Infrastructure) Rules 2010*) is handed back to Basin states under Basin state law, provided Basin state regulatory approaches ensure that operators' costs are prudent and efficient, and charges are set at levels that would not allow monopoly returns. If the ACCC is not satisfied that requirement is met, then the ACCC is the regulator under the *Water Charge Rules 2010* unless the ACCC grants an exemption under rule 23C.

Item 3 inserts three new definitions in subrule 3(1): 'Act', 'additional termination fee' and 'aggregate revenue requirement'. The item provides that the definition of 'Act' means the *Water Act 2007*. 'Additional termination fee' and 'aggregate revenue requirement' are terms provided for in items 85 (rule 71(4)) and items 70-75 respectively.

Item 4 amends paragraph (a) of the definition of 'application period' in subrule 3(1). The words 'commencement date' are omitted from paragraph (a) and substituted with '12 January 2011' which is the actual date of commencement of the *Water Charge (Infrastructure) Rules 2010*.

Item 5 repeals the definition of 'applied provisions' in subrule 3(1) because the substantive rule to which this definition relates (rule 59, accredited arrangements for Basin state agencies) has been repealed by item 85.

Item 6 amends subrule 3(1) by repealing the definition and then substituting a new definition containing paragraphs (a) and (b) only. Paragraph (c) is omitted from the definition of 'business day'. That paragraph provided a definition for business day in relation to an accredited agency, and is no longer needed. This is an amendment consequential to item 85 which repeals Part 9 relating to accredited agencies.

Item 7 inserts a definition for 'charge application period' in subrule 3(1) for the purposes of the new schedule of charge requirements inserted by item 43 (Part 4). The item provides that 'charge application period' means the period during which the charge applies, and is the period that the schedule of charges is in effect for, unless a different charge application period is specified in the schedule of charges (see subrule 11(2) and 12(2)).

Item 8 repeals the definitions of 'civil penalty' and 'commencement date' in subrule 3(1). The former is repealed because it is already defined in the *Water Act*. The latter is repealed because references to the commencement date for the *Water Charge (Infrastructure) Rules 2010* are being replaced with the actual date on which those rules commenced, i.e. 12 January 2011. For example, see item 4 and item 45.

Item 9 inserts in subrule 3(1) a definition for: 'first regulatory period' for the purposes of rule 24A; 'general termination fee' for the purposes of rule 71; and 'information request' for the purposes of rule 74.

Item 9 also inserts a definition for 'infrastructure charge'. The *Water Charge (Infrastructure) Rules 2010* included the term 'regulated charge' which was defined by reference to those

provisions in the section 91 definition of ‘regulated charge’ in the Water Act that relate to infrastructure charges. This meant that the *Water Charge (Infrastructure) Rules 2010* included a definition of ‘regulated charge’ that was different to the definition of ‘regulated charge’ in the Water Act. The ACCC advised that this caused confusion for stakeholders. The term ‘regulated charge’ is therefore repealed by item 13.

The *Water Charge (Planning Management Information) Rules 2010* included the term ‘regulated charge’ but the term was defined by reference to those provisions in the section 91 definition of ‘regulated charge’ in the Water Act that relate to planning and management charges. The *Water Charge (Planning Management Information) Rules 2010* are repealed by item 2 in Schedule 2 to the Amendment Rules.

Because the term ‘regulated charge’ was defined differently in the different sets of rules, it was confusing for operators and customers. The ACCC considered the extent of any overlap or duplication in the definitions contained in the three sets of water charge rules. The ACCC advised (p. 28 of the ACCC *Review of the Water Charge Rules Final Advice 2016*) that as part of combining the three sets of water charge rules, definitions should be revised to remove duplication and inconsistencies in order to improve clarity.

The ACCC proposed that the terms ‘infrastructure charge’ and ‘planning and management charge’ be defined to refer to the specific types of regulated water charges as had been provided in what was then the *Water Charge (Infrastructure) Rules 2010* and the now repealed *Water Charge (Planning and Management Information) Rules 2010* (Rule advice 4-B). Providing a single definition for ‘regulated charge’ is consistent with the Office of Parliamentary Counsel’s drafting principle of ‘one expression, one meaning’: see Drafting Direction 15.

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.

Item 10 repeals the definition of ‘initial period’ in subrule 3(1) because it relates to the transitional arrangements which applied to Part 6 operators under the *Water Charge (Infrastructure) Rules 2010* at the commencement of the *Water Charge (Infrastructure) Rules 2010* in 2011. This transitional provision is now redundant.

Item 11 repeals the definition of ‘levy’ in subrule 3(1). The item substitutes it with a definition that does not contain a reference to ‘regulated charge’. This is consequential to the amendment made by item 13, which repeals the definition of ‘regulated charge’. The Amendment Rules provides definitions for ‘infrastructure charge’ (item 9), ‘planning and management charge’ (item 12) and ‘termination fee’ (item 21).

Item 12 inserts a definition for ‘planning and management charge’ in subrule 3(1) that refers to paragraph 91(1)(c) of the definition of ‘regulated charge’ in section 91 of the Water Act. See further information about the reasons for this change at item 9.

Item 13 repeals the definition of ‘regulated charge’ in subrule 3(1). Instead, the Amendment Rules provide definitions for the terms ‘infrastructure charge’, ‘planning and management charge’ and ‘termination fee’. Each is defined by reference to the relevant parts of the definition of regulated charge in section 91 of the Water Act.

Item 14 repeals the definition of Regulator in subrule 3(1) which is consequential to amendments made by item 85 which repeals accreditation arrangements for Basin states and by item 44 which makes the ACCC the sole regulator under Part 6.

Item 15 repeals the definition of ‘regulatory asset base’ in subrule 3(1) and substitutes it with a definition that reflects changes made by item 96 to Schedule 2 regarding the determination of a regulatory asset base in relation to a Part 6 operator. (See item 44, rule 23 for the meaning of ‘Part 6 operator’.)

Item 16 inserts a definition for ‘regulatory event’ in subrule 3(1) for the purposes of Division 4 of Part 6 ‘Variation of approval or determination. ‘Regulatory event’ is defined to mean a change to the regulatory requirements imposed on an infrastructure operator, or the determination or approval of an operator’s charges, but excluding a fine, penalty, or compensation in relation to a breach of any law.

The ACCC advised that the regulator should be allowed to vary an approval or determination in certain circumstances following a ‘regulatory event’. An example of a regulatory event is if a change to the regulatory requirements imposed on an infrastructure operator relating to the provision of an infrastructure service results in a benefit to an infrastructure operator of more than 1% of the operator’s aggregate revenue requirement, or results in a ‘material and adverse effect’ to an infrastructure operator the rectification of which would exceed more than 1% of the operator’s aggregate revenue requirement.

Item 17 repeals the definition of ‘regulatory period’ in subrule 3(1) and substitutes it with a definition for Part 6 operators that provides for a default regulatory period of three years (instead of four years as per the *Water Charge (Infrastructure) Rules 2010*), unless the ACCC has set out a length for the regulatory period under rule 24 (see item 45).

Rule 24 allows the ACCC to lengthen a regulatory period from the 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; or
- a regulatory period that applies to the Part 6 operator in relation to non-Murray-Darling Basin (MDB) (rural) water services.

These changes give effect to the ACCC’s Final Advice. The ACCC considered that a default regulatory period of three years (with flexibility to extend this period up to 5 years) is appropriate and provides flexibility to align regulatory periods with regulatory periods under Basin state processes.

Item 18 inserts a definition for: ‘regulatory start date’ for the purposes of calculating regulatory periods under Parts 6 and 7; ‘relevant tax’ for the purposes of identifying a ‘taxation event’ for the purposes of varying a determination or approval under Part 6; and ‘right of access’ for the purposes of termination fees.

Item 19 repeals the definition of ‘schedule of charges’ in subrule 3(1) and substitutes it with a definition that references rules 11 and 12 instead of repealed rule 4 (see item 27).

Item 20 repeals the definition of ‘State water resources’ in subrule 3(1) because it is no longer needed following the repeal of Part 9 made by item 85. Item 20 also repeals the definition of ‘surcharge’ with the effect that the plain English meaning of this word applies.

Item 21 inserts in subrule 3(1) a definition for: ‘taxation event’ for the purposes of Division 4 of Part 6 ‘Variation of approval or determination; ‘terminating customer’ for the purposes of calculating and levying termination fees; ‘termination fee’ for the purposes of rule 71; and ‘termination information statement’ for the purposes of subrule 74(5).

Item 22 repeals the definition ‘the Act’ in subrule 3(1). This is consequential to the amendment made by item 3 which inserts a new definition and provides that ‘Act’ means the *Water Act 2007*.

Item 23 inserts a definition for ‘trade’ in subrule 3(1). The item provides that ‘trade’ has the same meaning as in the *Basin Plan 2012*. The Basin Plan had not been made when the *Water Charge (Infrastructure) Rules 2010* were made.

Item 24 repeals in subrule 3(1), an outdated and redundant definition of ‘transitional period’ which was relevant to the commencement of the *Water Charge (Infrastructure) Rules 2010* in 2011.

Item 25 insert two notes at the end of subrule 3(1). The first note explains information on how ‘civil penalty’ is defined in section 146 of the Act and how that relates to provisions in the rules containing this terminology. The second note explains that ‘penalty unit’ is defined in the *Crimes Act 1914*.

Item 26 repeals subrules 3(2) to (6) and substitutes them with subrules (2) and (3). The purpose of this amendment is to remove redundant definitions and out-of-date references to the Basin Plan.

Subrule (3) provides the meaning of ‘to give’ for the purposes of an operator providing a document, such as a schedule of charges, to its customers. This gives effect to the ACCC’s Final Advice that 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. The item provides that an infrastructure operator does not need to send the schedule of charges to all customers via the same means, and 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 a website address where the document can be found in an email or text message.

Item 27 repeals rule 4, which relates to the schedule of charges. This amendment is consequent to item 43 which inserts rules 11-15 for schedule of charges.

Item 28 inserts rule 6A at the end of Part 1. Rule 6A provides that a person who trades or assigns a right of access, or a part of a right, to another person does not terminate or surrender the right, or part of the right. This item is made for the purposes of rules 70 and 71, which are inserted by item 85, and which deal with when termination fees may be levied.

Item 29 repeals the heading in Part 2 and substitutes it with a new heading ‘Conditions on infrastructure charges and planning and management charges, and exemptions relating to

certain contracts' to reflect that Part 2 now applies to planning and management charges as well as to infrastructure charges.

Item 30 repeals rule 7 and substitutes it with a new rule 7 which provides conditions applying to planning and management charges as well as to infrastructure charges. Subrules 7(1) to (3) provide that, unless a charge is exempt from appearing in a schedule of charges under subrule 11(7), a person must not levy the infrastructure charges or the planning and management charge unless the charge is in accordance with a schedule of charges that was: for an infrastructure charge - in effect when the service that gave rise to the charge was provided; and for a planning and management charge – in effect when the circumstances for incurring the charge (as set out in the schedule of charges) are met.

Subrule 7(4) provides for retrospective application of charges in certain circumstances. A note after rule 7 provides that retrospective application of charges may occur if subrule 11(3), 11(4) or 12(3) applies. For example, under subrule 11(3) if a charge is determined or approved by the ACCC or a State Agency, and the determination or approval specifies the date from which the charge can apply, then the charge may commence on that date (provided it is specified in the schedule of charges) even if the date was before the schedule of charges was adopted.

Item 31 repeals subrule 8(2) and substitutes it with new subrule 8(2) which reflects amendments to Part 6 made by item 44. Subrule 8(2) provides that, subject to rules 33 and 39, a Part 6 operator (see item 44, rule 23 for the meaning of 'Part 6 operator') that has not been exempted under rule 23C must not, after the regulatory start date for an operator, levy an infrastructure charge unless the operator's infrastructure charges have been determined or approved under Part 6 and the infrastructure charge for that service does not exceed the determined or approved charge.

Item 32 inserts the words 'for the operator' after the words 'the application period' in subrule 8(3). This does not change the intended meaning of the rule but was added for clarity.

Item 33 omits the words 'entered into before, on or after the relevant date' in the heading to rule 9 because the subrule 9(14) which defined the term 'relevant date' as meaning 14 July 2010 (which was for the purposes of a transitional provision that is now redundant) is repealed by item 40.

Item 34 repeals subrules 9(1) to (5) and substitutes them with new exemption provisions for certain contracts, which relate to when an infrastructure charge does not have to be included in an operator's schedule of charges.

The ACCC recognised, at page 130 of its 2016 *Review of the Water Charge Rules: Final Advice*, 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 considered that the publication of commercially negotiated contracts would 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.

In accordance with the ACCC's Final Advice, the rules have been amended (see subrule 9(1)) to allow for an application to the ACCC for an exemption from the requirement to include infrastructure charges specified in a written contract between the operator and one or more customers in the operator's schedule of charges:

- in a situation where the operator or customer (as the case may be) believes on reasonable grounds that the publication/disclosure would have a material financial loss for, or material detriment to, the operator (subparagraph 9(1)(b)(ii)) or the customer (subparagraph 9(1)(b)(i)) or both (as opposed to the Water Charge (Infrastructure) Rules 2010 as in force before the commencement of these Amendment Rules, which require that there be a 'material and adverse effect' on either both the operator and the customer, or on the customer only);
- 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 (subrule 9(3));
- in a situation where the contract specifies a formula by which the charge would be determined (this clarifies subrule 9(2) as in force before the commencement of the Amendment Rules, which may have had the effect that an application could only be made where the amount of a charge is directly specified) (paragraph 9(1)(a)).

Subrule 9(5) provides that the ACCC may, in writing, request further information relating to the application from the infrastructure operator or the customer, within a period specified by the ACCC.

Item 35 omits the words '30 day period' in subrule 9(7) and substitutes the words 'period of 30 business days' to clarify that a 30 day period in subrule 9(6) means a period of 30 business days. Under subrule 9(6) the ACCC must make a decision about an application for exemption within 30 business days.

Item 36 omits the word '30 day period' in paragraph 9(8)(a) and substitutes the words 'period of 30 business days' to clarify that a 30 day period referred to in subrule 6 means a period of 30 business days.

Item 37 repeals subrules 9(9) and 9(10) and substitutes subrules 9(9) and 9(10) to reflect the exemption provisions inserted by item 33. Subrule 9(9) provides the ACCC must refuse to grant an exemption if it is not satisfied that disclosure of the details of the infrastructure charges under the proposed contract would have a material financial loss for, or material detriment to, the operator or the customer. Subrule 9(10) provides that the ACCC must give notice in writing of, and reasons for, its decision to the customer and the operator.

Item 38 omits the words 'an exemption has effect, or is granted' and substitutes them with 'an exemption is granted' wherever they occur in subrule 9(13). This is an amendment consequential to the amendments made by item 34 which provides that all exemptions must be applied for and no exemptions have effect without an application, that is, by reason of the operation of the rules. Subrule 9(1) of the *Water Charge (Infrastructure) Rules 2010* provided for an exemption (without application) if an operator believed on reasonable grounds that disclosure of the charge would found an action by the customer against the operator for

‘breach of confidence’. Subrule 9(1) as inserted by item 34 does not contain the ‘breach of confidence’ exemption.

Item 39 inserts subrule 9(13A) after subrule 9(13). This item gives effect to the ACCC’s advice that infrastructure operators who have received an exemption under rule 9 must include on their schedule of charges within 12 months after the day on which the exemption is granted, the following information:

- a notice of the exemption (paragraph (13A)(a));
- the name of the customer(s) to whom the exempt charge applies (paragraph (13A)(b));
- the time period of the contract (paragraph (13A)(c));
- the nature of the infrastructure service to which the charge exempt from disclosure relates (paragraph (13A)(d)).

At page 132 of its *Review of the Water Charge Rules: Final Advice* the ACCC stated 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*.

However, the ACCC did 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 advised the rules should provide that an operator will only be required to provide this information on their Schedule of Charges within 12 months after the exemption is granted.

Item 40 repeals the definitions of ‘material and adverse effect’ and ‘relevant date’ in subrule 9(14). The former because these concepts are replaced by the undefined concepts of ‘material financial loss / material detriment’ in subrule 9(1) inserted by item 34. See item 34 for further information. The latter because term ‘relevant date’ was defined in the *Water Charge (Infrastructure) Rules 2010* as meaning 14 July 2010 (which was for the purposes of a transitional provision that is now redundant).

Item 41 inserts rule 9A which sets out how an operator should pass through to its customers the cost of infrastructure charges or planning and management charges it incurs. The rule covers all infrastructure charges and planning and management charges incurred by an operator. 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.

Subrule 9A(1) provides that if an infrastructure operator incurs network operation charges, the operator *may* recover the charges from its customers by means of ‘a component of general charges levied on customers’ or, alternatively, ‘by means of one or more separate charges’. An infrastructure operator would be permitted to pass the charge through in delivery charges, for example, the network operation charge could be recovered through infrastructure charges payable per unit of water delivery right (or water drainage right).

Subrule 9A(2) provides that if one or more separate charges are levied under subrule (1) the separate charges must not recover in total more than the total amount of the network operation charges. A civil penalty of 200 penalty units applies to this provision. Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Subrule 9A(3) provides that if an infrastructure operator incurs ancillary charges, the operator must only recover the charges from its customers by means of one or more separate charges.

The ACCC advised at pages 254- 255 of its 2016 *Review of the Water Charge Rules: Final Advice* that:

'charges incurred by an operator that do not meet the definition of 'network operation charges' should be considered 'ancillary charges'. 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. For example, on-river fixed and variable infrastructure charges levied by an on-river infrastructure operator; and 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; and trade-related charges incurred by the operator on behalf of a customer trading a water access right (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). 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 water access entitlement'.

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 held); or a 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, the volume of water allocation that is allocated to a customer, etc.)

A civil penalty of 200 penalty units applies to subrule 9A(3). Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Subrule 9A(4) provides the amount recovered under subrule (3) must, as far as practicable, recover the same total amount as the ancillary charges.

Subrule 9A(5) provides that a charge levied to recover ancillary charges under subrule 9A(3) must not be levied on the basis of the number of units of water delivery right or water drainage right held. This subrule has the effect that such charges cannot form part of the basis for calculation of the maximum termination fee payable.

Subrule 9A(6) provides that an ancillary charge recovered under subrule 9A(3) must as far as practicable be levied on the same basis as the ancillary charge that is being recovered through it and where that is not practicable be levied on a basis that is reasonably similar to that basis. For example, volumetric charges should be recovered through volumetric charges.

Subrule 9A(7) provides that where an ancillary charge is incurred in relation to a particular customer, it must as far as practicable be recovered from that particular customer. For 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.

Subrule 9A(8) provides for an operator to defer updating its schedule of charges for 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. This allows 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 that it incurs and needs to pass-through to customers.

Subrule 9A(9) defines the terms 'ancillary charges' and 'network operation charges'.

The subrule provides that 'Network operation charges' is defined to mean any infrastructure charges and/or planning and management charges levied on an infrastructure operator (taking into account any discounts) on the basis of:

- (a) water access rights held or used by an infrastructure operator specifically for the purpose of meeting distribution losses (an example of this is conveyance water); or
- (b) 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. The definition provides an example of this: charges levied on off-take works used by the operator to extract water from or deliver water to a natural watercourse.

As stated above, the definition of 'network operation charge' means a charge levied on the infrastructure operator 'taking into account any discounts'. The definition does not specify how discounts must be taken into account. It would be acceptable for an infrastructure operator to pass on the rebate to customers in the form of discounted delivery charges.

The subrule provides that 'ancillary charges' means any infrastructure charges and planning and management charges incurred by an infrastructure operator (taking into account any discounts) that are not network operation charges.

Item 42 omits the words ‘after the transitional period, a member’ in rule 10 and substitutes these words with the words ‘a member’ to remove a now redundant reference to the transitional period that applied when the *Water Charge (Infrastructure) Rules 2010* commenced in 2011.

Item 43 repeals the whole of Part 4 and substitutes it with a new Part 4 which has the heading ‘Part 4 – Schedule of Charges’. Part 4 inserted by item 43, contains rules 11, 12, 13 and 15.

This item inserts rules which prescribe what information must be included in a Schedule of Charges. The ACCC noted at page 99 of its 2016 *Review of the Water Charge Rules: Final Advice* that the *Water Charge (Infrastructure) Rules 2010* ‘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’.

This item inserts rules for schedule of charge requirements that apply to all infrastructure operators. The ACCC considered at page 100 of its 2016 *Review of the Water Charge Rules: Final Advice* 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’.

The purpose of the new standardised schedule of charge requirements is to enhance pricing transparency and create a level playing field. Customers, including irrigators, will benefit from increased transparency regarding what charges they are required to pay and why. They will be able to compare their charges with the charges of other customers within and outside their networks.

Rule 11 sets out the schedule of charge requirements for infrastructure operators. Previously, under the *Water Charge (Infrastructure) Rules 2010*, the schedule of charge requirements did not apply to operators providing infrastructure services in relation to less than 10 gegalitres of water. The schedule of charge requirements now apply to all infrastructure operators regardless of the size of their service.

Paragraph 11(1)(a) provides that an infrastructure operator must adopt a schedule of charges that sets out both its infrastructure charges and planning and management charges in accordance with rules 11 and 13. This relates to the requirement under rule 7. Rule 7 provides that customers cannot be charged an infrastructure or planning and management charge unless the charge is set out in the schedule of charges that was in effect when the service giving rise to the charge was provided.

Paragraph 11(1)(b) provides that the schedule of charges must set the date on which it comes into effect for the operator and that this date must not be earlier than the date of adoption. To come into effect a schedule of charges must be adopted in accordance with this rule, and be published and distributed in accordance with rule 15. The period a schedule of charges is in effect commences on the day the schedule of charges is adopted and ends the day the schedule of charges is replaced with a newly adopted schedule of charges as provided in subrule 11(5).

Subrule 11(2) provides that the ‘charge application period’ for a charge is the period that the schedule of charges is in effect for the person who levies the charge, unless a different charge application period is specified in the schedule of charges. Subrule 11(2) provides that the ‘charge application period’ must not begin earlier than the date on which the schedule of charges comes into effect, unless subrules 11(3) and 11(4) apply.

In page 109 of its 2016 *Review of the Water Charge Rules: Final Advice*, the ACCC proposed 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.’

Rule 11(3) gives effect to the ACCC’s advice recommending that ‘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’.

Subrule 11(3) provides that if an infrastructure charge or a planning and management charge specified in a schedule of charges, and the date that charge applies, is required to be determined or approved by the ACCC or a state agency, the period the charge applies for must be consistent with the period set out in the ACCC or state agency’s determination. The effect of this subrule is that there could be circumstances where, under subrule 11(2), the ‘charge application period’ for a charge set out in the schedule of charges could begin earlier than the date on which the schedule of charges comes into effect.

Subrule 11(4) provides that if an adopted schedule of charges is replacing an existing schedule of charges and the only difference between the two schedules is in relation to charges passed through to customers to recover network operation charges (subrule 9A(1) refers) or ancillary charges (subrule 9A(3) refers) then the changed charges may be specified in the schedule of charges as applying on or after the date of application of the network operation charge or ancillary charge that caused the change in the charge. This would be a circumstance where, under subrule 11(2), the ‘charge application period’ for these pass-through charges could begin earlier than the date on which the schedule of charges comes into effect.

Subrule 11(4) gives effect to the ACCC’s advice that charges levied under the proposed ‘pass-through rule’ (rule 9A) may apply retrospectively (up to the time the charges incurred by the operator commenced).

Subrule 11(5) provides that the schedule of charges ceases to be in effect for the infrastructure operator from the date that another schedule of charges that has been adopted by the infrastructure operator comes into effect.

Subrule 11(6) provides that the infrastructure operator contravenes the subrule if the schedule of charges does not include the information specified in items 1 and 2 of the table in rule 13, unless an exemption is granted under subrule (7), or subrule (8) applies. The subrule provides that contravention of the subrule is subject to a civil penalty of 200 penalty units. The amount for all of the civil penalties in the Amendment Rules is set by the Water Act see subsection 92(9). Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Subrule 11(7) sets out charges for which information is not required to be included in the schedule of charges, specifically:

- (a) a charge for which an exemption has been granted under rule 9.
- (b) an infrastructure charge for which a discount applies, for example, a hardship discount, or a discount for temporary service disruption.
- (c) for a charge levied in accordance with rule 9A in relation to a transaction undertaken
- (d) a charge relating to a service if (i) the nature of which is known but the amount of the charge cannot reasonably be determined at the time the schedule of charges come into effect, and the charge is not a connection/disconnection fee, or (ii) the nature of the service is not known sufficiently early for it to be included in the schedule of charges.

Regarding paragraph (b), at page 134, of its 2016 *Review of the Water Charge Rules: Final Advice* the ACCC noted, '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. 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'.

Subrule 11(8) provides that if the infrastructure operator levies an infrastructure charge for an infrastructure service to which paragraph 11(7)(d) applies, the operator must adopt a new schedule of charges that includes the details of that charge within 12 months after the charge is levied.

Subrule 12 provides 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 rule 12 and rule 13 (para 12(1)(a)); and the date on which the schedule of charges comes

into effect, which must not be earlier than the date of adoption of the schedule of charges (para 12(1)(b)).

Rule 12 applies to Basin state government departments and to any water authorities that are not infrastructure operators.

For any water authorities that are also infrastructure operators, their planning and management charges can and must be published in their schedule of charges under rule 11. Planning and management charges were previously regulated under the *Water Charge (Planning and Management Information) Rules 2010*, which applied to Basin State government departments and water authorities. Those rules required persons or agencies determining charges for planning and management activities to publish information about their planning and management charges, including: the process for determining the charge amount; and a description of the water planning and management activities to which the charge relates and the costs of those activities. Those publication requirements were separate to the schedule of charge requirements under the *Water Charge (Infrastructure) Rules 2010* and were not called a Schedule of Charges. Rule 12 standardises the use of the term schedule of charges across operators.

While generally it is the Basin states who determine water planning and management charges, water authorities such as Goulburn Murray Water, Grampians Wimmera Mallee Water and Lower Murray Water also determine water planning and management charges. These water authorities are also infrastructure operators. These infrastructure operators had to publish a Schedule of Charges for their infrastructure charges under the *Water Charge (Infrastructure) Rules 2010* and a separate publication for their planning and management charges under the *Water Charge (Planning and Management Information) Rules 2010*. Under the Amendment Rules only one publication is required.

Subrule 12(2) provides that the ‘charge application period’ for a charge is the period that the schedule of charges is in effect for the person who levies the charge, unless a different charge application period is specified in the schedule of charges. Subrule 12(2) provides that the ‘charge application period’ must not begin earlier than the date on which the schedule of charges comes into effect, unless subrule 12(3) applies.

Subrule 12(3) provides that if a charge is determined by a State Agency and not the person who levies the charge, and the determination of the charges includes provisions relating to the dates when the charges apply, then any specification of the charge application period in the schedule of charges under subrule 12(1) must be in accordance with the State Agency’s determination. This would be an example of a circumstance where, under subrule 12(2), the ‘charge application period’ for a charge set out in the schedule of charges could begin earlier than the date on which the schedule of charges comes into effect.

Subrule 12(4) provides that a schedule of charges ceases to be in effect for the person who levies the charges from the date that another schedule of charges that has been adopted by the infrastructure operator comes into effect.

Subrule 12(5) provides that the person who adopts the schedule of charges contravenes the subrule if the schedule of charges does not include the information specified in items (1) and (3) of the table under rule 13 in relation to planning and management charges, and item 4 of the table under rule 13. The subrule provides that contravention of the subrule is subject to a civil penalty of 200 penalty units. The amount for all of the civil penalties in the Amendment

Rules is set by the Water Act (see subsection 92(9) of the Water Act). Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Rule 13 sets out in a table the information that must be included in a schedule of charges adopted under subrule 11(1) or 12(1).

Item 1 of the table in rule 13 provides that for each infrastructure charge or planning and management charge, the schedule of charges must include information about:

- (a) the name of the charge and the charge application period if this differs from the period the schedule of charges is in effect; and
- (b) the circumstances in which the charge is payable including, if applicable,
 - (i) the water resource, water resource plan or other plan, or catchment or district to which the charge relates,
 - (ii) the class of persons required to pay the charge, and
 - (iii) the class of water access right, irrigation right or water delivery right to which the charge relates; and
- (c) either:
 - (i) the amount of the charge or details of rates and all other details to enable the amount to be calculated; or
 - (ii) if the charge relates to connection or disconnection services from the operator's water service infrastructure, a statement that the amount of the charge will be determined when the customer receives that service; and
- (d) details of any discount or surcharges including the circumstances where they would apply. The paragraph provides an example: a discount for early payment. This paragraph gives effect to the ACCC's rule advice 5-F that the rules should harmonise 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 in their schedule of charges the details of any generally available discounts or surcharges; and
- (e) timeframes for payment of charges, including the number and timing of instalments where payment in instalments is allowed; and
- (f) the name of the person who determined the charge if this person is different from the operator or person who adopted the schedule of charges; and
- (g) if the charge is not payable to the operator or the person adopting the schedule of charges:
 - (i) the name of the person to whom the charge is payable, and
 - (ii) the name of the agency or person and on whose behalf the charge is being collected.

Item 2 of the table in rule 13 applies for each infrastructure charge and does not apply to planning and management charges. Item 2 provides that for each infrastructure charge the

following information about the charge must be included in a schedule of charges adopted under subrule 11(1) or 12(1):

- (a) a description of the infrastructure service to which the charge relates,
- (b) if the charge is covered by an exemption under rule 9, the information required to be included in the schedule by subrule 9(13A).

See item 39 for more information. Item 39 inserts subrule 9(13A) which provides that if the ACCC grants an exemption under rule 9 in relation to an application made on or after 1 July 2020, then within 12 months after the day on which the ACCC granted the exemption, the infrastructure operator must include the following information about the exempt charge in its schedule of charges:

- (a) a statement that the exemption has been granted under rule 9(13A);
- (b) the name of the customer or customers;
- (c) the time period the contract covers;
- (d) the infrastructure service that is covered by the exemption.

Item 3 of the table in rule 13 does not apply to infrastructure charges and applies only to planning and management charges. Item 3 provides that for each planning and management charge, information about the legislative, contractual or other authority for the charge must be included in a schedule of charges.

Item 4 of table in rule 13 requires that the schedule of charges must include the following general information:

- (a) the date on which the schedule of charges comes into effect (or will be taken to have come into effect) and a statement that the individual charges set out in the schedule of charges will apply from this date, unless a different date of application is specified for the charge.
- (b) a statement setting out the following:
 - (i) the process for determining charges and how a person may participate in this process.
 - (ii) the enquiry and dispute resolution process in relation to regulated water charges.
 - (iii) any generally available discounts, surcharges or hardship policies, if they apply.
 - (iv) if network and/or ancillary charges have been passed through to customers (rule 9A refers), a statement that explains how the operator has determined or calculated its charges to recover the network and/or ancillary charges it has incurred.
 - (v) a statement on any other information that is considered reasonably necessary or desirable to explain the charges to the customer.

Paragraphs (b)(i) and (ii) of item 4 of the table in rule 13 give effect to the ACCC's advice on page 100 of its 2016 *Review of Water Charge Rules: Final Advice* '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 proposes that an infrastructure operator should be required to include on its Schedule of Charges a statement setting out the processes 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.'

Paragraph (b)(iii) of item 4 of the table in rule 13 give effect to the ACCC's advice at page 108 of its 2016 *Review of the Water Charge Rules: Final Advice*. The ACCC considered that 'general discounts and surcharges should be set out on a Schedule of Charges, along with the circumstances in which they would apply. This should apply to discounts and surcharges applicable to a particular charge or charges, or discounts and 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'.

At page 134, the ACCC noted, '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. 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'. See item 43, subrule 11(7).

Paragraph (b)(iv) of item 4 in the table gives effect to the ACCC's advice at page 109 of its 2016 *Review of the Water Charge Rules: 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. 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 rule 15

Rule 15 sets out the requirements for distributing and publishing the schedule of charges.

Subrules 15(1) and (2) apply to all infrastructure operators and relate to new customers and written requests from customers for details about charges. Subrule 15(3) applies only to infrastructure operators that satisfy subparagraphs 23(b)(i) or (ii) – see Part 6. Subrule 15(4) applies to all infrastructure operators other than those that satisfy subparagraphs 23(b)(i)

or (ii) if they adopt a schedule of charges under subrule 11(1). Subrule 15(5) applies if the schedule of charges is one to which subrule 11(4) applies. Subrule 15(6) applies to a person other than an infrastructure operator who determines or levies planning and management charges and adopts a schedule of charges under subrule 12(1). Subrule 15(7) deals with situations where the publication and distribution of a schedule of charges is delayed because the charges are required to be determined or approved by a State Agency or the ACCC and the timing of the determination or approval is delayed.

The requirements in subrule 15(1), (2), (3), (4) and (6) are subject to a civil penalty of 200 penalty units. Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Infrastructure operators are required to give a copy of their Schedule of Charges to customers. Operators who have their charges regulated by the ACCC or a single State Agency must publish and send customers their Schedule of Charges at least 25 business days before the Schedule come into effect or as soon as possible after the operator's charges are approved/determined by the regulator. All other operators must publish and send customers their Schedule of Charges at least 10 business days before it comes into effect.

Subrule 15(1)(a) provides that an infrastructure operator must give to a new customer a copy of its schedule of charges within 10 business days of the day that the operator first receives notice or otherwise becomes aware that the person is a new customer.

The ACCC makes it clear at page 113 of their 2016 *Review of the Water Charge Rules: Final Advice* that operators are only required to 'give' customers a Schedule of Charges, and that the method of 'giving' may be chosen by the operator. This could include post, e-mail, fax etc. 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'.

Rule 15 also gives effect to the ACCC's advice on page 116 of their 2016 *Review of the Water Charge Rules: Final Advice* that the publication requirements should 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.

Paragraph 15(1)(b) and subrule 15(2) give effect to the ACCC's advice on pages 123 and 124 of their 2016 *Review of the Water Charge Rules: Final Advice* proposing 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.

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.

Paragraph 15(1)(b) provides that an infrastructure operator must also give to a new customer a copy of any schedule of charges which is not yet in effect but which has been given to the operator’s other customers in accordance with paragraphs 15(3)(a) or 15(4)(a), within 10 business days of the day that the operator first receives notice or otherwise becomes aware that the person is a customer.

Paragraph 15(2)(a) provides that an infrastructure operator must, within 10 business days of the request, give a copy of its current schedule of charges to a customer who has made a written request for details about the operator’s current charges.

Paragraph 15(2)(b) provides that an infrastructure operator must, within 10 business days of the request, give to a customer who has made a written request for details about the operator’s current charges a copy of any Schedule of Charges which is not yet in effect but has been given to the operator’s other customers in accordance with paragraphs 15(3)(a) or 15(4)(a).

Subrule 15(3) gives effect to the ACCC’s advice on page 116 of their 2016 Review of the Water Charge Rules: Final Advice 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, that is, 25 business days in advance, instead of 10. The ACCC also proposed complementary timeframes for approvals and determinations of infrastructure charges under Part 6. See Table 1 Regulatory Timelines for Part 6 Operators.

Subrule 15(3) sets out requirements for distributing and publishing a schedule of charges adopted under subrule 11(1) by an infrastructure operator that either levies charges in relation to a bulk water service in respect of water access rights (subparagraph 23(b)(i)); or levies charges for the storage or delivery of water necessary to give effect to an arrangement for the sharing of water between more than one Basin State (subparagraph 23(b)(ii)). This subrule provides that this requirement is in place regardless of whether or not the infrastructure charges are determined or approved by a single State Agency under a law of the State.

Under paragraph 15(3)(a), infrastructure operators must give a copy of their schedule of charges at least 25 business days before the day the Schedule takes effect if they levy infrastructure charges in relation to a bulk water service in respect of water access rights (subparagraph 23(b)(i)); or levy charges for the storage or delivery of water necessary to give effect to an arrangement for the sharing of water between more than one Basin State (subparagraph 23(b)(ii)).

In contrast, under subrule 15(4), all other infrastructure operators must at least 10 business days before their charges take effect give a copy of the schedule of charges to each of their customers, and if the operator has a website, publish their schedule of charges.

Under paragraph 15(3)(b), if an infrastructure operator levies infrastructure charges in relation to a bulk water service in respect of water access rights (23(b)(i)); or levies charges for the storage or delivery of water necessary to give effect to an arrangement for the sharing of water between more than one Basin State (23(b)(ii)), the infrastructure operator must, if it has a website, publish its schedule of charges on a publicly accessible part of the website at least 25 business days before the schedule of charges comes into effect. This website publication requirement is in addition to the requirement to ‘give’ a copy of the schedule of charges to each customer under paragraph 15(3)(a), and only applies if the operator has a website.

Subrule 15(4) sets out requirements for the distributing and publishing of a schedule of charges adopted under subrule 11(1) by any other infrastructure operator (i.e. to whom subrule 15(3) does not apply).

Paragraph 15(4)(a) requires these infrastructure operators to give a copy of the schedule of charges to each of its customers at least 10 business days before the schedule of charges comes into effect.

Paragraph 15(4)(b) provides that if the infrastructure operator has a website, the infrastructure operator must publish its schedule of charges on a publicly accessible part of its website at least 10 business days before the schedule of charges comes into effect. This website publication requirement is in addition to the requirement to ‘give’ a copy of the schedule of charges to each customer under paragraph 15(4)(a), and only applies if the operator has a website.

Subrule 15(5) applies if a schedule of charges is one to which subrule 11(4) applies. Item 43 inserts subrule 11(4). Subrule 11(4) provides that if an adopted schedule of charges is replacing an existing schedule of charges and the only difference between the two schedules is in relation to charges passed through to customers to recover network operation charges (subrule 9A(1) refers) or ancillary charges (subrule 9A(3) refers) then the changed charges can only be specified in the schedule of charges as applying on or after the date of application of the network operation charge or ancillary charge that caused the change in the charge.

Subrule 15(5) gives effect to the ACCC’s advice on pages 119 and 120 of the 2016 *Review of the Water Charge Rules: Final Advice* 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 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).'

Paragraph 15(5)(a) provides that the infrastructure operator is taken to comply with paragraphs (3)(a) and (4)(a) in relation to distribution of the schedule of charges if it gives each customer a copy of the schedule of charges, or a notice setting out details of the schedule of charges, with the next invoice issued to the customer after the schedule of charges is adopted.

Paragraph 15(5)(b) provides that an infrastructure operator is taken to comply with 15(3)(b) and 15(4)(b) in relation to publication of the schedule of charges if it publishes the schedule of charges on a publicly accessible part of their website as soon as practicable after adopting the schedule of charges.

Subrule 15(6) applies to a person other than an infrastructure who determines or levies planning and management charges and who adopts a schedule of charges under subrule 12(1). The subrule provides that if a person adopts a schedule of charges under subrule 12(1), at least 25 business days before the schedule of charges comes into effect, they person must:

- (a) publish the schedule of charges on a publicly accessible part of their website or on a publicly accessible part of the website of either (i) the person determining the charge, (ii) the agency or person to whom the charge is payable, or (iii) the agency or person on whose behalf the charges are collected; and
- (b) make the schedule of charges available at the person's principal place of business, or the principal place of business of either (i) the person determining the charge, (ii) the agency or person that the charge is payable to, or (ii) the agency or person on whose behalf the charges are collected.

Subrule 15(7) provides that where the publication and distribution of a schedule of charges are delayed because the charges are required to be determined or approved by a State Agency or the ACCC and the timing of the determination or approval prevents the person from performing the actions required by subrule 15(3), 15(4) or 15(6), the person is taken to comply with the relevant subrules if the person performed the required actions as soon as practicable after the charges are determined or approved.

Subrule 15(7) gives effect to the ACCC's advice on page 118 of their 2016 *Review of the Water Charge Rules: Final Advice* 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 or 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.

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 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'. (See item 30.)

Item 44 repeals rule 23 of the *Water Charge (Infrastructure) Rules 2010* and replaces it with a new rule 23 and rules 23A to 23D (see item 45).

Rule 23 provides that an infrastructure operator is a 'Part 6 operator' if:

- a) 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 paragraph subrule 29(2)(b); and
- b) the operator levies an infrastructure charge in relation to
 - (i) a bulk water service in respect of water access rights; or
 - (ii) 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.

Paragraphs 23(a) (inserted by item 44) and 29(2)(b) (inserted by item 48) give effect to the ACCC's advice that appropriate regulatory oversight of the operators who were Part 6 operators under the *Water Charge (Infrastructure) Rules 2010* can be achieved by Basin states under Basin state law 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.

The ACCC noted at page 146 of its 2016 *Review of the Water Charge Rules Final Advice* that this approach 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, less any government contributions through Community Service Obligations (CSOs) or forgone returns and any other revenue derived from the operator's water service infrastructure.

The reference to ‘bulk water services’ in para 23(b)(i) makes it clear that Part 6 will not ordinarily capture off-river infrastructure operators and a note after paragraph 23(b)(ii) provides that this is the case.

The ACCC noted at page 41 of its 2016 *Review of the Water Charge Rules Final Advice* that 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 ACCC’s transitional arrangements, for operators who were Part 6 operators under the *Water Charge (Infrastructure) Rules 2010* at the time the Amendment Rules commence and which cease to meet the new Part 6 criteria in rule 23, are inserted by item 85. See Part 11, rule 81.

Rule 23A provides that if an infrastructure operator becomes aware that it has become, or may on a specified date become, a Part 6 operator (see item 44, rule 23 for the meaning of ‘Part 6 operator’), the operator must notify the ACCC of that fact as soon as practicable after becoming so aware.

Rule 23B provides that if the ACCC receives a notice from an infrastructure operator under rule 23A, or otherwise becomes aware that an infrastructure operator is, or is likely to become from a specified date, a Part 6 operator (see item 44, rule 23 for the meaning of ‘Part 6 operator’), then the ACCC must form a view as to whether the operator is, or will become from a specified date, a Part 6 operator, and then notify the operator of its view. If the ACCC is of the view that the operator is, or will be, a Part 6 operator, then the ACCC must advise the operator that the ACCC will subsequently decide whether the operator should be granted an exemption under rule 23C.

Rule 23C sets out the process by which, and the circumstances in which, the ACCC may exempt an operator who meets the definition of a Part 6 operator in rule 23 from the requirement to have its infrastructure charges approved or determined by the ACCC under Part 6 of the rules.

Subrule 23C(1) provides that an infrastructure operator that is or expects to be a Part 6 operator may apply for an exemption under this rule.

Subrule 23C(2) provides that if an application has been made by an operator under subrule 23C(1), or if the ACCC has notified the operator under rule 23B or paragraph 81(12)(b) that the ACCC is of the view that the operator is a Part 6 operator, then the ACCC may grant an exemption in writing to an operator from the requirements of Divisions 2, 3, and 4 of Part 6.

Subrule 23C(3) provides the ACCC may on its own initiative extend the period of an existing exemption if it continues to be satisfied of the matters provided in subrule 23C(4).

Subrule 23C(4) provides that the ACCC may only grant an exemption if the ACCC is satisfied that the application of the requirements in Divisions 2, 3, and 4 of Part 6 would not materially contribute to the achievement of the Basin Water Charging Objectives and Principles.

Subrule 23C(5) provides that, when making a decision on whether or not to grant an operator an exemption from the requirements of Divisions 2, 3 and 4, the ACC must take 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.

A note under paragraph (h) provides that for paragraph (f), once that is the case, paragraph 23(a) will cease to apply to the operator, and the operator will no longer be a Part 6 operator.

Subrule 23C(6) provides that an exemption granted under rule 23C may be granted for a specified period, or for an unspecified period but subject to review at specified times.

Subrule 23C(7) provides that, before making a decision whether or not to grant an exemption, the ACCC may undertake public consultation.

Subrule 23C(8) provides that, before making a decision whether or not to grant an exemption, the ACCC may, in writing, request the operator to give the ACCC further information within a period specified by the ACCC in its request.

Subrule 23C(9) provides that if the ACCC fails to make a decision within three months after the day on which it received an application under subrule 23C(1), or gave notice under 23B or paragraph 81(12)(b), then the ACCC is taken to have granted the exemption for 3 years from the expiry of that three month period (i.e. a regulatory period).

Subrule 23C(10) provides that if the ACCC decides not to grant an exemption, the ACCC must invite the view of the operator regarding the date from which Division 2, 3 and 4 should apply to the operator, and then set that date. Subrule 23C(11) provides that the date set in subrule 23C(10) is the 'regulatory start date'.

Subrule 23C(12) provides that the ACCC must notify the infrastructure operator as soon as practicable of: its decision under rule 23C and; if the ACCC decides not to grant the exemption, of the regulatory start date for the operator.

Subrule 23D(1) provides that if an infrastructure operator that is a Part 6 operator under rule 23 ceases to be a Part 6 operator, or becomes aware of a matter that may result in the operator ceasing to be a Part 6 operator on a specified date, the operator must notify the ACCC of that fact, or that matter, as soon as practicable after becoming so aware.

Subrule 23D(2) provides that if an infrastructure operator that is a Part 6 operator under rule 23 ceases to be a Part 6 operator during a regulatory period for the operator, the Rules apply to the operator as if the operator continued to be a Part 6 operator for the remainder of that regulatory period.

There are two notes under subrule 23D(2). The first note provides that rule 25 will not have any application to an operator that will not be a Part 6 operator after its current regulatory period. Note 2 states ‘see also rule 81 for an operator that was a Part 6 operator immediately before 1 July 2020’. Rule 81 is a transitional provision (see item 85).

Item 45 repeals rules 24 and 25 of the *Water Charge (Infrastructure) Rules 2010* and replaces them with new rules 24, 24A and 25.

Rule 24 provides for changing the length of a regulatory period.

The ACCC noted at page 160 of its 2016 *Review of the Water Charge Rules Final Advice* that the rules should be amended to alter the definition of ‘regulatory period’ to provide for a default regulatory period of three years for Part 6 operators, instead of four years as per the *Water Charge (Infrastructure) Rules 2010*.

Item 17 inserts the definition of ‘regulatory period’ which provides that the default period is three years.

At page 163 of its 2016 *Review of the Water Charge Rules Final Advice*, the ACCC noted ‘that amendments to the Water Act in May 2016 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. Given the Water Act amendment, the rules cannot give the ACCC a general discretion to reduce a default four year regulatory period to three years. The ACCC therefore 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’.

The ACCC noted at page 163 that ‘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, for example, a regulatory period that applies to the Part 6 operator in relation to a State-based regulatory period, for example for urban water services. The ACCC noted that this would reduce the regulatory burden associated with non-alignment of these services’.

Subrule 24(1) provides the ACCC with a general discretion to lengthen, from the default period of 3 years to a maximum of 5 years, the duration of: (a) a specified future regulatory period of a Part 6 operator (by changing the end date of the specified future regulatory period); or (b) all the regulatory periods following a specified future regulatory period of a Part 6 operator, provided: (c) the ACCC has consulted the operator or received a request from the operator under subrule 24(2); and (d) the ACCC is satisfied that the change is appropriate in the circumstances.

Subrule 24(2) provides that:

- (a) if a Part 6 operator is also a supplier of urban water services or infrastructure services in relation to non-Basin water resources and the charges for the service are determined by an agency of a State under a law of the State, and

- (b) the charges are determined in respect of periods (agency periods) that are not aligned with the regulatory periods of the operator, and
- (c) the operator requests the ACCC to approve changes to its future regulatory periods in accordance with subrule 24(1) in order to align the future regulatory periods with the agency periods;

then the ACCC must consider whether the changes requested are appropriate in the circumstances.

Subrule 24(3) provides that subrule 24(1) does not apply in relation to a regulatory period for which a draft determination or approval has been published under rule 28.

Subrule 24(4) provides that where a regulatory period is approved under this rule and it is not for a whole number of years, the remainder after all the whole years are completed is treated as a year for the purposes of Divisions 2, 3 and 4 of Part 6.

Rule 24A provides for a Part 6 operator's application for determination or approval of charges for their first regulatory period.

Subrule 24A(1) provides that rule 24(A) applies to an infrastructure operator that:

- (a) has received a notice from the ACCC under rule 23B stating that the ACCC is of the view that the operator is, or will be, a Part 6 operator; and
- (b) was subsequently refused an exemption under rule 23C from the operation of the requirements of Division 2, 3 and 4 of Part 6, or was given such an exemption but their exemption has expired; and
- (c) has had its regulatory start date set in accordance with subrule 23C(10); and
- (d) proposes to levy infrastructure charges during their first regulatory period.

Subrule 24A(2) provides that an infrastructure operator that satisfies subrule 24A(1) must apply in writing to the ACCC at least 15 months before the regulatory start date for the operator for determination or approval of its infrastructure charges under Division 2 of Part 6 in respect of each year of the 'first regulatory period' for the operator. Subrule 24A(3) defines 'first regulatory period'.

This rule gives effect to the ACCC's 2016 *Review of the Water Charge Rules Final Advice* (page 164) recommending the inclusion of a statutory deadline, previously not in place, on a Part 6 operator to lodge their application for determination or approval of infrastructure charges with the ACCC for consideration at least 15 months before the regulatory start date. The ACCC also recommended in their advice that they as the regulator should publish their decision on an application at least 30 business days before the regulatory period commences (see item 52, rule 30).

The requirement for a Part 6 operator to submit its application at least 15 months before the start of the period, combined with the requirement for the ACCC to publish its decision 30 business days before the period commences means that the ACCC has approximately 13½ months to conduct the review.

In forming its final advice the ACCC considered stakeholder concerns about regulatory timeframes under the *Water Charge (Infrastructure Rules) 2010*. The main concern from stakeholders was that regulatory timeframes did not allow an infrastructure operator adequate time to complete internal administration processes before publishing / sending its Schedule of

Charges by the time required under rule 15. The ACCC acknowledged the advantages of an earlier date for the publishing of regulatory decisions but also considered that 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 Amendment Rules, including those items that relate to the timing requirements for publication of regulatory decisions and the publication of operators’ schedule of charges (see item 43, rule 15) are intended to provide a reasonable balance between objectives. The following table sets out these timeframes.

Table 1 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. (See item 45, rule 25)	4 months before the start of the year of the regulatory period to which the approval / determination relates. (See item 61, subrule 34(3)).
Regulator provides notice of its final decision	30 business days before the start of regulatory period to which the approval / determination relates. (See item 52, rule 30)	30 business days before the start of the year of the regulatory period to which the approval / determination relates. (See item 62, subrule 37(1))
Part 6 operator to notify customers of its Schedule of Charges [†]	25 business days before the regulated charges in its Schedule of Charges is due to commence (See item 43, subrule 15(3))	25 business days before the regulated charges in its Schedule of Charges is due to commence (See item 43, subrule 15(3))
Other infrastructure operators	10 business days before the regulated charges are due to commence. (See item 43, subrule 15(4))	10 business days before the regulated charges are due to commence. (See item 43, subrule 15(4))

Subrule 24A(3) provides the definition for the ‘first regulatory period’ as: if the ACCC has set a length for the operator’s regulatory period under rule 24, that period, beginning from the regulatory start date; or otherwise, the period of three years beginning on the regulatory start date.

Subrule 24A(4) provides that the infrastructure operator’s application for determination or approval of its infrastructure charges under Division 2 must include the information required under Schedule 1. See item 86.

Rule 25 provides for a Part 6 operator’s application for determination or approval of charges in subsequent regulatory periods. A ‘subsequent regulatory period’ is defined in subrule 25(1) as a regulatory period after the first regulatory period. As per the rules in relation to the ‘first regulatory period’, Rule 25 provides that a Part 6 operator must lodge their application for determination or approval of infrastructure charges for a ‘subsequent regulatory period’ to the ACCC for consideration at least 15 months before the regulatory start date.

Subrule 25(1) provides that a Part 6 operator that proposes to levy infrastructure charges in a regulatory period (a ‘subsequent regulatory period’) after the first regulatory period must apply in writing to the ACCC for determination or approval of its infrastructure charges under Division 2 in respect of each year of the subsequent regulatory period.

Subrule 25(2) provides that the application must be made no later than 15 months before the start of the subsequent regulatory period in respect of which the determination or approval relates.

Subrule 25(3) provides that the application must include the information referred to in Schedule 1. See item 86.

Item 46 repeals the heading to rule 29, ‘Regulator to approve or determine the regulated charges’, and substitutes it with the heading ‘ACCC to determine or approve infrastructure charges’. This change reflects that the ACCC is the sole regulator for Part 6 operators because Basin states are no longer accredited to carry out this role (see item 85 and item 44, rule 23, 23A to 23D).

Item 47 amends subrule 29(1) by omitting the words ‘approve, or determine’, and substituting with the words ‘determine or approve’. This change is to achieve consistency within the *Water Charge Rules 2010* and with the Water Act.

Item 48 repeals paragraph 29(2)(b) of the *Water Charge (Infrastructure) Rules 2010* and substitutes it with paragraphs 29(2)(b) and 29(2)(c). Paragraph 29(2)(b) provides that the ACCC must not determine or approve the infrastructure charges set out in an application under Division 2 of Part 6 unless it is 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:

- (i) government contributions related to the provision of the infrastructure services subject to the charges for which approval is sought;
- (ii) foregone return on investment by government in its share of capital in an infrastructure operator;
- (iii) revenue, other than from infrastructure charges, derived from the water service infrastructure used to provide infrastructure services. An example of this type of revenue in paragraph 29(2)(b)(iii) is revenue from generating hydroelectricity.

The ACCC advised at page 146 of its 2016 *Review of the Water Charge Rules: Final Advice* that this amendment will provide an essential level of protection for customers in aggregate—ensuring that revenue from infrastructure charges is likely to meet, but does not materially exceed, the prudent and efficient costs of providing the infrastructure services, less any government contributions through Community Service Obligations (CSOs) (subparagraph 29(2)(b)(i)) or foregone returns (subparagraph 29(2)(b)(ii)) and any other revenue derived from the operator’s water service infrastructure, including, for example, revenue from generating hydroelectricity (subparagraph 29(2)(b)(iii)). The ACCC considered that these tests would assist in ensuring that Part 6 operators do not earn monopoly profits, and 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 (see page 166 of the 2016 *Review of the Water Charge Rules: Final Advice*).

Paragraph 29(2)(c) provides that the ACCC must not determine or approve the infrastructure charges set out in an application under Division 2 of Part 6 unless it is satisfied that the infrastructure charges contained in an application under Division 2 of Part 6 are otherwise consistent with the requirements in other provisions of the Rules.

The ACCC advised at page 167 of its 2016 *Review of the Water Charge Rules: Final Advice* that while Part 6 operators should not include infrastructure charges that are inconsistent with the water charge 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. This amendment has been made to explicitly require the regulator to consider the consistency of the infrastructure charges being approved or determined with the other requirements of the water charge rules.

Item 49 amends subrule 29(3) by omitting the words ‘paragraph (2)(b)’ and substituting the words ‘paragraphs (2)(b) and 2(c)’. This item is consequential to the amendment made by item 48.

Item 50 inserts subrule 29(3A) after subrule 29(3).

Subrule 29(3A) provides that, if the ACCC is satisfied that:

- (a) there is sufficient uncertainty about the cost, timing, necessity, likelihood or feasibility of a capital expenditure project proposed by the Part 6 operator in its application; and
- (b) the inclusion of the proposed capital expenditure project would have a material impact on the infrastructure charges to be determined or approved;

then the infrastructure charges must be determined on the basis that funding the capital expenditure project would not be a prudent and efficient cost of providing the infrastructure services.

A note after subrule 29(3A) provides that the ACCC may otherwise assess the costs relating to proposed capital expenditure as not being prudent and efficient for the purposes of paragraph 29(2)(b). See item 55, subrule 31(1A).

The ACCC noted at page 178 of its 2016 *Review of the Water Charge Rules: Final Advice* that 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.

However, subrule 31(1A) provides that if the circumstances in subrule 29(3A) apply, the ACCC’s notice of its determination or approval may also specify a capital expenditure project as a contingent project and set out the conditions that the operator must satisfy in relation to the contingent project before the operator may apply for a variation of a determination or approval of its infrastructure charges under Division 4.

A Part 6 operator who has received such a notice may apply in writing to the ACCC for a variation of the determination or approval made under Division 2 or 3 (if the infrastructure operator is of the view that the conditions specified under subrule 31(1A) in relation to a contingent project have been satisfied). See item 74, subrule 43(5).

Item 51 amends subrule 29(4) by omitting the words ‘approving or determining’ and substituting them with the words ‘determining or approving’ for the purposes of consistency within the *Water Charge Rules 2010* and with the Water Act.

Item 52 repeals rule 30 of the *Water Charge (Infrastructure) Rules 2010* and substitutes a new rule 30.

Rule 30 gives effect to the ACCC’s 2016 *Review of the Water Charge Rules Final Advice* that the ACCC as the regulator should publish their decision on an application at least 30 business days before the regulatory period commences. The requirement for a Part 6 operator to submit its application at least 15 months before the start of the period, combined with the requirement for 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. This allows more time for infrastructure operators to complete internal administration processes before publishing/sending their Schedule of Charges by the time required in rule 15 (See item 43, rule 15).

Subrule 30(1) provides that the ACCC must, within the period ending on the day 30 business days before the start of the regulatory period in respect of which an application under rule 24A or 25 is made (that is, before the start of regulatory period to which the approval or determination relates) determine or approve the infrastructure charges set out in the application and give written notice of its decision in accordance with rule 31.

Subrule 30(2) provides that the period for the making of the decision under subrule 30(1) is extended, or further extended, by a period of 3 months if the ACCC, within the period or the extended period (as applicable):

- (a) is unable to make a decision; and
- (b) gives written notice to the applicant explaining why it has been unable to make the decision within the period.

The inclusion of the words ‘further extended’ in this subrule means that more than one extension is allowable under this rule.

Subrule 30(3) provides for the regulatory start date of the first regulatory period where an extension or further extension has been granted. It provides that where an extension, or further extension, is given in accordance with subrule 30(2) that relates to the first regulatory period of a Part 6 operator, the regulatory start date for the operator begins 30 business days from the end date of the extension, or further extension.

Subrule 30(4) provides that as soon as practicable after the ACCC gives a notice under subrule 30(2) (that is, a notice to the applicant explaining why the period for determining or approving the charges has been extended) the ACCC must publish the notice on the ACCC’s website.

Item 53 amends the heading to rule 31 by omitting the words ‘approval or determination’ and substituting the words ‘determination or approval’. This is a minor change to achieve consistency within the *Water Charge Rules 2010* and with the Water Act.

Item 54 amends subrule 31(1) by omitting the words ‘its approval or determination’, and substituting the words ‘the ACCC’s determination or approval’, to reflect that the ACCC is the sole regulator for Part 6 operators, whereas under Part 9 of the *Water Charge (Infrastructure) Rules 2010*, Basin states were accredited as regulators for the purposes of Part 6 operators.

Item 55 inserts subrule 31(1A) after subrule 31(1).

Subrule 31(1) provides that the ACCC must give notice in writing to a Part 6 operator of the ACCC’s determination or approval, as the case requires, under rule 29, of the operator’s infrastructure charges.

Subrule 31(1A) provides that if the circumstances in subrule 29(3A) (inserted by item 50) apply, the notice (that is, the notice provided under subrule 31(1)) may also specify a capital expenditure project as a ‘contingent project’ and set out the conditions that the operator must satisfy in relation to the contingent project before the operator may apply for a variation of a determination or approval of its infrastructure charges under Division 4 of Part 6.

The ACCC advised at page 178 of its 2016 *Review of the Water Charge Rules: Final Advice* that the rules should allow the regulator to specify a specific capital expenditure 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 through a variation of its approval or determination.

At page 186 of its 2016 *Review of the Water Charge Rules: Final Advice*, the ACCC recommended the inclusion of a materiality criterion which the ACCC must consider before it can specify a particular capital expenditure project as a contingent project. This was intended to prevent operators submitting a large number of small capital expenditure projects, which would increase regulatory costs for operators and regulators.

Specifically, the ACCC advised that it 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 considered that the inclusion of this criterion will promote regulatory certainty and make the operation of variations of determinations and approvals relating to contingent projects simpler and less costly. The ACCC noted 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.

Item 56 repeals rule 32 of the *Water Charge (Infrastructure) Rules 2010* and substitutes new rule 32. Rule 32 provides that a determination or approval by the ACCC of infrastructure charges under Division 2 of Part 6 has effect as a determination or approval of infrastructure charges: (a) in respect of the first year of the regulatory period to which the application

relates; and (b) in respect of each subsequent year of the regulatory period, subject to review and further determination or approval in accordance with Division 3 of Part 6.

Item 57 repeals subrules 33(1) and 33(2) of the *Water Charge (Infrastructure) Rules 2010* as they were transitional provisions for the purposes of the commencement of the *Water Charge (Infrastructure) Rules 2010* in 2011 and are now redundant. Subrule 33(3) of the *Water Charge (Infrastructure) Rules 2010* is retained in the renamed *Water Charge Rules 2010*.

Item 58 repeals subrule 33(4) of the *Water Charge (Infrastructure) Rules 2010* and substitutes subrule 33(4). Subrule 33(4) provides the definition of a ‘specified period’ for the purposes of paragraph 33(3)(a). Subrule 33(4) provides that the specified period is the later of:

- (a) the day six months after the end of the preceding regulatory period; and
- (b) if the period of 30 business days before the start of the regulatory period referred to in subrule 30(1) is extended or further extended under subrule 30(2), the day when that period as extended or further extended ends.

Item 59 amends subrule 34(1) by omitting the words ‘as reviewed’ and substituting the words ‘to be reviewed’ to make a minor grammatical clarification.

Item 60 repeals paragraph 34(2)(a) of the *Water Charge (Infrastructure) Rules 2010* and substitutes new paragraph 34(2)(a) and new paragraph 34(2)(aa).

Rule 34 is in Division 3 of Part 6. Division 3 of Part 6 provides for annual reviews of infrastructure charges for a second or subsequent year of a regulatory period.

Rule 34 provides for applications by a Part 6 operator to the ACCC for annual review of the operator’s infrastructure charges. Subrule 34(1), which apart from the minor grammatical change made by item 59, is not being amended by the Amendment Rules, provides that a Part 6 operator whose infrastructure charges in respect of a regulatory period have been approved or determined under Division 2 of Part 6 and, if varied under Division 4, so varied, must apply to the ACCC for approval or determination of its infrastructure charges in respect of the second year and each subsequent year of the regulatory period, to be reviewed in accordance with Division 3 of Part 6.

Subrule 34(2) sets out what an application by a Part 6 operator under subrule 34(1) must include. Paragraph 34(2)(a) provides that the application must include the operator’s forecasts of demand for, or consumption of, infrastructure services for the year to which the application relates. Paragraph 34(2)(aa) provides that the application must include an explanation of why the forecasts are different from those set out in the application made under rule 24A or 25, if applicable. The Amendment Rules do not make any changes to paragraphs 34(2)(b)-(d) in the *Water Charge (Infrastructure) Rules 2010* (renamed the *Water Charge Rules 2010*).

Item 61 inserts subrule 34(3) after subrule 34(2).

Subrule 34(3) provides that an application by a Part 6 operator for annual review of their infrastructure charges for a second or subsequent year of a regulatory period in accordance with 34(1) must be made no later than 4 months before the start of the year of the regulatory period to which the determination or approval relates. See Table 1 Regulatory Timelines for Part 6 operators.

Item 62 repeals subrule 37(1) of the *Water Charge (Infrastructure) Rules 2010* and substitutes with a new subrule 37(1). Subrule 37(1) provides that subject to subrule 37(2), the ACCC must, within the period ending on the day 30 business days before the start of the year to which the application relates, and after considering any submissions received before the date specified in the notice under paragraph 36(b), determine or approve the infrastructure charges in respect of the year to which the application relates.

Subrule 37(1) gives effect to Rule advice 5-N in the ACCC's 2016 *Review of the Water Charge Rules Final Advice* that they as the regulator should publish their decision on an application at least 30 business days before the regulatory period commences (See item 52, rule 30). See also Table 1 Regulatory Timelines for Part 6 operators. This requirement is in contrast to subrule 37(1) of the *Water Charge (Infrastructure) Rules 2010* which required the Regulator to approve or determine the charges of an infrastructure operator within 3 months after receiving an application from the operator.

Item 63 repeals paragraphs 37(2)(a) and (b) of the *Water Charge (Infrastructure) Rules 2010* and substitutes paragraphs 37(2)(a) and 37(2)(b) which contain minor changes as well as an additional paragraph, and new paragraph 37(2)(c).

Paragraph 37(2)(a) now includes the words 'from those used in the determination or approval of infrastructure charges under Division 2' after the words 'the changes in the demand or consumption forecasts set out in the application under rule 34'. This does not change the intended meaning of the rule but was added for clarity.

Paragraph 37(2)(b) now includes the word 'and' at the end of the paragraph, which is consequential to the addition of paragraph 37(2)(c).

Paragraph 37(2)(c) provides that in approving infrastructure charges in accordance with subrule 37(1) the ACCC must have regard to the consistency of the infrastructure charges with the requirements in other provisions of the *Water Charge Rules 2010*.

This gives effect to the ACCC's advice at pages 165 and 167 of the 2016 *Review of the Water Charge Rules: Final Advice* that 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. This amendment was made 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.

Item 64 repeals subrule 37(4) because the substantive subrule to which this related, that is, rule 37(1) in the *Water Charge (Infrastructure) Rules 2010*, is repealed by item 62 and substituted with a new subrule 37(1). Subrule 37(4) referred to the requirement in subrule 37(1) of the *Water Charge (Infrastructure) Rules 2010* for the Regulator to approve or determine the charges of an infrastructure operator within 3 months after receiving an application from the operator. Subrule 37(4) is no longer required and is not replaced. Instead new subrule 37(1) is inserted by item 62 and provides that the ACCC must, within the period ending on the day 30 business days before the start of the year to which the application relates, determine or approve the infrastructure charges in respect of the year to which the application relates.

The ACCC noted at page 155 of its 2016 *Review of the Water Charge Rules: Final Advice* that, under the *Water Charge (Infrastructure) Rules 2010*, 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(1)). 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.

The new requirement for the ACCC to publish its decision at least 30 business days before the regulatory period commences will allow more time for operators to calculate and publish their infrastructure charges than was available in practice with past decisions.

Item 65 repeals paragraph 37(5)(a) of the *Water Charge (Infrastructure) Rules 2010* and substitutes with new paragraph 37(5)(a) because the substantive subrule to which this related, that is, rule 37(1) in the *Water Charge (Infrastructure) Rules 2010* has been replaced with amended subrule 37(1). See items 62 and 64. The only change to paragraph 37(5)(a) is the omission of the words "of three months" which no longer applies.

Item 66 repeals subrule 39(1) of the *Water Charge (Infrastructure) Rules 2010*. Subrules 39(2) and 39(3) which provide for the temporary continuation of existing charges for a specified period in the event that charges have not been approved or determined are retained in the *Water Charge Rules 2010*.

Item 67 amends paragraph 39(3)(b) by omitting the words 'of 3 months'. This amendment is consequential to the amendment made to subrule 37(1) by item 62.

Item 68 amends the heading for rule 40 by omitting the words 'Regulator may vary' and substituting the words 'Operator may apply for variation of'. This change reflects that rule 40 sets out the process for an operator to apply for variation of an approval or determination in certain circumstances. This is in contrast to new rule 43A, inserted by item 75, which allows the ACCC to vary a determination or approval on its own initiative.

Item 69 amends paragraph 40(1)(b) by inserting the words 'for an event other than a taxation event or regulatory event' before the words 'the operator'.

Paragraph 40(1) provides for a Part 6 operator to apply in writing to the ACCC for a variation of an approval or determination under Division 2 or 3 of its infrastructure charges in respect of a regulatory period if: (a) 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 operators business and (b) for an event other than a taxation event or regulatory event, the operator could not reasonably have foreseen the event. See also item 75 which inserts rule 43A for variations in response to certain regulatory or taxation events.

Rule 40 of the *Water Charge (Infrastructure) Rules 2010* did not differentiate between types of events and the operator could only apply for a variation if the event could not reasonably have been foreseen. The ACCC noted at page 180 of its 2016 *Review of the Water Charge Rules: Final Advice* that the variation process under the *Water Charge (Infrastructure) Rules 2010* would not allow for the amendment of the original approval or determination in many circumstances to account for taxation and regulatory events. Where the event was foreseeable (but the monetary impact of the event uncertain), the variation process under the *Water Charge (Infrastructure) Rules 2010* did 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.

Item 70 repeals subparagraph 40(2)(c)(ii) of the *Water Charge (Infrastructure) Rules 2010* and substitutes new subparagraph 40(2)(c)(ii).

Paragraph 40(2)(c)(ii) provides that an application under subrule 40(1) must state whether the total amount that the Part 6 operator anticipates will be required during the remainder of the regulatory period to rectify the adverse effects of an event is likely to exceed:

- (A) 1% of the aggregate revenue requirement, for a taxation event or a regulatory event; and
- (B) otherwise 3% of the aggregate revenue requirement.

This gives effect to the ACCC's advice at p. 177 of its 2016 *Review of the Water Charge Rules: Final Advice* that a materiality threshold for regulatory and taxation events of one per cent of the (revised) aggregate revenue requirement is appropriate and that the materiality threshold for 'other events' should be adjusted downwards from 5 per cent to three per cent, given the revisions to the definition of 'aggregate revenue requirement' (this term is defined in item 3, subrule 3(1)).

In forming a view on these thresholds, the ACCC considered at p.187 of its 2016 *Review of the Water Charge Rules: Final Advice* 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 customers will have less certainty 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.

Item 71 amends paragraph 40(2)(d) by omitting the words 'reliability and safety' and substituting the words 'reliability or safety'. This amendment gives effect to the ACCC's advice at p.187 of its 2016 *Review of the Water Charge Rules: Final Advice* that it is 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 (rather than both) is warranted.

Item 72 amends rule 40 by adding subrules 40(3) and 40(4) after subrule 40(2). Subrule 40(3) provides for a Part 6 operator to apply in writing to the ACCC for a variation of the approval or determination made under Division 2 or 3 if the operator is of the view that the conditions specified under subrule 31(1A) in relation to a capital expenditure project specified as a contingent project have been satisfied. Item 55 inserts subrule 31(1A).

Subrule 40(4) provides for what must be included in an application under subrule 40(3). The application must include:

- a) the operator's reasons for its view that the conditions in subrule 31(1A) have been met;

- b) the total amount the operator anticipates will be required during the remainder of the regulatory period to meet the prudent and efficient costs of delivering the contingent project;
- c) the proportion of the costs of the contingent project that the operator seeks to recover through infrastructure charges; and
- d) the infrastructure charges the operator is seeking to vary and the amount of the variation.

Item 73 amends subrule 43(1) by omitting the words ‘regulated charges under Division 2 or 3’ and substituting the words ‘infrastructure charges’. This amendment is consequential to an amendment made to subrule 3(1) by item 9, in particular, the insertion of a definition for ‘infrastructure charge’.

Item 74 repeals subrule 43(5) of the *Water Charge (Infrastructure) Rules 2010* and inserts new subrule 43(5), 43(6) and 43(7).

Subrule 43(5) provides the requirements that the ACCC must be satisfied are met before the ACCC decides to vary its approval or determination for the Part 6 operator’s infrastructure charges, following an application by the operator under rule 40. See items 70 and 72 for information in relation to rule 40. The subrule provides that all the requirements in all of paragraphs 43(5)(a) to (d) must be met.

Paragraph 43(5)(a) provides that to decide whether or not to vary an approval or determination the ACCC must be satisfied as to the matters relating to the event referred to in paragraphs 40(1)(a) and (b) as set out in the application. See paragraph 40(1)(a) and the change made to paragraph 40(1)(b) by item 69 for further information.

Paragraph 43(5)(b) provides that, to decide whether or not to vary an approval or determination, in addition to the requirements in paragraph 43(5)(a), the ACCC must be satisfied that:

- (i) the total amount required during the remainder of the regulatory period to rectify the material and adverse effects of the event exceeds:
 - (A) for a taxation event or a regulatory event—1% of the aggregate revenue requirement;
 - (B) otherwise—3% of the aggregate revenue requirement; and
- (ii) it is reasonably likely that the total expenditure during the remaining part of the regulatory period is likely to exceed the total forecast expenditure for that remaining part.

Paragraph 43(5)(c) provides that, to decide whether or not to vary an approval or determination, in addition to the requirements in paragraph 43(5)(a) and (b), the ACCC must be satisfied that that the Part 6 operator has demonstrated that it is not able to reduce the operator’s expenditure to avoid the consequences referred to in paragraph (b) without materially and adversely affecting the reliability or safety of the operator’s water service infrastructure or the operator’s ability to comply with any relevant regulatory or legislative obligations.

Paragraph 43(5)(d) provides that to decide whether or not to vary an approval or determination, in addition to the requirements in paragraph 43(5)(a), (b) and (c), the ACCC must be satisfied as to the matters set out in paragraphs 29(2)(b) and (c). (Item 48 refers).

Subrule 43(6) provides that the ACCC must not, in relation to an application made under subrule 40(3), vary a determination or approval of infrastructure charges under this Division unless the ACCC is satisfied:

- (a) that the conditions specified under subrule 31(1A) have been satisfied; and
- (b) that the contingent project is prudent and efficient; and
- (c) as to the matters set out in paragraphs 29(2)(b) and (c).

Subrule 43(7) provides that the ACCC must, if varying a determination or approval of infrastructure charges under this rule, decide:

- (a) each infrastructure charge to be varied and the amount of the variation; and
- (b) the date from which each varied charge will apply, which must not be earlier than the next year of the regulatory period.

Item 75 inserts rule 43A after rule 43.

Rule 43A provides for variation of a determination or approval of a Part 6 operator's infrastructure charges by the ACCC, on its own initiative, in response to certain regulatory or taxation events.

Under rule 40 of the *Water Charge (Infrastructure) Rules 2010* only a Part 6 operator could seek a variation of an approval or determination. The regulator could not initiate a variation.

The ACCC noted at page 180 of its *2016 Review of the Water Charge Rules: Final Advice* that, under the *Water Charge (Infrastructure) Rules 2010*, 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 give it back later through other mechanisms).

The ACCC considered at page 179 of its *2016 Review of the Water Charge Rules: Final Advice* that both the regulator and the Part 6 operator should be allowed to initiate a variation for regulatory and taxation events but that only the Part 6 operator should be permitted to initiate a variation for other events.

At pages 179 and 180 of its *2016 Review of the Water Charge Rules: Final Advice*, the ACCC noted that such a variation could relate to a situation where a Part 6 operator imposes regulated charges on other Part 6 operators (for example, if either the Border Rivers Commission or Murray-Darling Basin Authority directly imposed charges for infrastructure services on other Part 6 operators). The ACCC noted that, 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, there are compelling reasons for allowing the regulator to initiate a variation in this context: These include that:

- 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 (by not taking action to initiate a variation).

- 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.

Subrule 43A(1) provides that the ACCC may, on its own initiative, vary a determination or approval of a Part 6 operator's infrastructure charges if it is satisfied that a regulatory event or taxation event provides a benefit to the infrastructure operator of more than 1 per cent of the operator's aggregate revenue requirement.

Subrule 43A(1) gives effect to the ACCC's advice at p. 177 of its 2016 *Review of the Water Charge Rules: Final Advice* that 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.

Subrule 43A(2) provides that the ACCC must give the Part 6 operator written notice of their intention to vary the determination or approval before varying the determination or approval.

Subrule 43A(3) provides that the notice under subrule 43A(2) must:

- identify the regulatory event or taxation event giving rise to the intended variation; and
- set out the estimated amount for the proposed variation of the operator's infrastructure charges; and
- advise that the operator may respond to the ACCC's notice within 30 business days after the date of the notice.

Subrule 43A(4) provides that the ACCC must not vary a determination or approval where it has been initiated by the part 6 operator through an application under subrule 40(3) as it relates to a contingent project unless it is satisfied as to the matters at 29(2)(b) and (c).

Subrule 43A(5) provides that the ACCC must, if varying a determination or approval of infrastructure charges under rule 43A, decide (a) each infrastructure charge to be varied and the amount of the variation; and (b) the date from which each varied charge will apply, which must not be earlier than the next year of the regulatory period.

Item 76 repeals the heading for rule 45 and substitutes the heading 'Part 7 Operators'. This is a minor drafting change to align this heading with the style of heading in rule 23 for 'Part 6 operators'.

Item 77 repeals subrule 45(1) of the *Water Charge (Infrastructure) Rules 2010* and inserts new subrules 45(1), 45(1A) and 45(1B).

Subrule 45(1) provides that an infrastructure operator becomes a **Part 7 operator** if:

- the operator is not a Part 6 operator; and

- (b) the operator is a member owned operator; and
- (c) the sum of the maximum volume of water from managed water resources in respect of which the operator provides infrastructure services in relation to all of the following is more than 10 gegalitres:
 - (i) water access entitlements held by the operator (otherwise than for the purpose of providing infrastructure services to customers who hold water access entitlements to that water);
 - (ii) water access entitlements held by the customers of the operator;
 - (iii) water access entitlements held by the owner (not being the operator) of the water service infrastructure operated by the operator; and
- (d) the operator has made a distribution to all its related customers at any time after 12 January 2011.

A note after the subrule provides that in subrule 45(1) the maximum volume of water refers to that held under water access entitlements.

Paragraph 45(1)(a) is an amendment to Part 7 of the *Water Charge (Infrastructure) Rules 2010*. The ACCC's advice for new distribution rules under Part 7 is not adopted in these Amendment Rules. Instead, this amendment is consequential to the amendments made to Part 6 by item 44. Part 6 of the *Water Charge (Infrastructure) Rules 2010* did not apply to member owned operators. Part 6, inserted by item 44, applies to both member owned and non-member owned operators. Without this amendment, under the *Water Charge Rules 2010* it would have been possible at law for a Part 7 operator to also be a Part 6 operator, although this would have been very unlikely in practical terms because a member-owned operator is very unlikely to provide a bulk water service.

Subrule 45(1A) provides that, if a Part 7 operator makes, or proposes to make, an application for the determination or approval of regulated charges under Division 2, the ACCC must:

- (a) invite the views of the operator on the appropriate date from which Division 2 should apply to the operator; and
- (b) set that date.

This amendment is consequential to the amendments made to Part 6 at item 44. That is, that the ACCC should set the regulatory start date, following consultation with the operator.

Subrule 45(1B) provides that the date set by the ACCC in subrule 45(1A) is the **regulatory start date** for the operator.

Item 78 amends subparagraph 45(2)(a)(iv) in a minor way by adding the word 'and' at the end of the paragraph to clarify that for the purpose of the application of Part 7, a member owned operator must satisfy both paragraphs (a) and (b).

Item 79 amends subrule 45(2) by omitting the words 'a member owned operator' and substituting the words 'an infrastructure operator'. This is a stylistic drafting change. The infrastructure operator must still be a member owned operator as per paragraph 45(1)(b), inserted by item 77.

Item 80 repeals subrule 45(3) of the *Water Charge (Infrastructure) Rules 2010* and substitutes it with new subrule 45(3).

Subrule 45(3) provides that an infrastructure operator ceases to be a Part 7 operator at the earliest of the following times:

- (a) when the operator ceases to be a member owned operator;
- (b) when paragraph (1)(c) stops applying to the operator;
- (c) upon the expiration of 3 years after the operator last made a distribution to all its related companies;
- (d) upon the expiration of 3 years after the regulatory start date for the operator.

Paragraph 45(3)(a) has been inserted to mirror the inclusion of a regulatory start date for Part 7 operators, see subrule 45(1A), inserted by item 77.

Item 81 repeals rule 52 and substitute it with new rule 52. Rule 52 provides that where the ACCC receives a submission in response to an invitation under Part 6 or 7, the ACCC must, subject to this Division, publish the submission on the ACCC's website as soon as practicable.

Item 82 repeals subrule 53(3) and substitutes it with new subrule 53(3). New subrule 53(3) provides that in rule 53 'application' includes further information given by the applicant at the request of the ACCC under rules 23C, 26, 35, 41 or 47. This provides that the arrangements for confidential applications and information not being published by the ACCC extend to confidential applications and information under rules 23C, 26, 35, 41 and 47.

Item 83 repeals subrule 54(5) and substitutes it with new subrule 54(5). New subrule 54(5) provides, in this rule, 'application' includes further information given by the applicant at the request of the ACCC under rules 23C, 26, 35, 41 or 47. This provides that the process for when the ACCC disagrees with a claim that an application or certain information is confidential extends to claims relating to rules 23C, 26, 35, 41 and 47.

Item 84 repeals rule 55 and substitutes it with new rule 55. Rule 55 provides that, if, under rule 9, an exemption has effect, or is granted, in respect of a contract between an infrastructure operator and a customer, the ACCC must not publish any information to which the exemption relates other than:

- (a) in relation to an exemption in effect, or applied for, before 1 July 2020—the names of the parties to the contract and the date on which the exemption was granted; and
- (b) in relation to an exemption applied for on or after 1 July 2020—the information specified in subrule 9(13A).

Under rule 55 of the *Water Charge (Infrastructure) Rules 2010*, where an exemption under rule 9 had effect, the ACCC could publish the names of the parties and the date on which the exemption has been granted, but could not publish any other information to which the exemption relates.

Paragraph 55(b) provides that the ACCC must also publish the information specified in subrule 9(13A), that is:

- a notice of the exemption (paragraph 9(13A)(a));
- the name of the customer(s) to whom the exempt charge applies (paragraph 9(13A)(b));
- the time period of the contract(s) (paragraph 9(13A)(c));
- the nature of the infrastructure service to which the charge exempt from disclosure relates (paragraph 9(13A)(d)).

Paragraph 79(5)(b) refers to ‘the customer or customers’. The ACCC noted at page 131 of its *Review of the Water Charge Rules: Final Advice* that the *Water Charge (Infrastructure) Rules 2010* refer only to ‘the customer’ (in relation to an exemption application). The ACCC advised that the amended 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.

Item 85 repeals Part 9 of the *Water Charge (Infrastructure) Rules 2010* and inserts Part 10 -Termination fees and Part 11 –Transitional provisions.

Part 9 of the *Water Charge (Infrastructure) Rules 2010* provided for the accreditation of arrangements under which the charges of Part 6 operators were approved by an agency of the relevant state. These arrangements are no longer required for the reasons set out below.

Under Part 6 of the *Water Charge (Infrastructure) Rules 2010* non-member operators that provided services in relation to at least 250 gigalitres of water access entitlement were regulated by Basin state regulators who were accredited under Part 9 of the *Water Charge (Infrastructure) Rules 2010*.

Under the Amendment Rules, regulation of these operators, and other bulk water service operators, is given to Basin states under Basin state law, provided Basin state regulatory approaches ensure that operators’ costs are prudent and efficient, and charges are set at levels that would not allow monopoly returns. If those requirements are not met, the ACCC is the regulator. See item 2 for further information.

Part 10 -Termination fees

Part 10 provides for termination fees. As per the ACCC’s advice, item 85 incorporates relevant provisions of the *Water Charge (Termination Fees) Rules 2010*, which are repealed, into the *Water Charge Rules 2010*, and enhances those provisions for increased transparency (see Item 1 for further information).

Part 10 includes:

- Division 1– *Certain fees prohibited*, rule 70
- Division 2 – *Termination fees*, rules 71, 72, 73, 74, and 75
- Division 3 – *Disconnection fees*, rule 76
- Division 4 – *Right to terminate right of access not affected*, rule 77

Some general information about termination fees is set out below.

What are termination fees?

Termination fees are fees payable to an infrastructure operator by an irrigator when they terminate or surrender the whole or part of a right of access to the operator's water service infrastructure.

Infrastructure operators make significant investments in their irrigation networks and face ongoing costs to maintain their infrastructure, that is, the costs are incurred by the operator 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. Revenue from termination fees can be used to limit future increases in charges for those customers who maintain their connection or to fund network rationalisation to lower ongoing costs.

The ACCC noted at page 259 of its 2016 *Review of the Water Charge Rules: Final Advice* that there are several competing interests affected by 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. Setting maximum termination fees too low risks leaving infrastructure operators with insufficient revenue to provide services to remaining customers, undermining investment in water infrastructure. Operators make 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.

Who may levy a termination fee?

The *Water Charge (Termination Fees) Rules 2009* regulated the circumstances in which irrigation infrastructure operators could charge termination fees and capped the maximum termination fee payable. Those rules did not require the imposition of a termination fee, it was optional, and the rule only applied to termination fees imposed by irrigation infrastructure operators.

As per page 259 of the 2016 *Review of the Water Charge Rules: Final Advice*, item 85 inserts new Part 10 to extend the application of termination fees to all infrastructure operators, not just irrigation infrastructure operators (IIO). In its advice the ACCC considered that this was necessary to ensure that the application of the rules regulating termination fees does not depend on factors such as an infrastructure operators demand profile or customer base, which can change over time and does extend to infrastructure operators which may not meet the definition of an IIO, but which may nevertheless seek to levy termination fees (now or in the future).

The ACCC notes at p. 260 of its *Review of the Water Charge Rules: Final Advice* that:

‘an operator which meets the definition of ‘IIO’ as defined in the *Water Act 2007* (the Act) 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, stock and domestic, 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.

Applying the enhanced termination fee rules to all operators 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.’

Division 1 prohibits infrastructure operators from imposing certain fees and charges on customers.

This is to ensure that infrastructure operators do not levy fees for termination or surrender of a right of access to infrastructure unless the fee meets the definition of a ‘termination’ under rule 71 and are regulated as such under the rules.

Subrule 70(1) provides that an infrastructure operator must not levy a fee, charge or payment of any kind for or in respect of the termination or surrender of the whole or part of a right of access.

A civil penalty of 200 penalty units applies to this provision. Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Subrule 70(2) provides that subrule 70(1) does not apply to fees authorised under the *Water Market Rules 2009* or to termination fees. A termination fee is a fee levied in accordance with rule 71.

Subrule 70(3) provides that where a person whose right of access has been terminated or surrendered in part or whole and the person has paid any applicable termination fee under rule 71 to the infrastructure operator, then the operator must not levy, and the person is not liable to pay, any fee, charge or other payment in relation to the right, or part of the right, that has been terminated or surrendered in respect of a financial year commencing after the termination or surrender.

A civil penalty of 200 penalty units applies to this provision. Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Division 2 of Part 10 sets out the circumstances in which a termination fee may be levied and the method of calculating termination fees.

Subrule 71 sets out the circumstances in which a termination fee may be levied.

Subrule 71(1) provides that a fee levied in accordance with rule 71 is a ‘termination fee’.

Subrule 71(4) provides that a termination fee consists of one or both of (a) a general termination fee and (b) an additional termination fee.

Subrule 71(2) provides that an infrastructure operator may, if the requirements in one of paragraphs 71(2)(a) to (c) are met, levy a termination fee on a person if the person has given written notice to the operator of their intention to terminate or surrender whole or part of an access right held by that person.

Paragraph 71(2)(a) requires that before the person gave the notice, the operator had given the person a termination information statement in relation to the right, or the part of the right being terminated or surrendered within 6 months before: (i) if the notice specified a future date for the termination or surrender to take effect—the specified date; or (ii) otherwise—the date of the notice.

Paragraph 71(2)(b) provides that an infrastructure operator may levy a termination fee on a person if the person has given written notice to the operator of their intention to terminate or surrender whole or part of an access right and all of the following apply:

- (i) the notice specified a date for the termination or surrender to take effect that was more than 6 months after the date of the notice; and
- (ii) on receiving the notice, the operator gave the person a termination information statement that included a statement in accordance with paragraph 74(5)(e); and
- (iii) the person has confirmed that they wish to proceed with the termination or surrender.

Paragraph 71(2)(c) provides that an infrastructure operator may levy a termination fee on a person if the person has given written notice to the operator of their intention to terminate or surrender whole or part of an access right and all of the following apply:

- (i) neither paragraph 71(2)(a) nor paragraph 71(2)(b) applies; and
- (ii) on receiving the notice, the operator gave the person a termination information statement; and
- (iii) the person has confirmed that they wish to proceed with the termination or surrender.

Subrule 71(3) provides that an infrastructure operator may also levy a termination fee if the operator, by notice in writing given to a person who holds a right of access terminates the whole or any part of that right in accordance with a contract applicable to the right on the grounds that an act or omission by the person is in breach of the person's obligations under that contract (other than the act of trading the whole or a part of a water access right).

Subrule 71(4) provides that a termination fee must consist of one or both of:

- (a) a general termination fee; and
- (b) an additional termination fee. See rule 73, also inserted by item 85, for further information about 'additional termination fees'.

Subrules 71(5) to (7) relate to the maximum general termination fee that can be charged.

Subrule 71(5) provides that if paragraph 71(2)(a) or 71(2)(c) applies, the general termination fee must not exceed the general termination fee set out in the termination information statement.

Subrule 71(6) provides that if paragraph 71(2)(b) applies, the general termination fee must not exceed the maximum amount set by rule 72 (also inserted by item 85), calculated using infrastructure charges specified in the schedule of charges in effect at the time of the termination or surrender. Rule 72 provides for the calculation of maximum general termination fees. 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.

Subrule 71(7) provides that if subrule 71(3) applies, the general termination fee must not exceed the maximum amount set by rule 72. Rule 72 provides for the calculation of maximum general termination fees.

Subrule 71(8) relates to maximum additional termination fees. It provides that the additional termination fee: (a) may be imposed only if such a fee has been approved under rule 73; and (b) must not exceed the fee approved. See rule 73 (also inserted by item 85) for further information about ‘additional termination fees’.

Subrule 71(9) sets out exceptions to subrules 71(2) and 71(3). Subrule 71(9) provides that subrules 71(2) and (3) do not apply to an infrastructure operator:

- (a) if both of the following apply:
 - (i) the holder of the right of access is not liable to pay charges to the operator in respect of the right; and
 - (ii) a fee in respect of the termination or surrender of the right or the part of the right is not specified in any contract or arrangement between the holder and the operator; or
- (b) if both of the following apply:
 - (i) the holder of the right of access is provided by the operator with a service for the storage of water using the operator’s water service infrastructure, in addition to the service for the delivery of water or drainage of water; and
 - (ii) the charges for the service for the storage of water are included in the charges in respect of the right of access.

Method of calculating termination fees

Rule 72 provides details of the method for calculating the maximum general termination fee.

Rule 72 relates to calculation of a maximum termination fee only. Operators are free to discount / waive termination fees as they see fit, as noted at page 277 of the 2016 *Review of the Water Charge Rules: Final Advice*:

‘The ACCC recognises stakeholder views that operators should be preventing 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.’

As per rule advice 6-B of the ACCC advice, rule 72 provides that the calculation of the maximum general termination only includes fixed volumetric infrastructure charges imposed: per unit of water delivery right; or per unit of water drainage right (where separate from a water delivery right); to the extent that a customer's right of access is being terminated.

Rule 72 replaces rule 7 in the *Water Charge (Termination Fees) Rules 2009*. Rule 7 provided that the maximum applicable termination fee was to be 10 times the relevant 'total network access charge' (TNAC).

The ACCC noted that no submissions to its Draft Advice advocated a change to the current ten times multiple, and continued to be of the view that it is reasonable to maintain the multiple at 10 times. However, the ACCC noted that TNAC allowed operators to use non-volumetric charges to recover costs, including fixed costs in their calculations. Non-volumetric charges include, for example, a charge per water meter, per outlet, per property, per account or with reference to the size of landholdings. Such non-volumetric charges have the effect of increasing the average cost of access (per megalitre of water delivery right held) for smaller irrigators as compared to larger irrigators.

At page 272 the ACCC noted that the practice under rule 7 of the *Water Charge (Termination Fees) Rules 2009* 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.

It also meant that the maximum termination fee payable per megalitre terminated varied depending on whether a customer was terminating some or all of their right of access, and that fully terminating a right of access could involve a very high termination fee (in per megalitre terms). This occurred because certain non-volumetric charges could be included in the termination fee base. For example, if there was a large account fee payable by each irrigator who held an account with the operator. An irrigator who terminated only a portion of their right of access would not have this fee included in their termination fee base if they did not close their account. However, the account fee would be included in the termination fee base if the irrigator terminated all of their remaining right of access, even if the volume of the right terminated was very small.

The ACCC considered that generally the practice of recovering ongoing (unavoidable) fixed costs via non-volumetric charges should be discouraged, so as to avoid the situation where the last megalitre terminated attracts a disproportionately high termination fee.

Under rule 72 of the Amendment Rules, calculation of the general termination fee base is generally restricted to include only volumetric fixed infrastructure charges levied per volume of water delivery right or water drainage rights held by the customer; and inclusion of capital costs (minus customer contribution) where there is a separate charge on infrastructure used exclusively by the terminating customer.

The ACCC considered that the new method for calculating termination fees under rule 72 would help ensure that termination fees only reflect ongoing unavoidable fixed costs faced by the infrastructure operator and address the disproportionate incentives for customers to retain small portions of their right of access in order to avoid termination fees associated with non-volumetric charges. The ACCC considered that this would improve rationalisation efforts (see page 274 of the 2016 *Review of the Water Charge Rules: Final Advice*).

Subrule 72(1) provides that the maximum amount of a general termination fee for the purpose of subrules 71(6) and 71(7), which both require the general termination fee to be capped at the maximum set by rule 72.

A note under subrule 72(1) provides that the fee may be lower than the maximum calculated in accordance with this rule.

Under subrule 72(1) the maximum general termination fee is the lesser of the amount calculated in accordance with subrule 72(2) and the fee determined in accordance with a contract between the operator and access right holder for termination or surrender, where such a contract is in place.

Subrule 72(2) provides the formula for calculating the maximum general termination fee. The formula is $X = (M \times A) + B$, where:

A represents the sum of fixed volumetric infrastructure charges that would have been imposed over a financial year in the absence of termination or surrender, which include:

- the amount of each infrastructure charge payable per unit of water delivery right held multiplied by the total number of delivery rights to be terminated or surrendered; and
- the amount of each infrastructure charge payable per unit of water drainage right (where separate from a water delivery right) multiplied by the number of units of drainage right to be terminated or surrendered.

B relates to costs associated with dedicated infrastructure that is only used by the terminating customer that will not be used again after termination or surrender. B is set at either:

- Zero, if there is no separate charge imposed by the operator on the customer for that infrastructure; and
- If the operator imposes a charge on the customer for that infrastructure; the lesser of:
 - 10 x the amount of the separate charge for that infrastructure (represented by the letter C) for a full financial year; or
 - A reasonable estimate of the total cost of that dedicated infrastructure minus a reasonable estimate of any contribution towards that cost made by the terminating customer in either a lump sum payment or through a separate infrastructure charge (represented by letter D).

It is at the operator's discretion whether or not to set a fee for B at all.

M is the termination fee multiple and is set at either:

- 1, if the operator doesn't allow for trade in water delivery rights applicable to the type the customer wishes to terminate; or
- 10, otherwise.

X is the amount for paragraph 72 (1)(a).

Subrule 72(3) provides that the following charges must be excluded when calculating A, C, and D in accordance with subrule 72(2):

- (a) any amount in respect of a service for the storage of water;
- (b) any amount of GST;
- (c) any charges for physically connecting or disconnecting a the customer from the operators water services infrastructure;
- (d) if there is a contract between the operator and customer and this has been approved under rule 73, any amount payable under the contract for cost recovery of capital works relating to the operators water services.

Subrule 72(4) sets out which schedule of charges must be used to obtain the relevant infrastructure charge when calculating A and C, in accordance with subrule 72(2), subject to subrule 72(5). This recognises that due to changes to publication requirements for the schedule of charges (refer rule 15, inserted by item 43), it is possible that some customers will not receive their schedule of charges until after the new charges come into effect.

Paragraph 72(4)(a) provides that if the calculation of A and C relates to an amount of a general termination fee that will be set out in a termination information statement (rule 74 refers) provided by an operator in response to a request for information from a customer, the schedule of charges in effect on the date the information request is received must be used for the calculation.

Paragraph 72(4)(b) provides that if the calculation of A and C is for the purpose of subrule 71(6), as it relates to notice given by a customer to an operator of the customers intention to surrender or terminate their service at a date at least six months after the date of their notice, the schedule of charges in effect on the date of the termination or surrender must be used for the calculation.

Paragraph 72(4)(c) provides that if the calculation of A and C is for the purpose of subrule 71(7), as it relates to termination of a customer's access right by an operator due to breach of contract, the schedule of charges in effect on the date the operator gives notice to the customer of their intention to terminate must be used for the calculation.

Subrule 72(5) provides that if:

- (a) paragraph 72 (4)(a) applies; and
- (b) a different schedule of charges had been in effect for the operator on the date 25 business days before the information request was received; and
- (c) using that earlier schedule of charges would produce a lesser maximum amount under subrule (2);

then the relevant infrastructure charges are those specified in that earlier schedule of charges.

Subrule 72(6) provides that despite subrule 72(1), if GST is payable in respect of a taxable supply relating to the termination or surrender of the whole or a part of a right of access:

- (a) the termination fee levied by the infrastructure operator may be increased by an amount not exceeding the GST payable in respect of that taxable supply; and
- (b) the fee determined in accordance with a contract referred to in paragraph (1)(b) may be increased by an amount not exceeding the GST payable in respect of that taxable supply.

Rule 73 provides for the approval of an ‘additional termination fee’ to be payable under certain contracts relating to capital works.

Rule 8 of the *Water Charge (Termination Fees) Rules 2009* provided for the allowance of termination fees that were in excess of the amount otherwise permitted under the rules in certain circumstances. Specifically, rule 8 allowed such a termination fee where the fee was specified in an existing or new contract between an operator and a customer and related to the recovery of capital expenditure that could not be recovered under the termination fee calculated under rule 7 of the *Water Charge (Termination Fees) Rules 2009*. The ability of operators and customers to negotiate such a clause in their contract reflected the possibility that some efficient investments could only be viable with cost recovery periods longer than those implied by the maximum termination fees provide for in the rules. Rule 8 required the parties to the contract to obtain approval from the ACCC for this additional fee.

The ACCC advised at page 295 of the 2016 *Review of the Water Charge Rules: Final Advice* that rule 8 should be incorporated into the Amendment Rules in the same form because the reasons for the implementation of regulatory supervision of the additional termination fee process are still valid.

Subrule 73(1) provides that rule 73 applies (i.e. approval of an additional termination fee) if there is a contract between an infrastructure operator and one or more access right holders involving the following: capital works relating to the operator’s water service infrastructure carried out within five years of the contract commencement date (paragraph 73(1)(a)); payment by a terminating customer, that relates to the recovery of that capital expenditure (paragraph 73(1)(b)).

Subrule 73 (2) provides that a party to the contract may, within 3 months after the date on which the contract was made, apply to the ACCC for approval of that fee as a fee payable by each terminating customer as an additional termination fee for the purposes of rule 71.

Additional termination fee

Subrule 73(3) provides that an operator can charge each terminating customer an ‘additional termination fee’ in accordance with subrule 73(1), and the fee is payable by each terminating customer, if the following conditions have been met:

- (a) an application is made to the ACCC for approval of the fee determined in accordance with the contract; and
- (b) the ACCC is satisfied that the contract:
 - i. relates to the infrastructure operator carrying out capital works, that relates to their water service infrastructure, within 5 years from when the contract was entered into; and

- ii. provides for fees to be payable by a customer for access to the operator's water service infrastructure that are of an amount that allows for the operator to recover up to the actual or reasonable estimate of expenditure on those capital works; and
 - iii. provides for a fee payable by the terminating customer to the operator that was fairly and reasonably agreed when the contract was negotiated and cannot be varied without agreement from the customer; and
- the ACCC is satisfied that the operator advised the customer of the general effect of these Rules; and
- (c) the ACCC is satisfied that the operator advised the holders of rights of access who are parties to the contract of the general effect of these Rules; and
 - (d) the ACCC approves the fee payable by the terminating customer to the operator to allow cost recovery of capital works in accordance with this rule while having regard to the water charging objectives.

At page 295 of its 2016 *Review of the Water Charge Rules: Final Advice*, the ACCC noted that rule 8 of the *Water Charge (Termination Fees) Rules 2009* 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 *Water Charge (Termination Fees) Rules 2009*. The ACCC noted 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 of the *Water Charge (Termination Fees) Rules 2009* required the parties to the contract to obtain approval from the ACCC for this termination fee. 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 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. The ACCC considered that rule 8 should be incorporated into the combined water charge rules in its current form.

Subrule 73(4) sets out the ACCC's information requirements and decision making process for assessing an additional termination fee for approval. Subrule 73(4) provides that if a person makes an application to the ACCC for approval of a fee determined in accordance with the contract and gives the ACCC:

- (a) a copy of the contract; and
- (b) the contact details of the parties to the contract; and
- (c) such details of contracts entered into, and arrangements made, for the carrying out of capital works relating to the operator's water service infrastructure within the period referred to in subparagraph (3)(b)(i) as are sufficient to confirm that the works have been, are being or are to be carried out; and
- (d) any further information requested by the ACCC;

then the ACCC:

- (e) must decide whether or not to approve the fee; and
- (f) must give notice in writing of its decision to each of the parties to the contract; and
- (g) if it decides not to approve the fee, must include in the notice under paragraph (f) the reasons for refusing approval.

Subrule 73(5) provides that if the ACCC does not make a decision under subrule (4) within a period of 30 business days after receiving an application under subrule (1), the ACCC is taken to have made a decision, at the end of that period, to approve the fee and to have given notice of the decision under paragraph (4)(f).

Subrule 73(6) provides that in calculating a period of 30 business days referred to in subrule (5), that the person calculating must disregard, if the ACCC has requested further information in relation to the application, a day during any part of which the request, or any part of the request, remains unfulfilled.

Subrule 73(7) provides that if the ACCC:

- (a) is unable to make a decision within the period of 30 business days referred to in subrule (5); and
- (b) within that period, gives written notice to the person who makes an application under subrule (1) explaining why the ACCC has been unable to make a decision on the fee within that period of 30 business days;

then the period of 30 business days referred to in subrule (5) is extended by a further period of 30 business days.

Infrastructure operator to provide information in response to customer seeking to terminate

Rule 74 (1) provides that, subject to subrule 74(3), upon receiving a written information request from a customer, the infrastructure operator must give the customer a 'termination information statement' within 25 business days after the day on which it received the request. Subrule 74(5) defines a 'termination information statement'.

A civil penalty of 200 penalty units applies to this provision. Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Rule 74 (2) provides that, subject to subrule 74(3), if an infrastructure operator receives an oral information request from a customer, the infrastructure operator must either: (a) inform the customer as soon as practicable that it will give the customer a termination information statement on receiving a written information request; or (b) give the customer a termination information statement, within 25 business days after receiving the oral request.

A civil penalty of 200 penalty units applies to this provision. Subsections 92(8)-(9) of the Water Act provide that the 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. 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).

Subrule 74(3) provides that the infrastructure operator is not required to give a customer a termination information statement in response to an information request if it has already given the customer a termination information statement in relation to the right of access, or the specified part of the right of access within 6 months before the following date:

- (a) if the information request: (i) is a notice that satisfies paragraph 74(4)(b); and (ii) specifies a future date for the termination or surrender to take effect — that date;
- (b) otherwise—the date of the request.

Subrule 74(4) provides the meaning of 'information request'.

Subrule 74(4) provides that in these rules information request means:

- (a) a request from a customer for information on the termination fee that would apply if the customer were to terminate or surrender the whole or a specified part of a right of access; or
- (b) notice from a customer of their intention to terminate or surrender the whole or a specified part of a right of access, including a notice that terminates or surrenders the right, or the specified part of the right, for the purposes of subrule 71(2).

Subrule 74(5) provides the meaning of 'termination information statement'.

Subrule 74(5) provides that in these Rules:

'Termination information statement' means a statement in writing, in response to an information request, which sets out or includes the following:

- (a) the amount of each of the following that would be payable to the operator by a person if the whole or a part of the person's right of access were terminated or surrendered within the period of 6 months after the day the statement is given to the person:
 - (i) the general termination fee;
 - (ii) any additional termination fee;

- (iii) any disconnection fee referred to in rule 76 and known at the time the statement is given or, if it is not practicable to know the fee at that time, an estimate of the amount of such a fee;
- (b) how the fees covered by paragraph (a) have been calculated or estimated;
- (c) whether the person may trade a water delivery right relevant to the right of access referred to in the information request together with a copy of any rules governing the trade of that water delivery right or a website where such rules can be found;
- (d) a statement that the amount of the general termination fee is valid for the period of 6 months after the day on which the statement is given to the person;
- (e) if the statement relates to an information request that is a notice that terminates or surrenders the whole or any part of a right for the purposes of subrule 71(2) and specifies a future date for the termination or surrender to take effect (the termination date) that is more than 6 months after the date of the notice—a statement that, if the person confirms that the person wishes to proceed with the termination or surrender, the general termination fee may be calculated on the basis of the schedule of charges in effect on the termination date, and may therefore be higher than the amount set out under subparagraph (a)(i).

Note 1: provides, for subparagraph (a)(ii), if the infrastructure operator has not yet received the relevant approval under rule 73, the operator may include the amount that is expected to apply, with a statement that this fee is subject to approval by the ACCC under that rule.

Note 2 provides, for paragraph (e), if a termination information statement is given to a person in circumstances to which paragraph 71(2)(b) or (c) applies, the operator must not levy a termination fee unless the person confirms that the person wishes to proceed with the termination or surrender.

Note 3 provides, for the maximum amounts that may be levied as general termination fees or additional termination fees, see subrules 71(5) to (8).

Rule 75 provides that a person must pay a termination fee (if any) levied by an infrastructure operator on the person in accordance with rule 71.

Division 3 of Part 10 relates to disconnection fees

76 Disconnection fee

Subrule 76(1) provides that subject to subrule 76(2), nothing in these Rules prevents an infrastructure operator imposing a fee in respect of the reasonable costs incurred by the operator by reason only of removing or disabling a physical connection between the operator's water service infrastructure and the infrastructure of a person who holds or has held a right of access to that water service infrastructure.

Subrule 76 (2) provides that a fee levied for the purposes of subrule (1) must be identified as a disconnection fee in the operator's applicable schedule of charges, whether or not it is payable at the same time as a fee under Division 2 – termination fees.

Division 4 Right to terminate right of access not affected

Subrule Rule 77 (1) provides that nothing in these Rules affects the right of an infrastructure operator to terminate the whole or any part of a right of access in accordance with a contract or arrangement applicable to that right.

Subrule Rule 77 (2) provides that a fee, charge or payment of any kind is not payable in respect of such a termination except as expressly authorised under Division 2.

Part 11—Transitionals

Division 1 – Amendments made by the Water Charge Amendment Rules 2019

Rule 78 inserts two new definitions that only apply in Division 1 of Part 11. The term ‘amending rules’ when referred to in this Division means the *Water Charge Amendment Rules 2019*. The term ‘old rules’ when referred to in this Division means the *Water Charge (Infrastructure Rules) 2010* as in force immediately before 1 July 2020.

Rule 79 sets out transitional arrangements for exemptions under rule 9 of the *Water Charge (Infrastructure Rules) 2010*. The transitional provisions relating to the exemptions under rule 9 are explicit that applications made but not assessed before 1 July 2019 are decided under the old rules and that any exemptions operating at 1 July 2019 are appropriately grandfathered, so as not to disadvantage existing rights, consistent with the principles applied by the Senate Standing Committee on Regulations and Ordinances.

Subrule 79(1) provides that an exemption in relation to an infrastructure charge under a particular contract in effect under subrule 9(1) of the *Water Charge (Infrastructure Rules) 2010* before 1 July 2020, or granted under subrule 9(6) of the *Water Charge (Infrastructure Rules) 2010* before 1 July 2020, continues to apply on and after that date as if granted under rule 9 as amended by the amending rules.

A note under subrule 79(1) provides that the effect is that the charge need not appear in a schedule of charges, and rule 7 does not apply in relation to the charge. However, any replacement schedule of charges adopted on or after 1 July 2020 must include the information about the exemption specified in subrule (5). That subrule includes the same requirements as in new subrule 9(13A).

A note under s 79(1) provides that the effect is that the charge need not appear in a schedule of charges, and rule 7 does not apply in relation to the charge. However, any replacement schedule of charges adopted on or after 1 July 2020 must include the information about the exemption specified in subrule (5). That subrule includes the same requirements as in new subrule 9(13A).

Subrule 79(2) provides that subrule (1) does not apply to an exemption in effect under subrule 9(1) of the old rules if, on or after 14 July 2010, the regulated charges specified in the contract in respect of which the exemption was in effect have been varied.

This rule is intended to prevent operators, who avoided entering into new contracts after 14 July 2010 by varying contracts entered into prior to 14 July 2010, from having their exemptions further extended.

Subrule 79(3) provides that the old rules apply in relation to an application for an exemption under rule 9 that was made, but not decided, before 1 July 2020.

Subrule 79(4) provides that during the period of 12 months beginning on 1 July 2020, despite paragraph 9(2)(a), an application for an exemption under rule 9 may be made in relation to a contract that was entered into before that date.

At page 130 of its 2016 *Review of the Water Charge Rules: Final Advice* the ACCC proposed 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 considered 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 viewed 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

Subrule 79(5) provides that despite subrule 9(13) as applied by subrule 79(1), if an exemption is continued in force by subrule 79(1), the infrastructure operator must, within 12 months after 1 July 2020, include the following information in its schedule of charges:

- (a) a statement that the exemption has been granted under this rule;
- (b) the name of the customer or customers;
- (c) the time period of the contract or contracts;
- (d) the infrastructure service to which the charge exempt from disclosure relates.

This subrule gives effect to rule advice 5-K of the ACCC’s 2016 *Review of the Water Charge Rules: Final Advice*.

At page 132 of its *Review of the Water Charge Rules: Final Advice* the ACCC stated:

‘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*’.

Subrule 79(5) provides that, for a grandfathered exemption, an operator will only be required to publish this information in their Schedule of Charges within 12 months after 1 July 2020.

Paragraph 79(5)(b) refers to ‘the customer or customers’. The ACCC noted at page 131 of its *Review of the Water Charge Rules: Final Advice* that the *Water Charge (Infrastructure) Rules 2010* refer to ‘the customer’ (in relation to an exemption application). The ACCC advised that the amended 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.

Rule 80 sets out transitional provisions for schedule of charges provisions (rule 7 and Part 4)

Subrule 80 (1) provides that this rule applies for the period of 12 months beginning on 1 July 2020.

A note under subrule 80(1) provides that the effect of rule 80 is that infrastructure charges and planning and management charges that were in effect immediately before 1 July 2020 may continue for up to 12 months without further action by the person levying or determining the charges. However, if any charge levied by an infrastructure operator or other person is to change, a new schedule of charges must first be adopted and come into effect for that operator or other person in accordance with Part 4 as amended.

Subrule 80(2) provides that an infrastructure operator is taken to comply with rule 7 and Part 4 if:

- (a) each infrastructure charge that the operator levies on a customer is either:
 - (i) a charge specified in a schedule of charges (within the meaning of these rules as in force immediately before 1 July 2020) that:
 - (A) if rule 15 as it then stood was applicable—was published before 1 July 2020 in accordance with that rule; and
 - (B) was in effect for the operator immediately before 1 July 2020; and
 - (C) has been given to the customer; or
 - (ii) covered by subrule 11(7); and
- (b) each planning and management charge that the operator levies on a customer:
 - (i) is a charge about which information was published before 1 July 2020 in accordance with the *Water Charge (Planning and Management Information) Rules 2010*; and
 - (ii) was in effect for the operator immediately before 1 July 2020.

Subrule 80(3) provides that a person other than an infrastructure operator is taken to comply with rule 7 and Part 4 on and after 1 July 2020 if each planning and management charge that it levies on a customer:

- (a) is a charge about which information was published before 1 July 2020 in accordance with the *Water Charge (Planning and Management Information) Rules 2010*; and
- (b) was in effect for the operator immediately before 1 July 2020.

81 Transitional provisions for existing Part 6 operators

At page 152 of its 2016 *Review of the Water Charge Rules: Final Advice*, the ACCC advised that it was appropriate for the regulator's approval / determination in relation to an application to be made under the same framework as the application was made. The ACCC considered that changing the framework for assessing an application which had already been made under

the *Water Charge (Infrastructure) Rules 2010* would not give effect to the principle of procedural fairness, as it is unlikely that all stakeholders would have sufficient opportunity to

To avoid doubt, the ACCC's *Review of the Water Charge Rules: Final Advice* advised that the proposed rules should provide that a Part 6 operator's infrastructure charges that were approved or determined under Part 6 of the *Water Charge (Infrastructure) Rules 2010* 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).

Subrule 81(1) provides that this rule applies to an infrastructure operator that, immediately before 1 July 2020, was a Part 6 operator in a regulatory period in respect of which its infrastructure charges had been determined or approved by the Regulator.

A note under subrule 81(1) provides that the subrule deals with an infrastructure operator that was a Part 6 operator immediately before 1 July 2020 (when substantial amendments to the Rules came into effect). Because the amendments have changed the definition of Part 6 operator, it is possible the operator will no longer satisfy the definition. The operator will, however, continue to be treated as a Part 6 operator until the end of the transition period, which is at least the remainder of its current regulatory period. In particular, the operator will be subject to rule 8 and Part 6.

During the transition period, the operator's status will be reassessed. If the operator will continue to be a Part 6 operator after the end of the transition period, the operator is required to make an application in relation to the next regulatory period under rule 25. Otherwise, the operator will cease to be treated as a Part 6 operator.

Subrules 81(2) and 81(3) relate to the transitional application and transition period.

Subrule 81(2) provides that if:

- (a) the infrastructure operator had made an application for a determination or approval of charges under Part 6 before 1 July 2020; but
- (b) the charges to which the application related had not been determined or approved before 1 July 2020;

then the application is a 'transitional application' for the infrastructure operator.

Subrule 81(3) provides that the 'transition period' for the infrastructure operator begins on 1 July 2020 and ends at the end of:

- (a) if the operator had made a transitional application—the regulatory period in relation to which the application was made; and
- (b) otherwise—the latest regulatory period in relation to which charges had been determined or approved before 1 July 2020.

Subrules 81(4) to 81(10) relate to the application of these Rules during the transition period.

Subrule 81(4) provides that these Rules apply to the infrastructure operator during the transition period as if it continued to be a Part 6 operator under rule 23 as amended by the amending rules, except as provided in this rule.

Subrule 81(5) provides that where infrastructure charges of the operator were determined or approved before 1 July 2020 in relation to a period after 1 July 2020 (i.e. they were determined or approved under Part 6 as it then stood), the determination or approval is taken to have been made under Part 6 as amended by the amending rules on 1 July 2020.

Subrule 81(6) provides that if the infrastructure operator had made a transitional application, then:

- (a) the charges to which the application relates are to be determined or approved in accordance with Part 6 as it stood before 1 July 2020; and
- (b) the determination or approval is taken to have been made under Part 6 as amended by the amending rules on 1 July 2020.

Subrule 81(7) provides that in applying Divisions 2, 3 and 4 of Part 6, as amended by the amending rules, to the infrastructure operator:

- (a) a reference to the ACCC is taken to be a reference to the Regulator; and
- (b) 'Regulator' has the same meaning as it did immediately before 1 July 2020.

Subrule 81(8) provides that rules 23A, 23B and 23D do not apply to the infrastructure operator until the operator has received the notification from the ACCC under subrule (12) of this rule.

Subrule 81(9) provides that in applying rule 23D to the infrastructure operator, the reference in subrule 23D(2) to the remainder of the regulatory period is taken to be a reference to the remainder of the transition period.

Subrule 81(10) provides that rule 25 does not apply to the operator unless it has been notified in accordance with subparagraph (15)(d)(ii) of this rule that the next regulatory period for the operator will begin immediately after the end of the transition period for the operator.

Subrules 81(11) to 81(15) relate to the assessment of transitioning Part 6 operator against amended criteria.

Subrule 81(11) provides that as soon as practicable after 1 July 2020, the infrastructure operator must notify the ACCC of:

- (a) whether or not it is a Part 6 operator under rule 23 as amended by the amending rules; and
- (b) any matter that it is aware of that may result in the infrastructure operator ceasing to be a Part 6 operator, or becoming one, on a specified date.

Subrule 81(12) provides that the ACCC must:

- (a) form a view as to whether the infrastructure operator is a Part 6 operator under rule 23 as amended by the amending rules, or is likely to cease to be one or to become one before the end of the transition period; and
- (b) notify the operator of the ACCC's view; and
- (c) if the ACCC is of the view that the operator is, or is likely to be, a Part 6 operator—advise the operator that the ACCC will decide whether the operator should be granted an exemption from the operation of Divisions 2, 3 and 4 of Part 6 after the end of the transition period.

Subrule 81(13) provides that if paragraph 81(12)(c) applies, the ACCC must decide whether such an exemption should be granted by applying rule 23C as modified by subrule (15) of this rule.

A note under subrule 81(13) provides that the ACCC will be required to notify the infrastructure operator of its decision under subrule 23C(12).

Subrule 81(14) provides that if paragraph 12(c) does not apply but, later in the transition period, rule 23B applies so that the ACCC is to consider an exemption for the operator under rule 23C:

- (a) any exemption may apply only after the transition period; and
- (b) the ACCC must apply rule 23C as modified by subrule (15).

Subrule 81(15) provides that for subrules (13) and (14), rule 23C is applied as if subrules 23C(9), (10), (11) and (12) were replaced by the following provisions:

- (a) if the ACCC fails to make a decision under this rule (rule 23C as modified by subrule 81(15)) within 3 months after receiving the application, or giving the notice under rule 23B or paragraph 81(12)(b), the ACCC is taken to have decided to grant the operator an exemption from the operation of Divisions 2, 3 and 4 of Part 6 for the period of 3 years that begins immediately after the end of the transition period for the operator;
- (b) if the ACCC decides not to grant the operator an exemption, the ACCC must set the next regulatory period as a period that begins immediately after the end of the transition period for the operator;
- (c) the 'regulatory start date' for the operator is taken to be:
 - (i) for the purposes of the definition of 'regulatory period' in subrule 3(1)—the date on which the operator's first regulatory period began; and
 - (ii) for other purposes—1 July 2020;
- (d) the ACCC must notify the infrastructure operator as soon as practicable:
 - (i) of a decision under this rule (including a decision taken to have been made under paragraph 81(15)(a)); and

- (ii) if the ACCC does not grant the exemption—that the next regulatory period for the operator will begin immediately after the end of the transition period for the operator.

A note under paragraph 81(15)(d) provides that the effect of this provision is that there is no discontinuity in the status of the operator as a Part 6 operator. In particular, rule 24A will not apply to applications for determination or approval of charges for the regulatory period following the transition period (only rule 25 will apply).

82 Transition provisions for existing Part 7 operators

Subrule 82(1) provides that if an infrastructure operator was a Part 7 operator immediately before 1 July 2020, then, on and after that date, it continues to be a Part 7 operator until it ceases to be a Part 7 operator in accordance with subrule 45(3) as in force immediately before 1 July 2020.

Subrule 82(2) relates to the application of Division 2 of Part 7 to existing Part 7 operators.

Subrule 82(2) provides that Division 2 of Part 7, as amended by the amending rules, applies to an infrastructure operator covered by subrule (1) as though:

- (a) a reference to the ACCC were a reference to the Regulator; and
- (b) ‘Regulator’ had the same meaning as immediately before 1 July 2020.

Rule 83 Transitional provisions for Regulators under Part 9

Rule 83 provides that if a State Agency was a Regulator immediately before 1 July 2020, it continues to be a Regulator for the purposes of:

- (a) Divisions 2, 3 and 4 of Part 6, as applied by subrule 81(4); and
- (b) Division 2 of Part 7, as applied by subrule 82(2);

until the accreditation of the Regulator is revoked by the ACCC, withdrawn by a Basin State or expires.

A note under rule 83 provides that a State Agency to which this rule applies will act as Regulator only to a transitioning Part 6 operator, for the remainder of the transition period for the operator.

Item 86 amends Schedule 1 to the *Water Charge (Infrastructure) Rules 2010*.

Schedule 1 relates to the information that must be included in an application, under Division 2 of Part 6, by an infrastructure operator for a determination or approval of charges for each year of a regulatory period (see item 44, subrules 24A(4) and 25(3)).

Subrule 24A(4) provides that an application for determination or approval of charges for the first regulatory period must include the information referred to in Schedule 1.

Subrule 25(3) provides that an application for determination or approval of charges in ‘subsequent regulatory period’ must include the information referred to in Schedule 1.

Item 86 inserts a note before clause 1 of Schedule 1. The note provides that the regulatory period that is set to expire, referred to in Schedule 1, may be:

- (a) a regulatory period set by these Rules (subrule 3(1) refers); or
- (b) a regulatory period set by a state agency under State law; or
- (c) a period of 3 years, if neither paragraphs (a) or (b) apply.

Item 86 also inserts clause 1AA before clause 1. Clause 1AA provides that where information specified by this Schedule for inclusion in the application is not yet available, the application must instead include a forecast of the information, with an annotation to the effect that the information is not yet available.

The insertion of clause 1AA gives effect to the ACCC’s advice at p. 172 of its 2016 *Review of the Water Charge Rules Final Advice*. The ACCC noted that the wording of Schedule 1 under the *Water Charge (Infrastructure) Rules 2010* referred to actual expenditures and revenue. The ACCC noted that 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 recommended that Schedule 1 include a provision to make it clear that where actual figures are unavailable, an operator must provide forecast figures.

Item 87 repeals clause 4 of Schedule 1 and substitutes it with new clause 4. Subclause 4(1) provides that an application made for determination or approval of charges must include the following information:

Details of the Part 6 operator’s:

- (a) actual revenue to date for each completed or part-completed year of the regulatory period that is set to expire, from each of the following sources:
 - (i) revenue from infrastructure charges;
 - (ii) revenue from government contributions related to the provision of those infrastructure services;
 - (iii) revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services; and
- (b) forecast revenue for each remaining year or part year of the current regulatory period and the following regulatory period, from each of the sources mentioned in subparagraphs (a)(i), (ii), and (iii); and
- (c) forecast revenue from providing infrastructure services for each year of the following regulatory period.

Subclause 4(2) provides that the revenue may be stated as for each year or part year of the agency revenue period, if the revenue is derived from charges levied by reference to a period (an **agency revenue period**) that:

- (a) is set by an agency of a State under a law of the State; and
- (b) does not align with the regulatory periods of the operator under these Rules;

Clause 4 provides for the ACCC to have the necessary information to make an assessment in accordance with subrule 29(2) (see item 48) and associated amendments to Schedule (2).

As explained at item 48, the ACCC advised at pages 164 and 166 of its 2016 *Review of the Water Charge Rules: Final Advice* that subrule 29(2) should be amended to more clearly take into account government subsidies and Community Service Obligations as well as revenue from sources other than infrastructure charges that is derived from the water service infrastructure used to deliver infrastructure services. The ACCC considered that, 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:

- i. any amount to be contributed by governments in relation to providing the infrastructure services; and
- ii. any amount reflecting a direction by a government forgoing a return on its share of capital in an infrastructure operator; and
- iii. any revenue (other than from infrastructure charges) derived from the water service infrastructure used to provide infrastructure services.

The ACCC considered that replacing subrule 29(b) with these changes incorporated would provide regulators and infrastructure operators with greater clarity on how a regulator is to account for revenue from sources other than infrastructure charges to be approved or determined.

Clause 4 provides for an infrastructure operator, in making its application, to give the ACCC the information needed for the ACCC to make a decision under rule 29(2)(b).

Item 88 amends paragraph 6(b) of schedule 1 by omitting the ‘period.’ and substituting it with ‘period;’. This is a minor grammatical amendment that replaces a colon with a semicolon.

Item 89 amends paragraph 8(a) of Schedule 1 by omitting all of the words before subparagraph (i) and substituting them with the following paragraph:

- ‘(a) in respect of each year of the regulatory period that is set to expire, including the following.’

This amendment omits the reference to ‘the initial period’ which related to an outdated transitional provision that is repealed by these Amendment Rules. See item 10 for further information.

Item 90 inserts subparagraph 8(a)(v) after subparagraph 8(a)(iv) of Schedule 1.

Subparagraph 8(a)(v) provides that a Part 6 infrastructure operator must include in their application to the ACCC details of differences between the actual capital expenditure of the operator and the capital expenditure most recently accepted by an agency of a State under a State law, or the ACCC, for the purposes of the determination or approval of the operator’s regulated charges, with reference to the amount of capital expenditure and the selection and scope of projects undertaken.

Item 91 amends paragraph 8(b) of Schedule 1 by inserting the words ‘the following’ after the words ‘including’. This is a minor stylistic drafting change.

Item 92 amends paragraph 9(a) of Schedule 1 by omitting all of the words before subparagraph (i) and substituting them with the following paragraph:

‘(a) in respect of each year of the regulatory period that is set to expire, including the following:’

This amendment removes a reference to ‘the initial period’ which related to an outdated transitional provision that is repealed by these Amendment Rules. See item 10 for further information.

Item 93 amends clause 1 of Schedule 2 of the *Water Charge (Infrastructure) Rules 2010*.

Schedule 2 relates to the determination of a regulatory asset base for a regulatory period after the first Part 6 regulatory period.

Clause 1 relates to the determination of the regulatory asset base for the first regulatory period of a Part 6 operator.

Item 93 amends the definition of **A** in paragraph 1(a) of Schedule 2 by omitting the words ‘that were used for’ and substituting them with the words ‘at the beginning of’. This is a minor drafting clarification.

Item 94 amends paragraph 1(a) of Schedule 2 by repealing the definition of **C** and substituting a new definition of **C**.

C is a value in the formula used to calculate the regulatory asset base for a Part 6 operator for the purposes of the first regulatory period under the Rules and item 94 provides that ‘**C**’ is defined as:

- the actual (or, where relevant, forecast) capital expenditure on assets used by the operator to provide infrastructure services (not including customer and government capital expenditure contributions) in regard to each year of the preceding period, and excludes expenditure that:
 - (i) was made in relation to:
 - (A) a major project not previously approved; or
 - (B) a project whose scope as undertaken materially differed from what was approved; or

(C) a project on which expenditure materially exceeded the amount previously approved; and

(ii) the ACCC is not satisfied was prudent and efficient expenditure.

This amendment gives effect to the ACCC's recommendation at page 171 of its 2016 *Review of the Water Charge Rules: Final Advice* that Schedule 2 (calculation of the regulatory asset base) should be amended to provide that actual capital expenditure in relation to the following projects may not be rolled into the regulatory asset base if the ACCC is not satisfied that the capital expenditure was prudent and efficient:

- i. a major project not previously approved; or
- ii. a project whose scope as undertaken materially differed from what was approved;
- iii. or a project on which expenditure materially exceeded the amount previously approved;

The ACCC considered at page 171 of its 2016 *Review of the Water Charge Rules: Final Advice* that such ex-post (after the fact) reviews may prevent inefficient investments, or overinvestments, being passed through to customers. The ACCC noted that without review it is possible that the operator may over-spend by incurring capital expenditure 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 regulatory asset base at the start of the next regulatory period. Users would then pay charges that incorporate the capital costs for inefficient investments for the remainder of the asset's life.

The ACCC advised that 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 capital expenditure to be excluded from the regulatory asset base and hence not inflate future charges. This would apply the same principle to historic capital expenditure as the regulator applies when assessing the efficiency of forecast capital expenditure.

Item 95 amends the definition of E in paragraph 1(a) of Schedule 2 by omitting the words 'in the case of the last year of the preceding period' and substituting them with the words 'where relevant'.

The effect of this amendment is that it provides that **E** is the actual (or, where relevant, forecast) revenue received by the operator from disposal of assets used to provide infrastructure services in the preceding period and not just the last year of the preceding period. See also item 86, clause 1AA of Schedule 1.

Item 96 amends clause 2 of Schedule 2. Clause 2 of Schedule 2 relates to the determination of the regulatory asset base for a regulatory period after the first Part 6 regulatory period.

Item 96 repeals the definitions of **A** and **B** in clause 2 of Schedule 2 and substitutes them with the following definitions.

A is the regulatory asset base of the operator determined under this Schedule in respect of the preceding regulatory period as calculated under either clause 1 or this clause, and adjusted as appropriate by replacing any forecast amounts in the calculations of that asset base by the amounts actually spent or received.

B is the total of the actual (or, in the case of the last year of the preceding regulatory period, forecast) capital expenditure on assets used by the operator to provide infrastructure services (net of actual customer and government capital expenditure contributions) in respect of each year of the preceding regulatory period, other than any expenditure that:

- (a) was made in relation to:
 - (i) a major project not previously approved; or
 - (ii) a project whose scope as undertaken materially differed from what was approved; or
 - (iii) a project on which expenditure materially exceeded the amount previously approved; and
- (b) that the ACCC is not satisfied was prudent and efficient expenditure.

This allows the ACCC to make an ex-post (after the fact) review of capital expenditure. The ACCC considered at page 171 of its 2016 *Review of the Water Charge Rules: Final Advice* that allowing ex-post reviews of capital expenditure may prevent inefficient investments, or overinvestments, being passed through to customers. Without review it is possible that the operator may over-spend by incurring capital expenditure that would not have been approved as efficient if considered by the regulator at the initial determination, and that this capital expenditure would automatically roll into the regulatory asset base at the start of the next regulatory period. Users would then pay charges that incorporate the capital costs for inefficient investments for the remainder of the asset's life.

The ACCC also considered that 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 capital expenditure to be excluded from the regulatory asset base and hence not inflate future charges. This would apply the same principle to historic capital expenditure as the regulator applies when assessing the efficiency of forecast capital expenditure (see item 87, clause 4(1) of Schedule 1).

Item 97 amends the definition of **D** in clause 2 of Schedule 2 by omitting the words 'in the case of the last year of the preceding regulatory period,' and inserting the words 'where relevant,' in their place.

The effect of this amendment is that it provides that **D** can include forecast revenue from disposal of assets used to provide infrastructure services in place of actual revenue for any year of the preceding regulatory period where appropriate, not just the last year of the preceding period.

This amendment is consistent with the amendment made by item 86, inserting clause 1AA in Schedule 1, which requires operators to provide forecast information where actual information is not available.

Item 98 inserts clause 3, which contains the heading ‘approved capital expenditure project’ after clause 2 of Schedule 2

Clause 3 provides that for the purposes of calculating **C** in clause 1 or **B** in clause 2, a capital expenditure project proposed by an infrastructure operator should be taken to have been approved to the extent that its scope and cost were accepted by a State agency or the ACCC in forecasting the amount of capital expenditure to be used when approving, determining or varying the operator’s infrastructure charges.

This amendment gives effect to the ACCC’s intention, as set out on page 171 of their advice, that any review of past capital expenditure should not require a detailed reconsideration of all capital expenditure items, as actual capital expenditure 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 capital expenditure.

Item 99 amends subclause 3(1) of Schedule 3 by omitting the words ‘years financial years’, and substituting the words ‘financial years’. This amendment was made to improve clarity and does not change the meaning of the subclause.

Item 100 amends paragraph 3(1)(b) of Schedule 3 by omitting the words ‘assets for’ and substituting them with the words ‘assets used for’. This amendment was made to improve clarity and does not change the meaning of the subclause.

Item 101 amends paragraph subclause 4(1) of Schedule 3 by omitting the words ‘years financial years’ and substituting the words ‘financial years’. This amendment is made to improve clarity and does not change the meaning of the subclause.

Item 102 repeals schedules 4 and 5 of the *Water Charge (Infrastructure) Rules 2010* because these schedules are related to Part 9 of the *Water Charge (Infrastructure) Rules 2010* which is repealed by the Amendment Rules by item 85.

Part 2— Multiple amendments

Water Charge (Infrastructure) Rules 2010

Item 103 provides that the word ‘applicant’s’ is omitted wherever it occurs and substituted with the words ‘Part 6 operator’s’ in the following provisions:

- (a) paragraphs 28(a) and 29(2)(a);
- (b) subrule 29(3);
- (c) paragraph 36(a);
- (d) subrule 43(1).

This is a minor drafting change to ensure consistency within the *Water Charge Rules 2010*.

Item 104 provides that the words ‘the initial period or’ are omitted wherever they occur in the following provisions:

- (a) Schedule 1, paragraph 5(a);
- (b) Schedule 1, paragraph 6(a);
- (c) Schedule 1, paragraph 7(a);
- (d) Schedule 1, paragraph 10(a);
- (e) Schedule 1, paragraph 11(a);
- (f) Schedule 1, clause 12.

These amendments are consequential to the repeal of the definition of ‘initial period’ in subrule 3(1) (see item 10). The term ‘initial period’ is repealed because it relates to the transitional arrangements which applied to Part 6 operators under the *Water Charge (Infrastructure) Rules 2010* at the commencement of those rules. All references to the ‘initial period’ are now redundant.

Item 105 provides that the word ‘provide’ is omitted and substituted with the words ‘give the ACCC’ wherever the word provide occurs in the following provisions:

- (a) rule 26;
- (b) rule 35;
- (c) rule 41;
- (d) rule 47.

This change reflects that the ACCC is the sole regulator under Part 6. See item 44.

Item 106 provides for amendments of listed provisions as they relate to regulated charges.

Item 106(1) provides that the words ‘regulated charges’ are omitted and the words ‘infrastructure charges’ are inserted in their place wherever they occur in the following provisions:

- (a) subrule 3(1) (paragraph (d) of the definition of application period);
- (b) paragraphs 8(3)(a) and 9(13)(a) and (b);
- (c) Part 3 (heading);
- (d) rule 10 (including the heading);
- (e) Part 6 (heading);
- (f) Division 2 of Part 6 (heading);
- (g) rule 26;
- (h) paragraph 28(a);
- (i) rule 29;
- (j) subrule 31(1);
- (k) subrule 33(3);

- (l) Division 3 of Part 6 (heading);
- (m) rule 34 (including the heading);
- (o) rule 35;
- (p) rule 36;
- (q) rule 37 (including the heading);
- (r) subrules 38(1) and (3);
- (s) rule 39 (including the heading);
- (t) rule 40;
- (u) subrule 44(1);
- (v) Part 7 (heading);
- (w) Division 2 of Part 7 (heading);
- (x) subrule 46(1);
- (y) paragraph 48(a);
- (z) rule 49 (including the heading);
- (za) rule 50 (heading);
- (zb) subrule 50(1);
- (zc) subrule 51(1);
- (zd) subparagraph 54(2)(c)(ii);
- (ze) paragraph 54(4)(b);
- (zf) Schedule 1, clauses 2 and 3;
- (zg) Schedule 1, clause 12 (not including the heading);
- (zh) Schedule 3, clause 1 (not including the heading);
- (zi) Schedule 3, clause 3 (including the heading);
- (zj) Schedule 3, subclause 4(2).

These changes are consequential to amendments made by items 9 and 13.

Item 106 (2) provides that the words ‘a regulated charge’ are omitted and substituted with the words ‘an infrastructure charge’ wherever the words ‘a regulated charge’ occur in subrule 8(3). These changes are consequential to amendments made by items 9 and 13.

Item 106 (3) provides that the words ‘the regulated charge’ are omitted and the words ‘the infrastructure charge’ are substituted in their place wherever they occur in paragraph 8(3)(b).

Item 106 (4) provides that the words ‘Regulated charges’ are omitted and the words ‘Infrastructure charges’ are inserted in their place wherever they occur in the headings to each of the following provisions:

- (a) Schedule 1, clause 12;

(b) Schedule 3, clause 1.

Item 107 provides that the word ‘Regulator’ and the word ‘Regulator’s’ are omitted and the word ‘ACCC’ or the word ‘ACCC’s’ are inserted in their place as appropriate wherever they occur in the following provisions:

- (a) subrule 3(1) (paragraph (d) of the definition of ‘application period’);
- (b) paragraph 9(13)(b);
- (c) rule 26 (including the heading);
- (d) rule 27 (including the heading);
- (e) rule 28 (including the heading);
- (f) rule 29;
- (g) rule 31 (including the heading);
- (h) subrule 33(3);
- (i) rule 34 (including the heading);
- (j) rule 35 (including the heading);
- (k) rule 36 (including the heading);
- (l) rule 37 (including the heading);
- (m) rule 38;
- (n) subrule 39(2);
- (o) subrule 40(1);
- (p) rule 41 (including the heading);
- (q) rule 42 (including the heading);
- (r) rule 43 (including the heading);
- (s) rule 44 (including the heading);
- (t) rule 46 (including the heading);
- (u) rule 47 (including the heading);
- (v) rule 48 (including the heading);
- (w) rule 49 (including the heading);
- (x) rule 50 (including the heading);
- (y) rule 51 (including the heading);
- (z) rule 53 (including the heading);
- (za) rule 54 (including the heading).

This change reflects that the ACCC is the sole regulator under Part 6. See item 44.

Item 108 provides for amendments to listed provisions as they relate to causing a notice to be made available.

Item 108(1) provides that the words ‘cause the notice, and the reasons for its decision, to be made available’ are omitted and the words ‘publish the notice and the reasons for its decision’ are inserted in their place wherever they occur in subrule 31(2). This change is a minor change for consistency across the *Water Charge Rules 2010*.

Item 108(2) provides that the words ‘cause the notice, and the reasons for its decisions, to be made available’ are omitted and the words ‘publish the notice and the reasons for its decisions’ are inserted in their place wherever they occur in the following provisions:

- (a) subrule 38(2);
- (b) subrule 44(2);
- (c) subrule 51(2).

Item 108(3) provides that the words ‘cause a copy of the notice to be made available’ are omitted and the words ‘publish the notice’ are inserted in their place wherever they occur in each of the following provisions:

- (a) subrule 37(6);
- (b) subrule 50(4).

Item 108(4) provides that the words ‘cause a copy of the notice to be available’ are omitted and the words ‘publish the notice’ are inserted in their place in subrule 43(4).

Item 109 provides that the words ‘or after’ are omitted wherever they occur in the following provisions:

- (a) subrule 31(2);
- (b) subrule 38(2);
- (c) subrule 44(2);
- (d) subrule 51(2).

These changes enhance the timeliness of the regulator’s publication of its decision.

Item 110 provides for amendments of listed provisions in Part 9.

Item 110(1) provides that the words ‘Part 6, 7 or 9’ are omitted and the words ‘Part 6 or 7’ are inserted in their place wherever they occur in the following provisions:

- (a) subrules 53(1) and (2);
- (b) paragraph 54(1)(a).

The amendments made by item 110(1) are consequential to the repeal of Part 9. See item 85.

Item 110 (2) provides that the words ‘or making a decision under Part 9’ are omitted wherever they occur in the following provisions:

- (a) subparagraph 54(2)(c)(ii);
- (b) paragraph 54(4)(b).

The amendments made by item 110(2) are consequential to the repeal of Part 9. See item 85.

Item 111 provides that the words ‘has the meaning given by’ are omitted and the words ‘: see’ are inserted in their place wherever they occur in the following provisions:

- (a) subrule 3(1) (definition of *Part 6 operator*);
- (b) subrule 3(1) (definition of *Part 7 operator*).

Item 112 provides that the words ‘Internet site’ are omitted and the word ‘website’ is inserted in their place wherever they occur in the following provisions:

- (a) subrule 9(12);
- (b) paragraph 9(13)(b);
- (c) rule 27;
- (d) paragraph 28(b);
- (e) subrule 31(2);
- (f) paragraph 36(b);
- (g) subrule 37(6);
- (h) subrule 38(2);
- (i) rule 42;
- (j) subrule 43(4);
- (k) subrule 44(2);
- (l) paragraph 48(b);
- (m) subrule 50(4);
- (n) subrule 51(2).

This amendment is made to provide consistency across the Statute Book.

Schedule 2—Repeals

Item 1 of Schedule 2 repeals the *Water Charge (Planning and Management Information) Rules 2010* and item 2 of Schedule 2 repeals the *Water Charge (Termination Fees) Rules 2009*. Some provisions from these rules are incorporated by the Amendment Rules into the *Water Charge Rules 2010*.

These items give effect to the ACCC's advice that the three sets of water charge rules should be combined into a single instrument by incorporating relevant provisions of the *Water Charge (Planning and Management Information) Rules 2010* and the *Water Charge (Termination Fees) Rules 2009* (and then repealing those instruments), and amending existing provisions in the *Water Charge (Infrastructure) Rules 2010* and renaming it the *Water Charge Rules 2010*.

In terms of impact, infrastructure operators benefit from more streamlined regulatory requirements. Operators no longer have to familiarise themselves with three separate sets of rules. All of the requirements are in one place, and the requirements themselves are standardised and consolidated.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Water Charge Amendment Rules 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Amendment Rules is to amend the water charge rules to implement certain recommendations made by the Australian Competition and Consumer Commission (ACCC) in its *Review of the Water Charge Rules: Final Advice*. The changes to the rules will increase transparency for customers by making it easier for them to identify what they need to pay and why. For operators, the changes will streamline and standardise regulatory requirements.

Human rights implications

The amendments in this Schedule have been considered against each of the seven core international human rights treaties. The Amendment Rules engage the right to an adequate standard of living and the right to health in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to an adequate standard of living and to the continuous improvement of living conditions is protected in Article 11 of the ICESCR. The right to the highest attainable standard of physical and mental health is protected in Article 12 of the ICESCR. The Committee on Economic, Social and Cultural Rights, established to oversee the implementation of the ICESCR, has interpreted these articles as including a human right to water which encompasses an entitlement to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’ (CESCR General Comment No.15: The Right to Water E/C 12/2002/11).

Section 10 of the *Water Act 2007* sets out the basis on which it deals with water charges relating to water access rights, irrigation rights and water delivery rights in relation to the resources of the Murray-Darling Basin (the Basin). Those bases include the promotion of more efficient use of the Basin water resources, their continued availability and health, the health of the associated environmental assets, and the economic and social wellbeing of the communities in the Basin. The Amendment Rules are consistent with, respect and protect the human right to water by improving the operation and effectiveness of the management of water resources.

Conclusion

The Amendment Rules are compatible with human rights.

The Hon. David Littleproud MP
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