

## WATER CHARGE (TERMINATION FEES) RULES 2009

I, the Minister for Climate Change and Water, having regard to advice given by the Australian Competition and Consumer Commission, make the following Rules under section 92 of the *Water Act 2007*.

Dated:

---

### Part 1 Preliminary

#### 1 Name of Rules

These Rules are the *Water Charge (Termination Fees) Rules 2009*.

#### 2 Commencement

- (1) Part 1 and rule 8 commence on the day after these Rules are registered.
- (2) The remaining provisions of these Rules commence on 1 July 2009.

#### 3 Definitions

*Act* means the *Water Act 2007*.

*business day* does not include a Saturday, Sunday or day that is a public holiday.

*civil penalty* means a civil penalty within the meaning of Division 4 of Part 8 of the Act.

*Note:* Subsection 92(9) of the Act provides that the civil penalty for a contravention of a provision of water charge rules is 200 penalty units.

Subsection 147(3) of the Act provides that the pecuniary penalty for a contravention of a civil penalty provision must not exceed:

- (a) if the wrongdoer is an individual—the relevant amount specified for the civil penalty provision; or
- (b) otherwise—an amount equal to 5 times the amount of the relevant amount specified for the civil penalty provision.

*contract* includes agreement;

*right of access*, in relation to an irrigation infrastructure operator's irrigation network, includes a right to the delivery of water and a right to the drainage of water through that network.

*terminating irrigator* means—

- (a) a person who terminates or surrenders the whole or a part of a right of access to an irrigation infrastructure operator's irrigation network or services provided in relation to such a right by notice in writing given to the operator; or

- (b) a person whose right of access to an irrigation infrastructure operator's irrigation network or services provided in relation to such a right is terminated by notice in writing given by the operator in accordance with a contract or arrangement applicable to the right on the grounds that the person is in breach of the person's obligations under the contract or arrangement.

***total network access charge***, for the purposes of the calculation of a fee under rule 7 in respect of the termination or surrender of a right of access to an irrigation infrastructure operator's irrigation network, means the total amount payable in respect of a financial year by a terminating irrigator, including amounts payable in respect of the recovery of expenditure on capital works, but does not include—

- (a) any amount calculated by reference to the number of units or volume of water actually delivered to the terminating irrigator; or
- (b) if a service for the storage of water is provided in addition to the service for the delivery of water, any amount in respect of the service for the storage of water; or
- (c) any amount imposed as a fee in respect of the costs of connecting, or disconnecting, the terminating irrigator to the operator's irrigation network; or
- (d) any amount that exceeds an amount based on the recovery of the costs (whether recurrent or capital) incurred by the operator in relation to the provision of the right of access or services provided in relation to that right; or
- (e) if a fee payable under a contract is approved under rule 8, any amount payable under the contract in respect of the recovery of expenditure on capital works relating to the operator's irrigation network carried out, or to be carried out, within 5 years after the contract was entered into.

#### **4 Right of access not terminated or surrendered by transfer or assignment**

For the purposes of these Rules, a person who transfers or assigns to another person the whole or a part of a right to access to an irrigation infrastructure operator's irrigation network does not, by reason only of the transfer or assignment, terminate or surrender the whole or a part of the right of access or services provided in relation to that right or a part of that right.

### **Part 2 Certain fees prohibited**

#### **5 Prohibition of certain fees and charges**

- (1) Except as expressly authorised under Part 3, an irrigation infrastructure operator must not impose, demand or receive, or cause to be imposed, demanded or received, a fee, charge or payment of any kind for or in respect of the termination or surrender of the whole or a part of a right of access to the operator's irrigation network or of services provided in relation to that right or a part of that right.

Civil penalty: 200 penalty units.

(2) Subrule (1) does not apply to—

- (a) fees authorised under the *Water Market Rules 2009*; or
- (b) fees imposed, demanded or received in respect of the termination or surrender, *before 1 July 2009*, of the whole or a part of a right of access to the operator's irrigation network or of services provided in relation to that right or a part of that right.

### **Part 3            Termination fees**

#### **6    *Termination fee may be imposed in certain circumstances***

(1) An irrigation infrastructure operator may impose a fee calculated in accordance with rule 7 if—

- (a) a person who holds a right of access to the operator's irrigation network terminates or surrenders the whole or any part of that right or services provided in relation to that right by notice in writing given to the operator; or
- (b) the operator, by notice in writing given to a person who holds a right of access to the operator's irrigation network, terminates the whole or any part of that right or services provided in relation to that right in accordance with a contract applicable to the right on the grounds that the person is in breach of the person's obligations under that contract.

(2) Subrule (1) does not apply—

- (a) if—
  - (i) the holder of the right of access to an irrigation infrastructure operator's irrigation network 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 a part of the right is not specified in any contract or arrangement between the holder and the operator; or
- (b) if the holder of the right of access to an irrigation infrastructure operator's irrigation network—
  - (i) is provided by the operator with a service for the storage of water in addition to the service for the delivery 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.

**7 Calculation of termination fee**

A fee imposed by an irrigation infrastructure operator under subrule 6(1) must not exceed—

- (a) the amount determined by multiplying by 10—
  - (i) where the whole of a right of access, or services provided in relation to the whole of such a right, are terminated or surrendered, the total network access charge payable to the operator by the holder of the right in respect of the financial year in which notice of termination or surrender is given; or
  - (ii) where a part of a right of access, or services provided in relation to a part of such a right, are terminated or surrendered, the proportion of the total network access charge payable to the operator by the holder of the right in respect of the financial year in which notice of termination or surrender is given, being the proportion that is applicable to that part of the right; or
- (b) if the fee for the termination or surrender of a right of access or a part of a right of access, or of services provided in relation to the whole or a part of such a right, are provided for in a contract or arrangement between the operator and the holder of the right, the fee determined in accordance with the contract—

whichever is the lesser.

**8 Approval of additional fee payable under certain contracts relating to capital works**

(1) If, under a contract between an irrigation infrastructure operator and one or more holders of rights of access to the operator's irrigation network in relation to the carrying out, within 5 years after the entering into of the contract, of capital works relating to the irrigation infrastructure operator's irrigation network, provision is made for the payment by a terminating irrigator of a fee relating to the recovery of that capital expenditure, a party to the contract may, within the period referred to in subrule (2), apply to the ACCC for approval of that fee as a fee payable by each terminating irrigator in addition to the fee determined under rule 7.

- (2) The period within which an application may be made under subrule (1) for the approval of a fee under a contract referred to in that subrule is—
  - (a) the period commencing on the day after these Rules are registered and ending at the expiration of 6 months after that day; or

- (b) the period of 3 months after the date on which the contract was entered into—

whichever is the later.

(3) If—

- (a) an application is made to the ACCC under subrule (1) for approval of the fee as determined in accordance with a contract referred to in that subrule; and

- (b) the ACCC is satisfied that the contract—
- (i) relates to, or is made in anticipation of, the carrying out by the irrigation infrastructure operator, within 5 years after the contract is entered into, of capital works relating to the operator's irrigation network; and
  - (ii) provides for fees payable for access to the operator's irrigation network by the holders of rights of access that reasonably relate to the recovery by the operator of expenditure on those capital works in an amount not exceeding the actual, or a reasonable estimate of, expenditure by the operator; and
  - (iii) provides for a fee payable to the operator by a terminating irrigator that was agreed by each party to the contract in the course of fair and reasonable negotiation, is clearly stated and is not subject to variation without the agreement of the holders of the rights of access; 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, in accordance with this rule, and having regard to the water charging objectives and principles, approves the fee referred to in subparagraph (b)(iii)—  
the fee is payable by each terminating irrigator.
- (4) If a person makes an application to the ACCC under subrule (1) for approval of a fee determined in accordance with a contract referred to in that subrule and provides the ACCC with—
- (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 irrigation network 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—  
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.

- (5) 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).
- (6) In calculating a period of 30 business days referred to in subrule (5), 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.
- (7) 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—
- the period of 30 business days referred to in subrule (5) is extended by a further period of 30 business days.

**9 *Liability to pay termination fee***

- (1) A person who, by notice in writing given to an irrigation infrastructure operator, terminates or surrenders the whole or any part of a right of access, or services provided in relation to the whole or a part of a right of access—
- (a) unless subrule 6(2) applies, must pay the fees (if any) imposed by the operator under rule 7; and
  - (b) if any fees are payable by that person under rule 8, must pay those fees.
- (2) A person whose right of access, or services provided in relation to a right of access, are terminated in whole or in part by an irrigation infrastructure operator by notice in writing given to the person—
- (a) unless subrule 6(2) applies, must pay the fees (if any) imposed by the operator under rule 7; and
  - (b) if any fees are payable by that person under rule 8, must pay those fees.

**Part 4            Disconnection fee**

**10 *Disconnection fee***

- (1) Subject to subrule (2), nothing in these Rules prevents an irrigation 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 irrigation network and the infrastructure of a person who holds or has held a right of access to that irrigation network.

- (2) A fee imposed for the purposes of subrule (1) must be identified as a disconnection fee, whether or not it is payable at the same time as a fee under Part 3.

**Part 5            General**

**11 *Right to terminate right of access not affected***

Nothing in these Rules affects the right of an irrigation infrastructure operator to terminate the whole or any part of a right of access to the operator's irrigation network or services provided in relation to such a right in accordance with a contract or arrangement applicable to that right or those services but a fee, charge or payment of any kind is not payable in respect of such a termination except as expressly authorised under Part 3.

DRAFT