Level 17, Casselden
2 Lonsdale Street
Melbourne Vic 3000

GPO Box 520
Melbourne Vic 3001

tel: (03) 9290 1800

www.accc.gov.au

Our ref: PRJ1003052
Contact officer: Megan Utter
Contact phone: (03) 9290 1467

25 September 2018

Toni Radcliffe
Senior Policy Officer
Delivery Share Review
Department of Environment, Land, Water & Planning
Level 12
8 Nicholson Street
East Melbourne VIC 3002
Rural.Water@delwp.vic.gov.au

Dear Ms Radcliffe

Victorian Delivery Share Review: Preliminary Findings Report

I note the current Victoria Delivery Share Review process underway. Below we set out some points related to termination fees for consideration in finalising your review. These comments reinforce previously published ACCC documents.

The Water Charge (Termination Fees) Rules 2009 set the maximum termination fee charge

The Water Charge (Termination Fees) Rules set the maximum termination fee that can be charged at 10 times the total network access charge (not including GST). However, infrastructure operators are not required to charge a termination fee. Infrastructure operators can and do use termination fee discounts / waivers as a strategy to encourage disconnection to facilitate network rationalisation or to encourage new customers to join the network.

The ACCC holds the view that it is reasonable to maintain the multiple at 10 times at present, but has noted that there may be cause to re-visit this parameter in future, depending on developments in the sector over time (ACCC (2016) *Review of the Water Charge Rules Final Advice*, p.271). Circumstances that might trigger need for a review of the '10 times' rule could include where operators develop more complex service offerings, such as seasonal delivery shares, different delivery service level products and limited term contracts, if the obligation to pay termination fees is not expressly excluded in developing those options.

Within the Murray-Darling Basin (MDB), the Water Charge (Termination Fees) Rules 2009 prevent operators from increasing the termination fee beyond the current maximum, so an increase to the termination fee would currently be prohibited except to the extent that it was achieved through adjustments to fixed charges. Adjusting fixed charges would affect all delivery shareholders, not just terminating irrigators. This would require approval by the Essential Services Commission of Victoria (ESCV), which has been accredited by the ACCC to undertake pricing approvals or determinations for Victorian operators under the Water

Charge (Infrastructure) Rules. The ESCV must have regard to the ACCC's *Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010* (2011) in making its decision, including requirements that tariff structures give effect to the Basin water charging objectives and principles. In particular, the regulator would consider the cost allocation and cost reflectivity of any tariff structure(s) proposed by the infrastructure operators.

We note that the rules do not require operators to give the same offer to waive / discount termination fees to all customers.

The ACCC views favourably the development of water delivery share markets and access to information

The ACCC has observed that Irrigation Infrastructure Operators have an incentive to discourage delivery share trades, and, instead, benefit from termination fee payments by terminating customers and from issuing 'new' delivery shares (ACCC (2017), *Water Monitoring Report 2015-16*, p.24). The Basin Plan water trading rules offer some protection to an individual customer requesting a trade; however, the existence of willing buyers and sellers is not necessarily sufficient to ensure robust water delivery right markets emerge.

While we have reported growing water delivery right trade for MDB operators in recent years, the ACCC considers that requiring Victorian operators to actively encourage markets and to provide access to timely and accurate information on delivery share rights, obligations and options, would promote efficient use of water infrastructure. Such steps would facilitate informed decisions by operators' customers about managing their infrastructure access needs and financial liabilities, and help them to avoid unnecessary termination fees.

Currently, under the ACCC pricing principles, the ESCV, as the regulator in Victoria, must take into account the revenue received from termination fees in determining the revenue required from regulated charges. The ACCC's *Guide on the water charge (infrastructure rules) – pricing application for Part 6 operators* notes that operators (which include GMW and LMW) should provide the regulator with details of customer consultation on proposals for determining how revenue received from termination fees will be reflected in regulated charges. This does not of itself create an obligation to consult on such proposals and nor does it prescribe the information that should be provided to customers.

The ACCC recommended amendments to the water charge rules in its 2016 review (still under consideration) that would require infrastructure operators to, among other things, provide an 'information statement' to a customer considering termination. The information statement would be required to include details of whether the customer could trade their water delivery right and any rules governing that trade (see draft rule 74(5)).

We would encourage you, in making your recommendations, to take into account the benefits to operators of preserving the relative simplicity of current multiple used in calculating termination fees and the potential for additional transaction costs to result from the options adopted.

If changes to the basis for recovering the Infrastructure Access Fee or Delivery Share Fee were to be recommended, the recommendation should explore how the alternatives proposed would affect termination fees payable under the current (and proposed) approaches to calculating the maximum termination fee. We draw your attention to the ACCC's recommended changes to the permissible composition of the TNAC or termination fee base, designed to ensure that maximum termination fees recoup only an amount related to the unavoidable ongoing fixed costs an operator incurs after a customer terminates (see rule advice 6B in chapter 6 of the Final Advice).

We have observed that stakeholder feedback through the delivery share review forums and related media coverage highlighted some confusion about what the Water Charge (Termination Fees) Rules 2009 require of infrastructure operators. We would welcome an opportunity to work with you to help inform stakeholders about how these rules operate. We draw to your attention our annual water monitoring reports, available on the ACCC website, which contain data since 2009-10 with information about transformation, termination and trade of water delivery rights in the MDB that will be useful to your review and further engagement with stakeholders.

Further information of relevance to this Review

We have previously commented on issues relevant to the review, including in our advice on the ACCC's review of water charge rules (in particular, chapter 6). We provided this advice to the Minister for Agriculture and Water Resources in September 2016 and it is still under active consideration. Any recommended changes to the Victoria regulations should have regard to the current rules and be cognisant of changes that may be required should the ACCC's rule advice be accepted.

We also refer you to the following publications available on the ACCC website:

- Chapter 7 'Water delivery rights' in our Advice to the Murray-Darling Basin Authority on Water Trading Rules (March 2010)
- Section 2.3.2 'Improving markets for water delivery rights and other location-related rights' in our submission to the Issues Paper for Productivity Commission Inquiry into National Water Reform (April 2017)
- The ACCC's 'Guide to the water charge (termination fees) rules', October 2012.

Please do not hesitate to contact Megan Utter on (03) 9290 1467 with any queries or requests for further information.

Yours sincerely

R. Wright.

Robert Wright
General Manager
Insurance, Water and Wireline Markets Branch