



Australian
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Consumer
Commission

ACCC advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009

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Glossary and definitions

This glossary endeavours to provide practical meanings of terms; however, readers may need to consider the legal meaning of some terms under the *Water Act 2007* (the Act) and obtain legal advice on these definitions, if required.

Access fee	A fee imposed by an operator for the provision of access services. Access fees may include multiple components (e.g. a fixed fee component and a variable fee component).
Access service	Service provided by an operator for the transportation of water using the operator's irrigation network.
Act	The <i>Water Act 2007</i> (Cth).
Conveyance loss	Water lost in the operator's network through evaporation, seepage etc. This loss represents the difference between the volume of water that is diverted by an operator (from the water source) for distribution to customers and the volume of water actually delivered by the operator to customers. The loss is likely to be made up of both fixed and variable components, and can vary substantially between networks and between seasons.
Civil penalty	A court-ordered pecuniary penalty (sum of money) ordered to be paid where a person has been found to contravene the Rules.
Disconnection fee	A fee to recover the costs incurred in disconnecting an irrigator from an operator's irrigation network, but not the costs associated with reconfiguring or rationalising an irrigation network as a consequence of the disconnection.
Draft advice	ACCC draft advice on amendments to the <i>Water Market Rules 2009</i> and the <i>Water Charge (Termination Fees) Rules 2009</i> , December 2009
Exit fee	A fee levied by an operator on the transfer of a water entitlement out of the operator's network or irrigation district (excluding any fee associated with the costs of processing that transfer).
Flow rate	Rate of flow of water over a specified period of time (e.g. day).
Irrigation district	An area or district that is supplied with water via an infrastructure supply network (channels, pipes and other structures) operated and maintained primarily to supply water for use within that district.
Irrigation infrastructure operator	Any person who owns or operates water service infrastructure for the purpose of delivering irrigation water to another person (e.g. an irrigator).

Irrigation network	The delivery and drainage infrastructure of an operator.
Irrigation right	A right that a person has against an operator to receive water and that is not a water access right or a water delivery right.
Irrigator	A person who receives water delivery services from an operator. This may include a person who receives water for any purpose, such as for stock and domestic use.
Minister	The Minister for Climate Change and Water.
MI	Murrumbidgee Irrigation Limited
MIL	Murray Irrigation Limited
Operator	An irrigation infrastructure operator.
Rationalisation	A reorganisation to increase efficiency. May result in an expansion or reduction of network size or an alteration of strategy pertaining to particular irrigation districts within an irrigation network.
Rules	Water Charge (Termination Fees) Rules 2009 and Water Market Rules 2009.
Termination fee	Any fee or charge payable to an operator for either terminating access or surrendering a water delivery right.
Total network access charge	The amount on which the termination fee multiple is applied in order to calculate a maximum termination fee. The total network access charge is the sum of all fixed access fees otherwise payable by an irrigator in a financial year for access to an operator's irrigation network, excluding connection/disconnection fees and fees under approved contracts.
Trade	Includes transfer.
Transformation arrangement	Process by which an irrigator permanently transforms their entitlement to water under an irrigation right against an operator into a water access entitlement held by the irrigator (or anybody else), thereby reducing the share component of the operator's water access entitlement.
Transitional period	The period of time between the date of the registration of the Rules and the date the Rules come into full effect. For WMR, the period of time between 23 June 2009 and 31 December 2009. For WCTFR, the period of time between 23 June 2009 and 31 August 2009.

Water access entitlement	A perpetual or ongoing entitlement, by or under a law of a state, to exclusive access to a share of the water resources of a water resource plan area.
Water access right	Any right conferred by or under a law of a state to hold water from a water resource or to take water from a water resource. This includes stock and domestic rights, riparian rights, a water access entitlement, a water allocation and any other right relating to the taking or use of water.
Water allocation	The specific volume of water allocated to a water access entitlement in a given season, defined according to rules established in the relevant water plan.
Water delivery right	A right to have water delivered by an operator.
Water right	Any right to hold or take water from a water resource, akin to a property right over water. This may be a statutory right or a right against an operator's water access entitlement.
WCTFR	Water Charge (Termination Fees) Rules 2009.
WCTFR Advice	ACCC advice to the Minister for Climate Change and Water on Water Charge (Termination Fees) Rules, December 2008.
WMI	Western Murray Irrigation Limited
WMR	Water Market Rules 2009.
WMR Advice	ACCC advice to the Minister for Climate Change and Water on Market Rules, December 2008.
Water service infrastructure	Infrastructure for the storage, delivery or drainage of water.

Summary of ACCC's Final Recommendations

The ACCC's final recommendations in relation to the Water Market Rules 2009 (WMR) are outlined in Box 1.

Box 1: ACCC final recommendations – WMR

1) Murray Irrigation Limited's variation of its members' water entitlements

Minister's request: The ACCC advice on water market rules of December 2008 recommended that MIL realise the benefits of holding a separate conveyance entitlement and re-issue its water entitlements to account for this separation. On 1 July 2009, Murray Irrigation Limited (MIL) varied its members' irrigation rights to remove the 17 per cent conveyance component. Due to the specific circumstances of this case, MIL has expressed concern that it may not benefit from the protection against legal action that s 97(10) of the *Water Act 2007* (the Act) provides to operators who are adjusting their arrangements to comply with the water market rules. Advice is sought on an amendment to the rules to clarify that protection from legal action is provided to MIL in this particular case.

ACCC's recommendation: The ACCC recognises MIL's concerns regarding uncertainty and protection from legal action.

The ACCC recommends amending subrule 16 of the WMR, consistent with the Minister's request, to broaden the compliance requirement of the subrule to all actions of operators that prevent or unreasonably delay transformation arrangements.

This amendment should consequently provide MIL with the protection of ss. 97(10) of the Act as its action of reissuing irrigators' water entitlements was undertaken solely to comply with the WMR.

The recommended amendment is the better approach in addressing MIL's concerns because it will not unnecessarily impact on irrigators' rights of action beyond what is currently provided under the Act.

2) Rule 10 – operators seeking security from irrigators upon transformation

Minister's request: Rule 10(1), allowing operators to require security against payment of future access fees in certain circumstances, is based on delivery rights being defined in terms of volume of water. However, operators who have issued delivery rights on a flow-rate basis may not be entitled to require security under this rule. Advice is sought on an amendment to ensure all operators are treated the same way with regard to their ability to require security.

ACCC's recommendation: that subrule 10(1) be amended to include:

- a new 'number of units' subrule; and
- a new 'conversion formula' subrule

to ensure that operators providing delivery on a flow rate or other basis are able to require security from partially transforming irrigators in the circumstances specified in the subrule.

3) Rule 16 – actions or omissions that prevent or unreasonably delay transformation

Minister’s request: Rule 16(1) prevents actions, or failures to act, by operators that would prevent or delay transformation, but only where an application for transformation has been received. As such, the rule may not catch all actions by operators that could prevent or delay transformation. Advice on an amendment to the rules is sought to address this issue.

ACCC’s recommendation: The ACCC recommends that subrule 16(1) be amended to remove ‘the receipt of a request in writing’ for the transformation of the whole or a part of the irrigation right as a precondition for the operation of the subrule as was intended in ACCC’s final advice to the Minister on water market rules.

4) Rule 7(1) – details of irrigation rights

Minister’s request: Rule 7(1) requires operators to provide irrigators with details of their irrigation rights; however it does not expressly require operators to provide the necessary information to show how the rights are calculated. Advice is sought on an amendment to the rules to address this issue.

ACCC’s recommendation: The ACCC recommends that subrule 7(1)(c) of the WMR be amended to require an operator, upon receiving written notice from a holder of an irrigation right against the operator, to provide details of the irrigation right of that holder, including details as are reasonably necessary to confirm the accuracy of the calculation of that irrigation right.

5) Rule 7(1)(c) – reference to current financial year

Minister’s request: Rule 7(1)(c) states that an operator must provide an irrigator with the details of their irrigation rights. The drafting of the rule may suggest that the amount of water an irrigator is entitled to transform is determined by the amount of water received in the current year in annual allocations rather than the entire amount an irrigator is entitled to under their irrigation right, subject to the conveyance provisions. Advice is sought on an amendment to clarify that an irrigator is entitled to transform the entire amount of water they are entitled under their irrigation right, subject to the conveyance provision.

ACCC’s recommendation: The ACCC recommends that subrules 7(1)(c) and 7(2)(a) of the WMR be amended to remove the phrase ‘in respect of the current financial year’ to provide greater clarity regarding the application of the subrules to an irrigators’ irrigation right only.

The ACCC's final recommendations in relation to the Water Charge (Termination Fees) Rules (WCTFR) are outlined in Box 2.

Box 2: ACCC final recommendations – WCTFR

6) Rule 5 – imposition of access fees after payment of termination fee

Minister's request: While the policy position in the ACCC advice on water charge (termination fees) rules of December 2008 was that operators should not impose ongoing water access fees on irrigators who have terminated delivery and have paid a termination fee, this position may not be clear in the rules as currently drafted. Advice is sought on an amendment to the rules to address this issue.

ACCC's recommendation: The ACCC recommends amending the WCTFR, by including a new subrule 5(3), to expressly set out that when:

- a person's access (and services provided in relation to that access) is terminated or surrendered in whole or in part; and
- the person has paid the corresponding termination fee to the operator

the operator must not charge, and the person will cease to be liable to pay, any fees levied after the payment of the termination fee that relate to the access (and services provided in relation to that access) that has been terminated or surrendered.

The proposed amendment is also designated as a civil penalty provision.

7) Rule 7(a) – relevant point in time for applicable total network access charge

Minister's request: Rule 7 provides that termination fees are to be calculated in respect of the financial year in which the notice of termination is given. The rules may not provide sufficient certainty about the timeframe within which termination must occur following a notice of termination for the purposes of calculating the termination fee. Advice is sought on an amendment to the rules to address this issue.

ACCC's recommendation: The ACCC recommends an amendment to the WCTFR to ensure that the termination fee cap is calculated based on the TNAC payable by the irrigator as at the date the notice of termination or surrender is given or date specified in the notice for termination or surrender to take effect, whichever is later.

8) Rule 6(1)(b) – imposition of a termination fee upon the trade of water access right

Minister's request: The ACCC advice on water charge (termination fees) rules of December 2008 recommended that operators should not be able to require payment of termination fees (and compel termination of delivery rights) when water entitlements are traded out of an operator's network. However, the rules do not expressly prohibit this action. Advice is sought on an amendment to the rules to address this issue.

ACCC's recommendation: The ACCC recommends an amendment to subrule 6(1)(b) of the WCTFR to prevent operators from relying on this subrule to impose termination fees in the circumstances where the contract provision purportedly breached is a condition associated with the act of trading of the whole or a part of a water access right.

1. Introduction

In 2008, the Minister for Climate Change and Water, Senator Penny Wong, (Minister) wrote to the Australian Competition and Consumer Commission (ACCC) pursuant to ss. 93(1) and 98(1) of the *Water Act 2007* (the Act) requesting advice on the making of water market and water charge rules. The ACCC provided the Minister with final advice on the WMR and the WCTFR (collectively the Rules) in December 2008.

On 23 June 2009, the WCTFR and WMR commenced and have had full legal force since 1 September 2009 and 1 January 2010 respectively.

Consultation by the ACCC with stakeholders during the transitional period highlighted some issues, most of a technical nature, concerning the implementation of the Rules. Some operators have also raised these concerns directly with the Minister and the Department of Environment, Water, Heritage and the Arts.

The Minister's request for advice on proposed amendments does not impact on the continued operation of the WMR and WCTFR. The ACCC does not envisage that operators and irrigators will be required to alter their arrangements as envisaged by the Rules as a result of the amendments recommended in this advice. The ACCC will continue to monitor and enforce compliance with the Rules.

1.1. Minister's request for advice

On 30 September 2009, the Minister wrote to the ACCC requesting advice, pursuant to ss. 93(1) and 98(1) of the Act, on proposed amendments to the Rules by March 2010.

As outlined in the Minister's letter (attachment A) the proposed amendments relate to:

- amendments relating to Murray Irrigation Limited's (MIL's) recent reissuance of irrigators' water entitlements. MIL has expressed concern that it may not benefit from the protection against legal action that s. 97(10) of the Act provides to irrigation infrastructure operators (operators) (discussed in chapter 2).
- minor amendments to address technical issues with the Rules that have arisen in the implementation of the Rules during the transitional period (discussed in chapters 3 and 4).

The Minister also requested that the ACCC, in developing its advice, undertake the relevant consultations with Basin State Ministers, operators and the public to satisfy the consultation requirements as set out in regulations 4.05 and 4.18 of the Water Regulations 2008.

This document is the ACCC's final advice to the Minister on the proposed amendments to the Rules provided in accordance with ss. 93(2) and 98(2) of the Act.

1.2. Consultation process

Consultation with stakeholders is an important part of the ACCC's process in developing its advice to the Minister. The ACCC released a website notice and draft advice accompanied by draft amendments to the Rules for consultation to inform its advice to the Minister. Notice of these processes and relevant documents were released on the ACCC website (www.accc.gov.au/water). Notice was also given in national and regional papers.

Website notice

On 9 October 2009, the ACCC issued a media release and published a notice on its website advising all stakeholders of receipt of the Minister's request for advice on proposed amendments to the Rules.¹ The notice invited comments by 2 November 2009, particularly with regard to MIL's concern that it may not benefit from the protection against legal action provided by s. 97(10) of the Act.

Notice of the Minister's request and an invitation for comment in response to the notice was also given in 'Deniliquin Pastoral Times' (13 October 2009), 'Daily Advertiser' (15 October 2009); 'The Land' (15 October 2009); and 'Weekly Times' (21 October 2009).

The ACCC received seven submissions in response to the web and newspaper notices. These submissions are available on the ACCC website.

Draft advice to the Minister and draft amendments

On 10 December 2009, the ACCC released for consultation the draft amendments to the water market rules and water charge (termination fees) rules as well as draft advice to the Minister. The ACCC sought submissions by 8 February 2010.² The draft advice was released on the ACCC website and notice was given in 'The Canberra Times' (12 December 2009); 'The Australian' (12 December 2009); 'Mildura Sunraysia Daily' (12 December 2009); 'Wagga Daily Advertiser' (12 December 2009); 'Land Newspaper' (17 December 2009); 'The Weekly Times' (16 December 2009); 'Queensland Country Life' (17 December 2009); 'The Stock Journal' (17 December 2009); and 'The Deniliquin Pastoral Times' (18 December 2009).

The ACCC received 10 submissions in response to the draft advice. These submissions, and those received in response to the website notice, were considered by the ACCC in developing its final advice to the Minister and are available on the ACCC website.

¹ ACCC media release, *ACCC invites comments on proposed amendments to water market rules and water charge (termination fees) rules*, 9 October 2009, <http://www.accc.gov.au/content/index.phtml/itemId/896408/fromItemId/855279>.

² ACCC media release, *ACCC invites comments on draft advice to the Minister on amendment to water market rules and water charge (termination fees) rules*, 10 December 2009, <http://intranet.accc.gov.au/content/index.phtml/itemId/1115324>.

Informal consultation

Throughout the consultation process, the ACCC also undertook targeted informal consultations with stakeholders.

1.3. Considerations of final advice

In forming recommendations on the proposed amendments for the final advice, the ACCC considered:

- the provisions of the Act and the relevant Basin objectives and principles set out in Schedules 2 and 3 of the Act;
- the information provided by stakeholders during the consultation process;
- whether the recommended amendment is consistent with the policy intent of the ACCC's final advice in December 2008 to the Minister on water market rules (WMR Advice) and water charge (termination fees) rules (WCTFR Advice) as well as the existing Rules;
- whether the recommended amendment can be implemented;
- whether the recommended amendment is likely to have the effect of preventing or unreasonably delaying transformation of irrigation rights and/or trade of the water access entitlements;
- whether there is any new information available to the ACCC that warrants a departure from its position in the draft advice.

2. Murray Irrigation Limited's variation to its members' water entitlements

Minister's request for advice and concerns of MIL:

The ACCC advice on water market rules of December 2008 recommended that MIL realise the benefits of holding a separate conveyance entitlement and re-issue its water entitlements to account for this separation. On 1 July 2009, Murray Irrigation Limited (MIL) varied its members' irrigation rights to remove the 17 per cent conveyance component. Due to the specific circumstances of this case, MIL has expressed concern that it may not benefit from the protection against legal action that s 97(10) of the Water Act 2007 provides to operators who are adjusting their arrangements to comply with the water market rules. Advice is sought on an amendment to the rules to clarify that protection from legal action is provided to MIL in this particular case.

2.1 Need for amendment to the WMR

When MIL was privatised in 1995, irrigators in the district renounced their own statutory water licences to the NSW Government and MIL. MIL was then issued with a bulk water licence representing the sum of each individual's statutory water licence. The NSW Government also issued MIL with an additional volume of water equivalent to 17 per cent of the bulk water licence for conveyance losses.

MIL then granted each irrigator a water entitlement which included the additional amount MIL received from the NSW Government for conveyance losses. The ACCC understands that irrigators were issued with a share and water entitlement certificate at this time that outlined individual irrigators' share and water entitlement in units. The certificate also recorded the types of entitlements to which that individual's water entitlements related.³

In 2004, MIL's bulk supply licence was replaced with NSW water access licences (WALs) including two high security WALs, one general security WAL and one conveyance WAL. However, MIL chose not to reissue the water entitlements of individual irrigators to take account of this change, instead continuing to rely on the existing water entitlement contracts with their specified 17 per cent conveyance component. For further information about previous MIL entitlement arrangements, including a diagram explaining the transition to MIL's current licence holdings, see the ACCC's draft advice.

On 22 May 2009, MIL indicated in its newsletter to members that it intended to make an adjustment to its irrigators' water entitlements. The newsletter noted that following the adjustment to water entitlements members would receive 'at least the same volume

³ Murray Irrigation Limited notes on its website that prior to the reissuing of entitlements recognising the existence of conveyance losses, it had a maximum announced allocation of 83 per cent of entitlements and carryover was capped at 41 per cent of entitlements. When a member made an external permanent transfer of water entitlements out of its area, the company retained 17 per cent of the water entitlements. See Murray Irrigation Limited, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

of water as they receive under the present arrangements'. The newsletter also stated that:

The problem that the company is aiming to avoid arises when an individual water entitlements holder seeks to transform their water entitlements, inclusive of the transmission losses component, by reducing the company's entitlement under its water access licences. If that were permitted to occur, it would jeopardise the position of the remaining water entitlements holders.⁴

This statement was made in accordance with MIL's understanding and interpretation of the operation of the WMR as outlined in its further public document about the change to water entitlements published on 7 July 2009:

The making of the Rules by the Commonwealth Government in June 2009 created the situation where a Murray Irrigation water entitlements holder could convert **all** of their Murray Irrigation water entitlements (including the transmission losses component) to NSW general security water entitlements, therefore creating an inequitable situation which would place remaining irrigators in jeopardy.

...

Once the transition period set out in the Rules ended the company would have been unable to legally retain the 17% transmission losses component from an external permanent transfer. In effect individual members could have externally transferred (or transformed) more than their "share" of Murray Irrigation general security water access licence into a separate water access licence.⁵

On 1 July 2009, MIL exercised its rights under its water entitlements contract to vary unilaterally the entitlements of its members.⁶ This variation cancelled a portion of members' water entitlements and delivery entitlements previously attributable to conveyance losses (i.e. 17 per cent). The effect was to provide irrigators with a maximum allowable allocation of 100 per cent as compared to 83 per cent under the previous water entitlement arrangement.

Irrigation right definitional issues

Subrule 7(2) of the WMR allows an operator to reduce the volume of water to which an irrigator is entitled, for the purposes of transformation, by taking into account conveyance losses. However, subrule 7(3) of the WMR states that the operator can only make the reduction if it does not hold a separate conveyance water access entitlement. MIL suggests that it would not have been permitted under the Rules to withhold a portion of an irrigator's entitlement for conveyance because of the operation of subrule

⁴ Murray Irrigation Limited, Talking water – Proposed Extraordinary General Meeting cancelled, 22 May 2009, <http://www.murrayirrigation.com.au/files/3291515.pdf>.

⁵ Murray Irrigation Limited, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

⁶ Murray Irrigation Limited, web notice submission 6A, para. 5.4.

7(3).⁷ Accordingly, MIL appears to consider that an irrigator's irrigation right extends to the whole of its MIL water entitlement.

An irrigator's irrigation right is defined in s. 4 of the Act as a right a person has against an operator to receive water (that is not a water access right or a water delivery right).

MIL's submission to the web notice suggests that its interpretation of irrigation rights includes that part of MIL irrigators' water entitlement attributable to the conveyance component.⁸ If the definition of irrigation right extended to the whole of a MIL irrigators' water entitlement and the WMR permit that irrigator to transform the whole of their water entitlement this may lead to an unfair outcome, for example:

individual members could have externally transferred (or transformed) more than their "share" of Murray Irrigation general security water access licence into a separate water access licence.⁹

It remains unclear whether this interpretation is correct given the history of how irrigators' water entitlements were established and the fact that the additional water for conveyance purposes was gifted from the NSW Government to MIL.

A possible alternative interpretation is that MIL's water entitlement contracts with individual irrigators specifically excluded that portion of their water entitlement as conveyance loss water and that, as consequence, irrigators' irrigation rights do not include an entitlement to the conveyance component. That is, MIL irrigators may only ever have been 'entitled to receive' a volume of water net of conveyance.

On the basis of the second interpretation, MIL may have been in compliance with the WMR if it chose to take no action and did not cancel irrigators' water entitlements. In addition, it may not have been disadvantaged by the operation of subrule 7(3) of the WMR because if an irrigator applied for details of their irrigation right for the purposes of transformation, MIL may have been able to respond that the entitlement to water was net of the 17 per cent conveyance component. This is similar to MIL's trading policy: 'when a member made an external permanent transfer of water entitlements out of Murray Irrigation's area, the company retained 17% of the water entitlements.'¹⁰

It is unclear which interpretation of irrigation rights is correct in the MIL context. Irrespective of this, the adjustment to irrigators' water entitlements occurred as a result of the reissuing of water entitlements to comply with the WMR. The discussion that

⁷ Murray Irrigation Limited, web notice submission 6A, p. 3, para 5.2.

⁸ Murray Irrigation Limited, web notice submission 6A, p. 2, specifically, para. 4.2.

⁹ Murray Irrigation Limited, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

¹⁰ Murray Irrigation Limited, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

follows should assist in clarifying uncertainty and set out the ACCC's consideration of an amendment to address MIL's concerns.

The Act already provides protection to irrigation infrastructure operators under subsection 97(10). This section states:

No claim, action or demand may be made, asserted or taken against an irrigation infrastructure operator for anything done by the operator solely for the purpose of complying with water market rules.

The ACCC understands that these types of provisions are sometimes included in legislation to protect parties who are acting in compliance with their obligations under an Act or delegated legislation such as the WMR.

Subsection 97(10) of the Act contains a qualifier that the protection from legal action extends to actions undertaken 'solely for the purpose of complying with the water market rules'.

Other irrigation infrastructure experiences

The ACCC has consulted with the NSW Office of Water (NOW) about other NSW operators that hold separate conveyance licences and the circumstances surrounding the issuing of these licences. The NOW advised that the four major irrigation corporations¹¹ and Hay Private Irrigation District (Hay PID) hold a separate conveyance licence.¹² The NOW explained that conveyance licences were created at the commencement of Water Share Plans. Those licences held by the irrigation corporations and Hay PID represented the conversion of rights held under the previous *Water Act 1912* (NSW) and that water entitlements and final volumes of the conveyance licences were agreed as part of the development of the relevant Water Sharing Plan.

The ACCC contacted those operators holding a separate conveyance licence in October 2009 seeking the following information: the circumstances and details surrounding the issuing of their respective conveyance licences; whether their customers' water entitlements were varied subsequent to the issuing of their (i.e. the operators) conveyance licences; and if so, how and what mechanisms were used by the operator to vary its customers' water entitlements.

Murrumbidgee Irrigation Limited (MI) and Jemalong Irrigation Limited (JIL) were the only operators to respond to this request for information. They advised that at the time the conveyance component was added to the operators' licence and this component was kept separate from irrigators' water entitlements. They further commented that this had

¹¹ Namely, Murray Irrigation Limited, Murrumbidgee Irrigation Limited, Coleambally Irrigation Co-operative Limited and Jemalong Irrigation Limited.

¹² The NOW noted that Hay Private Irrigation District's conveyance licence was a small conveyance licence (1968ML).

not caused any difficulty in their relationships with irrigators. Specifically, MI submitted that at the time of privatisation:

it insisted that there be no adjustment to customer entitlements as a result of the transition to Member Contracts – the volumetric entitlement held by each customer remained unchanged. MI holds a separate WAL for its conveyance requirements. This situation mirrored the long standing arrangements where the operating entity was responsible for conveyance, separate to customers' water entitlements.¹³

Similarly, JIL noted that:

Jemalong Irrigation Ltd. was issued with a separate conveyance licence at privatisation in 1995. This licence has since been converted into a Water Access Licence. JIL's customers [sic] water entitlements were not varied with the issuing or conversion of these licences as JIL holds this entitlement over and above any members [sic] water entitlements.¹⁴

These examples suggest that MIL may have created a greater level of complexity in its arrangements with its irrigators by issuing water entitlements linked to its conveyance water that other operators have avoided. Information available on MIL's website states that:

At the time, issuing Murray Irrigation water entitlements inclusive of the transmission losses to members was considered the best way of protecting the transmission losses from changes to government policy.¹⁵

MIL has not provided any further information to the ACCC explaining the reasons why it chose to pass on the conveyance licence water to irrigators in the form of water entitlements at the time the NSW Government granted the additional water.

¹³ Murrumbidgee Irrigation Limited submission to web notice, p. 1. Murrumbidgee Irrigation also raised concerns regarding potential capital gains tax liability from the 'the requirement to separate [delivery entitlements] from [water entitlements]'. While this issue is outside the scope of the Minister's request for advice, the ACCC notes that on 2 December 2009, the Assistant Treasurer, Senator Nick Sherry and the Minister issued a joint press release announcing that the Government will widen the capital gains tax roll-over for water entitlements and water allocations stating:

this CGT roll-over will apply more broadly to any capital gains or losses arising directly from the ending of an irrigator's water entitlement and the issuing to the irrigator of a replacement water entitlement. The roll-over will cover a broader range of transactions - including pre transformation transactions. The roll over will also be available when water entitlements are unbundled.

For further information see:

<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/102.htm&pageID=003&min=njsa&Year=&DocType>

¹⁴ Jemalong Irrigation submission to web notice, p. 1.

¹⁵ Murray Irrigation Limited website info, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

Is MIL at risk of litigation because of its actions?

The reissuing of water entitlements is consistent with the ACCC's recommendations to the Minister in 2008 on WMR to increase transparency about irrigator's entitlements to water. MIL's actions are also consistent with the policy approach of the WMR which recognise that operators can withhold a portion of water for the purposes of conveyance losses. It was on the basis of increasing transparency that the ACCC's advice supported the reissuing of MIL's water entitlements.

As discussed above, the Act provides operators with protection from legal claims where operators undertake actions solely for the purpose of complying with the WMR. It is arguable whether MIL's action of reissuing water entitlements already attracts the operation of subsection 97(10). That is, there is no suggestion that MIL varied its entitlements contracts for any reason other than to comply with the WMR in a way that was fair to its irrigators (and avoided the prospect of MIL being unable to fulfil its contractual obligations to irrigators).

The Minister's request for advice refers to subsection 97(10) and specifically noted that MIL held a concern that it may not benefit from the protection afforded by the provision. Therefore it appears that there is a concern that the actions of MIL are not protected by subsection 97(10).

MIL's submission to the web notice

On 5 November 2009, MIL made a submission to the initial consultation process. MIL's submission outlined the history of MIL water entitlements and delivery entitlements and MIL's understanding of the operation of the WMR. The submission also highlighted MIL's concern that its actions may not be protected by subsection 97(10) of the Act. MIL's submission concluded by stating:

Murray Irrigation wishes to ensure the barring of claims, actions or demands against Murray Irrigation for anything done by it in following the ACCC's recommendation to realise the benefits of holding a separate conveyance WAL and reissue its irrigation rights to exclude the conveyance component.¹⁶

Correspondence with MIL irrigators and other stakeholders

MIL irrigator submissions¹⁷

The ACCC received six submissions from irrigators and other stakeholders in response to the web notice in addition to MIL's submission.

Mr Crowhurst submitted that he does 'not agree that the bar to legal claims be extended to all or any actions taken by operators such as MIL's recent action to re-issue water

¹⁶ Murray Irrigation Limited, web notice submission 6A, p. 4, para. 7.4.

¹⁷ On 30 November 2009 staff received correspondence from MIL in addition to their initial submission. MIL's letter was a response to those public submissions published on the ACCC website as submission 6B to the web notice.

and delivery entitlements.’ Mr Crowhurst expressed the opinion that his views are ‘shared by other entitlement holders, [but] unfortunately they are reluctant to go public about their views.’¹⁸

Mr Morton made a submission noting this ‘water is historically “owned” by customers.’¹⁹

A further two irrigator submissions were received in response to the draft advice relevant to the MIL amendment. Both irrigators had previously made a submission to the website notice. MIL irrigators noted that if MIL has legally reissued customer water entitlements for the purposes of complying with the WMR then it ‘should not need to seek further exemption from what is already given’ in the Act.²⁰ One irrigator noted that:

it is for the court to decide whether or not MIL has acted legally and no court would entertain frivolous or mischievous actions. No person or entity should be above the law and granted exemption from challenge.²¹

2.2 Draft advice recommendation and stakeholder response

In the draft advice the ACCC considered two approaches that could address MIL’s concern, namely:

- the ACCC could directly address MIL’s concern by amending rule 16 of the WMR to prohibit all actions an operator does or fails to do that prevent or unreasonably delay transformation arrangements; or
- protection to operators from legal action could be extended by inserting a bar to claims in the WMR similar to the bar to claims provided in subsection 97(10) of the Act.

The ACCC’s draft advice supported the first approach.

Proposed amendment to rule 16 of WMR

The ACCC considered MIL’s reissuance of water entitlements in the context of MIL’s interpretation of the WMR. MIL considers that if it did not undertake the reissuing of water entitlements, the last 17 per cent of entitlements may not have been able to be transformed because MIL’s water access licences would be exhausted. MIL notes this

¹⁸ Mr D Crowhurst, web notice submission 4, p. 1.

¹⁹ Mr J Morton, web notice submission 7, p. 1.

²⁰ Mr D Crowhurst, draft advice submission 4, p. 1., Mr J Morton, draft advice submission 2, p. 1.

²¹ Mr J Morton, draft advice submission 2, p. 1.

would be an unfair result and inconsistent with the policy objectives of the WMR generally.²²

Rules 16 and 17 of the WMR reflect the essence of the WMR as they are overarching prohibitions on the acts of operators that prevent or unreasonably delay transformation or trade of water access entitlements. The remaining rules regulate operators' conduct by restricting or permitting certain actions so that transformation arrangements are not prevented or unreasonably delayed.

Rule 16 of the WMR as currently drafted restricts the compliance requirement to actions of an operator that occur in response to an application for transformation. The effect of this rule is narrower than the ACCC's advice to the Minister on WMR. The Minister's request highlights this concern which is discussed specifically in this final advice at section 3.2.

The proposed amendment to rule 16 of the WMR broadens the scope and compliance requirement of the existing rule to relate to all conduct by an operator that may prevent or unreasonably delay transformation arrangements as was intended by the ACCC's WMR Advice.

The proposed amendment to rule 16 of the WMR provides an unambiguous obligation on MIL and all operators to do everything necessary to avoid the preventing or unreasonable delay of transformation arrangements. MIL describes its actions to reissue water entitlements as being undertaken so that the last 17 per cent of water entitlements were not prevented from being transformed.²³ Therefore, it is reasonable to argue that MIL undertook its actions to comply with the WMR, specifically rule 16 of the WMR (as proposed to be amended).

As noted above, there is no suggestion that MIL varied its entitlements contracts for any reason other than to comply with the WMR in a way that was fair to its irrigators. As a consequence, MIL should benefit from the protection from legal action already provided under subsection 97(10) as its action of reissuing irrigators' water entitlements was undertaken solely to comply with the WMR. It is the ACCC's view that the proposed amendment is the most appropriate response to MIL's concern that it does not currently benefit from the protection of subsection 97(10).

A number of submissions raised concerns with the proposed amendment to rule 16 of the WMR.²⁴ These concerns are specifically addressed in section 3.2 below.

²² Murray Irrigation Limited, Talking water – Proposed Extraordinary General Meeting cancelled, 22 May 2009, <http://www.murrayirrigation.com.au/files/3291515.pdf>

²³ Murray Irrigation Limited, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

²⁴ Murray Irrigation Limited, draft advice submission 3, p. 1., Murrumbidgee Irrigation Limited, draft advice submission 6, p. 3., NSW Irrigators Council, draft advice submission 5, p. 2–3., Bullatale

No stakeholder submissions to the draft advice commented on whether the proposed amendment to rule 16 of the WMR is an appropriate approach to directly address MIL's concerns. In its submission to the draft advice, MIL maintained its position that a bar to claims should be included in the WMR (discussed below).

Extending protection from legal action – a bar to claims amendment in the WMR

The ACCC recognises there are significant legal limits on what can be considered to be within the scope of the WMR. Guided by the requirements of section 13 of the *Legislative Instruments Act 2003*, the ACCC does not consider delegated legislation to be an appropriate avenue to extend the protections from legal action offered under the principal legislation. An amendment to the WMR that extends protection from legal action would have significant implications on individuals' rights of action beyond the protection already afforded by subsection 97(10) and as envisaged by the legislature.

As the WMR is a legislative instrument, the WMR is subject to review by the Senate Standing Committee on Regulations and Ordinances. The Senate Standing Order 23 relevantly provides:

- (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
- (3) The committee shall scrutinise each instrument to ensure:
 - (a) that it is in accordance with the statute;
 - (b) that it does not trespass unduly on personal rights and liberties;
 - (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
 - (d) that it does not contain matter more appropriate for parliamentary enactment.

The Senate Standing Committee has published a statement setting out, under the heads of review, the issues with which it will be concerned. Apart from being concerned with technical matters, the Senate Standing Committee is also concerned to protect personal rights and liberties. It does this by examining delegated legislation and other instruments to ensure that they:

- do not impose retrospective burdens on persons;

- do not allow executive interference with accepted rights such as freedom from invasion of property and privacy;
- do not give a public official subjective discretions;
- and provide for rights of appeal on the merits against executive decisions.²⁵

The ACCC considered the Senate Standing Committee's heads of review when assessing the appropriateness of whether to recommend a bar to claims WMR amendment to the Minister. An amendment to the WMR to remove an irrigator's right to take legal action is likely to be considered a significant trespass on their personal rights and liberties, that is, on the ability of an irrigator to pursue civil remedies against MIL. It is necessary to weigh this interference with personal rights against the interests of MIL as the beneficiary of such an amendment to the WMR.

In its submission to the draft advice, MIL claimed that:

by their nature, many of the WM Rules are a significant trespass on the personal rights and liberties of operators and irrigators. In our view, it is difficult to see why a bar to claims would trespass on personal rights and liberties any more than a number of other WM Rules which, for example, cut across pre-existing contractual arrangements between operators and irrigators.²⁶

In addition, Western Murray Irrigation Limited noted in its submission to the draft advice that 'the rules are skewed heavily to favour the individual against the collective which the infrastructure operators support.'²⁷

The WMR have limited operators' ability to impose unreasonable restrictions on irrigators' ability to realise the full benefits of their water rights. The WMR were developed having regard to the Basin water market and trading objectives and principles and necessarily required a balance of stakeholder interests. For example, the interests of the individual irrigator to have better opportunities to transform and trade were also considered in relation to the need to provide appropriate protection of third-party interests.²⁸

The draft advice concluded that as MIL is likely to already benefit from the protection of subsection 97(10) provided an amendment is made to rule 16 of the WMR; on

²⁵ D. Pearce, Rules, Regulation and Red Tape – Parliamentary Scrutiny of Delegated Legislation, at 86–87 <http://www.aph.gov.au/senate/pubs/pops/pop42/pearce.pdf> in *The Distinctive Foundations of Australian Democracy: Lectures in the Senate Occasional Lecture Series 2003–2004*, Papers on Parliament 42, December 2004 <http://www.aph.gov.au/senate/pubs/pops/pop42/pop42.pdf>

²⁶ Murray Irrigation Limited, draft advice submission 3, p. 2.

²⁷ Western Murray Irrigation, draft advice submission 10, p. 2.

²⁸ See Schedule 3, Basin water market and trading objectives and principles, Clause 3 (a) and (e) of the Act respectively.

balance, any gain to MIL in additional protection from legal action is significantly outweighed by the unnecessary imposition on irrigators' personal rights and liberties. In response to the draft advice, MIL submitted 'that the ACCC weigh the interests again and conclude that Murray Irrigation ought to have the benefit of a bar to claims for the reasons given in our public submission dated 5 November 2009.'²⁹ However, based on the above considerations, the ACCC maintains the view that it is inappropriate to amend the WMR to include a further bar to claims.

2.3 Final ACCC recommendation

As noted above, MIL may have been in compliance with the WMR if it had chosen to take no action and did not cancel irrigators' water entitlements as MIL irrigators may only ever have been 'entitled to receive' a volume of water net of conveyance. However, the ACCC recognises MIL's concerns regarding uncertainty and protection from legal action.

The ACCC recommends amending rule 16 of the WMR consistent with the Minister's request, to broaden the compliance requirement of the rule to all actions of operators that prevent or unreasonably delay transformation arrangements.

This amendment should consequently provide MIL with the protection of ss. 97(10) of the Act as its action of reissuing irrigators' water entitlements was undertaken solely to comply with the WMR.

The recommended amendment is the better approach in addressing MIL's concerns because it will not unnecessarily impact on irrigators' rights of action beyond what is currently provided under the Act.

²⁹ Murray Irrigation Limited, draft advice submission 3, p. 2.

3. Technical issues – Water Market Rules 2009

3.1 Rule 10(1) allowing operators to seek security from irrigators in certain circumstances

Minister's request for advice and subrule 10(1) of the WMR

The Minister's request for advice stated:

Rule 10(1), allowing operators to require security against payment of future access fees in certain circumstances, is based on delivery rights being defined in terms of volume of water. However, operators who have issued delivery rights on a flow-rate basis may not be entitled to require security under this rule. Advice is sought on an amendment to ensure all operators are treated the same way with regard to their ability to require security.

Subrule 10(1) of the WMR requires:

- (1) Where a person, by written notice given to an irrigation infrastructure operator under subrule 8(1), requires the continuation of a right to have water delivered by the operator after transformation of the whole or a part of an irrigation right and, after the transformation, either:
 - (a) the person ceases to hold any part of the irrigation right (except as provided in subrule 7(8)); or
 - (b) the person holds a part of that right but the volume of water to delivery of which the person is entitled under the water delivery right in respect of the current financial year (disregarding any constraints on delivery) is more than 5 times the volume of water that the person is entitled to receive in respect of that year under the part of the right held by the person (excluding, if the person holds a part of an irrigation right as provided in subrule 7(8), the volume of water taken to be the share of a fixed network loss);

the operator may, subject to this rule, require security to be given by the person for the payment of fees or charges for access to the operator's irrigation network for the delivery of water to the person after the transformation.

3.1.1 Need for amendment to the WMR

The threshold requirement of subrule 10(1)(b) of the WMR is expressed as a ratio between the amount of irrigation right and amount of delivery right when both of these rights are defined in terms of a volume of water.

The subrule, as currently drafted, applies to operators that define the delivery rights in terms of the volume of water a person is entitled to have delivered over a course of an irrigation season, but may not apply to those operators that define delivery rights on some other basis, such as a flow rate basis.

An amendment to subrule 10(1)(b) is needed to ensure that operators that provide delivery on a flow rate or other basis are entitled to require security from irrigators upon partial transformation of their irrigation rights.

3.1.2 Draft advice recommendation and stakeholder response

In the draft advice, the ACCC identified 2 options for a proposed amendment:

- Reasonably required threshold for when security can be requested
- Conversion formula

Consistent with the policy intent of the ACCC's WMR Advice, both options retain the 5:1 ratio threshold specified in the subrule 10(1)(b) of the WMR (as currently drafted). However, each option would require operators to undertake additional steps to express or convert the underlying entitlements (delivery rights or irrigation rights) to be in the same measuring units to ensure that the ratio can be applied.

Reasonably required threshold for when security can be requested

This approach proposed amending subrule 10(1)(b) to include a requirement that operators benchmark the delivery right a person requires to continue after transformation against the average delivery rights of other irrigators holding similar irrigation rights against the operator.

For the purpose of applying the proposed threshold, operators would be required to express the volume of water under the remaining part of an irrigators' irrigation right in terms of a 'delivery right reasonably required to provide the person in that year with an average standard delivery of the volume of water to which the person is entitled under the part of the irrigation right' ('reasonably required delivery right'). In determining what a reasonably required delivery right is, an operator would be required to have regard to delivery rights of holders of similar irrigation rights against the operator.

In order to determine whether the operator can require security from the person, the operator would be required to determine whether the delivery right (expressed on flow rate or other basis) the person has requested retaining following transformation is more than 5 times the reasonably required delivery right (also expressed on flow rate or other basis).

If the operator determines that the security threshold is satisfied and the operator intends to request security from the transforming irrigator in accordance with rule 10 of the WMR, the operator will be required to provide details in writing to the transforming irrigator that reasonably confirm the operator's assessment under subrule 10(1)(b) of the WMR that the operator is allowed to request security.³⁰

Conversion formula

This approach proposed retaining the threshold in subrule 10(1)(b) in its current form, and including a provision for operators providing delivery services on a non-volumetric

³⁰ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 27.

basis to nominally convert delivery rights expressed as flow rate or other basis into delivery rights expressed as volume of water. The proposed approach would require an operator to perform this conversion upon a request for transformation using the same formula or conversion ratio as the operator used when it initially converted the pre-existing volumetric delivery rights into the delivery rights provided on flow rate or other basis.

This approach is based on an assumption that in order to use an alternative form of delivery, all operators currently using volumetric delivery rights will have to convert them into delivery rights defined on the basis of flow rate or other basis using a predetermined formula or conversion ratio. Should this occur, operators will then be able to use the same formula or conversion ratio to nominally convert a transforming irrigators' delivery right defined on flow rate or other basis back into a delivery right defined on a volumetric basis for the purpose of determining whether the security threshold in subrule 10(1)(b) is met.³¹

Stakeholder submissions

Submissions received in the course of the ACCC's consultations with stakeholders have confirmed the ACCC's understanding that most operators covered by the WMR define delivery rights, either explicitly or implicitly, on the basis of the volume of water an irrigator is entitled to have delivered over a course of an irrigation season. Such operators are covered by the existing formulation of subrule 10(1)(b) and are able to require security from partially transforming irrigators when the threshold specified in the subrule is met.

However, some stakeholders expressed a need for an amendment to subrule 10(1)(b) to ensure that any operators that re-define their delivery rights on the basis of flow rate or other basis will still be permitted under the WMR to require security from irrigators upon partial transformation.

For instance, the NSW Irrigators' Council submitted:

Like the ACCC, NSWIC is not aware of any IIO's that currently operate on a flow rate basis. Under no circumstances ought this be presumed to mean that no such operators exist in this state.³²

Similarly, Western Murray Irrigation Limited (WMI) submitted:

The rules do need to cater for 'flow rate' delivery rights and each operator must manage system operations in the best way for their business.³³

³¹ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 28.

³² NSW Irrigators' Council, draft advice submission 5, p. 2.

³³ Western Murray Irrigation Limited, draft advice submission 10, p. 1.

Of the two options proposed by the ACCC in the draft advice, the submissions have typically preferred the ‘conversion formula’ approach. For instance, WMI submitted:

WMI’s preference would be for Option 2 where a consistent conversion formula is applied by the operator to determine a volumetric amount to apply security.³⁴

Mark Cameron, a MI customer, also submitted:

Where delivery rights are no longer expressed in a water volume, I support the conversion formula approach... If an Operator wishes to avail itself to the prospect of security over delivery rights then it must create delivery rights that relate to what we currently hold.³⁵

However, the NSW Irrigators’ Council expressed concern that the conversion formula approach is based on a formula fixed at the date of the conversion:

NSWIC does not support a conversion formula approach. In an ever-changing physical environment, fixed conversion rates can quickly become outdated potentially resulting in unexpected or unintended outcomes.³⁶

In its submission to the draft advice, MI indicated that it is not covered by the proposed conversion formula amendment because it has not implicitly or explicitly defined delivery rights on the basis of the fixed volume of water an irrigator is entitled to have delivered over a course of an irrigation season. MI noted that the delivery entitlements of MI irrigators have been calculated using flow rate sharing formula which is based on the volume of water entitlements held:

The original channel designs in the MIA were based on servicing a defined area of land for each landholding as well as collectively. Later (about 1982), area-based entitlements were converted... a specific engineering formula (the Todd Formula) was developed for channel design which in basic terms provides for a delivery capacity of 0.75% of entitlement per day... This is the basis of our flow rate sharing formula and is currently based on water entitlements held.³⁷

MI further stated that it plans to ‘unbundle’ delivery rights from irrigation rights by issuing delivery entitlements to its customers in the near future on 1:1 basis to water entitlements:

historically, MI customers have had a bundled irrigation right and water delivery right (on a flow rate basis)... MI plans to unbundle these contractual rights... when unbundling occurs, it will at this stage be on the basis of one delivery entitlement being granted for every water entitlement held... It’s important to note that, under this

³⁴ Western Murray Irrigation Limited, draft advice submission 10, p. 1.

³⁵ Mr Mark Cameron, draft advice submission 1, p. 1–2.

³⁶ NSW Irrigators’ Council, draft advice submission 5, p. 2.

³⁷ Murrumbidgee Irrigation Limited, website notice submission 3, p. 2.

arrangement, there is no specified cap on the volume of water that may be delivered to a holder in any year. The number of delivery entitlements held merely affects the rate at which water will be delivered from time to time.³⁸

However, MI later submitted that there may be circumstances that will result in MI not issuing delivery entitlements to all its customers on a 1:1 basis:

whereby some landholders with fixed flow (drip) systems are receiving a higher level of service than they are currently paying for... what many landholders have done is to sell WE's without actually altering their level of service,

in cases where customers apply for additional DE's to go with temporary water traded into their landholding,

in cases where water has already been sold to government.³⁹

MI proposed an alternative approach:

Therefore, as an alternative to the ACCC's proposals, MI proposes that rule 10 of the WMRs be amended to simply provide that the threshold for taking security is triggered when the number of delivery entitlements held is more than five times the number of remaining water entitlements held.⁴⁰

3.1.3 Revised approach

The ACCC acknowledges the need for the proposed amendment to subrule 10(1) of the WMR to reflect both the volumetric and non-volumetric delivery arrangements to enable all operators to require security from irrigators upon transformation, in the circumstances specified in the subrule.

The ACCC understands that most operators are currently covered by the existing formulation of subrule 10(1)(b). While the ACCC cannot anticipate the manner in which operators may choose to structure their delivery arrangements in the future, the ACCC considers that any restructure is likely to involve conversion of the existing implicit or explicit volumetric delivery rights to the new non-volumetric delivery rights on some predetermined basis. This would be consistent with the manner in which irrigation infrastructure networks have been historically designed, with delivery rates being inextricably linked to the annual volume of water required, and would ensure that irrigators' delivery rights are not reduced in the process of the conversion.

The ACCC considers that, in light of the information available to it, a conversion formula approach is the best mechanism available to account for future changes to delivery arrangements.

³⁸ Murrumbidgee Irrigation Limited, draft advice submission 6a, p. 2.

³⁹ Murrumbidgee Irrigation Limited, draft advice submission 6b, p. 2.

⁴⁰ Murrumbidgee Irrigation Limited, draft advice submission 6a, p. 2.

The ACCC notes the concerns expressed by NSW Irrigators' Council that the conversion formula, as set out in the draft advice, may become outdated if it is fixed at a point in time. To address this concern, the revised proposed amendment includes a requirement on operators that use a conversion formula to make adjustments necessary to take into account any changes to the structure of delivery rights that take place after the date of the conversion of those delivery rights in the course of calculating the security threshold (e.g. if an operator re-issues delivery entitlements on the basis of a different conversion ratio).

The proposed variation should address stakeholders concerns and ensure that the conversion formula applied by operators for the purpose of subrule 10(1) is updated over time to reflect any changes to the structure of delivery rights.

The ACCC acknowledges the concerns expressed by MI that, given the manner in which its delivery rights have been historically defined, MI may not be covered either by the current formulation of subrule 10(1)(b) or the proposed conversion formula amendment. While the ACCC is currently not aware of any other operators covered by the WMR that have historically defined their delivery rights on the same basis as MI, an amendment to subrule 10(1)(b) is needed to ensure that such operators are also entitled to require security from irrigators upon partial transformation of their irrigation rights.

The ACCC has considered the approach proposed by MI in its initial submission, which includes inserting a phrase 'number of entitlements', and determined that this approach is substantially the same as the preliminary approach considered by the ACCC, which included inserting the phrase 'number of units' into the existing formulation of subrule 10(1)(b).⁴¹ MI's submission reaffirms the ACCC's view that this approach should address MI's concerns on the issue. While the ACCC considers that the phrases 'number of units' and 'number of entitlements' are interchangeable, the phrase 'number of units' is preferred for consistency as it is already used in rule 7 of the WMR.

To ensure that operators such as MI are covered by the existing subrule 10(1)(b) of the WMR, the ACCC recommends extending the operation of the subrule to include the situation where irrigators' delivery rights are expressed as delivery 'units'. In this situation such irrigators are entitled to delivery of water at a specified flow rate or non-volumetric basis. Such operators may require security from partially transforming irrigators if, after the transformation, the number of units under a water delivery right sought by an irrigator will be more than 5 times the number of remaining units under the irrigator's irrigation right.

However, the recommended amendment will only operate in circumstances where:

⁴¹ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 26.

- an operator first issues the number of units under a water delivery right on the basis of 1:1 ratio to the number of units under an irrigation right or, in some circumstances, issues a number of units agreed to by the parties in writing, which reasonably represents the irrigators' entitlement under the water delivery right immediately before the issue, and
- no subsequent restructure of water delivery rights takes place that would result in the number of units under a water delivery right being altered (other than as a result of acquisition, transfer or termination of the units under a water delivery right held by the irrigator).

This ensures that operators cannot manipulate the operation of the threshold ratio (5:1) by varying the number of units under a water delivery right held by irrigators.

Where delivery is provided on a volumetric basis, irrigators are issued with delivery entitlements on a 1:1 basis to water entitlements (i.e. for every 1 ML of irrigation right, an irrigator would hold a right to the delivery of 1 ML of water). It is on the basis of this 1:1 relationship between water and delivery entitlements that the 5:1 ratio was recommended for the security threshold in subrule 10(1) in the WMR Advice.

Therefore, in the circumstances where an operator provides delivery on a non-volumetric basis (for example on the basis of flow rate) and issues a number of units under a water delivery right to its irrigators, the proposed amendment allows operators to calculate the 5:1 ratio on the basis of the number of units issued, providing:

- the units under a water delivery right are first issued on a 1:1 basis relative to the number of units under an irrigation right; and
- operators do not subsequently restructure customers' delivery rights to alter this 1:1 relationship.

MI identified two circumstances in which an anomaly exists in customers' current delivery arrangements which means when unbundling occurs the customer is likely to be issued with more delivery entitlements than water entitlements (i.e. not on a 1:1 basis).⁴² The ACCC's understanding of these anomalies is discussed below.

The first is where an irrigator has already traded or transformed a part of their water entitlement but maintained the same level of delivery. For those customers when unbundling occurs, MI is likely to issue a number of delivery entitlements that will be greater than the number of remaining water entitlements, that is, not on a 1:1 basis.

The second anomaly relates to a specific group of customers within a particular fixed flow section of MI's network. That is, this section of the network is designed to provide delivery at a fixed level of flow rate and this may not be altered without redesigning the system.

⁴² Murrumbidgee Irrigation Limited, draft advice submission 6b, p. 2.

Typically, in parts of the MI network that are not on a fixed flow system, where a customer trades water and reduces their entitlement to delivery, MI makes the corresponding reduction in the customer's flow rate. However, for the MI customers whose part of the system is designed to provide delivery on the basis of a 'fixed flow rate', MI appears unable to reduce the flow rate they receive.

In these circumstances, MI may wish to rectify the anomaly at the time of unbundling by issuing those affected customers with a higher number of delivery entitlements than water entitlements (so that the number of their delivery entitlements corresponds to the fixed flow rate which they are receiving) and not on a 1:1 basis.

The ACCC recognises that irrigators may undertake (or have undertaken) actions that result in the number of units under a water delivery right being different to the number of units under an irrigator's irrigation right. To account for this, the recommended amendment allows operators to request security from partially transforming irrigators notwithstanding that:

- the operator, when first issuing units under a water delivery right, issues a number of units that is not the same as the number of units under an irrigation right (i.e. not on a 1:1 basis), providing the parties agree in writing that the number of units issued reasonably represents the irrigator's delivery right at the time, and
- irrigators change the number of units they hold under a water delivery right by acquiring, transferring or terminating units at any time after the issue of those units.

As MI foreshadowed in its submission, MI plans to unbundle entitlements to delivery and water on a 1:1 basis, except in the circumstances where the issue of units of delivery on a 1:1 basis would not accurately reflect the existing delivery arrangements with its customers, as discussed earlier.

MI will be able to require security from partially transforming irrigators provided:

- MI first issue delivery entitlements in a way that is consistent with the criteria set out above and does not subsequently restructure the delivery rights in a manner that will affect the number of delivery entitlements held by irrigators (other than as a result of irrigators acquiring, transferring or terminating delivery rights); and
- the number of units of delivery (i.e. number of delivery entitlements) that an irrigator seeks to maintain after the transformation will be more than 5 times the remaining number of units of water (i.e. number of remaining water entitlements under irrigation right).

In calculating the security threshold, operators in MI's situation would not need to refer to the conversion formula subrule, as it would be inapplicable to them.

3.1.4 Final ACCC recommendation

The ACCC recommends that subrule 10(1) of the WMR be amended to include:

- a new ‘conversion formula’ subrule; and
- a new ‘number of units’ subrule.

The effect of the proposed amendment is that:

- (a) operators that define delivery rights on the basis of a volume of water delivered over a course of an irrigation season will continue to use the current formulation of the security threshold;
- (b) operators that convert their volumetric delivery rights to delivery rights on the basis of flow rate or other basis will calculate the security threshold by using the appropriate conversion formula, adjusted for any changes to delivery rights that take place after the date of conversion of those delivery rights; and
- (c) operators that define delivery rights on a non-volumetric basis and that initially issue a number of units under a water delivery right on a 1:1 basis to the number of units under an irrigation right (or a number of units that reasonably represents the person’s delivery right as agreed in writing), will be able to calculate the security threshold with reference to the number of those units, providing delivery rights have not been subsequently restructured in a way that has altered the number of units under a water delivery right (other than as a result of the irrigator acquiring, transferring or terminating the delivery units).

3.2 Rule 16(1) preventing operators from delaying or preventing transformation

Minister’s request for advice and subrule 16(1) of the WMR

The Minister’s request for advice stated:

Rule 16(1) prevents actions, or failures to act, by operators that would prevent or delay transformation, but only where an application for transformation has been received. As such, the rule may not catch all actions by operators that could prevent or delay transformation. Advice on an amendment to the rules is sought to address this issue.

Subrule 16(1) of the WMR requires:

If an irrigation infrastructure operator receives, from a person who has an irrigation right against the operator, a request in writing for the transformation of the whole of a part of the irrigation right the operator must not do, or fail to do, an act in a way that prevents, or unreasonably delays, the transformation.

3.2.1 Need for amendment to the WMR

The WMR are rules that relate to an act that an operator does, or fails to do, in a way that prevents or unreasonably delays transformation arrangements.⁴³ While the Act does not define what constitutes prevention or unreasonable delay of transformation arrangements, it states that this may include restrictions imposed by an operator by the way in which an operator conducts its operations.⁴⁴

In the WMR Advice, the ACCC recommended that the Minister make subrule 16(1) of the WMR to prohibit any restriction or conduct by operators preventing or unreasonably delaying transformation arrangements, unless expressly permitted by the WMR.⁴⁵

Other parts of the WMR Advice further highlight the intent of the provision:

Rules 16, 17 and 20 go to the heart of the WMR regime and their fundamental purpose — to prohibit operators from preventing or unreasonably delaying transformation and trade.⁴⁶

This approach is also reflected in the Explanatory Statement to the Rules which states that ‘subrule 16(1) generally prohibits an operator from doing something or failing to do something that prevents or unreasonably delays transformation.’

The ACCC explained in the draft advice that subrule 16(1) of the WMR, as currently drafted, may have a narrower application than was intended in the WMR Advice. This is because the application of the subrule may be restricted to operator conduct that follows the receipt of a written request for transformation of an irrigators’ irrigation right. The existing subrule may not prohibit conduct or restrictions imposed by an operator prior to the receipt of a written request (e.g. policies or requirements that make it more difficult for irrigators to submit a written request for transformation). However, this conduct could also prevent or unreasonably delay transformation.

3.2.2 Draft advice recommendation and stakeholder response

In the draft advice the ACCC recommended that subrule 16(1) be amended to remove ‘the receipt of a request in writing for the transformation of the whole or a part of the irrigation right’ as a precondition for the operation of the subrule.⁴⁷ The recommended

⁴³ Section 97(1) of the Water Act 2007.

⁴⁴ Section 97(4)(b) of the Water Act 2007.

⁴⁵ ACCC, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. xvi.

⁴⁶ ACCC, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. 110.

⁴⁷ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 24.

amendment was proposed because it would better achieve the policy intent of subrule 16(1) of the WMR as stated in the WMR Advice.

It appears some stakeholders may have misinterpreted the proposed amendment as removing the need for an application for transformation to be in writing. For example, NSW Irrigators' Council noted that:

It is far from unreasonable to expect that a transformation affecting a property being dealt with in writing.⁴⁸

Similarly, WMI stated that it 'does not agree with the condition that operators facilitate transformation without receipt of a request for transformation in writing.'⁴⁹

When providing the WMR Advice to the Minister, the ACCC acknowledged the need for an application for transformation to be in writing and recommended rule 11 of the WMR, which states that 'an irrigation infrastructure operator may require an application for the transformation of the whole or a part of an irrigation right held against the operator... to be in writing'.

The proposed amendment does not affect the operation of rule 11 of the WMR and does not require operators to facilitate transformation prior to receipt of a written application for transformation.

The proposed amendment to subrule 16(1) of the WMR seeks to prohibit conduct of an operator that occurs prior to the receipt of a written application for transformation that could be used to prevent or delay transformation arrangements more generally. For example, an operator could attempt to unreasonably delay the transformation process by requiring irrigators who wish to transform to submit a 'pre-application' with no reasonable time period for consideration or make an appointment with the operator to discuss transformation arrangements as a pre-condition to a written application being considered by an operator. It is this sort of additional conduct that the proposed amendment is attempting to address.

WMI also noted in its submission that 'the amendment [to rule 16 of the WMR] mentions "transformation" only and not "trade".'⁵⁰ Subrule 16(1) of the WMR covers the act of transformation, whereas the trade of a water access entitlement is covered by subrule 17(1) of the WMR which states that:

an irrigation infrastructure operator must not do, or fail to do, an act in a way that prevents or unreasonably delays the trading, by a person who had an irrigation right

⁴⁸ NSW Irrigators Council, draft advice submission 5, p. 2., supported by Bullatale Creek Water Trust, draft advice submission 7, p.1., Southern Riverina Irrigators, draft advice submission 8, p. 3.

⁴⁹ Western Murray Irrigation, draft advice submission 10, p. 2.

⁵⁰ Western Murray Irrigation, draft advice submission 10, p. 2.

against the operator, of the whole or a part of a water access entitlement obtained as the result of transformation arrangements made with that operator.

Therefore, subrule 17(1) of the WMR has a broad application and does not require, as a precondition, the receipt of any written request or application. The proposed amendment to subrule 16(1) of the WMR will make the wording and operation of subrule 16(1) of the WMR consistent with subrule 17(1) of the WMR.

A number of operators raised a further concern about the proposed amendment to subrule 16(1) of the WMR. Specifically, MIL argued that the proposed amendment is:

significantly broader than the existing rule and imposes additional obligations on operators. If the proposed new rule 16 were to apply retrospectively (as appears to be proposed), there could be many things that Murray Irrigation or other operators did, or failed to do, from 23 June 2009 to 31 December 2009 that might contravene the proposed new rule 16. This would retrospectively expose operators to civil penalties and legal proceedings by aggrieved persons for past acts and omissions that were lawful at the time when they occurred. This would be unfair.⁵¹

Similarly, MI noted a concern that:

the proposed amendment could retrospectively expose MI and other irrigation infrastructure operators to potential liability, including civil penalties and claims by irrigators and others.⁵²

Subrule 16(1) of the WMR should be read in the context of subrule 16(2) of the WMR, which states that:

Anything done or omitted to be done under and in accordance with these Rules does not constitute a prevention or unreasonable delay under subrule (1).

In addition, subrule 16(1) of the WMR should also be read in the context of the transitional provision outlined in subrule 4(a) of the WMR, which states that:

a provision of a contract, arrangement or understanding between an irrigation infrastructure operator and a person who has an irrigation right or a water delivery right against the operator that is in force immediately before the commencement of these Rules continues to have the same force and effect as it would have if these Rules had not been made

The ACCC explained the effect of this transitional provision in the ACCC Guide to Water Market Rules 2009 and water delivery contracts:

Under water market rule 4, any provision in a contract, arrangement or understanding between an operator and irrigator that is in force before the commencement of the rules continues to have the same effect until 31 December 2009 as it would have if the rules

⁵¹ Murray Irrigation Limited, draft advice submission 3, p. 1.

⁵² Murrumbidgee Irrigation Limited, draft advice submission 6, p. 3.

had not been made. The transitional period provides an amnesty for arrangements established prior to 23 June 2009 that would otherwise breach the water market rules.

This ‘amnesty’ does not apply to circumstances where, following commencement of the rules, operators seek to impose terms and conditions in contracts that are in breach of the water market rules. Operators will expose themselves to the risk of enforcement action if they impose terms and conditions of this type.⁵³

The effect of the existing subrules 16(2) and 4(a) of the WMR is that:

- any actions (or omissions) by operators since 23 June 2009 that were in accordance with the WMR are exempt under subrule 16(2) of the WMR; and
- any provision of a contract, arrangement or understanding with irrigators that was in existence prior to 23 June 2009 remained in force between 23 June 2009 and 31 December 2009, pursuant to subrule 4(a) of the WMR, notwithstanding that the contractual provision, arrangement or understanding was contrary to the WMR.

Therefore, operators that did not actively seek to circumvent the WMR during the transitional period by altering their arrangements with irrigators should not have exposed themselves to actions taken by irrigators. This was always the intention of the WMR as set out in the WMR Advice.

3.2.3 Final ACCC recommendation

The ACCC recommends that subrule 16(1) be amended to remove ‘the receipt of a request in writing for the transformation of the whole or a part of the irrigation right’ as a precondition for the operation of the subrule.

This amendment better achieves the policy intent of subrule 16(1) of the WMR as stated in the WMR Advice.

3.3 Rule 7(1) requiring provision of details of irrigation rights

Minister’s request for advice and subrule 7(1) of the WMR

The Minister’s request for advice stated:

Rule 7(1) requires operators to provide irrigators with details of their irrigation rights; however it does not expressly require operators to provide the necessary information to show how the rights are calculated. Advice is sought on an amendment to the rules to address this issue.

Subrule 7(1) of the WMR requires:

⁵³ ACCC, *A guide to the Water Market Rules 2009 and water delivery contracts*, June 2009, p. 14.

- (1) If a person who holds an irrigation right against an irrigation infrastructure operator gives written notice to the operator that the person:
- (a) intends to apply, or applies, for transformation of the whole or a part of that right; and
 - (b) requests the operator to provide details of the contractual or other arrangements between the operator and the person relating to the irrigation right, including the number of units or volume of water to which the person is entitled under the irrigation right;
- the operator must, within 20 business days after receiving the notice, provide:
- (c) those details, including the number of units or volume of water to which the person is entitled in respect of the current financial year, as at the date of receipt of the notice; and
 - (d) if the operator reduces that number of units or volume in accordance with subrule (2) for the purposes of transformation, the number of units or volume of water as so reduced.

3.3.1 Need for amendment to the WMR

As identified by the ACCC in the WMR Advice, some parties may not have well defined irrigation rights.⁵⁴ The transitional period has further highlighted the extent to which some parties may have difficulty in calculating irrigators' irrigation rights, particularly in the circumstances where supply arrangements between the parties have historically been informal, not fixed and not based on written contracts clearly specifying the irrigators' rights.

3.3.2 Draft advice recommendation and stakeholder response

Subrule 7(1) of the WMR, as currently drafted, requires operators to provide details of the contractual or other arrangements in relation to the irrigation right. The details an operator should provide to irrigators about their irrigation rights may include information that is reasonably necessary to confirm the accuracy of the calculation of the irrigation right, however this is currently ambiguous.

To remove any uncertainty, increase transparency and facilitate resolution in the event of dispute, the ACCC proposed in the draft advice that operators be specifically required to advise irrigators on what basis irrigation rights have been calculated when providing details of their irrigation right.⁵⁵

Consultations on the draft advice supported the ACCC recommendation. For instance, WMI submitted that:

⁵⁴ ACCC, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, part 4.1.

⁵⁵ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 33.

WMI supports the provision of details of the calculation of the irrigation right to an irrigator. This will promote transparency and should reduce the risk of dispute if the calculation is accurate and fair to all irrigators. WMI believes most operators if they have not already done so will have to determine irrigation rights in the short term to comply with the rules and this issue will then fade in importance.⁵⁶

3.3.3 Final ACCC recommendation

The ACCC recommends that subrule 7(1)(c) of the WMR be amended to require an operator, upon receiving written notice from a holder of an irrigation right against the operator, to provide details of the irrigation right of that holder, including details as are reasonably necessary to confirm the accuracy of the calculation of that irrigation right.

3.4 Rule 7(1)(c) requiring operators to provide details of irrigation rights that can be transformed

Minister's request for advice and subrule 7(1)(c) of the WMR

The Minister's request for advice stated:

Rule 7(1)(c) states that an operator must provide an irrigator with the details of their irrigation rights. The drafting of the rule may suggest that the amount of water an irrigator is entitled to transform is determined by the amount of water received in the current year in annual allocations rather than the entire amount an irrigator is entitled to under their irrigation right, subject to the conveyance provisions. Advice is sought on an amendment to clarify that an irrigator is entitled to transform the entire amount of water they are entitled under their irrigation right, subject to the conveyance provision.

Subrule 7(1)(c) of the WMR requires:

- (1) If a person who holds an irrigation right against an irrigation infrastructure operator gives written notice to the operator that the person:
 - (a) ...
 - (b) requests the operator to provide details of the contractual or other arrangements between the operator and the person relating to the irrigation right, including the number of units or volume of water to which the person is entitled under the irrigation right;
the operator must, within 20 business days after receiving the notice, provide:
 - (c) those details, including the number of units or volume of water to which the person is entitled in respect of the current financial year, as at the date of receipt of the notice;

3.4.1 Need for amendment to the WMR

The phrase 'in respect of the current financial year' may suggest that the operator is required to provide details of the volume of water a person is entitled to receive in

⁵⁶ Western Murray Irrigation Limited, draft advice submission 10, p. 1.

annual allocation rather than the volume of water an irrigator is entitled to receive under an irrigation right against the operator.

This is because under the Act, the term ‘water allocation’ is defined by reference to a water accounting period (i.e. financial year), whereas the term ‘irrigation right’ is not:

- ‘irrigation right’ means ‘a right that a person has against an irrigation infrastructure operator to receive water, and is not a water access right or a water delivery right’; and
- ‘water allocation’ means ‘the specific volume of water allocated to water access entitlements in a given water accounting period’.⁵⁷

An amendment to the WMR is needed to clarify that, upon receipt of a written request for transformation from an irrigator, an operator is required to provide the details of contractual or other arrangements with the irrigator relating to the irrigator’s irrigation right, including the units or volume of water to which the irrigator is entitled under the irrigation right.

3.4.2 Draft advice recommendation and stakeholder response

In the draft advice, the ACCC recommended removing the phrase ‘in respect of the current financial year’ from subrules 7(1)(c) and 7(2)(a) of the WMR.⁵⁸

Consultations on the draft advice supported the ACCC recommendation. In particular, WMI submitted that:

WMI supports the removal of any reference to allocation in the determination of irrigation right.⁵⁹

3.4.3 Final ACCC recommendation

The ACCC recommends that subrules 7(1)(c) and 7(2)(a) of the WMR be amended to remove the phrase ‘in respect of the current financial year’ to provide greater clarity regarding the application of the subrules to an irrigators’ irrigation right only.

⁵⁷ Section 4 of the Water Act 2007.

⁵⁸ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 34.

⁵⁹ Western Murray Irrigation Limited, draft advice submission 10, p. 1.

4. Technical issues – Water Charge (Termination Fees) Rules 2009

4.1. Rule 5 imposition of termination fee

Minister's request for advice

The Minister's request for advice stated:

While the policy position in the ACCC advice on water charge (termination fees) rules of December 2008 was that operators should not impose ongoing water access fees on irrigators who have terminated delivery and have paid a termination fee, this position may not be clear in the rules as currently drafted. Advice is sought on an amendment to the rules to address this issue.

4.1.1 Need for amendment to the WCTFR

Information obtained by the ACCC during the transitional period suggests that some operators may be uncertain about their legal obligation to levy ongoing fees and charges on terminating irrigators in circumstances where operators are required by state legislation to levy land based fees and charges, which may include a component related to the provision of a right of access.

4.1.2 Draft advice recommendation and stakeholder response

In the draft advice, the ACCC recommended including a new subrule 5(3) in the WCTFR, which sets out that operators should not impose ongoing water access fees on irrigators who have terminated delivery and have paid a termination fee.⁶⁰

Consultations on the draft advice supported the ACCC recommendation. For instance, WMI submitted that:

WMI agrees that access fees should not be raised for the period after the termination fee is paid but notes all fees due and payable before the date of termination remain payable.⁶¹

4.1.3 Final ACCC recommendation

The ACCC recommends amending the WCTFR, by including a new subrule 5(3), to expressly set out that when:

- a person's access (and services provided in relation to that access) is terminated or surrendered in whole or in part; and

⁶⁰ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 36.

⁶¹ Western Murray Irrigation Limited, draft advice submission 10, p. 2.

- the person has paid the corresponding termination fee to the operator,

the operator must not charge, and the person will cease to be liable to pay, any fees levied after the payment of the termination fee that relate to the access (and services provided in relation to that access) that has been surrendered or terminated.

The ACCC recommends that subrule 5(3) be made a civil penalty provision, consistent with subrule 5(1) and the policy intent of the WCTFR. The ACCC considers the conduct by an operator of continuing to levy ongoing access fees in relation to the whole or part of right of access that has been terminated or surrendered (with the termination fee having been paid) to be contrary to the intention of the WCTFR and the Act.

4.2 Rule 7(a) timing of termination of access and calculation of termination fee

Minister's request for advice and subrule 7(a) of the WCTFR

The Minister's request for advice stated:

Rule 7 provides that termination fees are to be calculated in respect of the financial year in which the notice of termination is given. The rules may not provide sufficient certainty about the timeframe within which termination must occur following a notice of termination for the purposes of calculating the termination fee. Advice is sought on an amendment to the rules to address this issue.

Subrule 7(a) of the WCTFR requires:

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...

4.2.1 Need for amendment to the WCTFR

During the transitional period, the ACCC has been asked to consider a scenario whereby a terminating irrigator may provide notice of surrender or termination to an operator well in advance of the proposed termination date.

By anticipating access fee increases into the future, a terminating irrigator may be able to 'lock-in' a termination fee calculated using the TNAC in the financial year in which the notice of surrender or termination is given, which may be lower than the

TNAC applicable in the financial year in which the irrigator actually terminates or surrenders access to the operator's irrigation network.

An amendment to the WCTFR is needed to provide clarity to operators and irrigators about the effective date for the calculation of the termination fees.

4.2.2 Draft advice recommendation and stakeholder response

In the draft advice, the ACCC recommended that the effective date for the calculation of the termination fee should be the date the notice of termination or surrender is given or the date specified in the notice for termination or surrender to take effect, whichever is later.

The reference to a 'date specified in the notice' and inclusion of the phrase 'whichever is the later' will tighten the link between notice of termination or surrender and the applicable TNAC used to calculate the termination fee by not permitting terminating irrigators to continue to benefit from a right of access with a 'locked-in' termination fee. In addition, operators will not be able to delay the calculation of the termination fee beyond the date specified in the notice for termination or surrender to take effect.⁶²

Consultations on the draft advice supported the ACCC recommendation. For instance, WMI submitted that:

WMI supports the amendment to reflect more fairly for the operator when the termination or surrender is to take effect under the notice.⁶³

4.2.3 Final ACCC recommendation

The ACCC recommends an amendment to subrule 7(a) of the WCTFR to ensure that the termination fee cap is calculated based on the TNAC payable by the irrigator as at the date the notice of termination or surrender is given or the date specified in the notice for termination or surrender to take effect, whichever is later.

4.3 Rule 6 prohibition on operators requiring payment of termination fee when water is traded out of an operator's network

Minister's request for advice and subrule 6(1) of the WCTFR

The Minister's request for advice stated:

The ACCC advice on water charge (termination fees) rules of December 2008 recommended that operators should not be able to require payment of termination fees (and compel

⁶² ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 38.

⁶³ Western Murray Irrigation Limited, draft advice submission 10, p. 2

termination of delivery rights) when water entitlements are traded out of an operator's network. However, the rules do not expressly prohibit this action. Advice is sought on an amendment to the rules to address this issue.

Subrule 6(1) of the WCTFR requires:

- (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.

4.3.1 Need for amendment to the WCTFR

Information obtained by the ACCC from stakeholders in the initial phases of the operation of the WCTFR indicates that operators may seek to rely on subrule 6(1)(b) of the WCTFR to impose termination fees for breaches of contract in the circumstances where a holder of a right of access trades their water access right without surrendering or terminating the corresponding proportion of the right of access.

The WMR partially address this issue by prohibiting operators from:

- requiring termination as a result of transformation;⁶⁴
- preventing or unreasonably delaying transformation;⁶⁵ and
- preventing or unreasonably delaying the trade of a transformed water access entitlement.⁶⁶

However, the WMR have a narrower application than the WCTFR because the WMR only apply to those operators that can give effect to transformation arrangements. This means that the majority of operators in Victoria and Queensland may not be covered by the WMR as irrigators already hold their own statutory entitlements.

An amendment to the WCTFR is required to ensure the existence of a single framework for the treatment of exit fees, which applies to all operators, as was the policy intent in the WCTFR Advice.

⁶⁴ Rule 19 of the Water Market Rules 2009.

⁶⁵ Rule 16 of the Water Market Rules 2009.

⁶⁶ Rule 17 of the Water Market Rules 2009.

4.3.2 Draft advice recommendation and stakeholder response

In the draft advice, the ACCC recommended amending subrule 6(1)(b) of the WCTFR to prohibit operators from imposing a termination fee in circumstances where termination of a person's right of access has been made compulsory due to (or as a condition of) the act of trading of water access right by an irrigator.⁶⁷

Consultations on the draft advice supported the ACCC recommendation. However, WMI submitted that:

WMI is not sure the wording of the amendment is clear. WMI was pleased to see in the explanatory notes the ACCC is attempting to ensure all operators in each of the basin states will be covered by the termination fee rules.

However, WMI is concerned the amendment may prevent the operator terminating the delivery right for valid breaches of the contractual obligations by the entitlement owner. The operator may impose a termination fee even if the water is not traded if the breach is significant enough.

The bracketed comment at the end adds that the reason for the termination itself cannot be the act of the trade. WMI suggests this should not be in a bracket but a separate rule.⁶⁸

The WCTFR do not, and cannot,⁶⁹ regulate the act of termination itself, only the circumstances in which an operator can impose a termination fee for a termination of the right of access. Accordingly, the proposed amendment does not affect the ability of an operator to terminate access to its irrigation network for a breach of the irrigator's contractual obligations.

4.3.3 Final ACCC recommendation

The ACCC recommends an amendment to subrule 6(1)(b) of the WCTFR to prevent an operator from imposing a termination fee where the operator seeks to terminate access for a breach of a contract term or condition and where that term or condition is associated with the irrigator's act of trading of the whole or a part of a water access right.

⁶⁷ ACCC, *Draft advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*, December 2009, p. 40.

⁶⁸ Western Murray Irrigation Limited, draft advice submission 10, p. 2.

⁶⁹ As per sections 91(1) and 92 of the Water Act 2007.