



Australian
Competition &
Consumer
Commission

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

December 2009



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The Australian Competition and Consumer Commission (ACCC) welcomes submissions on the draft amendments and draft advice to the Minister on Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009. Responses to these documents should be supported with evidence and data wherever possible.

When making a submission, please title your document, 'Public submission on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009 by [INSERT NAME] on [INSERT DATE]'.

If there is any information you would like to request the ACCC not make publicly available, you should provide it in a separate document that has 'Confidential' clearly marked on every page.

The document containing confidential information should have a title such as 'Confidential annexure to submission by [INSERT NAME] on [INSERT DATE]'. (Information on the treatment of confidentiality is discussed in section 1.3.)

Provision of electronic submissions by email is preferred. The ACCC encourages interested parties to make submissions either in Microsoft Word or in PDF (OCR-readable text format—that is, they should be direct conversions from the word processing program, rather than scanned copies in which the text cannot be searched).

Submissions should be sent to:

Email: water@acc.gov.au (submissions should use the word 'Submission' in the title of the email)

Or by mail to the following address:

Water Branch
Draft advice and proposed amendments to Water Market Rules 2009 and
Water Charge (Termination Fees) Rules 2009
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001

General inquiries may be directed to the ACCC Infocentre on 1300 302 502 or to water@acc.gov.au.

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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* (Cth) 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.
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.
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).
Fixed costs	Costs that do not vary with the volume of water delivered.
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
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 Act	The Water Act 2007 (Cth).
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.
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

On 30 September 2009, the Minister for Climate Change and Water, Senator Penny Wong, (Minister) wrote to the ACCC requesting advice, pursuant to ss. 93(1) and 98(1) of the *Water Act 2007* (Act), on proposed amendments to the Water Market Rules 2009 (WMR) and the Water Charge (Termination Fees) Rules 2009 (WCTFR) (collectively the Rules) by March 2010.

As outlined in the Minister's letter the proposed amendments relate 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 operators.
- minor amendments to address technical issues with the Rules that have arisen in the implementation of the Rules during the transition period (discussed in chapters 3 and 4).

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

The ACCC will provide its final advice to the Minister in March 2010.

On 9 October 2009, the ACCC released a web notice inviting comments on the proposed amendments from interested stakeholders. The ACCC received 7 submissions in response to the web notice.¹ These submissions are available on the ACCC website (www.accc.gov.au/water).

The scope of the ACCC's advice is narrower than previous advices. This reflects the Minister's request for advice which identified specific amendments for the ACCC's consideration. The ACCC has restricted its advice to the matters identified in the Minister's letter.

The ACCC's draft advice to the Minister includes recommendations on the proposed amendments to the Rules and the reasons for each recommendation.

In developing the draft advice, the ACCC has considered the provisions of the Act and the relevant Basin objectives and principles set out in Schedules 2 and 3 of the Act.

In addition, in relation to the minor amendments to address technical issues, the ACCC has had regard to the following questions/criteria in forming its recommendation on the proposed amendments:

- is the recommended amendment consistent with the policy intent of the ACCC's final advice to the Minister and the existing rules?

¹ On 30 November 2009 staff received correspondence from MIL in addition to its initial submission. MIL's letter was a response to those public submissions published on the ACCC website as submission 6B to the web notice.

- can the recommended amendment be implemented?
- would the recommended amendment have the likely effect of preventing or unreasonably delaying transformation and/or trade of the water access entitlements?
- is there new information available to the ACCC that warrants a departure from its final advice?

The ACCC's draft advice recommendations in relation to WMR are outlined in Box 1.

Box 1: ACCC draft advice recommendations – WMR

MIL's concern – protection from legal action under s. 97(10) of the Act

- The proposed amendment to rule 16 of the WMR should consequently provide MIL with the protection of s. 97(10) as its action of reissuing irrigators' water entitlements was undertaken solely to comply with the WMR.

Rule 10 – security when delivery is on a flow rate basis

- The ACCC recommends that rule 10(1)(b) be amended to include an additional security threshold for operators providing delivery services on a flow rate or other basis.
- The ACCC is seeking feedback from stakeholders on two proposed approaches: a reasonably required threshold approach and a conversion formula approach.
- The feedback received from stakeholders, particularly in relation to the conversion formula approach, will be used by the ACCC to assess the viability of each approach for the purpose of making a recommendation to the Minister in the final advice.

Rule 16 – prevent or unreasonably delay transformation

- The ACCC recommends that rule 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 rule.

Rule 7(1) – details of irrigation rights

- The ACCC recommends that rule 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.

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

- 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 draft advice recommendations in relation to WCTFR are outlined in Box 2.

Box 2: ACCC draft advice recommendations – WCTFR

Rule 5 – operator not to charge access fees after payment of termination fee

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

- a person's right of access (and services provided in relation to that right) 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 right of access (and services provided in relation to that right) that has been terminated or surrendered.

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

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

- 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.

Rule 6(1)(b) – prohibit operators from imposing a termination fee upon the trade of water access right

- The ACCC recommends an amendment to rule 6(1)(b) of the WCTFR to prevent operators from relying on this rule 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 wrote to the ACCC pursuant to ss. 93(1) and 98(1) of the Act requesting advice on the making of water market and water charge rules. The ACCC provided the Minister with final advice on the Rules in December 2008.

On 23 June 2009, the WMR commenced subject to the transitional period provided for in rule 4.² Further, the WCTFR commenced on 23 June 2009 and have had full legal force since 1 September 2009.

Consultation by the ACCC with some stakeholders during the transitional period has highlighted some technical issues 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.

1.1. Minister's request for advice

On 30 September 2009, the Minister requested advice from the ACCC on proposed amendments to the Rules in response to stakeholder concerns. Attachment A to the Minister's request outlines the matters to be addressed by proposed amendments. These proposed amendments fall into two categories:

- Murray Irrigation Limited's (MIL's) recent reissue 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 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 has also requested that the ACCC, in developing its advice, undertake the relevant consultations with Basin State Ministers, irrigation infrastructure operators (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 represents the ACCC's draft advice on the proposed amendments to the Rules. The ACCC's final advice will be provided to the Minister by March 2010 in accordance with the Minister's request.

1.2. Consultation process

Consultation with stakeholders is an important part of the ACCC's process in developing its advice to the Minister. On 9 October 2009, the ACCC issued a media

² Rule 4 of the WMR provides for a transitional period, giving operators until 31 December 2009 to be fully compliant with the Rules.

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. 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.

The ACCC now seeks submissions on the draft advice to the Minister. The ACCC encourages interested parties to submit their views on the ACCC's draft advice and draft amendments no later than **Monday 8 February 2010**.

1.3. Treatment of confidential information

The ACCC prefers that all written submissions be publicly available to foster an informed and robust consultative process. Accordingly, submissions will be considered to be public and will be posted on the ACCC website unless confidentiality is sought and obtained from the ACCC.

Any information that parties would like to request the ACCC not to make publicly available should be provided in a separate document and clearly marked 'Confidential' on every page. Reasons must be provided to support the request for confidentiality.

The ACCC will only accept a claim of confidentiality if the information is truly confidential in nature. Grounds on which confidentiality could be claimed include that the information disclosed is commercial-in-confidence and/or is non-public information.

The ACCC will not accede to a request for confidentiality if it would not be in the public interest to do so. If the ACCC considers the information should be disclosed (either because it is not confidential or because it would not be in the public interest to receive the information without public disclosure), the ACCC will provide the parties with an opportunity to withdraw the submission (or part of the submission) containing the information. If the submission (or part of the submission) is withdrawn, the ACCC may not take it into account. If a party elects not to withdraw the submission (or part of the submission), the ACCC may disclose the information publicly.

Any information accepted as confidential by the ACCC will not be publicly released by the ACCC, except where required as part of the provision of advice to the Minister or where required by law (e.g. in response to a request under the *Freedom of Information Act 1982* or a subpoena regarding proceedings between third parties).

Please refer to the *ACCC-AER information policy: the collection, use and disclosure of information* available on the ACCC website – <http://www.accc.gov.au>

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. Background

ACCC final advice

The ACCC considered the particular situation of MIL in its final advice on the Water Market Rules of December 2008 (WMR Advice). The ACCC recommended that there should be no exception in the proposed rules to cover this issue, and made the following recommendation:

[T]he ACCC recommends that the operator realise the benefits of holding a separate conveyance entitlement, as was the likely intention when the licence was issued, and reissue its water entitlements to account for this separation.³

It appears that some MIL irrigators may hold the view that their right to water extends to that portion of their water entitlement attributable to MIL's conveyance licence. This is despite the terms and conditions of irrigators' water entitlement contracts explicitly providing that water allocation would be generally restricted to only 83 per cent of the entitlement. The ACCC made the above recommendation for the purpose of increasing the transparency of MIL irrigators' entitlements to water.

MIL licences and conveyance arrangements

On 3 March 1995, MIL was formed when the NSW Government privatised the Murray Irrigation Area and Districts, transferring ownership to irrigators. Irrigators in the area and district, who previously held statutory water licences, renounced those licences to the NSW Government and MIL – as a corporate entity – was issued with a bulk water licence. The bulk water licence represented the sum of each individual's renounced

³ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. 54.
(<http://www.accc.gov.au/content/item.phtml?itemId=878227&nodeId=bfe975eb919feae50381ea9da115fb20&fn=Water%20Market%20Rules%20-%20Final%20Advice.pdf>).

statutory water licence. MIL was also issued an additional volume of water equivalent to 17 per cent of the bulk water licence.

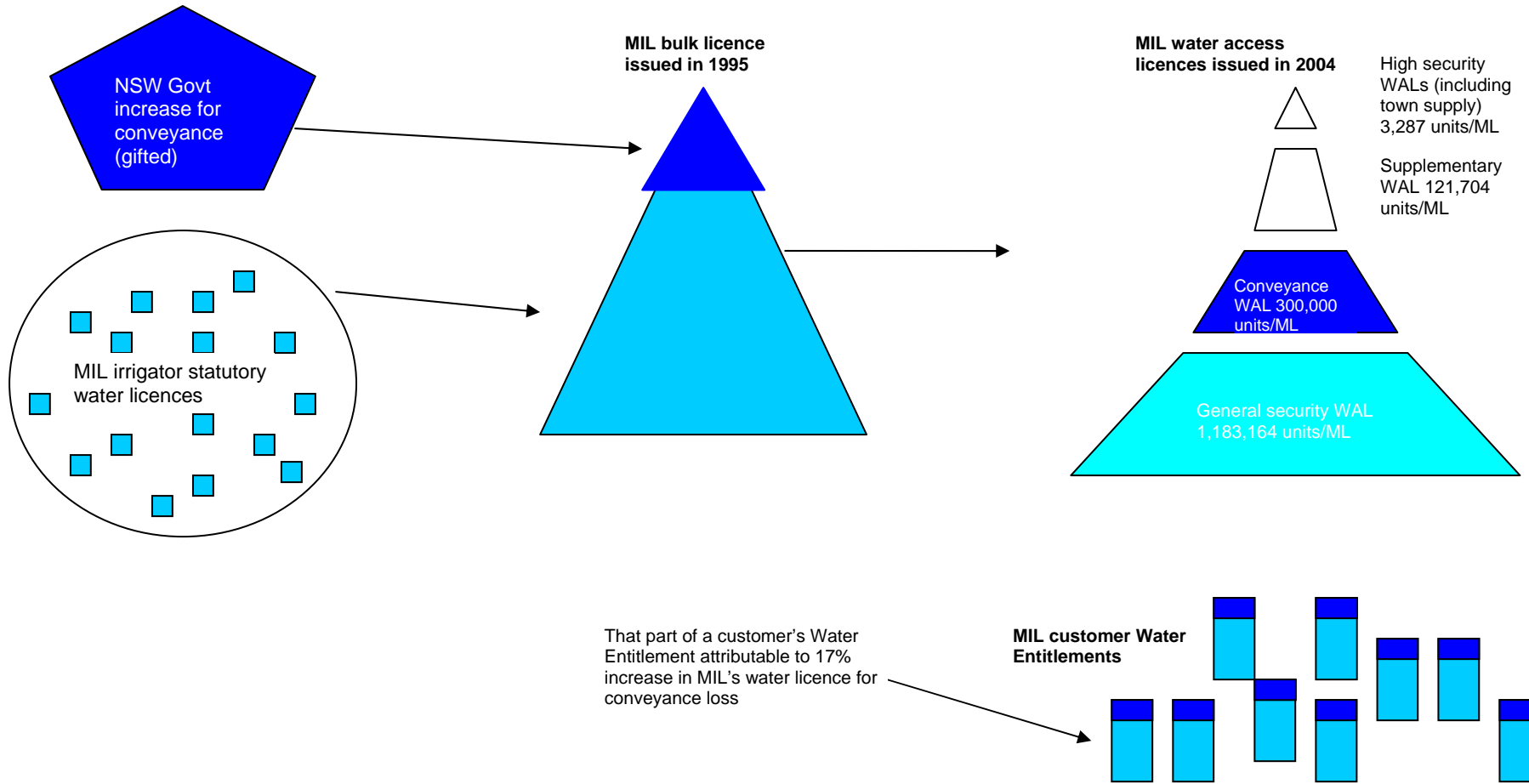
In the privatisation process, land and water were separated, with each irrigator landowner issued share and water entitlements in the company. These water entitlements included the additional amount MIL received from the NSW Government for conveyance losses. The ACCC understands that irrigators were 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.

The water entitlements were granted in association with a water entitlements contract. This contract outlined the rights and responsibilities of the parties. The ACCC understands that these water entitlement contracts previously stated, in effect, that the irrigator's entitlement to water under the contract will be limited to an annual allocation of only 83 per cent of each irrigator's water entitlement.⁴

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. A diagrammatical summary of these events is provided at Box 2.1.

⁴ MIL notes on its website that prior to the reissuing of entitlements recognising the existence of transmission losses, Murray Irrigation 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 Murray Irrigation's area, the company retained 17 per cent of the water entitlements. See MIL website info, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

Box 2.1 – Information on share components of MIL water access licences current as at 27 November 2009 see <http://www.water.nsw.gov.au/Water-Management/default.aspx> for the Water Management Act Registers.



On 22 May 2009, MIL indicated in its newsletter to customers that it intended to make an adjustment to its irrigator water entitlements. In this newsletter of 22 May 2009, MIL noted:

Murray Irrigation remains of the view that this restructuring is clearly in the best interests of the company and its members. The proposed restructuring will result in water entitlements holders receiving at least the same volume of water as they receive under the present arrangements. But, importantly, it will also prevent an unfair and unworkable situation from arising under the federal government's proposed *Water Market Rules*. 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.⁵

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.⁶

On 1 July 2009, MIL exercised its rights under its water entitlements contract to vary unilaterally the entitlements of its customers.⁷ The decision was not subject to an annual or extraordinary general meeting.⁸ The effect of this variation was to cancel a portion of customers' 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.

⁵ Murray Irrigation Limited, Talking water – Proposed Extraordinary General Meeting cancelled, 22 May 2009, <http://www.murrayirrigation.com.au/files/3291515.pdf>.

⁶ MIL website info, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

⁷ MIL, web notice submission 6A, para 5.4

⁸ Murray Irrigation Limited, Talking water – Proposed Extraordinary General Meeting cancelled, 22 May 2009, <http://www.murrayirrigation.com.au/files/3291515.pdf>.

Existing protections under the Water Act

The Act already provides protection to irrigation infrastructure operators under s. 97(10), which 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, though rare, are included in legislation to protect parties who are acting in compliance with their obligations under an Act or delegated legislation.

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

2.2. Consultation

MIL submission to the web notice

On 5 November 2009, MIL made a submission to the initial consultation process. MIL’s submission outlines the history of MIL water entitlements and delivery entitlements and MIL’s understanding of the operation of the WMR. The submission also highlights MIL’s concern that its actions may not be protected by s. 97(10) of the Act. MIL’s submission concludes 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.⁹

Correspondence with MIL irrigators and other stakeholders

MIL irrigator submissions¹⁰

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

One submission was made on the basis that the person’s details were not released.¹¹ A further two written submissions were received from MIL irrigators previously involved in the consultation process on the WMR.

⁹ Murray Irrigation Limited, web notice submission 6A, p. 4, para 7.4.

¹⁰ 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.

¹¹ Web notice submission 1, p. 1.

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 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.’¹²

Mr Morton made a submission noting that a large proportion of the 17 per cent loss revoked by MIL represented variable losses which he stated are ‘un-metered deliveries on to customer property’ and this ‘water is historically “owned” by customers.’ Mr Morton also goes on to state that:

- Murray Irrigation Limited’s decision to reduce its customer’s water entitlements by 17% was excessive and unnecessary.
- Un-metered deliveries account for 8% of losses and the reduction should have been 9% not 17%.
- Murray Irrigation Limited is obviously not comfortable with the decision it has made and I suggest this is the reason why they have asked for the amendment to the rules.
- I don’t believe Murray Irrigation Limited should be given protection for complying with the rules when it has gone way beyond what was necessary in realising the benefits of its separate conveyance licence.
- If a customer wishes to transform, that water which has historically been delivered onto the customers property will be retained by Murray Irrigation Limited for the benefit of the remaining customers. I don’t believe the intent of the rules is to see one irrigator benefiting from the decision of another to transform.
- It is ultimately for Murray Irrigation Limited to decide the contractual relationship between itself and its customers, protection from legal action should not however be provided where changes are made beyond what is required to comply with the rules.¹³

Other irrigation infrastructure operators’ experiences

The ACCC consulted with the NSW Office of Water about other NSW operators that hold separate conveyance licences and the circumstances surrounding the issuing of these licences. The NSW Office of Water advised that the four major irrigation corporations¹⁴ and Hay Private Irrigation District (Hay PID) hold a separate conveyance licence.¹⁵ The NSW Office of Water explained that conveyance licences were created at the commencement of the Water Sharing Plans. Those licences held by the irrigation corporations and Hay PID represented the conversion of rights held under the previous *Water Act 1912* and that water entitlements and final volumes of the conveyance licences were agreed as part of the development of the relevant Water Sharing Plan.

¹² Mr D Crowhurst, web notice submission 4, p. 1.

¹³ Mr J Morton, web notice submission 7, p. 1.

¹⁴ Namely, Murray Irrigation Limited, Murrumbidgee Irrigation Limited, Coleambally Irrigation Co-operative Limited and Jemalong Irrigation Limited.

¹⁵ The NSW Office of Water noted that Hay Private Irrigation District’s conveyance licence was a small conveyance licence (1968ML).

The ACCC contacted those operators holding a separate conveyance licence seeking information about the circumstances and details surrounding the issuing of the operator's conveyance licence; whether the operator's customers' water entitlements were varied subsequent to the issuing of the operator's conveyance licence; 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 their licence it was kept separate from irrigators' water entitlements and this had 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.¹⁶

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.¹⁷

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:

¹⁶ Murrumbidgee Irrigation 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>

¹⁷ Jemalong Irrigation submission to web notice, p. 1.

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.¹⁸

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.

2.3. Discussion

Subrule 7(2) of the WMR allows an irrigation infrastructure 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 irrigation infrastructure operator can only make the reduction if it does not hold a separate conveyance water access entitlement. MIL suggests 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 7(3).¹⁹ Accordingly, it appears MIL's application of the WMR is based on its interpretation that an irrigator's irrigation right extended to the whole of MIL's water entitlement.

Irrigation right definitional issues

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.²⁰ If the definition of irrigation right extended to the whole of a MIL irrigator's 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.²¹

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

An alternative interpretation could be that because in MIL's case its water entitlement contract with irrigators specifically excluded that portion of their water entitlement as conveyance loss water, then irrigators' irrigation rights do not include an entitlement to

¹⁸ MIL website info, Water Entitlement Reduction – Summary, 7 July 2009:
<http://www.murrayirrigation.com.au/files/3291545.pdf>

¹⁹ Murray Irrigation Limited, web notice submission 6A, p. 3, para 5.2

²⁰ Murray Irrigation Limited, web notice submission 6A, p. 2, specifically, para. 4.2.

²¹ MIL website info, Water Entitlement Reduction – Summary, 7 July 2009:
<http://www.murrayirrigation.com.au/files/3291545.pdf>

the conveyance component. That is, MIL irrigators may only ever have been ‘entitled to receive’ a volume of water net of conveyance.

Based on this interpretation, MIL may have arguably 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 rule 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.’²²

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. The discussion that follows should assist in clarifying uncertainty and provides the ACCC’s consideration of an amendment to address MIL’s concerns.

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 rules which recognise that operators can withhold a portion of water for the purposes of conveyance losses. For reasons of transparency, the ACCC 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 actions, in reissuing water entitlements, already attract the operation of s. 97(10). That is, there is no evidence 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).

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

There are two approaches the ACCC considers 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 prevents or unreasonably delays transformation arrangements; or

²² MIL website info, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

- the WMR could extend protection to operators from legal action by inserting a bar to claims similar to the bar to claims provided in s. 97(10)

The ACCC supports the first approach.

Proposed amendment to rule 16 of WMR

The ACCC has considered MIL's reissuance of water entitlements in the context of MIL's application 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 rightly suggests this would be an unfair result and inconsistent with the policy objectives of the WMR generally.²³

The ACCC notes that rules 16 and 17 of the WMR reflect the essence of the WMR as they prohibit acts of operators that prevent or unreasonably delay transformation arrangements. 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 is that the rule is narrower than the ACCC's advice to the Minister on WMR. The Minister's request highlights this concern and is discussed specifically in this draft advice at section 3.2.

The proposed amendment to Rule 16 will broaden 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, in effect, to not fail 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.²⁴ Therefore, it is reasonable to argue that MIL undertook its actions to comply with the WMR, specifically rule 16 of the WMR (as amended).

As noted above, there is no evidence 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 under s. 97(10) as its action of reissuing irrigators' water entitlements was undertaken solely to comply with the WMR. The ACCC is satisfied that the proposed amendment sufficiently

²³ Murray Irrigation Limited, Talking water – Proposed Extraordinary General Meeting cancelled, 22 May 2009, <http://www.murrayirrigation.com.au/files/3291515.pdf>.

²⁴ MIL website info, Water Entitlement Reduction – Summary, 7 July 2009: <http://www.murrayirrigation.com.au/files/3291545.pdf>

addresses MIL's concern that it does not currently benefit from the protection of s. 97(10).

Extending protection from legal action – a bar to claims amendment of 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 has significant implications on individuals' rights of action beyond the protection already afforded by s. 97(10) and as envisaged by the legislature.

As the WMR are delegated legislation, the WMR are 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 Standing Committee has published a statement setting out, under the heads of review, the issues with which it will be concerned. Apart from its concentration on more technical matters, the Standing Committee has overseen the need to protect personal rights and liberties through examining legislation to ensure that it does not impose retrospective burdens on persons; does not allow executive interference with accepted rights such as freedom from invasion of property and privacy; does not give a public official subjective discretions; and provides for rights of appeal on the merits against executive decisions.²⁵

The ACCC has considered the 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. It

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>

is necessary to weigh this interference with personal rights against the interests of MIL as the beneficiary of such an amendment to the WMR.

Given MIL is likely to already benefit from the protection of s. 97(10) when amendment is made to rule 16 of the WMR, on balance, the ACCC considers that any gain to MIL in additional protection from legal action is significantly outweighed by the unnecessary imposition on irrigators' personal rights and liberties. Therefore, the ACCC does not consider it appropriate to amend the WMR to include a further bar to claims.

2.4. ACCC recommendation

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 s. 97(10) as its action of reissuing irrigators' water entitlements was undertaken solely to comply with the WMR.

The recommended WMR amendment directly addresses MIL's concern while not unnecessarily impacting on irrigators' rights of action beyond what is currently provided under the Act.

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 rule 10(1) of the WMR

Minister's request for advice:

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.

Rule 10(1) of the WMR:

- (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 Background

In the WMR Advice, the ACCC considered whether the WMR should allow operators to require security from irrigators against the future payment of access fees. In response to stakeholder concerns that transformation increased business risk due to decreased security over ongoing fees, the ACCC recommended that all operators be allowed to require security in certain circumstances to address this risk.²⁶

Rule 10(1) of the WMR allows an operator to request security from a transforming irrigator who wishes to maintain ongoing delivery rights following a full or partial transformation of the irrigators' irrigation right.

²⁶ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. xiii.

The threshold for requesting security in the circumstances of partial transformation, specified in rule 10(1)(b) of the WMR, only permits an operator to require security if the volume of water the irrigator is entitled to have delivered under their delivery right (disregarding any constraints on delivery) is five times more than the volume of water that they are entitled to under their irrigation right after transformation.

3.1.2 Need for amendment to the WMR

The threshold requirement of rule 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 volume of water.

The rule, 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, but may not apply to those operators that define delivery rights on some other basis, such as flow rate basis.

The ACCC is not aware of any operators covered by the WMR that currently provide delivery services on a non-volumetric basis. However, in correspondence with the ACCC, MI has indicated that it may be moving towards provision of delivery services on a flow rate basis in the near future.

An amendment to rule 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 in the circumstances specified in the rule.

3.1.3 Preliminary approaches

The ACCC initially considered an approach that involves inserting the phrase ‘number of units’ into Rule 10(1)(b) of the WMR to read:

*The person holds a part of that right but the **number of units** or 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 number of units** or 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 ACCC considered that the phrase ‘number of units’ could refer to the number of delivery units, irrespective of how these delivery units were defined, thereby allowing for a resolution to the issue.

In the course of the initial consultation stage on the proposed amendments, the ACCC sought feedback from MI on whether the approach outlined above would address MI’s concerns in relation to their ability to request security under flow rate delivery arrangements.

In a submission to the ACCC, MI advised that in its view the insertion of ‘units’ would not resolve the issue:

...the number of delivery entitlements does not entitle the holder to delivery of a "number of units ... of water". They entitle the holder a share of a flow at any point in time. This share can vary

depending on whether there are any prior-ranking types of delivery entitlements or capacity constraints to be considered.²⁷

The ACCC also considered whether the issue could be addressed by an amendment requiring operators intending to provide delivery arrangements on a flow rate basis to seek the ACCC's approval or determination of the appropriate threshold for requesting security. This approach would involve the ACCC determining the appropriate threshold to the particular circumstances of each operator. However, unlike the water charge rules, there is no provision in the Act for the ACCC to make determinations or give approval in relation to the water market rules.²⁸

Given the constraints identified to the preliminary approaches, the ACCC has examined other options to address the issue.

3.1.4 Options

The ACCC has identified 2 options for a proposed amendment to address the Minister's concerns:

- 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 rule 10(1)(b) of the WMR (as currently drafted). However, each option requires 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 involves amending rule 10(1)(b) to include a requirement that operators benchmark the delivery right a person requires to continue to hold after transformation against the average delivery rights of other irrigators that hold similar irrigation rights against the operator.

For the purpose of applying the proposed threshold, operators will 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' (to be referred to in this document as 'reasonably required delivery right'). In determining what is a reasonably required delivery right, an operator would be required to have regard to delivery rights of holders of similar irrigation rights against the operator.

²⁷ Murrumbidgee Irrigation Limited, web notice submission 3, p. 2.

²⁸ Section 93(2) of the Act allows water charge rules to deal with the 'determination or approval by the ACCC of regulated water charges'. Security over ongoing future fees is unlikely to fall within the definition of a regulated water charge.

For the purpose of determining whether the operator can require security from the person, the operator would then be required to determine whether the delivery right (expressed on flow rate or other basis) the person has requested to retain 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 rule 10(1)(b) of the WMR that the operator is allowed to request security.

The application of the threshold in this proposed approach is not as explicit as in the existing formulation of rule 10(1)(b) of the WMR because irrigators may not know in advance of submitting an application for transformation to an operator what delivery right would be 'reasonably required' to provide the irrigator with the average standard delivery of their remaining volume of irrigation right.

However, the proposed approach requires operators to provide details in writing to the irrigator confirming the accuracy of operator's assessment. This will increase the transparency and rigour of the proposed approach, providing greater confidence and certainty about the process for a transforming irrigator. These details could also assist an irrigator in any formal negotiation process that may be instigated by the irrigator under rule 8 of the WMR pertaining to the contractual terms and conditions of water delivery rights post transformation.

In addition, the benefit of this proposed approach is that the applicability of the proposed threshold is unlikely to be affected by the manner in which operators choose to structure their delivery arrangements. The flexibility of this proposed approach is likely to allow all operators providing delivery services on flow rate or other basis to request security from transforming irrigators in the circumstances specified in the proposed amendment.

Conversion formula

This approach involves retaining the threshold in rule 10(1)(b) in its current form, but including a provision for operators providing delivery services on a non-volumetric 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 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 all these delivery rights 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 rule 10(1)(b) is met.

The benefit of this proposed approach is that it would provide a clear and transparent threshold for operators and irrigators as to when security can be required. Consistent with the existing rule 10(1)(b), irrigators are likely to be able to anticipate whether an operator is going to require security from them following partial transformation of their irrigation right. The threshold in this proposed approach would also be consistent with and based on the same principles as the threshold in the existing formulation of rule 10(1)(b) of the WMR.

However, this proposed approach is based on an assumption that a conversion will be possible. The ACCC currently does not have sufficient information to anticipate the manner in which various operators are likely to structure delivery arrangements using flow rate or other basis. In particular, there is uncertainty as to whether:

- operators are likely to use a conversion ratio or formula when switching from volumetric delivery arrangements to non-volumetric delivery arrangements;
- in adopting non-volumetric delivery arrangements, the operators are likely to allocate a greater proportion of their network's capacity to irrigators;
- in adopting non-volumetric delivery arrangements, operators are likely to create different types of delivery entitlements and how the existing delivery entitlements are likely to be converted into these different types of delivery entitlements;
- there are other considerations that may be relevant to operators providing delivery on flow rate or other basis.

Accordingly, the ACCC is seeking information from stakeholders during the consultation period to assist it in determining the viability of this proposed approach, particularly operators who are currently considering providing delivery services on a flow rate or other basis.

3.1.5 ACCC recommendation

The ACCC recommends that rule 10(1)(b) be amended to include an additional security threshold for operators providing delivery services on a flow rate or other basis.

The ACCC is seeking feedback from stakeholders on both approaches proposed above, particularly the issues raised in relation to the proposed conversion formula approach.

The feedback received from stakeholders, particularly in regard to the issues highlighted for the conversion formula approach will be used by the ACCC to assess the viability of each of the proposed approaches for the purpose of making a recommendation to the Minister in the ACCC's final advice.

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

Minister's request for advice and rule 16(1) of the WMR

Minister's request for advice:

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.

Rule 16(1) of the WMR:

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 Background

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.²⁹ 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.³⁰

In the WMR Advice, the ACCC recommended that the Minister make rule 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.³¹

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.³²

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.'

3.2.2 Need for amendment to the WMR

²⁹ Section 97(1) of the Water Act 2007 (Cth).

³⁰ Section 97(4)(b) of the Water Act 2007 (Cth).

³¹ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. xvi.

³² Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. 110.

Rule 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 rule may be restricted to operator conduct that follows the receipt of a written request for transformation of an irrigator's irrigation right. The existing rule 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 or trade.

3.2.3 ACCC recommendation

The ACCC recommends that rule 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 rule.

This amendment better achieves the policy intent of rule 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 rule 7(1) of the WMR

Minister's request for advice:

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.

Rule 7(1) of the WMR:

- (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 Background

In the WMR Advice, the ACCC identified that the ability of irrigators to transform their rights to water is premised on the existence of clearly defined entitlements to water held under an irrigation right against an operator. The ACCC acknowledged the

potential complexities that may arise in the course of parties reaching agreement about the nature of those irrigation rights, particularly where land and water are bundled and conveyance losses are not separately identified.³³

To facilitate resolution of disputes between irrigators and operators over the nature of irrigation rights, the ACCC recommended rule 7 of the WMR in the WMR Advice to provide that, upon receipt of a written notice for transformation:

- an operator must provide details of the contractual or other arrangements with an irrigator, including the number of units or volume of water to which the irrigator is entitled under the irrigation right as at the date of receipt of the notice³⁴
- if an operator, which does not hold a separate conveyance licence, reduces the volume of water to which a person is entitled under an irrigation right to account for conveyance losses, the operator must provide details as are reasonably necessary to confirm the accuracy of the reduction calculation³⁵ and
- if an irrigator seeks a formal negotiation of the matter, an operator must make a genuine attempt to reach an agreement with the irrigator within 30 business days.³⁶

3.3.2 Need for amendment to the WMR

As identified in the WMR Advice, some parties may not have well defined irrigation rights.³⁷ 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.

3.3.3 ACCC recommendation

Rule 7(1) of the WMR, as currently drafted, requires operators to provide details of the contractual or other arrangements in relation to irrigation right. It is arguable that the details of a person's irrigation right would encompass those details as are reasonably necessary to confirm the accuracy of the calculation of the irrigation right.

³³ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, part 4.1.

³⁴ Rule 7(1) of the Water Market Rules 2009.

³⁵ Rule 7(4) of the Water Market Rules 2009.

³⁶ Rule 7(7) of the Water Market Rules 2009.

³⁷ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, part 4.1.

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

The ACCC recommends that rule 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 rule 7(1)(c) of the WMR

Minister's request for advice:

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.

Rule 7(1)(c) of the WMR:

- (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 Background

In the WMR Advice, the ACCC recommended rule 7(1)(c) of the WMR be drafted to include the phrase 'in respect of the current financial year, as at the date of receipt of the notice'. The phrase was included to expressly require operators to provide details of irrigation rights at the point in time in which an irrigator sought transformation. This would inform irrigators of the maximum volume of water they could hold as a water access entitlement upon transformation.

The ACCC also recommended using the phrase 'in respect of the current financial year' in rule 7(2)(a) in the definitions of terms 'B' and 'C' of the formula specified in the rule for the purpose of indicating the timing at which those terms are to be determined.

3.4.2 Need for amendment to the WMR

The phrase ‘as at the date of receipt of the notice’ in rule 7(1)(c) of the WMR and the phrase ‘as at the date of the request’ in rule 7(2)(a) of the WMR appear to satisfy the timing element described above. The phrase ‘in respect of the current financial year’ appears to be superfluous in both instances.

In addition, 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 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’.³⁸

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.

3.4.3 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.

³⁸ Section 4 of the Water Act 2007.

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

4.1. Rule 7 imposition of termination fee

Minister's request for advice

Minister's request for advice:

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 Background

The policy intent in the development of the ACCC's final advice to the Minister on WCTFR in December 2008 (WCTFR Advice) was that once irrigators' right of access to the operator's irrigation network is terminated or surrendered and a corresponding termination fee has been paid, an operator would no longer levy ongoing fees and charges on that irrigator for the right of access (or services in relation to that right) that has been terminated.

The ACCC did not recommend a rule under the WCTFR to expressly address this matter. The ACCC considered this outcome to be self evident and recognised that it was already part of the standard industry practice.

4.1.2 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.

For instance, the ACCC is aware that under the NSW *Water Management Act 2000* (WMA), private irrigation districts (PIDs) may be required to fix and levy various rates and charges for all land holdings within its district each year.³⁹ The ACCC understands these fees and charges may include a component related to the provision of a right of access and are associated with the holding of land rather than with the delivery of water. The ACCC further understands that landholders are required to pay rates or charges irrespective of whether water is taken by the landholders.⁴⁰

³⁹ Sections 167 and 169 of the Water Management Act 2000 (NSW).

⁴⁰ Section 172(1) of the Water Management Act 2000 (NSW).

If a PID ratepayer surrenders or terminates their right of access (and services provided in relation to that right), but continues to hold a landholding within the district, the PID may be required under the WMA to continue to fix and levy charges in relation to that land holding that may relate to the provision of a right of access surrendered or terminated by the ratepayer.

Regulations under the WMA explicitly permit PIDs to waive or reduce any fees or charges imposed under the WMA.⁴¹ Nevertheless, the lack of an express rule under the WCTFR, prohibiting operators from continuing to levy ongoing rates and charges relating to the right of access that has been surrendered or terminated, creates uncertainty about the consequences of a PID not exercising its discretion to waive or reduce ongoing fees or charges.

The ACCC also understands that the WMA regulates private water trusts (PWT) and allows, but does not require, PWT to fix and levy rates on lands within a water supply district.⁴² An amendment to the WCTFR would clarify the obligation on PWT not to exercise their discretion under the WMA to continue levying rates on ratepayers in relation to the portion of the right of access to the PWT's irrigation network that has been surrendered or terminated by the ratepayer.

On 8 September 2009, the ACCC wrote to both PWTs⁴³ and PIDs⁴⁴ with respect to this issue.

4.1.3 ACCC recommendation

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

- a person's right of access (and services provided in relation to that right) 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 right of access (and services provided in relation to that right) that has been surrendered or terminated.

The recommended amendment:

⁴¹ Clause 41 of the Water Management (General) Regulation 2004.

⁴² Section 232 of the Water Management Act 2000 (NSW).

⁴³ Hay Private Irrigation District, Moira Private Irrigation District, West Corugan Private Irrigation District and The Narromine Irrigation Board of Management.

⁴⁴ Bama Irrigation Trust, Bringan Irrigation Trust, Bullatale Creek Water Trust, Bungunyah Koraleigh Irrigation Trust, Glenview Irrigation Trust, Goodnight Irrigation Trust, Pomona Irrigation Trust and West Cadell Irrigation Trust.

- does not prohibit operators from continuing to levy ongoing fees and charges that relate to the portion of the right of access that has not been terminated or surrendered,
- does not affect any liabilities already accrued in relation to the right of access and services provided in relation to that right (e.g. unpaid past access fees), and
- does not prohibit operators from continuing to charge ongoing fees and charges unrelated to the provision of a right of access (e.g. land rates).

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 a 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 rule 7(a) of the WCTFR

Minister's request for advice:

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.

Rule 7(a) of the WCTFR:

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 Background

In the WCTFR Advice, the ACCC recommended that the WCTFR require operators to calculate termination fees on the basis of the total network access charge (TNAC)

that is payable by an irrigator in the financial year in which the notice of surrender or termination was given.⁴⁵ This would discourage an operator from delaying the termination of a right of access (and thereby calculation of the termination fees payable) until a subsequent financial year in which scheduled access fees may be higher.

Accordingly, the ACCC recommended rule 7(a) of the WCTFR, which expressly links the calculation of the termination fee to the TNAC payable in the financial year in which notice of surrender or termination is given.

4.2.2 Need for amendment to the WCTFR

In the WCTFR Advice, the ACCC envisaged that actual termination would occur within a reasonable period of written notice being given. Accordingly, the WCTFR did not specify how soon termination must occur following notice of surrender or termination. 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.

4.2.3 ACCC 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.

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.

⁴⁵ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. 33.

4.3 Rule 4 prohibition on operators requiring payment of termination fee when water is traded out of an operator's network

Minister's request for advice

Minister's request for advice:

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.

While the Minister's request for advice referenced Rule 4 of the WCTFR, the concern is better addressed through Rule 6(1) of the WCTFR which provides:

- (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 Background

In the WCTFR Advice, the ACCC recommended the creation of the WCTFR for the purpose of removing barriers to trade of water access rights. The ACCC identified as a significant barrier to trade, the imposition of a requirement by operators that irrigators selling their water entitlements outside the operator's district must terminate their right of access to the operator's network and pay a fee (known as an 'exit fee').

In the WCTFR Advice, the ACCC made it clear that imposition of a termination fee for compulsory termination of delivery rights upon the sale of water is effectively the imposition of an exit fee and should be prohibited.⁴⁶ The ACCC recommended rule 6(1) of the WCTFR, which sets out the specific circumstances in which an operator can impose a termination fee.

Rule 6(1)(b) of the WCTFR allows operators to exercise their discretion to terminate the irrigators' right of access and impose a termination fee, but only where the termination is on the grounds that the holder of the right of access is in breach of their contractual obligations.

⁴⁶ Australian Competition and Consumer Commission, *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, p. xiv.

4.3.2 Need for amendment to the WCTFR

Information obtained by the ACCC from stakeholders in the initial phase of the operation of the WCTFR indicates that operators may seek to rely on rule 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 addresses this issue by prohibiting operators from:

- requiring termination as a result of transformation⁴⁷
- preventing or unreasonably delaying transformation⁴⁸
- preventing or unreasonably delaying the trade of a transformed water access entitlement.⁴⁹

However, the WMR have a narrower application than 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.

4.3.3 ACCC recommendation

The ACCC recommends an amendment to rule 6(1)(b) of the WCTFR to prevent operators from relying on this rule 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.

The recommended amendment will have the effect of prohibiting operators from imposing a termination fee in circumstances where termination of a person's right of access has been made contractually compulsory or as a condition of trade of water access right by an irrigator.

⁴⁷ Rule 19 of the Water Market Rules 2009.

⁴⁸ Rule 16 of the Water Market Rules 2009.

⁴⁹ Rule 17 of the Water Market Rules 2009.