



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Water Market Rules guidance for irrigation infrastructure operators: Dispute resolution

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Key terms

infrastructure operator: any person or entity that owns or operates infrastructure for one or more of the following purposes:

- i) storage of water
- ii) delivery of water
- iii) drainage of water

for the purpose of providing a service to someone who does not own or operate the infrastructure.

irrigation infrastructure operator: an infrastructure operator that operates water service infrastructure for delivering water for the primary purpose of irrigation.

transformation: the process where an irrigator (or anybody other than the irrigation infrastructure operator) 'transforms' the whole or part of their irrigation right into a water access entitlement.

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 and/or take water from a water resource, including a stock and domestic rights, riparian rights, a water access entitlement and a water allocation.

water delivery right: a right to have water delivered by an infrastructure operator. It typically represents the holder's right of access to an irrigation network (there may also be a right to drainage) and can be terminated.

About this guidance

The ACCC is responsible for monitoring and enforcing compliance with the Water Market Rules 2009 (water market rules) under the *Water Act 2007* (Cth).

These rules prohibit irrigation infrastructure operators from preventing or unreasonably delaying irrigators in the Murray-Darling Basin permanently transforming their irrigation right into or onto a statutory water access entitlement (the process of transformation).

This guidance has been designed to assist irrigation infrastructure operators to develop dispute resolution policies that comply with the water market rules, while also assisting operators' customers to understand how these rules apply.

Dispute resolution in the water market rules

The water market rules provide for a dispute resolution process on specific topics.

An irrigator may request a formal negotiation of a dispute with their irrigation infrastructure operator about:

- an irrigation infrastructure operator providing incorrect or incomplete details of an irrigation right for the purposes of transformation
- variations in the terms and conditions of a water delivery contract following transformation.

If an irrigator and their irrigation infrastructure operator cannot resolve a dispute 10 business days after an irrigator has received details of their irrigation right or the terms and conditions for water delivery following transformation, the irrigator may notify the irrigation infrastructure operator in writing that they are seeking a formal negotiation of the dispute.

Formal negotiation

Under the water market rules, a formal negotiation is an irrigation infrastructure operator making a 'genuine attempt' to reach agreement with an irrigator within 30 business days of receiving:

- (a) a written request for formal negotiation on the details of the irrigator's irrigation right, or
- (b) the terms and conditions of a water delivery right.

An irrigation infrastructure operator must make a genuine attempt to reach agreement on the details of the irrigation right within 30 business days of receiving a written request for formal negotiation of the matter.

A 'genuine attempt' is defined to include the taking of steps to appoint a third party to help resolve the dispute. It could potentially also include:

- ensuring correspondence is promptly addressed
- discussing the issue(s) with the irrigator to understand the reason for the disagreement and potential solutions
- sharing any dispute resolution costs, for example the cost of employing a mediator
- offering reasonable solutions to the issue.

The water market rules do not require the third party to have formal qualifications in dispute resolution or mediation. Anyone can act as the third party so long as they are agreed to by both parties. The third party should be independent of both the operator and the irrigator.

A trusted local community member may be a third party. However, a third party who is experienced and qualified in dispute resolution—for example, a mediator—may be preferable in many circumstances.

Case study: A formal negotiation process

On 1 October 2022, Mr Smith writes to Barmah Water providing notice of his intention to apply to transform all his irrigation right. His letter includes a request asking Barmah Water for details of the volume of water that he is entitled to under his irrigation right.

Barmah Water does not have a separate water access entitlement for network (conveyance) losses.

On 3 October 2022, Barmah Water writes to Mr Smith advising that, for the purposes of transformation, he has a nominal entitlement of 850 ML of general security water each year. Barmah Water's letter explains that Mr Smith's total irrigation right is 1,000 ML. 15% has been deducted from Mr Smith's irrigation right to account for fixed network losses.

The letter explains that when an irrigator transforms an irrigation right held against Barmah Water, Barmah Water comes to a written agreement with the irrigator about how much the irrigator's right will be reduced to account for fixed network losses. Barmah Water does not usually use the formula outlined in the water market rules. The letter includes details showing that Barmah Water's fixed network losses for the last 10 years have been 20% of the total volume of water it takes from the river. 15% of this relates to fixed network losses and 5% to variable losses.

Mr Smith disagrees with this assessment because Barmah Water recently undertook significant upgrades to its infrastructure and its fixed network losses are now much lower (only 5%).

On 18 October 2022, Mr Smith sends Barmah Water an email seeking formal negotiation regarding its calculation of fixed network losses for the purposes of transformation.

Barmah Water telephones Mr Smith to discuss the next steps of the formal negotiation. Barmah Water proposes engaging Mike from Mighty Mediators to help resolve the dispute. Mighty Mediators is a local company that deals in contract disputes.

Neither Mr Smith nor Barmah Water has any direct connection to any of the mediators employed by Mighty Mediators. Both parties agree to appoint Mighty Mediators to resolve the dispute. The parties agree to share the costs of hiring Mighty Mediators equally.

On 20 October 2022, Barmah Water contacts Mighty Mediators to arrange a mediation session. Once the availability of Mighty Mediators is established, Barmah Water contacts Mr Smith and offers several meeting dates and times.

The parties all sign a mediation agreement, which outlines:

- Mike's role and powers
- Mike's charges for the mediation session and subsequent sessions if required

- that some specific information related to Barmah Water’s network operations is confidential
- details of how the mediation session will run
- how an agreement will be reached and how it will be enforced.

The parties meet at 9.30am on 21 October 2022 at the offices of the Mighty Mediators.

Barmah Water and Mr Smith discuss their dispute with Mike for two hours. Mike helps them to come to a resolution by listening to Barmah Water explain how it calculated the 15% fixed network losses based on 10 years of data. Mike considers evidence that Barmah Water provides him to substantiate this analysis. At Mr Smith’s request, Barmah Water also provides Mike with information related to the recent upgrade of Barmah Water’s infrastructure.

Mike reviews the water market rules and considers ACCC guidance material about the water market rules. Mike helps the parties to clarify the dispute, and to understand the issues for both parties and the requirements of the rules. Barmah Water and Mr Smith agree that Barmah Water will only deduct 5% from Mr Smith’s irrigation right to account for fixed network losses. Mike helps both parties see this is a fair solution because Barmah Water’s fixed network losses will still be covered for the future.

Mike prepares the terms of the agreement in writing and both Mr Smith and Barmah Water sign the agreement. Both parties get a copy of the agreement for their records.

On 24 October 2022, Barmah Water provides revised details of Mr Smith’s irrigation right and the reduction representing his share of the fixed network loss in accordance with the mediated agreement settled on 21 October.

The ACCC’s role

We cannot assist irrigation infrastructure operators or irrigators by representing either party or facilitating negotiation, mediation or arbitration to resolve a dispute. The ACCC can only take enforcement action against an irrigation infrastructure operator for not complying with the water market rules, including by failing to make a genuine attempt to resolve a dispute covered by those rules.

Factors we may consider when deciding whether an irrigation infrastructure operator has made a genuine attempt to resolve a dispute include:

- the independence of the third party proposed by the irrigation infrastructure operator for formal negotiation
- the time taken to respond to the irrigator’s inquiries and requests, and to reach agreement if applicable
- the irrigation infrastructure operator’s contribution to the costs of formal negotiation
- the irrigation infrastructure operator’s conduct during formal negotiations—for example, whether the irrigation infrastructure operator demonstrated a conciliatory approach.

If an irrigation infrastructure operator is unable to reach agreement with an irrigator on the details of their irrigation right or water delivery right, they must notify the ACCC within 30 business days of the irrigator giving notice seeking formal negotiation.

Irrigation infrastructure operators should ensure they keep track of the formal negotiation process and endeavour to anticipate any significant delays to ensure they comply with all the requirements of the water market rules.

Further related guidance

- Water Market Rules guidance for irrigation infrastructure operators: Application of the rules.
- Water Market Rules guidance for irrigation infrastructure operators: Transformation processes and transformation application fees.
- Water Market Rules guidance for irrigation infrastructure operators: Security.
- Water Market Rules guidance for irrigation infrastructure operators: Fixed network losses.