



TRIM Ref: E3556

Monday 1 February 2010

Water Branch  
Australian Competition and Consumer Commission  
Level 35, The Tower  
360 Elizabeth Street  
Melbourne VIC 3000

By email: [water@accc.gov.au](mailto:water@accc.gov.au)

**Submission on proposed amendments to the *Water Market Rules 2009* and *Water Charge (Termination Fees) Rules 2009* by Murray Irrigation Limited**

**1. Introduction**

- 1.1 We make this submission in response to the Australian Competition and Consumer Commission (ACCC) draft advice to the Minister for Climate Change and Water on proposed amendments to the *Water Market Rules 2009* (Cth) (**WM Rules**) and *Water Charge (Termination Fees) Rules 2009* (Cth) published in December 2009 (**Draft Advice**).
- 1.2 In particular, this submission concerns the Minister's request for advice about Murray Irrigation Limited's (**Murray Irrigation**) variation to its water entitlements holders' water entitlements.
- 1.3 Please refer to our public submission dated 5 November 2009 for the relevant background.

**2. Proposed new rule 16 of the WM Rules**

- 2.1 The proposed new rule 16 is significantly broader than the existing rule and imposes additional obligations on operators. If the proposed new rule 16 were to apply retrospectively (as appears to be proposed), there could be many things that Murray Irrigation or other operators did, or failed to do, from 23 June 2009 to 31 December 2009 that might contravene the proposed new rule 16. This would retrospectively expose operators to civil penalties and legal proceedings by aggrieved persons for past acts and omissions that were lawful at the time when they occurred. This would be unfair.<sup>1</sup>

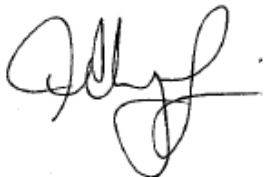
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<sup>1</sup> Page 23 of the Draft Advice notes that the Senate Standing Committee on Regulations and Ordinances has overseen the need to protect personal rights and liberties through examining legislation to ensure that it does not impose retrospective burdens on persons.

### 3. The alternative proposal of extending protection from legal action

- 3.1 In our view, a bar to claims would fit squarely within the rule-making power delegated to the Minister under subsection 97(1) of the Act. We note that the ACCC states, on page 22 of the Draft Advice, that if Murray Irrigation had failed to act, the result would have been inconsistent with the policy objectives of the WM Rules generally.
- 3.2 On page 23 of the Draft Advice, the ACCC notes that “[a]n 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”. By their nature, many of the WM Rules are a significant trespass on the personal rights and liberties of operators and irrigators. In our view, it is difficult to see why a bar to claims would trespass on personal rights and liberties any more than a number of other WM Rules which, for example, cut across pre-existing contractual arrangements between operators and irrigators.
- 3.3 In the Draft Advice, the ACCC weighs the interference with personal rights and liberties associated with a bar to claims against the interests of Murray Irrigation and concludes that it would be preferable to amend rule 16 rather than introduce a bar to claims.<sup>2</sup>
- 3.4 The ACCC reaches that conclusion “[g]iven MIL is likely to already benefit from the protection of s. 97(10) when amendment is made to rule 16 of the WMR”. Part 2 of this letter explains why the proposed new rule 16 may actually make matters worse. Therefore, we submit that the ACCC weigh the interests again and conclude that Murray Irrigation ought to have the benefit of a bar to claims for the reasons given in our public submission dated 5 November 2009.

Yours faithfully



**Anthony Couroupis**  
**General Manager**

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<sup>2</sup> However, if a bar to claims were a significant trespass, an amendment to rule 16 which the ACCC suggests achieves the same result, must also be a significant trespass.