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Australian Competition and Consumer Commission  
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## **Public submission to ACCC - *Water Market Rules 2009* amendments**

### **1. Introduction**

- 1.1 We make this submission in response to the notice that the Australian Competition and Consumer Commission (**ACCC**) is seeking information to inform the development of 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).
- 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.

### **2. History of Murray Irrigation's water access entitlements and water entitlements holders' irrigation rights**

- 2.1 On 3 March 1995, the NSW government transferred ownership of Murray Irrigation, an unlisted public company, to its irrigator shareholders, who make up most of its water entitlements holders. At the time, Murray Irrigation was granted a bulk supply licence.
- 2.2 In calculating the share component on Murray Irrigation's bulk supply licence, the NSW government considered the volume of the water rights held, at that time, by irrigators in Murray Irrigation's area of operations and increased the total by 20.95% to allow for a conveyance component. This resulted in the conveyance component making up approximately 17.3% of the share component on Murray Irrigation's bulk supply licence.
- 2.3 Murray Irrigation then divided that total share component between its water entitlements holders under individual contracts. Each water entitlements holder's irrigation rights therefore included a conveyance component. The definitions applying to irrigation rights in Murray Irrigation's constitution and in the individual contracts entered into by Murray Irrigation expressly included a conveyance component.

- 2.4 To take account of the existence of the conveyance component of the irrigation rights, Murray Irrigation formerly had two rules in its contracts:
- (1) the annual allocation made available to water entitlements holders was only 83% of the NSW government's relevant available water determination (**AWD**); and
  - (2) if a water entitlements holder wished to carry out an external permanent transfer, Murray Irrigation withheld 17% of the irrigation rights and only 83% were transferred.
- 2.5 In 2004, Murray Irrigation's bulk supply licence was replaced with NSW water access licences (**WALs**) including the following:
- (1) two high security WALs;
  - (2) one general security WAL; and
  - (3) one conveyance WAL.
- 2.6 In effect, the conveyance component of the bulk water licence was transferred to the conveyance WAL, reducing the share component of the high and general security WALs by approximately 17.3%.
- 2.7 However, Murray Irrigation did not reduce the number of irrigation rights on issue at that time. This meant that the volume of the irrigation rights on issue exceeded the share component on Murray Irrigation's high and general security WALs by approximately 20.95%.

### **3. *Water Market Rules 2009***

- 3.1 The WM Rules permit a holder of irrigation rights issued by an irrigation infrastructure operator to transform the irrigation rights into a WAL.
- 3.2 Subrule 7(2) of the WM Rules allows an irrigation infrastructure operator to reduce the volume of water to which a water entitlements holder is entitled, for the purposes of transformation, by taking into account conveyance losses. However, subrule 7(3) states that the irrigation infrastructure operator can only make the reduction if it does not hold a separate conveyance water access entitlement.

### **4. *Murray Irrigation's unique situation***

- 4.1 Until 1 July 2009, Murray Irrigation was in a situation unique among irrigation infrastructure operators. Section 5.5 of the ACCC's *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008 refers specifically to Murray Irrigation's unique situation.
- 4.2 Murray Irrigation's situation was unique because:
- (1) Murray Irrigation holds a separate conveyance WAL; but
  - (2) the irrigation rights held by water entitlements holders against Murray Irrigation included a conveyance component.

### **5. *ACCC's consideration of the issue and advice***

- 5.1 In its *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, the ACCC considered the circumstance where irrigation rights

held against an irrigation infrastructure operator include a conveyance component. Subrule 7(2) of the WM Rules was developed by the ACCC to deal with that circumstance.

- 5.2 However, subrule 7(3) states that the operator can only make the reduction if it does not hold a separate conveyance water access entitlement. Since 2004, Murray Irrigation has held a separate conveyance water access entitlement, being a conveyance WAL.
- 5.3 In section 5.5 of the ACCC's *Water market rules: Advice to the Minister for Climate Change and Water*, December 2008, the ACCC recommended against making any exception to the WM Rules to accommodate Murray Irrigation's unique situation, specifically stating:

*“The recommended rules do not make an exception for Murray Irrigation Limited (that is, the special case where an operator holds a separate conveyance entitlement but also seeks to withhold from transformation a volume of the person's entitlement to water). This approach is not intended to deny Murray Irrigation Limited from adjusting irrigators' water entitlements to reflect conveyance losses. Rather, the 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.”*

- 5.4 The ACCC publicly recommended that Murray Irrigation realise the benefits of holding a separate conveyance WAL and reissue its irrigation rights to exclude the conveyance component. In light of that, on 1 July 2009, Murray Irrigation followed the ACCC's recommendation, by exercising an existing contractual right to vary unilaterally the contracts under which the water entitlements holders in its area of operations hold their irrigation rights against Murray Irrigation.

## **6. Murray Irrigation's reduction of irrigation rights and water delivery rights**

- 6.1 The specific steps that Murray Irrigation took to implement the ACCC's recommendation were:

- (1) amending the definition of “*Water Entitlement*”, which defines its water entitlements holders' irrigation rights, to remove the reference to any conveyance component; and
- (2) reducing the number of irrigation rights held by water entitlements holders so that the total nominal quantity of irrigation rights of each class was as close as practically possible to, without being less than, the total share component on Murray Irrigation's relevant WALs.

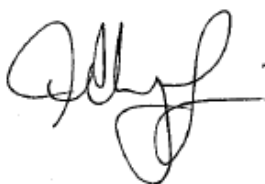
- 6.2 This meant a reduction of irrigation rights of approximately 17% (rounded up to the nearest whole irrigation right) to exclude the conveyance component.
- 6.3 The annual allocation of the remaining irrigation rights has risen from a maximum of 83% of the AWD to a maximum of 100% of the AWD, to match the maximum permitted by the *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2003* (NSW) (**Water Sharing Plan**). The effect is that water entitlements holders have approximately 17% fewer irrigation rights but are entitled to a maximum annual allocation of 100% (rather than 83%) of the AWD.
- 6.4 Murray Irrigation also made the following two amendments to the contracts with water entitlements holders:

- (1) the ability to carryover water allocation from one water year to the next was also increased to match the maximum permitted by the Water Sharing Plan; and
  - (2) if a water entitlements holder transfers their irrigation rights to a WAL held by someone other than Murray Irrigation, the company will no longer withhold any irrigation rights and 100% will be transferred.
- 6.5 Comparing the arrangements on and from 1 July 2009, with the arrangements before 1 July 2009, at any point in time:
- (1) water entitlements holders will have at least the same volume of annual allocation credited to their water allocation account; and
  - (2) water entitlements holders will be able to transfer at least the same number of irrigation rights to a WAL held by someone other than Murray Irrigation.
- 6.6 Simultaneously, Murray Irrigation also reduced water entitlements holders' water delivery rights by the same proportion as their irrigation rights (approximately 17%).

## **7. Bar to claims**

- 7.1 Murray Irrigation holds a separate conveyance water access entitlement. The WM Rules prohibit Murray Irrigation from withholding the conveyance component of an irrigation right from transformation. The ACCC, in its advice to the Minister, recommended against making an exception for Murray Irrigation, despite its unique situation. Murray Irrigation does not seek to reopen that issue. Murray Irrigation has adapted and it no longer withholds the conveyance component from transformation.
- 7.2 However, it was intended that protection be afforded to irrigation infrastructure operators as they took steps to adapt to the WM Rules.
- 7.3 Subsection 97(10) of the *Water Act 2007* (Cth) bars claims, actions or demands against an irrigation infrastructure operator for anything done by the operator solely for the purpose of complying with the WM Rules.
- 7.4 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.

Yours faithfully



**Anthony Couroupis**  
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