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

Public submission on proposed amendments to the *Water Market Rules 2009* and *Water Charge (Termination Fees) Rules 2009* by Murrumbidgee Irrigation Limited

1. Introduction

1.1 We make this submission in response to the Australian Competition and Consumer Commission's (ACCC) document titled "*Proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009*" published in December 2009 (Proposal).

1.2 We submit that the following proposed amendments to the *Water Market Rules 2009* (Cth) (WMRs) set out in the ACCC's Proposal should be rejected for the reasons explained in this letter:

- (1) Recommendation 1.3: Operators seeking security when delivery rights are defined as flow rate or other basis; and
- (2) Recommendation 1.4: Operators not to delay transformation.

2. Recommendation 1.3: Operators seeking security when delivery rights are defined as flow rate or other basis

2.1 The ACCC has proposed two options for an amendment to rule 10 of the WMRs. Neither of these options is suitable.

2.2 With respect to option 1, MI's delivery entitlements entitle the holder of a delivery entitlement to a variable share of the available flow at any point in time. The basic problem is that for the 5:1 ratio to work, one needs to be comparing like with like; it is difficult to meaningfully compare a flow (delivery entitlements) with a stock (water entitlements).

2.3 If there are sufficient water flows available to meet all orders for water in the relevant part of the irrigation network at the relevant time, the relevant holder will be entitled to at least a specified average minimum flow rate per day per delivery entitlement.

2.4 However, if at any point in time, there are insufficient water flows available to meet all orders for water in the relevant part of the irrigation network at the relevant time, the relevant holder's share of the available flow will depend on, among other things:

- (1) the rate of flow at the relevant time;
- (2) whether any holders of prior-ranking types of delivery entitlements order water in the relevant part of the irrigation network at the relevant time; and

- (3) whether any holders of delivery entitlements ranking equally with the relevant holder order water in the relevant part of the irrigation network at the relevant time and, if they do, what proportion of the delivery entitlements held by holders ordering water in the relevant part of the irrigation network at the relevant time are held by the relevant holder.

2.5 It is important to note that, under this arrangement, there is no specified cap on the volume of water that may be delivered to a holder in any year. The number of delivery entitlements held merely affects the rate at which water will be delivered from time to time. Determining the number of delivery entitlements that are "*reasonably required to provide the person in that year with an average standard delivery of*" their irrigation right will depend on, among other things:

- (1) how much water allocation the relevant holder anticipates will be credited to their water allocation account in respect of their water entitlements in the relevant financial year, and how much of it they anticipate they will wish to have delivered;
- (2) what rates of flow are expected from time to time in the relevant financial year (taking into account any capacity constraints in the relevant part of the river and irrigation network and the relevant holder's own on-farm works, and whether these constraints are temporary or permanent);
- (3) whether it is expected that sufficient water flows will be available to meet all orders for water in the relevant part of the irrigation network from time to time;
- (4) whether the relevant holder wishes to have water delivered at a high flow rate in a short period of time, or is comfortable having water delivered at a lower flow rate over a longer period of time (which may depend on the nature of the relevant holder's business);
- (5) whether there are holders of prior-ranking or equal-ranking delivery entitlements in the relevant part of the irrigation network and, if so, the proportion of those delivery entitlements held by the relevant holder; (expectations as to the termination or granting of delivery entitlements in the relevant part of the irrigation network may also be relevant); and
- (6) whether the relevant holder expects to be ordering water at the same time as holders of prior-ranking or equal-ranking delivery entitlements in the relevant part of the irrigation network.

2.6 Accordingly, determining a 'reasonably required delivery right' would be a complicated, time-consuming and subjective process, involving significant potential for disputes. Therefore, option 1 is not a workable solution.

2.7 Option 2 is inapplicable to MI because it assumes either:

- (1) that delivery entitlements were originally an entitlement to delivery of a fixed volume of water and were then converted to a flow rate or other basis; or
- (2) that such a conversion will take place in the future.

2.8 MI has never carried out such a conversion, nor does it expect to in the future.

2.9 Therefore, neither of the ACCC's proposed options is appropriate to address the failure of rule 10 of the WMRs to deal with delivery entitlements that are granted on the basis of a share of the available flow.

2.10 We have considered alternative options to address this issue. By way of background to MI's alternative proposal set out below, historically, MI customers have had a bundled irrigation right and water delivery right (on a flow rate basis) although the latter has only recently been defined and enforced. MI plans to unbundle these contractual rights once the Australian government has drafted the amendments to the capital gains tax laws which it has proposed to permit the unbundling to occur without triggering a capital gains tax liability. When unbundling occurs, it will at this stage be on the basis of one delivery entitlement being granted for every water entitlement held.

- 2.11 Therefore, as an alternative to the ACCC's proposals, MI proposes that rule 10 of the WMRs be amended to simply provide that the threshold for taking security is triggered when the number of delivery entitlements held is more than five times the number of remaining water entitlements held. For the purpose of that calculation, the number of delivery entitlements held must be adjusted to take account of any consolidation, subdivision or other reorganisation of delivery entitlements that occurs after the date on which the water delivery right is unbundled from the irrigation right.
- 2.12 We note that, while this formulation would be appropriate for MI, it may not necessarily be applicable to all operators. We query whether there ought to be a general rule supplemented by customised rules based on how an operator's delivery entitlements are structured. We also note that the ultimate position regarding the tradability of water delivery rights may have a bearing on this issue. For these reasons, we seek a meeting with the ACCC, at your earliest convenience, to discuss these issues and inform the ACCC's final advice to the Minister about the appropriate solutions. We will contact you shortly to arrange a meeting. After careful consideration we are increasingly of the view that Delivery rights cannot be tradable, however at this stage our policy is not yet finalised.

3. Recommendation 1.4: Operators not to delay transformation

- 3.1 The ACCC is proposing to amend subrule 16(1) of the WMRs. However, the proposed amendment could retrospectively expose MI and other irrigation infrastructure operators to potential liability, including civil penalties and claims by irrigators and others.
- 3.2 The ACCC's proposed amendment purports to retrospectively regulate acts and omissions by operators after the commencement of the WMRs on 23 June 2009. It is possible that, during the period from 23 June 2009 to 31 December 2009, MI and other operators did not necessarily comply with the standard that would be retrospectively imposed by the amended subrule 16(1). However, the purpose of the transitional period under the WMRs was that full compliance was only required from 1 January 2010.
- 3.3 It would be clearly unfair for the ACCC to change the rules to retrospectively impose more onerous obligations on operators.

Yours Faithfully,



Brett Tucker
Managing Director