



04 March 2016

Review of the water charge rules
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

Dear Sir/Madam

Waterfind would like to thank the ACCC for addressing many of the issues raised in Waterfind's Issues Paper Submission in the Review of Water Charge Rules Draft Advice. Waterfind believes that if certain rule advices are implemented as such, they will benefit the Australian water market by improving the market transparency and reducing barriers to trade.

Attached to this cover letter is Waterfind's response to specific ACCC draft rule advice and recommendations, and also commentary around water market concerns that were discussed in the draft advice but no specific rule advices or recommendations were made based on them.

Sincerely

A handwritten signature in blue ink, appearing to be "Alister Walsh", written in a cursive style.

Alister Walsh
CEO Waterfind

WATERFIND – COMMENTS ON SPECIFIC ACCC DRAFT RULE ADVICE AND RECOMMENDATIONS

Rule advice 4-A

The three sets of water charge rules (WCIR, WCTFR and WCPMIR) should be combined into a single instrument by incorporating the relevant provisions of the WCTFR and WCPMIR into the WCIR and renaming this as the Water Charge Rules. The water market rules should not be combined with the water charge rules.

Although Waterfind fully supports combining the three sets of water charge rules (WCIR, WCTFR and WCPMIR) into a single instrument, Waterfind would like to get some additional clarification and justification to why water market rules (WMR) should not be combined with them.

Waterfind believes that the combination of the Water Charge and Market Rules would provide clarity to end users, rather than requiring reference to multiple documents, and cannot see any clear negatives to this. Currently both Water Charge (Termination Fees) Rules 2009 (WCTFR) and WME only apply to irrigation infrastructure operators (IIOs). However, the proposed extension of these rules makes WCTFR effectively applicable to all infrastructure operators (Rule advice 6-A). One of ACCC's justifications for this is the fact that "there may be operators who have never met the definition of 'IIO' but who nevertheless may be entitled to charge a termination fee". Waterfind considers that the exact same argument could be used to combine WMR with water charge rules, as termination fees are closely related to the very nature of WMR (i.e. rules dealing with actions or omissions of an IIO that prevent or unreasonably delay transformation arrangements or trade). In addition, Waterfind considers that WMR have very little merit as standalone rules.

Alternatively, WMR could be merged with Basin Plan Water Trading Rules (WTR). As WTR itself notes that "the WMR are more closely related to the WTR than the water charge rules", there is some overlap with these two sets of rules, and combining them would be beneficial if WMR are not combined with the rest of water charge rules. The problem with this, in Waterfind's opinion, would be that so far the Murray-Darling Basin Authority (MDBA) has done very little to monitor let alone enforce the WTR, even though there is evidence of some irrigation operators or water authorities breaching the rules¹. That said, the water market might benefit if the ACCC's role would be expanded to monitor and enforce the WTR as well (and, ultimately, combine all water charge rules, WMR and WTR into a single set of rules).

Rule advice 4-B

The proposed single set of water charge rules should apply to 'regulated water charges' as set out in the Act and Regulations, with separate definitions for:

- *infrastructure charge – corresponding with the definition of 'regulated charge' in the WCIR*
- *planning and management charge – corresponding with the definition of 'regulated charge' in the WCPMIR*

¹ For instance, since the WTR took effect there have been a lack of public announcements by the Commonwealth Environmental Water Holder, the MDBA itself or other Commonwealth/Basin State agencies in situations where their actions have had direct consequences for operational/trading limits

- *termination fee – corresponding with a charge allowed for under the current WCTFR rule 6 or rule.*

Waterfind would like to comment that the current definition of ‘regulated charge’ in the WCPMIR is ambiguous: “regulated charge means a charge for water planning and water management activities to which Part 4 of Division 1 of the *Water Act 2007* applies”. Thus, in the proposed combined water charge rules it would be of great benefit to clearly spell out what constitutes a WPM charge.

Rule advice 4-C

The private right of action (to recover loss or damage resulting from a breach of the rules) which currently applies to the water charge (infrastructure) rules should be extended to apply to the water charge rules more generally.

Although Waterfind supports this rule advice, we question whether the combined rules and extension of private right of action cover all trade barriers in relation to water charges. See Waterfind’s commentary on rule advice 5-D.

Rule advice 5-A

The rules should be amended such that Part 3 (i.e. non-discriminatory rules) applies to all infrastructure operators instead of only to member-owned operators.

Waterfind fully supports this rule advice, as also non-member-owned operators can impose trade barriers.

Rule advice 5-D

The rules should be amended to prohibit an infrastructure operator from imposing, or demanding payment of, an infrastructure charge:

- *upon an application to trade, transfer or terminate a tradeable water right (including where the application is not made to the infrastructure operator);*
- *as a condition of the infrastructure operator granting its consent or approval to a trade, transfer or termination of a tradeable water right*
- *when or because a tradeable water right has been traded or transformed;*
- *because a customer has undertaken, or intends to undertake, a trade, transfer or termination of a tradeable water right;*

other than where that infrastructure charge reflects the administrative costs necessarily incurred in processing the trade, transfer or termination.

This rule should be a civil penalty provision.

Waterfind fully supports this rule advice, and considers that from the water market perspective it is the single most important advice the ACCC has given in the draft advice.

However, to fully provide transparency to water market participants, Waterfind believes the ACCC needs to provide a definition for a ‘reasonable administration cost’ and/or ‘the administrative costs necessarily incurred in processing the trade, transfer or termination’, or set a cap for such water transaction fees.

Waterfind acknowledges that it is very difficult to set a Basin-wide cap. As noted by the MDBA in their Issues Paper submission, “MDBA further noted that marginal cost of administering a trade may be different for each trade authority approval because there is wide variation in the number of trades in each state”². However, Waterfind suggests that one method of capping water transaction fees charged by the infrastructure operators would be to compare them to application fees charged by government water authorities (i.e. the fees paid by private diverters) in the same catchment/state, as customers of the irrigation infrastructure operators (IIO) usually need to pay those fees as well on top of the internal transaction fee. Waterfind’s view is that under no circumstance should IIO customers have to pay more than the corresponding ‘private diverter’ fee currently is when trading their water assets externally outside of their irrigation districts.

Waterfind would also like to comment on the following ACCC interpretation in the draft advice (highlights by Waterfind):

*“Transaction fees that apply to an application to trade a WAE or an application to change or vary a water access right, **that are imposed by an operator on behalf of government, are planning and management charges. The proposed non-discrimination clauses would not apply to these types of charges. However, where an infrastructure operator imposes their own trade application charges, these are considered infrastructure charges and the proposed rule would apply**”³.*

Based on this interpretation, Waterfind considers that volume-based transaction fees (e.g. trade-out fees for temporary water) charged by certain infrastructure operators would be prohibited under rule advice 5-D since none of them are imposed by an operator on behalf of government. Waterfind believes that it is of crucial importance that this rule advice is implemented as such, as Waterfind considers that such trade-out fees are not justified, and are also in breach of the National Water Initiative (NWI) objectives as well as the Basin water charging objectives and principles (BWCOP) to facilitate the efficient functioning of water markets. Furthermore, Waterfind considers that a volume-based trade-out fee cannot by definition be a ‘reasonable administration cost’ as administration cost of a single transaction would be the same regardless of the volume of the trade.

As one of the leading Australian water brokers, Waterfind believes it is well positioned to comment on WaterNSW charge on water allocation traded out of NSW in relation to rule advice 5-D. Waterfind concurs with the findings of Marsden Jacob Associates (MJA), as they identified that “*this charge has led to dual pricing for NSW water allocation in the southern Murray-Darling Basin (MDB), with NSW sellers listing their (NSW) water allocations at a \$5-\$7 discount in Victorian and SA markets*”. From a pure water market perspective, in Waterfind’s opinion it is an undeniable fact that this fee distorts the water market. This opinion is also generally shared by Waterfind’s clients actively trading in the Southern Connected system.

However, Waterfind also concurs with the ACCC’s view that there are alternative charging structures for operators to recover their prudent and efficient costs without distorting water use and trade decisions. For instance, if the operators would levy variable charges at the time water is allocated, rather than when water is used, as per ACCC’s suggestion, this would not have a distorting market

² MDBA, Submission to the ACCC water charge rules review issues paper, July 2015, pp. 6-7.

³ ACCC, Review of Water Charge Rules Draft Advice, November 2015, p. 68.

effect. Thus, Waterfind fully supports this suggestion, as it would level the playing field between NSW, SA & Vic irrigators in terms of interstate water trading as NSW water sellers would be indifferent between selling water to buyers in any state.

Levying variable charges at the time water is allocated would also solve another issue in relation to the WaterNSW variable water usage charge. This charge applies not only to interstate trades but also to intrastate temporary trades that involve a buyer whose licence is not linked to a NSW Works Approval. While in certain cases (e.g. the buyer only momentarily parks the water onto his account and moves it onwards to a licence that does have a works approval attached) it is possible to claim this fee back, at present this process is overly cumbersome. This has led to situations where persons rightfully eligible to claim their fees back have not done it due to the process being too difficult. Levying variable charges at the time water is allocated would therefore fix this issue as well.

Although Waterfind is supportive of the proposed non-discrimination clauses and believes they would reduce trade barriers by preventing IOs from imposing unjust charges, there is a risk that the scope of the proposed water charge rules is not enough to cover all trade barriers in relation to water charges. Specifically, the new rule advice does not prevent situations where temporary trading outside of their irrigation districts is prohibited altogether for IIO customers. If and when such incidents are not in breach of the current or proposed water charge rules, or even Basin Plan Water Trading Rules, it is questionable whether irrigators have any avenues to appeal. Therefore, water ombudsman type of solution suggested by Waterfind in its initial submission to the Issues Paper (see also commentary for (Recommendation 8-C) would help in this matter.

Rule advice 5-S & 5-U

The water charge rules should be amended to provide that an infrastructure operator is also taken to have made a distribution where it trades, transfers or allocates water in the form of a 'water allocation' or an allocation of water to an irrigation right other than:

- *the allocation of water from an irrigation infrastructure operator to the holder of an irrigation right for the purpose of reflecting the allocation of water by a State Agency to the water access entitlement held by the irrigation infrastructure operator on their behalf; or*
- *those necessary to give effect to a trade of water access right or irrigation right by a customer,*

*Such a trade, transfer or allocation would not trigger Part 7 if it met the criteria of a **standard distribution** as listed in Rule advice 5-S. Standard distributions are those made:*

- ***on the basis of all the operator's customers' rights of access (typically represented by their water delivery right);***
- *to customers that had previously contributed to a fund for the replacement of infrastructure when this money is no longer required because the replacement of the infrastructure is no longer required, in proportion to the contributions made by each customer;*
- *in the form of reasonable honorariums;*

- *to all customers in a specific part of the area serviced by the infrastructure operator in relation to water savings achieved by the operator in that part, in proportion to each customer's right of access to that part; or*
- *made by an infrastructure operator to its owners but only if the infrastructure operators' infrastructure charges are approved or determined under Part 6 or by a State Agency under the water management law of a Basin State.*

Waterfind agrees with this rule advice, but would like to clarify whether e.g. allocation 'enhancements' given by certain IIOs meet the criteria of a standard distribution and are thus allowed as long as they're based on delivery rights, or is this the case only if the enhancement is given to ALL customers holding delivery rights (instead of the enhancement applying only to customers with a certain class of delivery rights).

Rule advice 6-E

The rules should be amended to provide that, if an infrastructure operator does not provide for the trade of water delivery right in relation to their water service infrastructure separately from the trade of a water access right or irrigation right, the multiple applied to the fixed volumetric charge levied per unit of water delivery right or unit of water drainage right should be 1x rather than 10x.

Waterfind fully supports this rule advice. However, Waterfind also considers that IOs could provide their customers or potential new entrants more information about the tradability delivery rights. Based on the feedback Waterfind has received from its clients they are often not aware of how delivery rights can be traded, let alone the value of the right (be it a positive or a negative price, depending on the situation).

Based on Waterfind's experience it is especially hard to establish a delivery right market for Victorian delivery shares. Whereas in NSW delivery rights are of the form 'one delivery entitlement equals to the right to deliver 1ML of water to the customer', in Victoria delivery rights are allocated as ML/day units. The latter unit is often hard to interpret and makes comparison and trading of the delivery rights difficult. In order to facilitate water delivery right trade, it might be of use to review and possibly unify the units that are used in defining water delivery rights. Thus, Waterfind would like to reiterate its suggestion from the initial Issues Paper submission that the ACCC consider actions needed to standardise the delivery right units across the Murray-Darling Basin. As water delivery rights form the basis of the Total Network Access Charge (TNAC), the unit standardisation would also improve the comparability of termination fees across different operators. This would be of great benefit for the potential new entrants looking to access IOs irrigation network.

Recommendation 8-A

The ACCC recommends that the Australian Government should work with Basin States to improve the accuracy and consistency of water trade reporting. In particular, water trading price data should be collected on a consistent basis in a way that can allow for the separation of market-based trades from other types of trades.

Waterfind is a long-time advocate of improving the water market information, and believes that there are simple steps the Government could take to improve the accuracy and consistency of water trade reporting. For instance, the WTR (Section 12.48 of Chapter 12 of the Basin Plan) state that a person selling (disposing of) a water access right must report the agreed price of the trade when seeking approval or registration of the trade. However, at present this rule does not place an

obligation on any other person involved in the trade, e.g. an approval authority or a registration authority. Waterfind suggests that the obligation to disclose trade prices should be extended to the authorities, as from market transparency perspective it doesn't make much sense to collect water trade data but not publish it. Most authorities are reporting trade prices via state water registers and/or are under the obligation of reporting them to the Bureau of Meteorology (BOM) as per *Water Act 2007* anyway, so the requirement to publically report trade prices would not constitute additional burden to the authorities as the processes are already in place.

In relation to the National Water Market System (NWMS) project, which was discontinued in 2014, the Government should make immediate decisions how the legacy of that project is dealt with. Waterfind acknowledges that the BOM has continued to make the information on the NWMS website partially available, however not all functions of the website are fully working and/or up to date – for instance the downloadable data sets on the NWMS website have not been updated since April 2014.

As Waterfind understands that the IOs are still required to use the information systems created for the NWMS to report the water market information to the BOM, someone should take ownership of the NWMS data, and either improve the existing portal or develop a new one as soon as is practicable in order to provide more efficient water trade information services for market participants. However, Waterfind is sceptical towards the Government's appetite and/or ability to manage this work, especially due to the failure of the NWMS project. Therefore, Waterfind would like to see the Federal and State Governments to reach out to the industry for their knowledge and best practices in this matter to come up with a sustainable solution.

Recommendation 8-C

The ACCC recommends that governments consider the merits of expanding the jurisdiction of existing ombudsman schemes or small business commissioners to resolving disputes between infrastructure operators and their customers, or the creation of a new scheme to perform these roles.

As per Waterfind's initial submission to the water charge rules review to the Issues Paper, Waterfind fully supports this recommendation, especially since the ACCC does not currently provide a dispute resolution service in relation to the water charge rules (neither does the MDBA for Water Trading Rules for that matter). This would also provide an option for individual private irrigation trusts or joint water supply scheme members to claim their rights to manage their own water assets in problematic situations (within and beyond the scope of the water charge rules).

WATERFIND – COMMENTS ON WATER MARKET CONCERNS MENTIONED IN THE DRAFT ADVICE

Regulation of water market intermediaries

Waterfind is a long-time advocate of bringing water market intermediaries under stricter regulation. Waterfind's position is that we believe there would be benefits for the Commonwealth Government to regulate the water market through a licencing system, and that such regulation would require water market intermediaries to:

- Operate an independently audited trust account for client funds that is protected from creditors.
- Hold professional indemnity insurance specific to the operation of the position of water broker or exchange service.
- Prohibit any employee of an intermediary from engaging in the buying and reselling of water for profit.
- Operate independently from a water regulatory authority.
- Offer contracts drawn specifically for the purpose of water transfers.
- Employ standards and consistent procedures to control the transfer process and protect the rights and interests of clients.
- Report contracted prices to a centralised water price reporting system, ideally through a constant data stream or at least on an hourly basis.
- Disclose and have agreements with clients as to the form of the relationship (i.e. whether it is an intermediary or agency relationship). Further to these minimum requirements, a stronger regulatory framework for the water market would also ideally include:
- The development of broader regulatory water market rules that includes performance standards and procedures for announcing water allocations, changing water market rules, and processing water transactions.

Further to these minimum requirements, a stronger regulatory framework for the water market would also ideally include:

- The development of broader regulatory water market rules that includes performance standards and procedures for announcing water allocations, changing water market rules, and processing water transactions.
- The capacity for Government organisations that approve water transfers to refuse to process transfers lodged by an unlicensed intermediary.
- The requirement for market intermediaries to achieve some form of quality endorsed certification (i.e. ISO 9001 quality certification).

Trade by non-water users and concerns about 'speculators'

The Oxford Dictionary defines speculation as follows:

"Investment in stocks, property, etc. in the hope of gain but with the risk of loss"

Using this definition in the strictest sense, most of Australian water right holders would be considered, in one form or another, speculators, and as Australian farming enterprises are continuing to be aggregated, Australia has over the last 10 years undergone an actual decline in the number of individuals speculating in holding water.

As regards the growth of people buying or selling water that do not have an intention of using that water for food and fibre production or industrial purposes, and/or they are buying and selling water for the sole purpose of making money, Waterfind does not survey its customers on their intentions regarding buying and selling water. However, based on Waterfind's general market knowledge and anecdotal evidence, our suggestion is that the amount of water held in the market for non-food / fibre production or industrial use has increased over the last 10 years. Nevertheless, the eventual application of this water is still for food and fibre production or environmental purposes. The largest water holder of this type today would be the Commonwealth Environmental Water Holder.

While Waterfind has an obvious vested interest in maturing and growing the water market, Waterfind would be very cautious towards the introduction of rules that would attempt to decrease market participation. Waterfind believes that such rules would simply serve to temporarily disrupt, encourage innovative rules work arounds, and increase the volatility of the market. Increased volatility would then only serve as additional lure to profit-maximising investors seeking to make profit out of this precious resource.

Waterfind believes it is imperative for the Commonwealth to encourage increased participation as well as maturity of the water market, as this serves to decrease volatility and provides irrigation communities with increased opportunities to grow their irrigated agricultural businesses while supporting continued advancements on irrigation efficiency. In other words, Waterfind agrees with the ACCC's view that there should not be any limitations on which entities can buy and sell water in the Basin.

In summary, Waterfind's view is that excluding the disruptive effect of the CEWH's participation in the water market as currently involved, the water market is now consolidated and engaged enough that regardless of who owns the water, there isn't the capacity for any single entity (apart from the CEWH) to have a dramatic impact on its performance.

NSW temporary trade deadline dates

Although not specifically discussed in the draft advice, Waterfind would like to take the opportunity to comment on the trade barrier caused by the season closing dates in the NSW Murray & Murrumbidgee valleys. In these valleys interstate temporary trading closes at the end of April, whereas intrastate trading continues until the end of May. In South Australia and Victoria both intra- and interstate temporary trading continues effectively until the end of the season in 30 June. Waterfind's view is that this places NSW Murray and Murrumbidgee irrigators into unfair position compared to SA & Vic water users.

Furthermore, Waterfind does not see any clear reasoning why in NSW the trade should close that much earlier compared to other states. Waterfind suggests that the ACCC investigate standardising the trade closing dates in the Southern Connected system as this would provide irrigators equal chances to manage their water assets and remove the barrier from NSW water users.