

Minister seeks advice on proposed amendments to the Water Market Rules 2009 and Water Charge (Termination Fees) Rules 2009

The Minister for Climate Change and Water, Senator Penny Wong, (Minister) has written to the ACCC requesting advice on proposed amendments to the Water Market Rules 2009 and the Water Charge (Termination Fees) Rules 2009 (collectively the Rules) by March 2010.

As outlined in the letter the proposed amendments relate to:

- Murray Irrigation Limited's (MIL's) recent reissue of irrigators' water entitlements. MIL has expressed concern that it may not benefit from the protection against legal action that s.97(10) of the Water Act 2007 provides to operators.
- minor amendments to address technical issues with the Rules. These amendments do not appear to raise any policy implications and are proposed to ensure the Rules more accurately reflect the ACCC's final advice to the Minister (provided in December 2008).

In preparing its advice to the Minister on the Water Market Rules in 2008, the ACCC considered MIL's specific circumstances based on the information available and considered that an exception to the Water Market Rules was not appropriate. However the ACCC did note in its final advice to the Minister, that the lack of an inclusion for exception for MIL was not intended to deny MIL from adjusting irrigators' water entitlements to reflect conveyance losses.¹

The ACCC understands that on the 1 July 2009 MIL reduced the number of water entitlements held by approximately 17 per cent. This reduction removed the transmission losses (conveyance) component from MIL water entitlements. The number of delivery entitlements on an MIL landholding was also reduced by the same number as the water entitlements on the landholding.²

Section 97(10) of the Water Act provides a statutory bar to claims as follows:

No claim, action or demand may be made, asserted or taken against an irrigation infrastructure operator for anything done by the operator solely for the purpose of complying with water market rules.

It appears there is a concern that the bar to legal claims provided for in the Water Act does not extend to all actions taken by operators such as the MIL action to re-issue irrigator's water entitlements.

The ACCC now invites interested parties to provide the ACCC with information to inform the development of draft advice to the Minister on proposed amendments. The

¹ ACCC, *Final advice to the Minister Climate Change and Water on water market rules*, December 2008, p. 54.

² For more information see: <http://www.murrayirrigation.com.au/files/3291545.pdf>.

ACCC is particularly interested to receive information regarding the proposed amendment to address MIL's concern that it may not benefit from the protection against legal action that the section 97(10) of the Water Act provides to operators.

Responses to this notice should be submitted to the Water Branch — water@acc.gov.au by **2 November 2009**. All responses to this notice will be addressed in accordance with the ACCC's information policy [<http://www.acc.gov.au/content/index.phtml/itemId/846791>].

The ACCC will consider responses to this notice in developing draft advice and proposed amendments to the Rules which will be released for consultation in December 2009. It is expected stakeholders will have until February 2010 to respond to the draft advice and draft amendments before the ACCC provides its final advice on proposed amendments to the Minister by March 2010.

Background

MIL is an operator that holds a separate water access entitlement relating to the network losses of its system. At the time of its incorporation MIL was issued with one bulk licence. This licence included the sum of individual members' general security and permanent allocation along with an additional 21 per cent based on historical network losses. At that time, MIL issued water entitlements that equalled the total of its bulk water licence. In 2005 MIL was issued with a separate water access licence for network losses (conveyance licence). The volume of water covered by this conveyance licence was deducted from MIL's existing bulk water licence. However, at that time MIL did not reissue irrigators' water entitlements to take account of the creation of the separate conveyance licence. Rather, MIL currently assumes that 17 per cent of each irrigator's water entitlement is sourced from the operator's separate conveyance licence. It is understood that MIL is the only operator to which this applies.

In December 2008, the ACCC provided its final advice on water market rules and water charge (termination fees) rules to the Minister. The ACCC suggested that there was little benefit in holding a separate licence and then devolving the licence back into irrigators' water entitlements as this could create the impression that the operator is withholding water in addition to that required to cover conveyance losses. The ACCC recommended in its final advice that the operator realise the benefits of holding a separate conveyance entitlement, as was the likely intention when the licence was issued, and adjust its water entitlements to account for this separation.