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20 November 2019

Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By e-mail only:
adjudication@acc.gov.au

Attention: Madeleine Houghton

Dear Madam

CB10000471 – Virginia Irrigation Association Incorporated - submission

I refer to your letter dated 30 October 2019 to SA Water. I am instructed to respond to Virginia Irrigation Association Incorporated (**VIA**)'s collective bargaining notification as follows:

Introduction

1. SA Water does not consider that there will be any likely effect on competition arising from the VIA's proposed collective bargaining arrangements, nor any particular public benefit.
2. However, SA Water does not intend to enter into negotiations with the VIA except to the extent that it may in fact be authorised to act for existing members. That is likely to be a small minority of producers who receive irrigation by way of the Virginia Pipeline Scheme (**VPS**).
3. SA Water and VIA were parties to very detailed arrangements by way of the Renewal Deed (described in paragraph 1.3.1 of the VIA's notification and apparently comprising Attachment 2 or 3 thereto) which potentially governed future price setting and the conduct of negotiations and arbitration. The Renewal Deed was validly terminated effective 5pm on 25 June 2019 by SA Water.
4. The notification is invalid in terms of its stated representation and the statutory prescribed limit, and if permitted, is likely to be of little utility.

Response to Paragraph 1.3 of the notification

5. The VIA states that it represents 400 members but Annexure 1 to the notification specifies only 63 "contracting" members who are actually members of the VIA. It is not clear whether the contracting members have duly sought membership in writing, been accepted by the Committee of VIA or its delegate, and paid the annual fee as required

by the VIA Rules in Annexure 2. The VIA has also failed to identify the initial contract required by s 93AB (2) of the *Competition and Consumer Act 2010* (Cth) (**the Act**) although the subscription of members to the VIA Rules may be so intended. Further, insofar as the VIA is purporting to provide notice on behalf of its members pursuant to s 93AB (7) of the Act, 39 of those listed in Annexure 1 appear to be non-corporations and therefore unable to provide their own notification under s 1A of the Act and therefore ineligible for that purpose.

6. The members specified in the list in Annexure 4, described as potential future contracting parties, are presumably not current members of the VIA in accordance with the VIA Rules, or if they are members, have not authorised the VIA to conduct negotiations on their behalf. That list is not a current or accurate list of producers who are customers of SA Water. Further, insofar as the VIA is purporting to provide notice on behalf of future members pursuant to s 93AB (7A) of the Act, a majority of those listed in Annexure 4 appear to be non-corporations and therefore unable to provide their own notification under s 1A of the Act and therefore ineligible for that purpose.
7. The VIA is not currently to SA Water's knowledge "in the process of negotiating renewed customer contracts for its members..." as the Renewal Deed has been terminated and the VIA has not engaged with SA Water's correspondence to engage in arbitration.

Response to Paragraph 3 of the notification

8. SA Water refutes the allegation that the parties agreed that water price following the BOOT period would be less than during the BOOT period, and also refutes the allegation that the Renewal Deed was agreed in recognition that the treatment of the water was to be an ongoing cost of environmental compliance requirements.
9. SA Water was not intending direct negotiations between itself and producers to involve legal representation. That will only increase the parties' costs, and there is no formal arbitration process entered into between SA Water and VIA that would justify legal representation. However, this may be determined on a case-by-case basis.
10. SA Water has not agreed to negotiate with the VIA the terms and conditions specified in paragraph 3.1 (i) – (iv) inclusive.
11. The VIA's proposed collective bargaining is not consistent with the Renewal Deed, which firstly required good faith negotiation and then any arbitration on whether good faith negotiation has occurred, before any arbitration on other outstanding matters (including as to price) pursuant to cll 5.5.2, 5.4 and 5.5 of the Renewal Deed. Accordingly, any expectation as referred to in paragraph 6 above is not reasonable on the VIA's part and was not reasonable at the time of giving the notification.
12. Contrary to the assertion in paragraph 3.3 that collective bargaining will obviate the need for SA Water to negotiate with over 400 individual customers, SA Water typically enters into supply arrangements with individual customers as part of its business. Further, on present information the VIA in no way acts for "over 400" producers.
13. SA Water refutes the allegations in paragraph 3.3 that it has excessive bargaining power and that it is exploiting such power to artificially inflate the price of water supplied through the VPS. If SA Water had failed to negotiate to date in good faith (which is

strenuously denied) the VIA had a remedy to determine that issue under cll 5.4 and 5.5 of the Renewal Deed but has not exercised that remedy at any time.

14. SA Water also refutes that water pricing put forward by it is unsustainable and may lead to business failures or wider local, community or environmental impacts (in fact the pricing is favourable to producers supplied water under the VPS compared to the tariffs applicable to other customers generally and the water has been historically supplied under the VPS at prices significantly below the actual costs of supply).
15. SA Water understands in fact that there is a secondary water market involving those producers, which is inconsistent with the VIA's allegations and the wholly speculative and hypothetical scenario set out on page 10.

Response to Paragraph 5 of the notification

16. As to paragraph (a) SA Water repeats paragraphs 4, 5 and 11 above.
17. As to paragraph (b) SA Water repeats paragraphs 12 and 13 above.
18. As to paragraph (c) SA Water repeats 7 and 10 above.
19. As to paragraph (d) SA Water repeats paragraph 13 above and says that homeowners are already effectively subsidising the favourable water prices of the producers under the VPS. SA Water also repeats paragraph 7.
20. As to paragraph (e) SA Water repeats paragraph 13 above.

Response to Paragraph 9 of the notification

21. As to paragraph 9.3 SA Water repeats paragraph 12 above.
22. As to paragraph 9.4(c) SA Water repeats paragraphs 4, 5 and 11 above.

Response to Paragraph 10 of the notification

23. SA Water refutes the alleged public benefits specified in paragraphs (a) – (d) inclusive in their entirety. The allegations regarding businesses continuing to operate, avoidance of job losses, competition levels, irrigators being able to continue to purchase water and the like are entirely speculative and unsupported by evidence. Such claims fail to adequately take into account the benefit received by producers to date by receiving water over a 15 year period at prices significantly below comparable schemes and below the cost of production enabling them to expand their operations over the duration of the VPS.

Response to Paragraph 11 of the notification

24. Contrary to the allegations made in paragraph (a), the VIA appears to be intending a result to the detriment of households (imposing additional costs on them) and SA Water itself (depriving it of fair costs recovery, compliance with regulatory requirements, and the rational and evidence based use of resources for the public benefit).

Response to Paragraph 16 of the notification

25. Contrary to the VIA's assertion that the prescribed amount will not be exceeded, the relevant requirement under s 93AB of the Act is that the corporation reasonably expect to make 2 or more contracts with the target where the sum of the prices for the supply or acquisition of SA Water's goods or services under those contracts will not exceed \$5M in any 12 month period.

26. It is conceivable that if the VIA was to negotiate 400 contracts, the prescribed limit in sum will be exceeded. On that basis the notification of collective bargaining on the basis put forward may be invalid through failing to meet the statutory requirements of s 93AB and regulation 71B.

SA Water looks forward to the ongoing operation of the VPS.

Yours faithfully
CROWN SOLICITOR

Per:

