



AUSTRALIAN  
COMPETITION  
& CONSUMER  
COMMISSION

# Statement of Reasons

In respect of a notification lodged by  
Virginia Irrigation Association Incorporated

in respect of

collective bargaining with SA Water

Date: 18 December 2019

Notification number: CB10000471

Commissioners:  
Rickard  
Ridgeway

## Summary

The ACCC does not object at this time to the notification lodged by the Virginia Irrigation Association Incorporated (**VIA**) to enable the VIA to collectively negotiate on behalf of current and future members with the South Australian Water Corporation (**SA Water**) for the supply of recycled water from the Virginia Pipeline Scheme (**VPS**).

The ACCC considers the notified conduct is likely to result in public benefits in the form of transaction cost savings and better input into contracts, and minimal, if any, public detriments.

The notification was lodged on 22 October 2019 and the ACCC has decided to allow it to remain in force for a period of ten years from that date. Accordingly, the notification came into force on 5 November 2019 and will remain in force until 21 October 2029, unless it is withdrawn or revoked.

## The notification

1. On 22 October 2019, the VIA lodged a collective bargaining notification<sup>1</sup> to enable it to collectively bargain on behalf of current and future VIA members with SA Water for the renegotiation of VIA members' customer contracts for the supply of water from the VPS (the **Notified Conduct**).
2. Specifically, the VIA submits it expects to collectively negotiate the following terms and conditions of VIA members' contracts for the supply of water from the VPS:
  - a. the prices and mechanisms for settling prices
  - b. the terms on which payment is to be made
  - c. the obligation to supply reclaimed wastewater at a certain volume, specification and quality, and
  - d. the term of each customer contract and the rights and obligations on each party to extend and/or terminate the contract.
3. The VIA submits that its rationale for the Notified Conduct is that the Notified Conduct is necessary because of SA Water's near monopoly position within the water supply industry in South Australia. Further, that SA Water owns and operates the Bolivar Wastewater Treatment Plant which wholly supplies the recycled water presently supplied to irrigators through the VPS. Members of the VIA and SA Water are currently negotiating water pricing for the recycled water supplied through the VPS. The VIA submits that the water pricing proposed by SA Water for the recycled water supplied through the VPS is inflated and unsustainable for the majority of the irrigators along the VPS.

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<sup>1</sup> Businesses can obtain protection from legal action under the *Competition and Consumer Act 2010 (CCA)* for collective bargaining including associated collective boycotts by lodging a collective bargaining notification with the ACCC. Protection for collective bargaining (which does not involve a collective boycott) will generally commence 14 days after the collective bargaining notification is lodged.

4. The VIA has requested that the notification be in force for ten years.<sup>2</sup>

## Background

5. VIA represents irrigators of the Virginia region in South Australia, on the Northern Adelaide Plains. The VIA presently has in excess of 400 individuals as members, who are irrigators that conduct various irrigated primary production operations in and near Virginia. VIA submits that most of its members are relatively low water users with low water use primary production enterprises (e.g. glasshouses). The remaining approximately one third of VIA members are large broad acre irrigators who use comparatively large amounts of reclaimed water from the VPS.<sup>3</sup>
6. SA Water is a statutory corporation established by the *South Australian Water Corporation Act 1994* (SA). SA Water provides water services to approximately 1.7 million South Australian customers. These services include supplying water, removing sewage, treating sewage and wastewater, and recycling some wastewater.<sup>4</sup>
7. The VPS is a reticulated water treatment and pipeline distribution system, which distributes recycled water from the Bolivar Wastewater Treatment Plant throughout the Virginia Irrigation District. The VPS enables approximately 40% of treated effluent from the Bolivar Wastewater Treatment Plant to be reclaimed and used for horticultural irrigation.
8. Prior to the establishment of the VPS, a small number of irrigators located near the channel that discharged treated wastewater from the Bolivar Wastewater Treatment Plant to the sea were able to access recycled wastewater for restricted irrigation use. The restrictions on use of this wastewater were due to water quality and public health concerns. Other irrigators had arrangements to use groundwater through arrangements with what is now the South Australian Department of Environment and Water.
9. VIA submits that presently, the only alternative water supply available to VIA's irrigators beyond the reclaimed water from the VPS is groundwater. VIA notes that the sustainable and lawful rate of extraction is limited by water allocations endorsed on water licences issued to individual irrigators.
10. The VPS was established pursuant to various agreements to which the VIA and SA Water were parties in 1996-1997, and was established as a build, own, operate, transfer (**BOOT**) project. Ownership of the VPS was transferred to SA Water at the conclusion of the BOOT period on 18 January 2018.<sup>5</sup>
11. The VIA submits that at the outset of the VPS project, the VIA and SA Water executed a Renewal Deed in which the parties agreed that the water price following

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<sup>2</sup> The ACCC may provide a written notice determining the expiry of the collective bargaining notice if the ACCC is satisfied that the standard three year period is not appropriate and another period (up to 10 years) is appropriate in all the circumstances. The ACCC must, in or with the notice, provide a written statement of its reasons for giving the notice.

<sup>3</sup> Collective bargaining notification by Virginia Irrigation Association Incorporated lodged 22 October 2019, page 2.

<sup>4</sup> SA Water website, [www.sawater.com.au/about-us/about-sa-water](http://www.sawater.com.au/about-us/about-sa-water), accessed on 11 December 2019

<sup>5</sup> Collective bargaining notification by Virginia Irrigation Association Incorporated lodged 22 October 2019, pages 2-3.

the BOOT period would be less (in real terms) than during the BOOT period. VIA submits SA Water has signaled its intention to increase the water price for water supplied via the VPS.

## Consultation

12. The ACCC invited submissions from a wide range of interested parties. A copy of the public submission is available on the [ACCC's public register](#).
13. The ACCC received one submission from SA Water. SA Water states that it does not intend to enter into collective negotiations with the VIA except to the extent that VIA may in fact be authorised to act for existing members. SA Water states that this is likely to be a small minority of producers who receive irrigation by way of the VPS, and much less than the 400 members that the VIA claims in its notification.
14. Consequently, SA Water does not consider that there will be any likely effect on competition arising from the VIA's proposed collective bargaining arrangements. SA Water considers that there are unlikely to be public benefits that arise from the notified conduct. It submits that VIA's public benefit claims relating to allowing businesses to continue to operate, avoiding job losses, and enabling irrigators to continue to purchase water are speculative and unsupported by evidence. It further submits that 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.
15. SA Water also disputes a number of other aspects of the notification, including:
  - a. that SA Water agreed that the price for water would decrease following the BOOT period
  - b. that SA Water has excessive bargaining power and that it is exploiting that power to increase the price of water, and
  - c. that the proposed water pricing is unsustainable or is likely to lead to business failures or local, community or environmental impacts.

## ACCC's assessment

16. The ACCC has considered the Notified Conduct in accordance with section 93AC of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
17. In doing so, the ACCC has taken into account:
  - The likely future with and without the Notified Conduct. In particular, the ACCC considers that, absent the Notified Conduct, each participant in the group is likely to continue to individually negotiate and contract for the supply of water from the VPS with SA Water.
  - The relevant areas of competition likely to be affected by the Notified Conduct. The ACCC considers that the primary area of competition is the acquisition of recycled water from SA Water by irrigators located along the VPS in the Northern Adelaide Plains. The ACCC considers that there may be other potential purchasers of this recycled water, and to that extent, there may be competition for the acquisition of that water between other irrigators.

## **Public benefits are likely to arise**

18. The ACCC considers that the Notified Conduct is likely to result in the following public benefits:
  - Transaction cost savings – such as reduced negotiation and drafting costs, associated with collectively negotiating customer contracts, between the notifying parties and SA Water, compared to the cost of irrigators negotiating their contracts individually with SA Water, and
  - Better input into contracts – collective negotiations may enable individual irrigators to achieve greater input and representation of their views about the terms and conditions of their contracts than what they could achieve through individual negotiations with SA Water.
19. The notifying parties also submit that the Notified Conduct is likely to result in lower water prices for irrigators, enabling irrigators to continue operating their businesses and purchasing recycled water from SA Water, resulting in broader community and environmental benefits. As noted above, SA Water disputes these claimed public benefits and refutes that water pricing put forward by it is unsustainable and may lead to business failures or wider local, community or environmental impacts.
20. SA Water disputes that up to 400 irrigators could potentially collectively bargain for recycled water along the VPS with SA Water and that this reduces the claimed transaction cost savings. However, the ACCC considers that even if a small number of irrigators engage in the Notified Conduct, some public benefits are likely to result.
21. The ACCC considers that while the Notified Conduct could potentially result in a large group of individuals engaging in collective bargaining with SA Water, SA Water has significant bargaining power as a monopoly provider of water along the VPS. Even if the Notified Conduct does not result in lower prices for recycled water along the VPS, the ACCC considers that there are likely to be public benefits arising from the Notified Conduct in the form of transaction cost savings and better input into contracts.

## **Minimal public detriment**

22. The ACCC considers that the Notified Conduct is likely to result in minimal, if any, public detriment from a reduction in competition between the members of the bargaining group for the acquisition of water from the VPS to irrigators located along the VPS in the Northern Adelaide Plains because:
  - Participation in the Notified Conduct is voluntary for both the VIA member irrigators and SA Water; if parties wish to negotiate individually, they remain free to do so.
  - Competition in the downstream markets in which irrigators compete is unlikely to be affected because the irrigators will continue to compete with a wide range of other primary producers in downstream markets.

## **Period for which the Notification will be in force**

23. A collective bargaining notification (and therefore the protection it confers) will be in force for a period of three years from the date it is lodged unless the ACCC determines that another period is appropriate or the notification is withdrawn or revoked.
24. In this case, VIA asked that the notification remain in place for ten years.

25. The ACCC considers that it is appropriate for the notification to remain in force until 21 October 2029, for the following reasons:
- The likely benefits of the Notified Conduct may be expected to continue for the duration of the Notified Conduct and therefore total benefits are likely to be greater with the extended notification period.
  - The extended notification period is unlikely to change the minimal public detriment which is likely to result from the Notified Conduct.

## Decision

26. The ACCC considers that the benefit to the public that is likely to result from the Notified Conduct will outweigh the detriment to the public that is likely to result.
27. Accordingly, the ACCC does not object to the notification at this time. As with any notification, in accordance with s 93 AC, the ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the public benefit does not outweigh the public detriment.
28. With respect to the period for which the notification will remain in force, for the reasons set out in paragraph 25, in accordance with s 93AD(5), the ACCC is satisfied that a ten year period is appropriate in all the circumstances, being the period ending on 21 October 2029.<sup>6</sup>
29. Accordingly, the protection provided by notification CB10000471 commenced on 5 November 2019 and will continue until 21 October 2029, unless the notification is withdrawn or revoked.
30. This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the CCA.

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<sup>6</sup> As required by s 93AD(5)(b), this period will end no later than 10 years after the day that the notification was lodged.