

WATER MARKET RULES 2009

I, the Minister for Climate Change and Water, having regard to advice given by the Australian Competition and Consumer Commission, make the following Rules under section 97 of the *Water Act 2007*.

Dated:

Part 1 Preliminary

1 Name of Rules

These Rules are the *Water Market Rules 2009*.

2 Commencement

These Rules commence on the day after they are registered.

3 Definitions

In these Rules, unless the contrary intention appears:

Act means the *Water Act 2007*.

business day, in relation to an obligation of an irrigation infrastructure operator, does not include a Saturday, Sunday or day that is a public holiday in the place where the operator's principal place of business is situated.

civil penalty means a civil penalty provision within the meaning of Division 4 of Part 8 of the Act.

Note : Subsection 97(8) of the Act provides that the civil penalty for a contravention of a provision of the water market rules is 200 penalty units.

Subsection 147(3) of the Act provides that the pecuniary penalty for a contravention of a civil penalty provision must not exceed:

- (a) if the wrongdoer is an individual—the relevant amount specified for the civil penalty provision; or
- (b) otherwise—an amount equal to 5 times the amount of the relevant amount specified for the civil penalty provision.

contract includes agreement.

trade includes transfer.

transformation, in relation to the whole or a part of an irrigation right against an irrigation infrastructure operator, means the transformation of the whole of that right, or a part of that right, in accordance with transformation arrangements, into a water access entitlement.

transformation arrangements means arrangements of the kind referred to in paragraph 97(1)(a) of the Act.

transitional period means the period beginning on the commencement of these Rules and ending on 31 August 2009.

4 *Transitional provision for application of these Rules*

Until the end of the transitional period—

- (a) a provision of a contract, arrangement or understanding between an irrigation infrastructure operator and a person who has an irrigation right or a water delivery right against the operator that is in force immediately before the commencement of these Rules continues to have the same force and effect as it would have if these Rules had not been made; and
- (b) a reference in these Rules to business days has effect as a reference to business days after the end of the transitional period.

Part 2 Facilitation of transformation

5 *Irrigation infrastructure operators to inform irrigators of the making of these Rules*

As soon as possible after the commencement of these Rules, each irrigation infrastructure operator must, by written notice, inform each person who has an irrigation right against the operator that these Rules have been made, how copies may be obtained and how the ACCC may be contacted for further information about these Rules or its role in relation to them.

6 *Irrigation infrastructure operator to establish procedures for transformation*

(1) An irrigation infrastructure operator (not being an operator to whom subrule (2) applies) must establish clear procedures for the transformation, in accordance with these Rules, of the whole or a part of an irrigation right held against the operator and—

- (a) may include in those procedures provisions under which a person may ascertain details of an irrigation right and associated water delivery right held by the person against the operator; and

(b) must ensure that, no later than the end of the transitional period—

- (i) details of those procedures; and
- (ii) procedures for making application for transformation:

are readily available to persons holding irrigation rights against the operator.

Civil penalty: 200 penalty units.

- (2) An irrigation infrastructure operator to whom this subrule applies who, after the end of the transitional period, receives from a holder of an irrigation right against the operator a notice in writing of an intention to apply for, or a written application for, transformation, must ensure that details of procedures for the transformation of irrigation rights, including procedures for making application for transformation, are readily available to the holder.

Civil penalty: 200 penalty units.

- (3) Subrule (2) applies to an irrigation infrastructure operator who, under water access entitlements held by the operator, is not entitled to take or hold 10,000ML or more of water for irrigation purposes only.

Note: Operators may develop their own forms for applications for transformation or may use forms prepared by the ACCC.

Part 3 Irrigation right

7 Irrigation infrastructure operator to provide details of irrigation right

- (1) If a person who holds an irrigation right against an irrigation infrastructure operator gives written notice to the operator that the person—
- (a) intends to apply, or applies, for transformation of the whole or a part of that right; and
 - (b) requests the operator to provide details of the contractual or other arrangements between the operator and the person relating to the irrigation right, including the number of units or volume of water to which the person is entitled under the irrigation right—
- the operator must, within 20 business days after receiving the notice, provide —
- (c) those details, including the number of units or volume of water to which the person is entitled in respect of the current financial year, as at the date of receipt of the notice; and
 - (d) if the operator reduces that number of units or volume in accordance with subrule (2) for the purposes of transformation, the number of units or volume of water as so reduced.

Civil penalty: 200 penalty units.

- (2) Except as provided in subrule (3), an irrigation infrastructure operator may reduce the number of units or volume of water to which the holder of an irrigation right is entitled, for the purposes of transformation of the right, by a number of units or volume of water—
- (a) calculated in accordance with the formula—

$$A = \frac{B}{C} \times D$$

where—

- A is the number of units or volume of water by which the entitlement may be reduced under this rule;
- B is the number of units or volume of water to which the holder of the irrigation right is entitled through the operator's network in respect of the current financial year as at the date of the request under subrule (1);
- C is the total number of units or volume of water to which holders of irrigation rights against the operator are entitled in respect of the current financial year through the operator's network as at the date of the request under subrule (1) (disregarding any reductions made under this rule);
- D is the average number of units or volume of the operator's irrigation fixed network loss in respect of the 10 financial years immediately before the financial year in which the request under subrule (1) is made (less any reductions made under this rule); or

(b) the number of units or volume of water agreed in writing between the holder and the operator.

- (3) Subrule (2) does not apply if, immediately before providing the details under subrule (1), the irrigation infrastructure operator held a separate water access entitlement relating to loss of water during distribution of water to holders of irrigation rights.
- (4) If a reduction is calculated in accordance with paragraph (2)(a), the irrigation infrastructure operator must provide to the holder of the irrigation right such details as are reasonably necessary to confirm the accuracy of the calculation.
- (5) If the holder of an irrigation right against an irrigation infrastructure operator believes that details provided under this rule are not complete or are incorrect and—
 - (a) seeks to reach agreement with the operator as to the details of the irrigation right (including the number of units or volume of water to which the holder is entitled before any reduction is made under subrule (2)); and
 - (b) the parties do not agree the details within 10 business days after receipt of the details—

the holder may give notice in writing to the operator that the holder seeks a formal negotiation of the matter.

- (6) A formal negotiation for the purposes of subrule (5) is a genuine attempt by the operator to reach agreement with the holder of the irrigation right, within 30 business days after the giving of the notice under that subrule, as to the details of the irrigation right.

- (7) If a notice is given to an irrigation infrastructure operator under subrule (5), the operator must not fail to make a genuine attempt to reach agreement on the details of the irrigation right within 30 business days.

Civil penalty: 200 penalty units

- (8) If, in accordance with subrule (2), an irrigation infrastructure operator reduces the number of units or volume of water to which the holder of an irrigation right is entitled for the purposes of transformation, the number of units or volume of water by which the entitlement is reduced is to be taken to be a part of the irrigation right that the holder continues to hold and to represent the share of the fixed network loss borne by the holder.

- (9) If a person who—

(a) holds a part of an irrigation right representing a share of a fixed network loss referred to in subrule (8) against an irrigation infrastructure operator; and

(b) does not hold, or ceases to hold, a water delivery right against the operator—
the part of the irrigation right referred to in paragraph (a) is revoked.

- (10) In this rule—

fixed network loss, in relation to an irrigation infrastructure operator, means, in respect of a financial year, the number of units or volume of water lost, as estimated by the operator, during the distribution of water through the operator's irrigation network to the point of delivery to holders of irrigation rights but does not include variable water loss.

genuine attempt includes the taking of such steps as would reasonably be expected to result in the appointment of a third person to resolve the dispute.

variable water loss means the number of units or volume of water—

(a) lost during the distribution of water through the operator's irrigation network to the point of delivery to holders of irrigation rights; and

(b) attributable to the number of units or volume of water delivered to the holders of irrigation rights.

Part 4 Water delivery rights

8 Contractual terms and conditions of water delivery rights

- (1) If a person who holds an irrigation right against an irrigation infrastructure operator gives written notice to the operator that the person—

(a) intends to apply, or applies, for transformation of the whole or a part of that right;
and

- (b) requires the continuation of a right to have water delivered by the operator after transformation, whether or not the person holds a water access entitlement obtained as the result of transformation—

the operator must, within 20 business days after receiving the notice, provide details of the contractual terms and conditions between the operator and the person applicable to the right to have water delivered when the notice is received with such variations (if any) to take effect from transformation as are permitted under subrule (2).

- (2) The operator must not make any variations to the contractual terms and conditions between an irrigation infrastructure operator and another person referred to in subrule (1) other than variations that—
 - (a) are necessary as a consequence of the transformation ; or
 - (b) are agreed in writing by the operator and that person.

- (3) If—

- (a) a person who gives notice to an irrigation infrastructure operator under subrule (1) believes that the terms and conditions of the right to have water delivered after transformation have not been provided by the irrigation infrastructure operator under that subrule or that the details provided are incorrect; or
- (b) the operator and the person do not agree on a variation of the terms or conditions within 10 business days after the operator provides the written details under subrule (1)—

the person may give notice in writing to the operator that the person seeks a formal negotiation of the matter.

- (4) A formal negotiation under subrule (3) is a genuine attempt by the irrigation infrastructure operator to reach agreement with the person, within 30 business days after the giving of the notice under that subrule, as to the terms and conditions of the right to have water delivered.
- (5) If a notice is given to an irrigation infrastructure operator under subrule (3), the operator must not fail to make a genuine attempt to reach agreement within 30 business days as to the terms and conditions of the right to have water delivered.

Civil penalty: 200 penalty units.

- (6) In this rule, ***genuine attempt*** includes the taking of such steps as would reasonably be expected to result in the appointment of a third person to resolve the dispute.

9 Continuation of water delivery services

An irrigation infrastructure operator—

- (a) must provide details of a right to have water delivered that continues after transformation in accordance with subrule 8(1);
- (b) must not make any variation to contractual terms and conditions of a right to have water delivered that continues after transformation except as authorised under subrule 8(2);
- (c) must provide water delivery services in accordance with the terms and conditions of a right to have water delivered that continues after transformation in accordance with rule 8.

Civil penalty: 200 penalty units.

10 Security may be required for payment of fees or charges for delivery of water

(1) Where a person, by written notice given to an irrigation infrastructure operator under subrule 8(1), requires the continuation of a right to have water delivered by the operator after transformation of the whole or a part of an irrigation right and, after the transformation, either—

- (a) the person ceases to hold any part of the irrigation right (except as provided in subrule 7(8)); or
- (b) the person holds a part of that right but the volume of water to delivery of which the person is entitled under the water delivery right in respect of the current financial year (disregarding any constraints on delivery) is more than 5 times the volume of water that the person is entitled to receive in respect of that year under the part of the right held by the person (excluding, if the person holds a part of an irrigation right as provided in subrule 7(8), the volume of water taken to be the share of a fixed network loss)—

the operator may, subject to this rule, require security to be given by the person for the payment of fees or charges for access to the operator's irrigation network for the delivery of water to the person after the transformation.

- (2) An irrigation infrastructure operator must not require security to be given by a person under this rule in an amount that, at the time the security is given—
 - (a) exceeds the amount that, under the *Water Charge (Termination Fees) Rules 2008 (No. 1)*, would be payable to the irrigation infrastructure operator for the termination of the water delivery right held by the person against the operator at that time; or
 - (b) if there is no such amount, exceeds the amount of the total network access charge within the meaning of those Rules payable to the operator in respect of the year in which the security is given.

- (3) An irrigation infrastructure operator must not refuse to accept security by reason only of the form in which it is offered if a person offers it in one or more of the following forms:
- (a) where part of an irrigation right is transformed, a charge over a part of the irrigation right that the person continues to hold; or
 - (b) a charge over an unencumbered water access entitlement, or an unencumbered part of a water access entitlement, obtained by the person as the result of the transformation of part of an irrigation right; or
 - (c) a charge over any other unencumbered water access entitlement, or unencumbered part of a water access entitlement, held by the person; or
 - (d) a guarantee given by an authorised deposit-taking institution within the meaning of the *Banking Act 1959*; or
 - (e) a deposit lodged with the irrigation infrastructure operator; or
 - (f) any other form of security agreed upon by the irrigation infrastructure operator and the person.

Note: Rule 18 provides that security must not be required or given in relation to transformation arrangements except as provided in this rule.

Part 5 Applications relating to transformation of irrigation rights

11 Application for transformation where water access entitlement is to be held by applicant

- (1) An irrigation infrastructure operator may require an application for the transformation of the whole or a part of an irrigation right held against the operator by a person who intends to hold a water access entitlement obtained as the result of the transformation to be in writing and to include—
- (a) the name and address of the applicant;
 - (b) the account number, or other details, identifying the applicant as the holder of an irrigation right against the operator;
 - (c) the number and type of units, or the volume, of water to which the applicant is entitled under the whole, or the part, of the irrigation right;
 - (d) if another person holds a legal or equitable interest in the whole or the part of the irrigation right, as the case requires, confirmation that that person has given approval to the application;

- (e) whether the applicant wishes to have, or to continue to have, a right to have water delivered by the operator after the transformation, whether or not the applicant continues to hold an irrigation right or a water access entitlement obtained as a result of the transformation;
 - (f) any other information reasonably necessary for the purposes of transformation arrangements.
- (2) An irrigation infrastructure operator must not require from an applicant for transformation of the whole or a part of a irrigation right any information that is not reasonably necessary for the proposed transformation arrangements.

Note: Termination charges under water charge rules may apply if the applicant does not retain a water delivery right.

12 Application for transformation where water access entitlement is to be held by person other than the operator or the applicant

- (1) An irrigation infrastructure operator may require an application for the transformation of the whole or a part of an irrigation right held against the operator where the water access entitlement obtained as the result of the transformation is to be held by a person other than the applicant to be in writing and to include—
- (a) the name and address of the applicant;
 - (b) the account number, or other details, identifying the applicant as the holder of an irrigation right against the operator;
 - (c) the number and type of units, or the volume, of water to which the applicant is entitled under the whole, or the part, of the irrigation right;
 - (d) if another person holds a legal or equitable interest in the whole or the part of the irrigation right, as the case requires, confirmation that that person has given approval to the application;
 - (e) whether the applicant wishes to continue to have a right to have water delivered by the operator after the transformation, whether or not the applicant continues to hold a part of the irrigation right or a water access entitlement obtained as a result of the transformation;
 - (f) the name of the person (not being the applicant or the operator) who is to hold the water access entitlement obtained as a result of the transformation;
 - (g) details of any water access entitlement to which the whole or part of the entitlement that is sought is to be appended; and
 - (h) any other information reasonably necessary for the purposes of transformation arrangements.

- (2) An irrigation infrastructure operator must not require from an applicant for transformation of the whole or a part of an irrigation right any information that is not reasonably necessary for the proposed transformation arrangements.

13 Fees

- (1) An irrigation infrastructure operator may require an application under rule 11 or 12 for transformation of the whole or a part of an irrigation right to be accompanied by—
 - (a) a fee for the transformation;
 - (b) if applicable, a fee relating to a water delivery right.
- (2) The fees determined by an irrigation infrastructure operator in relation to an application under rule 11 or 12 must not exceed an amount based on the recovery of the reasonable and efficient costs incurred, or likely to be incurred, by the operator in processing the application.

Civil penalty: 200 penalty units.

14 Irrigation infrastructure operator to process applications efficiently

- (1) Subject to subrule (2), an irrigation infrastructure operator who receives an application for the transformation of the whole or a part of an irrigation right against the operator must advise the applicant in writing if—
 - (a) the application is not complete or is not in accordance with these rules;
 - (b) the application is not accompanied by the relevant fees applicable to the application;
 - (c) there are any outstanding charges or fees payable by the applicant to the operator in respect of the irrigation right—and specify the further information that is required, the fees payable or the outstanding charges, as the case requires.
- (2) An irrigation infrastructure operator must, after receiving an application for the transformation of the whole or a part of an irrigation right, advise the applicant in writing no later than 5 business days after the end of the relevant period—
 - (a) that the application is approved; or
 - (b) if the operator is unable to approve the application within the relevant period because—
 - (i) a person who holds a legal or equitable interest in the irrigation right has refused to give approval; or
 - (ii) a requirement under a law of a State cannot be satisfied; or

(iii) the applicant has not provided the information required, or paid the fees or outstanding charges, referred to in subrule (1)—

that the application has not been approved for one or more of the reasons referred to above and that the ACCC has been so advised as required under rule 15.

(3) In this rule—

relevant period, in relation to a decision whether or not to approve an application for transformation of an irrigation right, means the period of 20 business days after—

- (a) receipt by the irrigation infrastructure operator of the application; or
- (b) where further information, a fee or outstanding charges are requested under subrule (1), receipt by the operator of the further information, the fee or outstanding charges, or an agreement is made between the operator and the applicant for the payment of outstanding charges, as the case requires—

whichever is the later but—

- (c) if the applicant has requested details of the relevant irrigation right under rule 7 or, under rule 8, required the continuation of a right to have water delivered, does not include any period before the details of the irrigation right or right to have water delivered are agreed; and
- (d) if appropriate steps have been taken—
 - (i) to obtain the approval of a person holding a legal or equitable interest in the irrigation right; or
 - (ii) to satisfy a requirement under a law of the State—

does not include the business days after the steps are taken and before the approval is given or refused or the requirement satisfied, or advice received to the effect that it cannot be satisfied.

Part 6 General

15 *Operator to notify ACCC if unable to meet timelines or approve an application for transformation*

(1) If an irrigation infrastructure operator is unable—

- (a) to reach agreement with the holder of an irrigation right on the details of the right within a period of 30 business days after a notice seeking a formal negotiation of the matter is given under subrule 7(5); or
- (b) to reach agreement with the holder of an irrigation right on the details of a water delivery right within a period of 30 business days after a notice seeking a formal negotiation of the matter is given under subrule 8(3)—

the operator must, within that period, notify the ACCC in writing of the reasons why the operator is unable to reach agreement within that period.

- (2) If an irrigation infrastructure operator is unable to approve an application for transformation of the whole or a part of an irrigation right within the relevant period under rule 14, the operator must, no later than 5 business days after the end of that period, notify the ACCC in writing of the reasons why the operator is unable to approve the application within that period.

16 *Irrigation infrastructure operators to facilitate transformation arrangements*

- (1) If an irrigation infrastructure operator receives, from a person who has an irrigation right against the operator, a request in writing for the transformation of the whole or a part of the irrigation right the operator must not do, or fail to do, an act in a way that prevents, or unreasonably delays, the transformation.

Civil penalty: 200 penalty units.

- (2) Anything done or omitted to be done under and in accordance with these Rules does not constitute a prevention or unreasonable delay under subrule (1).

17 *Irrigation infrastructure operator not to prevent or delay trading of water access entitlement*

- (1) An irrigation infrastructure operator must not do, or fail to do, an act in a way that prevents or unreasonably delays the trading, by a person who had an irrigation right against the operator, of the whole or a part of a water access entitlement obtained as the result of transformation arrangements made with that operator.

Civil penalty: 200 penalty units.

- (2) Anything done or omitted to be done under and in accordance with these Rules does not constitute a prevention or unreasonable delay under subrule (1).

18 *Irrigation infrastructure operators not to take security except in accordance with these Rules*

- (1) An irrigation infrastructure operator must not require, and must not accept, security—
 - (a) in relation to the transformation of an irrigation right; or
 - (b) in relation to—
 - (i) a water delivery right; or
 - (ii) water access entitlement right—

obtained in connection with the transformation of an irrigation right held by a person against the operator.

Civil penalty 200 penalty units

- (2) Subrule (1) does not apply in relation to security given in connection with the grant of a water delivery right under rule 10.

19 *Water delivery right not to be terminated by reason only of application for transformation*

An irrigation infrastructure operator must not, as a condition of approving an application for transformation, terminate, or require the applicant to terminate, any right to have water delivered held by the applicant against the operator.

Civil penalty: 200 penalty units.

20 *Contractual arrangements between irrigation infrastructure operators and holders of irrigation rights or water access entitlements*

(1) An irrigation infrastructure operator must not include in a contract, arrangement or understanding entered into between the operator and a person who holds an irrigation right against the operator or a water access entitlement obtained as the result of transformation arrangements a provision that—

(a) seeks to impose a charge or fee that is not—

(i) a regulated water charge; or

(ii) a fee authorised under rule 13.

Note: Section 91 of the Act provides that a fee for terminating access to an operator's network is a regulated water charge.

(b) restricts or seeks to restrict, or discriminates against, a person, or class of persons, with or to whom the holder of an irrigation right or a water access entitlement obtained as the result of transformation of an irrigation right proposes to trade the whole or a part of the entitlement; or

(c) imposes a restriction based solely on the category or attributes of the irrigation right or water access entitlement; or

(d) any other provision that may prevent or unreasonably delay transformation of the whole or a part of an irrigation right.

Civil penalty: 200 penalty units.

(2) Subrule (1) does not apply to a term or condition that—

(a) is required or expressly permitted by or under a law of the relevant State, or authorised by a licence granted to the relevant irrigation infrastructure operator under such a law, and applicable to the operator's irrigation network; or

(b) requires a person—

(i) who is the holder of the whole or a part an irrigation right against an irrigation infrastructure operator or of a water access entitlement obtained as a result of

the transformation of a part of that right; and

- (ii) who intends to continue to hold a water delivery right against the operator after transformation—

to install a water meter to measure the water delivered from the operator's network; or

- (c) requires the approval of a person who holds a legal or equitable interest in an irrigation right to be given before the right, or a part of the right, is transformed.

21 *Irrigation infrastructure operators to notify irrigators of relevant changes to constitution, contracts etc.*

- (1) An irrigation infrastructure operator must, by written notice given to each person who holds an irrigation right against the operator, provide information about any changes made after the commencement of these Rules to the operator's constitution, management, supply contracts, water delivery rights or any other contracts, arrangements or understandings, being changes that affect, or may affect, the respective rights and obligations of the operator and the holder in relation to transformation arrangements.
- (2) An irrigation infrastructure operator must give notice of a change referred to in subrule (1) within 10 business days after the change is made.

Note: The changes referred to in this rule include changes made for the purposes of compliance with these Rules.

Part 7 Proceedings for damages

22 Proceedings to recover loss or damage

A person who suffers loss or damage as a result of conduct, or an omission, of another person that contravenes these Rules may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

Note: See section 97(9) of the Act.