



TRIM Ref: E3317

Friday 10 September 2010

Director
Water Market Section
Department of Environment, Water, Heritage and the Arts
GPO Box 787
Canberra ACT 2601

watermarketsection@environment.gov.au

Dear Sir/Madam

Subject: Response to Water Infrastructure Charge Rules under section 92(1) of the *Water Act 2007* (Cth)

1. Thankyou for the opportunity to respond to the Department of Environment, Water, Heritage and the Arts' (the Department) proposed changes to the Water Charge (Infrastructure Rules) 2010 (The Rules).
2. Murray Irrigation Limited is an unlisted public company that supplies irrigation water and associated services to its shareholders. It also provides services to customers who hold irrigation rights with Murray Irrigation Limited who are not shareholders.
3. Murray Irrigation's Board of Directors includes six shareholder (or irrigator) Directors and upto three external (non-shareholder) Directors. There are currently two external Directors. Murray Irrigation's Directors are elected by the shareholders for four year terms, with elections held every two years.
4. Murray Irrigation's constitution prevents the Company issuing a dividend to its shareholders.
5. Murray Irrigation holds five water access licences with the NSW Government and has issued contractual rights (irrigation rights) to its customers. Murray Irrigation's NSW Murray general security licence is equal to approximately 67 percent of the total general security water entitlements in the NSW Murray.
6. Murray Irrigation's total licence volume excluding its supplementary water licence is approximately 1,423,000, unit shares or 69 percent of the volume NSW Murray water entitlements. The company supplies irrigation water and associated services to 2,390

landholdings over an area of 748,00ha in the southern Riverina. Further information about the company and its operation is available at www.murrayirrigation.com.au.

7. This submission contains two parts; firstly Murray Irrigation's general comments about the Rules; and secondly comments on the changes proposed to the Rules of specific relevance to Murray Irrigation.

Part 1 Can the Water Charge (Infrastructure) Rules 2010 be justified?

Additional regulation of Murray Irrigation

8. At no time in the development of the either *Water Act 2007* (Cth) or the Rules have either the Government or the Australian Competition and Consumer Commission (ACCC) demonstrated a business case for the proposed Rules including demonstration that the benefits of the Rules will exceed the costs of the regulation.
9. It is Murray Irrigation's view that whilst consultation has been exhaustive it has not generated robust debate or clearly demonstrated how the Rules will contribute to achieving the objects of the *Water Act 2007* (Cth) or that the benefits of increased regulation on commercial irrigation infrastructure operators will be achieved.
10. The Rules in their current form are a regulatory impost on Murray Irrigation that will impose additional costs on our irrigator customers. It could be argued that the Rules, by their prescriptive nature will act to reduce the opportunities for irrigation infrastructure operators to make commercial business decisions.
11. In addition, the very nature of establishing the Rules as legal instruments has the potential to lead to conflict with other laws, for example the *Trade Practices Act 1974* (Cth) and for potential, unintended consequences to occur because of "loop holes" arising from drafting that will impact on the effectiveness of the Rules.
12. In the case of Murray Irrigation our shareholders have the opportunity to express their dissatisfaction with the company's performance by the election of Directors. In the last four years, Murray Irrigation's irrigators have continued to be billed for the cost of access to our infrastructure, despite four years of extremely low water sales. The pressure from irrigators for the Company to address costs in the face of extremely low water sales has been extreme. The Company actively responded to this pressure and pursued avenues of reducing costs to reduce charges to irrigators. This is the commercial reality of Murray Irrigation's operating environment.
13. It is Murray Irrigation's view that the Rules are simply not required to make the company accountable. The Rules also focus on issues associated with the opportunities for different treatment of customers based on whether they are shareholder customers or non-shareholder customers. In Murray Irrigation's current form all customers that irrigate from our channel system are also shareholders and have the opportunity to vote.
14. In the case of our non-member customers who own irrigation rights but no land, Murray Irrigation's relationship with these customers is regulated by the *Water Market Rules 2009* (Cth) and contract law. The charges that apply to these customers are; Government entitlement charges and Murray Irrigation's account administration fee which is currently \$160 per annum. If Murray Irrigation attempted to impose an onerous charging regime on these customers or a regime that was different to Government's they would just transform their irrigation rights.

15. Whilst Murray Irrigation may in the future have customers that are not shareholders, it is difficult to envisage a circumstance where our irrigation customers will seek to relinquish their power to elect Directors or for new entrants not to become shareholders, in order to elect Directors.
16. Good corporate governance demands that Murray Irrigation's own business planning and budgeting processes are robust and address many of the issues required by the Network Services Plan.
17. Murray Irrigation has previously raised concerns with the requirements for the five year network services plan, consultation and public disclosure process required by the Rules. Some of our concern relates to what will be required in the network service plan. Whilst the ACCC has consulted with Murray Irrigation about the potential requirements in the network services plan, the results of this consultation are not publicly available and will not be until after the Rules are finalised.
18. The requirement for Irrigation Infrastructure Operators to provide five year network services plan to customers has the potential, in the event that the network services plan and services change for legitimate commercial reasons that the Irrigation Infrastructure Operator could be exposed to action from a customer under the *Trade Practices Act 1974*(Cth) for misleading conduct.

Regulatory failure because of gaps in the application of the Rules

19. The Government and the ACCC are cognisant of significant gaps in the *Water Act 2007* (Cth) that will prevent the Rules achieving consistent outcomes in the irrigation sector across the Murray-Darling Basin.
20. Specifically in relation to Water Charges;
 - The Murray Darling Basin Authority (including River Murray Water) does not strike a charge and therefore is not captured by the Rules. Costs incurred by the Murray Darling Basin Authority and passed on to Murray Irrigation through state government charges are Murray Irrigation's single largest costs and the Authority is not regulated.
 - The South Australian Government does not impose regulated water charges on its irrigators, therefore the Rules will allow this practice to continue in South Australia.
 - Murray Irrigation's understanding is also that some of the smaller trust and private irrigation districts in NSW are also not captured by the Rules.
21. As a consequence of these limitations Murray Irrigation concludes that only the NSW and Victorian irrigation sectors and the private irrigation schemes in South Australia will be captured by the Rules.
22. **A regulatory framework which has these inadequacies is fundamentally flawed and therefore should not be implemented in its current form. These failings are reasons alone for the Water Charge Infrastructure Rules to be reconsidered by the Government.**

Existing regulation, consistent with the National Water Initiative is already applied in NSW and to an extent in Victoria

23. The NSW Independent Pricing and Regulatory Tribunal (IPART) regulates both State Water and the Water Administration Ministerial Corporation Charges (NSW Office of Water). IPART have regulated bulk water charges since 1996. Arguably NSW's approach is the most consistent of any of the Basin States with the National Water Initiative and as identified by the ACCC, NSW is recovering a higher proportion of costs from its irrigators than any other state. In Victoria the Essential Services Commission (ESC) regulates Goulburn Murray Water's charges.
24. Consequently the charges of government owned infrastructure operators that will be captured by the Rules are already regulated. It is Murray Irrigation's view this approach is adequate, should be maintained and does not require the involvement of the ACCC, which has less experience in the water sector than either the IPART or the ESC.

Specific comments on the amendments

25. The amendments proposed generally provide clarity and or are required because of the changes in the timeframe for making the Rules. Murray Irrigation has specific comments on three of the proposed rules.

Rule 10 Restriction of certain regulated charges

26. It is Murray Irrigation's view that Rule 10 is ambiguous. One view is that prohibition in Rule 10 could apply simply where the practical effect of a charging arrangement is that any water entitlements holder pays a different regulated charge for the same service provided to any water access licence holder. This view is substantially restrictive.
27. The ACCC states in its Water Charge Infrastructure Rules advice to the Minister for Climate Change and water, 2009 (page 55).

"Operators should not be inhibited from charging non-uniform prices that give effect to the user pays and cost-reflective objectives and principles of the Water Act. It is important, however, that pricing is transparent and customers are aware of the factors behind price differentials, such as regional differences in the cost of supply."

This implies a less restrictive interpretation of Rule 10.

28. **Murray Irrigation recommends Rule 10 be amended to clarify that it requires a reasonable and transparent basis for differential charges, rather than requiring the same charge be imposed in each case unless an exception applies.**
29. **Murray Irrigation also recommends that Rule 10 include wording that makes it clear that differential charging for the same service should not be allowed solely on the basis of whether that customer holds an irrigation right or a water access entitlement**

Rule 45 Application of Part (Approval or determination of regulated charges of Part 7 operators)

30. Murray Irrigation's interpretation is that Rule 45 is intended to capture cash distributions not water distributions. It is Murray Irrigation's view that distributions in the Rules should explicitly exclude water distributions, otherwise there is the potential for the ACCC's advice in relation to the Water Market Rules and the treatment of customers that have terminated their delivery right to result in Murray Irrigation being classified as a Part 7 operator under the Rules.
31. Murray Irrigation acknowledges that this Rule has been modified with the aim of providing greater clarity about the trigger for application of Part 7 of the Rules. However, Murray Irrigation is concerned that proposed changes still do not provide sufficient clarity about the trigger for application of Part 7 of the Rules.

Unintended consequences of ambiguity in this clause may result in the Part 7 operator applying to Murray Irrigation as it moves towards more cost reflective pricing and or endeavours to make robust decisions in consultation with irrigators about future infrastructure access.

32. Murray Irrigation recommends 45(2) (b) be altered to read as follows;
is not to be taken to have made a distribution, whether as referred to in paragraph (a) or in any other manner, if the distribution was made to its customers without distinction on the basis of whether a customer is a related customer or other customer.

Rule 5 Member owned operator

33. This Rule, in the event that Murray Irrigation customers with irrigation rights, transform their contractual rights to statutory rights may result in Murray Irrigation no longer being defined by the Rules as a member owned operator, even though the ownership of Murray Irrigation has not changed.
34. The definition in Rule 5 describes water access entitlement ownership not the nature of the ownership of the infrastructure operator entity. Murray Irrigation's understanding of the intent of Rule 5 is to provide for a different form of regulation under the Rules where the customers are also the owners of the irrigation infrastructure operator.
35. **Murray Irrigation recommends that Rule 5 be cast in terms of a member owned operating having a majority of its customers as related customers.**

Definitions Customers

36. Murray Irrigation is concerned that the definition of a customer is too broad. **Murray Irrigation recommends that “or who seeks infrastructure services, from the operator” be deleted from the definition.**
37. The requirements to provide potential customers with access to information should be adequately captured by Part 4 of the Rules.

Murray Irrigation appreciates the opportunity to comment on the proposed Rules. Murray Irrigation would be interested to discuss the issues raised in this submission with the Department of Environment, Heritage and the Arts.

If you have questions in response to this submission please contact Mrs J. McLeod, Executive Manager Policy and Stakeholders on T. 03 5898 3340.

Yours sincerely

A handwritten signature in black ink that reads "Jennifer McLeod". The signature is written in a cursive style with a large initial 'J'.

Jennifer McLeod
Acting General Manager