

Murrumbidgee Irrigation Limited

Public submission

Water Charge (Infrastructure) Rules 2010

17 September 2010

Murrumbidgee Irrigation Limited (MI) makes the following submissions with respect to the proposed *Water Charge (Infrastructure) Rules 2010 (Cth) (Rules)*.

Rule	Submission
"Customer"	<p>Under the Rules, a "customer" is a person who is entitled to, or who seeks, access to an operator's infrastructure (or related services such as the delivery of water through, or the drainage of water into, an operator's infrastructure). Therefore, whether a person falls within the definition depends on whether the person has a right of access to an operator's infrastructure (e.g. a "water delivery right").</p> <p>However, the definition of "customer" refers to a person being entitled to infrastructure services "as the holder of ... an irrigation right ...". The definition of "irrigation right" in the <i>Water Act 2007 (Cth)</i> excludes a "water delivery right". Therefore, an "irrigation right", by definition, can never grant a right of access to an operator's infrastructure. It would be contradictory to include any reference to "irrigation right" in the definition of "customer" and the resulting confusion would be a recipe for dispute. It would defeat the purpose of unbundling "irrigation rights" and "water delivery rights" if "irrigation rights" could confer any right of access to an operator's infrastructure. If the drafting is intended to capture rights which still remain bundled, we note that a bundled right will always satisfy the definition of "water delivery right" (which is separately referred to in the definition of "customer"). For these reasons, the reference to an "irrigation right" should be deleted from the definition of "customer".</p> <p>In addition, the reference to a person who "seeks" access to an operator's infrastructure causes difficulties in a number of contexts (e.g. rules 5(b) and 15) in which the defined term "customer" is used. Therefore, it should be deleted from the definition. In places where specific rules are intended to cover persons who seek infrastructure services from an operator, such persons should be mentioned expressly in those rules.</p>
4	<p>It will be of assistance to the industry if the ACCC produces a guide to the rules (similar to its guides to the <i>Water Market Rules 2009 (Cth)</i> and <i>Water Charge (Termination Fees) Rules 2009 (Cth)</i>) and the guide includes templates for the schedule of charges, information statement, network consultation paper and network service plan.</p>
5	<p>As we understand it the objective here is that, for so long as the persons who pay an operator's charges (essentially the holders of water delivery rights) also own, and therefore control, the operator, there is no need for the operator's charges to be approved by the ACCC. The rule states that an operator will be a "member owned operator" for so long as the majority of the water it delivers (i.e. water in relation to which it "provides infrastructure services") is derived from its own water access entitlements. There are several difficulties with this concept.</p> <p>First, the rule purports to define "member owned operator" but it contains no reference to the persons who own the operator (i.e. its members). It focuses on who holds the water</p>

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access entitlements and irrigation rights, not who pays an operator's charges or is a member of the operator. These are fundamental problems.

Secondly, we surmise that rule 5 is based on an unstated assumption that there is a necessary link between irrigation rights and control over the operator. However, this assumption will not always hold. Membership of an operator could be associated with holding water delivery rights, holding irrigation rights or holding both of those rights, or not associated with either of those rights. Different operators may take different approaches to membership and these approaches may change over time. Where the members of the operator are water delivery right holders, the transformation of their irrigation rights will not affect their ownership of, or control over, the operator. It would be illogical for the operator to cease to be a Part 5 operator when it remains owned and controlled by the same persons, even if they have transformed their irrigation rights.

Thirdly, the corollary of the second point applies. Under the current drafting of rule 5, an operator could cease to be owned and controlled by the persons who pay the operator's charges (essentially the holders of water delivery rights) but it would remain a Part 5 operator as long as the holders of the irrigation rights do not transform them. This would be an odd result.

Fourthly, it is difficult to understand why water allocation purchased externally for delivery within an operator's area of operations should count towards an operator losing its status as a Part 5 operator.

Fifthly, the relevant percentage threshold for control should be considered. In our view an operator should be considered a member owned operator so long as a specified percentage of its shareholders (or equivalents) are related customers. We consider that the specified percentage should be less than 50%, noting, in other circumstances relating to the control of companies, significantly lower percentage thresholds apply. For example, a takeover offer must generally be made once a person's shareholding in a public company increases above 20%.

7, 11, 12,
14, 18(1),
19(2),
20(3)(a) &
22

It should be sufficient for the schedule of charges, information statement, network consultation paper, network service plan and comments from the ACCC's engineer to be published on an operator's web site, with hard copies being provided to customers on request.

It is unnecessarily cumbersome, time-consuming and expensive to require hard copies to be given individually to all customers initially, to all customers whenever changes are made, to all new customers, and to all customers who request a copy from time to time, as well as publishing documents on the operator's website.

We submit that it should not be necessary to notify customers individually, even in electronic form. It should not be assumed that all customers will have access to e-mail and we would anticipate many instances in which delivery failures will occur because the customers change their e-mail addresses without notifying the operator or the documents (e.g. the network service plan) exceed customers' maximum allowable message sizes. This would then necessitate sending hard copies by post.

The Department has suggested to us that it would be acceptable to send electronic communications to customers with hyperlinks to documents on an operator's web site. However, this would contravene the Rules which require the operator to "give a copy" of a document to a customer and arguably those that require "written notice" or "notice in writing". At a minimum, there will be potential for customers to argue about whether a "copy" or "notice" has been given validly. The Rules must be clear so as to minimise the scope for disputes. If you reject our submission about the sufficiency of publication on our web site with hard copies being provided to customers on request, then a less preferable alternative would be for the Rules to expressly authorise electronic communications which nominate an electronic means (e.g. a hyperlink) that the customer may use to access a document or notice.

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	<p>Any guide that the ACCC subsequently publishes cannot change the Rules, so if electronic communications are to be authorised, they need to be authorised expressly by the Rules.</p>
7 & 8(1)	<p>We submit that a Part 5 operator which has not provided a network service plan or information statement (possibly due to circumstances beyond its control) should be authorised to continue to levy existing charges until any new schedule of charges is produced.</p>
	<p>Failure to provide a network service plan will expose an operator to civil penalties. To additionally prevent an operator from levying any charges at all is draconian and could jeopardise the operator's solvency. This would be an unfair result, especially where the operator's non-compliance occurs due to circumstances beyond its control, such as fire flood or industrial action.</p>
10	<p>Under rule 10 of the Rules, operators are prohibited from specifying different charges for customers with irrigation rights and other customers (that is, those who have transformed) for services of the same class, unless the difference reflects the difference in the actual costs of providing the services.</p>
	<p>When interpreted literally, rule 10 is very restrictive, and could apply where <i>any</i> irrigation right-holder pays a different regulated charge for the same class of service provided to <i>any</i> water access entitlement-holder.</p>
	<p>The ACCC's water monitoring information request (part 1) clearly contemplates different pricing groups. However, in order for this to be permitted under a literal interpretation of rule 10, either:</p>
	<p>(1) an operator would need to be able to show that the infrastructure services were not of the same "class"; or</p>
	<p>(2) the difference in the two customers' charges would need to be equal to or less than the difference between the actual costs necessarily incurred in providing the relevant infrastructure services to the two customers.</p>
	<p>To illustrate the types of difficulties that will arise, assume that an operator's pricing policy were to apply different regulated charges in different geographic areas. Assume that the border of two such geographic areas runs along a road which divides the properties of two neighbours, one of whom holds an irrigation right and the other a water access entitlement. In these circumstances, the current drafting of Rule 10 is bound to trigger a dispute in which one of the neighbours will claim that the services provided to him or her cannot be of a different class, or cost any more than, the services provided to the neighbour across the road.</p>
	<p>To minimise the risk of disputes, it should be clarified that rule 10 only applies where different charges are payable by different customers on the basis of whether they hold irrigation rights or a water access entitlements, and that the rule does not apply to pricing arrangements (such as ones based on geographical areas) that are unrelated to the type of water right held by the customer.</p>
	<p>What we are dealing with is price discrimination between customers "<i>on the basis of</i>" their holding an irrigation right and the drafting should reflect that clearly. Our proposal is as follows:</p>
	<p><i>"After the transitional period, a member owned operator must not, in specifying the regulated charges in relation to an infrastructure service, specify different regulated charges payable for an infrastructure service on the basis of whether the customer receiving the infrastructure service holds an irrigation right."</i></p>

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We also note that the current drafting of Rule 10 refers to “*infrastructure services provided in respect of an irrigation right*”. This is a conceptual impossibility because an “*irrigation right*” is not a “*water delivery right*” and therefore cannot confer any right to have water delivered (i.e. it cannot confer any right to “*infrastructure services*”).

- 18 The obligation placed on part 5 operators (member owned) to prepare what is effectively a draft NSP with the additional requirement to canvass alternative options and discuss relevant issues is particularly onerous in terms of time, cost, and manageability. There is no corresponding obligation under the rules for part 6 operators (non-member or government owned), yet the ACCC has previously acknowledged that member-owned operators carry less risks to efficiency than do non-member owned operators. The rules should provide equality of information and opportunity for customers to engage about network plans for similar size non-member owned and member owned operators. This could be achieved by providing the same requirements in rule 18 to part 6 operators or by lessening the obligations under rule 18. We believe that the latter is the best approach because the approach reflected in rule 18 is not cost-effective. Intensive discussion of planning options is better conducted through specific purpose consultative arrangements (eg, through customer service committees and their equivalent).

We propose that the requirement for a network consultation paper be omitted from the Rules, and replaced with a requirement to formulate and distribute a draft network service plan to customers for consultation and feedback before finalisation, with specific provision for customers to suggest alternatives for consideration before the network service plan is finalised. We submit that the draft plan be subject to comments from the independent engineer (see rule 20) and that the draft plan and comments from the independent engineer be provided at the same time to all customers to ensure adequate consultation and engagement about the plan.

- 19 Under section 51A of the *Trade Practices Act 1974* (Cth), a statement by a corporation as to future matters (including, for example, budget projections and forecasts) without reasonable grounds is deemed to be misleading and, unless the corporation adduces evidence to the contrary, the corporation is deemed not to have had reasonable grounds for making the statement.

This law will apply to network service plans and information statements that an operator produces under the Rules. A network service plan must contain details or estimates of service levels, works, expenditure, financing, grants and subsidies, and regulated charges over a five-year period. This is an exceptionally long period for a publically available forecast by a corporation and, given the period of time and the risk of unforeseen events and other uncertainties, the forecast could be unreliable. It may be difficult to overcome the statutory presumption that there are no reasonable grounds for the statements as to future matters in the network service plan, especially when it involves forecasting over a five-year period. For example, in the last three years our water sales volumes have varied by as much as 75% due to seasonal conditions alone, with obvious impacts on service and pricing. Expectations for this season could see this variation increase to 220% as the effects of the drought continues to recede.

Statements as to future matters made by corporations in normal circumstances are voluntary. However, operators will be compelled by the Rules to make these statements. It would be unfair to compel operators to make statements about future matters over long periods and expose themselves to contraventions of the *Trade Practices Act 1974* (Cth), especially where there is a reverse onus of proof.

While the Rules acknowledge that some of the forecasts may prove inaccurate (and requires variations to be explained in information statements), this does not affect the deeming of statements as to future matters in the network service plan as misleading under section 51A of the *Trade Practices Act 1974* (Cth).

Statements under the Rules should be exempt from the operation of the relevant

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	provisions of the <i>Trade Practices Act 1974</i> (Cth).

20 The introduction of the comments of an independent engineer at such a late stage in the NSP planning process poses significant risks of instability for member owned operators. Resolution of the comments will trigger re-evaluation by customers and the operator at a very late stage. This will likely require review of the plan, and re-engagement with customers. It will increase costs and result in delays that may put timeliness of the NSP at risk (see above comments on rules 7&8), or force acceptance of an NSP that is inherently unstable (see above comments on rule 19). Also, under the current rule, the operator's customers will not have the benefit of the engineer's comments when making submissions with respect to the network consultation paper. This will reduce the quality of that initial engagement.

We suggest that the objectives of ensuring consultation with well informed customers can be delivered more efficiently and effectively if the ACCC's engineer provides comments on the draft network service plan rather than leaving it until the last minute.

45(2)(b) The reference to distributions made "*without distinction*" between related and other customers is ambiguous. It is not clear whether all customers must receive the same distribution or whether they can receive different distributions as long as the same formula is applied consistently (e.g. based on the number of water delivery rights held).

It should be made clear that a distribution is made "*without distinction*", even if different customers receive different distributions, provided that the different distributions are not made on the basis of whether a person is a related or other customer.

In order to attract the exemption in rule 45(2)(b), "*all*" customers must receive the distribution. However, an operator should not become a Part 7 operator merely because some customers do not receive the distribution as long as the decision is not made on the basis of whether they are a related or other customer. For example, if a customer does not receive the distribution because they are in default under their contract with the operator or because the distribution is based on the number of water delivery rights held and the customer does not hold any, this should not cause the operator to become a Part 7 operator. As we understand it, the test should be whether any distinction is made on the basis of whether a person is a related or other customer.

Our proposal for Rule 45(2)(b) is 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 without distinction between customers on the basis of whether they were related customers".

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