

Summary of the Water Market Rules 2009

Subsection 97(1) of the *Water Act 2007* permits the Minister for Climate Change and Water to make water market rules that relate to acts of irrigation infrastructure operators (operators) that prevent or unreasonably delay the making of transformation arrangements.

'Transformation' is where the share component of the operator's water access entitlement is reduced to allow an irrigator's entitlement to water under an irrigation right to be permanently transformed into a water access entitlement held by that irrigator, or by a third party (if the irrigator wishes to trade it).

The water market rules do not require operators to transform the irrigation rights of all their customers. Transformation can only be triggered by a request from an irrigator and, once requested, the operator is generally required to allow transformation.

Rules 1, 2 and 3 - Name of rules, commencement and definitions

Rule 1 sets out the name of the rules. Rule 2 specifies that the rules commence on the day after they are registered on the Federal Register of Legislative Instruments. That is, from the day after registration, operators cannot undertake actions that are prohibited by the water market rules, except in relation to existing contracts and arrangements (see rule 4). Rule 3 sets out definitions of certain terms that are used in the rules.

Rule 4 - Transitional period

Rule 4 provides for transitional arrangements in relation to contracts, arrangements or understandings that exist immediately before the commencement of the water market rules. The water market rules do not affect any such contracts, arrangements or understandings until the end of the transitional period (i.e. until after 31 August 2009).

Rule 5 - Information about water market rules

Rule 5 requires all operators to inform each person who has an irrigation right against the operator about the existence of the water market rules, and how they can obtain copies and further information about the rules.

Rule 6 - Establishment of transformation procedures

Rule 6 requires operators to establish clear processes for transformation of irrigation rights, and to make these procedures readily available to persons who hold an irrigation right against them.

Medium and large operators will be required to comply with rule 6 (i.e. to develop and make available their procedures) from 1 September 2009. Small operators (those holding water entitlements of less than 10,000 ML for irrigation purposes) are only required to update their processes when an irrigator applies for transformation.

Rule 7 - Determination of irrigation rights

Before an irrigator transforms an irrigation right, that irrigator needs to know the details of the right. While the water market rules do not prescribe the terms on which the entitlement to water should be determined, rule 7 does require operators to provide an irrigator with details of his or her irrigation right, if the irrigator intends to apply for transformation and requests those details. Where the irrigator does not agree on the details of the irrigation right, rule 7 requires the operator to make a genuine attempt to reach agreement on these details.

Rule 7 - Conveyance losses

Some operators do not hold a separate conveyance entitlement for water losses that occur during distribution of water in their networks. In these circumstances, rule 7 permits operators to withhold a portion of an irrigator's entitlement to water from transformation to account for the fixed conveyance losses of the network, in accordance with a formula set out in paragraph 7(2)(a), or as agreed between the operator and the holder.

If an irrigator wishes to transform an irrigation right but retain an entitlement to have water delivered, the volume of water withheld from transformation by the operator remains a part of the irrigator's irrigation right, provided the irrigator does not terminate his or her water delivery right against the operator.

Rule 7 also requires an operator to provide a transforming irrigator with the information necessary to demonstrate that the portion of water entitlements withheld by the operator for fixed conveyance losses has been appropriately calculated. In the event an irrigator disputes this amount, the rules require the operator to make a genuine attempt to reach agreement with the irrigator.

Rules 8 and 9 - Ongoing delivery

Rules 8 and 9 require operators to:

- continue to provide delivery services to an irrigator after transformation, if requested by the irrigator before transformation; and
- provide those services on the same terms and conditions as before transformation, subject to variations necessary as a consequence of the transformation, unless otherwise negotiated with the irrigator.

As the terms and conditions of a varied delivery contract contribute to an irrigator's decision on whether to transform, the rules require the operator to provide the proposed amended delivery contract to an irrigator before transformation, if requested by the irrigator. Where the irrigator does not agree on the post-transformation terms and conditions of delivery provided by the operator, rule 8 requires the operator to make a genuine attempt to reach agreement with the irrigator on these details.

Rule 10 - Security over ongoing water delivery fees

Rule 10 permits an operator to require security against future payment of water delivery fees if the holder of an irrigation right applies for transformation, continues to hold a water delivery right, and either:

- transforms the whole of their irrigation right; or
- has a delivery right that entitles the holder to have delivered more than 5 times the volume of water the person is entitled to receive under the irrigation right retained after transformation.

The value of security is limited to the applicable termination fee.

Rule 10 prohibits operators from refusing to accept an offer of security from an irrigator on the basis of form only, if it is in the form of a charge over an irrigation right or an unencumbered water entitlement, a bank guarantee or a deposit, or another form agreed between the operator and the irrigator.

Rules 11-15 - Applications relating to transformation of irrigation rights

Rules 11 and 12 permit an operator to require an application for transformation of an irrigation right to be in writing and to include particular information that is reasonably necessary for transformation arrangements.

Rule 13 permits operators to require such applications to be accompanied by fees for transformation or relating to a water delivery right. However, rule 13 prohibits operators from charging fees that exceed an amount based on the recovery of reasonable and efficient costs for processing the application.

Rule 14 requires operators to process applications for transformation efficiently and within set time limits (called the 'relevant period'). Under rule 14:

- operators who receive an application for transformation are required to make a decision on the application within 20 business days from receipt of application, and notify the irrigator of the approval or the reason it cannot be approved within 5 business days after this period;
- where the operator seeks further information from the irrigator for the purposes of processing an application to transform and/or trade, the processing period begins after that information is provided;
- the processing period also excludes any days after steps have been taken to obtain any necessary third party approval or fulfil any State law requirement and before a response has been received;
- the processing period is only triggered once the applicant irrigator has agreed with the operator the details of his or her irrigation right, and if applicable the details of his or her continuing delivery right.

Under rule 15:

- an operator who is unable to reach agreement within 30 business days on the details of irrigation rights under rule 7, or water delivery rights under rule 8, is required to advise the ACCC, within that period, of the reasons for the delay;
- if an operator is unable to approve an application within 20 days from receipt of the application, the operator must, within 5 business days, also notify the ACCC of the reasons why the application was not approved.

Rules 16 and 17 - Restrictions on transformation arrangements or trade

Rules 16 and 17 generally prohibit an operator from doing something, or failing to do something, that prevents or delays transformation or trade of a transformed entitlement. However, the water market rules permit operators to undertake the following actions:

- requiring (in a manner permitted by the rules) the following things to occur before processing an application for transformation:
 - ⇒ the payment of certain fees and charges (e.g. unpaid access charges and reasonable administration fees) (rule 14);
 - ⇒ the provision of security against ongoing water delivery fees (rule 10); and
 - ⇒ the approval of third parties who have a legal or equitable interest in the irrigation right that is to be transformed (rules 14 and 20).

- imposing requirements that are expressly permitted under a State law or a related instrument (rules 14 and 20);
- excluding a portion of an irrigator's irrigation right from being eligible for transformation, to take into account conveyance losses in a manner permitted by the rules (rule 7); and
- requiring the holder of an irrigation right or transformed water access entitlement, who intends to continue to hold a delivery right against the operator after transformation, to install a water meter (rule 20).

Rule 18 - Security other than for ongoing water delivery fees

Rule 18 prohibits an operator from requiring or accepting security in relation to transformation or in relation to a water delivery right or water access entitlement obtained as a result of transformation, except in accordance with rule 10.

Rule 19 - Prohibition of termination of water delivery right

Rule 19 prohibits an operator from requiring the termination of a water delivery right as a condition of approving an application for transformation. This rule ties in with rule 8, which requires the operator to negotiate a modified ongoing delivery right after transformation if requested by the irrigator.

Rule 20 - Prohibited content of contracts

Rule 20 prohibits an operator from including provisions in contracts or other arrangements or understandings between the operator and a holder of an irrigation right against that operator, which may prevent or unreasonably delay transformation of an irrigation right.

Rule 21 - Notification of changes to constitution, contracts etc

Rule 21 requires an operator to notify persons who hold irrigation rights against that operator of changes made after the commencement of the water market rules to the operator's constitution, and to contracts, arrangements or understandings that may affect the rights and obligations of the operator and holder in relation to transformation arrangements.

Rule 22 - Proceedings to recover loss or damage

Rule 22 permits persons who suffer loss or damage as a result of another person contravening the water market rules to recover damages for that loss against that other person.

Penalties

Various provisions of the water market rules are civil penalty provisions. Where a water market rule has been designated as a civil penalty provision, the maximum penalty is 200 penalty units (currently \$22,000) for individuals and 1000 penalty units (currently \$110,000) for corporations.