

**Response to ACCC**

**Water Charge Rules for Termination**

**Fees Position Paper**

**080911**

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## **Introduction**

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

In responding to Australian Competition & Consumer Commission, NSWIC is responding with the views of its members. However, each member reserves the right to make independent submissions on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

## **Comments on consultation**

The ACCC must recognise that responses will be provided by representative groups in many instances, rather than directly from individuals. The nature of those representative groups, such as NSWIC, is such that they must consult with their membership as a draft response is drawn. This serves to severely limit the timeframe available. It is vital that the ACCC recognise not only that this timeframe is limited, but that there are currently four separate papers being pursued by the ACCC along with two Senate Inquiries, a Productivity Commission Inquiry and a Green Paper.

It is our very strong view that this and any future consultative processes undertaken by the ACCC must be at least consistent with the eight week timeframe proposed in the current draft regulations.

## **General Comments**

NSW Irrigators Council (NSWIC) has adopted a specific policy position on Termination Fees. We:

- Support provisions that allow the charging of Termination Fees;
- Believe that Termination Fees up to 15 times that annual access fee should be allowed pursuant to Schedule E of the MDB Agreement; and
- Believe that Termination Fees should be paid at the time of terminating access to an infrastructure operators system.

Termination Fees are a vital requirement for the forward revenue requirements of an irrigation infrastructure operator. In NSW in particular, infrastructure operators operate in the private sector. In many instances, particularly the instance of large operators, governance must be achieved pursuant to the *Corporations Act*. That is, infrastructure operators in NSW do not have the “fall back” position of the public purse.

It is vital that infrastructure operators are able to maintain sufficient revenue streams to manage the infrastructure on which their customers rely. Termination fees are a key component of that.

## **Irrigation Infrastructure Operators**

NSWIC has made repeated submission to the ACCC, the Commonwealth Government and the NSW Government with respect to the nature of irrigation infrastructure operators and the necessity to ensure that small operators in NSW are identified, consulted and made part of the policy development process.

*We are appalled that absolutely no attempt has been made by any of these parties to respond to this concern.*

The definition of an infrastructure operator is likely, in our opinion, to encompass in excess of 400 entities, ranging for corporations to joint water supply authorities, trusts, irrigation districts, partnerships and potentially non-formal arrangements. We have repeatedly advised that no “list” of these operators has been compiled. The requirement in NSW that only one Water Access License be attached to a Works Permit means that no list of infrastructure operators can exist, yet determines that hundreds of entities will fall into the operator category as works are shared.

NSWIC has sought funding assistance to implement an engagement strategy, where information would be sent to all WAL holders asking them to self identify by means of a reply paid, uniquely identified form. The list developed from this would be used to convene a number of regional forums where affected parties would be invited to directly advise the ACCC process and, thereby, the government policy process.

Such a strategy would result in a high response rate as it is run by a party (NSWIC) that is non-government, yet would provide enormously valuable returns to government.

NSWIC understands that the ACCC envisages a compliance and enforcement role for itself subsequent to adoption of the Water Market Rules (including Termination Fees).

NSWIC reiterates – again – its advice that it will be far cheaper, effective, beneficial and efficient for the ACCC and the government to engage with small infrastructure operators *now* in developing rules than having to pursue non-compliant operators once the rules are in place.

We again offer our assistance to implement what should be a straightforward strategy.

## **Responses**

### **Legitimacy of Termination Fees**

NSWIC concurs with the ACCC position that Termination Fees are a legitimate regulated water charge.

### **Timing of Fees**

NSWIC concurs with the ACCC position that Termination Fees should only be payable when delivery rights are terminated (howsoever such termination may occur). We note, however, that the issue of security for payment of Termination Fees remains an issue for discussion.

### **Exit Fees**

NSWIC concurs that Exit Fees should not be a legitimate regulated water charge.

### **Barrier to Trade**

NSWIC does not agree that the Termination Fee is necessarily a barrier to trade on the basis that it affects the net price obtained by an irrigator in a sale. The burden of Termination Fee payment is potentially a matter for contractual negotiation between buyer and seller. Not recognising as such potentially leads to a situation of the ACCC having created contractual precedent, which it absolutely must not do.

### **Multiples – the Level of Termination Fees**

NSWIC does not agree with the ACCC recommendation with respect to multiples. The range of discount variables is inappropriate and does not take inflation into effect. Nor does it consider the falling interest rate environment or the implications of taxation. Moreover, imposing an artificially low multiple potentially leads to an increase in fixed charges by infrastructure operators seeking to maintain a quantum of Termination Fees.

Further, NSWIC argues that the ACCC have made an unsustainable assumption in determining multiples – that access fees perfectly represent recovery of fixed costs. NSWIC submits that this is patently untrue – and reiterates previous submissions (Water Charging Rules) that access fees should not represent fixed costs. It is probably that each and every infrastructure operator would freely admit that the majority of their costs are fixed, but the majority of their revenue is variable. Such a charging structure, whilst not “economically efficient” from the theoretical viewpoint of the ACCC, is what is demanded by customers. As such, it represents what would occur should the nature of the industry be competitive (which, given the infrastructure involved, it is not). Termination Fees, however, should represent payment against

fixed costs. If they are to be calculated by a multiple of access charges, it is entirely legitimate that such multiple be at the level agreed in Schedule E of the MDB Agreement to take into account this consumer driven pricing discrepancy.

### **Over Time Decrease in Multiple**

NSWIC does not agree with the over time decrease of Termination Fee multiples. Such a process undermines the theoretical approach to the Fee in the first instance. Recognition of rationalised costs must be provided in the quantum of the access fee, providing benefits to remaining users, rather than solely passed to terminating users in the form of a lower multiple. Further, the decreasing scale potentially leads to deferral of decisions to enter the market either as buyer or seller, which is clearly contrary to Commonwealth Government policy.

### **Right to Negotiate**

NSWIC believes that contractual negotiations for higher Termination Fees (such as in the case of significant infrastructure investment) must not be precluded by the Market Rules. It is not the role of the ACCC to regulate how two parties freely enter into contractual dealings. To enter into such a role potentially stifles investment that not only stimulates more efficient practices, but delivers environmental outcomes that irrigators, governments and the Australian people wish to pursue.

### **Further Review**

NSWIC concurs with the ACCC recommendation that a further review of Termination Fees should be conducted, but disagrees with the dates proposed. Proposing a commencement of 2013 and a conclusion of 2015 serves to underscore the dramatic lack of integration of consultation in water policy changes. The review must be timed to take into account the conclusion of the drafting process for the Basin Plan, the implementation of the Basin Plan and the conclusion of NSW Water Sharing Plans. The review should commence in 2010 and conclude in 2011. Moreover, the ACCC should immediately review its programmes to ensure that they align with other policy change measures and reviews.