

**Response to ACCC**

**Water Market Draft Rules**

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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 the Australian Competition & Consumer Commission's (ACCC) *Draft Water Market Rules*, 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.

## General Comments

The sheer weight of documentation produced by the ACCC and respondents to various papers on water trade and management issues has potentially removed the capacity of all involved to understand why this process commenced in the first instance.

NSWIC recognises that it is the role of the ACCC to respond to the Minister's request to provide draft rules pursuant to the *Water Act 2007*. We acknowledge that, with the publication of *Draft Water Market Rules*, the ACCC is doing just that.

Council is greatly concerned, however, that the ACCC is narrowly interpreting legislation to minimise the task it has to fulfil, whilst ignoring the broader picture.

The enormous task has been undertaken by the ACCC and respondents for one simple reason – to encourage the creation of an effective and efficient water market.

Rather than simply consider the matters referred to it by the Minister or conferred upon it by the *Water Act*, NSWIC submits that it is incumbent on the ACCC – as a senior economic advisory body in Australia – to consider a much wider range of issues.

The ACCC must recognise that the *Water Market Rules* only apply to – and hence only regulate – a small part of what the overall market is and will be. NSWIC submits that it is incumbent on the ACCC to provide commentary and advice on water market issues as a whole to the Commonwealth Government so that sensible, practical and implementable systems are borne out, implemented and supported by all.

This consideration must commence with an overview of the major barriers to trade that currently exist. NSWIC sees no evidence of this work having been undertaken. If such work were undertaken, NSWIC is confident that it would show that the major barriers to trade are not within private irrigation infrastructure operators, but within government Departments and processes.

Until – and unless – identification of major trade barriers is completed, any system will be ad hoc at best. NSWIC supports water market rules – but asks that they be applied to all, equally and fairly, and that they be implemented in conjunction with measures to address all major barriers to trade.

Anything less is lip service – and is not designed to address the big picture at all.

## **Applicability of Rules**

### ***Private v's State Entities***

The paper explains in great length that the Water Market Rules will only apply to operators who hold bulk licenses. In practice, the Rules will therefore apply only to private sector operators in South Australia and New South Wales.

The paper details the basis behind the current work of the ACCC – the need to encourage efficient, effective and sustainable markets in water products. It then goes on to describe, by reference to strict interpretations of the Act, why the ACCC is not proposing rules or regulations to govern State owned entities in Victoria and Queensland.

NSWIC acknowledges that the terms of the Act are such that the Rules would only be applicable to the private sector operators, but is disappointed that the ACCC has chosen to effectively ignore its larger responsibility in this task – identifying critical barriers to trade and recommending that they be dealt with by government, and the methods for so doing. The paper writes off their responsibility in one paragraph, viz:

*“The ACCC acknowledges that the scope of the water market rules may limit the effectiveness of the water market rules in addressing delays in the transformation arrangements where jurisdictional processes are involved.”<sup>1</sup>*

When a private sector operator clears a trade currently within a matter of days, whereas State Departments take weeks and, in many cases, months to complete their part of the transaction, the problem clearly lies with the operations of the latter. To ignore the barriers that are erected by State Departments and State Irrigation Infrastructure Operators is to ignore the vast majority of the problem.

To target only private sector operations smacks of a socialist approach to water delivery, contrary to decades of policy decisions in NSW.

Whilst the Act may prescribe that the Rules are limited in scope, no such prescription is made over the contents of the ACCC advice to the Minister. A failure to address where the delays actually occur is a failure to deliver on the total scope of the Water Market project.

### ***Exclusion of Entities***

NSWIC concurs with the ACCC that certain entities – based on size, volume or any other consideration – should not be altogether excused from the rules. Importantly, our concurrence is not based on the interpretation of the Act made by the ACCC, but on the

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<sup>1</sup> ACCC Draft Water Market Rules Paper, page 8.

overall aim of the water market project. Consideration of the Act aside, the water market rules will not be effective unless applied to all.

### **Pro-Forma Documentation**

NSWIC is pleased that the ACCC has acceded to its request for template documents, but reiterates our submission that the ACCC – or the Commonwealth – must warrant that these documents comply with the Rules and the Act. Without such warrant, they are little more than a further compliance burden.

### **Breadth of Consultation**

The Paper claims to have “consulted widely” whilst acknowledging that “there may be some operators unaware of the existence of the rules or the work of the ACCC.”<sup>2</sup>

NSWIC refers to its earlier submissions with respect to small infrastructure operators in NSW. We noted the likelihood of some 400 to 600 parties, suggesting strategies to ensure contact with and input from these entities. Our suggestions were put to the Commonwealth, the State of NSW and to the ACCC. Each of those entities ignored our suggestions.

It is, at best, disingenuous to suggest that wide consultation has occurred when no specific effort has been made to firstly identify and secondly contact the small infrastructure operators that will be affected by these rules. NSWIC submitted that it would be simpler to ensure that these operators were aware of their obligations by identifying and working with them now rather than prosecuting them in future. This submission is unchanged.

NSWIC is particularly concerned that the ACCC state that “aside from most irrigation corporations in New South Wales, many operators do not have separately identified conveyance loss entitlements.”<sup>3</sup> Whilst NSWIC presumes that the ACCC refers to the large irrigation corporations, it gives us great cause for alarm that the ACCC has once again failed to recognise the hundreds of small operators who will be caught up in the Rules.

### **Water Market Rules v’s Corporations Act**

NSWIC accepts the ACCC position that the Water Market Rules will be a legislative instrument and hence operators will be required to comply with them.

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<sup>2</sup> ACCC Paper, page 11

<sup>3</sup> Page 33

Such recognition does nothing to allay the concerns of operators with respect to their fiduciary duty to run a company profitably. If prices are set by the ACCC, as potentially they may be, and the company is not able to demand a prudent level of security of payment (as potentially may occur with respect to limited termination fees), what comfort is given to the Director of a company that might then operate at a loss?

The Paper addresses, in rudimentary fashion, the concerns that NSWIC and others raised with respect to a conflict between the rules and the Constitution of an operator. The ACCC state that

*It would be in the interests of the company (and therefore its shareholders and its directors) to company with the water market rules and amend its constitution accordingly.*

This blasé response does not, in any sense, address the submissions put to the ACCC. Operators quite rightly ask what the ACCC envisages their position will be if their shareholders reject constitutional changes that are proposed in order to comply with the Rules.

The ACCC conclude that stakeholders should “seek private legal advice in relation to these issues.” This suggestion again shows how little the ACCC has considered the operators – and their customers – involved. The Rules that are proposed will affect *hundreds* of operators and *thousands* of customers. NSWIC again submits that the ACCC is in a position – financially and practically – to provide advice on which irrigators can rely. **The ACCC should provide advice on this key issue that they are prepared to warrant.**

## **Transformation Arrangements**

NSWIC has provided a separate submission with respect to the benefits (or otherwise) of transformation.

NSWIC remains concerned that the ACCC has not considered the ramifications of transformation on operators. The Paper states “the associated costs and benefits (of transformation) are borne by the individual transforming...”<sup>4</sup> Such a simplified view does not consider the costs (or benefits) to the operator or to the remaining customers and shareholders of the operator.

## **Establishing a New Delivery Contract**

NSWIC does not concur with the draft rules that terms and conditions of a delivery contract with a transformed irrigator must be the same as a non-transformed irrigator

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<sup>4</sup> ACCC Advice to the Minister – Draft Water Market Rules p16

(DR8(2)(c)). Whilst Council notes that variations may be made that “are necessary as a consequence of the transformation”, this does not cover the increased risk of dealing with a transformed customer, nor the increased compliance burden placed on the operator. An operator must be able to charge a separate fee structure to a transformed irrigator.