

# **Response to ACCC**

## **Water Charge Rules for Termination**

### **Fees**

### **Draft Rules**

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Andrew Gregson  
Chief Executive Officer

## **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 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.

On behalf of irrigators (those that remain after others leave the industry), our primary concern is ***third party impacts***. NSWIC submits that the termination fee rules must be set to ensure that remaining irrigators are not faced with higher charges as a result of industry rationalisation. The benefit of any doubt, including conservatively generous setting of levels of termination fees, must accrue in favour of these third parties.

## 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.

***Absolutely no attempt has been made by any of these parties to respond to this concern.***

The simple act of holding a regional forum is insufficient – particularly when no such forum was held in northern NSW, contrary to the submission provided by NSWIC. To claim that an opportunity for input was provided via the forum is disingenuous when the ACCC was clearly aware, pursuant to NSWIC’s submission, that the problem is not disinterest on behalf of smaller operators, but the fact that smaller operators do not know that they are infrastructure operators pursuant to the Act.

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 would have been a straightforward strategy had it been commenced earlier in the timeframe available.

## Responses

### **Multiples – Ignoring Third Party Impacts**

NSWIC is pleased that the ACCC has revised its position on the level of fees, but is disappointed that this appears to be a “bartering” exercise where the position commenced at 15 (pursuant to Schedule E), was lowered to 8 (by the ACCC Position Paper) and has now been set at 10 (Draft Rules).

NSWIC notes that significant consultation and negotiation was undertaken in the preparation of Schedule E, which set the multiple at 15 times. We are disappointed that the ACCC has chosen to reassess the entire issue, creating further uncertainty, rather than to assume 15 as the default position and seek arguments for change from that position. In short, what was wrong with Schedule E? Should irrigators now assume that everything in the Agreement is subject to complete review?

NSWIC is pleased to note that the ACCC reviewed its range of discount factors, but reiterates that focus continues to be on the wrong area – discount factors, return on assets, risk free rates, weighted average costs of capital and (as advanced by the ACCC at the Deniliquin forum) *investment certainty* are all side issues. We note with great disappointment that the concept of minimising **third party impact** has not been addressed as the key factor in determining termination fee multiples.

The quantum of termination fees must be set such that remaining irrigators are not affected – in terms of higher prices OR a change in pricing structure – by industry rationalisation.

In the Draft Advice, the ACCC notes that “Operators can vary pricing arrangements and offer other incentives to provide better signals to irrigators.” Irrigators don’t require pricing signals – they require the efficient operation of infrastructure to deliver their water.

NSWIC is particularly concerned that the ACCC is using the termination fee rules to pursue a secondary aim – the change in ratio of prices paid by irrigators to infrastructure operators away from variable to fixed charges. Recognising that a quantum of termination fees is required, infrastructure operators under the draft rules will be forced to increase the proportion of fixed charges as the multiple is lowered.

*If the ACCC wants to control prices charged by infrastructure operators, or the ratio of fixed to variable charges, it should do so via the Water Charging Rules and not the Termination Fees rules.*

### **Frontier Economics Report**

The ACCC commissioned Frontier Economics to provide numbers justifying a multiple. This is close to consideration of third party impacts as the Draft Rules gets.

The report finds that “*access fees will increase by only 3 to 20 percent*”<sup>1</sup>

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<sup>1</sup> Frontier report, page 27 as quoted in ACCC Draft Advice

Regardless of the rate of increase, this is a third party impact that the Rules ought to be ensuring cannot occur. Why ought remaining irrigators face higher costs as others move out?

In terms of the rate itself, it is inappropriate at very best to use the qualifier “only” on a potential price increase of twenty percent!

Furthermore, the Frontier report noted that gross margins of remaining irrigators would be reduced by “between 0.2 and 5.9 per cent”.

Again, this is a clearly defined third party impact. The ACCC must provide some commentary quantifying that impact – noting what the dollar impact of a 5.9 per cent gross margin impact would be.

### **Existing Contracts**

The Draft Rules provide that “The ACCC may approve the imposition of higher termination fees where contained in new or existing contract.”

This statement purports to require the breach of existing contacts – an incredibly dangerous precedent which ought not even be countenanced.

NSWIC submits that under no circumstances should existing contractual relationships be altered by the ACCC.