



National Farmers' Federation

Public Submission to the ACCC Draft Water Market Rules

10 November 2008



Member Organisations



Draft Water Market Rules

The NFF welcomes the opportunity to comment on the ACCC draft water market rules. The NFF notes that changes have been incorporated because of public consultations and that the ACCC has attempted to provide a balance between the needs of the Irrigation Infrastructure Operator (IIO) and individual irrigators.

NFF would like to suggest some amendments to the draft rules to more clearly clarify some areas. These are detailed below.

Draft Rule 7: Irrigation infrastructure operator to provide details of irrigation right

NFF is concerned with two aspects of this draft rule – namely sub-clauses (2) and (4).

Sub-clause 7(2)

NFF supports the right for the IIO to deduct the fixed conveyance component from the water to be transformed, noting that clause (4) excludes this provision from IIOs that have a separate conveyance entitlement.

NFF has previously submitted that the IIO are best placed to determine what conveyance losses may be. NFF also notes that the draft report to the Minister discusses fixed and variable components of the conveyance loss and indicates that the fixed conveyance component should be the volume deducted under this sub-clause (see 5.3 “treatment of fixed v variable conveyance losses, draft report, p. 32).

However, sub-clause (2) does not provide this clarification. NFF seeks an amendment to this sub-clause to clarify that the fixed component is that which is deducted from water to be transformed from the bulk entitlement.

A side issue but equally important is how the fixed and variable conveyance components are calculated by the IIO. The conveyance components must be calculated using average losses over the longer term. To deduct a proportion of a conveyance loss calculated over, say the drought years only, would be placing an unfair burden on those irrigators wishing to transform.

The calculation of the conveyance loss (i.e. the “D” in the formulae) should be made available to the irrigator wishing to transform, and a dispute resolution process implemented where the irrigator has an objection to the calculation of this amount. This is consistent with other aspects of the draft rules.

A further issue for gravity systems (and in some cases, water course IIO) is that State Governments will review conveyance losses from time to time. This may affect the calculation of the fixed and variable components. Any adjustments because of such reviews should be made available to the members of an IIO and the fixed

component to be deducted for transformation adjusted accordingly (if varied as a result)).

Sub-clause (4)

NFF support this sub-clause. However, for some river-based systems, State Government can also provide a conveyance loss component – in some cases formally and in others informally.

NFF suggests that this sub-clause is amended to include any IIOs where the State Government formally or informally provides the conveyance component. To do otherwise will result in “double dipping” by the IIO.

Taxation and Constitutional Law Advice

NFF notes that the draft report (at p. 15) states that taxation and constitutional advice has been sought. NFF seeks clarification of when and how this information will be provided to irrigators to ensure that a decision to transform is made with all currently available information and advice.

Undue Influence to Transform

NFF notes that there is a glaring omission in the draft rules relating to third party undue influence on irrigators (individually or in groups) to transform their water rights. NFF submits that such pressures should be prohibited in the rules and attract penalties.

An example is pressure by financiers to transform water rights to statutory based entitlements or informing the irrigator that lending arrangements are jeopardised (loans called in or terminated), interest rate margins increased or lending against asset value reduced should the irrigator not accede to the request.

It is a misnomer that the separation of land and water is driving the financial industry. Irrigators within the private irrigation corporations (where a significant amount of water is held as bulk entitlements) effectively separated their land and water in the mid 1990s. There have been no issues in the intervening time with lending arrangements.

At present, the position of particularly financiers is unclear and lacks transparency. There appears to be a disconnect between the policy and practice of the finance industry. NFF understands that in practice, lenders have had no issues with lending arrangements against water rights and their associated supply contracts (with loans against water rights for over 10 years and infrastructure operators now having facilities to register security interests).

One of the principle drivers for approving lending arrangements is capacity to repay loans. This is largely unaffected by the status of water held by customers and more influenced by factors such as seasonal conditions and prospects of future income.

Financiers have a position of power over farmers and with many under financial pressure due to drought, the risk of their lending arrangements are more tenuous. Financiers seeking transformation of water rights are in a position to exert undue influence over clients due to this particular situation.

Pressure by financiers for irrigators to transform their water rights will place unnecessary cost burdens on irrigators (including the transformation cost, possible changes to contract conditions such as supply and water charges and the annual transfers of water). NFF would seek that where financiers request transformation and irrigators agree to the change, the lending institution should bear the transaction costs (initial and ongoing such as annual transfer fees).

NFF notes that some financial institutions may seek amendments to lending arrangements for those irrigators who do not transform, in recognition of perceived or actual risk. Existing loan contracts (like the ACCC position on water contracts) should be preserved to ensure that irrigators are not perversely affected by transformation or alternatively by not transforming water rights.

Financiers should be able to treat new loans (and loan contracts) with different arrangements to reflect a range of risk factors including capacity to pay, risk profile, security offered – as is currently the situation. NFF does seek improved transparency on the current and future lending arrangements (such as interest rates and margins) for water rights and statutory water access entitlements.

NFF requests the inclusion of a rule to prevent third parties from exerting undue influence on irrigators to transform. Where transformation is negotiated between the third party and irrigator, the cost is to be borne by the party requesting transformation and that terms and conditions of existing lending and water contracts remain preserved. NFF also requests that the Australian Financial industry be required to provide clear and transparent information on their lending policies for water rights provided under IIO entitlements and for statutory water entitlements.

Delivery Right

NFF understands that there have been representations that delivery rights should be extinguished for that part of the water entitlement that is traded upon transformation.

Delivery rights form part of the unbundling of water entitlements from land. The components of unbundling include entitlement, use, site (for direct pumpers) and delivery rights. The delivery right is that component which has least specification but remains part of the unbundled property right.

Retention of delivery rights will have several benefits for irrigators:

- Retains the ability for the irrigator to access the infrastructure operators' network when water entitlements are retained, or increased through

acquisition (this is also pertinent when a dryland farm becomes irrigated again or when acquired by an irrigator who could use their existing rights or entitlements over this new land acquisition);

- Under current proposals, if water is used (within the IIO) in excess of the delivery entitlements, then a penalty/premium rate delivery access charges will apply. Some irrigators' business models are that they will acquire allocation (or even supplementary access water) when cheaper for broad acre production and as such, the proposal to automatically extinguish delivery entitlements will disadvantage these irrigators;
- Delivery rights retain the capability for irrigators to take advantage of capacity constraint situations (flow rate share) when there is trade of part of the transformed entitlement – irrigators have indicated that this could potentially provide significant benefit to their farm business;
- Retention of the delivery right provides asset advantages to the irrigator should trade in delivery rights be introduced in the future – this is part of the realisation of the full potential of the previously unbundled right (NFF understands that there is some attempts by irrigators to trade these rights now); and
- In the event that flow rate share is linked to the number of delivery rights, they may be required to implement high flow rate capacity on farm irrigation works to improve water use efficiency or when two or more delivery access points are combined into fewer access points.

Inevitably many irrigators within IIOs that wish to exit irrigation by selling their water access entitlements will wish to retain their delivery entitlements to avoid the termination fee. In such cases, the IIOs will be in an intolerable position. These members will have no interest in receiving water from the IIO and will likely be pursued each year for payment of the annual access fee.

It is reasonable, in such situations, that these members be required to extinguish their delivery entitlements, unless the irrigator can conclusively demonstrate a future intention to irrigate.

NFF does not support the automatic extinguishment of these rights. Irrigators that actively continue to use water within the IIO should have the capacity to set their own mix of access entitlements and delivery entitlements that best suits their enterprise mix. For example, an opportunistic broad acre irrigator that regularly uses the annual allocation market may well retain a high level of delivery entitlements versus access entitlements. Alternatively, an irrigator with permanent plantings is highly likely to match delivery entitlement to access entitlements.

In the past, some of the IIOs have allowed some flexibility between the level of water access entitlement and delivery entitlement held by individual irrigators, which provided irrigators the flexibility described above.

NFF Contact

Deborah Kerr
NRM Manager
Ph: 02 6273 3855
Fax: 02 6273 2331
Email: dkerr@nff.org.au