

WATER ACT 2007**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION GIVEN UNDER SECTION 163****BY****MURRAY IRRIGATION LIMITED****(ACN 067 197 933)****PERSONS GIVING THIS UNDERTAKING**

- (1) This undertaking (**the Undertaking**) is given to the Australian Competition and Consumer Commission (**the ACCC**) by Murray Irrigation Limited ACN 067 197 933 (**MIL**) of 443 Charlotte Street, Deniliquin, in the State of New South Wales under section 163 of the *Water Act 2007* (**the Act**).

BACKGROUND

- (2) **MIL** is a corporation that owns and operates water service infrastructure for the purposes of the delivery of water for irrigation to over 2 400 farms in southern New South Wales. **MIL's** area of operations includes over 748 000 hectares north of the Murray River.
- (3) The Water Charge (Termination Fees) Rules 2009 (**the Rules**) were registered by the then Minister for Climate Change and Water on 22 June 2009 and took full effect from 1 September 2009.

DISCOUNT FOR ON-TIME PAYMENT

- (4) **MIL** issues tax invoices for its charges including the customer's annual access fee for water delivery services to its customers on a quarterly basis.
- (5) In September 2009 **MIL** issued a tax invoice to all **MIL** customers pertaining to each customer's liability to pay the July–September 2009 quarterly instalment of various charges (**September invoice**). All of these tax invoices included a provision indicating that if payment of the invoice by the customer was made on or before the due date, the gross amount of the invoice would be discounted by 10 per cent.
- (6) In October 2009, the ACCC raised with **MIL** its concerns about the effect the discount for on-time payment has on the calculation of termination fees.
- (7) In December 2009 **MIL** issued a second quarterly tax invoice to all **MIL** customers pertaining to each customer's liability to pay the October–December 2009 quarterly instalment of various charges (**December invoice**). As with the

September invoice, the December invoice included a provision indicating that if payment by the customer of the invoice was made on or before the due date, the gross amount of the invoice would be discounted by 10 per cent.

- (8) Since the commencement of the Rules on 1 September 2009, **MIL** imposed a fee in respect of the termination of the whole or a part of a right of access to its irrigation network (**termination fee**) on customers seeking to terminate their access to **MIL's** irrigation network (**terminating customers**). During the period 1 September 2009 to 1 January 2010, 64 of **MIL's** terminating customers qualified for both or either of the discounts for on-time payment in respect of the September and December invoices by completing payment of those invoices on or before the due date.
- (9) The calculation of the termination fee imposed by **MIL** on each of those 64 terminating customers did not have regard to the discount for on-time payment.

FEE FOR THE SURRENDER OF DELIVERY ENTITLEMENTS

- (10) In May 2007 **MIL** introduced a fee for the surrender of delivery entitlements upon first introducing delivery entitlements and termination fees of \$220. The fee was in respect of the processing of an application for termination or surrender of delivery entitlements.
- (11) Since 1 September 2009 **MIL** has imposed the fee for the surrender of delivery entitlements on 112 occasions in respect of the termination of delivery entitlements by terminating irrigators.

THE RELEVANT RULES

- (12) Rule 5(1) of **the Rules** prohibits an irrigation infrastructure operator from imposing a fee, charge or payment of any kind for, or in respect of, the termination of the whole or a part of a right of access to that operator's irrigation network unless as expressly authorised under **the Rules**.
- (13) Rule 7 of **the Rules** authorises an irrigation infrastructure operator to impose a termination fee where that fee does not exceed the amount determined by multiplying by 10 the relevant total network access charge payable to the operator by the holder of the right of access in respect of the financial year in which notice of termination or surrender is given.
- (14) Rule 3 of **the Rules** defines the term 'total network access charge' to mean the total amount payable in respect of a financial year by a terminating irrigator, subject to various inclusions and exclusions.

THE RELEVANT CONDUCT

- (15) The ACCC considers that the calculation of termination fees for a number of terminating customers is not authorised under **the Rules** because the calculation of the total network access charge payable by the terminating customer did not have regard to the 10 per cent discount for on-time payment. Consequently, the ACCC considers that the imposition of these termination fees constitutes conduct in contravention of rule 5 of **the Rules**.

(16) Further, the ACCC considers **MIL's** imposition of the fee for the surrender of delivery entitlements is also not authorised under **the Rules** and constitutes conduct in contravention of rule 5 of **the Rules**.

(17) **MIL** admits that:

- (a) by failing to have regard to the discount for on-time payment for those terminating customers that qualified for the discount in the calculation of those customers' termination fees; and
- (b) by imposing the fee for the surrender of delivery entitlements on terminating customers,

MIL's conduct in relation to a number of termination transactions completed since 1 September 2009 was in breach of rule 5(1) of **the Rules**.

IRRIGATION INFRASTRUCTURE OPERATOR RESPONSE

(18) In response to the ACCC's concerns, **MIL** has:

- (a) issued refunds totalling over \$115,000 to those 64 terminating customers that qualified for the discount for on-time payment and did not have their termination fee appropriately calculated having regard to the discount; and
- (b) ceased imposing the fee for the surrender of delivery entitlements on terminating customers; and
- (c) committed to providing refunds to those 112 terminating customers that were charged the \$220 fee for the surrender of delivery entitlements; and
- (d) sought guidance from a suitably qualified, independent compliance professional or legal practitioner with expertise in the Act and **the Rules**, to ensure it is informed about its obligations under **the Rules**.

(19) **MIL** has also offered to give the Undertaking in the terms set out below to the ACCC under section 163 of the Act. The ACCC has agreed to accept the Undertaking under section 163 of the Act.

COMMENCEMENT OF UNDERTAKING

(20) This Undertaking comes into effect when:

- (a) the Undertaking is executed by **MIL**; and
- (b) the **ACCC** accepts the Undertaking so executed.

(21) Upon the commencement of this undertaking, **MIL** undertakes to assume the obligations set out in paragraphs (22) to (29) below.

UNDERTAKING

- (22) For the purposes of section 163 of the Act, **MIL** undertakes that, to the extent that it is prohibited by **the Rules** from doing so, it will refrain, for a period of 3 years, from imposing, demanding or receiving, or causing to be imposed, demanded or received, a fee, charge or payment of any kind for or in respect of the termination or surrender of the whole or a part of a right of access to the operator's irrigation network or of services provided in relation to that right or a part of that right to the extent that the fee, charge or payment exceeds the fee authorised under Part 3 of **the Rules** having regard to any discounts or concessions in respect of the financial year in which notice of termination or surrender is given for which a terminating customer has qualified.
- (23) **MIL** further undertakes, within 30 days of this Undertaking coming into effect, to implement and, for a period of 3 years, maintain mechanisms to ensure that termination fees are calculated appropriately having regard to each terminating customer's circumstances. These mechanisms will include a process for calculating the termination fee applicable to each customer as follows:
- (a) Upon receipt of a terminating customer's notice of termination or surrender, **MIL** will cause the Administrator of the Share Registry of **MIL** to send a request to the Finance Manager of **MIL** requesting that the latter calculate a termination fee;
 - (b) **MIL** will cause the Finance Manager of **MIL** to review the terminating customer's account history for the financial year in which notice of termination or surrender is given and calculate the appropriate termination fee having regard to the effect of any applicable discounts or concessions;
 - (c) **MIL** will cause the Finance Manager of **MIL** to convey the results of the review of the terminating customer's account history and the calculation of the termination fee to the Administrator of the Share Registry of **MIL** via electronic mail (e-mail); and
 - (d) **MIL** will maintain the electronic customer record including storing the relevant e-mail sent by the Finance Manager of **MIL**.
- (24) Within 30 days of this Undertaking coming into effect, **MIL** will cause a copy of the pro forma letter set out in Annexure A of this Undertaking to be sent to each current **MIL** customer and each of those persons who have ceased to be **MIL** customers since 1 September 2009.
- (25) **MIL** undertakes, within 7 days of this Undertaking coming into effect, to publish for a period of 3 months in the top one third on the home page of its website (www.murrayirrigation.com.au), a hyperlink in 12pt bold Arial or similar font (the **Hyperlink**) to the notice set out in Annexure B of this Undertaking with the heading being in 18pt bold Arial or similar font and text being in 14pt Arial or similar font. Immediately preceding the **Hyperlink** will appear the words "Murray Irrigation gives ACCC undertaking for breach of Water Charge (Termination Fees) Rules 2009" in 18pt bold Arial or similar font.

- (26) **MIL** will, by 30 September 2010, 30 September 2011, 30 September 2012 and 30 September 2013, provide, at its own expense, a report to the ACCC detailing the following information in respect of each termination transaction for which written notice is given by the terminating irrigator to **MIL** during the financial year 2009–10, 2010–11, 2011–12, and 2012–13 (respectively):
- (a) the terminating customer's total network access charge in respect of the financial year in which notice of the termination is given;
 - (b) details of any discount or concession offered by **MIL** to the terminating irrigator in respect of the financial year in which notice of the termination is given and details of how the terminating irrigator qualified for such discounts or concessions; and
 - (c) the termination fee or any other fee imposed on the terminating irrigator by **MIL** in respect of the termination of the whole or a part of a right of access to **MIL**'s irrigation network, or services provided in relation to that right, in the financial year in which notice of termination is given.
- (27) If requested by the ACCC in writing, **MIL** will provide within 14 days, at its own expense, copies of the relevant tax invoices for a sample of terminating irrigators included in a report provided under paragraph (26) of this Undertaking, such sample being twenty-four terminating irrigators or five per cent of terminating irrigators, whichever is the greater, selected by the ACCC.
- (28) If, based on the copies of relevant tax invoices provided under paragraph (27) of this Undertaking, the ACCC notifies **MIL** of any suspected contravention of the Rules, and if requested by the ACCC in writing, **MIL** will provide within 14 days, at its own expense, copies of relevant tax invoices for other terminating irrigators included in the report provided under paragraph (27) of this Undertaking, selected by the ACCC.
- (29) Despite paragraphs (27) and (28) of this Undertaking, **MIL** can only be obliged to provide copies of any relevant tax invoices that it has not previously provided to the ACCC.


ACKNOWLEDGMENTS

- (30) **MIL** acknowledges that:
- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of s. 163 undertakings on its website;
 - (b) the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications;
 - (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and

(d) for the purposes of this Undertaking, the Rules are those Water Charge (Termination Fees) Rules in force as at the time of the relevant conduct.

EXECUTED BY

Murray Irrigation Limited, ACN 067 197 933 and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.


.....
Secretary/Director

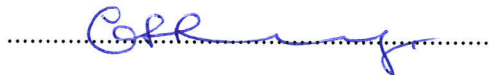
Geoff CUTLER
COMPANY SECRETARY


.....
Director

STEWART GORDON ELLIS.

This.....15th.....day of.....July.....2010

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 163 OF WATER ACT 2007.


.....

Graeme Julian Samuel
Chairman

This.....27th.....day of.....July.....2010

ANNEXURE A



Murray Irrigation Limited

Registered Office:
443 Charlotte Street DENILIQUIN NSW 2710
PO Box 528 DENILIQUIN NSW 2710
T. 03 5898 3300 F. 03 5898 3301
www.murrayirrigation.com.au

[DATE] 2010

[Murray Irrigation Customer]

[Address 1]

[Address 2]

Dear [Murray Irrigation Customer]

Murray Irrigation Limited gives ACCC court enforceable undertaking

Murray Irrigation has given the Australian Competition and Consumer Commission (ACCC) a court enforceable undertaking in accordance with s. 163 of the *Water Act 2007* after multiple breaches of the *Water Charge (Termination Fees) Rules 2009* (the Rules).

In or about September 2009, Murray Irrigation offered a ten per cent discount to customers that paid their quarterly tax invoice on time (the discount). Murray Irrigation offered the discount again when issuing a second quarterly invoice in or about December 2009.

Murray Irrigation has, for some time, imposed a \$220 fee for the surrender of delivery entitlements for the processing of an application for termination or surrender of delivery entitlements.

Under rule 5(1) of the Rules, which became effective from 1 September 2009, irrigation infrastructure operators must not impose a fee, charge or payment of any kind for, or in respect of, the termination of the whole or a part of a right of access to that operator's irrigation network except as expressly authorised under the Rules.

Rule 7 of the Rules authorises an irrigation infrastructure operator to impose a termination fee where that fee does not exceed the amount determined by multiplying by ten the relevant total network access charge payable to the operator by the holder of the right of access in respect of the financial year in which notice of termination or surrender is given.

Murray Irrigation has processed many termination transactions since the Rules came into effect following requests from customers for termination of their delivery entitlements. On sixty-four occasions Murray Irrigation's calculation of the termination fee did not have regard to the discount for on-time payment for those terminating customers that qualified for the discount.

Further, since 1 September 2009 Murray Irrigation imposed the \$220 fee for the surrender of delivery entitlements on one hundred and twelve occasions.

The undertaking provides, among other things, that Murray Irrigation will refrain, for a period of three years, from imposing termination fees that have not been appropriately calculated having regard to any discounts or concessions for which terminating customers have qualified in respect of the relevant financial year. Murray Irrigation has also ceased imposing the \$220 fee for the surrender of delivery entitlements.

Murray Irrigation has also issued refunds of over \$115,000 to affected customers and proposes to issue further refunds for the \$220 fee for the surrender of delivery entitlements.

For further information about the Rules and Murray Irrigation's compliance with them, please contact Murray Irrigation's Administration Manager (Matthew Watts) on (03) 5898 3300 or see Murray Irrigation's website www.murrayirrigation.com.au or the ACCC's website www.accc.gov.au/water.

Yours sincerely

Anthony Couroupis
General Manager
Murray Irrigation Limited

ANNEXURE B

Murray Irrigation Limited gives ACCC court enforceable undertaking

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