

# BROKERAGE AGREEMENT

FY 2009-2010

The Brokerage Agreement is between **The WaterExchange ACN 003 476 864** ('Waterexchange') the **Customer** and the **Broker**, collectively known as the **Parties**. This Agreement records the Terms of participation of Waterexchange's Service.

## 1. DEFINITIONS

"Accounts"	means the amount of money owing.
"Allocation"	means the temporary water Allocation available for Trade or Traded by way of assignment.
"Application"	means an Application for the assignment of Allocation to the Regulating Water Authority.
"Authority to Act"	means the Published form that is executed by the Customer on behalf of the Broker in order to use the Waterexchange Service.
"Broker"	means that the Broker who holds a licence with the Waterexchange and has an Authority to Act executed on behalf of the Customer.
"Buy Order"	means an offer to buy an Allocation.
"Complete"	means the time when a Buy Order is Matched with a Sell Order and an Application is sought to have the Trade approved.
"Concluding"	means the time when a Sell Order and Buy Order are Matched.
"Customer"	means any person who has authorised a Broker registered by the Waterexchange to place a Buy Order or a Sell Order.
"Electronic Communication"	means a communication of Information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both.
"Fees"	means the money charged to the Broker for the use of the Service and includes the amount charged to Waterexchange by the Regulating Water Authority to process an Application
"ID"	means the Personal Identification Number given to a Broker that when used in conjunction with a User Number gives access to the Service.
"Information"	means Information in the form of data, text, images or sound.
"Match"	means the moment in time when a Sell Order and Buy Order meet to Complete a Trade.
"Parties"	means the Waterexchange, the Customer and the Broker
"Purchaser"	means any person who places a Buy Order for an Allocation on the Site.
"Published"	means Information that has been placed on the Site.
"Registration Form"	means the Registration Form on the Site.
"Regulating Water Authority"	means the Minister of the Crown or the State Government department or agency or Private Irrigation Corporation or Private Irrigation Trust which processes, administers, determines upon or otherwise deals with the Application.
"Sell Order"	means an offer to sell an Allocation.
"Served"	includes Information that has been given or sent or Information by Electronic Communication.
"Service"	means the Service and Services the Waterexchange provides via the Site.
"Site"	means the website <a href="http://www.waterexchange.com.au">www.waterexchange.com.au</a> .
"Termination Form"	means the Termination Form available on the Site.
"Terms"	means the <del>Terms and conditions that govern</del> the access to and use of the Waterexchange Site and Service.
"Trade"	means the sale or purchase of an Allocation on the Site and "Traded", "Trading" and "Trader" have corresponding meanings.
"User Number"	means the number given to a Broker that when it is used in conjunction with a Personal Identification Number gives access to the Service.
"Vendor"	means any person who places a Sell Order for an Allocation on the Site.

## 2. PRELIMINARY

### a. Titles and Headings

- i. Title and headings are inserted into the Brokerage Agreement for reference purposes only and must not be used to interpret the Brokerage Agreement.

### b. Interpretation

In the interpretation of the Brokerage Agreement, unless the context otherwise requires:

- i. words importing the singular shall include the plural and vice versa, words importing reference to any gender shall include all other genders, words importing persons shall include a reference to a corporation and other legal entities and vice versa;
- ii. paragraph headings are for convenience only and shall not form part of the Brokerage Agreement nor affect its construction;
- iii. where a word or phrase is given a particular meaning other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- iv. a reference to any Act of Parliament or code or section thereof or Schedule hereto shall be read as if the words "or any statutory modification or re-enactment thereof or substitution therefore" were added to the reference;
- v. a reference to any clause, paragraph, Appendix or Schedule is, unless the context otherwise requires, a reference to a clause, paragraph, appendix or Schedule of the Brokerage Agreement;
- vi. references to any Party to the Brokerage Agreement or any other document or Brokerage Agreement shall include his/her or its personal representatives, successors or permitted assigns;
- vii. references to \$ or dollar are references to the currency of the Commonwealth of Australia;
- viii. a reference to the Brokerage Agreement includes any variation, novation or replacement;
- ix. if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day and a reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
- x. reference to a Party using its best endeavours, reasonable endeavours, best effort or reasonable effort to procure any consent or assignment or other act, matter or thing shall not of itself require that Party to give any consideration whatsoever for such consent, assignment, act, matter or thing;
- xi. reference to an associate of a person means another person who is associated with that person by application of any of the provisions of division 2 of part 1.2 of the *Corporations Act 2001*;
- xii. a provision of the Brokerage Agreement must not be construed to the disadvantage of a Party merely because that Party was responsible for the preparation of the Brokerage Agreement or the inclusion of the provision in the Brokerage Agreement; and
- xiii. "including" and similar expressions are not words of limitation.
- xiv. Where the date for performance by a party of an obligation falls on a Saturday, Sunday, public holiday or day on which banks are closed for business in Sydney, New South Wales, that date shall be extended to the next date on which banks are open for business in Sydney, New South Wales.

### c. Acknowledgement of the Broker and the Customer

- i. The Brokerage Agreement is between the Waterexchange, the Customer and the Broker.
- ii. The Parties are bound by the Brokerage Agreement Published on the Site at the time a Trade is concluded; and
- iii. The Waterexchange is a facilitator only. The Waterexchange is not a Purchaser or Vendor.
- iv. It is the responsibility of the Parties to read and understand the Brokerage Agreement Published on the Site before using the Service. The Customer and the Broker consent to Information being Served by the Waterexchange by means of an Electronic Communication; and
- v. The Customer and the Broker acknowledge and agree that the dispatch of an Electronic Communication occurs when it enters the Information system outside the control of the Waterexchange.

### d. Eligibility of the Customer and the Broker

- i. It is a condition of the Brokerage Agreement that the Customer and the Broker are 18 years or older and have the capacity to enter the Brokerage Agreement and be bound by its conditions and the Customer and the Broker warrant that all the Information provided in the Registration Form is true and accurate.

### e. Authority

The Customer and the Broker acknowledge and agree that:

- i. The Waterexchange may amend the Brokerage Agreement at any time; and
- ii. The Customer and the Broker are bound by the Brokerage Agreement Published on the Site as at the time of the Trade Concluding.
- iii. The Customer must Complete and execute an Authority to Act form and return it to the Broker.

### f. Relationship of Parties

- i. The Waterexchange is independent of the Customer and the Broker.
- ii. Before using the Service, the Customer must have paid to the Broker the amount owing to purchase the water Allocation; and
- iii. Before using the Service, the Broker must have the Customer's money to pay for the water Allocation they are purchasing.
- iv. The Broker is responsible to the Waterexchange to Complete the Trade and the Customer is responsible to the Broker to Complete the Trade.

### g. Entire Agreement

The Published Brokerage Agreement at the time of a Trade Concluding contains the entire understanding between the Parties. No verbal or written modifications or variations may be made by the Customer or the Broker to the Brokerage Agreement.

### 3. TRANSACTION PROCEEDINGS

#### a. Responsibilities of the Waterexchange

- i. The Waterexchange may withdraw its Service without notice; and
- ii. The Waterexchange does not warrant or guarantee a Customer or Broker's ability to Complete a Trade; and
- iii. The Waterexchange agrees to forward the Application to the relevant Regulating Water Authority for Approval after the Trade Concludes.

#### b. Authority to Act

The Customer authorises the Broker:

- i. To accurately Complete the Authority to Act form; and
- ii. To provide all necessary Information required by the Regulating Water Authority to process the Customer's Application.

#### c. Approval

- i. The Regulating Water Authority is responsible for Approving a Trade.
- ii. The Waterexchange is not liable to the Customer or the Broker if the Regulating Water Authority refuses the Application.

### 4. PAYMENT

#### a. General

- i. The Waterexchange is independent of any Regulating Water Authority.
- ii. The Waterexchange will not provide Information to the Customer or the Broker relating to the status of any Trade or Application.
- iii. The Customer and the Broker must keep records of each Authority to Act and details of each Trade for at least 6 years. These records must be available to the Waterexchange when requested.

#### b. Timeframe

- i. The Broker must pay all outstanding Accounts within 72 hours of the Completion of Trade.

#### c. Fees & Levies

- i. All Fees & Levies incurred by the Waterexchange must be paid before an Application for Trade is sent to the relevant Regulating Water Authority for Approval.
- ii. The Waterexchange must receive payment of Fees in full regardless of whether or not a Trade is Approved,
- iii. In the event a Trade is denied, the Waterexchange will refund the payment made, minus any Fees imposed by a Regulating Water Authority.

#### d. GST

- i. Except as expressly provided in the Brokerage Agreement, all amounts referred to in the Brokerage Agreement do not include GST.

### 5. GENERAL CONDITIONS

#### a. Privacy

- i. The Waterexchange is bound by the Privacy Policy Published on the Site. The Waterexchange's Privacy Policy may be amended from time to time. It is a condition of using the Waterexchange Site and Service that the Customer and the Broker accept the Privacy Policy as Published at the Conclusion of Trade.
- ii. It is a condition of the Brokerage Agreement that any contact the Customer and the Broker has with the Waterexchange may be recorded.
- iii. The Waterexchange will not enter into direct contact with the Customer.

#### b. User ID of the Broker

- i. The Broker will receive a User Number ("user ID") and a Personal Identification Number ("PIN") which the Broker will keep confidential; and
- ii. The Broker is solely responsible for the security and confidentiality of the Broker's User ID and your PIN; and
- iii. The Broker must fulfil any obligation to Trade when the Broker's User ID and PIN are used in a transaction; and
- iv. The Broker must immediately notify the Waterexchange of any use of the Broker's User ID and PIN that was not authorised by the Broker.
- v. The Broker is liable for any loss, costs or expenses incurred from unauthorised use of the Broker's User ID and PIN.

#### c. Site and Service

The Customer and Broker acknowledge and agree that:

- i. The Waterexchange provides a Service with reasonable skill and care;
- ii. The Waterexchange Site and Service may not always be available, accessible or secure;
- iii. The Service may not operate without error;
- iv. Information on the Waterexchange Site or Service is not advice. The Customer and the Broker must seek their own professional advice;
- v. No action should be taken or omitted to be taken in reliance upon any Information the Waterexchange puts on its Service;
- vi. The Waterexchange accepts no liability for any damage that may result from the transmission of any viruses via the Site, Service or files which are available for Customers and Brokers to download from the Site or Service.

#### d. Intellectual Property

- i. The Customer and the Broker acknowledge and agree that the Intellectual Property of the Waterexchange at all times remains the property of the Waterexchange.
- ii. The Customer and the Broker have no right, title or interest in the Intellectual Property of the Waterexchange.
- iii. Unless authorised in writing by the Waterexchange, the Customer and the Broker may not use or copy any material on the Waterexchange Site or Service except for the purpose of Trading an Allocation.

#### e. Governing Law and Jurisdiction

- i. The place of the Brokerage Agreement is New South Wales.
- ii. The Waterexchange Site and Service are governed by the laws in force in New South Wales at the time the Brokerage Agreement is Published on the Site.
- iii. The Customer and the Broker submit to the exclusive jurisdiction of the courts of New South Wales and the New South Wales appellate courts.

#### f. Termination and Survival

- i. The Waterexchange may terminate the Brokerage Agreement effective immediately on written notice to the Customer and the Broker.
- ii. The Customer or Broker may terminate the Brokerage Agreement by completing and executing the Brokerage Agreement Termination Form;
- iii. Subject to the Brokerage Agreement, termination is immediate upon the Waterexchange receiving and accepting in writing the Completed Brokerage Agreement Termination Form;
- iv. Termination does not affect obligations of the Customer or the Broker incurred prior to Termination.
- v. The Broker must pay all Accounts and Fees due to any other User of the Waterexchange Service prior to Termination;
- vi. The Customer and the Broker are bound to the Brokerage Agreement as Published on the Site until Terminated.

#### g. Third Party beneficiaries

- i. The Brokerage Agreement confers no rights or remedies on any third party, other than the Parties to the Brokerage Agreement and the permitted assigns.

#### h. Notices

- i. Any Information sent by the Waterexchange to the Customer or Broker will be deemed as having been Served once the Waterexchange dispatches it; and
- ii. Publication is notice and Parties are bound by the current, Published version of the Brokerage Agreement at the Completion of the Trade.

#### i. Waiver

A waiver of a breach of any condition in the Brokerage Agreement will not be considered a waiver of a further breach of the same Term, or a waiver of a breach of any other Term, or a waiver of the Waterexchange's right to declare an immediate or subsequent default.

#### j. Assignment and Successors

- i. The Brokerage Agreement may not be assigned without prior and written consent of the Waterexchange.
- ii. The Waterexchange may assign its rights and obligations under the Brokerage Agreement without notice to the Customer or the Broker.
- iii. If the Brokerage Agreement is properly assigned, then it will bind and benefit the successors and assigns of the Parties.

#### k. Matters outside the Waterexchange's control

- i. Except where bound by law, the Waterexchange will not be responsible for any breach of the Brokerage Agreement caused by majeure events such as acts of God (eg earthquakes, flooding), Australia in a state of War, Strikes, Riots and any other event that is outside the control of the Waterexchange.

#### l. Exclusions

The Waterexchange offers its Service "As is" and notwithstanding any other provision of the Brokerage Agreement and to the fullest extent as permitted by Law, the Waterexchange will not be liable for any losses or damages of any kind. The Waterexchange attempts to ensure that Information on its Service is accurate however the Waterexchange cannot guarantee the accuracy, timeliness, Completeness, performance or fitness for any purpose. The Waterexchange is not liable for any negligence whatever its cause and takes no absolute obligation for any matter arising from the actions of a third party, an employee or contractor of the Waterexchange.

#### m. Severability

- i. The Brokerage Agreement is to be read and construed subject to the Laws of New South Wales or the Commonwealth, to the extent that where any provision of the Brokerage Agreement or the application thereof to any person or circumstance is held invalid, the remainder of the Brokerage Agreement and the application of the provision to other persons or circumstances is not to be affected.