

PRODUCTIVITY COMMISSION SUBMISSION INTO MECHANISMS TO PURCHASE WATER ENTITLEMENTS

We, the members of the Deniliquin Lawyers' Association, welcome the opportunity to submit our thoughts in relation to appropriate and inappropriate mechanisms for "recovering water in the Murray-Darling Basin."

In particular, we would like to focus on the Restoring the Balance program and the lessons to be learnt from it.

It is our view that the Issues Paper, at page 14, highlights, and appropriately labels, the fundamental flaw in the strategy underlining the process adopted to date.

There is no possible way that thinking persons in our community can understand that the Federal Government would adopt what you rightly identify as a "no regrets" presumption and proceed to enter, then dominate and effectively take over, the market for water, without having, first, actually determining what water is needed, and from where.

The outcome of a broad "no regrets" presumption underlying the buying, and without any apparent clear articulated plan for long term sustainable land use in areas from which water has been acquired has been frustrating, baffling, and downright depressive on communities already struggling with a sustained drought, which may possibly be an indication of the future, with climate change, rather than a sustained aberration.

We believe that it is simply wrong to make judgments about how water should be acquired, recovered, or saved, without knowing how much, and from where. If the actual objective of the Federal Government in relation to the acquisition of water, in both number, and area of source, were known, then individual water owners, communities, irrigation infrastructure operators and Councils could assist in targeting the appropriate sources and amounts with a view to striking the necessary balance to ensure the long term viability of the food production industry so vital to the Basin, and Australia as a whole.

Underlying all the problems seems to be the "no regrets" strategy which has been adopted thus far. It has led to the impression that there is insufficient transparency when, quite probably, in fact, the plan has been all too transparent.

It is our view, based on involvement with irrigators and communities in the Basin that:

1. It is the responsibility of the Federal Government to identify and announce the actual target for the recovery of water in each particular region.
2. Having determined the amount to be acquired, it should make an offer to purchase at a specific price per unit of water, depending upon the nature of that unit, and with specified allowances/deductions for "encumbrances" such as Snowy Borrow schemes.
3. The Federal Government is kidding itself if it thinks that the RTB Buyback mechanism has not changed the market. It has become the market. It really should just accept that fact, seek offers at a price it is prepared to pay and then get out of the market to leave it open to trade between irrigators so that it can be used for the

- purpose for which it is intended, namely the production of food, with seasonal conditions dictating the appropriate price, and hence use, of the water.
4. Effectively, the only trade in water, other than to the Government, is by speculators who think that the price will come up or down as a consequence of future Government forays into the market. It is patently artificial.
 5. The Government should, by now, have a very clear idea of the value of the water it is acquiring and be in a position to identify a price. Those in the more marginal parts of irrigation areas, and those under the most pressure from their lending institutions, as a consequence of the ongoing drought, will have the opportunity of accepting “just terms” without the Government having to actually indulge in a compulsory acquisition process.
 6. The less marginal, and stronger, irrigators will be in a position to contribute further water savings to the pool identified as being required by way of the upgrading of infrastructure designed to increase food output.
 7. The following points are raised in respect of the procedure chosen for the RTB program:
 - (a) issuing a “sales advice/letter of instruction” to the solicitors for DEWHA and to the solicitors/brokers for the water owner instead of the letter from DEWHA saying that the Department had decided to pursue the water owner’s offer would involve professional advisers at an early stage to facilitate the smooth passage of the transaction;
 - (b) the issue of contracts by the Commonwealth’s solicitors, should be followed by the vendor/water owner proving title and the Purchaser to investigate that title, in the normal fashion, by the time of the agreed completion date;
 - (c) the present procedure which involves a non-transparent due diligence process said, in correspondence when it commences, to take between “3 and 4 weeks” but invariably significantly longer, means that the water owners/vendors and, very significantly, their respective lending institutions, are left longer without the certainty of a contract and with no reasonable idea of when the matter may reach completion. This is totally lacking in commercial reality. We have, daily, if not hourly, seen the impact of this uncertainty on our clients and their families throughout the process;
 - (d) the elongated due diligence process, with its inherent uncertainty, has appeared secretive, and has left participants to make judgments as to progress, based on the inference which can be drawn from other experiences in the program, rather than clear and transparent steps;
 - (e) the tender process adopted was said to close on 30 June 2009. Participants felt entitled to defer a decision to tender until close to the tender date, to take into account their own individual financial circumstances and seasonal conditions. Those who tendered in the last seven days appear not to have been considered, regardless of the price. Those participants who have fallen into this category have at least received the certainty of a letter telling them that they have

missed out. Decision based on inference continues for those who have not received a letter, but have also not received a contract, as a consequence of DEWHA's change in policy in relation to its reaction to the embargo imposed by New South Wales. But it is, at this point, the only comfort participants have is an inference that those who have not received letters will ultimately get a contract if the embargo is lifted.

- (f) whilst the intervention of the New South Wales Government, in the form of the embargo, has complicated the process of dealing with offers, it has particularly highlighted the communication issue referred to in 7(e). Through a process of questioning, participants and their advisors have been able to glean that, at this point, there appear to be five categories of prospective vendors who have not actually received letters of rejection, as referred to in 7(e), as follows:
- i. those who lodged later in the tender, have not received written confirmation that their offer is to be pursued to the point of due diligence, but, at least, have not received a rejection letter,
 - ii. those who have received advice that due diligence is being pursued;
 - iii. those that are aware that due diligence has been completed but no instructions have been issued for contracts to be drawn;
 - iv. those who have received contracts but have been advised that those contracts are not to be exchanged; and
 - v. those with exchanged contracts where settlement is proceeding, except in the case of transactions involving Water Access Licences.

It clearly should not have been left to participants, and their advisors, to try to work out where individuals stand. Participants should have received official notification of their position as a consequence of the impact of the embargo. Whatever mechanism is adopted for future use, the communication, particularly when something unexpected arises, must be significantly better than it has been in this phase of the RTB.

- (g) because of the magnitude of the Federal Government involvement, and the uncertainty about what it is going to do next, and when, there can be no faith in the normal water trading market.
- (h) although we have been impressed with the efficiency of the Commonwealth Solicitors, Lawlab, frequently the conveyancing process seems to be unnecessarily delayed because of the Commonwealth having only one person apparently delegated to execute documents on its behalf.
8. We have little or no experience with the small block irrigator retirement program and do not feel qualified to comment.
9. The trading of water entitlements for funds specifically earmarked for On Farm Water Efficiency has proved popular and effective and should be pursued and enhanced, as we believe is intended.

10. We do not think that it is helpful to consider other, or alternative market mechanisms, such as annual allocation transfers, leases, derivatives etc. This would only complicate the situation further and would be particularly unhelpful unless the “no regrets” approach is abandoned and replaced with a real strategy.
11. Termination fees, are not, of themselves, a disincentive to the process. The disincentive has been the timing of the formulation and, finally, adoption by Minister Wong, of the Rules in respect of termination fees. Further uncertainty throughout the course of this process has led, in the case of Murray Irrigation Ltd, to a series of enforced changes of policy which has, unfortunately, resulted in “winners” and “losers” depending upon the point at which entitlements were sold, something that is not always within the control of the water owner, particularly when lending institutions have greater influence on the decision to sell than the owner.

Provided there is no change to the Rules finally adopted into law by Minister Wong at the end of June (not February) 2009, this should not prove to be an ongoing impediment.

12. If the CPGs are the reason that a more traditional conveyancing process was not adopted by DEWHA, then perhaps those guidelines need to be looked at.
13. Finally, the Commonwealth must accept that, given its budgeted expenditure, if it continues with its current format of acquisitions, it will dominate/distort the market for at least the next 3½ financial years.

The thought of another 3½ years of “more of the same” is frankly quite terrifying from the perspective of the mental and fiscal welfare of our clients and our communities.