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Submission to Productivity Commission

Market Mechanisms for Recovering Water in the Murray-Darling Basin

090902

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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators access 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.

This document represents the views of the members of NSWIC. However each member reserves the right to independent policy on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

Compliance with Consultation Expectations

In March 2009, in response to the growing number and complexity of consultation processes, NSWIC adopted a policy outlining the expectations of industry in this respect. The policy is appended to this submission. Consultation processes in which NSWIC participates are evaluated against this policy.

We assess this consultation as *Direct* and encourage the Commissioner to ensure that individual irrigators, together with representative groups, have access to the process.

Our policy requires consultation to proceed through five stages.

(i) *Identification of problem and necessity for change*

Satisfactory.

(ii) *Identification of solutions and proposed method for implementation*

This process must occur subsequent to the close of submissions.

(iii) *Summary of submissions, identification of preferred approach*

This process must occur subsequent to the close of submissions.

(iv) *Explanation of interim determination and final feedback*

This process must occur subsequent to the close of submissions.

(v) *Publication of final determination*

This process must occur subsequent to the close of submissions.

General Comments

NSWIC is firmly of the opinion that Australia is proceeding with environmental water recovery in a most unsatisfactory fashion. At present, we, as a community, are purchasing without any plan for an outcome.

The issue is surely not how to buy, but what to buy. The how must come after the what!

A thorough understanding of the problem needs to be had before a solution can be developed. As is evidenced throughout our submission, NSWIC believes that a plan based around outcomes must be a first step.

The water market is not so simple a place as to offer water in buckets. A complex array of entitlements provides an equally complex array of reliability, deliverability and location. Similarly, the Australian environment demands an equally sophisticated analysis of its requirements. The Productivity Commission is uniquely placed to understand that every litre of water removed from productive use that is not required by the Australian environment will have a profound effect on regional economies and communities and the national economy and food security.

Buying water without an understanding of how much is required, where it is required and when it is required is foolhardy. NSWIC has provided a submission to the Commonwealth Environmental Water holder outlining exactly this position. A copy is attached.

A purchase of any good or service must be preceded by one simple question – what is the problem that needs solving? A business wouldn't purchase the professional services of an accountant if what they needed were a lawyer.

The Australian Government – and the Productivity Commission – must first understand the outcomes that they seek. Only then can they determine what it is they need to meet those outcomes.

Responses to Questions

Is the focus on acquiring entitlements the best way of achieving the environment's needs?

This question lays bare the significant problem at the heart of the matter – until such time as the “environment’s needs” are both understood and clearly delineated, no “best way” can possibly be determined.

That is not to say that the focus on acquiring entitlements – either through purchase or infrastructure upgrade programs – is the wrong focus. Indeed, it may be the “best way” of achieving a goal. To pursue the current focus without first understanding what is needed, where it is needed and when it is needed, however, creates a situation where potentially none of the three goals – effectiveness, efficiency or appropriateness – are actually achieved.

It is our submission that a detailed program to understand what is required, where it is required and when it is required must precede further large-scale purchases. We recognise that the Environmental Watering Plan to be included in the Basin Plan aims to achieve this, but an interim plan to guide purchases prior to that must not only be completed but must be published. By any measure, RTB is a massive policy shift will fundamentally change the structure and size of the irrigation industry and the communities that it supports. The effectiveness of the program will be seriously undermined if the Australian community – and particularly the rural community of the MDB – is not actively engaged in designing and implementing the program.

It is important to note, however, that this submission does not suggest a slowing down or halt to the infrastructure investment programs. At very least, these programs should now be rolled out to the same extent as the RTB program has been. It has been the contention of this organisation throughout the water reform process that the two aspects of water recovery – purchase and investment – must occur simultaneously and in a coordinated fashion. To date, this has not occurred, a situation to the detriment of all stakeholders, the environment included.

Is a ‘no regrets’ presumption a reasonable basis for purchasing entitlements, and at what point does this cease to be the case?

As the report accurately states, the ‘no regrets’ approach is not an absolute measure. With each purchase made, the threshold of regret clearly approaches. Without an understanding of the position of the threshold, it appears probable that the point of regret will be passed, undermining the aim of the RTB program and, more widely, the policy aims of Water for the Future.

Irrigators recognise that science in this field is able to provide reliability or accuracy – but not both. Whilst we recognise that an accurate volumetric figure on environmental requirements cannot be provided in the short term, we believe that a reliable bandwidth is obtainable. At the very least, an interim purchasing strategy ought to be developed that identifies a bandwidth for key environmental assets. In that way, minimum and maximum levels can be published for each geographic group of assets

with a great degree of accuracy. This bandwidth can then graphically assist in determining the approach to – and avoidance of – the regret threshold.

What are the arguments for continuing the buyback after the new Basin Plan is implemented in 2011, and associated state water sharing plans start to be implemented in 2014?

This question raises an important issue in the context of the interaction between the RTB program and the implementation of the Basin Plan. Whilst it may fall outside the Terms of Reference of the Commission, it is clear that consideration needs to be given by the MDBA to the reduction in consumptive water use subsequent to the implementation of the Basin Plan that will be brought about by market activity. That is, the MDBA ought consider what further purchases will be made subsequent to the Basin Plan in setting the sustainable extraction limit.

Without such consideration, it is possible that a sustainable extraction limit may be set by the MDBA and enacted under Water Sharing Plans (in NSW) which then negates the need for further purchases. The corollary of this, of course, is a larger than necessary decrease in reliability for irrigators and a resultant significant effect on their businesses, their communities and the wider Australian economy. Such a result would clearly not meet the “efficiency” goal of the program.

With this consideration in mind, NSWIC supports the timeframe proposed for the RTB program. Even at its current levels, it is having a clear and massive effect on the water market. Decreasing the timeframe over which the committed funds are sent to the market will exacerbate the effects, further increasing prices, exacerbating the “cliff top” effect (see below) and punishing the most efficient irrigators who must enter the market in anticipation of a reliability decrease.

As the RTB annual quantum figures reported in the Commission’s paper clearly show, no exit strategy has been built into the purchasing program at this point. Without a clearly defined exit strategy from the major market player, the potential for a price collapse (and hence an equity collapse for irrigators that have leveraged against water entitlements) is a clear and present danger. In our submission, a clearly defined exit strategy specifically designed to avoid this situation must be determined and widely published as a matter of some urgency.

What implications do environmental demands across the Basin have on the targeting of purchases and the mechanisms and instruments that should ideally be used?

Our understanding of environmental science shows that four considerations are key to servicing environmental demand:

- Location of the asset;
- Volume of water required;
- Frequency of watering requirement; and
- Timing of watering requirement.

Clearly the first of these considerations must have an integral effect on the geographical targeting of purchases. It is clearly inefficient and ineffective to focus – advertently or not – purchasing effort in a geographic region far removed from the environmental asset that requires the water.

The three further considerations must all play an important role in determining the mechanisms and instruments of purchase (and investment) programs. The second consideration – volume – is obvious; there is no need to obtain more entitlement than is required in any form. NSWIC recognises that precision in terms of required volume for any individual asset will be difficult to provide and that ranges are a more likely short-term scientific response. In view of this, NSWIC submits that acquisition targets must be set at the lower end of that range in recognition of the social and economic impact caused by removal of water from productive use and the fact that further access to acquisition programs (purchase or investment) can be undertaken should precision within that range increase volumetric requirements.

The frequency of the watering requirement is a key consideration in determining what license yield is required to obtain that frequency. Whilst current public comment and political rhetoric might demand the purchase of high reliability entitlement, this clearly does not reflect the climatic nature of the Australian environment. Floods and droughts existed in this country long before irrigation development and, indeed, long before habitation. It would be both ineffective and inefficient to engage in an environmental watering regime that did not recognise the flood/drought cycle that Australia's flora, fauna and river systems are designed to encompass.

The timing of the watering requirement is a key consideration in the market instruments that ought be considered. The Commission has rightly considered alternative instruments – including various derivatives – that might best meet the requirements of an environmental asset. As an example, some environmental wetlands may be best served by infrequent flooding. It is highly unlikely that an overbank event to flood a wetland could be created by allocation against entitlement. This would clearly also be an expensive – and hence inefficient – undertaking (if alternative mechanisms are available at less cost).

NSW Irrigators Council has supported the River Reach proposal since inception. This proposal is essentially for the development of a derivate (option) product within the water market. At a point where allocations pass a certain threshold, the balance entitlement is acquired as an option by the CEWH. Clearly, this product is designed to provide the CEWH with additional water in relatively wet years. Whilst this might sound counter-intuitive, it provides the CEWH with a tool to match watering to the Australian environment. When natural flow conditions approach overbank events (as it might in a relatively wet year), a River Reach derivative would enable to CEWH to augment the natural flow to either create or prolong the event. What's more, modelling shows that River Reach style derivatives ought have a price advantage over purchase of permanent entitlement which is a clear advantage to the Government and its constituent taxpayers.

River Reach is but one form of derivative. NSWIC is of the view that little work has been done to consider what products might meet environmental needs and what regulatory work would need to be done to enable those products. In our submission, Government-funded programs to complete this work – in conjunction with entitlement

holders – ought be undertaken in the short term to provide further tools to the RTB program.

How should environmental water be allocated across competing projects and sites?

NSWIC is content with the Environmental Watering Plan and Environmental Water Holder regime set out in the *Water Act*.

Should the buybacks be designed so as to reduce structural adjustment costs or should adjustment be addressed separately? If the former, are there particular buyback mechanisms that should be used to do this? If the latter, what approach should be used?

It is our understanding that the Water for the Future program, as with the National Plan for Water Security under the previous Government, is designed to radically overhaul water use and to readjust the volume consumed. Given that RTB is one component of Water for the Future, it would be unwise to quarantine it from the overall adjustment aims. That is, the suite of programs must clearly be strategically aligned to ensure optimal outcomes.

NSWIC submits that such strategic alignment is currently sadly lacking.

If a focus on adjustment such that water use is minimised whilst productivity is maximised is a key component of an overall adjustment strategy, which we believe it is, then a consideration of buyback instruments and, to a lesser extent, mechanisms, must certainly be undertaken. In determining how to adequately provide for environmental assets based on the matters discussed previously in this submission, a further consideration of minimising impact on productive use ought be undertaken.

That is, consideration of minimum-impact buyback instruments and mechanisms must be a key part of the overall strategy.

Does the exit grant package for small block irrigators play a useful role in the overall buyback scheme? Should it be offered again?

The small block package is a small part of a large program. Clearly, it will benefit those that wish to take advantage of it.

The small block package cannot, however, be seen in isolation from the overall strategy of Water for the Future. Consideration must be given to whether the entitlements that are being obtained fit what is required by the environment, in conjunction with other matters discussed herein, and whether the minimal impact criteria discussed above can be met.

NSWIC is aware that the Commonwealth has no intention to reopen the small block scheme.

What impact has the Restoring the Balance program had on the price of water entitlements to date? What, if any, impact has this had on the market for seasonal allocations?

The lack of reliable, timely and accurate market data ensure that any answer given to this question is based solely on anecdotal evidence and therefore of marginal worth.

The Commonwealth Government has, on one hand, provided significant funds to develop water markets but on the other hand has not provided the market with the data which is possessed subsequent to each tender (see below).

It would seem apparent from the graph published subsequent to the first tender that prices have gone up. Further, it seems academically obvious that prices must increase. ABARE has identified elasticity of demand as one factor (and clearly the Commonwealth are inelastic as a purchaser given the RTB program is based on quantum and time, not price), but ABARE have not addressed elasticity of supply as a major price driver.

Anecdotally, the vast majority of sellers are, whilst willing, financially stressed subsequent to consecutive years of record low allocations. Should this situation change and another avenue of cash flow be made available (returns on production), then the supply is likely to become particularly inelastic. The result price impact will clearly be significant.

Should these circumstances eventuate, it is clear that alternate market instruments must be considered to avoid massive price shocks to the market.

With respect to temporary trade markets (“seasonal trade”), NSWIC does not believe that RTB activity to date has had demonstrable impact.

DEWHA is now publishing average prices paid for entitlements. What impact is this likely to have on bids in subsequent or one-off purchases?

Average prices paid are utterly worthless to a market, particularly when the timeframe for such average is the 12 month period which DEWHA have used.

Markets are only vaguely interested in average prices. They are driven by marginal prices; the price paid for the last transaction in a similar product. Without marginal prices being disclosed by the Commonwealth, a mockery is being made of the stated aim to encourage the development of timely information in markets.

Moreover, the averaging engaged in by DEWHA is across license types. Where averages themselves are but vaguely useful, averages that are of potentially vastly differing products are without use.

In terms of the impact on future purchase prices, the provision of timely and accurate market data will clearly have an impact – be that up or down. The greater impact, however, will be the sense of equity and trust developed within the market place through accurate and timely information.

How much influence would the choice of market mechanism used to purchase entitlements for environmental purposes have on the market for water?

The sheer size and scale of the RTB program ensures that the Commonwealth – as the dominant player in water markets – will have a major impact on markets regardless of what mechanism they use.

The development of a single exchange would be of benefit to all market players, including governments. Such an exchange would provide a simple mechanism to provide timely and accurate information and would allow the government to move more freely in targeting the products that they require. It is the position of NSWIC that such an exchange ought be industry led and managed.

What impact has the entrance of the Commonwealth (and other governments) into the market for water had on background trade in water between third parties?

Again, the lack of timely and accurate market information dictates that any answer to this question be based on anecdotal evidence.

NSWIC is of the opinion that government activity has had a major impact on background trade. It appears to be the opinion of market players and potential players that there is a significant gap between the price the Commonwealth is prepared to pay and the price paid by third parties. As a result, vendors are intent on engaging with the Commonwealth, which has potentially led to a significant drop in liquidity and volume in the “background” market.

Perceptions aside, empirical evidence shows that Commonwealth activity has had a significant impact on market price. When coupled with record low inflows and compromised markets (external trade barriers), it is clear and obvious that the fledgling market has yet to operate in “normal” conditions to allow assessment.

How would speeding up or slowing down the Australian Government’s water purchases influence the effects on trade between irrigators?

The major impact would likely be on price, although the external variables in this question preclude an absolute response.

Specifically, NSWIC has rejected the “get in and out fast” theory espoused by noted academics.

What are the advantages and disadvantages of the different market mechanisms that could be used to obtain water for the environment? In particular, how do they compare in terms of compliance and transaction costs and the ability to meet the differing watering needs of environmental assets?

This question serves to underscore the contradiction pointed out in our general comments – this process has become an investigation of *how* to buy without addressing the underlying question of *what* to buy.

The process ought be in three simple steps:

1. *What does the environment need?*
2. *What mix of products would best deliver that whilst minimising third party effects?*
3. *What is the best way to obtain that optimum mix of products?*

Dealing with step three first will undoubtedly provide a result that is neither efficient nor effective.

The submissions below in response to the various identified market mechanisms are therefore generic. They do not take into account what it is that ought be purchased – as we have not undertaken any research on what be purchased to best suit the needs of environmental assets. That is clearly a role for government – and a role that has been sadly neglected to date.

Purchasing entitlements in the market place

NSWIC submits that such a practice would not only potentially serve the needs of RTB and the environment, but could have the effect of rapidly driving the water market to maturity through encouraging a central exchange. A central exchange would provide both the volume and liquidity required by the government to purchase those products that it should identify as required and would further provide a robust platform for the irrigation sector to embrace the future.

It is a clear policy aim of the Government to provide a mechanism to move water to its highest value use. This is underpinned by the capacity to trade in an unfettered market and the existence of an indefeasible property right. The third spoke of this triumvirate is the development of a central exchange which can provide reliable services to the market. NSWIC submits that the RTB program represents a perfect opportunity for the rapid development of such an exchange, which ought be industry led and government supported.

NSWIC concurs with ABARE that this ought be the preferred mechanism.

Purchasing entitlements through a tender (or auction) process

As a mechanism used to date, significant angst and uncertainty has been created in rural communities. In particular, a feature of this model has been the dramatic lack of timely and accurate information at the margins. It appears to be the position of DEWHA that this mechanism must be constrained by privacy or commercial-in-confidence provisions. Whilst NSWIC does not necessarily accept this proposition, if it is, indeed, the case, then this is clearly an inappropriate mechanism to use in fostering a robust market that can

survive the RTB process, the eventual withdrawal of the Government and continue to serve the irrigation sector.

Purchasing land and entitlements in the market place

Whilst this is clearly a mechanism to achieve large scale, politically palatable and media-attractive purchases, if not considered in the context of an overall strategy it is largely meaningless.

The Commission points to the example of Toorale on the Upper Darling. Clearly no consideration was given as to *what to buy*, given the lack of proximity to environmental assets, the unregulated nature of the entitlement and the existence of the Interstate Sharing Agreement and its complex rules as water leaves the Menindee Lakes downstream. The one-off agreement to shepherd water from Toorale to the lower Lakes created significant angst and third party impacts and, furthermore, showed quite clearly the lack of consideration given prior to the purchase of what water was needed for.

Purchasing seasonal allocations

NSWIC has opposed the involvement of the Commonwealth in the temporary market, other than the eventual engagement of the CEWH in trading water from their allocation pool.

Purchasing seasonal allocations may provide certain results prior to the implementation of the Basin Plan, with a more permanent result provided by the reductions that the Plan will undoubtedly bring. Whilst this might be considered efficient in terms of overall dollars spent, the resultant impact on irrigation businesses, surrounding communities and the Australian economy would be devastating.

Leasing entitlements

Such a process may be shown worthwhile when a determination of product mix to meet environmental requirements is made. Lease arrangements would likely show a positive impact in terms of maintaining productivity in irrigation.

Purchasing options contracts

Submissions made previously in this document underscore the position of NSWIC in terms of derivative product development, including options. We believe that derivatives have the potential to service environmental needs, once determined, whilst minimising impact on irrigation.

Derivatives are most likely to develop in a market place with sufficient depth and liquidity which, pursuant to previous submissions, are more likely to develop within a centralised, robust exchange.

NSWIC reiterates its commitment to the River Reach program.

Covenants

NSWIC has maintained a policy position over many years that the underlying characteristics of a license must not be altered based on ownership. That is, the DEWH must not be able to apply an entitlement in a way that a private owner may not.

In light of that, NSWIC is wary of covenants as described.

Subsidies for irrigators to leave irrigation

NSWIC would prefer to see subsidies that allow irrigators to remain viable – likely with efficiency gains – which then allows them to exit irrigation, if they should so wish, through access to standard market mechanisms.

Purchasing environmental services

NSWIC makes no submission on this point.

Are there other market mechanisms, not listed above, that the Commission should be considering?

Whilst NSWIC is not able to immediately identify other options, we submit that a robust and fully functional market – based around a centralised exchange – is in the best position to develop derivative products to suit the needs of all market players. In encouraging the development of such, the Commonwealth would be servicing its own future needs – once they are identified.

With the benefit of the experience gained from the three tenders under the RTB program:

- ***What are the advantages and disadvantages of the chosen rolling tender process?***
- ***How could the tender process be improved?***
- ***How do you think an open market process would have fared instead?***

In the absence of a clearly defined purchasing strategy that is part of an overarching plan, the preferred mechanism is, at best, difficult to determine.

With what anecdotal evidence NSWIC has been able to evince, it would seem clear that the advantages (flexibility, price determination, certainty) of the rolling tender accrue primarily to government whilst the disadvantages (uncertainty, inflexibility, price-taker) accrue primarily to the vendor.

Without question, the single largest problem has been the lack of information on marginal pricing and volumes, although this is not necessarily a symptom of the rolling tender process. In light of that, improvement could clearly be made by providing marginal pricing information.

NSWIC submits that an open market process would have fared far better *had there been a clear purchasing strategy*.

What mix of market mechanisms and water products should the Australian Government be using to achieve its environmental objectives?

Pursuant to earlier submissions, this question is premature. It is based on the assumption that the Australian Government *has* clearly defined environmental objectives.

In terms of market mechanisms, NSWIC submits that the policy aims of the Australian Government are twofold – the development of a robust market in water and engagement with that market to obtain environmental entitlement. Whilst the existing tender process clearly serves that second aim, it does not serve the first. We believe that the policy aims would be best served by the Australian Government dealing *within* rather than *alongside* the existing market. To that end, a mechanism that is used by other market players ought be considered, on the basis that it meets the yet-to-be-determined needs of environmental holdings.

As discussed previously, it is premature to consider what water products the CEWH ought be provided without a detailed understanding of what it is that the environment requires. Whilst NSWIC believes that River Reach style derivatives ought have a significant role, a centralised exchange servicing a robust market will develop the derivatives – or provide the source entitlement – to any significant buyer that is clear about what they want and/or need.

What examples of the use of market mechanisms for purchasing water entitlements or similar property rights are you aware of, and what lessons can be learned from these that might apply to purchasing water in the Basin?

- ***How substantial are or were these purchasing programs (for example, in comparison to the total stock of property rights concerned or the size of the relevant market)?***
- ***What institutional constraints might limit the degree to which those examples might apply to purchasing water in the Basin?***

Australia is unique in having recognised water entitlements as a property right and, as a result, finding direct parallels overseas is not possible.

The purchase of other property rights that the discussion paper identifies – fishing and logging rights – are relevant to an extent, but do not approach the RTB process in either size or program longevity. Moreover, these programs were designed merely to reduce consumption of the relevant commodity and were not designed to run in conjunction with efficiency measures as part of an overarching strategy.

The analysis of on-market share buyback in the discussion paper is perhaps misleading in that it identifies the purchase of an individual share. The analysis is perhaps more relevant if considered as an investment across a portfolio of shares rather than in a single company.

This analogy serves to underscore the primary proposition of NSWIC – the commencement of design for an investment portfolio would always be an understanding of what is required – what is the appetite for risk, what long term growth is required, what short term yield is needed and the like. That is, an investment portfolio would first consider what it needs before it proceeded to enter the market. Once those needs were determined, the portfolio would enter the centralised exchange mechanism – the ASX – and behave like any other buyer. Should the portfolio require products not currently in existence, the volume and liquidity provided by the centralised exchange would swiftly enable the development of those products.

Upgrading Infrastructure

The discussion paper notes¹ in respect of infrastructure investment programs that “water recovered through infrastructure investments is converted into legally secure water entitlements”.

This is not correct in a NSW context. No new entitlements will be created – and it is the position of NSWIC that new entitlements must not be created in any jurisdiction as a result of infrastructure programs. The creation of new entitlements undermines the concept of the program in the first instance and clearly has a third party impact via a reduction in reliability on other entitlements within a water resource plan area.

Furthermore, the Commission appears of the opinion that infrastructure projects are targeted only at “outdated, leaky irrigation systems” to reduce losses due to “leakage, seepage and evaporation”. This is demonstrably incorrect. Whilst guidelines for all programs have not yet been released (which remains a source of frustration for NSWIC), it is our understanding that the details of individual projects will be at the discretion of applicants. The criteria, we believe, will see individual projects assessed on a value for money basis that includes the volume of entitlement to be given up and the quantum of dollars to be contributed. Projects may include upgrading currently reasonable infrastructure to cutting edge technology, laser levelling fields and realignment of delivery channels. The programs are – and should be – about maximising efficiency, not simply modernising the oldest infrastructure in the Basin.

Should water purchasing and infrastructure upgrades be coordinated and, if so, how?

¹ At page 22, paragraph 1

It is clear and obvious that policy goals will be best achieved by the alignment of the two programs as part of an overall strategy.

The “how” part of the equation leads back to the underlying submission of NSWIC – it is an absurdity to set about acquiring water for environmental use without knowing what it is that the environment requires. Once that is determined, a process of coordination is possible. This process would involve purchasing only those entitlements that are necessary and assessing infrastructure applications using needs-based criteria. Should an infrastructure application deliver the required volume of the required type of entitlement in the required location at a reasonable comparative price, then this application ought be considered more favourably than a purchase of entitlement in the region.

This really is a simple solution – first determine what is required and *only then* determine how to use the two acquisition methods (investment and purchase) in conjunction with one another to achieve optimal outcomes.

What potential is there for a more cost-reflective approach to pricing of water delivery to obviate the need for targeting purchases of water?

If the Commission wishes to raise the prospect of delivery-distance costing, then it must be prepared to discuss the matter along rivers and across state borders. This will likely be unpalatable, which is unfortunate.

The introduction of cost-reflective pricing within irrigation infrastructure operator’s areas would not obviate the need for targeted purchasing. Merely increasing the expense of one irrigator over another would not necessarily see such an operation shut down or relocate. Profitability is a factor of a wide range of variables – the input cost of water delivery is merely one of them and is unlikely, in any event, to be offset by the massive costs of relocation, particularly given the immovable nature of irrigation delivery infrastructure on-farm.

How well has the irrigator-led group proposal component of Restoring the Balance addressed the possibilities for taking group action that coordinates infrastructure upgrades and water sales? How could it be improved?

The results of this component of RTB provide the answer to the first part of this question.

Anecdotally, NSWIC is concerned that DEWHA may have attempted to “wedge” irrigation infrastructure operators against groups of customers. It is our understanding that groups of customers have been advised by DEWHA to “negotiate” with infrastructure operators to decrease termination fees and/or to provide a volume of entitlement from conveyance licenses.

In our submission, “group action” requires a collaborative approach from *all stakeholders including the infrastructure operator*.

What impact is the 4 per cent limit having on the market for water entitlements?

It is imperative that the Commission understand that the 4% limit is relevant to Victoria only.

The 4% rule was initially applicable within the areas of operation of the major private infrastructure operators in NSW. Subsequent to the implementation of the *Water Market Rules* and the resultant capacity of an individual irrigator to “transform” their entitlement and hold it apart from the bulk entitlement, the 4% rule is effectively rendered obsolete in this state. There is no requirement for an individual, transformed entitlement to be attached to a geographically defined extraction point. As a result, it’s trade cannot be traced from one area to another. Without the capacity to account for the 4% rule, it effectively does not exist in NSW.

Furthermore, the Commission ought inquire into whether unbundling – the separation of water entitlements from land entitlements underway in Victoria – has been accrued as trade pursuant to both the 4% and 10% rules in that state.

The answer to the question in respect of impact demands an empirical answer. The statistics of purchases across states are clear for all to see – the vast majority of RTB have come from NSW whilst a large number of contracts are unable to settle in Victoria due to barriers. The Commission ought use its powers of inquiry to quantify this latter amount.

The Victorian 10% limit is addressed in the preamble to this question, but not in the question itself. As the paper acknowledges, “the Victorian Government has announced that it will be removed by 31 October 2009”². NSWIC understands that the process is now complete, although reserves its right to make further submissions should this situation alter.

It is the submission of NSWIC that the capacity exists for Victoria to retain its trade barriers via the *Water Market Rules* which are currently being drafted by the ACCC on the instruction of the MDBA. NSWIC provided a submission on this matter to the ACCC. A copy of the relevant portion of that document has been appended to this submission.

This inquiry ought consider the ramifications of the retention of Victoria’s trade barriers – both 4% and 10% – and must not consider their removal as a foregone conclusion.

What impact is it having on the effectiveness and efficiency of the Australian Government’s purchasing programs (both under the RTB program and under The Living Murray)?

Aside from the empirical impact that the Commission will undoubtedly be aware of, the trade barriers in place in Victoria are serving to undermine stakeholder support for both programs. Whilst the Victorian Government remain belligerent and the Australian Government remain recalcitrant in taking any firm action whilst continuing

² At page 32

to purchase primarily from NSW, there is a clear – even if inadvertent – targeting of one state over another. Such and inequitable state without a clear strategy to remove the inequity will undoubtedly destroy stakeholder support and hence the effectiveness of the programs.

To what extent are irrigators who wish to sell their entitlements being disadvantaged by the limit?

The disadvantage accrues to those irrigators that are unable to sell due to the 4% and 10% limits. As noted, these irrigators are located in Victoria and are not represented by NSWIC.

Is a limit on outwards trade the best way to address concerns over possible socio-economic impacts on particular irrigation areas?

Any trade limit to address such concerns must be applied equally across all irrigation areas. Given that this is not the case, the question is moot until such time as a level playing field is achieved.

Is the Commonwealth-Victorian agreement on the 4 per cent limit a satisfactory way to allow a greater quantity of entitlements to be purchased in Victoria?

The agreement must be seen in context; it merely extends a percentage limit to a volumetric limit – and a modest limit at best. Whilst Victoria have agreed to an extra 300 gegalitres, this is to be achieved over 4 years, is pitiful when seen in the context of the 297 gegalitres already purchased from NSW and is subject to a veto power of the Victorian Government.

In the submission of NSWIC, the existence or size of trade barriers is irrelevant. The key consideration is a level playing field across states. The agreement between the Commonwealth and Victoria merely served to entrench an inequity and to justify the belligerent position of one state over others.

What impact is the NSW Government's ban on sales of NSW entitlements to the Commonwealth for environmental purposes likely to have on the ability of the buyback to obtain water efficiently and effectively?

This question verges on rhetorical. Clearly, the NSW embargo will have a significant effect.

Termination Fees

The discussion paper states that termination fees are “generally a multiple of the annual access fee charge by the operator, which is itself set to recover the fixed costs of delivering water.”³ This is demonstrably incorrect, as a brief glance at any

³ At page 25

NSW private infrastructure operators' financial statements will bear witness to. Very few infrastructure operators in this state recover their fixed operating costs (approximately 97% of all costs) through fixed charges.

How substantial are the impediments to trade in entitlements created by the imposition of termination fees?

In any trade environment, expenses accrue to one party or another – be that commission charged by agents, duties charge by government agencies or general expenses associated with a sale and purchase. The transfer of irrigation entitlements is no different.

NSWIC concedes that termination fees create an expense that must be considered by vendors of entitlements. We are, however, supportive of termination fees as a means to minimise third party impacts. We do not believe it is reasonable for the collective to pay for the exit decision of the individual. Termination fees ought be considered as any other transaction cost.

The Australian Competition and Consumer Commission (ACCC) has obviously considered the issue of termination fees at great length during the *Water Market Rules* process. Whilst setting rules in respect of the quantum of fees, the ACCC acknowledged the appropriateness of a termination fee *per se*. NSWIC does not believe that the Productivity Commission needs to reconsider this issue.

Is the potential for irrigation assets to be stranded a relevant concern? Should some buyback mechanisms be preferred over others because they have a lower propensity to lead to stranded assets?

The concept of stranded assets is, in fact, twofold – assets of an infrastructure operators and on-farm assets.

The former ought be covered by termination fees, if set at an appropriate level. The latter, however, is a more difficult concept. Both the Commissioner and the Australian Government need to understand that land values are dramatically reduced when water is removed from that land. The assets which reticulate water across an irrigation property are generally fixed (pipes, channels and the like) and are valueless without access to water.

Are termination fees likely to help or hinder the efficient use of, and investment in, irrigation infrastructure during the buybacks?

In the event that infrastructure operators are rendered unsustainable through moves to remove or reduce termination fees, the quality of infrastructure which they serve is irrelevant.

How can the right incentives for investment in irrigation infrastructure be achieved during the buyback program?

NSWIC has consistently advanced the position that expenditure per megalitre of water gained from infrastructure investment will – and must – be higher than a megalitre obtained via buyback. Infrastructure investment results in, at least, maintained productivity and allows regional economies to thrive on the back of the 3.5 times multiplier that irrigated agriculture provides.

The “right incentive”, then, is a sufficient quantum of funds advanced by the Australian Government to make investment more attractive to an irrigator than sale.

What impact are termination fees likely to have on an irrigator’s willingness to sell and the cost of the buyback?

This matter has been covered by previous questions.

Are the costs associated with trading water entitlements (including those associated with delays and lack of market information) higher than they should be?

Transaction costs in dollar terms ought properly be set on a user-pays basis for efficient costs.

At the same time, processing delays – particularly at state government levels – are a major impediment to trade, particularly interstate trade.

It is incorrect to assume that unreasonable processing delays are occasioned within infrastructure operators who hold bulk entitlements. As a corollary to this, it is incorrect to assume that transformation will result in significantly decreased transaction delays.

Are these costs a significant impediment to the efficient operation of government water buybacks and the water market more generally?

The transaction costs are not – the processing delays most certainly are.

How might these costs be reduced?

The processing delays are at a state government level and are driven by a range of factors, costs being only one. The answer is, unfortunately, likely political in nature.

To what extent have the CPG’s restricted or limited the design of current DEWHA purchasing mechanisms and the decision to buy only water entitlements?

This is a question that can only be answered by DEWHA, who designed the purchasing mechanism currently in use.

What impact might the CPGs have on the Commonwealth's ability to use alternative purchasing mechanisms to buy water products other than water entitlements?

This is a question of process which ought properly be asked subsequent to the design of a purchasing program that best suits the requirements of the environment, as has been advanced earlier in this submission.

If a well constructed, strategic and properly published overall approach to obtaining environmental entitlements requires a departure from the CPGs, then the Commonwealth Minister ought be prepared to do what is necessary to ensure that this occurs.

SUBMISSION CONCLUDES



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Submission to DEWHA/CEWH

Proposed Framework for Commonwealth Environmental Watering

090725

Andrew Gregson
Chief Executive Officer

NSW Irrigators Council (NSWIC) is pleased to see the development of this framework. We have consistently advocated that an identifiable and understandable plan is vital to the success of the entire national water plan. Our constituents – and the communities that they support – need to know that there is a clear plan and result for the pain that they are suffering.

At the same time, it is our clear position that a framework for managing environmental water is but a part of a much larger process. It is essential that this part fit in with the whole.

The Bigger Picture

Our single greatest concern with this framework is not the framework itself, but its lack of integration with any larger strategy.

In our submission, the framework is being developed to manage an unknown quantum of entitlement in unknown geographic areas. By their very nature, the sheer size of these variables renders the framework extremely difficult to develop, at best.

Our Council has consistently advocated a strategic approach to environmental water that commences with identification of assets prior to identification of methods to obtain entitlement prior to defining a management framework.

Put simply, the current process appears to be:

1. Obtain water assets without geographic or product type reference;
2. Develop a management framework for water assets; and
3. Identify the environmental assets that need water.

We believe that this approach has the capacity to deliver the perverse outcome of devastating economic and social affects in regional communities without delivering the environmental benefits sought.

In our submission, this process ought be completely reversed:

1. Identify the environmental assets that need water;
2. Develop a management framework that includes descriptions of geographic requirements, regularity of watering requirement and volume of water requirement; and
3. Develop and implement a method of obtaining the water assets necessary to implement that framework.

We believe that this process will not only deliver the environmental benefits sought, but will limit the social and economic consequences for regional communities within the Basin.

No Change in License Characteristics

NSW Irrigators Council has advocated throughout this change process that entitlements obtained by the Commonwealth – howsoever that may occur – must not have their characteristics altered in any way that is not possible for a privately owned entitlement. For example, a NSW Murray General Security Entitlement that is obtained by the CEWH through an on-farm infrastructure scheme must continue to exhibit the characteristics that it would in private hands.

Integration of Government Programs

We recognise that the Murray Darling Basin Authority (MDBA) is tasked with developing the Environmental Watering Plan (EWP) as part of the Basin Plan process set out in the *Water Act 2007* (Cth). We further recognise that the proposed framework on which we are commenting is an interim framework until the EWP is implemented.

That said, it is clear that the EWP must learn from your current process, giving it the capacity to be informed by practical experience. To that end, we submit that the MDBA – and, particularly, the Basin Community Committee – must be involved in the development of the interim framework.

Environmental Asset Register

The register, referred to in the draft framework, must be developed with wide consultation and must be publicly available.

Monitoring and Reporting

By any criteria, the policy program to obtain and manage additional environmental watering is massive. It is therefore critical that a proper monitoring and reporting regime is implemented at the outset. Submissions to this extent appear within this paper.

Specific Comments

SECTION ONE – Introduction

No comments.

SECTION TWO – Overall objectives and scope of Commonwealth water use

The “watering actions” that the framework attempts to define cannot be seen in isolation from the processes to obtain water from consumptive use and the impacts that this will necessarily have.

Whilst acknowledging that this framework is designed to assist in the application of environmental water, we submit that considerations of environmental maintenance other than the application of water must be considered in determined optimum outcomes. As a specific example, we refer to the Macquarie Marshes. Outcomes obtained by land purchase – as opposed to the further application of scarce water resources – have proved to provide a significantly better environmental outcome. Similarly, that better environmental outcome has come at less third party expense due to the removal of the economic driver – water – from an area reliant in part on irrigation⁴.

The draft notes that “Determining the optimum levels and ecological equilibrium points will be limited, in some cases seriously so, by available scientific knowledge”⁵. Such a statement serves to underscore our submission that this entire process is being inappropriately run backwards. The effects on communities – both social and economic – of removing water are well documented. It is foolhardy, then, to allow these negative effects to occur without a sufficient scientific understanding of the environmental positive affects that are being pursued. In our submission, “available scientific knowledge”, particularly that which is “seriously” missing, should be obtained before this process continues.

In the context of the “risk management framework” noted as required to operate without scientific certainty, we submit that the risks on the other side of the ledger of water removal are well known, recognised and documented.

We are particularly concerned at the characteristics described in the paper on page 4, noting success if ecological processes are “as close as possible to natural”. Recognition needs to be given to the fact that Australia – including rural Australia – is populated and developed. It is unhelpful to employ language that suggests such activity is necessarily bad or wrong. As an example, current conditions would have seen the Murray River run dry several years ago prior to crossing the South Australian border were it not for the regulatory structures brought to the rivers by development.

⁴ See Hogendyk, G (2007) *The Macquarie Marshes: An Ecological History*, Institute of Public Affairs, Occasional Paper, September 2007. See also *Macquarie Marshes Pilot Project “Burrina” – 3 Year Report, 2005-2008* (Unpublished report for Macquarie Marshes Environmental Trust).

⁵ A Framework for Determining Commonwealth Environmental Watering Actions, page 3.

In light of the population and development of Australia, it is unrealistic to suggest that “as close as possible to natural” is a symbol of success.

Question 1 Does the scope of Commonwealth environmental watering as outlined, meet your expectations of the range of ecological parameters that should be considered in the use of Commonwealth environmental water?

Our answer is an unqualified no due to the absence of underlying detail either not available or not pursued.

This framework ought be seen as a plan for irrigating the environment. If an irrigator were to develop a plan without an understanding of what they needed to apply water, where that application was to take place, when that application was to take place, what it is they are seeking to achieve in that application, what the likely outcome of that application is and the alternatives available, he or she would be considered an inefficient operator, at best – and would likely be labelled an economic vandal.

Simply put, irrigators believe that rules for water use must apply to all water users. We are expected to account for every drop – so must the Commonwealth Environmental Water Holder.

SECTION THREE – Specific water use objectives

In table 1, in the “management actions” section describing “extreme dry” conditions, the framework suggests “use carryover volumes to maintain critical needs.

Whilst we suspect this means nothing more than using the standard carryover provisions attached to certain types of license to meet the critical needs of environmental assets, we are concerned at possible misinterpretation.

We ask that specific reference be made to use of carryover provisions of licenses held by the CEWH. Our concern stems from recent “mining” of carryover from private entitlement holders to meet critical human needs and conveyance water. We would most certainly not support carryover mining to provide precedence for entitlements held by the CEWH as this would clearly infringe the requirement of not changing license characteristics.

Further, we are concerned at the use of “critical needs”, as it may be misinterpreted in light of “critical human needs” as noted in the Act. We suggest instead “critical environmental needs”.

Question 2 Do you agree with the proposed ecological objectives under different water availability scenarios outlined in the table above, or can you offer suggestions for improvement?

It is our belief that this proposal reinforces the incorrect approach of *managing the entitlement that you have* rather than *obtaining the entitlement that you need*.

In particular, we urge consideration of alteration of the mix of products obtained by the CEWH to meet the outcomes that you seek. Consideration must be given to derivative water products that provide water at times and locations required by environmental assets.

SECTION FOUR – Prioritisation process

We are concerned that the resources – human, financial and time – required to develop the environmental asset register has been grossly underestimated in developing the framework. This is a massive task which underpins the entire concept of Commonwealth environmental water management and hence it is imperative that it be undertaken in a fashion that is open, accountable and transparent as well as allowing significant input from stakeholders, NSWIC and its member included.

Further, we are concerned that the framework set out in figure 1⁶ treats “Water Holdings” as a fixed, rather than variable, component. A single class of water entitlement is subject to regular change – hence the mix of products that will necessarily be held by the CEWH will require a process that allows for constant re-evaluation.

Question 3 Do you have a view on how the four main steps outlined above should be further developed?

NSWIC notes with interest – and supports – the proposed requirement to detail the opportunity cost of any watering action⁷. It is our strong contention that this opportunity cost detail be extended to describe the opportunity cost *in dollar terms* of returning the water used in any action to consumptive use.

Rarely does the opportunity present to enable an accurate and understandable quantification of environmental management costs. In implementing an opportunity cost consideration, the CEWH has allowed just such an opportunity. With the volume of water derived from a mix of entitlements, a simple calculation can be made at the time of use to value that water at point-in-time market prices. Such an evaluation will enable not only the CEWH, DEWHA and the Minister to consider the fiscal viability of environmental watering actions, but will allow the Australian public a genuine and bona fide opportunity to quantify their environmental willingness.

⁶ Page 10

⁷ Page 11 – Section 4 subparagraph (e)

Question 4 Do you have a view on the adequacy of the 'basis for determination', 'possible criteria' and 'information sources' for each step as outlines in the above table?

Whilst the sources noted are valuable, we submit that significant sources of local knowledge – which will be vital in adequate and appropriate environmental knowledge – have not been identified.

In particular, extensive reference to State Government Departments, NSW Catchment Management Authorities, NSW State Water Corporation and local stakeholder representative groups – including irrigators and infrastructure operators – will provide not only a valuable trove of on-ground data, but will have the added benefit of providing a community attachment to environmental watering management.

Question 5 Do you have a view as to how the various studies/tools/frameworks mentioned should be used to develop the Commonwealth's framework for prioritising watering actions?

It is our clear belief that an approach of “just add water” will not solve the underlying environmental issues. Further detailed consideration of specific requirements for each environmental asset is necessary – hence our concern at the sheer size of the development process for the asset register.

SECTION FIVE – Cooperative environmental water use

Question 6 Do you have a view on how the process for cooperative environmental watering as described could be improved?

It is absolutely necessary that a collaborative – rather than a prescriptive – approach be adopted.

As a specific comment, the Delivery Phase must take into account capacity share to ensure minimised negative third party impacts. The capacity of the Barmah Choke is a good example.

SECTION SIX – Prioritising environmental watering actions in 2009-10

Question 7 Do you have any suggestions on improving the criteria for short-listing watering priorities at Attachment A, for use in 2009-10?

We seek the addition of two further criteria;

1. The financial opportunity cost, as outlined earlier, should be implemented immediately; and

2. The environmental results of each any every watering action must be monitored and reported so that consideration of impacts against costs can be undertaken.



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Consultation

The Expectations of Industry

090303

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.

This document represents the views of the members of NSWIC. However each member reserves the right to an independent view on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

Executive Summary

This document sets out the consultation process that the irrigation industry expects from Government on policy matters affecting the industry.

Specifically, the industry expects that the contents of this document inform the consultation process with respect to preparation of the Basin Plan by the Murray Darling Basin Authority.

Background

Industry has been critical of consultation processes entered into by both State and Commonwealth Government entities in the change process with respect to water policy. Irrigators have significant sums invested in their businesses, all of which are underpinned by the value, security and reliability of their primary asset – water.

Irrigators recognise the imperatives for change and are content to provide advice on policy measures to ensure effective outcomes for all involved.

In light of these two factors, it is not unreasonable that irrigators request adequate consultation.

Recent consultation efforts have ranged from excellent to woeful⁸. Irrigators believe that a method of consultation should be determined prior to the commencement of a policy change process. To that end, this document sets out the methods which we believe are acceptable and ought be adopted by Government both State and Commonwealth.

In particular, this document aims to inform the Murray Darling Basin Authority in its work developing the Basin Plan.

⁸ See case studies later in this document.

Forms of Consultation

We consider two forms of consultation to be acceptable – Direct and Indirect. The preferred option will be dictated by circumstances.

Direct Consultation

This method involves engaging directly with affected parties, together with their representative organisations. As a default, it ought always be considered the preferred method of consultation.

Irrigators acknowledge that practical exigencies must be considered to determine if Direct Consultation is possible. Such considerations will include:

- The number of affected stakeholders (the smaller the number, the more ideal this method);
- The timeframe available for implementation (the longer the timeframe, the more ideal this method)⁹; and
- The geographical distribution of stakeholders (the closer the proximity, the more ideal this method).

Indirect (Peak Body) Consultation

This method involves engaging with bodies that represent affected parties. NSW Irrigators Council is the peak body representing irrigators in this state. The National Irrigators Council is the peak body in respect of Commonwealth issues.

Irrigators acknowledge that there will be occasions on which consultation with peak bodies is necessary for practical reasons. Such reasons may include:

- An overly large number of affected stakeholders;
- A short timeframe (not artificial) for implementation;
- A large geographic spread of stakeholders; and
- An issue technical in nature requiring specific policy expertise.

This form of consultation requires some specific considerations that must be addressed in order for it to be considered acceptable;

- Timeframes

⁹ Although note specifically that artificial timeframes, such as political necessity, will not be well received by irrigators.

Indirect Consultation is, in essence, the devolution of activity to external bodies. That is, the task of engaging with affected stakeholders to assess their views and to gather their input is “outsourced” to a peak body. That peak body cannot operate in a vacuum and, as such, must seek the views of its members lest it become unrepresentative. Dependent on the nature of the issues and the stakeholders, this may take some time. It is vital that peak bodies be requested to provide advice on necessary timeframes prior to seeking to engage them in an Indirect Consultation model.

- **Resource Constraints**

Peak bodies do not possess the resources of government. In most instances – and certainly in the case of irrigation industry peak bodies – their resources are gathered directly from members and hence must be well accounted for.

Peak bodies engage in a significant range of issues and activities, many of which feature their own time constraints.

Prior to commencing the consultation process, discussions with peak bodies must be held to ensure that the needs of stakeholders with respect to resourcing and timeframes are respected. This may include ensuring that consultation does not occur during times of known peak demand; coordination with other government agencies to avoid multiple overlapping consultation processes; and coordination with peak bodies existing consultation mechanisms (for example, NSWIC meeting dates are set annually and publicly available. These are an ideal forum for discussion as they provides access to key stakeholders with no additional cost to stakeholders).

Stages of Consultation

Irrigators believe that a multi-stage consultative model, in either the Direct or Indirect applications, is necessary.

(i) *Identification of problem and necessity for change*

Irrigators are wary of change for the sake of change. In order to engage industry in the process of change, an identification of its necessity is required. This should take the form of a published¹⁰ discussion paper as a minimum requirement.

(ii) *Identification of solutions and method for implementation*

With a problem identified and described, a description of possible solutions together with a proposed method of implementation should be published.

¹⁰ We accept that “published” may mean via internet download, but require that hard copies be made available free of charge on request.

It is imperative that the document clearly note that the proposed solutions are not exhaustive. The input of stakeholders in seeking solutions to an identified problem is a clear indicator of meaningful consultation.

It is likely, in practice, that steps (i) and (ii) will be carried out concurrently. This should take the form of a document seeking written submissions in response. The availability of the document must be widely publicised¹¹. The method for doing so will vary depending on the method of consultation. As a threshold, at least 90% of affected stakeholders ought to be targeted to be reached by publicity.

(iii) *Summary of submissions, identification of preferred approach*

Subsequent to the closing date, a document ought to be published that summarises the submissions received in the various points covered. It must also append the full submissions.

Acknowledgement of a consideration of the weighting of submissions must be given. As an example, a submission from a recognised and well supported peak body (such as NSWIC) must be provided greater weight than a submission from a small body, an individual or a commercial body with potential commercial interests.

There are no circumstances in which submissions ought to be kept confidential. Whilst we recognise that identification of individuals might be restricted, any material on which a decision might be based must be available to all stakeholders.

The document must then identify a preferred approach, clearly stating the reasons why that approach is preferred and why alternate approaches have been rejected.

Where the need for change has been questioned by submissions, indicating that a case has not been made in the opinions of stakeholders, further discussion and justification of the necessity must be made in this document.

(iv) *Explanation of interim determination and final feedback*

The document prepared in stage (iii) must now be taken directly to stakeholders via forums, hearings or public discussions. All stakeholders, whether a Direct or Indirect model is chosen, must have an opportunity to engage during this stage.

The aim of this direct stage is to explain the necessity for change, to explain the options, to identify the preferred option (together with an explanation as to why it is the preferred option) and to seek further input

¹¹ Regional newspapers, radio stations and the websites of representative groups and infrastructure operators are useful options in this respect.

and feedback. Further change to a policy at this point should not, under any circumstances, be ruled out.

(v) *Publication of final determination*

Subsequent to stage (iv), a document must be published summarising the feedback received from that stage, identifying any further changes, identifying why any particular issues raised across various hearings at stage (iv) were not taken into account and providing a final version of the preferred solution.

What Consultation Is Not

“Briefings” after the fact are not consultation (although they may form part of the process). Stakeholders will not be well disposed to engagement where prior decisions have been made by parties unwilling to change them. Briefings in the absence of consultation will serve to alienate stakeholders.

Invitations to attend sessions with minimal notice (less than 10 days) is not consultation. Consideration must be given to the regional location of parties involved, together with the expenses and logistical issues of travel from those regions.

Case Study One

Australian Productivity Commission (Review of Drought Support)

Getting it Right

During 2008, the Australian Productivity Commission commenced a review of Government Drought Support for agriculture. The review commenced with the publication of a document to which submissions were sought. A significant period of time was allowed for submissions.

Subsequent to the close of submissions, a draft position was published which took into account written submissions that were received, identified issues raised in submissions and identified a number of changes considered subsequent to submissions.

The Commission then engaged in a large series of public hearings in areas where affected stakeholders were located. Parties were invited to provide presentations in support of their submissions. Parties who had not lodged written submissions were also welcome to seek leave to appear. The meetings were open to the public, who were also given the opportunity to address the hearing.

A series of “round tables” in regional areas was conducted with identified and self-disclosed stakeholders. These meetings gave those who were unable or unwilling to provide presentations in public the opportunity to have input. At the same time, no submissions were kept confidential, the Commission recognising that the basis for its determinations must be available to all.

Importantly, present at the hearing were three Commissioners. It is vital that the decision makers themselves are available to stakeholders, rather than engaging staff to undertake this task.

We understand that a final publication will be made available in 2009.

Case Study Two

CSIRO (Sustainable Yields Audit)

Getting it Wrong

In early December, CSIRO (in conjunction with a number of other Government entities) conducted a regional “consultation” series with respect to the Sustainable Yields Audit. The series was, in our opinion, ill-informed, poorly organised, poorly executed and poorly received.

In late November, CSIRO sought advice from NSWIC over the format and timing of the series. We provided advice that:

- The series did not cover sufficient regional centres to engage all stakeholders. In particular, Northern NSW had not been included;
- The series should not be by invitation, but should be open to all comers given the implications not only for irrigators but for the communities that they support;
- Ninety minutes was vastly insufficient to cover the depth and breadth of interest that would be raised by attendees; and
- That the timeframe between invitation and the event was insufficient.

None of that advice was adopted.

Invitations were sent to an undisclosed number of stakeholders who had been identified by an undisclosed method. In the short space of time available to advise attendance, CSIRO threatened to cancel a number of sessions on the basis of low responses. Given the limited notice and invitation list, NSWIC became aware of a number of stakeholders who wanted to attend but were unable to.

During the sessions, information was presented as a “briefing” despite being described as consultation. As such, extremely limited time was available was questions to be addressed – a key feature of consultation. Moreover, where information that was presented was questioned, a defensive stance was taken – a key feature of lack of willingness to engage stakeholders in a consultative fashion.

In particular, NSWIC is particularly concerned at the lack of willingness to engage on factual matters contained within the report. Where glaring inaccuracies were pointed out, defensiveness was again encountered. In several instances, inaccuracies that had been advised by stakeholders were perpetuated in later documents.

Further, several presenters were clearly not aware of the full range of detail surrounding the matters that they discussed. It is imperative that those seeking feedback on a subject understand that subject in depth prior to commencing consultation.



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Response to ACCC

Water Trading Rules

Issues Paper

090501

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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.

This document represents the views of the members of NSWIC. However each member reserves the right to independent policy on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

Compliance with Consultation Expectations

In March 2009, in response to the growing number and complexity of consultation process, NSWIC adopted a policy outlining the expectations of industry in this respect. The policy is appended to this submission. Consultation processes in which NSWIC participates are evaluated against this policy.¹²

We assess this consultation as **Direct**.

Our policy requires consultation to proceed through five stages.

(vi) *Identification of problem and necessity for change*

Satisfactory.

(vii) *Identification of solutions and proposed method for implementation*

We understand that this will form part of the Position Paper.

(viii) *Summary of submissions, identification of preferred approach*

We understand that this will form part of the Position Paper.

(ix) *Explanation of interim determination and final feedback*

We understand that this will form part of the Position Paper.

(x) *Publication of final determination*

We ask that the final advice to the MDBA be made available publicly at the time of provision of that advice.

¹² We note that our policy was not available at the commencement of this consultation process.

Opening Statement

The timing of the release of this Issues Paper, the timeframe in which Draft Rules are to be returned to the Murray Darling Basin Authority (March 2010) and the timeframe in which those Rules are to be implemented all point to serious errors of process in the approach by the Commonwealth Government to the issue of rural water use.

These same issues point to a failure of the Australian Competition and Consumer Commission to provide full and frank advice to its instructing party and, more importantly, to adhere to its primary role of protecting consumers.

The Commonwealth has made it very clear that it aims to achieve equity and fairness in its process to move water from consumptive to environmental use by use of the water market. It is currently heavily engaged in that process and has plans to remain so engaged for several years hence.

It defies logic – let alone equity and fairness – that the rules which are to govern that market were not set prior to the Commonwealth becoming the major participant.

The results of this serious failure in process is the effective targeting of one state over another, the complete breakdown of the equity and fairness concepts and the dramatic erosion of trust in water markets, government intent and faith in the allegedly independent market regulator, the ACCC.

General Comments

NSWIC recognises that the ACCC works under instructions from external authorities, in this instance the MDBA. We further recognise that the ACCC therefore must answer to predetermined terms of reference.

Nevertheless, NSWIC has been disappointed at the lack of willingness on behalf of the ACCC to provide advice to instructing authorities outside the terms of reference. For example, in providing Water Market Rules to Minister Wong, the ACCC refused to provide advice on the value of rules on transformation in the first instance. For further example, in providing advice on the Water Charing Rules for Planning and Management, the ACCC have not provided concise advice that lack of jurisdictional capacity renders the rules effectively meaningless in achieving the alleged overall aim of competitive neutrality.

NSWIC is comforted to see “the existence and magnitude of any barriers or impediments”¹³ noted as a point for discussion at the outset of this paper. Our organisation will, during the course of this submission and throughout the process, continue to raise the existence of such barriers in other states. We note upfront in our submission and at the beginning of the process that the existence of such barriers and the lack of willingness on behalf of governments to deal with them threatens the entire move to Commonwealth oversight of the Basin, let alone the development of effective and efficient markets in water.

¹³ Issues Paper, page 1.

Specific Comments

3.4.1 Interaction with water trading rules in water resource plans.

This one issue defines the potential worth of the Water Trading Rules.

Whilst it is a general principle of law that a proper Commonwealth statutory instrument will prevail over a conflicting State statutory instrument¹⁴, to the extent of the inconsistency, a general exemption to this principle has been made in Section 245(2) of the *Water Act* (Cth) 2007. This section provides, *inter alia*, that a transitional water resource plan containing trading rules will prevail over a Commonwealth rule, such as those to be proposed by the ACCC for inclusion in the Basin Plan.

Transitional water resource plans are defined in Section 241 as either plans specified in Schedule 4 of the Act (all of which are plans in Queensland, South Australia and New South Wales) or later to be “prescribed by the regulations”¹⁵. An explanatory note appears in Reprint 1 of the Act¹⁶ noting that “it is intended that the transitional water resource plans for water resource plan areas in Victoria are to be prescribed by regulation...”

Transitional water resource plans in New South Wales are simply identified as the Water Sharing Plans adopted under the *Water Management Act (NSW)* 2000. These plans expire in 2014. They are specified in Schedule 4 of the Commonwealth Act.

Transitional water resource plans in Victoria are not simply identifiable. It is widely recognised that the Victorian plans – howsoever defined – do not expire until 2019. This date was apparently set based on the review date of Bulk Water Entitlements, potentially considered a *de facto* water resource plan, as 15 years subsequent to the 2004 adoption of amendments to the *Water Act (Vic)* 1989¹⁷.

NSWIC does not submit that Victorian Bulk Water Entitlements are, or will be, the Victorian transitional water resource plans. We note that there are a range of other documents that may be considered, including Streamflow Management Plans, Water Plans and, potentially, the strategy documents published under the “Our Water, Our Future” program.

In our submission, Victoria may note that the Basin Plan is currently scheduled for implementation in 2011. As a result, there is no pressing timeframe for that state to provide transitional water resource plans to the Commonwealth for adoption pursuant to Section 241(1)(b).

¹⁴ *Commonwealth of Australia Constitution Act* (Cth) 1900, Section 109

¹⁵ Section 241(1)(b)

¹⁶ Reprinted 1 January 2009 with amendments up to Act 139, 2008.

¹⁷ 2004 does not represent the date of settlement of the Bulk Water Entitlement. In the case of the Goulburn Bulk Water Entitlement, settlement appears to have occurred in or around 1993, giving an effective lifespan of some 24 years.

Moreover, with the timeframe provided for the Water Trading Rules (March 2010¹⁸), it is entirely possible – and, in our submission, probable – that Victoria will refrain from providing transitional water resource plans *until such time as it has seen and considered the Rules*.

The practical implication is that Victoria can – and, in our submission, probably will – then design Water Trading Rules to the advantage of that state *even if they are contrary to the Rules provided by the ACCC* which can be inserted into transitional water resource plans thereby providing protection until at least 2019.

Even aside from the issue of transitional water resource plans, Victoria has the capacity to maintain barriers indefinitely through referral to Section 250C and D of the *Water Act*. That State may declare its trade restrictions an excluded matter to which the Commonwealth legislation – including the Basin Plan containing Water Trading Rules – is displaced. That is, the capacity exists for Victoria to sit entirely outside the Water Trading Rules.

As noted at the outset, this one issue defines the potential worth of the Water Trading Rules.

Whilst one jurisdiction is able to quite simply subvert the Rules, thereby ensuring a lack of equity, the Rules are utterly worthless.

¹⁸ ACCC Water Trading Rules Issues Paper, Table 1.1, Page 2